LEGISLATIVE APPORTIONMENT IN MICHIGAN

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LEGISLATIVE APPORTIONMENT IN MICHIGAN

Introduction

Legislative apportionment is the process by which a state is divided into geographic districts from which are chosen United States congressional representatives, state senators and state representatives.* Section 2 of Article I of the United States Constitution requires that representation in the Congress be apportioned among the several states in accordance with their respective populations. At presents Michigan has 18 congressional representatives. Sections 2 and 3 respectively of Article 4 of the state Constitution require that the state Senate consist of 38 members and the state House of Representatives consist of 110 members.

The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment requires states to conduct apportionment after each federal decennial census so that representation will reflect changes in population. According to the 1990 decennial census, the state's population grew by only 33,253 persons (0.36 percent) between 1980 and 1990, the smallest gain between two decennial censuses in Michigan history. Due to this modest population growth relative to that in other states, Michigan will be apportioned two fewer congressional districts than at present. In addition, although the number of Michigan legislative districts is constitutionally fixed, population shifts within the state over the last decade will require their redistribution from less- to more-populous areas within the state.

Previous apportionment efforts in Michigan over the last 30 years give little cause for optimism that enactment of a plan that will effect the necessary redistribution of political districts will be easy to achieve. Upon the prior three occasions -- in 1964, 1972, and 1982 -- the matter had to be resolved by the state Supreme Court. Perhaps, given the nature of the task, a certain degree of difficulty is to be expected. However, two considerations render the state of affairs in Michigan particularly antithetical to the requirements of good government.

First, in the absence of a state constitutional or statutory provision to the contrary, apportionment is a function to be discharged by the state Legislature, consistent of course with the requirements of federal law. This is the case in Michigan since state constitutional provisions that had established an eight-member apportionment commission are, as will be explained below, no longer operative and since the Legislature has not enacted any law assigning such responsibility to another governmental body. The difficulty which arises from entrusting the responsibility for apportionment to the same branch of government that is the chief beneficiary of the process is obvious.

Second, because representation is a fundamental hallmark of republican government, its allocation should be governed by standards that ensure the strictest propriety. At present, there are no such standards in either the state Constitution or statutes. The standards that were part of the 1963 state Constitution were invalidated by a series of judicial decisions, beginning within one year of the Constitution's adoption. While the Michigan Supreme Court in 1982 declared that legislative apportionment must be conducted in a manner that is consistent with "Michigan con-

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* The term "apportionment" is used in this report, although "[I]n some states a distinction may be made between reapportionment the allotment to each county of its quota of representatives, determined by the legislature, and redistricting, the rearrangement of boundaries of legislative districts, performed by local agencies. In most cases, the existence of single member districts makes the distinction unnecessary." Walter, **Reapportionment of State Legislative Districts**, (37 Illinois Law Rev 20, 21; 1940).

stitutional history," that standard is subject to both interpretation and changing majorities of the Court.

The fact that each of Michigan's four Constitutions, dating back to 1835, have contained provisions of varying specificity to govern legislative apportionment, suggests that Michigan voters have thought it unwise to accord an unlimited discretion in the matter to any branch of state government including the courts. Given this history, and in light of the fact that legislative apportionment is fundamental to self-government, both the process and the standards that govern it ought to be part of the state's fundamental law.

Even though the United States Supreme Court decision which invalidated the apportionment provisions of the Michigan Constitution was issued over 27 years ago, the Michigan 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.

Nor have the voters addressed it. Since 1964, the people of Michigan have exercised their right to propose amendments to the state Constitution on 11 occasions, but none of the proposals has dealt with apportionment. The absence of such a voter-initiated amendment may lie in the fact that the incivility that attends apportionment need be suffered but once every ten years, and that despite existing imperfections apportionment does, in fact, occur. Nevertheless, the establishment of a more orderly process would seem prudent.

There is an additional justification for revisiting the question of how apportionment is conducted in Michigan. The present decennial apportionment cycle is the first that will be subject to the federal voting rights act since its amendment by Congress in 1982. The purpose of the acts originally adopted in 1965, was to enforce the constitutional voting rights of racial and ethnic minorities, particularly in the South, by affording them an equal opportunity to vote. As with equal opportunity in other contexts, however, the right to vote did not guarantee any particular electoral outcome. The subsequent amendments which applies nationwide, shifted the focus from ensuring an equal opportunity to vote, to prohibiting the dilution of existing minority voting strength. The latter implicates what amounts to a proportional representation for racial and ethnic minorities.

The 1982 amendment has already had a major impact upon state and local governments. During the summer of 1991, the United States Justice Department, which enforces federal voting rights legislation, blocked the implementation of apportionment schemes for both houses of the Mississippi Legislature and for the Louisiana state Senate on the grounds that those plans diluted minority voting strength. Legal challenges have also been filed at the local level in several other states. A rational apportionment process, set forth in the state Constitution, would do much to assist Michigan in avoiding a similar fate.

Part I. Judicial and Constitutional Background

Because the current state of affairs with respect to legislative apportionment in Michigan has resulted from several decades of federal and state court decisions, a brief review of them is in order.

A. Relevant Federal Decisions

1. State Legislative Apportionment: Subject-Matter Jurisdiction

In **Baker v Carr**, (369 US 186; 1962), plaintiffs were citizens of the state of Tennessee who brought suit in federal district court alleging a state statute resulted in a "debasement" of their vote and thus denied them and other citizens similarly situated the equal protection of the laws afforded by the Fourteenth Amendment to the United States Constitution. Even though the state Constitution required apportionment following each decennial census, the Tennessee General Assembly had not adopted such a plan since 1901. During the intervening period, Tennessee's population grew from two million residents to 3.6 million, while the number of residents eligible to vote grew from 487,380 to 2,092,891. Plaintiffs asked the court to declare unconstitutional the existing apportionment plan and to enjoin the Legislature from holding elections until a valid plan was adopted, or in the alternative asked the court to draft a plan using the state's constitutional criteria or to order that the Legislature be elected at large.

A federal district court dismissed the complaint due to a lack of jurisdiction of the subject matter and because, in its opinion a political question was implicated. On appeal a majority of the United States Supreme Court reversed on both grounds, holding that a claim asserted under the Equal Protection Clause alleging a state legislative apportionment scheme impaired plaintiffs' right to vote presented a justiciable controversy subject to adjudication by federal courts. The Court remanded the suit to federal district court for consideration of the merits. In doing so, the Supreme Court expressed no view regarding either the proper constitutional standard for evaluating the validity of a state legislative apportionment scheme, or what an appropriate remedy would be in the event that a constitutional violation might be found to exist.

The significance of **Baker** was that it ran contrary to a long line of prior decisions of that Court that had treated similar lawsuits as implicating political questions that should be resolved through the political process and not by the courts. The **Baker** decision should be distinguished from cases such as **Nixon v Herndon**, (273 US 536; 1937) and **Gomillion v Lightfoot**, (364 US 339; 1960) in which the Court struck down voting rights discrimination directed at racial minorities in violation of an explicit constitutional provision. The invidious discrimination alleged in **Baker**, on the other hand, was restricted to "the relationship between population and legislative representation -- a wholly different matter from the denial of the franchise to individuals because of race, color, religion or sex." (369 US at 267.)

While the propriety of the result reached in **Baker** was subject to debate, the passage of time and respect for precedent have all but foreclosed discussion. That being so, the debate need not be rejoined. It is sufficient here to observe that some federal judicial remedy was appropriate given the ineffectual nature of existing political remedies and the absence of a judicial remedy at the state level As previously noted, courts prior to **Baker** were generally reluctant to involve themselves in what was seen as a political matter.

Even when a state legislature was required by an explicit state constitutional provision to undertake periodic apportionment, as was the case with Tennessee, state courts generally held that for nonperformance of the duty, the legislature was answerable solely to the people through the political process. Given that the very purpose of legislative apportionment is to distribute political powers it was an understandably unsatisfactory result for voters who alleged that a malapportioned legislature diluted the strength of their votes to be told by the courts that their only recourse was to vote the offending legislature out of office.

Such state judicial acquiescence was often rationalized on the grounds that it would be inappropriate for a court to attempt to mandamus the performance of a constitutional obligation by a coordinate branch of government. While voters in several states removed this obstacle by placing the responsibility for apportionment in the hands of an administrative officer or board that was subject to mandamus,* not all state constitutions authorized voters to directly propose legislation by statutory initiative or constitutional amendment. Voters lacked such recourse in states in which a constitutional amendment could only be proposed by the legislature, given the fact that any legislature likely to propose such an amendment would be equally likely to eliminate the need to do so by adopting an acceptable apportionment plan. The inadequacy of pre-**Baker** remedies was evidenced by the fact that within the nine-month period after **Baker**, lawsuits challenging the constitutionality of state legislative apportionment schemes were instituted in 34 states.

2. Congressional Apportionment: Subject-Matter Jurisdiction and Standards

The subject in **Baker** was state legislative apportionment. After the **Baker** decision, the Supreme Court dealt with the question of congressional apportionment. In **Wesberry v Sanders**, (376 US 1; 1963), the Court held that a challenge to a congressional apportionment plan enacted by a state legislature likewise presented a justiciable controversy subject to adjudication by federal courts. However, the Court further held that the controlling standard with respect to congressional apportionment was equality of population. The Court's conclusion was based upon an examination of the history of Section 2 of Article I of the United States Constitutions that provides in pertinent part for congressional representatives to be "chosen every second Year by the People of the several States...." Later, in **Kirkpatrick v Preisler**, (394 US 526; 1969), the Court would elaborate upon the constitutional requirement that governs congressional apportionment, by holding that Section 2 of Article I "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown" by the state. (394 US at 531.) Stated in another manners where congressional apportionment is the issues the Court recognizes no excuse for departing from the objective of equal representation for equal numbers of people "other than the practical impossibility of drawing equal districts with mathematical precision." **Mahan v Howell**, (410 US 315t 322; 1973).

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*At the general election in November of 1952, Michigan voters approved a citizen-initiated amendment that, beginning in 1953 and each year thereafter, required the board of state canvassers to apportion the House of Representatives in the event the Legislature refused to do so. However, the amendment deleted the existing constitutional requirement that the Senate be apportioned every ten years, and instead defined the Senate districts by enumerating the county or counties that were to comprise them. Therefore, Senate districts could not be altered without amending the state Constitution.

3. State Legislative Apportionment Revisited: Federal Standards

Thus far, the U.S. Supreme Court had held in **Baker** and **Wesberry** respectively, that both state legislative apportionment and congressional apportionment were justiciable questions under the U. S. Constitution and had with respect to the latter subject enunciated the rule that congressional apportionment had to be governed by equality of population. There remained the question of the proper federal constitutional standard for evaluating the validity of a state legislative apportionment scheme since, as already noted, **Baker** expressed no view on the matter.

Subsequently, in **Reynolds v Sims**, (377 US 533; 1964), the Supreme Court was confronted by a second state legislative apportionment case, this one brought by residents of Alabama. At the time of the lawsuits the 105 state House districts in Alabama varied in population from 6,731 to 104,767, while the 35 state Senate districts varied in population from 15,417 to 634,864. These substantial population variances (ratios of approximately 15 to 1 and 41 to 1 in House and Senate districts, respectively) existed despite the fact that Section 200 of Article 9 of the state Constitution required representation to be based upon population.

The Supreme Court described the nature of the problem posed by such population variances, in a passage that is quoted at length, as follows:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government and legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it would be inconceivable that a state law to the effect that, in counting votes for legislators, the votes of certain citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face values could be constitutionally sustainable. Of course, the effect of state legislative distracting schemes which give the same number of representatives to unequal numbers of constituents is identical. (377 US at 562-563.)

Thus, the Court concluded that, "as a basic constitutional standard, the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned on a population basis." (377 US at 568.) The result in **Reynolds** has been seen as synonymous with the principle of one persons one vote, but as will be shown below, this formulation somewhat overstated the rule with respect to state legislative apportionment.

4. Legislative and Congressional Apportionment Distinguished

While the **Reynolds** Court defined the applicable rule as being that both houses of a bicameral state legislature were to be apportioned on a population basis, the Court also identified permissible exceptions to the rule. In the very next sentences, the Court held that the right to vote for state legislators was unconstitutionally impaired when its weight "is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." (377 US at 568; emphasis supplied.) Second, the Court noted that with respect to the Equal Protection Clause, under which **Reynolds** was decided, "mathematical nicety is not a constitutional requisite." (377 US at 569.) Notwithstanding these qualifying statements, lower federal courts and state courts, including the Michigan Supreme Court, construed **Reynolds** as requiring equality of population among districts as the sine qua non of state legislative apportionment. For example, the state Supreme Court declared in 1972 that "[t]he controlling criterion for judgment in legislative apportionment controversies involving bicameral state legislatures, under the Equal Protection Clauses of the Federal and state Constitutions is equality of population as nearly as practicable." **In re Apportionment of Legislature – 1972**, (387 Mich 442, 453; 1972).

Much of the confusion regarding the applicable rule with respect to state legislative apportionment resulted from the fact that the **Reynolds** decision was preceded by **Wesberry**, which did require equality of population among congressional districts. However, as the Court observed in **Reynolds**, in implementing the principle of representative government set forth in **Wesberry**, some distinctions might be drawn between congressional and state legislative representation. The Court noted, for example, that

> [a] state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and to provide for compact districts of contiguous territory.... So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equality-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. (377 at 578-579.)

However, the significance of these pronouncements were largely lost upon lower federal and state courts, as was the fact that the Supreme Court was deciding congressional apportionment and state legislative apportionment litigation under distinct provisions of the federal Constitution Section 2 of Article I and the Equal Protection Clause of the Fourteenth Amendment, respectively. As a result, lower federal and state courts continued to apply a far more stringent equality-of-population standard to state legislative apportionment,

Subsequently, in **Mahan v Howell**, (410 US 315; 1973), the United States Supreme Court made explicit what had been mistaken for dictum in **Reynolds**, that in the case of state legislative apportionment, a state might depart from the goal of population equality in order to effectuate a rational state policy. The Court concluded that a rational state policy did exist in **Mahan** and approved a deviation from exact population equality of 16.4 percent.*

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* The facts of **Mahan** suggest that the actual deviation was not 16.4 percent as indicated by the Court, but rather 16.4 <u>percentage points</u>. A percent may be defined as a

Although the Court in **Mahan** did not indicate that 16.4 percentage points was the maximum deviation allowable regardless of whether a larger deviation might also be in furtherance of rational state policy, lower federal courts and many state courts regarded such a deviation as the outer limit. In fact, the Court in **Mahan** noted that "[w]hile this percentage may well approach tolerable limits, we do not believe it exceeds them." (410 US at 329.) Indeed, ten years later in **Brown v Thomson, Secretary of State**, (462 US 835; 1983), the Court upheld an apportionment plan for the Wyoming House of Representatives that produced average and maximum deviations of 16 and 89 percentage points, respectively. It should be noted, however, that the circumstances in Brown were unusual in that Wyoming is sparsely populated and the state's long-standing policy was that, although representation was to be based on populations each county was to have at least one representative.

In general, the Supreme Court has treated any deviation of less than ten percent as de minimis, but larger deviations as establishing prima facie evidence of discrimination that requires justification by the state. Perhaps the best illustration of the Court's application of the differing standards that govern state legislative apportionment and congressional apportionment is that on the same day that the Court upheld a maximum deviation of 89 percentage points in **Brown**, it overturned a New Jersey congressional apportionment scheme that produced a maximum deviation of only 0.6984 percentage points between the least and most-populous districts. **Karcher v Daggett**, (462 US 725; 1983).

To summarize at this juncture, **Baker v Carr** and its progeny reveal a gradual transition on the part of the United States Supreme Court in the manner of addressing legislative apportionment. The Court moved from a position of viewing the matter as political in nature, to viewing it as a justiciable question that was subject to adjudication by federal courts. Subsequently, the Court held that the underlying constitutional basis for both congressional and state legislative representation was equality of population, meaning strict equality of population with respect the former, but permitted deviations that were incident to the effectuation of a rational state policy in the case of the latter.

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part of a whole expressed in hundredths, while a percentage point is the arithmetic difference produced by adding or subtracting two numbers expressed as percents. For example, an increase in value from one percent to two percent is an increase of 100 percent, but of only one percentage point.

In **Mahan**, an ideal district was one containing 46,485 persons. The most-populous district and least-populous district respectively were 6.8 percent larger (49,646 persons) and 9.6 percent smaller (42,022 persons) than the ideal. This represented an 18.1 percent difference (49,646 persons compared to 42,022 persons), but a 16.4 percentage point difference (6.8 percent plus 9.6 percent). Apparently, the Court confused these two concepts and subsequent judicial references to **Mahan**, including those made by the Michigan Supreme Court, have not corrected this arithmetic error.

Second, the Michigan Supreme Court has consistently read **Mahan** as if the primary focus was the relationship that the most-populous and least-populous districts bore to the ideal district. As a result, the Michigan Supreme Court has interpreted a maximum 16.4 percentage point divergence to be synonymous with a requirement that the most- and least-populous districts cannot vary from the ideal district by more than plus or minus 8.2 percentage points. (Under this interpretation, the most-populous district cannot exceed 108.2 percent nor the least-populous district be less than 91.8 percent of the ideal.) However, the focus in **Mahan** was the relationship that the most-populous and least-populous districts bore to each other. As already noted, the actual population divergence in **Mahan** ranged from 6.8 percent above the ideal to 9.6 percent below.

B. Relevant Provisions of the Michigan Constitution

Baker v Carr was decided on March 26, 1962, while the work of Michigan's Constitutional Convention was in progress. The coincidence of events would prove to be unfortunate. In retrospect, **Baker** is considered to be a landmark decision, particularly when viewed through the prism of subsequent state legislative apportionment cases, but its significance was not fully apparent at the time the Convention was deliberating. The reason was simple: **Baker** merely held state legislative apportionment to be a justiciable matter under the federal Constitution. It did not enunciate a controlling constitutional standard, however, nor did it suggest that certain characteristics – apportionment based in part on geographic area, for example -- were unconstitutional. The Convention was considering, and would eventually approve, precisely such an approach. The United States Supreme Court would not declare a standard until 1964, by which time the present state Constitution had already been written and adopted.

1. The 1908 Constitution as Background

In 1962, Michigan was one of 12 states that elected its House of Representatives on a population basis and was one of 28 states that elected its Senate on a combination basis of population and land, an approach that had its basis in the then-existing 1908 state Constitution. The Senate consisted of 32 members elected from districts that the Legislature was required to "rearrange" among the counties following each federal census. The House of Representatives consisted of a maximum of 100 members chosen from districts that the Constitution required be apportioned by dividing the state's population by the maximum number of seats. The resulting quotient was referred to as the "ratio of representation." However, the Constitution also required that any county that contained a "moiety" of that ratio would receive one representative. A moiety is basically a fraction in excess of 50 percent.

Other than from a political standpoint, the moiety concept had little justification. It was quite inconsistent to divide the population of the state by the applicable number of House seats, in order to determine a per-district populations and to then allocate some of those seats to counties having only a fraction of that population. The outcome of apportionment can vary substantially depending upon which area of the state receives the first district. Since it was customary to first allocate seats out-state, including to moiety counties, Wayne County simply received whatever seats were left, despite being entitled to more seats based upon population. The practical effects and no doubt the intended purposes was to maintain existing legislative representation from rural areas of the state that could not otherwise be achieved given population growth in urban areas of the state. For example, according to the 1950 federal census, the least-populous Senate district, the 32nd (comprised of Baraga, Houghton, Keweenaw, and Ontonogon Counties) had 61,008 persons, while the most-populous Senate districts the 18th (comprised of only a portion of Wayne County) had 544,364 persons. The state Legislature had last been apportioned in 1925, on the basis of the 1920 federal census.

In November 1952, voters adopted a citizen-initiated constitutional amendment that made several significant changes in apportionment. The amendment was referred to as a "balanced-legislature" approach since it provided for the election of the House of Representatives on essentially a population basis and the Senate on the combination basis of population and land. Under the amendment, the Senate was increased to 34 members but the requirement that it be apportioned every ten years was deleted.

Instead, the amendment fixed senatorial districts by enumerating the county, or counties, that comprised them, it would be observed at the 1961 Constitutional Convention that "[t]his fixed distracting without any provision to reflect population changes is the feature most objected to by critics of the present apportionment." 2 Official Record, Constitutional Convention 1961 at 2016.

Second, the number of seats in the House of Representatives was increased to a maximum of 110. However, both the method and the number used in calculating the ratio of representation (100) were intentionally left unaltered. Thus, the maximum number of seats exceeded by ten the number used to determine the ratio. As a result, even after allocating seats to moiety counties, enough seats were left to provide Wayne County with the number of seats to which it was entitled under full population-based representation.

2. Deliberations at the 1961 Constitutional Convention

Legislative apportionment generated voluminous and, on occasion, heated debate at the 1961 Constitutional Convention.* Recall that the delegates to the Convention were themselves elected from then-existing legislative districts. The apportionment provisions adopted by voters as part of the 1963 Constitution, contained in Sections 2 through 6 of the Article 4, were devised in Convention by the committee on legislative organization. The basic features of these provisions were as follows:

The Senate. Section 2 provides for a 38-member Senate elected from single-member districts. Counties were to be the basic building blocks of the system. Thus, each county was to be assigned apportionment factors based upon the sum of its percentage of the state's population multiplied by four and its percentage of the state's land area. As such, the formula was weighted 80 percent by population and 20 percent by land. Counties that were entitled to two or more senators were to be divided into single-member districts of as nearly equal population as possible were to follow municipal boundaries to the extent possible, and "be compact, contiguous, and nearly uniform in shape as possible."

In justifying the use of land as one basis in apportioning the Senate, the majority report of the committee on legislative organization stated:

> The committee is convinced that most Michigan citizens would agree with former President Eisenhower [who had addressed the Convention on the matter] that the major basis for representation should be population, but that most also believe that in a state with large and diverse geographic areas, some consideration should be given to the area factor in determining representative districts in at least one house of the legislature. 2 Official Record, Constitutional Convention 1961 at 2035.

The House of Representatives. Section 3 provides for a 110-member House of Representatives, also elected from single-member districts consisting of "compact and convenient territory contiguous by land." Each county with at least seven-tenths of one percent of the state's population was entitled to one representative. Counties with less population were to be

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* Apparently apportionment is seldom an easy matter to resolve. For example, "[t]he United States government printing office puts out a volume in which are reproduced the complete notes of President Madison as he chronicled what transpired at that convention [the federal Convention of 1787]. There are some 600 pages, of which 300 deal with reapportionment." 2 Official Record, Constitutional Convention 1961 at 2072.

aggregated with other counties until the population threshold was reached. After this initial apportionment, any remaining seats were to be apportioned "among the representative areas on the basis of population by the method of equal proportions." As in the case of the Senate, provision was made for counties entitled to two or more representatives. Again, the majority report of the committee noted:

> By providing one representative to a county or group of counties which has not less than 7/10 of 1 percent of the population of the state, the plan recommended comes as close as possible to basing the house on population without breaking county lines and without combining great numbers of counties into districts of unwieldy and unreasonable size. Id.

Annexation and Merger. Section 4 provided that territory annexed by, or merged with, a city located in a county with more than one legislative district would become a part of the city's district if so authorized by ordinance.

Contiguity. Section 5 provided that an island was to be considered contiguous to the county of which it is a part.

Apportionment Commission. Section 6 established an eight-member commission on legislative apportionment with four members each chosen by the "state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment." The size of the commission would be enlarged to 12 were a third-party candidate to receive more than 25 percent of the vote. Each party selecting commission members was required to choose one member from each of the following geographical regions: the upper peninsula; the northern part of the lower peninsula; southwestern lower Michigan; and southeastern lower Michigan.

Section 6 also provided that the secretary of state was to convene the commission within 30 days after adoption of the Constitution and each federal decennial census. A final apportionment plan required a concurrence by a majority of the commission, was required to be published as provided by law and took effect 60 days thereafter. In the event a majority of the commission could not reach agreement, it could jointly or individually submit a proposed plan to the state Supreme Court. The Court was then required to identify the plan that complied "most accurately with the constitutional requirements" and direct the commission to adopt it.

As was noted at the outsets in absence of a state constitutional or statutory provision to the contrary apportionment is a function to be discharged by the state Legislature. In proposing that legislative apportionment be conducted by a commission, Delegate John A. Hannah gave the following reasons:

> Apportionment of the legislative districts is a knotty and difficult problem in practically every state in the union. Your committee became convinced that fully as important as a fair and valid formula for distracting the state is a constitutional provision that will require that the formula be applied and that the districts be redrawn as population shifts or changes dictate. It [the committee] became convinced that it is totally unrealistic to expect a legislature to redistrict and reapportion seats in its own body. Redistricting inevitably involves the possible denial of seats to members of

> the existing legislature, and conceivably a fair and equitable redistricting could deprive the most able and respected members of the legislature of their seats. Wholly aside from the political implications involved, the personal relationships alone work to delay, subvert, or prevent prompt and equitable reapportionment of itself by the legislature. 2 Official Record, Constitutional Convention 1961 at 2015.

While the intention of having a body other than the Legislature conduct apportionment was laudable, the commission on legislative apportionment would prove an unmitigated failure. Not on one occasion during its 18 year existence did a majority of the commission agree on a single plan, but in each instance split along partisan lines. This failure resulted from two factors: the size of the commission and the method of its selection. The requirement that the commission be composed of an even number of persons provided no internal means of resolving an impasse. Similarly, the requirement that members be appointed by political parties virtually guaranteed a degree of partisanship that would, given the nature of the subject, render compromise highly unlikely.

C. Relevant Michigan Decisions

1. Decisions of 1962

In **Scholle v Secretary of State**, (367 Mich 176; 1962), the state Supreme Court declared that the Senate apportionment provisions of the 1908 Constitution, as amended by voters in 1952, violated the federal Equal Protection Clause. The **Scholle** case had previously been before the Court in 1960 at which time it had been dismissed. (360 Mich 1; 1960.) On the prior occasion, four justices who had held the Senate apportionment provisions did not violate the federal Constitution were joined by a fifth justice who concluded that, while a violation did exist, the Court was without jurisdiction to grant relief. Subsequently, the United States Supreme Court in **Scholle v Hare, Secretary of State of Michigan**, (369 US 429; 1962), vacated the judgment of the Michigan Supreme Court and remanded the matter for consideration in light of its decision in **Baker v Carr**.

Upon remand, the state Supreme Court held the Senate apportionment provisions to be unconstitutional and enjoined the Secretary of State from conducting a primary election for the Senate. The Court declared that it would direct the Secretary of State to conduct a statewide at-large election if the Legislature failed to adopt a valid apportionment plan for the Senate by August 20, 1962. (To avoid any doubt regarding the validity of acts adopted by the Legislature since 1954, the Court held that existing Senators were de facto officials until December 31, 1962.) On July 27, 1962, nine days after the Court issued its order in Scholle, the U. S. Supreme Court granted a stay of that order, pending final disposition of the matter. As a result, the 1962 state Senate election was held in accordance with the existing provisions of the 1908 Michigan Constitution.

2. Decisions of 1964

The matter of legislative apportionment continued to generate considerable activity before the Michigan Supreme Court during the first six months of 1964. (Voters adopted a new state Constitution in April of 1963 that took effect on January 1, 1964.) On January 31 of that years the commission on legislative apportionment failed to reach agreement in its maiden effort. In accordance with Section 7 of Article 4 of the state

Constitution, several commissioners individually submitted various plans to the state Supreme Court. **In re Apportionment of State Legislature - 1964**, (372 Mich 418; 1964). A majority of the Court deferred any action until April 15, 1964, on the grounds that a decision by the federal Supreme Court was imminent regarding applicable federal standards. A minority of the Court was of the view that it should proceed to select one of the apportionment plans submitted since the state constitutional provision under which the plans were submitted accorded the Court no other option and since a federal constitutional standard for state legislative apportionment had not yet been enunciated.

On April 10, 1964, the state Supreme Court again deferred action. On May 26, 1964, the Court ordered the commission to adopt the so-called "Hanna" plan as that which complied most accurately with "state constitutional requirements." Three weeks later, the Legislature adopted Public Act 280 of 1964, which postponed that year's primary election from August 4 to September 1.

Then on June 15, 1964, the U.S. Supreme Court decided **Reynolds v Sims**, that as previously noted, held the Equal Protection Clause of the federal Constitution to require seats in both houses of a bicameral state legislature to be apportioned substantially on a population basis. On June 17, 1964, two days after and as a result of the **Reynolds** decision, the state Supreme Court vacated its order of May 16 directing adoption of the Hanna plans and directed the commission to adopt by June 19, 1964, an apportionment plan that was consistent with **Reynolds**. (373 Mich 247; 1964.)

The commission again failed to reach agreement on a single plan and individual commissioners submitted various plans to the Court. On June 22, 1964, the Court ordered the commission to adopt the so-called "Austin-Kleiner" plan because it produced the smallest population variance -- a variance of 2,027 persons between the least- and most-populous Senate districts and 3,082 persons between the least- and most-populous House districts. (373 Mich 250; 1964.) It should be noted that one justice concluded that since the state apportionment criteria were unconstitutional because of **Reynolds**, the same result must obtain with respect to the commission. While that justice reasoned that voters would not have empowered a commission to apportion the Legislature absent criteria in the state Constitution to control its discretion a majority of the Court would not reach the same conclusion until 1982.

3. Decision of 1965

In mid-1965, 34 citizens filed a petition under Section 6 of Article 4 of the state Constitution, the relevant paragraph of which reads as follows:

> Upon the application of any elector filed not later than 60 days after final publication of the plans the supreme court, in the exercise of original jurisdiction shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

Plaintiffs asked the Court to review the Austin-Kleiner plan, alleging that it constituted political gerrymandering. **In re Apportionment of State Legislature - 1965**, (376 Mich 410; 1965). They sought the right to take depositions of the commission and asked that the apportionment plan be declared void for all elections after 1964. The Court's disposition of the matter

illustrated its regrettable tendency of that period to sacrifice coherent majority opinions on the alter of individual expression. Eight justices wrote six separate opinions the majority of which remanded the matter to the commission with instructions to devise an acceptable plan within 60 days.

4. Decision of 1966

After remand of the matter to the commission, it again failed to reach agreement on a single plan and so informed the Court. Democratic commissioners resubmitted the Austin-Kleiner plan and four Republican commissioners submitted an alternative plan. **In re Apportionment of State Legislature - 1965-1966**, (377 Mich 396; 1966). The issues had become so convoluted by this time that there was some disagreement among the justices regarding the constitutional provision under which the cause was brought. One justice held that the Court should hold the commission in contempt for having failed to agree upon a plan. Three other justices who believed that the Austin-Kleiner plan was unconstitutional, voted to remand the matter once again to the commission. The remaining four justices, in three separate opinions voted to dismiss the matter. Since a majority of the Court could not agree upon a single course of action, the matter was dismissed by default and the Austin-Kleiner plan left in place.

5. Decision of 1972

On January 28, 1972, after the 1970 federal census, the commission failed to reach agreement and, thereafter, various plans were submitted to the Court by individual commissioners. **In re Apportionment of State Legislature - 1972**, (387 Mich 442; 1972). At the outset, the Court noted that

> [t]he activities of the political parties during the 1964 commission on legislative apportionment, and the political shenanigans of both political parties making up the commission this year, as brought out in oral argument before this court, convinced a majority of the court that it would be futile to remand this cause to the commission for further proceedings. (387 Mich at 450.)

On this particular occasion, the Court ordered the commission to adopt the so-called "Hatcher-Kleiner" plan, even though that plan had never been submitted to the commission. It will be recalled that at the times the Court still interpreted **Reynolds** as requiring equality of population to the extent practicable as the controlling standard in legislative apportionments and regarded as dictum statements in **Reynolds** that a state might legitimately desire to maintain the integrity of political subdivisions. Thus, the Court selected the apportionment plan that produced the least population variance, although it also fragmented more political subdivisions than did the other plans. The Hatcher-Kleiner plan split 59 local units in apportioning the Senate (33 counties, 15 cities, and 11 townships) and 118 local units in apportioning the House (49 counties, 33 cities, and 36 townships). The Court ordered the plan into effect for the House elections of 1972.

6. Decision of 1982

After the 1980 census, the apportionment commission once again failed to agree upon a single plan. On February 12, 1982t the state Supreme Court requested briefs on two questions: firsts whether the commission or the Court continued to have authority to act given that the apportionment criteria were unconstitutional and second, if such authority still existed, what standards ought to guide its exercise. **In re Apportionment**

of State Legislature - 1982, (413 Mich 96; 1982). As will be shown momentarily the answer provided by the Court to the former of these two questions further clouded the issue.

Regarding the latter question, the Court observed that under Section 6 of Article 4 of the state Constitution, if a majority of the commission could not agree on a plan, then each member could submit a proposed plan "to this Court which 'shall determine which plan complies most accurately with the constitutional requirements' and shall direct that the commission adopt it." (413 Mich at 122; emphasis in original.) The Court held that the term "constitutional requirements" meant those provisions of Sections 2 through 6 of Article 4 that were not violative of the federal Equal Protection Clause.

Clearly those provisions that required apportionment to be based upon land and population were unconstitutional. The Court observed that "[t]he touchstone of Art 4, Sec 2-6 was discrimination; discrimination in favor of less populated areas against more populated areas. The Legislature was to be apportioned according to the criteria stated in Art 4, Sec 2-6 without regard to the goals of achieving equality and the avoidance of discrimination." (413 Mich at 124.) On the other hand, those provisions that specified the number and term of office of senators and representatives were free of constitutional difficulty.

Furthermore, the Court now interpreted **Reynolds** as allowing states to deviate from population equality in order to advance a rational state policy. As the Court noted, "[t]he refusal to give credence to what the 1972 Court called the dictum of **Reynolds v Sims**, can no longer be justified." (413 Mich at 119-120.) Thus, the Court also held as constitutionally valid those criteria that preserved political subdivision boundaries, that provided for the preservation of Senate districts and that required districts to be contiguous, convenient, compact, rectangular, uniform and squarer since these criteria expressed rational and legitimate state policies.

Having concluded that those apportionment provisions of the state Constitution that were not violative of the federal Equal Protection Clause remained valid, the Court then considered whether the commission on legislative apportionment still had authority to act. The Court then concluded that the commission was unconstitutional because there were no longer any valid state constitutional provisions to guide its conduct. The conclusion that the commission had not been intended to operate without criteria in the state Constitution to control its discretion was amply supported by statements recorded during the 1961 Constitutional Convention and was the same one reached by a lone justice in 1964. However, the Court extended its reasoning beyond the commission as follows:

> The formulae which this Court has twice implemented are not what the people approved. What the approved they cannot have. And what they have, we cannot approve.
>
> The matter should be returned to the political process in a manner which highlights rather than hides the choices the people should make.
>
> We have accordingly concluded that the provisions of Art 4s Sec 2-6, cannot be maintained. When the weighted land area/population apportionment formulae fell, <u>all the apportionment rules fell because they are inextricably related</u>. (413 Mich at 138; emphasis supplied.)

Thus, the Court held in the same opinion that the apportionment provisions of the state Constitution that did not violate the Equal Protection Clause of the federal Constitution were valid, but then held that, because those provisions were not severable from the invalid provisions, all of the provisions were invalid. However, the Court then prescribed criteria that it identified as being "consistent with the constitutional history of the state," criteria that were essentially the same as those it had just declared invalid. The entire result was highly confusing. Subsequently, one justice of the Court would explain these apparently contradictory holdings as having resulted from

> a compromise opinion signed by all the members of the Court. Although those who were of the opinion that the apportionment rules were not severable prevailed on that aspect of the matters those who felt that the valid apportionment rules should be enforced prevailed on that aspect of the matter. (437 Mich at 1210.)

The Court proceeded to appoint an officer to draft an apportionment plan based upon the standards it had prescribed. However, the Court noted that

> [t]he Legislature may, by a statute approved by the Governor with immediate effect at least 4 weeks [May 4, 19821 preceding the filing date for the August 1982 primary, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. (413 Mich at 143.)

Such a plan enacted by the Legislature and approved by the Governor would, according to the Court, supersede its own plan. The Legislature failed to enact such a plan and on May 21, 1982, the Court entered a final order approving the apportionment plan submitted by its officer, with certain modifications as recommended by him. State legislative elections in 1982 were conducted according to this apportionment plan.

7. Decision of 1984

The following year, the Legislature adopted an apportionment plan in the form of Public Act 256 of 1983. The bill that became Act 256 did not deal with apportionment when it was originally introduced; rather, it amended the Michigan election law. During the course of its consideration by the Legislature, however, the bill was modified into an apportionment bill and enacted into law.

Subsequently, in **Anderson v Oakland County Clerk**, (419 Mich 142; 1984), the state Supreme Court entered an order that provided, in part, as follows:

> The Court holds that 1983 PA 256 is unconstitutional as in violation of the second sentence of Section 24 of Article 4 of the 1963 Constitution which provides 'No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title'.

The Court further ordered that, in the absence of the enactment of a law providing otherwise and given immediate effect before July 10, 1984, legislative elections would be conducted in districts as adopted by the Court in its 1982 decision. The Legislature failed to adopt such a law.

8. Dismissal Order of 1990

On December 27, 1990, the Court dismissed a motion that had asked it to reopen the 1982 legislative apportionment proceedings for the purpose of establishing judicial guidelines in advance of the next apportionment cycle. The motion was dismissed for want of an existing case or controversy. Two justices joined in the dismissal with the understanding it in no manner related to "the jurisdiction or responsibility of this Court with respect to reapportionment." **In re Apportionment of State Legislature**, (437 Mich 1208, 1209; 1990.)

D. 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, both of which are examined below. The qualifying term "initial" is employed here because, since **Baker v Carr**, courts no longer hesitate to impose appropriate remedies in the event that officials whose responsibility it is to conduct legislative apportionment fail to do so.

1. Initial Responsibility

In 37 of the 50 states, the initial responsibility for state legislative apportionment rests with the legislature. (See Table 1.) This is not surprising given the fact that apportionment is by default a legislative function, absent a state constitutional or statutory provision assigning responsibility elsewhere. (The 1963 Michigan Constitution assigned this responsibility to an independent commission; in 1982, the commission was held to be unconstitutional by the state Supreme Court.) In Alaska and Maryland, initial apportionment responsibility has been assigned to the governor. In the remaining 11 states, it is conducted by a board or commission.

Table 1

Responsibility For State Legislative Apportionment

Initial Responsibility Reposed In:

Legislature		Governor	Board or Commission
Alabama	Nebraska	Alaska	Arkansas
Arizona	Nevada	Maryland	Colorado
California	New Hampshire		Hawaii
Connecticut	New Mexico	Maine	
Delaware	New York	Missouri	
Florida	North Carolina	Montana	
Georgia	North Dakota	New Jersey	
Idaho	Oklahoma	Ohio	
Illinois	Oregon	Pennsylvania	
Indiana	Rhode Island	Vermont	
Iowa	South Carolina	Washington	
Kansas	South Dakota		
Kentucky	Tennessee		
Louisiana	Texas		
Massachusetts	Utah		
Michigan	Virginia		
Minnesota	West Virginia		
Mississippi	Wisconsin		
	Wyoming		

Source: National Conference of State Legislatures, Redistricting Provisions: 50 State Profiles (Washington, D.C.: October 1989); CRC calculation.

Deciding who to entrust with initial responsibility for apportionment is not easily resolved. The difficulty arising from entrusting such responsibility to the Legislature, the branch of government that is the chief beneficiary of the process, is obvious and to be avoided. Nor, in Michigan, should the initial responsibility be lodged in the state Supreme Court. The observation must be made, albeit with appropriate tactfulness, that justices of the Court are nominated at partisan conventions of the same political parties under whose banner legislators seek office and are, therefore not wholly immune to partisan considerations. Even so, in the absence of a constitutional or statutory violation, courts of law should remain appropriately wary of becoming entangled in the distribution of political power.

This fact was painfully evident in the Court's four-to-three apportionment decision of 1972, in which one dissenting justice accused the majority of engaging in the same "political shenanigans" of which the majority had accused the apportionment commission. It is also noteworthy that a second justice who dissented from the majority decision to adopt the apportionment plan submitted by the Democratic commissioners pointedly failed to receive renomination at his party's convention in 1976. Since he was an incumbent, however, he was placed on the ballot by virtue of filing an affidavit of candidacy and was reelected.

As a related matter, it remains unclear under what authority the state Supreme Court acted in 1982, when it appointed an officer to develop a legislative apportionment plan. Earlier in its opinion, **In re Apportionment of State Legislature - 1982**, the Court had made passing reference to

its "responsibility to provide for the continuity of government," (413 Mich at 116), but it cited no constitutional provision bestowing such responsibility on the Court. Indeed, no such constitutional provision readily reveals itself. As previously noted, apportionment is a legislative responsibility absent a state constitutional or statutory provision to the contrary. The establishment of the apportionment commission divested the Legislature of this function. However, the subsequent holding by the Court that the commission was unconstitutional could only have the effect of returning the initial responsibility to the Legislature, not of lodging it in the Court.

The authority to determine the constitutionality of an apportionment plan differs significantly from that to direct the drafting of a plan in the first instance. That the Court's role was to be limited to the latter is suggested by the following exchange that occurred during the 1961 Convention:

> **MR. DANHOF**: Mr. Chairman, I would like to ask a question of Mr. Plank, if I might. Mr. Plank, I take it that it was the considered opinion of your committee that only as a last resort would you go to the supreme court? I mean, you certainly were not encouraging the submission of various plans to the supreme courts is that correct?
>
> **MR. PLANK**: That is correct. Our thinking was that the apportionment commission would come to an agreement on their own. <u>The only use of the supreme court would be if they do not come to agreement</u>. Then they must submit plans to the supreme court, so that they in turn can determine which one of the plans will be used in redistricting. 2 Official Record, Constitutional Convention 1961 at 2015. (Emphasis supplied.)

The 1961 state Constitutional Convention placed responsibility for legislative apportionment in an eight-member commissions the membership of which was selected by the major political parties. While the actual shortcomings of that approach have already been examined, the concept of reposing such responsibility in a constitutionally based commissions independent of the Legislature, remains sound. There would appear to be no-inherent reason why a properly selected and constituted commission cannot serve an important function.

2. Necessity for Standards

Because representation is fundamental to republican government, its allocation ought to be governed by standards that ensure the strictest propriety. While the federal Constitution requires that state legislatures be apportioned on a population basis, states have considerable latitude to depart from this standard in order to effectuate rational state policies.* However, that a state's policy may be deemed rational for purposes of federal constitutional adjudication does not mean it is in the best interests of the state's citizens.

The federal court decisions examined earlier may be seen as indicating what is minimally required by the Equal Protection Clause. Buts considering the importance of apportionment, and given that its consequences

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* The need for standards is less pressing with respect to congressional apportionment given the fact that Section 2 of Article I of the federal Constitution brooks only the limited population variances that are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown. Kirkpatrick v Preisler, (394 US 526; 1969).

must be endured for a decade at a time, the citizens of Michigan may desire to establish additional safeguards. What the state Supreme Court observed in 1982, that "[a] commission guided by standards clearly delineated in advance and which are enforced is a different body than a commission left to its own devices restrained only by federal constitutional requirements," is applicable regardless of who performs apportionment. **In re Apportionment of State Legislature - 1982**, (413 Mich 96, 135; 1982). It is an established principle of law that citizens of a state may, through their state constitution, afford themselves greater protections than those provided by the federal Constitution. The principal purpose of state constitutions being to define and limit governmental power and structures they are the only proper repository for apportionment standards.

Given a general agreement on both the importance of standards and their proper placements attention may shift to a determination of what the standards should be. Among the standards generally followed 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 Court noted,

> [t]he goal of compactness seeks to avoid gerrymandering and is not an end in itself. Districting solely to achieve population equality 'may be little more than an open invitation to partisan gerrymandering'. **Reynolds v Sims**, supra, at 578. It is therefore necessary to limit the pursuit of the goal of equality of population to achieve the goal of compactness.
>
> An election district, circumscribed by a circle, containing the least land area (excluding land outside of this state or under the Great Lakes) outside of the districts is the most compact. **In re Apportionment of State Legislature - 1982**, (413 Mich 96, 134-135; 1982).

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

The state Supreme Court in its opinion, **In re Apportionment of State Legislature - 1982**, (413 Mich 96o 140; 1982), concluded that the constitutional history of Michigan revealed "dominant commitments to contiguous, single-member districts [that are] drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible." Given these commitments, the Court then directed the use of specific standards that may be paraphrased 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 variances 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.

This state's experience with legislative apportionment under the present state Constitution may be summarized as follows: a ruling by the United States Supreme Court invalidated the legislative apportionment provisions of the Michigan Constitution within a year of its adoption. The commission on legislative apportionment, which continued to function without standards, was unable to agree upon a single 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 permissible deviations that advanced rational state policies. Also in 1982o the state Supreme Court held that the commission on legislative apportionment was no longer valid in the absence of standards to circumscribe its discretion. Thus stands the matter as the state approaches the current apportionment cycle: there is neither a constitutionally based provision specifying who shall perform apportionment, nor one specifying what standards shall be followed.

Even though Michigan has been without valid apportionment standards as part of its fundamental law for the past 27 years, the Michigan Legislature has yet to address this important issue. Nor have voters addressed it. Since 1964, the people of Michigan have exercised their right to propose amendments to the state Constitution on 11 occasions, but none of the proposals have dealt with apportionment. It may be that the absence of such a voter-initiated amendment lies in the fact that the incivility that attends apportionment need be suffered only once every ten years, and that despite existing imperfections apportionment does, in fact, occur. Nevertheless, the people of Michigan may wish to consider establishing a more sedate and orderly process.

Part II. 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 philosophical basis underlying voting rights legislation is that racial and ethnic minorities, having had their right to vote historically denied or abridged as a group, are entitled to protection as a group.

The 1965 act as originally adopted was intended to provide minorities an equal opportunity to vote. As with equal opportunity in other contexts the right to vote did not guarantee any particular electoral outcome. In 1982, Congress adopted amendments to the voting rights act that shifted the focus from ensuring the right to vote to prohibiting the dilution of existing minority voting strength. The distinction between the two approaches is not insignificant because the latter approach implicates what amounts to proportional representation for racial and ethnic minorities. As will be examined below, at some as yet undefined point, the attempt to ensure electoral outcomes by protecting group voting strength and the philosophical basis underlying the principle of one persons one vote -- that voters are entitled to representation as <u>individuals</u>, -- suggest incompatible goals, both of which cannot be fully achieved.

A. Background

The purpose behind the 1965 federal voting rights act is best understood in an historical context. The Fifteenth Amendment was adopted by Congress on February 27, 1869o and ratified by the required number of states on March 30, 1870. Section 1 of the Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colors or previous condition of servitude." Section 1 is not self-executing, however. Thus, Section 2 provides that "[t]he Congress shall have power to enforce this article by appropriate legislation."

After the Fifteenth Amendment became effective, and for approximately the next 90 years, Congress passed a number of acts intended to enforce its provisions. Among these were the enforcement act of 1870, the civil rights act of 1957, the civil rights act of 1960, and Title I of the civil rights act of 1964. For two reasons, however, these congressional efforts generally proved ineffective in preventing states, principally those in the southern region of the country, from enacting discriminatory voting laws.

First, the Fifteenth Amendment did not divest states of their authority to establish reasonable voter qualifications for state and local elections.* It is noteworthy that the Fifteenth Amendment does not confer a right to vote upon anyone. The Amendment merely provides that the right to vote, once conferred, cannot be denied or abridged on account of race, colors or previous condition of servitude. States that enacted discriminatory voting laws often sought to portray them as legitimate voter

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* State-established voter qualifications also have a direct effect upon federal elections. The first sentence of Section 2 of Article 1 of the federal Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The second sentence of the Seventeenth Amendment provides likewise for the election of United State Senators.

qualification laws. Second, the federal enforcement acts typically provided for case-by-case adjudication. Not only was such an approach expensive and time-consuming, but even when a challenge to a voting law proved successful, often the state legislature simply responded by enacting a slightly different law which would then require a new legal challenge.

In surveying the history of such discriminatory voting laws, the United States Supreme Court noted in **South Carolina v Katzenbach, Attorney General**, (383 United States 301, 311-312; 1965), that

> [t]he course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar Institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in **Guinn v United States**, 238 U.S. 347, and **Myers v Anderson**, 238 U.S. 368. Procedural hurdles were struck down in **Lane v Wilson**, 307 U.S. 268. The white primary was outlawed in **Smith v Allwright**, 321 U.S. 649, and **Terry v Adams**, 345 U.S. 461. Improper challenges [to voter qualifications] were nullified in **United States v Thomas**, 362 U.S. 58. Racial gerrymandering was forbidden in **Gomillion v Lightfoot**, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in **Schnell v Davis**, 336 U.S. 933; **Alabama v United States**, 371 U.S. 37; and **Louisiana v United States**, 380 U.S. 145.

Congress responded to the foregoing circumstance by enacting the voting rights act of 1965. In doing so, Congress was, according to the Court, motivated by two considerations:

> First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the [federal] Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. (383 US at 309.)

B. Principal Provisions of the Voting Rights Act

As originally enacted, the voting rights act consisted of 18 sections, numbered 2 through 19, of which Sections 4 and 5 were principal provisions. Section 4 authorized the United States attorney general to suspend for a five-year period any discriminatory voting test or device then in effect in any state or political subdivision subject to its terms. In additions Section 5 prohibited any state or political subdivision which was subject to Section 4 from instituting any new voter regulation -- one that was not in effect on November 1, 1964 -- without prior approval (often referred to as "pre-clearance") from a federal district court or the attorney general. Sections 4 and 5 applied to

> any State or political subdivision of a State which (1) the [United States] Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

> A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 [requiring the federal civil service commission to appoint voting examiners in certain circumstances] or section 13 [concerning the termination of coverage] shall not be reviewable in any court and shall be effective upon publication in the Federal Register.*

What made the voting rights act such an effective tool for combating discriminatory voting laws was the fact that it authorized the United States attorney general to suspend such laws in advance of any legal challenge. As the Court noted in **South Carolina v Katzenbach**, "[t]he measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication." (383 US at 327-328.) Thus, such laws no longer had to be challenged on a case-by-case basis. Furthermore, states subject to the act could not enact new voter requirements without prior approval of the attorney general.

1. Requirement of Discriminatory Intent or Purpose

In 1980, the United States Supreme Court issued a decision in a voter discrimination case that would have a significant effect upon both the voting rights act and current apportionment efforts throughout the country. Ironically, the case of **City of Mobile, Alabama v Bolden**, (446 US 55; 1980), was not even decided on statutory grounds, but rather on the basis of the Fourteenth and Fifteenth Amendments.

The plaintiffs in Mobile challenged the at-large method by which the city commission was elected, alleging that the approach violated the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs, however, offered no evidence to prove that they had ever been denied the opportunity to vote for the candidates of their choice. The city had been governed by a three-member commission since 1911 but no black resident had ever been elected to the commission. At the time of the lawsuits black residents comprised 34 percent of the city's population.

The federal district court held for the plaintiffs and ordered the city commission "disestablished" and replaced by a mayor and city council. This result was affirmed by the Court of Appeals for the Fifth Circuit. On appeal to the United States Supreme Court, a four-justice plurality reversed. The plurality opinion observed that the at-large voting system had been authorized by the Alabama Legislature and was used extensively in other parts of the country as well. The crux of the issue was whether an otherwise valid voting method, enacted without any proof of discriminatory intents was unconstitutional if it produced a discriminatory result.

The plurality of the Supreme Court concluded that prior decisions of the Court stood for the principle that "racially discriminatory motivation [intent] is a necessary ingredient of a Fifteenth Amendment violation." (446 US at 62.) Because plaintiffs had failed to prove that the city adopted its at-large voting system due to either a discriminatory intent

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*By mid-November of 1965, the coverage formula of the act applied to Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia in their entirety, and to three counties in Arizona, one county in Hawaii, one county in Idaho, and 26 counties in North Carolina. South Carolina v Katzenbach, Attorney General, (383 US 301, 318; 1965). According to the United States Department of Justice, two local units of government in Michigan, Clyde Township in Allegan County and Buena Vista Township in Saginaw County, have been-subject to the act since November 1, 1972.

or purpose, the Court found no violation. The Court reached the same conclusion with respect to the Equal Protection Clause. (Plaintiffs also had alleged a violation of Section 2 of the voting rights act, but the Court held that Section was nothing more than a restatement of the Fifteenth Amendment which, therefore, added nothing to the complaint.)

2. 1982 Congressional Amendment

The holding of Mobiles that a plaintiff who alleged a voting arrangement to be discriminatory must prove that the government acted with discriminatory intent or purpose, was short-lived. Congress reacted swiftly to the Mobile decision by amending Section 2 of the voting rights act. It should be noted that unlike Sections 4 and 5, discussed above, that apply only to certain geographic areas, Section 2 applies throughout the entire country. Section 2 now reads as follows, with the amendatory language capitalized:

> (a) No voting qualification or prerequisite to voting or standards practice, or procedure shall be imposed or applied by any State or political subdivision ~~to deny or abridge~~ IN A MANNER WHICH RESULTS IN A DENIAL OR ABRIDGEMENT OF the right of any citizen of the United States to vote on account of race or color, OR IN CONTRAVENTION OF THE GUARANTEES SET FORTH IN SECTION 4(f)2, OR AS PROVIDED IN SUBSECTION (B).
>
> (B) A VIOLATION OF SUBSECTION (A) IS ESTABLISHED IF, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, IT IS SHOWN THAT THE POLITICAL PROCESSSES LEADING TO NOMINATION OR ELECTION IN THE STATE OR POLITICAL SUBDIVISION ARE NOT EQUALLY OPEN TO PARTICIPATION BY MEMBERS OF A CLASS OF CITIZENS PROTECTED BY SUBSECTION (A) IN THAT MEMBERS HAVE LESS OPPORTUNITY THAN OTHER MEMBERS OF THE ELECTORATE TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE. THE EXTENT TO WHICH THE MEMBERS OF A PROTECTED CLASS HAVE BEEN ELECTED TO OFFICE IN THE STATE OR POLITICAL SUBDIVISION IS ONE CIRCUMSTANCE WHICH MAY BE CONSIDERED: PROVIDED, THAT NOTHING IN THIS SECTION ESTABLISHES A RIGHT TO HAVE MEMBERS OF A PROTECTED CLASS ELECTED IN NUMBERS EQUAL TO THEIR PROPORTION IN THE POPULATION. (Emphasis in original.)

The practical effect of the amendment was to reject the “intents” test enunciated in Mobile, in favor of an “effects” test. A Section 2 violation may now be alleged when, based on the “totality of the circumstances,” it is shown that the political processes, or voting systems of a governmental unit are not equally open to all members of a protected class of citizens without regard to whether that governmental unit was motivated by a discriminatory intent or purpose when it adopted the voting system in question.

Federal courts have relied upon a majority report of the United States Senate Judiciary Committee that accompanied the bill that amended Section 2 in interpreting congressional intent. In **Thornburg v Gingles**, (478 US 30, 36; 1985), the U.S. Supreme Court noted that the report set forth the following factors as being probative of a Section 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the minority group.

[And] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The **Thornburg** Court set forth three criteria that a minority group must satisfy in order to establish a Section 2 violation. Essentially, a minority group must show that it is sufficiently large and geographically compact to comprise a majority of a single-member district; that it is politically cohesive;, and that the majority group tends to vote as a bloc with sufficient regularity so as to generally defeat the preferred candidate of the minority group. As the Court itself summarized the issue, "[t]he essence of a Section 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." (478 at 47.)

While Section 2 of 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 1982, 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.

C. Whither One Person-One Vote?

Of greater consequences from a public policy standpoint, may be the change in focus of Section 2 as amended. As originally enacted, Section 2 was but a restatement of the principle underpinning the Fifteenth Amendment, that all citizens should be accorded an equal opportunity to vote. This explains why the original Section 2 was viewed at the time of its consideration by Congress as "an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute." **City of Mobile, Alabama v Bolden**, (446 US at 61.)

The focus of Section 2 as amended, however, is no longer on ensuring that individuals have an equal opportunity to vote, but rather on whether members of a protected class of citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The language of both the amended Section and the companion committee report are replete with references to members of a "class of citizens," or of a "protected class," or to "members of the minority group." Noteworthy by its absence is any reference to citizens as individuals.

This basic, but significant, philosophical difference between the original and amended versions of Section 2 was foreshadowed by the plurality and dissenting opinions in the Mobile case. The Court noted that the theory espoused by the dissenting opinion

> appears to be that every 'political group,' or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers. Moreover, a political groups' 'right' to have its candidates elected is said to be a 'fundamental interest,' the infringement of which may be established without proof that a state has acted with the purpose of impairing anybody's access to the political process. Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. (446 US at 75.)

Depending upon how federal courts choose to interpret Section 2, what was dismissed by the plurality as "political theory" may in fact become the supreme law of the land. While Section 2 disavows "a right to have members of a protected class elected in numbers equal to their proportion in the population," it may nevertheless encourage that result. Legal challenges that have already been filed in several states suggest that how the Section should be interpreted is anything but clear. State and local governments may reasonably conclude that the surest means of avoiding the expense of defending a voting rights act challenge, as well as the moral stigma that attaches to an accusation that minorities are being denied the right to vote, lies in adopting an apportionment plan that simply allocates to each protected group its proportionate share of representation. If so, this would be an unfortunate result since it would promote the balkanization of voters along lines of ethnicity.*

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*While the voting rights act is generally considered in the context of legislative apportionment, in 1991, the United States Supreme Court held that Section 2 as amended also applies to elected state judiciaries. Chisom v Roemer, (111 SCt 2354; 1991). The Court had already so held with respect to Section 5 of the act. Clark v Roemer, (111 SCt 2096; 1991). The Chisom decision raises a question regarding the extent to which certain judicial districts from which judges are elected in Michigan satisfy Section 2 of the voting rights act.

The right to vote, and other rights that are either conferred or protected by a constitution, has traditionally been considered to inhere to individuals rather than to groups. As suggested at the outset of Part II, at some as yet undefined point, the attempt to ensure electoral outcomes by protecting group voting strength and the philosophical basis underlying the principle of one person, one vote -- that citizens are entitled to representation as individuals -- suggest incompatible goals, both of which cannot be fully achieved.

For examples the Michigan Court of Appeals is composed of 24 judges, eight of whom are elected from each of three districts established by the Michigan Legislature through Public Act 279 of 1986. However, neither the judicial article of the Michigan Constitution, nor the requirements of good government, dictate that Court of Appeals Judges must be chosen from three multi-member districts rather than from 24 single-member districts. While multi-member districts are not per se violative of the federal Constitution, multi-member districts together with other "social and historical conditions" (such as those set forth above at Page 26) may be probative of a violation of Section 2 of the voting rights act. Furthermore, while Section 2 does not require proportional representation, it is noteworthy that the percent (8.3) of minority judges presently on the Michigan Court of Appeals is significantly less than the percent (13.9) of black residents in Michigan as enumerated by the 1990 census, and that neither Judge was initially elected to the Court.