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COMMENTS

A COMPREHENSIVE SURVEY OF REDISTRICTING OR REAPPORTIONMENT LAW: STATE AND FEDERAL*

One of the most controversial areas within the legal spectrum today is redistricting or reapportionment law.¹ Recent Supreme Court redistricting decisions² have had a national impact rivaling even the famed school desegregation decision, *Brown v. Board of Educ.*³ Unlike the school desegregation issue, however, reapportionment law is a complex area, replete with distinctions and qualifications.

I. PRE-BAKER STATE COURT VIEW

Judicial examination of legislative redistricting, while currently in the public eye, is not a new concept or radical departure from traditional law. State courts had entered the "political thicket" of legislative redistricting long before Mr. Justice Frankfurter in *Colegrove v. Green*⁴ expressed doubts on the advisability of judicial trespass. These courts were concerned with whether a given redistricting act violated the state (not federal) constitution. This concern centered itself around three considerations: population equality among the various districts, contiguity of territory, and compactness of territory. In order to understand the legal ramifications of redistricting today, it is necessary to examine the legal effect of these factors as developed in state courts prior to *Baker v. Carr*.⁵ Before a state court would examine these factors on their merits, however, it was necessary that it find itself possessed of requisite jurisdiction and the plaintiff possessed of standing to sue.

Jurisdiction and Standing to Sue

Traditionally, state courts have found little difficulty in assuming

*The *Law Review* Board acknowledges that Attorney James W. Rector, Jr., formerly clerk to Justice Beilfuss of the Wisconsin Supreme Court and presently with the firm of Godfrey & Kahn, Milwaukee, Wisconsin, substituted for the regular faculty advisor in the construction of this article.

¹ Certain political scientists have urged a rather arbitrary distinction between the terms "redistricting" and "reapportionment." Harvey, *Reapportionments of State Legislatures—Legal Requirements*, 17 LAW & CONTEMP. PROB. 364 (1952); Comment, 1955 WIS. L. REV. 125 n. 1. The term "reapportionment," it is argued, refers to the allotment of representatives among already existent districts. "Redistricting" refers to the creation or change of legislative or congressional districts. This distinction is simply not made in the cases. Furthermore, a reapportionment system (as that term is limited by the distinction) could raise constitutional questions under the equal protection clause as it would require the allotment of at least one representative from each of the existent districts. If granting a given district even one representative would create substantial population inequalities within the apportionment as a whole, the apportionment would be unconstitutional. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). In this article the terms "redistricting" and "reapportionment" are used synonymously.

² *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

³ 347 U.S. 483 (1954).

⁴ 328 U.S. 549 (1946).

⁵ 369 U.S. 186 (1962).

jurisdiction of redistricting disputes. This is evidenced by the fact that in only a comparatively few cases has the matter of jurisdiction been an issue. Insofar as a redistricting statute partakes of the qualities of any state law, some state court has jurisdiction to pass upon the judicial aspects of its constitutionality.⁶ A question occasionally raised in early redistricting cases was whether the state supreme court had original jurisdiction in redistricting controversies or whether original jurisdiction was in some lower state court. The general rule was that such jurisdiction had been given to the supreme court by the state constitution or statutes in conferring upon it the jurisdiction to issue the original writs of injunction, prohibition, and mandamus.⁷

The second matter which had to be resolved before a state court would consider a redistricting dispute upon the merits was the problem of standing to sue. State courts, historically, have held two views on whether a private citizen living within the state may sue to invalidate an unconstitutional redistricting. One view was that a private citizen possessing the right to vote⁸ has standing to bring suit.⁹ Some courts have held that this standing exists whether or not the wrong complained of affects the district in which the plaintiff votes.¹⁰ Thus, John Citizen living in County A might sue to invalidate the state's redistricting act even though his suit alleged that only Counties B, C, E, and Z were underrepresented or gerrymandered. John Citizen had a direct personal

⁶ *Denney v. State ex rel. Basler*, 144 Ind. 503, 42 N.E. 929 (1896).

⁷ *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892); *Giddings v. Blacker*, 93 Mich. 1, 52 N.W. 944 (1892); *Jones v. Freeman*, 193 Okla. 554, 146 P. 2d 564 (1943), *appeal dismissed and cert. denied*, 322 U.S. 717 (1944). Sometimes original jurisdiction is conferred upon the supreme court by a specific redistricting provision in the constitution. *Smith v. Board of Apportionment*, 219 Ark. 611, 243 S.W. 2d 755 (1951). The Wisconsin Supreme Court post-*Baker* took original jurisdiction of a dispute concerning the apportionment of county boards as an action for declaratory judgment even though the Wisconsin constitution nowhere specifically authorized it to do so. It felt that Wis. CONST. art. 7, §3 (the section granting the supreme court original jurisdiction to issue extraordinary writs, authorized it to exercise its judgment and discretion in assuming jurisdiction of cases having so widespread and important an effect upon the rights and liberties of the people of Wisconsin as to warrant intervention by the supreme court. *State ex rel. Sonneborn v. Sylvester*, 25 Wis. 2d 177, 130 N.W. 2d 569 (1964). As a pure matter of grammar, it is rather difficult to see how this construction may be drawn from the rather limiting words of article 7, §3.

⁸ The author could find no pre-*Baker* cases stating specifically whether the plaintiff was required simply to possess the qualifications to vote or whether he must actually have voted. In most if not all the cases, plaintiff on the facts was a voter. The author's impression is that possession of the qualifications to vote would have been sufficient. See, e.g., cases cited note 9 *infra*. The federal court position on this issue is just as uncertain. It appears certain, however, that the plaintiff there, as in the state courts, would have to possess at least the qualifications to vote. *Baker v. Carr*, *supra* note 2, at 204-06.

⁹ *Brooks v. State ex rel. Singer*, 162 Ind. 568, 70 N.E. 980 (1904); *Jones v. Freeman*, *supra* note 7; *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931). In some states the right of the individual voter to bring suit is expressly provided for in the state constitution. *In re Sherrill*, 188 N.Y. 185, 81 N.E. 124 (1907).

¹⁰ *Brooks v. State ex rel. Singer*, *supra* note 9; *Jones v. Freeman*, *supra* note 7; *Stiglitz v. Schardien*, *supra* note 9.

interest in the constitutional distribution of legislative representatives throughout the state. This interest might be affected by overrepresentation in other counties as well as by underrepresentation in his own. The second view advanced by state courts was that a private citizen may bring suit to test a redistricting law if the attorney general refuses to do so.¹¹ This usually meant that John Citizen must first request the attorney general to bring suit. The theory of state courts taking this position was that an invalid redistricting violated primarily a public rather than a private or personal right. John Citizen did not suffer a personal wrong distinguished from many of his fellow voters; rather, the public as a whole suffered due to the unconstitutional actions of its state officers (*e.g.*, the state legislators who passed the act, the state official who calls the elections under it). Redistricting was, therefore, a matter *publici juris* and the attorney general was the official whose duty it was to bring suits vindicating the public right.¹² John Citizen, therefore, was first required to request the attorney general to challenge the existing redistricting law. If the attorney general refused or otherwise by his actions indicated he would not bring suit, John Citizen had standing to sue. Some courts which adopted this general viewpoint held that a request was not necessary if it appeared certain to the court that the attorney general would have refused had he been requested to bring suit.¹³ The Wisconsin court post-*Baker* has allowed the Governor as well as the attorney general (in their public capacities) to commence a *parens-patriae* type action vindicating the public right in a redistricting dispute.¹⁴

Population Equality Among Districts

Once a state court had decided that it possessed jurisdiction and

¹¹ *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 124-30, 53 N.W. 35 (1892); *Everitt v. Board of County Comm'rs*, 1 S.D. 365, 47 N.W. 296 (1890); *Giddings v. Blacker*, *supra* note 7.

¹² *State ex rel. Lamb v. Cunningham*, *supra* note 11; MERRILL, MANDAMUS §§229-30 (1892). Once his request to the attorney general has been refused, a private citizen in post-*Baker* Wisconsin apparently has the right to challenge the constitutionality of a state law apportioning a purely local body governing a county *other* than his own. But how much further this goes and to what other situations it applies, query? *State ex rel. Sonneborn v. Sylvester*, 132 N.W. 2d 249 (1965). It might make a difference that the law challenged in the *Sonneborn* case was a law of general application to 70 out of 72 counties. (Thus, when the law was declared invalid, it was invalid as to all counties, including the plaintiffs.)

¹³ *Giddings v. Blacker*, *supra* note 7; *Wheeler v. Northern Colorado Irrigation Co.*, 9 Colo. 248, 11 Pac. 103 (1886) (strong dictum). The attorney general, for example, without formally refusing to sue, might indicate sufficiently his position by defending the redistricting act when John Citizen challenges it. Possibly *contra*, *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *State ex rel. Lamb v. Cunningham*, *supra* note 11.

¹⁴ *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W. 2d 551 (1964). This case does not indicate whether the Governor must request the attorney general to sue before suing in his public capacity. As a matter of fact, the Governor, before continuing suit, did request the attorney general to sue and the request was refused.

that the plaintiff had standing to sue, it was ready to consider the redistricting issue upon the merits. The first of the three key factors often at issue in redistricting disputes is population equality. A population equality problem arises when a state redistricting act¹⁵ or constitution¹⁶ creates districts of unequal population, each district receiving the same or an otherwise disproportionate number of representatives, or creates districts of equal population but grants to each an unequal number of representatives. If, for example, District *A* has three times the population of District *B*, and District *B* receives one state senator while District *A* receives two, then, although each resident of District *A* casts *one* vote, the value or weight of his vote has been diluted. It is worth only two-thirds as much as the vote of a resident of District *B*. The power of a resident of District *A* to vote has not been interfered with or deprived, but the value of his vote, if he in fact votes, has been lessened.¹⁷ The question is whether a court recognizing such inequality in a given redistricting act can invalidate that act and, if so, whether it can compel the legislature to enact a fair redistricting, either directly or indirectly.

The state court answer to this question was many-faceted. If the legislature passed a redistricting statute containing population inequalities alleged to violate the constitution (and thus not pursuant to any constitutional formula), state courts had the power to invalidate it. It was necessary, therefore, that the state constitution contain a provision directly or impliedly requiring population equality in districting. If it did, then the question at issue (whether or not the constitutional provision was violated) was judicial and not political.¹⁸

The mere fact that a constitutional provision calling for population equality renders a redistricting dispute based on population inequalities justiciable means only that a court would decide the issue before it.¹⁹

¹⁵ Redistricting power usually lies in the hands of the state legislature. See, e.g., Wis. CONST. art. IV, §3. Legislatures have sometimes allowed appointive boards or elected county bodies to do the actual redistricting. Sometimes the constitution empowers another body to do the actual redistricting. *Pickens v. Board of Apportionment*, 220 Ark. 145, 246 S.W. 2d 556 (1952).

¹⁶ E.g., N.Y. CONST. art. III, §4, contains an apportionment formula: "The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants excluding aliens, by fifty, and the Senate shall always be composed of fifty members, except that if any county having three or more Senators at the time of any apportionment shall be entitled on such ratio to an additional Senator or Senators, such additional Senator or Senators shall be given to such county in addition to the fifty Senators, and the whole number of Senators shall be increased to that extent."

¹⁷ Thus, cases vindicating a citizen's right to vote, such as *United States v. Mosley*, 238 U.S. 383 (1915), *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *United States v. Classic*, 313 U.S. 299 (1941), are not foursquare precedents in malapportionment differences. They have sometimes, however, been cited as such.

¹⁸ *Parker v. State*, 133 Ind. 178, 32 N.E. 836 (1882); *State ex rel. Harte v. Moorhead*, 99 Neb. 527, 156 N.W. 1067 (1916); *State ex rel. Morris v. Wrightson*, 56 N.J. 126, 28 Atl. 56 (1893).

¹⁹ The presumption of constitutionality applies to redistricting acts, as it does

It is necessary, then, to examine what criteria have influenced state courts in the past to invalidate a given redistricting act on the basis of population inequalities. The one law review writer touching upon this precise point suggests a sort of "high-low district" criterion:

The standard most often used by courts is a comparison between the largest and smallest district, according to population in relation to each other and the average or theoretically perfect district. These cases suggest that when the standard is equality of population, an apportionment plan resulting in one district containing more than double the population of another would be invalid. The collected state cases show that an almost equal number of legislative apportionment laws resulting in ratios of under two to one, supposedly apportioned on the basis of population, have been sustained or invalidated while virtually every law yielding districts with over a two to one ratio has been declared unconstitutional.²⁰

The "high-low district" criterion does not appear adequate to explain court opinions in this area. By admission, it does not explain those cases in which redistricting acts have been invalidated on the basis of population inequality even though the difference in population between the highest and lowest districts was less than two to one.²¹ Nor does it explain the many state court decisions sustaining districting acts alleged to violate constitutional provisions on population equality even though the high-low district difference was greater than two to one.²² This theory, moreover, cannot explain those cases in which a court decided the issue of population equality without even mentioning the population figures of the highest and lowest districts.²³ The recent Wisconsin case of *State ex rel. Reynolds v. Zimmerman*,²⁴ already a landmark in state court redistricting, cannot be reconciled with this theory, for Calumet County (the smallest assembly district) has a population of 22,268

to all other legislative acts. *People ex rel. Heffernan v. Carlock*, 198 Ill. 150, 65 N.E. 109 (1902); *State ex rel. Fletcher v. Ruhe*, 24 Nev. 251, 52 Pac. 274 (1898); *State ex rel. Warson v. Howell*, 92 Wash. 540, 159 Pac. 777 (1916).

²⁰ Goldberg, *The Statistics of Malapportionment*, 72 YALE L. REV. 81, 93 (1962).

²¹ Brooks v. *State ex rel. Singer*, *supra* note 9 (smallest district—10,787, largest district—17,775); *State ex rel. Attorney General v. Cunningham*, *supra* note 7 (smallest district—38,690, largest district—68,601); *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932) (smallest district—183,934, largest district—336,654).

²² *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932) (smallest district—16,037, largest district—58,000); *Graham v. Special Comm'rs*, 306 Mass. 237, 27 N.E. 2d 995 (1940) (smallest district—6,107, largest district—12,427); *Stenson v. Secretary of State*, 308 Mich. 48, 13 N.W. 2d 202 (1944) (smallest district—27,807, largest district—76,222). These cases are cited by Goldberg, himself, *supra* note 20, at 104 (Appendix B).

²³ *Rogers v. Morgan*, 127 Neb. 456, 256 N.W. 1 (1934); *Armstrong v. Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934); *People ex rel. Heffernan v. Carlock*, *supra* note 19.

²⁴ 23 Wis. 2d 606, 128 N.W. 2d 16 (1964). This is not a pre-*Baker* case. It is cited here simply to indicate that even in a model court-drawn districting, the disparity is greater than 2 to 1.

and Walworth County (the largest assembly district) has a population of 52,368.

It is not so much the ends of the curve as the deviations in the middle that have concerned state courts in redistricting cases, although for rhetorical effect, it seems, courts often talk of highs and lows. The most important test used by state courts in determining whether a districting act was invalid because of population inequality was the degree of avoidable underrepresentation afforded by the act.²⁵ The best way to define underrepresentation is by example. If the total number of districts is divided into the total population of a state, an ideal or perfect district number is arrived at. To the extent that the population of a given district is greater than the population of the ideal district, that district is underrepresented. To the extent that it is less, the district is overrepresented (assuming one representative per district). Mathematical equality among districts is, of course, impossible. The best of apportionments can only *approximate* equality.²⁶ Overrepresentation has been regarded with considerably less concern than underrepresentation.²⁷ Where the underrepresentation has been substantial (considering the state or other area redistricted as a whole), state courts have many times invalidated the offending act.²⁸ Where it is minimal or where there is no alternative plan by which it could constitutionally be avoided, districting acts have invariably been sustained.²⁹

²⁵ In *State ex rel. Bowman v. Damman*, *supra* note 22, for example, where the population difference between the highest and lowest districts was far greater than 2 to 1, the Wisconsin court sustained a redistricting act in which it could find only 3 instances of avoidable underrepresentations in 71 redistricted counties. On the other hand, in the following cases apportionments were invalidated, the degree of avoidable underrepresentation being considerable. *Brown v. Saunders*, *supra* note 21; *Stiglitz v. Schardien*, *supra* note 9; *People ex. rel. Pond v. Board of Supervisors*, 19 N.Y. Supp. 978 (Sup. Ct.), *aff'd*, 20 N.Y. Supp. 97 (Sup. Ct. 1892); *Parker v. State*, *supra* note 18; *Brooks v. State ex rel. Singer*, *supra* note 9; *Merril v. Mitchell*, 257 Mass. 184, 153 N.E. 562 (1926).

²⁶ *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *Attorney General v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916).

²⁷ Overrepresentation does not necessarily correspond with underrepresentation. A situation can exist where there is substantial overrepresentation but little underrepresentation. Suppose State A's legislature decides to redistrict it into 71 assembly districts. It then substantially overrepresents Districts A, B, C, and D by giving them substantially more representation than the ratio of their population to the first ideal district population would entitle them. After doing this, a second ideal district population is computed by dividing the total remaining districts (67) into the total remaining state population. Each of the 67 districts is then given a population close to the second ideal district number. In this way the deviation per district above the first ideal district number (the underrepresentation) will most probably be low. For a good study on the various mathematical methods used in redistricting, see the memorandum of H. Rupert Theobald, M.A., filed with the Wisconsin Supreme Court in April 1964.

²⁸ *Brown v. Saunders*, *supra* note 21 (see especially table at 106); *Stiglitz v. Schardien*, *supra* note 9 (tables at 318 and whole tenor of opinion strongly suggest that underrepresentation is the prime consideration); *People ex rel. Pond v. Board of Supervisors*, *supra* note 25.

²⁹ *People v. Board of Supervisors*, 148 N.Y. 187, 42 N.E. 592 (1896); *Brophy*

When underrepresentation or overrepresentation among districts was coupled with lack of compactness and/or contiguity of territory in a particular redistricting act, state courts have been more willing to invalidate the act on any of these grounds than they perhaps would have been had only population inequalities been evident.³⁰ This, then, was the second test or criterion used by state courts (in the relatively few instances where the facts permitted) in judging the validity of redistricting acts alleged to contain population inequalities.

A modified version of the "high-low district" criterion previously criticized might be offered as the third test without, however, much case law substantiation. When the difference between the highest and lowest districts was, in the court's opinion, extreme and the reason for such variation lay in legislative policy rather than constitutional accident, at least one state court invalidated the districting act although there was no substantial avoidable underrepresentation in the area redistricted as a whole.³¹ The utilization of this criterion would, to an extent, involve a court in the examination of legislative intent. State courts have repeatedly denied looking into the legislative intent behind districting acts.³² Yet, a reading of the cases in this area leads one to conclude that courts often do examine legislative intent.³³ The three criteria, then, used by state courts to test a redistricting act passed by the legislature for population inequalities were the degree of avoidable underrepresentation, the extent to which population inequalities were combined with lack of compactness and/or contiguity of territory, and the degree of variation between high and low districts resulting from legislative policy rather than constitutional accident.³⁴

The foregoing tests were applied to redistricting acts passed by the legislature. An entirely different legal situation arose when the legislature simply failed to act. Suppose, for example, that the state of Ruralism's constitution commands the legislature to redistrict after each federal census. Ruralism's legislature, however, has refused to

v. Suffolk County Apportionment Comm'rs, 225 Mass. 124, 113 N.E. 1040 (1916); *City of Lansing v. Ingham County Clerk*, 308 Mich. 560, 14 N.W. 2d 426 (1944); *Attorney General v. Secretary of the Commonwealth*, 306 Mass. 25, 27 N.E. 2d 265 (1940). A districting act might not be sustained, although underrepresentation was minimal, if a court applied one of the other two tests discussed in the text.

³⁰ *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *Williams v. Woods*, 162 S.W. 1031 (Tex. Civ. App. 1914); *In re Timmerman*, 51 Misc. 192, 100 N.Y. Supp. 57 (Sup. Ct. 1906). Compactness and contiguity of territory are discussed apart from population equality in the text pp. 524-526 *infra*.

³¹ *State ex rel. Harte v. Moorhead*, *supra* note 18.

³² *Ibid.*; *In re Livingston*, 96 Misc. 341, 160 N.Y. Supp. 462 (Sup. Ct. 1916); *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (1895).

³³ See, e.g., *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *State ex rel. Lamb v. Cunningham*, *supra* note 11. A reading of these cases leads one to conclude that the court was influenced to some degree by what (right or wrong) it considered the legislature's intent.

³⁴ While these tests are, perhaps, nowhere explicitly formulated, they appear a key to the otherwise inexplicable maze of state court decisions in this area.

perform its constitutional duty and has not redistricted since 1901. Consequently, representatives are still elected under the 1901 districting act. John Citizen, living in a city whose population has grown immensely since 1901 as compared to many of the more rural districts, finds that the weight of his vote has been diluted. If he sues, will the court compel the legislature to perform its duty? The unanimous answer of pre-*Baker* state courts was "no." A court could not by mandamus compel a co-ordinate branch of the government to act. The question was a political one to be resolved in the ballot box, not the courtroom. The controversy was simply not justiciable.³⁵ The two Wisconsin *Cunningham*³⁶ decisions are cited as unique in this area by the American Law Reports³⁷ in that they indirectly compel the legislature to act. In the first *Cunningham* case, the Wisconsin court held the redistricting act before it invalid and demanded a special session of the legislature to pass a valid act on the veiled threat of no election. (The court stated that it would be perfectly proper for a state to have no valid apportionment act and implied that all previous apportionment acts were invalid.) Later Wisconsin decisions, however, retreated from this position, holding (while nowhere explicitly overruling *Cunningham*) that the legislature might not be compelled to do its duty even by such an indirect mandamus.³⁸

Thus John Citizen, in the sample situation, could not compel the legislature to do its duty. Could he sue to have the 1901 act declared unconstitutional? Most state courts held he could, since the 1901 act was an action of the legislature upon which a court could adjudicate.³⁹ If the 1901 act, however, had at some time in a court action been declared constitutional, at least one state court has held that it could not by the mere passage of time become unconstitutional.⁴⁰

Once a pre-*Baker* state court had determined that a given redistricting act was unconstitutional on the basis of population inequality, the problem arose as to what form of remedy or relief the plaintiff could secure. The usual remedy was a simple declaration that the act or acts before the court were unconstitutional and that until a new act was passed, the last districting act (prior to the act or acts declared unconstitutional) that was enforced and not specifically declared uncon-

³⁵ *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926).

³⁶ *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *State ex rel. Lamb v. Cunningham*, *supra* note 11.

³⁷ Annot., 46 A.L.R. 964, 966-67 (1927).

³⁸ *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 23 N.W. 2d 610 (1946); *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W. 2d 903 (1952).

³⁹ This is not to infer that he could obtain any relief even if the court decided that the act was unconstitutional. The form of relief available, if any, as will be pointed out, was dependent upon several additional factors.

⁴⁰ *State ex rel. Martin v. Zimmerman*, *supra* note 38. *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, a very recent case, overruled *Martin* on this specific point.

stitutional would be in effect.⁴¹ A minority of courts refused any relief (even though they often termed the act in question unconstitutional) if a return to the last act that was enforced would have simply increased under- or overrepresentation.⁴² Even courts adhering to the majority view, however, would refuse to invalidate the offending act if there was no prior districting act or if all prior districting acts had been declared unconstitutional.⁴³ The reason behind this refusal was that if the court invalidated the offending act, the state would have no districting act at all. In this situation, elections could not be held until a new districting act was passed by the legislature. With the exception of the Wisconsin court in the two prophetic *Cunningham* decisions,⁴⁴ such an indirect method of mandamus to the legislature was repugnant to all pre-*Baker* state courts.

One state court has, pursuant to constitutional provision, actually redistricted the state itself.⁴⁵ Unless specifically directed to do so by such a constitutional provision, however, court redistricting as a remedy was out of the question in pre-*Baker* days. Not only was it regarded as an indirect attempt to mandamus the legislature, but also as the exercise of legislative power, since districting was a legislative rather than judicial function.⁴⁶

Contiguity of Territory

Contiguity of territory is the second key factor which concerned state courts in redistricting disputes. As with population equalities, a constitutional provision requiring contiguity of territory was necessary before a state court would consider a dispute as to its existence justiciable.⁴⁷ Contiguity of territory as a constitutional requirement means that all land within each created district must be contiguous or physi-

⁴¹ *Giddings v. Blacker*, *supra* note 7; *Williams v. Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906); *Stiglitz v. Schardien*, *supra* note 9; *In re Sherrill*, *supra* note 9. Technically, this would usually be accomplished by issuing the appropriate writ (prohibition, injunction, or mandamus) to the ministerial officer charged with calling elections.

⁴² *Jones v. Freeman*, *supra* note 7. In this case the court held it had jurisdiction of the action by reason of its constitutional power to grant the extraordinary writs (in this instance, mandamus). If an extraordinary writ is an inapplicable remedy in the first instance, a court has no jurisdiction of a case solely by reason of its power to issue that writ when appropriate. The court held that mandamus was an inapplicable remedy because, if granted, it would simply increase already existent population inequalities. It does not explain how its general power to issue mandamus gives it jurisdiction over a case where the issuance of a mandamus would be improper.

⁴³ *Fesler v. Brayton*, 145 Ind. 71, 44 N.E. 37 (1896); *State ex rel. Winnie v. Stoddard*, 25 Nev. 452, 86 Pac. 237 (1900); *Sullivan v. Schnitzer*, 16 Wyo. 479, 95 Pac. 698 (1908). A state court has no jurisdiction to dissolve the state government.

⁴⁴ *State ex rel. Attorney General v. Cunningham*, *supra* note 7; *State ex rel. Lamb v. Cunningham*, *supra* note 11.

⁴⁵ *Pickens v. Board of Apportionment*, *supra* note 15.

⁴⁶ *Jones v. Freeman*, *supra* note 7.

⁴⁷ Almost every state constitution contains such a provision; see, e.g., Ws. CONST. art. IV, §§4 ("to consist of contiguous territory and be in as compact form as practicable"), 5 ("of convenient contiguous territory").

cally touching.⁴⁸ A question sometimes arises as to whether land separated by a large body of water (*e.g.*, a lake), but no intermediate land, is contiguous. State courts generally held that it was not unless it completely surrounded the water body (in which event it might not be compact) or unless the land sought to be adjoined to the shore land consisted of an island too small in itself to be a district.⁴⁹ The requirement of contiguous territory was strictly enforced by state courts. This was so even if a districting plan containing districts with contiguous territory would require greater population inequalities among the districts than a districting plan containing districts with noncontiguous territory. The usual remedy in a suit alleging noncontiguous territory was a declaration that the act (or acts) under attack was unconstitutional and that, until the passage of a new act by the legislature, the last prior redistricting act that was enforced and not specifically declared unconstitutional would be in effect.⁵⁰

Compactness of Territory

The third key factor which concerned state courts in redistricting disputes is compactness of territory. A constitutional provision calling for compact territory was necessary before a state court would consider a dispute on this issue justiciable.⁵¹ The term "compactness of territory" means simply that the territory of each created district must be closely united.⁵² What constitutes a closely united district is not an easy question to answer. Certainly, the mere fact that a district is given a jagged rather than smooth boundary would not impair close unity. What is compact in a rural area might not be in a city. One judge (dissenting) has accurately suggested that compactness involves not only "territorial compression but . . . density of population and such considerations as convenience of access and unity of interest."⁵³

So long as a districting act contained reasonably compact districts, state courts would not invalidate it on this ground. Perfect compactness was neither possible nor required.⁵⁴ Generally a doubt as to compactness would be resolved in favor of the legislature.⁵⁵ Unlike the require-

⁴⁸ *In re Sherrill*, *supra* note 9. State courts sometimes permitted rejoinder of non-contiguous territory if such joinder were the only way to prevent violation of a constitutional provision forbidding division of counties in the formation of legislative districts. *In re Reynolds*, 202 N.Y. 420, 96 N.E. 87, *affirming* 128 App. Div. 881, 115 N.Y. Supp. 1114 (1911).

⁴⁹ *Houghton County v. Blacker*, 92 Mich. 638, 52 N.W. 951 (1892).

⁵⁰ The author could discover no cases stating what the remedy would be if there was no prior districting act or if all prior districting acts had been declared unconstitutional.

⁵¹ Almost every state constitution has such a provision; see *e.g.*, WIS. CONST. art. IV, §§4-5.

⁵² *People ex rel. Woodyatt v. Thompson*, *supra* note 32.

⁵³ *In re Sherrill*, *supra* note 9, at 139.

⁵⁴ *Ibid.*

⁵⁵ Cases in which redistricting acts have been invalidated on the ground of non-compactness generally appear to contain extreme violations. *In re Timmerman*, *supra* note 30, for example, had two assembly districts, "one of

ment of contiguous territory, territorial compactness was considered less important than population equality. If greater population equality among districts could be achieved by making the districts slightly less compact, it was necessary to do so.⁵⁶ It does not appear, however, that compactness could be entirely ignored in securing greater population equality.⁵⁷

II. THE FEDERAL POSITION

Unlike state courts, federal courts have only recently considered the justiciability problem in reapportionment disputes. The United States Supreme Court in 1946 squarely held that congressional redistricting suits were not justiciable and strongly implied that state legislative reapportionment contests followed the same rule.⁵⁸ The Warren Court in 1962 overturned this ruling when it held that all redistricting disputes were justiciable.⁵⁹ In 1964 the Supreme Court declared that the Constitution requires all reapportionment acts to afford substantial equality of population among districts.⁶⁰ These rulings reflected the Court's belief that the Constitution as a document is the embodiment of a particular political philosophy (representative democracy as opposed to republic). The Court is no longer to be a mere passive regulator, but rather a positive force in securing the fruits of that philosophy.

Colegrove v. Green

Colegrove v. Green,⁶¹ decided in 1946, was the first significant federal districting case. Appellants, several Illinois voters, alleged that the Illinois Congressional Districting Act violated the Congressional Reapportionment Act of June 18, 1929, and the United States Constitution because it allowed population inequalities and noncompact districts. The Court indicated that it could dispose of the case simply by citing *Wood v. Broom*⁶² which held that the Congressional Reapportionment Act of

which commences on the westerly margin of the city, and runs thence along its westerly boundary in a southeasterly direction $1\frac{3}{4}$ miles having an average width of $\frac{1}{2}$ mile. It then takes an abrupt turn to the north for $1\frac{1}{2}$ miles, with an average width of $\frac{1}{4}$ of a mile, and with some further turnings, it runs westerly for $\frac{1}{2}$ of a mile, having an average width of $\frac{1}{4}$ of a mile, and then turns southeasterly for $\frac{3}{4}$ of a mile, having a width at some points of but two city blocks. It then turns at right angles, and in a northeasterly direction for $\frac{3}{4}$ of a mile [being between 5 and 6 miles in length, and having thirty sides or faces, while another has thirty-one sides or faces, the lines of which divide five wards of the city]." 100 N.Y. Supp. at 58.

⁵⁶ *State ex rel. Lamb v. Cunningham* *supra* note 11; *People ex rel. Woodyatt v. Thompson*, *supra* note 32. A constitutional provision forbidding the division of county lines in the formation of representative districts was also regarded as more important than compactness.

⁵⁷ The usual remedy in a suit alleging noncompetent territory was a declaration that the act (or acts) under attack was unconstitutional and that, until the passage of a new act, the last prior districting act that was enforced and not specifically declared unconstitutional would be in effect.

⁵⁸ *Colegrove v. Green*, *supra* note 4.

⁵⁹ *Baker v. Carr*, *supra* note 2.

⁶⁰ *Reynolds v. Sims*, *supra* note 2.

⁶¹ *Colegrove v. Green*, *supra* note 4.

⁶² 287 U.S. 1 (1932).

June 18, 1929, did not contain or incorporate the provisions of the Congressional Reapportionment Act of August 8, 1911, requiring compactness of territory and approximate equality of population. The Court, however, did not choose to rest its decision upon this narrow legal basis. Unlike the *Wood* Court,⁶³ the Court in *Colegrove* stated that the controversy in dispute was not justiciable. Redistricting contests, it felt, involved the Court in political questions not meet for judicial determination.

Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people.⁶⁴

The remedy for malapportionment, the Court noted, lies in the election of state legislators who will properly redistrict and in the House of Representatives' power under article I, section 5, of the United States Constitution to reject unqualified members. The Court did not comment upon the practical possibility of either of these so-called remedies.

Colegrove did not have much over-all effect on prior state law. Few, if any, state courts adopted its point of view.⁶⁵ The reason for this was that prior state law in all its niceties and complexities provided against all the dangers feared by the *Colegrove* Court while still holding most redistricting disputes justiciable.⁶⁶

Insofar as the decision in *Colegrove* turned upon the fact that the dispute in question was deemed nonjusticiable, a significant problem concerning jurisdiction of the subject matter and standing to sue in the federal courts arises. Lack of jurisdiction in a federal court means that

the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Article 3 Section 2), or is not a 'case or controversy'

⁶³ In *Wood*, the Court expressly refused to consider the question of justiciability.

⁶⁴ *Colegrove v. Green*, *supra* note 4, at 553-54. The majority opinion in *Colegrove* was that of only three Justices. Mr. Justice Rutledge, who concurred, and the three Justices who dissented all felt the issue was justiciable.

⁶⁵ Some courts cited *Colegrove* but did not alter their pre-existing law. *Watts v. O'Connell*, 247 S.W. 2d 532 (Ky. 1952); *State ex rel. Martin v. Zimmerman*, *supra* note 38.

⁶⁶ It is difficult to conceive that even the *Colegrove* Court would have applied its rule in the extreme situation. Suppose, for example, the Wisconsin legislature were to apportion 8 out of its 10 congressmen to Milwaukee County. Would the *Colegrove* Court have found a dispute as to this apportionment nonjusticiable? There is some evidence that lower federal courts were dissatisfied with *Colegrove* and sometimes refused to follow it. *Dyer v. Kazuhise Abe*, 138 F. Supp. 220 (D. Hawaii), *rev'd as moot*, 256 F. 2d 728 (9th Cir. 1958); *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958); 177 F. Supp. 803 (D. Minn. 1959); *WMCA, Inc. v. Simon*, 196 F. Supp. 758 (S.D. N.Y. 1961); 202 F. Supp. 741 (S.D. N.Y. 1961), *rev'd and remanded*, 370 U.S. 190 (1962).

within the meaning of that section; or the cause is not one described by any jurisdictional statute.⁶⁷

Standing to sue means only that the plaintiff (distinguished from his fellow citizens generally), has some vital interest which will be affected beneficially or adversely by a judicial determination of the dispute.⁶⁸ Jurisdiction of the subject matter and standing to sue, therefore, do not involve a consideration of the merits of the action. Justiciability, on the other hand, does involve a consideration of the merits, at least to the point of determining

whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. . . .⁶⁹

It is only common sense that a court will not reach the merits of an action until it has determined (expressly or by implication) that the necessary preliminaries (jurisdiction and standing to sue) exist. Now the Court in *Colegrove* nowhere explicitly stated that federal courts possess jurisdiction or that individual plaintiffs have standing to sue in congressional redistricting cases. However, since it decided the issue of justiciability over and above the issue as to the meaning of the Congressional Reapportionment Act of June 18, 1929, it can be argued that the Court found federal court jurisdiction and individual standing to sue in congressional redistricting cases apart from any jurisdiction conferred by virtue of the fact that the Congressional Reapportionment Act of June 18, 1929, was a federal law.⁷⁰

It has been argued that federal court jurisdiction and standing to sue in all redistricting cases have long prior to *Colegrove* become settled nooks in constitutional law.⁷¹ The argument is a good one if limited to congressional redistricting cases. In such cases the federal question

⁶⁷ *Baker v. Carr*, *supra* note 2, at 198.

⁶⁸ *Id.* at 204. Cases which define generally the meaning of standing to sue in the federal courts are: *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Ex-Cell-O Corp. v. City of Chicago*, 115 F. 2d 627 (7th Cir. 1940). It is apparent, therefore, that the federal courts have adopted the view of some state courts (see text p. 517 *supra*) that a private citizen has standing to sue (without first requesting the attorney general to do so) as he has a deep personal interest in the apportionment of his elective bodies. It is not clear whether the plaintiff must simply possess the qualifications to vote or be an actual voter. *Baker v. Carr*, *supra* note 2, at 204-06 n. 26.

⁶⁹ *Baker v. Carr*, *supra* note 2, at 198.

⁷⁰ The only direct comment as to jurisdiction in *Colegrove* is: "This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.'" 328 U.S. at 552. The following comment has sometimes been interpreted as indicating that the *Colegrove* Court found the plaintiff's without standing to sue: "This is not an action to recover for damage because of the discriminatory exclusion of plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." *Ibid.*; cf. Wisconsin Supreme Court's interpretation of this comment in *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, 126 N.W. 2d at 556.

⁷¹ *Baker v. Carr*, *supra* note 2, at 201, 206.

conferring jurisdiction upon federal courts could arise under a number of explicit provisions in the United States Constitution, such as article I, sections 2 and 4.⁷² No such explicit constitutional provisions exist, however, with regard to the selection of state legislative districts.

Baker v. Carr

The first Supreme Court case squarely holding that federal courts possessed jurisdiction and that individual plaintiffs could sue to test apportionments of state legislatures was *Baker v. Carr*, decided in 1962.⁷³ The Tennessee legislature had failed since 1901 to perform its state constitutional duty and redistrict the state. Plaintiffs, individual voters in various Tennessee counties, alleged that their votes had been diluted, denying them equal protection of the laws guaranteed by the fourteenth amendment. The district court, uncertain whether Supreme Court cases denying relief were based upon lack of federal court jurisdiction or nonjusticiability of the redistricting issue, held that it lacked jurisdiction to try the suit and that the issue in dispute was not justiciable. The Supreme Court, therefore, ruled only on the issues of jurisdiction, standing to sue, and justiciability. It did not endeavor to determine whether plaintiffs were entitled to relief, nor what form that relief should take.

The Court first stated that federal courts possessed jurisdiction to try disputes concerning apportionment of state legislatures. It noted the difference between jurisdiction and justiciability, indicating that cases such as *Colegrove*, in terming the redistricting issue non-justiciable, affirmed by implication the existence of federal court jurisdiction. It cited, however, only one case which could be taken as holding by implication that federal courts had jurisdiction over suits attacking apportionment of state legislatures (*i.e.*, as distinguished from suits attacking selection of congressional districts).⁷⁴

The individual plaintiffs (voters in allegedly underrepresented counties) possessed, in the Court's view, standing to sue. They had a direct, immediate, personal interest in the effectiveness of their votes.

The most revolutionary part of the *Baker* decision was its holding that a suit to test the constitutionality of a state legislature's failure to redistrict was justiciable. A political question is not justiciable. But every case involving the protection of a political right does not necessarily involve a political question. A political question exists when there

⁷² Ohio *ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932). On the issue of jurisdiction, all Supreme Court cases prior to *Baker* seem to have dealt with congressional districting.

⁷³ Note 2 *supra*. *South v. Peters*, 339 U.S. 276 (1950), may have assumed that federal courts possessed jurisdiction and that there was standing to sue in cases of this type, but it certainly did not squarely so hold.

⁷⁴ *Baker v. Carr*, *supra* note 2, at 203. The case was *South v. Peters*, *supra* note 73.

is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁷⁵

A resolution of the redistricting issue in dispute, the *Baker* Court felt, involved none of these difficulties. The Tennessee legislature and the United States Supreme Court, it stated, are not coordinate or coequal bodies. Judicial determination of the controversy would not embarrass the Government at home or abroad. The equal protection clause was the judicially manageable standard against which redistricting acts calling for apportionment of state legislatures could be tested. Redistricting disputes, the Court declared, do not involve political questions but political rights, and as such they are justiciable.

The chief difficulty with *Baker v. Carr*, was that it failed to provide any definition of the term "equal protection of the laws" as applied to redistricting cases. Prior to *Baker*, the equal protection clause had been invoked by the Court with relative infrequency except in the areas of racial discrimination and criminal procedure.⁷⁶ As a concept, it meant only that a state might not discriminate by unreasonable classification. Simply because a man was indigent, he should not be denied the right to appeal.⁷⁷ Simply because a man has black skin he should not be denied the right to attend the state's only law school.⁷⁸ So long as the classification was reasonable, there was no invidious discrimination and no denial of equal protection.

When the theretofore little used concept of equal protection was applied to redistricting disputes, a severe problem of interpretation arose among law review writers and courts. Did it constitute an unreasonable classification to underrepresent cities with a view toward allowing rural opinion to have some weight in what would otherwise be a predominantly urban legislature, especially if commanded to do so by the state constitution? Was it invidious discrimination to only slightly underrepresent

⁷⁵ *Baker v. Carr*, *supra* note 2, at 217.

⁷⁶ Emerson, *Malapportionment and Judicial Power*, 72 YALE L. J. 64 (1962).

⁷⁷ A state does not have to grant the right to appeal in criminal cases. If it does, however, the equal protection clause requires that the state make the right of appeal equally available to the indigent prisoner by supplying him free of cost with the transcript necessary in order to take the appeal, if this is the method required for securing appellate review. *Griffin v. Illinois*, 351 U.S. 12 (1956). A state may not, consistent with the equal protection clause, impose a financial barrier to the filing of a motion for leave to appeal to the state supreme court on the ground that indigents can appeal to an intermediate appellate court for review. *Burns v. Ohio*, 360 U.S. 252 (1959).

⁷⁸ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

sent certain areas but not flagrantly gerrymander? Where was the classification line to be drawn—with the man or the political unit? Obviously, confusion reigned. Most courts and law review writers seem *in effect* to have concluded that what the Supreme Court meant to do was adopt some sort of variation of the prior state court redistricting rules. A redistricting act to satisfy the equal protection clause (in their view) would have to be reasonable. If there was underrepresentation, a legislature would have to have some justifiable and evident reason for allowing it.⁷⁹ In other words, they felt, *Baker* was intended to prevent only the extreme case, the obvious gerrymander, the flagrant failure of the legislature to perform its constitutional duty.⁸⁰ How wrong they were.

The Substantial Equality Rule

Early in 1964, the Supreme Court began to clarify its views on the subject of legislative districting. In *Wesberry v. Sanders*⁸¹ the Court held that the constitutional test for the validity of congressional districting plans was substantial population equality among districts. Mathematical precision was impossible but, as nearly as practicable, each man's vote was required to carry the same weight. This decision, however, did not find its basis in the equal protection clause, but rather in article I, section 2,⁸² of the United States Constitution.

*Reynolds v. Sims*⁸³ and the five districting cases⁸⁴ decided with it on June 15, 1964, set down the meaning of equal protection as a standard governing the apportionment of state legislatures. The last apportionment of the Alabama legislature in *Reynolds v. Sims* occurred shortly after 1900 and was based on the federal census of that year despite the fact that the Alabama constitution required apportionment decennially. The district court held this apportionment unconstitutional on the basis of population inequalities, giving the legislature a period of time to suggest a constitutional plan. Neither of the two plans suggested was, in the district court's view, wholly constitutional. It there-

⁷⁹ Some examples are area representation, history, and representation of economic interests.

⁸⁰ *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962); *Sweeney v. Notte*, 183 A. 2d 296 (R.I. 1962); *Caesar v. Williams*, 371 P. 2d 241 (Idaho 1962); Israel, *On Chartering A Course Through The Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962); Bickel, *The Durability of Colegrove v. Green*, 72 YALE L. J. 39 (1962); McClosky, *The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Freud, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631 (1964).

⁸¹ 376 U.S. 1 (1964).

⁸² The pertinent part of article I, §2, reads as follows: "The House of Representatives shall be composed of members chosen every second year *by the people of the several states*. . . ." (Emphasis added.)

⁸³ Note 2 *supra*.

⁸⁴ *WMCA, Inc. v. Lomenzo*, *supra* note 1; *Maryland Comm. v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964).

fore took the best parts of both plans, combined them, and ordered the 1962 elections held under this court-combined plan.⁸⁵

The Supreme Court approved the district court's decision. It held that *both* houses of a state legislature must be apportioned on the basis of *substantial population equality among districts in order to afford equal protection of the laws*.⁸⁶ Precise mathematical equality of population among districts, being impossible, was not required. *So long as there was substantial equality*,⁸⁷ certain deviations from strict population equality might be allowed.

A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme.⁸⁸

⁸⁵ The new legislature, of course, was expected to enact a constitutional plan.

⁸⁶ The substantial equality rule is based upon total population, not upon the number of registered voters or upon the number of voters actually turning out at the polls, or even upon the number of adults of voting age. It is conceivable, therefore, that the application of the population-based substantial equality rule to districting plans will produce vote dilution in areas of high population but low voter registration or low voter turnout at the polls, and areas where the number of minors or others not qualified to vote is high. Suppose, for example, District *A*, located in a southern state, has a population of 40,000 people, consisting of 20,000 poorly educated Negroes, 8,000 cracker whites, and 12,000 middle class whites. Approximately 12,000 voters annually cast ballots in District *A* elections (2,000 Negroes and cracker whites and 10,000 middle class whites). District *B*, on the other hand, composed largely of retired senior citizens, has a population of 20,000. Therefore, District *B* in a population-based substantial equality apportionment has one-half the number of state legislators allotted to District *A*. Approximately 15,000 voters annually cast ballots in District *B* elections. John Citizen, a resident of District *B*, finds that the value of his vote as one of District *B*'s 15,000 votes is less than one-half that of any one of District *A*'s 12,000 voters.

A requirement that the substantial equality rule be based upon actual voter turnout at the polls, voter registration, or adult population would call into question provisions in many state constitutions requiring that the state legislature apportion according to the last federal census (*e.g.*, WIS. CONST. art. IV, §3). In practice, such provisions have been assumed to require apportionment based upon total population. Arguably, they might be interpreted as merely requiring apportionment based upon population as evidenced by the census. Then an apportionment based upon adult population or even voter registration or turnout would not offend them. The United States Supreme Court has not, as yet, discussed this problem. It is true that the Court in *Reynolds* and its companion cases did compare existing apportionments with total population. Arguably, at least, the Court in *Reynolds* was merely providing a *test* or *yardstick* against which an existing apportionment might be measured. It was not, then, discussing the *method* by which substantial equality should be achieved (method problems are raised by Mr. Chief Justice Warren himself when he rejects rationality, *etc.*; see note 93 *infra*). If this is the case, then it is open to the Court at a latter date to hold that an apportionment achieved by the *method* of total population computation does not always afford substantial equality of population. *But see* Ellis v. Mayor, 234 F. Supp. 945 (4th Cir. 1964).

⁸⁷ The classification line, then, is to be drawn with the man and not the political unit. Anything other than "one man, one vote," with certain specific and minor exceptions, constitutes an unreasonable classification. See note 93 *infra*.

⁸⁸ *Reynolds v. Sims*, *supra* note 2, at 578. Maintaining the integrity of political subdivision lines would not be so valid a consideration, the Court felt, in congressional districting, as in state legislative apportionment cases.

However, neither history, area representation, economic, or other group interests are sufficient ends to justify deviation from strict population equality, for "citizens, not history or economic interests, cast votes."⁸⁹ "Legislators represent people, not trees or acres."⁹⁰

Appellants in *Reynolds* alleged that the application of a substantial equality standard in apportioning both houses of a state legislature (thereby making the basis of representation in each house the same) would render anachronistic the concept of bicameralism. This, the Court stated, was untrue. A deliberate, mature consideration of legislative proposals and the prevention of precipitate action upon them were, in the Court's view, the principal goals of bicameralism.⁹¹ These could be achieved even though the entire legislature was elected on a population basis. Bills could be required to pass both houses before becoming law. The terms of members of one house as compared with those of the other could be staggered. A certain area could be overrepresented in one house and correspondingly underrepresented in the other.⁹² Finally, the size of one house could be larger than the other, insuring in most instances that members of both houses represent different size districts and/or different group interests (economic, social, etc.).

Another argument advanced against the *Reynolds* rule was that it vitiated the so-called "federal analogy." The United States was formed when several sovereign states, through their duly appointed representatives, composed and assented to the federal constitution. The term "federal analogy" means simply that these sovereign states would not put a broader limitation upon their own powers (in the Constitution) than that which they delegated to the federal government. Since Congress contains, by constitutional command, one house based solely on population and one house based solely on political units (states), it can be no less constitutional, it is argued, for a state legislature to contain one house based on population and the other on political subdivisions (e.g., counties). The Court rejected this argument as having no basis in fact or theory. It noted that the system of representation in Congress grew out of a dispute between the large and small states which threatened to deadlock the constitutional convention. The large states wanted congressional representation based on population. The small states wanted each state to receive the same number of representatives, no matter how large or small it was. The present system of congressional representation (members of the House selected on a population basis; members of the Senate on the basis of statehood), therefore, represents a

⁸⁹ *Id.* at 580.

⁹⁰ *Id.* at 562.

⁹¹ *Id.* at 576.

⁹² Thirty-one days prior to the date upon which the United States Supreme Court handed down its decisions in *Reynolds* and its companion cases, the Wisconsin Supreme Court applied this principle in its court-drawn reapportionment of Wisconsin. *State ex rel. Reynolds v. Zimmerman*, *supra* note 24.

compromise among sovereign states. Without this compromise, they would have conferred no sovereignty upon the federal government. Counties (or other subdivisions of the state), on the other hand, confer no sovereignty upon the state. They are mere creations of the state, often subject to change or extinction at the legislature's will. The constitutional status of Congress, in the Court's view, therefore, did not apply in this regard to state legislatures.⁹³ The Court's rejection of the federal analogy strikes, perhaps, a fatal blow at the concept of dual federalism and is an excellent example of the Court's adoption of the philosophy of representative democracy.

Five of the six districting cases decided by the Supreme Court on June 15, 1964, involved apportionments commanded or at least indirectly required by state constitutional provisions or formulas.⁹⁴ This, however, made no difference to the Court in adjudicating their compliance with the equal protection clause.

But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the federal and a state constitution, the supremacy clause of course controls.⁹⁵

Each of the five cases in question arose on appeal initially from a federal district court. Nevertheless, it is practical to consider what might happen if a case of this type were taken to a state supreme court. Could the state supreme court invalidate a portion of its own constitution requiring unequal apportionment? *Reynolds* and its companion case indicate that it could. This view is based upon the supremacy clause, article VI of the United States Constitution. This clause states, in essence, that as between a state constitution and the federal constitution, the federal constitution is supreme, and that state judges must by oath or affirmation promise to support the federal constitution. Thus, it is argued, (by keeping this promise) a state court could in-

⁹³ The Court noted that a state districting plan based upon the "federal analogy" might be very rational and still be unconstitutional. The test of constitutionality under the equal protection clause is not rationality, but reasonable classification. A rational apportionment plan could very well contain an unreasonable classification. (This is one of the few areas in which the Court has applied a near per se rule in the definition of what is a reasonable classification under the equal protection cause. In *Brown v. Board of Educ.*, *supra* note 3, the Court laid down a per se rule defining reasonable classification in the area of race discrimination.) Anything other than "one man, one vote," with certain specific and minor exceptions, constitutes an unreasonable classification.

⁹⁴ *WMCA, Inc. v. Lomenzo*, *supra* note 1; *Lucas v. Colorado Gen. Assembly*, *supra* note 84; *Maryland Comm. v. Tawes*, *supra* note 84; *Roman v. Sincock*, *supra* note 84; *Reynolds v. Sims*, *supra* note 2. While general Alabama constitutional provisions (in *Reynolds*) required population equality, other specific provisions made the practical achievement of equality impossible.

⁹⁵ *Reynolds v. Sims*, *supra* note 2, at 584.

validate its own constitution. It is conceivable that a state court might be reluctant to adopt this view.⁹⁶ A state supreme court, after all, owes its existence ultimately, at least, to the state constitution. It is a creation of that document, an arm of the state, not the federal government, unless the doctrine of dual federalism is dead. A state supreme court, therefore, might contend that it exercises only the judicial power of the state (not federal judicial power) and thus is powerless to invalidate the document from which it draws its powers. Such a decision would probably evoke an attempted appeal to the United States Supreme Court. The Supreme Court could refuse to entertain the appeal on the ground that what the state judicial power is, is a matter of state law of which the state supreme court is the final arbiter.⁹⁷ It is more likely, however, that the Court would accept the appeal and overrule the state court decision, basing its action upon the supremacy clause argument of the *Reynolds* case. A determined state court might then instruct its clerk not to file the Supreme Court's mandate (maintaining that this was simply an indirect way of using its power to invalidate the document which was the source of that power) as the Wisconsin Supreme Court once did and did successfully.⁹⁸ Unless the superior court's mandate is filed with the lower court, the lower court is not overruled and its decision remains the law within its territorial jurisdiction. Appellants only remedy then would be to request a federal court order holding someone in contempt. That someone could not be the supreme court clerk, as he would have a perfect defense (*i.e.*, had he filed the mandate, he would have been in contempt of the state supreme court). The contempt action could only be brought against the supreme court justices themselves. Assuming but not asserting that a contempt order could be effectively executed by the marshalls of one court upon the members of another, if the state justices had the support of the state legislature (so there was no impeachment and/or appointment of new justices), as likely they would, the contempt remedy would be impractical and unworkable, as it would in large part effectively prevent dispensation of justice throughout the entire state.⁹⁹

⁹⁶ After its judgment was vacated by the United States Supreme Court in *Scholla v. Hare*, 360 Mich. 1, 104 N.W. 2d 63 (1960), *vacated and remanded*, 369 U.S. 429 (1962), the Michigan Supreme Court, upon remand, held invalid sections of its own constitution as violative of the equal protection principle laid down in *Baker*. *Scholle v. Hare*, 367 Mich. 178, 116 N.W. 2d 350 (1962).

⁹⁷ The plaintiff's state court remedies would then be totally exhausted. He would unquestionably be able to bring suit for the vindication of his federal right in the federal district court of his area.

⁹⁸ The Wisconsin Supreme Court determined that the Fugitive Slave Act of September 18, 1850, was unconstitutional. *In re Booth*, 3 Wis. 13 (1854). The United States Supreme Court overruled and reversed the Wisconsin Supreme Court, holding the Fugitive Slave Act constitutional. *United States v. Booth*, 62 U.S. 506 (1858). The Wisconsin Supreme Court refused to file the United States Supreme Court's mandate and the law in Wisconsin remained as enunciated by its supreme court.

⁹⁹ A large fine, rather than imprisonment, as a penalty for contempt might be

One law review writer has suggested that all districting actions should be brought first in the appropriate state court, and that until it has refused to afford proper relief, federal courts should abstain from deciding the issue.¹⁰⁰ This, it is argued, would enable state courts, having an intimate knowledge of state affairs, to fashion the appropriate remedy. It would also pay lip service to the doctrine of federalism. The suggestion is a good one so long as the districting issue in dispute does not involve an attack upon the state constitution. If it does, it would probably be better to seek a judgment of unconstitutionality in the federal court. One could then sue upon that judgment in the state court to secure an appropriate remedy.¹⁰¹

The apportionment plan invalidated in *Lucas v. Colorado Gen. Assembly*,¹⁰² a companion case to *Reynolds*, contained several unique features not found in the five other districting cases. In the first place, anyone prejudiced by the plan could secure its abolition through initiation of a referendum to that effect (provided a majority of the state's voters agreed with him on the referendum). Such a referendum could be initiated by anyone procuring signatures from only eight per cent of those who actually voted for secretary of state in the last election. There was, therefore, in Colorado an effective nonjudicial means to secure relief for legislative malapportionment. This was of no importance, the Supreme Court declared. A person's legal rights may not be denied in court simply because he possesses a remedy for their violation outside of court.

In the second place, the Colorado apportionment plan had been approved by a majority of the Colorado electorate. The legislature submitted that plan and a plan based solely on population to the people in the form of a referendum. The plan adopted was selected by a sound majority, including majorities in each allegedly malapportioned area. This, the Supreme Court stated, was irrelevant. Constitutional rights do not depend on majority vote. They are not creatures of majority will. The Court's reasoning here can best be illustrated by example. Suppose a majority of voters in the United States vote to disenfranchise a large minority. This process is continued with ever smaller majorities until finally there are only three enfranchised voters, two of whom vote to disenfranchise the other one. This could hardly be termed constitutional or even democratic. Yet the majority will has been followed in each instance.

The Court (in each of the six 1964 districting decisions) explicitly

a practical enforcement device. The text comments refer primarily to imprisonment for contempt.

¹⁰⁰ Comment, *Baker v. Carr and Legislative Apportionment: A Problem of Standards*, 72 YALE L. J. 968, 1030 (1962).

¹⁰¹ It would, of course, be possible to secure a remedy in the federal court.

¹⁰² Note 84 *supra*.

refused to indicate what remedial devices it considered proper. Choices of particular remedial techniques, it stated, would vary with the apportionment plan attacked and the local circumstances surrounding it. It would be advisable, the Court felt, for a lower court, after holding a districting act unconstitutional, to set aside a reasonable period of time during which the state legislature might enact a constitutional apportionment. Only highly unusual circumstances, however, would justify the lower courts allowing even one more election under the constitutionally invalid apportionment act.¹⁰³

Prior state court districting law has been changed considerably by the recent Supreme Court decisions. The presence of an unfair population formula in a state constitution is no longer an impediment to judicial relief. All districting disputes are now justiciable. Contiguity of territory is no longer a valid reason for deviating substantially from population equality. While underrepresentation is still a prime concern, any deviation from substantial population equality is taboo. A court must do more than simply invalidate the offending act with the effect of returning to the last act that was enforced and not specifically declared unconstitutional.

Congressional Reaction to the New Rule

The 1964 Supreme Court districting decisions quickly became as controversial as *Brown v. Board of Educ.*¹⁰⁴ State legislatures the nation over faced the prospect of conversion from rural to urban and suburban orientation. The impact of the Court's pronouncements was felt in Congress as Senator Dirksen offered a rider¹⁰⁵ to the Foreign Aid Bill. Dirksen's rider provided that "in the absence of highly unusual circumstances" any federal court (Supreme or lower) handling an apportionment case must stay the granting of any relief for the period necessary

(i) to permit any state election of representatives occurring before January 1, 1966, to be conducted in accordance with the laws of such state in effect immediately preceding any adjudication of unconstitutionality and

(ii) to allow the legislature of such state a reasonable opportunity in regular session or the people by constitutional amendment a reasonable opportunity following the adjudication

¹⁰³ If an election is imminent when the court's decision of unconstitutionality is announced and the state's election machinery is already in progress, the court might be justified in allowing the election under the invalid act. This could be a highly unusual circumstance. There is nothing wrong, the Court stated, with a state's adopting a periodic readjustment plan. A state constitution may provide that its legislature will reapportion every five years or after each decennial federal census. If population inequalities arise before that time, the state would not be required to reapportion earlier so long as the total period between apportionments does not exceed ten years.

¹⁰⁴ Note 3 *supra*.

¹⁰⁵ Amendment to H.R. 11380, 88th Cong., 2d Sess. (1964).

of unconstitutionality to apportion representation in such legislature in accordance with the Constitution.¹⁰⁶

The Supreme Court under the rider would be required to withhold its hand in reviewing state court decisions, as well as federal.

The Dirksen rider has been criticized as an attempt to limit Supreme Court (and other federal court) jurisdiction of redistricting disputes. Congress has several times in the past removed the Supreme Court's jurisdiction of certain cases.¹⁰⁷ During Reconstruction days, for example, the Supreme Court appeared likely to hold unconstitutional some of the provisions for military occupation of the South. In 1867, the Supreme Court held that it possessed jurisdiction over appeals from the circuit court on judgments in habeas corpus cases arising under the Judicial Act of 1867.¹⁰⁸ The particular case in which this decision was made was then argued on the merits before the Court and taken under advisement. This was the kind of case which, if heard on the merits, would involve Reconstruction laws of dubious constitutionality. Congress, therefore (while the case was awaiting decision on the merits), passed a law (March 27, 1868) repealing that provision of the Judicial Act of February 5, 1867, which authorized appeals to the Supreme Court from decisions of the circuit court in habeas corpus cases arising under it. When this law was pointed out to the Court, it dismissed petitioner's appeal on the ground that it no longer possessed requisite jurisdiction.¹⁰⁹ The Court held that its appellate jurisdiction was conferred by the Constitution, but conferred subject to "such exceptions, and under such regulations, as the Congress shall make."¹¹⁰

[T]he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.¹¹¹

Therefore, the Court stated in *Ex parte McCordle*,¹¹² Congress has a constitutional right to remove parts of the Court's appellate jurisdiction. Although *McCordle* has been criticized,¹¹³ it has been consistently followed.¹¹⁴

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ex parte McCordle*, 74 U.S. 506 (1868); *Hallowell v. Commons*, 239 U.S. 506 (1916); *Bruner v. United States*, 343 U.S. 112 (1952).

¹⁰⁸ *Ex parte McCordle*, 73 U.S. 318 (1867).

¹⁰⁹ *Ex parte McCordle*, *supra* note 107.

¹¹⁰ U.S. CONST. art. III, §2.

¹¹¹ *Ibid.*

¹¹² Note 107 *supra*.

¹¹³ N.Y. Times, Aug. 7, 1964, p. 56, cols. 6-7; *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n. 11 (1962) (dissenting opinion).

¹¹⁴ *Missouri v. Missouri Pac. Ry.*, 292 U.S. 1, 15 (1934); *Stephan v. United States*, 319 U.S. 423, 425-26 (1943); *De La Roma Steamship Co. v. United States*, 344 U.S. 386, 390 (1953); *Glidden Co. v. Zdanok*, *supra* note 113, at 567 (majority opinion).

The Dirksen rider did not fall within the purview of the *McCardle* case. Contrary to certain of its critics, it did *not* attempt to *remove or limit* Supreme Court (and other federal court) jurisdiction of redistricting disputes. It sought to

stay the entry or execution of any order interfering with the conduct of the state government, the proceedings of any house of the legislature thereof, or of any convention, primary, or election. . . .¹¹⁵

The Dirksen rider, therefore, would have prevented federal courts from granting any relief in cases dealing with the apportionment of state legislatures (for the period of its application).¹¹⁶ It would not have prevented federal courts from taking jurisdiction of and adjudicating such cases.

Another objection raised against the Dirksen rider was that its passage would have provided a precedent for congressional interference with the national uniformity of constitutional rights. Constitutional rights are uniform throughout the United States because the United States Supreme Court has appellate jurisdiction over the final decisions of the highest state court in cases dealing with the Constitution's interpretation. This principle was first enunciated by Mr. Chief Justice Marshall in the case of *Cohens v. Virginia*.¹¹⁷ He traced the Supreme Court's appellate power to article III, section 2, of the United States Constitution, which gives the Supreme Court appellate jurisdiction over "all cases" arising under the Constitution, laws, and treaties of the United States. Mr. Justice Marshall felt that the term "all cases" was broad enough to include any case described within the constitutional provision, in whatever lower court it might have been decided, state or federal.¹¹⁸ The policy favors which motivated this ruling were aptly stated by Mr. Justice Story in *Martin v. Hunter's Lessee*:¹¹⁹

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

¹¹⁵ Amendment to H.R. 11380, 88th Cong., 2d Sess. (1964).

¹¹⁶ Dirksen's rider did not apply to congressional apportionment cases. Had it been enacted, relief could have been granted in such cases under *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹¹⁷ 6 Wheat. 264 (1821).

¹¹⁸ *Cohens v. Virginia*, *supra* note 117, at 416.

¹¹⁹ *Martin v. Hunters Lessee*, 1 Wheat. 303, 348 (1816).

Mr. Justice Holmes expressed the same belief at a much later date:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.¹²⁰

The Dirksen rider, contrary to its critics, did not interfere with the Supreme Court's constitutionally protected power of assuring the national uniformity of constitutional rights. In the first place, it did not attempt to impair the Court's jurisdiction. It sought rather to curtail (temporarily) the Court's power to grant relief. Therefore, had it been enacted, the Dirksen rider would not have affected the Supreme Court's appellate jurisdiction over appropriate state court cases. It would not have prevented the United States Supreme Court from reviewing upon appeal an apportionment case decided by a state supreme court. In the second place, even if the Dirksen rider had affected the Court's jurisdiction, it is doubtful that it could be termed unconstitutional as violative of the *Cohens* principle. The Supreme Court's appellate jurisdiction over state courts is conferred by article III, section 2, of the Constitution, which specifically states that Congress may make exceptions to it. Finally, the *Cohens* case dealt with an attempt by the state of Virginia to assert as a blanket proposition that the United States Supreme Court had no appellate jurisdiction over state courts. The Dirksen rider, had it been enacted, would have represented an attempt by Congress, a national body, to limit the Court's relief-giving powers, not generally, but as regards cases dealing with the apportionment of state legislatures.

It appears, therefore, that the Dirksen rider was constitutional. Whether politically Congress would have been wise to enact it is another matter.¹²¹

III.

THE WISCONSIN POSITION

Early in 1964, the Wisconsin Supreme Court revamped its state districting law. In doing so it handed down a precedent-breaking decision which could well become a model for state districting cases through the nation.¹²² The Wisconsin case was decided prior to the Supreme Court's decision in *Reynolds v. Sims* and was based upon

¹²⁰ HOLMES, *Law and the Court*, COLLECTED LEGAL PAPERS 295-96 (1920).

¹²¹ The Tuck Bill, H.R. 11926, 88th Cong., 2d Sess. (1964), which would have taken jurisdiction away from all federal courts in all districting cases, and a resolution stating, in effect, that the sense of Congress was to give the states sufficient time to adjust to the new apportionment rule, also failed to pass the 88th Congress.

¹²² *State ex rel. Reynolds v. Zimmerman*, *supra* note 14. The court gave the legislature a reasonable time to enact a constitutional reapportionment. When it did not, the court drew up its own reapportionment plan in *State ex rel. Reynolds v. Zimmerman*, *supra* note 24.

the Wisconsin constitution, not the federal constitution. Still, it effectively presaged many of the commands and much of the advice given in *Reynolds v. Sims* and its companion cases. Continuing in this vein, the Wisconsin Supreme Court on January 5, 1963, became the first court to apply the rule of *Reynolds v. Sims* to a statewide county board apportionment law.¹²³

The Wisconsin Court Reapportionment Plan

The relator in *State ex rel. Reynolds v. Zimmerman*¹²⁴ alleged that the legislature had failed to obey its constitutional duty to reapportion legislative districts after the 1960 federal census and that the existing apportionment plan enacted in 1951 was invalid because of population inequalities. He urged the court to mandamus the respondent, Robert Zimmerman, Secretary of State, to hold the 1964 elections either according to a court drawn apportionment plan or at large.

In June 1963, senate bill 575, S., attempting to reapportion Wisconsin legislative districts, passed both houses of the legislature but was vetoed by Governor Reynolds. His veto was not overridden. Shortly thereafter (August, 1963), the legislature passed Joint Resolution 49, which purported to reapportion Wisconsin's legislative districts. Joint Resolution 49 was substantially similar to 575, S. As it was a joint resolution, however, it did not require gubernatorial consent, or passage over the Governor's veto by a two-thirds majority in the event he failed to consent. Respondent asserted that Joint Resolution 49 was a valid apportionment and that he would call the 1964 elections under it unless the court should invalidate it. In the event Joint Resolution 49 was invalidated by the court, respondent stated, he would call the 1964 elections under the Districting Act of 1954, the so-called Rosenberry plan, unless directed otherwise by the court.

John Reynolds, the court held, had standing to bring suit in his official capacity as Governor.¹²⁵ Joint Resolution 49, in the court's view, was not an apportionment act at all as it was passed without the Governor's consent or veto. The one political institution representative of the totality of state voters having a place in the legislative process is the executive office, headed by the Governor. The court felt that the Wisconsin constitution placed heavy emphasis upon the requirement that legislative districts be apportioned "according to the number of inhabitants."¹²⁶ This goal could be more readily realized if an officer

¹²³ *State ex rel. Sonneborn v. Sylvester*, *supra* note 12.

¹²⁴ Note 14 *supra*.

¹²⁵ See p. 518 & note 14 *supra*. Technically, Reynolds had standing simply to *continue* suit, although the court specifically states he had standing to *bring* suit. On the facts, Reynolds initiated the suit in question when he was attorney general and continued it when he became Governor, as the new attorney general refused to continue it.

¹²⁶ Wis. CONST. art. IV, §3. This particular provision of the Wisconsin constitution gave rise to the court's population-based per capita equality rule. See pp. 544 & 545 *infra*. Thus the court's finding that the Governor is an esen-

responsible to all of those inhabitants played some part in the selection of an apportionment plan. Therefore, the court reasoned, the constitution's framers intended to include the Governor in the reapportionment process.¹²⁷ Possibly the court was influenced to adopt this position by the fact that Governor Reynolds belonged to one political party, and the majority of the state legislature to another. Respondent argued that the constitution might be amended or a referendum submitted to the people by the legislature without the Governor's consent. This argument, the court noted, was irrelevant. In both situations presented by respondent the voting majority (as well as minority) expressed their will directly at the polls. There was, however, no need for them to speak through the Governor as there would be in a re-districting situation.

Respondent urged that a textual analysis of the constitution supported his contention that the Governor was not a necessary part of the state legislative reapportionment process. The constitutional provision requiring state legislative districting reads: "[T]he legislature shall apportion and district anew the members of the senate and assembly"¹²⁸ (emphasis added), while the provision relating to congressional districting states:

Two members of congress shall also be elected . . . and until otherwise *provided by law*, the counties [named] shall constitute the first congressional district, and elect one member. . . .¹²⁹
(Emphasis added.)

Respondent pointed out that article V, section 10, of the constitution provides that "every bill which shall have passed the legislature shall, *before* it becomes a *law*, be presented to the governor. . . ." (Emphasis added.) He argued, therefore, that omission of the term "law" in the provision governing state legislative districting indicated that the constitutional framers intended to allow the legislature to reapportion itself without the Governor if it chose to do so. The court noted that article IV of the constitution, dealing with legislative powers, contains many sections "providing that 'the legislature shall' discharge some substantive function of government."¹³⁰ Many of these functions, it stated, were of the very essence of government. Certainly respondent could not contend that the omission of the term "law" in these provisions meant that the legislature could act under them by resolution. Provisions sup-

tial part of the reapportionment process is directly related to the court's finding that reapportionment must be based upon per capita population equality among districts.

¹²⁷ The provisions of WIS. CONST. art. V., §10 (requiring the Governor's consent or passage over his veto by a two-thirds majority), therefore, apply to reapportionment legislation.

¹²⁸ Note 126 *supra*.

¹²⁹ WIS. CONST. art. XIV, §10.

¹³⁰ State *ex rel.* Reynolds v. Zimmerman, *supra* note 14, at 554-55, 126 N.W. 2d at 557-58.

porting the court's point in that they confer power upon the legislature without mention of the term "law" appear in article III ("Suffrage"),¹³¹ article VII ("Judiciary"),¹³² article VIII ("Finance"),¹³³ article X ("Education"),¹³⁴ article XI ("Corporations"),¹³⁵ article XIII ("Mis-

¹³¹ Wis. CONST. art. III, §1: "Every person, of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be *prescribed by the legislature* . . . shall be deemed a qualified elector. . . ." (Emphasis added.)

¹³² Wis. CONST. art. VII, §2: "The *legislature* may also vest such jurisdiction as may be deemed necessary in municipal courts, and shall have power to establish inferior courts. . . . [T]he legislature shall provide as well for the election of judges of the municipal courts as of judges of inferior courts. . . ." (Emphasis added.)

Wis. CONST. art. VII, §6: "The *legislature* may alter the limits or increase the number of circuits, making them as compact and convenient as practicable. . . ." (Emphasis added.)

Wis. CONST. art. VII, §7: "[T]he *legislature* may . . . authorize additional circuit judges to be chosen. . . ." (Emphasis added.)

Wis. CONST. art. VII, §10: "Each of the judges of the supreme and circuit courts shall receive a salary, payable at such time as the *legislature* shall fix. . . ." (Emphasis added.)

Wis. CONST. art. VII, §11: "And the *legislature* may provide for holding other terms and at other places. . . ." (Emphasis added.)

Wis. CONST. art. VII, §14: "[T]he *legislature* shall have power to abolish the office of judge of probate in any county. . . ." (Emphasis added.)

Wis. CONST. art. VII, §15: "The electors . . . shall . . . as the *legislature* may direct, elect justices of the peace. . . . [T]heir number and classification shall be regulated by *law*." (Emphasis added.)

Wis. CONST. art. VII, §18: "The *legislature* shall impose a tax on all civil suits. . . ." (Emphasis added.)

Wis. CONST. art. VII, §23: "The *legislature* may provide for the appointment" (Emphasis added.)

Wis. CONST. art. VII, §24: "[He shall] serve temporarily as a circuit judge and shall be compensated as the *legislature* provides." (Emphasis added.)

¹³³ Wis. CONST. art. VIII, §1: The *legislature* may empower cities, villages or towns to collect and return taxes on real estate. . . ." (Emphasis added.)

Wis. CONST. art. VIII, §5: "The *legislature* shall provide for an annual tax sufficient to defray the estimated expenses of the state. . . . [W]henver the expenses of any year shall exceed the income, the *legislature* shall provide for levying a tax . . . sufficient . . . to pay the deficiency. . . ." (Emphasis added.)

Wis. CONST. art. VIII, §7: "The *legislature* may also borrow money. . . ." (Emphasis added.)

Wis. CONST. art. VIII, §8: "On the passage in either house of the legislature of *any law* which imposes, continues or renews a tax . . . the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three-fifths of all the members elected to such house shall in all such cases be required to constitute a quorum therein." (Emphasis added.)

Would respondent contend, therefore, that if the legislature levied a tax under §5 it could do so without the Governor, without a recording of yeas and nays, and with less than three-fifths of its elected members present, whereas if it chose to levy that *same* tax under §8 it could not do so without gubernatorial participation, without recording yeas and nays, and without a quorum of three-fifths of its elected members?

¹³⁴ Wis. CONST. art. X, §1: "The supervision of public instruction shall be vested in a state superintendent and such other officers as the *legislature* shall direct; and their qualifications, powers, duties and compensation shall be prescribed by *law*." (Emphasis added.)

¹³⁵ Wis. CONST. art. XI, §3: "Cities and villages . . . are . . . empowered, to determine their local affairs and government, subject only . . . to such enactments of the *legislature*. . . ." (Emphasis added.)

cellaneous Provisions"),¹³⁶ and article XIV ("Schedule").¹³⁷ The legislature has in the past exercised these powers through the enactment of law, either with the Governor's consent or over his veto.

The court buttressed its argument as to the necessity of the Governor's participation in the reapportionment process by resorting to the doctrine of practical construction. Every prior apportionment in Wisconsin's history has been accomplished through the joint efforts of the legislature and the Governor in passing and signing into law a particular reapportionment bill. This, the court felt, indicated that both the legislative and executive branches of its state government had long recognized the necessity of gubernatorial participation in reapportionment.¹³⁸ The long standing view of the political branches of government as to the scope of their authority in issues relating to the relative power of coordinate branches of government, the court stated, is of great weight when a court must make a judicial determination of the scope of that authority.¹³⁹ Thus, Joint Resolution 49, formulated and perfected without participation by the Governor, was no apportionment at all.¹⁴⁰ Since it was not even formally speaking an apportionment, its constitutional merits as an apportionment measure were not before the court.

Since it was not superseded by Joint Resolution 49, the Rosenberry plan, passed by the legislature and signed by the Governor into law in 1951, was Wisconsin's apportionment law. As such, it was before the court on its constitutional merits.

The court indicated that the Wisconsin constitution requires "*per capita equality of representation*"¹⁴¹ (emphasis added) among Wis-

¹³⁶ Wis. CONST. art. XIII, §9: "All county officers . . . shall be elected . . . or appointed . . . as the legislature shall direct. All city, town, and village officers . . . as in the legislature shall designate. . . ." (Emphasis added.)

Wis. CONST. art. XIII, §10: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy. . . ." (Emphasis added.)

¹³⁷ Wis. CONST. art. XIV, §2: "All laws now in force in the territory of Wisconsin . . . shall remain in force until . . . altered or repealed by the legislature." (Emphasis added.)

Wis. CONST. art. XIV, §7: "All county, precinct and township officers shall continue to hold their respective offices . . . until the legislature shall provide for the holding of elections. . . ." (Emphasis added.)

Wis. CONST. art. XIV, §13: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." (Emphasis added.)

¹³⁸ The Wisconsin court in an earlier case held that the Governor's participation in reapportionment was necessary and that this was shown from history. *State ex rel. Broughton v. Zimmerman*, *supra* note 38, at 407, 52 N.W. 2d at 908.

¹³⁹ To substantiate this point the court cited the following cases: *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Smiley v. Holm*, 285 U.S. 355 (1932).

¹⁴⁰ *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, at 553-59, 126 N.W. 2d at 557-59.

¹⁴¹ *Id.* at 564, 126 N.W. 2d at 562.

consin's legislative districts. The precise constitutional provision upon which the court grounded its position reads as follows:

At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, *according to the number of inhabitants*, excluding Indians not taxed, soldiers, and officers of the United States army and navy.¹⁴² (Emphasis added.)

The force of this constitutional provision is limited, the court noted, in only two ways. In the first place, absolute mathematical equality, being impossible, is not required.¹⁴³ In the second place, per capita equality of representation, being a constitutional requirement, is limited by other specific constitutional restrictions upon it.¹⁴⁴ There are only three such restrictions. Assembly districts must be bounded by county, precinct, town, or ward lines,¹⁴⁵ and senate districts must consist of whole assembly districts.¹⁴⁶ Certain governmental lines, therefore, are to be held inviolable in the formation of assembly and senate districts. Assembly districts, for example, may consist of one county, several counties, or a portion of one county, but never one county plus a portion of another, or portions of several counties. The second constitutional restriction upon the per capita equality principle is the requirement of compactness of territory,¹⁴⁷ and the third is the requirement of contiguity of

¹⁴² Note 126 *supra*.

¹⁴³ State *ex rel.* Reynolds v. Zimmerman, *supra* note 14, at 566, 126 N.W. 2d at 563.

¹⁴⁴ *Ibid.*

¹⁴⁵ WIS. CONST. art. IV, §4.

¹⁴⁶ WIS. CONST. art. IV, §5. The term "precinct" as used in the constitution is ambiguous in that it is susceptible of two meanings. Two Wisconsin cases have suggested that it referred to the area around a polling place inhabited by those who voted at that polling place. State *ex rel.* Attorney General v. Cunningham, *supra* note 7, at 520; Chicago & N.W. Ry. v. Oconto, 50 Wis. 189, 196, 6 N.W. 607, 609 (1880). In *Cunningham* the court stated: "When the constitution was adopted, the optional township system of government, enacted in 1841, did not prevail in several counties of the territory of Wisconsin. Those counties were divided into precincts,—mainly for election purposes,—each of which correspond in some respects to the town or ward of other counties. But the precinct of the constitution disappeared when the uniform system of town and county government prescribed by the constitution [article IV, §23] became fully operative."

It has been argued with some merit that the term "precinct" should be interpreted differently. Under the *Oconto-Cunningham* interpretation the word "precinct" as used in the constitution became obsolete or meaningless almost with the passage of the constitution. Meaningless words, it has been urged, are not placed in constitutions. Therefore, the term "precinct" should be given its ordinary or commonly understood meaning, *i.e.*, a subdivision of a ward or of a town. Brief for the Racine County Republican Party as Amicus Curiae, pp. 3-4, State *ex rel.* Reynolds v. Zimmerman, *supra* note 24.

¹⁴⁷ The court in, State *ex rel.* Reynolds v. Zimmerman, *supra* note 14, at 566, 126 N.W. 2d at 563, appears to consider only the integrity of governmental boundaries as a precise constitutional restriction. Still, when it actually reapportions the state in State *ex rel.* Reynolds v. Zimmerman, *supra* note 24, at 606-07, 128 N.W. 2d at 17, it specifically states that it could have achieved greater per capita equality of population had it not made allowances for compactness of territory. Compactness of territory is required by the same

territory.¹⁴⁸ It is interesting to note that the United States Supreme Court in *Reynolds v. Sims*¹⁴⁹ specifically and perhaps exclusively cited these three restrictions as legitimate deviations from the strict population equality standard. Although justifying a deviation from strict population equality, the existence of one of these restrictions according to the United States Supreme Court would not justify a deviation from substantial population equality.¹⁵⁰ Whether the Wisconsin Supreme Court would have permitted a substantial deviation from per capita equality of representation in the name of one of these restrictions is an open question.¹⁵¹ Certainly, it could not now do so consistent with the federal constitution.

Underrepresentation throughout the state under the Rosenberry plan was substantial. The largest senate district was 73.9 percent greater than the ideal district, and the smallest senate district was 38 percent less than the ideal district.¹⁵² The largest assembly district was 121.3 percent greater than the ideal district, and the smallest assembly district was 50.3 percent less than the ideal district.¹⁵³ Deviations from the ideal in many of the other districts were equally substantial.¹⁵⁴ The court ruled, therefore, that the Rosenberry plan, Wisconsin's apportionment law, was unconstitutional as it did not comport with the per capita equality of representation standard.

State ex rel. Reynolds v. Zimmerman, by invalidating the Rosenberry plan,¹⁵⁵ overruled holdings in the *Martin*¹⁵⁶ and *Broughton*¹⁵⁷

provisions of the Wisconsin constitution as are the boundary line restrictions (article IV, §4, for the assembly and article IV, §5, for the senate).

¹⁴⁸ Like compactness of territory, contiguity of territory is apparently excluded as a precise constitutional restriction in *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, at 566, 126 N.W. 2d at 563. Contiguity of territory, however, like compactness of territory, is required by the same constitutional provisions that require integrity of governmental boundaries (article IV, §4, for the assembly and article IV, §5, for the senate). The court could have avoided the Calumet County problem discussed at p. 554 *infra* if contiguity of territory was no restriction, by simply forming a single assembly district out of Calumet County and some other noncontiguous county.

¹⁴⁹ Note 2 *supra*, at 578-81.

¹⁵⁰ The Court states in *Reynolds v. Sims*, *supra* note 2, at 578: "[T]o do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way."

¹⁵¹ This statement is made with reference to the Rosenberry plan (a legislative enactment). A discussion of the application of these restrictions in the court's own apportionment plan and their (federal) constitutional implications follows in the text.

¹⁵² *State ex rel. Reynolds v. Zimmerman*, *supra* note 24, at 625 (chart in appendix), 128 N.W. 2d at 26.

¹⁵³ *Ibid.*

¹⁵⁴ 19 assembly districts were more than 18 percent greater than the ideal assembly district, and 7 senate districts were more than 18 percent greater than the ideal senate district. *Ibid.*

¹⁵⁵ The Rosenberry plan was declared constitutional in *State ex rel. Broughton v. Zimmerman*, *supra* note 38, and *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W. 2d 416, 61 N.W. 2d 300 (1953).

¹⁵⁶ *State ex rel. Martin v. Zimmerman*, *supra* note 38.

¹⁵⁷ *State ex rel. Broughton v. Zimmerman*, *supra* note 38.

cases to the effect that an apportionment plan constitutional in its inception could not become unconstitutional simply because of shifts in population over the passage of time. The court could see no distinction

between a plan which, when enacted and applied *immediately*, denies per capita equality of representation and a plan which though valid when enacted, denies per capita equality of representation when applied some years later after substantial shifts in population have occurred. At the moment the court considers the constitutionality of either plan, the denial of the constitutional right has the same magnitude.¹⁵⁸

Would the converse of this proposition also be true? In other words, could an apportionment unconstitutional in its inception become constitutional simply because of shifts in population over a period of time? Suppose, for example, the legislature enacts a flagrant gerrymander.¹⁵⁹ Stalling techniques are then utilized. Population shifts occur, so that when the apportionment plan is considered by the court it meets the constitutional tests. It appears, under *State ex rel. Reynolds* reasoning, that this plan would be upheld. *At the moment* the court considers the apportionment plan in question, the constitutional right it affirms has the same magnitude as it would had the plan been constitutional in its inception. It might be argued that a plan constitutional in its inception is *existent* law which could over the passage of time become unconstitutional, whereas a plan unconstitutional in its inception is a nullity. It is easier for something to become nothing than for nothing to become something.

It is, nevertheless, an astonishing legal proposition that a law specifically declared constitutional under a given constitution could become unconstitutional at a later point in time under that same constitution without overruling the initial determination of constitutionality. Perhaps, what the court meant to accomplish by its holding on this point was a condemnation of legislative inaction in the face of a constitutional duty to act, by abolishing the old state court rule that an apportionment valid in its inception remained so until the legislature enacted another valid apportionment supplanting it. Then, any constitutional

¹⁵⁸ *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, at 562, 563, 126 N.W. 2d at 562.

¹⁵⁹ If a state constitution requires, as does Wisconsin's, that only one valid apportionment may be made every ten years (one per federal census), it appears that the legislature could allow for reasonably expected population trends, at least up to mid-point in that ten year period, when drawing its apportionment plan. The United States Supreme Court has expressly stated that a state constitution may limit the number of legislative apportionments so long as it permits at least one apportionment per ten year period, even though population inequality occurs during that period. See note 103 *supra*. If population shifts or increases can be expected during that period, an apportionment plan reflecting them would seem in harmony with the one man, one vote principle.

apportionment would automatically expire (become invalid) at the first session of the legislature after the next federal census.

If this was what the court meant, the language it used was too weak. From the court's language, although admittedly ambiguous, it would appear that an apportionment law remains valid until successfully challenged in court or supplanted by the legislature. It would appear further that even though a federal census had passed since its enactment and the legislature had failed to reapportion, an apportionment law would be sustained upon challenge so long as it met the constitutional tests of per capita population equality, compactness, and contiguity of territory, and did not violate the integrity of county, town, or ward lines. It seems also that immediately after a federal census and prior to the completion of the first legislative session thereafter, a plaintiff who possessed standing to sue could seek a declaratory judgment that the existing apportionment law was unconstitutional, even though the court would have to wait until the completion of the first legislative session following such census before taking remedial action.¹⁶⁰

Perhaps the court's language upon this point was deliberately loose and ambiguous. The court wanted to find the Rosenberry plan unconstitutional. Yet, it had been specifically declared constitutional in two prior cases.¹⁶¹ The logical resolution of this difficulty would have been a holding that each apportionment plan expires automatically after a new federal census. The court, however, may have wished to avoid the legal consequences of such a rule.¹⁶² Its somewhat confusing holding, therefore, that an apportionment law specifically declared constitutional could by shifts in population over the mere passage of time become unconstitutional might be explained as the use of a convenient escape valve.

State ex rel. Reynolds overruled *Martin* and *Broughton* in another respect. The *Martin* and *Broughton* cases held, in accord with general pre-*Baker* state court law, that a court could grant no affirmative relief in apportionment cases. Thus, judicial relief was limited to an invalidation of the offending act or acts provided, of course, that there was some prior act not specifically declared unconstitutional.¹⁶³ Returning to the philosophy of the early *Cunningham* cases,¹⁶⁴ the court in *State*

¹⁶⁰ The supreme court of course, could decline to exercise its original jurisdiction. On the other hand, if the action was brought in a circuit court, it seems the circuit court would have to take the case.

¹⁶¹ Note 155 *supra*.

¹⁶² If, for example, the first session of the legislature after each federal census could not pass a reapportionment law, the court would be compelled to reapportion the state even though the prior apportionment law filled all the constitutional requisites.

¹⁶³ For a detailed analysis of pre-*Baker* state court remedies, see pp. 523-525 *supra*.

¹⁶⁴ *State ex rel. Lamb v. Cunningham*, *supra* note 11. In *State ex rel. Attorney General v. Cunningham*, *supra* note 7, at 484, 51 N.W. at 730, the court

ex rel. Reynolds found it had the power to grant affirmative relief. Aside from the courts, the only place to obtain redress for an apportionment wrong is in the electoral process. The court felt that that avenue of redress was closed when the wrong complained of was the corruption of the electoral process itself.¹⁶⁵ The only remedy for vote dilution was judicial. If the constitutional mandate of per capita equality in representation was to be enforced at all, the court had to have the power to fashion an affirmative apportionment remedy.

Once a court decides it has the power to grant an affirmative remedy, the question arises as to which affirmative remedy should be employed. The United States Supreme Court has refused for the present, at least, to discuss the appropriateness of any particular affirmative remedy.¹⁶⁶ Certainly no state court would attempt directly to mandamus a state legislature to pass a constitutional act.¹⁶⁷ There are three affirmative remedies frequently offered as means by which this result might be indirectly effected. They are: elections at large, a system of weighted voting, and a temporary court-drawn districting plan.

Elections at large as a remedy for legislative malapportionment raise serious questions under the United States Constitution. In an election at large, each state legislator runs throughout the entire state, not simply a particular district. Those who win are those who, like the victorious gubernatorial candidate, receive a majority of the state's votes. The political party, therefore, which controls a majority of the state's voters in a given election is likely to elect almost all of its candidates. The other parties, no matter how strong their minorities, are likely to elect few, if any, representatives to either of the state's legislative houses. Suppose, for example, State *A* has 100 assemblymen. Party *B*, whose adherents number about 38 percent of the state's population, regularly elects 30 assemblymen. John Citizen votes for Party *B*'s candidates in an election at large. Party *B* gets 38 percent of the vote and elects none of its candidates. John Citizen could argue that the weight of his vote has been diluted in violation of the equal protection clause.¹⁶⁸ He certainly is seriously underrepresented, in that before,

stated: "[T]here should be as close an approximation to *exactness* as possible, and this is the utmost limit for the exercise of legislative discretion."

¹⁶⁵ *State ex rel. Reynolds v. Zimmerman*, *supra* note 14, at 564, 126 N.W. 2d at 562.

¹⁶⁶ See pp. 536-537 *supra*.

¹⁶⁷ Whether a federal court could directly mandamus a state legislature to perform its duty has not yet been decided. The United States Supreme Court in *Virginia v. West Virginia*, 246 U.S. 565, 603-06 (1918), suggested the possibility of a federal court doing this, but specifically refused to decide whether it possessed the power to do so. Whether or not a federal court could issue such a mandamus, practical difficulties would make it highly inadvisable to do so.

¹⁶⁸ John Citizen might allege in the alternative that the republican form of government clause (U.S. CONST. art. IV, §4) has been violated. This clause has been held to raise a political question. *Luther v. Borden*, 17 U.S. (7 How.) 1 (1849). Nevertheless, it appears today that at least some cases

30 assemblymen advocated his beliefs, now none do. One method which has been suggested as a means of avoiding infringement of minority rights (violating the fourteenth amendment) in an election at large is to limit the number of candidates either party may run on its slate to a percentage of the total number of legislators to be elected.¹⁶⁹ State A, for example, having a total of 100 assembly seats, might prohibit any party from running more than 66 candidates. This would assure the election of at least 34 persons who were not members of the majority party. This device limits the voter's ability to select the candidate of his choice. The United States Supreme Court has never ruled on its constitutionality.

Elections at large create underrepresentation in another way, at least arguably violative of the equal protection clause. A legislator elected at large is answerable to all the voters of the state, just as is the Governor, not to the voters of a particular district. Therefore, whatever party he belongs to, he is likely to represent only those interests which have state-wide appeal.¹⁷⁰ A majority party voter, therefore, to the extent his interests are local, might find the value of his vote diluted.

In Wisconsin there is no need for the court to consider whether elections at large as a remedy violate the equal protection clause of the federal constitution or even the per capita equality standard of the Wisconsin constitution. The Wisconsin constitution expressly requires that state senators¹⁷¹ and assemblymen¹⁷² be elected "by single districts." Elections at large, therefore, would appear to violate Wisconsin's constitution.

Some political scientists have advocated a system of weighted voting as a remedy for legislative malapportionment.¹⁷³ A court applying this remedy would leave the legislative districts as they are under the unconstitutional apportionment act. It would affix a weight to each legislator's vote which would bear the same relation to the total number of members in his legislative house as the population of his district bears to the total population of the state. Thus, one state senator might have

arising under it would be held to present a justiciable controversy. *Baker v. Carr*, *supra* note 2, at 686-88, especially n. 48.

¹⁶⁹ The 1964 elections of members to the Illinois House of Representatives were held at large. This was pursuant to a specific command in the Illinois constitution. *People ex rel. Spence v. Carpentier*, 30 Ill. 2d 43, 195 N.E. 2d 690 (1964). *People ex rel. Daniels v. Carpentier*, 30 Ill. 2d 590, 198 N.E. 2d 514 (1964), held that minority rights under the fourteenth amendment were adequately protected since the Illinois legislature prohibited any political party from presenting a slate of candidates totaling more than two-thirds of the total number of representatives to be elected.

¹⁷⁰ The device suggested in note 169 *supra* would not dissolve this objection to the constitutionality of elections at large.

¹⁷¹ Note 146 *supra*.

¹⁷² Note 145 *supra*.

¹⁷³ Emerson, *Malapportionment and Judicial Power*, 72 YALE L. J. 64, 78 (1962), *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 18, 161 A. 2d 705, 714 (1960).

1½ votes and another three-fourths of a vote. This remedy could conceivably impair the work of the legislature. Problems would arise as to the allocation of speaking time and the appointment of committee members. The Wisconsin constitution places certain limitations upon the court's ability to use this remedy. In order to override the Governor's veto, the constitution requires a vote of two-thirds of the members present in both houses, not two-thirds of the weighted votes.¹⁷⁴ In order to compel a recording in the house journal of those voting for and those against when a vote is taken, the constitution requires a request by one-sixth of those present, not one-sixth of the weighted votes.¹⁷⁵ Constitutional amendments must be agreed to by a majority of the members of two successive legislatures, not by a majority of the weighted vote.¹⁷⁶ A majority of each house, according to the constitution, shall constitute a quorum, not, apparently, a majority of the weighted vote.¹⁷⁷ No court, state or federal, has used this remedy.

The Wisconsin court in *State ex rel. Reynolds*, apparently aware of their deficiencies, did not even discuss elections at large or weighted voting as potential remedies. Instead, it announced that unless the legislature with the Governor's participation passed a constitutional apportionment within two months (by May 1, 1964), it would district the state itself. No apportionment was enacted during the two months allotted by the court for that purpose. The court, therefore, drew up its own districting plan and ordered the secretary of state to call elections under it until such time as the legislature passed a constitutional apportionment act.

Problems Created by the Wisconsin Court Reapportionment Plan

This court drawn districting plan gives rise to a variety of problems. A court's power is judicial, not legislative.¹⁷⁸ A court decree which in every other way possesses the character and form of a legislative act (whose passage is required of the legislature by the constitution) could only be justified as an exercise of judicial rather than a usurpation of legislative power on the ground that it is (unlike the action of the legislature) provisional. A court-drawn apportionment is certainly such a decree. If this particular remedy must be provisional, it could be argued that the court in *State ex rel. Reynolds* should have made its districting plan effective only until the next election of the legislature is completed instead of until the legislature passes a constitutional plan. This argument has much theoretical merit. It is dif-

¹⁷⁴ Wis. CONST. art. V, §10.

¹⁷⁵ Wis. CONST. art. IV, §20.

¹⁷⁶ Wis. CONST. art. XII, §1.

¹⁷⁷ Wis. CONST. art. IV, §7. Many other provisions require a vote by a certain percentage of the members of the legislature, such as: art. VII, §13; art. XI, §4; art. VIII, §8.

¹⁷⁸ Wis. CONST. art. VII, §2; U.S. CONST. art. III, §1.

ficult to view as provisional a court decree which could exist as long as the legislative act which it supplants.¹⁷⁹ As a practical matter, however, the court was probably wise in making its remedy effective until the legislature passes a constitutional plan. It is possible that the legislative majority (in at least one house) will continue to represent one party and the Governor another. In this event, unless the court's plan remains effective as a stimulus to legislative action, another stalemate between the legislature and the Governor on the reapportionment issue might occur. Should such a stalemate occur, further costly and time consuming litigation might be necessary to determine what redistricting plan to call the next elections under.

The Wisconsin constitution requires that the state be reapportioned after each federal census.¹⁸⁰ If the first session of the legislature thereafter fails to produce a constitutional reapportionment, the legislative duty continues in each succeeding session until a constitutional reapportionment law is enacted.¹⁸¹ Once such a reapportionment is enacted, the state may not again be reapportioned until the next federal census.¹⁸² The constitution, then, permits one and only one redistricting per federal census. The court in *State ex rel. Reynolds* constitutionally redistricted the state. Does this court drawn reapportionment constitute the one constitutionally permissible reapportionment and effectively prevent the legislature from enacting its own reapportionment to supplant the courts until the next federal census? The provision of the Wisconsin constitution which has been interpreted as limiting the number of reapportionments to one per federal census states that "the legislature shall apportion and district anew the members of the senate and assembly."¹⁸³ (Emphasis added.) It could be argued, therefore, that the constitution commands the legislature to reapportion once per federal census. If the only apportionment following a federal census is a court reapportionment, the legislature, it appears, would still be entitled to one reapportionment.

It seems likely that the Wisconsin Supreme Court, if called upon to adjudicate the matter, would adopt this point of view.¹⁸⁴ The court

¹⁷⁹ If the legislature should fail to pass a valid reapportionment, the court's plan would remain in effect until, at least, the next federal census was completed. At this time it would be possible to bring a new action asking the court to reapportion the state again on the ground that its plan had become unconstitutional by reason of population inequalities arising after the plan was put into effect.

¹⁸⁰ Note 126 *supra*.

¹⁸¹ *State ex rel. Attorney General v. Cunningham*, *supra* note 7.

¹⁸² *Slauson v. City of Racine*, 13 Wis. 444 (1861); *State ex rel. Thomson v. Zimmerman*, *supra* note 155, at 661; *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312-13, 63 N.W. 2d 52, 56 (1954).

¹⁸³ Note 126 *supra*.

¹⁸⁴ *Slauson v. City of Racine*, *supra* note 182, is the initial case construing the constitution to allow but one apportionment per federal census. The court in that case did not explicitly state whether one apportionment means one legislative apportionment or one apportionment (of any kind). However,

stated in *State ex rel. Reynolds* that its districting plan was to be effective only until the legislature passed a constitutionally permissible apportionment act. If the court meant by this that its plan was effective at least until after the next federal census because another reapportionment was not permitted by the constitution until then, the court's reapportionment would *necessarily* be effective for as long a period of time as any reapportionment by the legislature could be. Such a remedy could by no stretch of the imagination be termed provisional. If the court's districting plan in *State ex rel. Reynolds* is not provisional, it is an exercise of legislative (not judicial) power as it bears all the marks of a legislative act.¹⁸⁵ The court in *State ex rel. Reynolds* specifically stated that its remedy was provisional.¹⁸⁶ It apparently recognized, therefore, that the existence of the court-drawn reapportionment plan would not impair the enactment of a constitutional reapportionment plan by the legislature prior to the next federal census.

One of the briefs filed with the court to assist it in drawing its reapportionment plan urged that Milwaukee County be given 26 assembly seats in place of the 24 it possessed under the Rosenberry plan.¹⁸⁷ The court decided to give Milwaukee County 25 seats. Perhaps one of the reasons Milwaukee was not given 26 seats was that in order to do so the court would have had to redraw city of Milwaukee ward lines.

Normally Milwaukee's ward lines,¹⁸⁸ like those of any other Wisconsin city,¹⁸⁹ are changed by an ordinance of its common council. Nevertheless, if the legislature chose to do so, it would undoubtedly have the power to redraw Milwaukee's ward lines.¹⁹⁰ It could be argued, therefore, that if the legislature did not change Milwaukee's ward lines and thereby created or permitted an apportionment which failed to meet the standard of per capita equality of representation, a court which possesses the power to draw up its own provisional reapportionment possesses the power to insure its constitutionality by changing Milwaukee's ward lines.

On the other hand, a court might feel that a certain amount of judicial restraint is necessary in reapportionment disputes. Somewhere there is a line between the exercise of judicial and legislative power in court reapportionment cases. It could be argued that it has been crossed when governmental boundary lines are tampered with in setting up

in a later case, *State ex rel. Smith v. Zimmerman*, *supra* note 182, the court stated: "It is now settled that, without a constitutional change permitting it, no more than one legislative apportionment may be made in the interval between two federal enumerations." (Emphasis added.)

¹⁸⁵ See pp. 551 & 552 *supra*.

¹⁸⁶ Note 14 *supra*, at 571, 126 N.W. 2d at 566.

¹⁸⁷ Relator's Apportionment Plans, pp. 1-19, Exhibit XIX, pp. 1-26.

¹⁸⁸ MILWAUKEE, WIS., CITY CHARTER ANN. 4 (1914).

¹⁸⁹ WIS. STAT. §62.08 (1) (1963).

¹⁹⁰ See *State ex rel. Neacy v. City of Milwaukee*, 150 Wis. 616, 138 N.W. 76 (1912).

legislative districts. If ward lines may be changed in affording a more equitable reapportionment, then county lines may be changed as well. The fact that county boundaries are set up by legislative statute¹⁹¹ does not adequately distinguish them in this regard from ward boundaries, as statutes which are unconstitutional can be invalidated by the court.

The court's reapportionment plan in *State ex rel. Reynolds* allocated to Calumet county one assembly seat even though its population is 17,260 less than that of the ideal assembly district. Assembly districts under the Wisconsin constitution may consist of one county, several entire counties, or a portion of one county, but never one county plus a portion of another or portions of several counties.¹⁹² By historical accident, it is impossible to join Calumet County to any of the entire counties surrounding it without creating an assembly district so large as to produce substantial underrepresentation. Seeking to avoid underrepresentation, the court felt compelled to overrepresent Calumet County rather substantially. It was, indeed, compelled to do so *if* it did not possess the power to alter county lines. If it did possess such power, a far more equitable reapportionment could have been made by the simple extension of Calumet County's boundaries at the expense of one or more of its neighboring counties.¹⁹³ Such a reapportionment, if within the court's power, would appear to have been required by the standard of per capita equality of representation.

The United States Supreme Court has, as yet, had no occasion to consider this problem. If the *Reynolds*¹⁹⁴ rule is to be interpreted literally, a court would be required to redraw county or ward lines if no other means could be found by which to achieve substantial equality of population among districts. It is, however, still open to the court to find that the alteration of governmental lines involves an exercise of legislative rather than judicial power. This problem, moreover, might in most instances be avoided by a simple finding that the lower court achieved substantial population equality without redrawing governmental lines.

Some memoranda filed with the court to assist it in reapportioning Wisconsin urged the court to lower the number of assemblymen from 100 to 98 and the number of state senators from 33 to 31.¹⁹⁵ The court did not do this, as it settled upon a plan affording substantial population equality without altering the number of legislative repre-

¹⁹¹ WIS. STAT. §2.01 (1963).

¹⁹² Note 145 *supra*.

¹⁹³ This is but one example. The alteration of county lines in many other instances would have been conducive to a more equitable apportionment population-wise.

¹⁹⁴ *Reynolds v. Sims*, *supra* note 2.

¹⁹⁵ Memoranda submitted to the Wisconsin Supreme Court on May 1 and May 8, 1964, by Archie Maurer.

sentatives. It is proper to consider, nevertheless, whether any circumstances could arise under which the court would be compelled to change the number of its legislative representatives. The Wisconsin constitution states that the number of assemblymen shall not be less than 54 nor more than 100 and that the number of state senators must be between one-third and one-fourth of the number of assemblymen.¹⁹⁶ The legislature has declared by statute that the number of assemblymen shall be 100 and the number of state senators 33.¹⁹⁷ If the statutory number should prevent the construction of a constitutional reapportionment, a court would be required to change that number under both the Wisconsin and the United States Constitution. The Wisconsin court in *State ex rel. Reynolds* makes no exception to its per capita equality of representation standard for an arbitrary number of representatives selected by the legislature. The United States Supreme Court in *Reynolds v. Sims* does not include such an arbitrary statutory number in the list of its exceptions to strict population equality, and that Court allows no exceptions to substantial population equality.

Even if a constitutional apportionment plan could be drawn using the statutory number of representatives, the court could ignore that number if a better apportionment would be achieved with a lesser number of representatives. The statute which declares the number of legislative representatives is an integral part of Wisconsin's apportionment plan, as it has little meaning apart from the districting process. Therefore, when the court declares Wisconsin's apportionment law invalid and takes upon itself the burden of drawing up a constitutional apportionment plan, it is immaterial whether or not the court's plan retains the statutory number of legislators, so long as it meets the constitutional requirements, both state and federal.

The court indicated in *State ex rel. Reynolds* that it could have drawn a reapportionment plan more closely approaching population equality in assembly districts had it disregarded the requirement of compactness of territory.¹⁹⁸ In some instances, the court stated, it was able to balance resulting underrepresentation in the assembly by overrepresentation in the state senate. The Wisconsin constitution requires that assembly districts be as compact as practicable.¹⁹⁹ How does the Wisconsin court's action square with the federal constitution as interpreted by the United States Supreme Court in *Reynolds v. Sims*? To the extent that underrepresentation in the assembly is compensated for by overrepresentation in the state senate, the equal protection clause is not violated by population inequalities incurred to secure compact ter-

¹⁹⁶ WIS. CONST. art. IV, §2.

¹⁹⁷ WIS. STAT. §13.01 (1963).

¹⁹⁸ Note 24 *supra*, at 606-07, 128 N.W. 2d at 17.

¹⁹⁹ Note 145 *supra*.

ritory. This method of balancing inequalities to achieve equality was explicitly endorsed by the Supreme Court in *Reynolds v. Sims*.²⁰⁰

The assembly underrepresentation not compensated for by state senate overrepresentation must be put to the test of substantial population equality. Compactness of territory is one of the exceptions specifically noted by the United States Supreme Court as justifying deviation from strict population equality.²⁰¹ The deviation, however, may not be so great as to create substantial population inequality. Just what substantial population equality means in a given situation is difficult to discern with certitude. It depends to an extent upon the mental attitudes of the judges examining a given reapportionment plan. Still, it seems that Wisconsin's Supreme Court reapportionment plan affords substantial population equality despite population deviations allowed to secure assembly districts with compact territory. It takes 48.4 percent of the state's population to elect a bare majority of the state senate and 45.4 percent to elect a bare majority of the assembly.²⁰² While this is probably not the only consideration behind the concept of substantial population equality, it is the most important one.²⁰³

While legislative discretion in reapportionment has been curbed considerably by recent Wisconsin and United States Supreme Court decisions, some amount of discretion still remains with the legislature. The legislature need not enact the best possible reapportionment plan; it need only enact a constitutional plan. Does a court when drawing a reapportionment plan have as much discretion as the legislature or must it, unlike the legislature, construct the best possible plan? The United States Supreme Court has not directly answered this question. Still, in *Sims v. Frink*²⁰⁴ the district court reapportioned Alabama by combining the best parts of two invalid plans and ordered this reapportionment effective only until the next election of the legislature was completed. The district court indicated that its reapportionment would be unconstitutional as a permanent measure should be the legislature endeavor to adopt it verbatim. The United States Supreme Court in *Reynolds v. Sims* agreed with the district court that its reapportionment plan would be unconstitutional as a permanent measure.²⁰⁵ The Supreme Court, nevertheless, affirmed the district court's action in ordering the next Alabama election under its plan, and commended the plan as a provisional, temporary, stopgap remedy.²⁰⁶ It could be argued, there-

²⁰⁰ Note 2 *supra*, at 577.

²⁰¹ *Id.* at 578.

²⁰² Note 152 *supra*.

²⁰³ The percent of the total state population needed to elect a bare majority of the legislature is substantially greater under the Wisconsin Supreme Court reapportionment plan than under any of the plans invalidated by the United States Supreme Court in *Reynolds v. Sims* and its companion cases.

²⁰⁴ 208 F. Supp. 431 (M.D. Ala. 1962).

²⁰⁵ Note 2 *supra*, at 586-87.

²⁰⁶ *Ibid.*

fore, that a court has a wider latitude of discretion in fashioning its own reapportionment plan as a temporary remedy for malapportionment than the legislature does in enacting a permanent reapportionment law. On the other hand, it must be remembered that *Reynolds v. Sims* involved an appeal by the lower court defendant. Had the plaintiff, Sims, appealed alleging that the district court reapportionment diluted the weight of his vote in the next election, the decision might have been different. If the district court had ordered its plan effective until the legislature passed a constitutional plan, as did the Wisconsin court in *State ex rel. Reynolds*, it appears that the Court would not have upheld it if challenged by Sims, as the Court in approving it stressed the fact that it would be effective only until the next legislative election was completed.

The Wisconsin County Board Case

The first state supreme court to apply the one man, one vote principle to county board apportionment was the Wisconsin Supreme Court in *State ex rel. Sonneborn v. Sylvester*,²⁰⁷ decided January 5, 1965. The county board apportionment statute (section 59.03(2) of the Wisconsin statutes) at issue governed the selection of county supervisors in 70 of Wisconsin's 72 counties.²⁰⁸

Relators, two residents of Waukesha County, alleged in their complaint that the operation of section 59.03(2) resulted in gross population disparities between supervisory districts within counties throughout the state. An exhibit made part of the complaint showed an overall population disparity ratio between the most overrepresented and the most underrepresented supervisory districts of more than 3 to 1. In 42 counties the ratio was more than 10 to 1 and in Waukesha County it was 66 to 1. Respondent demurred to the merits of the complaint.²⁰⁹

The court (overruling the demurrer) held section 59.03(2) unconstitutional in that it produced population inequality among supervisory districts violating the equal protection clause of the federal constitution and article I, section 1, of the Wisconsin constitution.²¹⁰ Article I, section 1, the court stated, is the substantial equivalent of the due process and equal protection clauses of the fourteenth amendment.²¹¹ The court, in finding section 59.03(2) a state constitutional violation, could not

²⁰⁷ Note 12 *supra*.

²⁰⁸ It did not apply to Milwaukee and Menominee Counties. The statute applied only to counties with a population of less than 500,000. Milwaukee County's population is greater than 500,000. Menominee County is an Indian reservation.

²⁰⁹ A demurrer on the ground of lack of jurisdiction in the supreme court was overruled in a prior opinion. See note 7 *supra*.

²¹⁰ This section reads: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

²¹¹ *State ex rel. Sonneborn v. Sylvester*, *supra* note 12, at 252.

appeal to article IV, section 3, of the constitution, which is the basis of the *State ex rel. Reynolds* per capita equality of population rule. This is because article IV, section 3, specifically limits itself to the apportionment of "members of the senate and assembly."

Respondent contended that the one man, one vote principle of *Reynolds v. Sims* did not apply to county boards, since their composition and power was statutory rather than constitutional in origin. The population-based substantial equality rule, it was argued, applied only to independent-governmental entities deriving their power directly from the people governed. The court admitted that counties were statutory legislative creatures. It pointed out, however, that the key to the application of the equal representation principle was not the *origin* but the *type* of power exercised by the governmental entity. If the powers exercised are legislative, then the one man, one vote principle applies.²¹² If they are administrative, it does not apply.

Since the composition of the legislature must conform to the principle of equal representation, it is logical that the arm or political subdivision of such legislature *enacting legislation* should be governed by the same principle of equal representation.²¹³ (Emphasis added.)

Administrative boards differ from county boards, the court noted, in that they perform administrative duties, though some of their rules and regulations may have the effect of law. It seems hard to deny, however, that in today's complex society administrative boards actually do exercise legislative power, oftentimes with more far-reaching effect upon the populace than county boards.²¹⁴

Respondent drew an analogy between county boards, United States territorial legislatures, and the District of Columbia Board of Commissioners. The state legislature, it was argued, has the same plenary power over county boards that the United States Congress has over territorial legislatures and the District of Columbia Board of Commissioners. The court noted that the state legislature has the power to determine the type and form of county government, although it could not abolish the county entirely as a unit of government. The court held that

this analogy goes only to the lack of an express provision in the constitution granting the right to vote and not to the question of whether when under the plenary power the right to vote is provided for it must be on the one man-one vote principle.²¹⁵

²¹² The court apparently backed up a little on this point when it made the somewhat confusing statement that "we do not now decide [that] every legislative function requires representative-elective execution." Query, whether or not this admission causes the courts fundamental rationale for imposing the one man, one vote principle upon county board apportionments to limp a bit? *State ex rel. Sonneborn v. Sylvester*, *supra* note 12, at 256.

²¹³ *Ibid.*

²¹⁴ DAVIS, ADMINISTRATIVE LAW CASES 112, 113 (1959).

²¹⁵ *State ex rel. Sonneborn v. Sylvester*, *supra* note 12, at 256.

Presumably, therefore, the legislature could appoint county supervisors, but if it chooses to make the positions elective it must employ the equal representation rule.

In order to afford the legislature a reasonable time properly to apportion county governmental units (which could not be accomplished unless the April 6, 1965, county board elections were held under section 59.03(2), the court gave its declaration of unconstitutionality prospective effect only (at a date to be set later by the court). The court indicated that if no constitutional apportionment law was passed by November 1, 1965, the relators or other interested parties could apply to the court for an order fixing a date as of which county supervisors elected under section 59.03(2) would no longer be validly in office, to enjoin future elections under that statute, or for other appropriate relief.

There is one crucial issue which the court in *Sonneborn* failed even to discuss. The one man, one vote principle stems from the conception that the United States is by the Constitution a representative democracy. A representative democracy is not possible unless each man's vote is accorded the same weight. A system of equally weighted voting requires (1) population equality (2) among people at least in some sense equally affected or governed by the government body in question. The one man, one vote principle, therefore, has two prongs which must be considered when applying it.

Suppose, for example, Governing Board X has the power to make laws binding upon individuals living and voting in Counties A, B, and C, but does not have the power to make laws binding upon individuals living and voting in County Z. An apportionment law requiring that members of Board X be elected on a population equality basis among Counties A, B, C, and Z would clearly dilute the weight of every vote in Counties A, B, and C. Now suppose that Board X has the power to make laws binding upon individuals living and voting in Towns A, B, and C, as well as Village Z. Its lawmaking power, however, is limited with respect to Village Z, so that only a small percentage of its laws which bind individuals living and voting in Towns A, B, and C also bind individuals living and voting in Village Z. Village Z elects its own village board, which passes ordinances governing all those matters upon which Board X is not entitled to legislate for Village Z but is and does for Towns A, B, and C. An apportionment plan requiring that members of Board X be elected on a strict population basis by voters of Towns A, B, and C, as well as Village Z, would dilute every vote cast in Towns A, B, and C unless the voters of Towns A, B, and C were given representatives on the village board of Village Z. An apportionment law allotting Village Z proportionately less representation than Towns A, B, and C (the proportion dependent upon the impact which Board X's laws have on Village Z as compared to their impact

upon Towns *A*, *B*, and *C*) is more in accord with the principle of equal representation embodied in the equal protection clause and article I, section 1, of the Wisconsin constitution, as it would afford each voter of Towns *A*, *B*, and *C*, as well as Village *Z*, an equally weighted vote.

A court, therefore, in applying the one man, one vote principle to a given apportionment must consider the impact of government upon the governed. The equal representation rule is not a black letter fiat, but a rule of some subtlety. Normally, when the question at issue involves the apportionment of a state legislature, as was the case in *Reynolds v. Sims*, a court will not be called upon to assess specifically the impact of government upon the populace, for a state government is sovereign over all its territory.²¹⁶ When the question at issue, however, is the apportionment of county boards throughout the state, a court should assess the realities of county government with a view to determining their impact upon the populace.

This the Wisconsin court did not do in *Sonneborn*. Except for the matters of taxation and welfare, Wisconsin county boards exert considerably less legislative influence over those living within cities and villages than they do over those living in other areas within their territorial boundaries. County boards, for example, may enact zoning ordinances outside the limits of incorporated cities and villages (whose councils enact their own ordinances).²¹⁷ This is *not* to say that an

²¹⁶ It is not impossible, however, to conceive of a situation where governmental impact would be relevant in determining the validity of a districting plan apportioning a state legislature. Suppose, for example, residents of a federal enclave (territory of a state under federal jurisdiction pursuant to article I, §8, clause 17, of the United States Constitution) challenge an otherwise constitutional state law apportioning its legislature on the ground that under the one man, one vote principle the enclave should be accorded an assemblyman. Whatever the result, it seems certain a court could not avoid the impact issue. Cf. 49 CALIF. L. REV. 550 (1961).

²¹⁷ WIS. STAT. §59.07 (1963). A few additional examples are: WIS. STAT. §59.07 (18) (1963): "[County boards may] 'exercise outside of cities and villages all the powers conferred on cities to regulate dance halls, roadhouses and other places of amusement.'"

WIS. STAT. §59.07 (44) (1963): "In counties not containing a city of the first class, [county boards may] employ a corporation counsel and fix his salary."

WIS. STAT. §59.07 (38) (1963): "[County boards may] 'license and regulate dealers in second-hand motor vehicles, wreckers of motor vehicles, or the conduct of motor vehicle junking. Such regulation shall not apply to any municipality which adopts an ordinance governing the same subject.'"

WIS. STAT. §59.07 (36) (1963): "[County boards may] provide fire department service and protection for such residents as are otherwise unable to obtain service from a municipality. . . ."

WIS. STAT. §59.07 (49) (1963): "*Billboard regulation*. . . . Such ordinances shall not apply within cities and villages which have adopted ordinances regulating the same subject matter."

WIS. STAT. §59.07 (50) (1963): "*Riding horses, regulation*. . . . Such ordinances shall not apply within cities and villages which have adopted ordinances regulating the same subject matter."

WIS. STAT. §59.07 (51) (1963): "*Building and sanitary codes*. . . . Such codes, rules and regulations shall not apply within cities and villages which have adopted ordinances and codes governing the same subject matter."

assessment of the impact of county boards throughout the state upon the populace of their respective counties would have altered the final result in *Sonneborn*. It is only to suggest that a realistic evaluation of a state-wide county board apportionment plan in terms of representative equality and the equally weighted vote would require such an assessment.

A FINAL TRIBUTE

Redistricting or reapportionment law is of its very nature conducive to controversy and conflict. Quite naturally, therefore, courts have been the subject of rather continuous criticism by segments of the legal community regardless of what position they have taken with respect to the adjudication of reapportionment disputes. A few years ago courts were accused of ignoring substantial justice, as they provided no practical relief in most districting cases. Today they are accused of meddling in legislative affairs because they provide that relief.

This serves to exemplify the dilemma with which courts have been faced in reapportionment cases. On the one hand, they have sought to dispense substantial justice which includes the granting of practical relief. On the other, they have sought to avoid a usurpation of legislative power. A thorough reading of the many hundreds of cases touching the redistricting issue compels recognition of the judicial restraint with which courts have handled this problem. A panoramic view of reapportionment law, state and federal, from its inception until today exposes one continuing thread which has been the motivation of judicial conduct throughout. That thread is the rule of necessity. Courts have entered the thicket of districting only when they felt necessity compelled them to do so. They have acted slowly, cautiously, and with restraint.

Viewed in this light, the population equality principle of today is seen as a *necessary* extension of prior state districting law rather than a radical departure into legislative provinces. Democracy in today's ever more mechanized and populated America can be revitalized by insuring each citizen an equally strong voice in the politics of his country.

ROBERT A. MELIN

WIS. STAT. §59.07 (85) (1963): "*Air pollution control*. . . Such ordinance shall not supersede any town, village, or city ordinance which has been or may be enacted and which is at least equally restrictive."