

# Council Comments:

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### LEGISLATIVE APPORTIONMENT IN MICHIGAN

#### THE ISSUE IN BRIEF

Legislative apportionment is the process by which a state is divided into geographic districts from are chosen United States congressional representatives, state senators, and state representatives. The federal Constitution requires that congressional representation be apportioned among the states according to their respective populations. Michigan's population grew by less than one percent between 1980 and 1990. Due to this modest population growth relative to that of other states, Michigan will be apportioned two fewer congressional districts than at present (16 instead of 18). In addition, although the number of legislative districts is fixed by the state Constitution--38 Senate districts and 110 House districts--population shifts within the state during the last decade will require their redistribution from less- to more-populous area.

At present, the state Constitution has neither valid provisions specifying who shall perform apportionment, nor valid standards to govern the process. In the absence of a state constitutional or statutory provision to the contrary, apportionment is a legislative responsibility. The difficulty that arises from entrusting this responsibility to the same branch of government that is the chief beneficiary of the process is obvious. Even though the United States Supreme Court decision which invalidated the apportionment standards of the Michigan Constitution was issued over 27 years ago, the Legislature has yet to provide other, suitable apportionment standards. As a result, after each census the courts are placed in the inappropriate position of having to rescue the Legislature from its own failure to address this important issue in a rational manner.

#### Judicial and Constitutional Background

##### Relevant Federal Decisions

In 1962, the United States Supreme Court decided in *Baker v Carr* that legislative apportionment was a justiciable matter under the federal Constitution. The following year, the Court reached the same conclusion with respect to congressional apportionment. The significance of *Baker* was that it ran contrary to a long line of prior decisions of that Court which had treated similar lawsuits as implicating political questions that should be resolved through the political process and not by the courts.

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**Baker v Carr** did not establish any controlling constitutional standard against which to judge state legislative apportionment plans. That would occur in **Reynolds v Sims**, decided in 1964. In **Reynolds**, the Court held that the federal Constitution required that seats in both houses of a bicameral state legislature be apportioned on a population basis, the one person-one vote standard. However, the Court noted that a state could depart from this standard in order to achieve legitimate policies, such as preserving the boundaries of political subdivisions. Congressional apportionment plans, by contrast, must satisfy the standard of strict population equality.

### **Relevant Provisions of the Michigan Constitution**

**Baker v Carr** was decided in 1962 while the work of the Michigan Constitutional Convention was in progress, but the significance of the decision was not fully apparent to the Convention because **Baker** merely held state legislative apportionment to be a justiciable matter under the federal Constitution. **Baker** did not suggest that apportionment based in part on geographic area might be unconstitutional. The Convention was considering and would eventually approve, precisely such an approach. Sections 2 and 3 respectively of Article 4 of the state Constitution provided for a Senate and House apportioned on the basis of land and population. Article 4 also established an eight-member apportionment commission.

### **Relevant Michigan Decisions**

Shortly after the state Constitution took effect in 1964, **Reynolds v Sims** invalidated its legislative apportionment standards. The apportionment commission continued to operate, without standards, but was unable to agree upon an apportionment plan after the 1960, 1970, and 1980 federal decennial censuses. In each instance, the state Supreme Court was called upon to select from among competing plans. The Court adopted whichever plan produced the least population variance, until 1982, when it recognized that a state could depart from the one person-one vote standard to achieve legitimate state policies. In its 1982 decisions the Court also concluded that the apportionment commission was unconstitutional in the absence of standards to circumscribe its discretion.

### **Initial Responsibility for Apportionment and the Necessity for Standards**

Two of the most significant matters with respect to legislative apportionment are who should exercise the initial responsibility and what standards should control the process.

#### **Initial Responsibility**

In 37 of the 50 states, the initial responsibility for state legislative apportionment rests with the legislature. This is not surprising given the fact that apportionment is by default a legislative function, absent a state constitutional or statutory provision to the contrary. In two states, initial apportionment responsibility has been assigned to the governor. In the remaining 11 states, it is conducted by a board or commission.

## Necessity for Standards

As noted above, the federal Constitution requires that seats in both houses of a bicameral state legislature be apportioned on a population basis, but that a state may depart from the standard in order to pursue a rational state policy. Among the other standards generally followed by states are adherence to local boundaries, compactness, and contiguity.

**Adherence to Local Boundaries.** This standard generally requires that each local unit be apportioned so that it has the largest possible number of complete districts within its boundaries before any part is joined to territory outside the boundaries of the local unit to form a district. This standard according to the state Supreme Court, takes precedence over the standard of compactness.

**Compactness.** The compactness requirement is generally interpreted to mean that districts are to be as square as practicable. As the state Supreme Court has described its the most compact election district is one that is circumscribed by a circle, that contains the least land area (excluding land outside of this state or under the Great Lakes) outside of the district.

**Contiguity.** The requirements for this standard are relatively straightforward. Simply put, a contiguous district is one in which a person may travel between any two points in the same district without leaving the district.

In 1982, the Michigan Supreme Court concluded that the state's constitutional history revealed dominant commitments to contiguous, single-member districts drawn along local unit boundary lines which, within those limitations, are as compact as feasible. The Court then ordered the use of standards that may be summarized as follows:

- (1) that legislative districts be drawn to preserve county boundaries, with the least possible population variance and in no case a variance of more than 16.4 percent. Where breaking county boundaries was necessary so as not to exceed the maximum variance, the fewest number of townships necessary to come within the allowable range were to be shifted;
- (2) that legislative districts within a county entitled to more than one seat be drawn to preserve city and township boundaries, with the least possible population variance, and in no case a variance of more than 16.4 percent. Where breaking city or township boundaries was necessary so as not to exceed the maximum variance, the fewest number of people necessary to come within the allowable range were to be shifted; and
- (3) that legislative districts within a city or township entitled to more than one seat be drawn to achieve maximum compactness possible within a population range of 98 to 102 percent of absolute equality between the districts of that city or township.

These standards continue in place unless modified by the courts, the Legislature, or by the state's voters. In anticipation of its own inability to resolve the apportionment question, the Legislature earlier this year once again asked the Michigan Supreme Court to take jurisdiction of the matter. However, apportionment remains a legislative, and not a judicial, responsibility. The Court could give the Legislature an incentive to fulfill that responsibility by ordering (as it did for the

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state Senate in 1962) that the Legislature be elected at large, unless it adopt a suitable plan by a specific date.

### **Apportionment and Federal Voting Rights Legislation**

State legislative apportionment must be conducted in a manner that is consistent with federal law, among which are various acts that Congress has adopted to enforce the constitutional voting rights of racial and ethnic minorities. Of especial relevance is the voting rights act of 1965. The present apportionment cycle is the first that will be subject to the federal voting rights act since its amendment by Congress in 1982.

While the voting rights act will no doubt further complicate the apportionment process in Michigan, both political parties have given recognition to the fact that an acceptable apportionment plan must satisfy the demands of the federal act. The only major difference between the parties as regards the voting rights act appears to be whether it should take precedence over other standards that the Michigan Supreme Court specified in 1982t such as preserving the integrity of political subdivision boundaries or should be merely one among such standards. This difference while significant, will no doubt be resolved by the courts.