HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978

Article III: Reapportionment in Hawaii (Volume II)

Craig Kugisaki

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813

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Richard F. Kahle, Jr.
Editor

Samuel B. K. Chang
Director

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REAPPORTIONMENT YEARS

Section 4. The year 1973 and every eighth year thereafter shall be reapportionment years.

REAPPORTIONMENT COMMISSION

A legislative reapportionment commission shall be constituted on or before March 1 of each reapportionment year and whenever reapportionment is required by court order. The commission shall consist of nine members. The president of the senate and the speaker of the house of representatives shall each select two members. Members of each house belonging to the party or parties different from that of the president or the speaker shall designate one of their number for each house and the two so designated shall each select two members of the commission. The eight members so selected shall, promptly after selection, be certified by the selecting authorities to the chief election officer and shall within thirty days thereafter select, by a vote of six members, and promptly certify to the chief election officer the ninth member who shall serve as chairman of the commission.

Each of the four officials designated above as selecting authorities for the eight members of the commission shall, at the time of the commission selections, also select one person from each basic island unit to an apportionment advisory council for that island unit. The councils shall remain in existence during the life of the commission and each shall serve in an advisory capacity to the commission for matters affecting its island unit.

A vacancy in the commission or a council shall be filled by the initial selecting authority within fifteen days after the vacancy occurs. Commission and council positions and vacancies not filled within the times specified shall be filled promptly thereafter by the supreme court.

The commission shall act by majority vote of its membership and shall establish its own procedures except as may be provided by law.

Not more than one hundred twenty days from the date on which its members are certified the commission shall file with the chief election officer a reapportionment plan, which shall become law after publication as provided by law. Members of the commission shall hold office until the reapportionment plan becomes effective or until such time as may be provided by law.

No member of the reapportionment commission or an apportionment advisory council shall be eligible to become a candidate for election to either house of the legislature in either of the first two elections under any such reapportionment plan.

Commission and apportionment advisory council members shall be compensated and reimbursed for their necessary expenses as provided by law.

The chief election officer shall be secretary of the commission without vote and, under the direction of the commission, shall furnish all necessary technical services. The legislature shall appropriate funds to enable the commission to carry out its duties.

6. Where practicable, representative districts shall be wholly included within senatorial districts.

7. Not more than four members shall be elected from any district.

8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

MANDAMUS AND JUDICIAL REVIEW

Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan, or it may take such other action to effectuate the purposes of this section as it may deem appropriate. Any such petition must be filed within forty-five days of the date specified for any duty or within forty-five days after the filing of a reapportionment plan. [Am Const Con 1968 and election Nov 5, 1968]

ELECTION OF MEMBERS; TERM

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

Article IV
EDUCATION

BOARD OF EDUCATION

Section 2. There shall be a board of education composed of members who shall be elected by qualified voters in accordance with law. At least part of the membership of the board shall represent geographic subdivisions of the State. [Am HB 4 (1963) and election Nov. 3, 1964]

CHIEF ELECTION OFFICER

The legislature shall provide for a chief election officer of the State, whose responsibilities shall be as prescribed by law and shall include the supervision of state elections, the maximization of registration of eligible voters throughout the State and the maintenance of data concerning registered voters, elections, apportionment and districting.

APPORTIONMENT AMONG BASIC ISLAND UNITS

The commission shall allocate the total number of members of each house being reapportioned among the four basic island units, namely (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered in the last preceding general election in each of the basic island units and computed by the method known as the method of equal proportions, except that no basic island unit shall receive less than one member in each house.

MINIMUM REPRESENTATION FOR BASIC ISLAND UNITS

The representation of any basic island unit initially allocated less than a minimum of two senators and three representatives shall be augmented by allocating thereto the number of senators or representatives necessary to attain such minimums which number, notwithstanding the provisions of Sections 2 and 3 of this article shall be added to the membership of the appropriate body until the next reapportionment. The senators or representatives of any basic island unit so augmented shall exercise a fractional vote wherein the numerator is the number initially allocated and the denominator is the minimum above specified.

APPORTIONMENT WITHIN BASIC ISLAND UNITS

Upon the determination of the total number of members of each house to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of registered voters per member in each district is as nearly equal to the average for the basic island unit as practicable.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.
2. No district shall be so drawn as to unduly favor a person or political faction.
3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
4. Insofar as practicable, districts shall be compact.
5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and when practicable shall coincide with census tract boundaries.

Chapter 1
INTRODUCTION

The problems involved in reapportionment are basic to the character of democratic government. The method of apportioning the number of elected officials and dividing political units into districts provides the framework for the selection of legislative representatives. In the last 15 years, no part of the representative process has undergone more rapid change than this aspect of selecting elected officials. Since 1962, the courts have required revolutionary changes in the standards used for apportioning elected public bodies.

Apportionment can be defined as "the division of a population into constituencies whose electors are to be charged with the selection of public officers".[1] Generally, this involves three basic steps: (1) the definition of the basis of representation--people, governmental unit, special interest groups, etc.; (2) the delineation of the geographic area from which elected officials are to be selected; and (3) the allocation of available representative seats among the districts established.[2] United States Supreme Court decisions since 1962 have held that, as a constitutional requirement, all states and local governments must use population as the basis of representation, and that representatives must be allocated among districts of substantially equal numbers of people.

Indeed, in 1970, the United States Supreme Court laid down the general rule that:[3]

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

State and local government apportionment plans which grant representation to geographical areas or political subdivisions without regard to the equal

population principle enunciated by the court are now unconstitutional. "The weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."[4]

In recent years, the courts have applied these principles to almost all types of popularly elected public bodies, including the U.S. Congress, state legislatures, city and county councils, and school boards. A look at state legislative bodies evidences the root of the reapportionment problem.

DEVELOPMENT OF MALAPPORTIONMENT

The democratic standard of population-based apportionment in both legislative houses is nothing new to the experience of American states, even though many state legislatures in the twentieth century have deviated greatly from this standard. The history of apportionment shows that the states considered population to be the basic factor in the apportionment of legislative seats when their first constitutions were adopted. The original constitutions of 36 states required that representation be based completely, or almost so, on population. Of the 20 states joining the Union after ratification of the federal constitution and prior to the Civil War, only two, Florida and Vermont, provided for legislative representation on some basis other than population for both houses.[5]

Even in those states which originally provided for apportionment based on political subdivisions, representation did not differ greatly from the distribution of the states' population. Frontier conditions of isolation and poor communications provided a rationale for the representation of every political unit. The deviations from a population standard often made little practical difference in the 18th and 19th centuries. The distribution of a state's inhabitants then was fairly equal and the number of counties comparatively few.[6]

Around the start of the 20th century, however, it became evident that significant population shifts were causing legislative districts to differ

significantly in population size. The United States was changing from a country predominantly rural to a nation overwhelmingly urban and suburban. These population changes, however, were not being reflected in legislative representation.

Rural dominance was natural and logical in the 19th century, because the nation's character was largely agrarian. But the failure of state representative bodies to adapt to the changing nature of American society in the 20th century resulted in serious apportionment and districting problems. By the time the Supreme Court assumed jurisdiction over reapportionment cases in March of 1962, inequality of legislative representation was solidly entrenched in all but a handful of the 50 states. The pattern of legislative representation revealed sharp disadvantages to growing urban and suburban areas. Rural districts with declining populations enjoyed a political power based on an importance long since gone.

METHODS OF MAINTAINING MALAPPORTIONMENT

As the nation's population continued to shift from rural to urban areas, two major approaches were used by rural-dominated legislatures to maintain malapportionment:

(1) Restrictive constitutional provisions protecting rural interests were frozen in state constitutions; and

(2) Legislatures refused to carry out their duty to reapportion seats in accordance with population shifts.

Restrictive constitutional provisions took a variety of forms. Some state constitutions guaranteed a certain number of representatives to each geographic area or political subunit, regardless of its population. Other methods of limiting the representation of urban areas included: (1) formulas and ratios that allowed progressively less representation to the more populous communities, (2) provisions against dividing counties into districts, (3) minimum representation for each county, and (4) maximum limits on representation for populous counties

and cities. Such provisions guaranteed rural areas more representation than they would be entitled to if apportionment were based strictly on population.

In some states, apportionment provisions which granted direct representation to geographic areas or political units in the 18th and 19th centuries were simply frozen in the constitutions to stave off the effects of population changes in the 20th century. In other states, the legislatures deliberately changed population requirements in their constitutions to geographic ones in order to limit the growing power of the cities. One survey showed that by the early 1960's population was the dictated criterion for apportionment in only 20 of the state senates and in 17 of the lower houses.[7] Furthermore, there were only 9 states with no constitutional restrictions of any consequence upon a fully democratic pattern of population representation in both houses. These states were Indiana, Kentucky, Massachusetts, Minnesota, Oregon, South Dakota, Virginia, Washington, and Wisconsin.[8]

The second, though less extensive, cause of unrepresentative state legislatures was the common failure of lawmaking bodies to obey their own constitutional requirements for periodic reapportionment. Most state constitutions called for periodic reapportionment of one or both houses, usually after every federal census. These provisions usually went unobserved and unenforced. The overwhelming majority of state legislatures simply refused to reapportion or redistrict during the first sixty years of this century. "It is virtually impossible to find an example, from 1901 to 1962, of an apportionment fairly and equitably performed which was voluntarily initiated by a state legislature."[9]

In some states, representative inequalities were the result of both constitutional restrictions and legislative failure to reapportion. This used to be the case in Hawaii. The Hawaii Constitution traditionally guaranteed senate representation to the outer island counties disproportionate to the size of their populations. In addition, the legislature failed to reapportion the population-based house of representatives for over 50 years.

The court decisions of the 1960's required that the states take the necessary reapportionment steps. In states like Hawaii, the legislatures acted quickly to comply with the court's reapportionment orders. In cases where the states failed to comply, the courts themselves intervened and performed the reapportionment function.

EFFECTS OF MALAPPORTIONMENT

The unrepresentative character of state legislatures had serious effects on legislative representation and on the conduct of state government. It affected the balance of power among different groups within the states, the policies enacted or not enacted by the legislatures, and the role of the states within the federal system.

Rural-Urban Balance

Due to restrictive constitutional provisions and legislative refusal to reapportion, citizens living in urban or suburban districts were accorded much less political weight than rural or small-town residents. Since the average urban constituency had grown considerably more populous than the typical rural district, a city representative might speak for upwards of 50,000 persons while a rural legislator might represent only 10,000. The discrepancies in some states were much more striking. In the late 1960's, for example, the most populous district in the Vermont house of representatives contained 987 times more people than did the least populous district, yet each was accorded one representative.[10] The result in many states was minority rule by artificially created legislative majorities.

Two-Party System

Apportionment systems allowing urban areas less legislative strength than their populations merited gave an immediate advantage to the political party or

faction which was strongest in the rural areas. This often resulted in legislative control by the minority party of the state. As a general rule, it was the republican party in the North and Midwest which benefited from the extra representation granted rural areas. On the other hand, in the South and some border states it was the democratic party which reaped the benefits of malapportionment. Granting an unfair legislative advantage to one party also increased the likelihood of divided government. A minority party frequently controlled the legislature while the governorship was won by the statewide majority party. In addition, malapportionment affected the balance of rural-urban factions within each party.

Legislative Policy

Granting a representational advantage to particular geographic or political groups meant that these groups were able to exert more influence on legislative policy than their relative numbers merited. Growing urban problems were inadequately dealt with by rural-dominated legislatures. Discrimination in favor of sparsely populated areas characterized the distribution of tax revenues, the sharing of tax burdens, the allocation of grants-in-aid, and the provision of state services. In addition, rural conservative elements were in a position to block social and economic legislation desired by many liberal urban groups.

Federal System

Because needed funds and services were in many cases not supplied by state governments, metropolitan areas turned to the federal government where they had greater influence. The consequence of the federal government's response to their needs was increasing federal involvement in state affairs and a decrease in public confidence in the ability of state governments to solve urban problems.[11]

The foregoing presents a general background to the reapportionment problem of the early 1960's by focusing on the malapportionment of state

legislatures. The following portions of this study will discuss the specific details of reapportionment, in the particular context of Hawaii. Chapter 2 deals with the legal aspects of the reapportionment problem, with primary emphasis on the case development of judicial guidelines for reapportionment. Chapter 3 sets forth the Hawaii experience in the reapportionment of the state legislature. Focus then turns to school board apportionment in chapter 4. Case law as well as the apportionment problems of Hawaii's elected Board of Education is treated in this chapter. In chapter 5, recent issues regarding congressional districting are presented. The hurried reader may wish to quickly pass over the legal and historical overview presented by those first five chapters.

The last three chapters focus on the issues of greatest decisional relevance for Hawaii's Constitutional Convention delegates. Chapter 6 sets forth the questions and arguments raised by alternative bases for apportioning representative bodies. In this chapter, five measures of population are analyzed. In chapter 7, the mechanics of apportionment and districting are considered. Various tools for affecting gerrymandering in the reapportionment process provide the focus for this chapter. Finally, the last chapter deals with the machinery for reapportionment. Chapter 8 addresses questions such as who should perform the reapportionment; how can it be enforced; and how frequently should elective bodies be reapportioned.

Chapter 2
JUDICIAL BACKGROUND AND LEGAL CONSIDERATIONS

PART I. INTRODUCTION

This chapter provides delegates to the Hawaii State Constitutional Convention with an overview--historic and factual--of the legal aspects of the reapportionment problem and of the guidelines that the United States Supreme Court has established concerning specific issues in reapportionment.

The courts have provided the impetus in reforming malapportionment and have prescribed the constitutional framework within which it is to operate. Accordingly, this chapter is case-oriented, to alert delegates to the presence of constitutional shoals in reapportioning the state legislature. Discussion will be limited to the court's decisions regarding the apportionment of state legislatures. Detailed examination of the court's actions regarding the apportionment of other publicly elected bodies is discussed in later chapters.

Within the framework of the constitutional limitations set by the courts there is still a vast array of policy considerations on which the delegates to the convention will have to make decisions. This study, particularly, the later chapters makes some observations on these policy considerations. Within the context of the reapportionment function, the constitutional requisites contained in this chapter should be viewed as guideposts rather than obstacles on the path toward more representative democracy.

PART II. A CAPSULE SURVEY OF REAPPORTIONMENT IN THE COURTS FROM COLEGROVE TO REYNOLDS

Before 1962, the courts generally declined granting judicial relief from malapportionment. In Colegrove v. Green, 328 U.S. 546 (1946), the U.S. Supreme Court refused to grant relief from grossly malapportioned Illinois congressional districts[1] on the ground that judicial intervention would require

review of political questions not appropriate for judicial remedy. "Courts ought not to enter this political thicket", wrote Justice Frankfurter in 1946.

So the law remained until 1962, when the U.S. Supreme Court held in Baker v. Carr, 369 U.S. 186, that reapportionment cases were indeed justiciable and amenable to judicial relief when appropriate. That decision concerned the threshhold issue of justiciability only and not the merits of the controversy, but it opened the door to numerous reapportionment cases.

In February 1964, the U.S. Supreme Court first decided a reapportionment case on its merits in Wesberry v. Sanders, 376 U.S. 1. It invalidated a system in which certain congressional districts in Georgia had two to three times as many people as other districts. Each district elected one congressperson. The Court agreed that the vote of a person in a more heavily populated district is diluted in comparison with the vote of a person in a much less populated district. It held that Article I, section 2, of the Constitution, which provides that representatives be chosen "by the People of the several States" means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's".[2] However, two points must be noted. First, Wesberry involved congressional districting but not state legislative apportionment. Second, the controversy focussed on Article I, section 2 of the Constitution and not the equal protection clause of the Fourteenth Amendment.

On June 15, 1964 the U.S. Supreme Court squarely passed upon the apportionment of state legislatures in Reynolds v. Sims, 377 U.S. 533, and its five companion cases, WMCA, Inc. v. Lomenzo, 377 U.S. 633 (from New York); Maryland Committee v. Tawes, 377 U.S. 656 (from Maryland); Davis v. Mann, 377 U.S. 678 (from Virginia); Roman v. Sincock, 377 U.S. 695 (from Delaware); and Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (from Colorado). The situation in Reynolds v. Sims was not atypical. The Alabama constitution provided for population-based apportionment of the senate and the house of representatives, and for reapportionment by the legislature after each decennial federal census. The last apportionment was based on the 1900 census and the legislature had never reapportioned itself thereafter. Population shifts and

uneven population growth resulted in gross malapportionment. According to the 1960 census, the number of persons represented by a representative varied from 6,731 to 104,767. The number of persons represented by a senator varied from 15,417 to 634,864.

The Court begain its analysis by pointing out that the right of suffrage is constitutionally protected[3] and recited its one-man one-vote principle established in the Wesberry case:[4]

> ...Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Acknowledging that Wesberry was not directly germane because it involved congressional apportionment, the Court set forth its rationale for bringing state legislative apportionment under the umbrella of the equal protection clause. The Court reasoned that districts with unequal numbers of persons had the effect of diluting the value of the vote in the more populous district. It said:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.... 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 ten times for their legislative representatives, while voters living elsewhere could vote only once.... Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluations of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.[5] ...To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.... Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause.[6]

Then it announced its holding that such a dilution of the voting right was a violation of the Equal Protection Clause:[7]

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

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that seats in both houses of a bicameral state legislature be apportioned substantially on a population basis.[8] Elaborating upon this holding, the Court stated:[9]

> [W]e mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

The specifics of how those with reapportionment responsibilities were to comply with the Court's broad one-man, one-vote standard were not enumerated in those early cases. Later court decisions were to provide more specific guidelines delineating the bounds of a constitutional reapportionment plan. The remainder of this chapter examines the constitutional requisites for compliance with the equal population principle enunciated by the Court to date.

PART III. SCOPE OF JUDICIAL REVIEW OF AN APPORTIONMENT PLAN

In reviewing a state's legislative apportionment plan, courts "must of necessity consider the challenged scheme as a whole in determining whether the particular state's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of

the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the state's voters, in both houses of a bicameral state legislature".[10]

In a bicameral system, the scheme of representation provided by one house must be evaluated in relation to the kind of representation provided in the other in order that a "total scheme of apportionment best suited to the State's needs"[11] may be constructed.

As stated by the U.S. Supreme Court in Reynolds v. Sims, 377 U.S. at 576-577:

> Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

The U.S. Supreme Court has established the broad policy of reviewing apportionment as a total scheme of both houses of a legislative body. It also has addressed itself to the principles relative to a bicameral legislative system. But the Court has not expressly applied the concept to other legislative systems at this level of government, e.g. a parliamentary system. Since the constitutional convention may consider legislative structures different from the present bicameral system, such as a unicameral legislature or a parliamentary form of government, it should be noted that the "one man, one vote" principle has been applied to unicameral bodies such as city and county councils[12] and school boards.[13]

PART IV. "POPULATION" AS AN APPORTIONMENT BASE AND THE RELATION OF THE REGISTERED VOTERS MEASURE TO IT

There have been numerous bases for apportioning the elected representatives of legislative bodies. Geographical areas, political subdivisions, and other criteria have been used as alternative mechanisms for allocating the representational composition of governmental policy-making bodies. In addressing the malapportioned state legislature in Reynolds v. Sims, the United States Supreme Court established that apportionment must be based substantially on "population".[14] The Court further held in a companion case, Lucas v. Colorado General Assembly, that a state's failure to utilize a population based apportionment scheme cannot be justified or ratified by a vote of the state's electorate.[15]

In Lucas, a majority of the voters in every county in the State of Colorado voted in favor of a plan which did not conform to the equal population principle. In doing so, the voters rejected an alternative plan which was population based. The defendants in Lucas advanced this expression of the will of the people in support of the validity of the apportionment plan in question. To this the U.S. Supreme Court replied that:[16]

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.

The courts have further specified that reference to the federal legislative structure is not appropriate when apportioning non-congressional representative districts. In Reynolds, the Court stated that analogy to the federal system of a nonpopulation-based senate coupled with a population-based lower house is "inapposite and irrelevant to state legislative districting schemes".[17] The federal system was conceived out of compromise and concession among the sovereign states in the establishment of the Federal Republic. Political subdivisions of a state, on the other hand, are creatures of the state and have never been considered as sovereign entities. "The relationship of the states to

the federal government could hardly be less analogous."[18] The court viewed reliance on the federal analogy as "little more than an after the fact rationalization offered in defense of maladjusted state apportionment arrangements".[19]

Although, the U.S. Supreme Court held in 1964 that both houses of a bicameral legislature must be apportioned substantially on a "population basis", it did not elaborate on the definition of "population".[20]

A later 1966 decision, Burns v. Richardson, 384 U.S. 73 (1966), which concerned Hawaii reapportionment shed some light. According to the Court:

> 1. The Equal Protection Clause does not require the use of "total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured".[21] [emphasis added]
>
> "Aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" need not be included in the apportionment base as a matter of constitutional law. The decision to include or exclude any such group is a matter within the discretion of the body charged with determining the state policy in this field, so long as the classification is not one that the constitution forbids.[22]
>
> 2. Compliance with the equal population rule of Reynolds v. Sims is to be measured by the resulting apportionment base.[23]
>
> 3. State citizen population is a permissible population base. However, such figures might be hard to obtain or extrapolate.[24]
>
> 4. An apportionment based on registered voters satisfies the Equal Protection Clause if it produces an apportionment "not substantially different from that which would have resulted from the use of a permissible population base".[25] Presumably, "registered voters" itself is not a permissible population base.
>
> 5. Use of a registered voter basis presents certain problems. Such a basis depends upon the extent of political activity of those eligible to register, which might be subject to suppression. Sudden and substantial fluctuations in registration may be caused by such fortuitous factors as a particularly controversial election issue, a particularly popular candidate or even weather conditions.[26]
>
> 6. The fact that an apportionment based on registered voters does not approximate one based on total population is insufficient to

establish constitutional deficiency if the difference can be sufficiently explained, for example, by the distribution of nondomiciliary military personnel. "It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base."[27]

7. Findings that military population distribution was sufficient to explain the differences between total population and registered voters apportionments, that state laws neither preclude members of the military from establishing residence in the State and becoming eligible to vote nor aim to disenfranchise the military or any other group of citizens, and that a high proportion of the possible voting population is registered were sufficient to indicate that the interim apportionment in question, based on registered voters, substantially approximated that which would have appeared had state citizen population been the guide, in the absence of evidence to the contrary.[28]

8. Blanket exclusion of all military and military-related personnel from the population base is unconstitutional. "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."[29] However, exclusion of those not meeting a state's residence requirements is constitutionally permissible. "The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a state's residence requirements is a difference between an arbitrary and a constitutionally permissible classification."[30]

9. It did not hold that "the validity of the registered voters basis as a measure has been established for all time or circumstances,..."[31] It suggested that reapportionment more frequently than every ten years, perhaps each four or eight years, "would better avoid the hazards of its use". States must provide some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment meets the minimum requirements for maintaining a reasonably current scheme of legislative representation.[32] The court suggested that "use of presidential election year figures might both assure a high level of participation and reduce the likelihood that varying degrees of local interest in the outcome of the election would produce different patterns of political activity over the State."[33] It appears that even if the state constitution were to prescribe use of the registered voter basis in apportionment, a person may challenge a resulting apportionment as being violative of the Equal Protection Clause if it does not substantially approximate an apportionment based on state citizen population or other permissible population basis.

Thus, the Court provided flexibility in how states measure population for the purposes of legislative apportionment.

PART V. REPRESENTATIVENESS OF APPORTIONMENT

Whatever the measure of population used, the Court has not established rigid or uniform mathematical standards or formulas in evaluating the constitutional validity of a legislative apportionment scheme. Rather, the Court seeks "to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination".[34] In this regard, the Supreme Court in its early cases disapproved the suggestion that population variance ratios smaller than 1-1/2 to 1 would presumably comport with minimal constitutional requisites, while ratios in excess thereof would necessarily involve deviations from population-based apportionment too extreme to be constitutionally sustainable.[35]

The Court felt that some deviation from a strict population standard may be permissible if "based on legitimate considerations incident to the effectuation of a rational state policy";[36] provided that population is not submerged as the controlling consideration.[37]

The use of political, natural or historical boundary lines to avoid indiscriminate districting that invites partisan gerrymandering; to accord political subdivisions some independent representation; and to maintain compactness and contiguity are examples of such "rational state policy" that may justify minor departures from the population principle.[38] However, an apportionment scheme of giving at least one seat to each county regardless of population, particularly when there are many counties with sparse populations, would submerge the equal population principle to an extent that the resulting deviation would not be constitutionally permissible.[39]

"Rationally justifiable" divergences from equality of population to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house may be permissible. On the other hand, divergences, though minor, "may be cumulative instead of

offsetting where the same areas are disadvantaged", in which case the apportionment would be questionable.[40] What is marginally permissible in one state may be unsatisfactory in another depending on the particular circumstances of the case.[41]

"Neither history alone nor economic or other sorts of group interest" nor "considerations of area alone" nor distance, in light of modern modes of transportation and communication,[42] nor geographic or topographic considerations,[43] can justify departures from the equal population standard. Neither can a policy of protecting "insular minorities" and according recognition to a state's "heterogeneous characteristics" justify substantial deviations from the equal population standard,[44] nor can an attempt to balance urban and rural power in the legislature.[45]

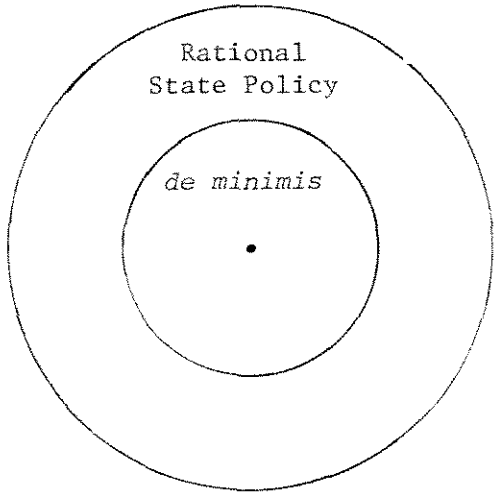
Reynolds and its five companion cases established conceptual standards within which the one-man one-vote principle is to be applied to reapportionment plans. In 1973, the U.S. Supreme Court decided a number of cases that further clarified how the representativeness of state apportionment plans complying with the equal population principle is to be measured.

In measuring the extent of representativeness, the Court generally looks to the percentage deviation from the ideal number of persons per representative.[46] This index of representativeness can be explained by use of an example. Assume that the statewide average or ideal number of persons represented by a legislator is 10,000, and that a certain district has 11,000 persons, or an excess of 1,000 persons over the ideal number. Division of 1,000 by 10,000 yields +10 per cent, the percentage deviation. By similar computation a district of 9,000 persons, or 1,000 less than the ideal number would have a minus percentage deviation of -10 per cent. Districts of less than average population, and therefore overrepresented, will have a minus percentage. Those of more than average population, and therefore underrepresented, will have a plus percentage.

Use of these percentages can be put within a framework for analysis. There is a relationship between the ideal number of people per representative

and the "legitimate considerations incident to the effectuation of a rational state policy".[47] Their relationship and differences are depicted in Figure 1.

Figure 1



In the figure, the center dot represents the ideal number of people per representative. The first concentric band around the dot labeled, "de minimis", represents the range of deviations which might be considered to be unavoidable and thus acceptable without question in all cases. The second concentric band labeled, "rational state policy", represents the range of deviations (over and beyond the de minimis range) which are permissible if they result because of "legitimate considerations incident to the effectuation of a rational state policy".

De Minimis Deviations

Before 1973, although it acknowledged that relatively small or de minimis deviations are practically unavoidable, the U.S. Supreme Court never sought to establish any range of deviations which could be considered to be de minimis. Indeed, the Court in case after case insisted that no such range could be established, that the establishment of any de minimis deviation would be arbitrary and inconsistent with the standard of "as nearly as practicable", that whether any deviation is de minimis must be determined based on the

circumstances of the case, that what is marginally permissible in one instance may not be permissible in another. Consistent with this stance, the Court seemed always to insist that, if the deviations can be reduced by apportioning in another way, that other route must be followed.

1. White v. Regester. In June 1973, the Court decided the case of White v. Regester, 412 U.S. 755. In that case, the 150-member Texas house of representatives was apportioned among 79 single-member districts and 11 multimember districts. The ideal number of people per representative was 74,645. The largest and smallest district and the per cent by which each deviated from the ideal number of people per representative were as follows:

	POPULATION PER REPRESENTATIVE	% DEVIATION FROM THE IDEAL
Largest District.....	78,943	-4.1
Smallest District.....	71,597	+5.8
Total Deviation.....		9.9

Texas offered no justification for the deviations. In fact, it appeared that the deviations among the districts could be lowered by adopting another plan.

The U.S. Supreme Court held that a total deviation of 9.9 per cent is relatively minor (de minimis) and is constitutionally permissible, even without justification. It held that a mere showing that there is a total deviation of 9.9 per cent or that another plan could be conceived with lower deviations among districts is not enough to invalidate the plan, that, to overturn an apportionment plan which has a 9.9 per cent total deviation, something more must be shown to prove that the plan is invalid under the Equal Protection Clause.[48]

2. The outer boundary. How much greater than 9.9 per cent may the total deviation be and yet be valid without justification? What is the outer boundary of the first concentric band shown on Figure 1? The Court does not answer this question precisely in White v. Regester. However, some guideline may be gleaned from the following.

In White v. Regester, the Court in approving the 9.9 per cent total deviation said, "Very likely, larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy.'"[49] Then, again, in Abate v. Mundt,[50] a case involving the apportionment of a county board of supervisors decided two years before the White case, the Court held that a total deviation of 11.9 per cent requires justification. Similarly, in 1975 the Court held that a deviation of 20 per cent was constitutionally impermissible.[51] Since the Court in the White case expressed no misgivings about the Abate case and in the light of the caution expressed in the White case about total deviations exceeding 9.9 per cent, it might be argued that the Court has drawn a line somewhere around 10 per cent--deviations beyond that amount requiring justifications and deviations less than that amount requiring no justification.[52]

Deviations Based on Effectuation of Rational State Policy

Under the holding of White v. Regester, deviations greater than de minimis must be justified "based on legitimate considerations incident to the effectuation of a rational state policy". Before 1973, although the Court acknowledged that maintenance of the integrity of political subdivision (county, city, etc.) boundary lines is a rational state policy, it never enunciated clearly to what degree districts may depart from the ideal number of people per representative in cases where such rational state policy was being sought to be implemented. Indeed, in a number of cases it held that the deviations were too large although effectuation of a state policy to recognize political subdivision lines was offered as justification for the deviations.

1. Mahan v. Howell. In February 1973, the U.S. Supreme Court decided the case of Mahan v. Howell.[53] There, the State of Virginia's 100-member House of Representatives was apportioned among 52 single-member, multi-member and floater delegate districts. The total deviation between the largest district and the smallest district was 16.4 per cent, thusly:

	% DEVIATION FROM THE IDEAL
Largest District	+9.6
Smallest District	-6.8
Total Deviation	16.4

The State of Virginia sought to justify the deviations on the policy of the state legislature to maintain the integrity of traditional county and city boundary lines. It claimed that it could not lower the deviation and still maintain such integrity.

The U.S. Supreme Court decided this case via a two-step process. First, it held that respecting the integrity of political subdivision lines is a rational state policy which was consistently applied in this case. As such, there was sufficient justification for Virginia to exceed the de minimis level in the deviations among the districts. Having established this, the Court then took the next step.

In the second step, the Court at the outset noted that, although the deviations may exceed the de minimis level if they are caused by the effectuation of a rational state policy to respect the boundary lines of political subdivisions, nonetheless, those deviations must be within reasonable limits. In the words of the Court,

> For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.

Then the Court examined the 16.4 per cent total deviation and found that this deviation does not exceed constitutional limits.

2. The Outer Boundary. How much greater than 16.4 per cent may a total deviation be and yet be within constitutional limits in cases where the deviation is the result of the effectuation of a rational state policy, such as

recognizing the integrity of political subdivision lines? There is no precise answer in Mahan v. Howell. However, again, as in the de minimis situation, some guidelines may be gleaned from what the Court said in Mahan and from its holdings in prior cases.

In Mahan v. Howell, the Court, while approving the 16.4 per cent total deviation, said that that deviation "may well approach tolerable limits". Then, the legislative apportionment plans which the Court struck down in earlier cases on the ground that the deviations were too large (although the states sought to justify those deviations on the basis of effectuating a rational state policy of respecting political subdivision lines) had total deviations of 26.4 per cent,[54] 25.6 per cent,[55] 33.5 per cent,[56] 28.2 per cent,[57] and 24.8 per cent.[58] The Court's utterance in the Mahan case and its ealier decisions appear to suggest that not much more than 16.4 per cent total deviation would be permissible even if there is justification based on some rational state policy.

Parallel to the issue of representativeness as determined by population per elected official is the question of representational structure. Where population per representative quantitatively insures voter equality, issues of representational structures look to ex ante qualitative assessments of a citizen's vote. Four types of representational structures that affect the quality of the voting right--multimember districts, floater districts, place systems, and fractional voting--have been presented to the court. Each structural type, in turn, is reviewed by the parts that follow.

PART VI. MULTIMEMBER DISTRICTS AND VOTER STRENGTH DILUTION

Among the issues of representational structure, the validity of multimember districts stands out as the question most frequently litigated. Unlike in single-member districts, the residents in multimember districts have two or more representatives elected from the district on an at-large basis. Citizens in such districts vote for more than one representative.

The general rule is that so long as substantial equality of population per representative is maintained, a districting plan including multimember districts is constitutionally permissible if it does not operate to dilute the voting strength of racial or political elements of the voting population. In applying this standard, the Court has developed two distinct lines of authorities. Different criteria for judicial review have been established and the lines of cases are distinguishable on the basis of who performs the districting. Where nonjudicial bodies like the legislature create multimember districts, less rigorous standards of analysis are used. In contrast, where court-ordered districting plans are devised, single-member districts are preferred to multimember districts.

The line of cases dealing with multimember districts designed by state legislatures goes back to 1964. In Reynolds v. Sims,[59] the Court indicated that a state might devise an apportionment plan for a bicameral legislature with one body composed of at least some multimember districts. Enlarging upon that suggestion the following term, the Court reversed a lower court holding that multimember districts were per se unconstitutional.[60] In Fortson v. Dorsey, the Court rejected a lower court holding that multimember districts are per se unconstitutional and the notion that Equal Protection requires the formation of single-member districts. The mere assertion that multiple member districting has possible weaknesses was insufficient to establish a violation of Equal Protection. Although the Court acknowledged that multimember districts, in particular circumstances, may operate to dilute the voting strength of groups within a district, the person challenging the multimember plan as unconstitutional had not demonstrated an actual minimization or cancellation of voting power.

The Court further expanded upon this holding in a case from Hawaii. In Burns v. Richardson,[61] the Court concluded that "the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts."[62] Instead, citing Fortson, the Court concluded that there must be evidence that a denial of access to the political process has taken place.[63] The person challenging such a system must bear the burden of demonstrating that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular

case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[64] Under the standard, both houses in a bicameral legislative system may contain multiple member representative districts.

The Court has set no rigid standards for what type of evidence is necessary to establish a violation of Equal Protection voting rights through multimember districts. Such evidence may be developed where the multimember districts compose a larger part of the legislature; where both bodies in a bicameral legislature utilize multimember districts; or where the members' residences are concentrated in one part of the district. A survey of U.S. Supreme Court decisions, however, shows only one case in which the Court found that multiple member districts were being used invidiously to cancel out or minimize the voting strength of a minority group.[65]

In a case where no invidious cancellation of voting strength was found, United Jewish Organizations of Williamsburg, Inc. v. Carey,[66] the Court held that the white population was not fenced out of the political process. These non-white majorities were created in certain districts to enhance the election probability of non-whites because compliance with section 5 of the federal Voting Rights Act required New York to alter the size of the non-white majorities in a number of districts. The total number of districts with non-white majorities was not changed. In order to raise the size of the non-white majority of one district from 61 per cent to 65 per cent, a community of approximately 30,000 Hasidic Jews was split between two Senate and two Assembly districts. On behalf of that Hasidic community, the petitioners argued that such a plan would dilute the value of their voting strength by halving its effectiveness solely for the purpose of achieving a racial quota and on the basis of race.

Although the challenged plan contained only single-member districts, the Court relied on two arguments advanced in cases involving multimember districts. First, the Court found that as a group, whites still were provided fair representation. The court asserted that voters do not have a constitutional complaint merely because their candidate has lost at the polls and the person elected is one for whom they did not vote.[67] Second, the Court further went on

to explain that within population apportionment standards, the state may alter the voting strength of any group or party to create proportional representation within the legislature. The Court upheld the racially motivated districting by analogizing its effect to that of a change from multimember to single-member districts. Just as the states carve single-member districts out of a previously multimember district in order to increase minority representation, so too can states draw district lines to enhance the opportunities for minority election.

In concluding, that white voting strength was not being invidiously minimized, the Court explained that the plan could be "viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters...."[68] Thus, it appears that while the Court may strike down as unconstitutional the dilution of voter strength where the political access of a minority group is involved, the Court may be unresponsive to groups with dominant political power whose voter strength is diluted for the purpose of achieving proportional minority representation.

Although the Court has taken action where the vote of minority racial groups have been diluted by multimember districting, it has yet to affirmatively intervene where legislatively established multimember districts affect minority political groups. It is interesting to note that the Court has spoken of a "cancellation or minimization" of voting strength where racial groups are involved.[69] In contrast, the language of a case decided the same day,[70] referred to a "fencing out" of minority political groups. While such a distinction suggests that the Court may rely upon more rigorous standard for voting strength dilution where political groups are the targets of districting, the Court curiously found that white majorities were not being "fenced out" of the political system in Carey. Such a finding suggests a court movement toward adoption of the more rigorous "fenced out" requisite for dilution. Notwithstanding section 5 of the federal Voting Rights Act, such a trend allows legislatures to avoid proportional representation for racial minorities. On the other hand, Carey's use of the "fenced out" standard may only represent the Court's mode of analysis where single-member districts complying with the Voting Rights Act are constitutionally challenged.

Where court-ordered reapportionment schemes are fashioned, the general rule is that absent unusual circumstances, single-member districts should be created by the Court delineating the representational districts. Single-member districts are preferred to multimember districts. The judicial preference for single-member districts stem from the weaknesses inherent in multimember districting. In a recent case, the Court pointed to three aspects of multiple member districts that undermine the democratic process. First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases.[71] Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at-large, residents of particular areas within the district may feel that they have no representative specially responsible to them.[72] Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts.[73] Because of these weaknesses the Court has treated reapportionment schemes differently when multimember districts are created by the judiciary.

After reviewing the line of cases dealing with court-ordered reapportionment, the Court expressly distinguished them from those with legislatively delineated districts, in Chapman v. Meier.[74] The Court there asserted that "The standards for evaluating the use of multimember districts thus clearly differ on whether a federal court or a state legislature has initiated the use."[75] The Court reasoned that when a plan is court-ordered, there is generally no state policy of multimember districting deserving respect or judicial deference. The Court thus concluded that a district court facing the task of reapportioning representative districts must fashion single-member districts. This holding has been followed in subsequent cases dealing with court-ordered districting.[76]

Given the judicial preference for single-member districts, it is important to know what "unusual circumstances" justify court-ordered establishment of multimember districts. In both cases where court-ordered multimember districts were left undisturbed by the U.S. Supreme Court, the districting schemes challenged were set up as temporary, interim remedies for reapportionment.[77]

The Court, however, has yet to recognize other conditions as "unusual circumstances". The Court has suggested, however, that other factors grounded in state policy may deserve judicial deference and permit district courts to draw up multiple member districts. Nonetheless, until the Court clearly addresses such a set of facts reflecting a valid state policy, lower courts performing the reapportionment function will be required to follow the Supreme Court's preference for single-member districts.

The Court has further indicated that even where single-member districts are established, the districts created may not escape the review of the Supreme Court. In a recent case, Connor v. Finch,[78] the Court, after striking down the court-ordered reapportionment, expressed concern regarding the composition of single-member districts. The decision there turned on an impermissible percentage deviation among the single-member districts but the Court offered further guidance on how the single-member districts should be redrawn. Responding to plaintiffs argument that the boundaries drawn by the district court diluted the voting strength of Black population concentrations, the Court raised its concern over unexplained departures from neutral guidelines. Although the lower court adopted contiguity and compactness as a basis for districting, the districts designed were irregularly shaped. Such irregularities resulted from use of existing political boundaries as the basis of districting. The Supreme Court found that there were no long-standing state policies justifying the lower court's use of local political boundaries and deviation from its own stated guidelines. The Supreme Court concluded that upon remand, new boundary lines establishing reasonably contiguous and compact districts should be drawn to allay suspicions that Black voting strength was being diluted and to avoid future constitutional challenges. At this time it is not clear what significance the Court's guidance in Connor v. Finch will have on court-ordered reapportionment in the future.[79]

Thus, though it appears that new directions regarding standards for voting strength dilution may characterize the Court's actions in the future, regardless of whether the representational districts created are court-ordered or noncourt-ordered, the framework within which such districting make take place is clear. Legislatures undertaking the task of reapportionment may create

multimember districts. Even where the voting power of minority political groups is affected, the legislatures will be given wide discretion by the courts. On the other hand, where the political power of racial groups is purposefully minimized, the Court may take a more strict posture of review. In contrast, judicial discretion in fashioning multimember districts is much prescribed. Absent unusual circumstances, courts reapportioning legislative districts should establish single-member districts. To date, unusual circumstances justifying court-ordered multimember districts have revolved around temporary, interim districting remedies.

PART VII. FLOTERIAL DISTRICTS

A second mechanism for structuring citizen representation is the floterial district. A floterial district is "a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned".[80]

For example, assume that the norm is one representative for each 10,000 persons. District X has 14,000 inhabitants and District Y has 16,000. The population of each is in excess of the norm but not enough to give each another representative. Each is allotted one representative and the two districts are combined into a floterial district for the election of an additional representative from the combined district. The result would be three seats for 30,000 people or an average of one seat per 10,000 people. The floterial district is basically an at-large district superimposed over the component separate districts. Two states currently use floterial districts in their legislatures. New Mexico's house of representatives has one floterial district, while Mississippi's 46-district house contains seven floterial districts and its senate has one floterial district.

The U.S. Supreme Court indicated that floterial districts may be permissible when it said in Reynolds v. Sims:[81]

> Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts.

However, concern has been expressed that if the constituent districts within a floterial district are not substantially equal in population, the weight of individual votes in the respective districts may be so disproportionate that the plan could not survive judicial scrutiny.[82]

The vote values in districts X and Y in the above-mentioned example (using 14 and 16 as their respective populations for simplicity) can be calculated as follows: a voter in district X would have 1/14 of 1 (or .0714) share in the single-member district plus 1/30 of 1 (or .0333) share in the floterial district for a total value of .1047. The voter in district Y would have shares of 1/16 of 1 (.0625) and 1/30 of 1 (.0333) for a total of .0958. But .1047 is greater than .0958.

Where the differences in population are greater the imbalance in the relative values would be greater. The view has been expressed that all floterial districts really do is (1) provide areas, but not individual districts, or individual voters within those districts with the representation to which they are entitled (e.g., in the above example it permitted districts X and Y to receive the representation to which they were collectively entitled, but it did not provide Y or the voters within it with the representation to which it and they individually were entitled); and (2) it slightly reduces the existing inequities between the constituent districts (e.g., the ratio of disparity between .1047 and .0958 is somewhat less than that between .0714 and .0625).[83]

In Kilgarlin v. Martin,[84] a three-judge U.S. District Court held a floterial district scheme unconstitutional. The population of an ideal or average district (derived by dividing total population by the total number of seats in the house) was 63,864. Neuces County with a population of 221,573 elected three representatives. Kleberg County with a population of 30,052 did not elect any representative for itself. It was combined with Neuces County into a floterial district of 251,625 persons, who elected one representative. The proponents of the plan contended that the combined population of 251,625 thus elected four

representatives, or one representative for every 62,906 persons, which was close to the average. The court, however, stated that with a population of 30,052, Kleberg County had approximately one-half $\frac{(30,052)}{(63,864)}$ of the total necessary to elect one representative. However, the value of the votes of Kleberg County residents equals not 1/2 but only 1/8 $\frac{(30,052)}{(251,625)}$ of the total necessary to elect the sole representative for whom they could vote. "Thus, the vote of a resident of Kleberg County is diluted so that it only has 25 per cent of the weight that it should ideally have."[85] On this ground, among others, the court held that the floterial districting was invalid. It held, however, that the single-member and multimember provisions of the plan were valid.

On appeal, the U.S. Supreme Court completely ignored the issue of the validity of the floterial districting. Instead, it held that the District Court had erred in upholding the remainder of the plan because the population variances among the single member and multimember districts, which had not been satisfactorily justified by the District Court or by the evidence, were sufficient to invalidate the reapportionment plan. Accordingly, it reversed and remanded the case.[86] There has been no decision by the U.S. Supreme Court on the extent of variance permissible in floterial districts.

PART VIII. THE SLOT AND PLACE SYSTEMS

Another variation among apportionment schemes is the post or slot system. It is used in multimember districts where candidates file and run for specific slots rather than compete against all others in the district. In Georgia, for example, in state representative districts with two or more seats, candidates must designate a specific seat by naming the incumbent candidate desired to be opposed. Such a candidate runs only against the incumbent designated and others designating the same seat.[87]

In such a system, none may file against a very strong incumbent in Post Number 1 who is then automatically elected, while the incumbent in Post Number 2 or 3 may draw several candidates. Each voter may vote for only one candidate

running for each slot. Under the regular electorial systems in other multimember districts, if there are five seats to be filled the five persons who receive the highest vote are winners. Under the slot system the five individuals who each receive the highest vote for the specific post for which they run are the winners. It is possible, under the slot system, for the loser in the race for one post to receive more votes than the winner of another slot, yet the latter is declared a winner and the former, a loser.[88]

A post scheme coupled with a residency requirement is called the "place system". Each of the candidates in such a system must reside in a geographically established subdistrict or place within a multimember district. Only the residents of each place, although running at-large in the district, may qualify as candidates for the allocated seat.

The Georgia state apportionment plan in Fortson v. Dorsey,[89] employed the place system. Populous counties encompassed several senatorial districts. Candidates had to reside in and run from only one senatorial district and oppose only candidates therefrom although they were voted upon by all the voters in the county at large. As explained more fully above, the U.S. Supreme Court upheld the system in the absence of a showing that it operated to minimize or cancel out the voting strength of racial or political elements in the voting population. In that case each of the senatorial districts or "places" was substantially equal in population.[90]

In Dusch v. Davis,[91] "places" with grossly unequal populations were involved. In issue was the apportionment of the 11-member Council of the City of Virginia Beach, called the 7-4 plan. The city consists of seven boroughs ranging in population from 733 to 29,048. Each borough constitutes a "place". Seven members are apportioned among the seven boroughs, one to each, who must be a resident of that borough. However, all are voted upon by the voters of the entire city. The remaining four members are assigned to the city at large and may reside anywhere within the city. The U.S. District Court had upheld the plan. The Court of Appeals for the Fourth Circuit reversed, saying:

> The principle of one-person-one-vote extends only to the level of representation, and exacts approximately equal representation of the people--that each legislator, State or municipal, represents a reasonably like number in population. But that is not achieved in the 7-4 plan; the imbalance in representation in the council is obvious.[92]
>
> ...For example, Blackwater containing 733 people will have the same assured representation as the borough of Lynnhaven with 23,731 persons, or Bayside with 29,048, or Kempsville with 13,900. Similar contrasts are evident....[93]
>
> Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan....[94]

On appeal, the U.S. Supreme Court reversed, and approved the plan. Adverting to its reasoning in the Fortson case, the U.S. Supreme Court said that each borough is merely the basis of residence of a candidate and not of voting or representation.[95]

> He is nonetheless the city's, not the borough's councilman. In Fortson there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But...the constitutional test under the Equal Protection Clause is whether there is an "invidious" discrimination....

Finding no invidious discrimination, the Supreme Court approved the plan. It quoted with approval from the District Court's opinion upholding the plan:[96]

> The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.... The history--past and present--of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit citywide voting. The "Seven-Four Plan" is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.

The Virginia Beach plan was incident to a consolidation of theretofore independent political subdivisions. Such consolidations always entail sensitivity among the constituent subdivisions, but it is generally agreed that they should be encouraged to enable metropolitan areas better to cope with modern-day problems that do not respect municipal boundaries or to remedy the problems created by a multiplicity of small boroughs, townships, and municipalities within an area. This consideration might have influenced the Supreme Court. It observed toward the close of its opinion:[97]

> The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis in relation to the city, the sub-urbia, and the rural countryside....

In its most recent decision examining an apportionment plan involving a place system, Dallas County, Alabama v. Reese,[98] the Supreme Court, in a per curiam opinion reiterated its holding in Dusch v. Davis. There, an Alabama apportionment scheme involved county-wide balloting for each of four county

commission members although it required one member be elected from each of four residency districts. The populations of the four districts varied widely with the result that only one resident of the City of Selma could be made a member of the Commission even though the city contained one-half of the county's population. The federal circuit court concluded that the unequal residency districts diluted the votes of the city's residents and resulted in invidious discrimination.

The Supreme Court reversed the Court of Appeals. It reaffirmed the principle that districts used merely as the basis of residence and not for voting or representation are constitutionally permissible, if each elected official represents the citizens of the entire county and not only those in the district in which the official resides. However, it is significant to note that the Court further acknowledged that Dusch "contemplated that a successful attack raising such a constitutional question [as invidious discrimination] must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population".[99] In doing so, the Court indicated that although place apportionment systems are not per se unconstitutional, they may be held constitutionally impermissible when resulting in factual circumstances reflecting a dilution of voting strength.[100]

According to the sequence of cases from Fortson to Dallas County, there is no per se denial of equal protection by the place system as far as the voter is concerned. But it does raise at least a question of policy, if not of constitutionality, regarding the desirability of the restriction upon candidacy by residency areas. Such restrictions appear most troublesome where the constituent districts are fairly homogeneous in character and vary in voter population. For example, in Dusch, Blackwater, with only 733 persons, was entitled to one resident on the council, whereas Bayside, with 29,048 residents, was also allowed one council member. At the least, by so grossly diminishing the opportunity of candidacy among the more populous districts with their larger pool of talent, the place system may adversely affect the quality of legislators and legislation.

PART IX. WEIGHTED AND FRACTIONAL VOTING

Fractional and weighted voting is a fourth issue regarding representational structure that has been brought to the courts. In weighted voting, a legislator's vote is weighted in proportion to the number of people represented. It has been proposed to cure without redistricting an apportionment of legislators that is not proportionate to population. However, it could also be used to cure an isolated case of over or underrepresentation that might otherwise not be curable practically.

A purpose of weighted voting is to allow a county that would not otherwise retain its own representative because its population was too small, to get separate representation.[101] The vote of the representative in the smallest district is given a value of 1, and those in other districts are computed on the basis of relative population.

Fractional voting is a form of weighted voting. The largest district may be represented by 1 vote, while the smaller districts have votes of fractional value relative to population.

Although the United States Supreme Court has not passed upon the constitutionality of weighted or fractional voting, in the few cases where weighted or fractional voting has been sanctioned, it has been under extraordinary circumstances.[102] For example, in a Washington case involving reapportionment of the state legislature, the Court permitted fractional voting as a temporary form of reapportionment because of the short time period before the election.[103] Permanent weighted and fractional voting schemes have been held either totally invalid or doubt has been cast on their validity questioned in a number of lower federal and state court decisions.[104]

In Hawaii, the fractional voting system established by the 1968 Constitutional Convention was struck down as constitutionally impermissible.[105] The provision provides:[106]

> The representation of any basic island unit initially allocated less than a minimum of two senators and three representatives shall be augmented by allocating thereto the number of senators or representatives necessary to attain such minimums which number, ...shall be added to the membership of the appropriate body until the next reapportionment. The senators or representatives of any basic island unit so augmented shall exercise a fractional vote, wherein the numerator is the number initially allocated and the denominator is the minimum above specified.

Because the voter population of Kauai permitted only one senator to be apportioned to that island, the fractional voting scheme added an additional senator to the constitutionally apportioned 25 senator total and allocated it to Kauai. The effect was to give Kauai two senators with one-half vote each. Although it was argued that the major work of the legislature is done in committees and two senators were minimally necessary for effective representation in senate committees; that only Kauai was to be affected in the foreseeable future for an anticipatedly temporary period; and that the advantage given Kauai would work to compensate for the diluted senatorial voting power of Kauai residents, the court held that there were no extraordinary circumstances present in the Hawaii reapportionment scheme to permit a fractional voting provision. The court said:[107]

> The evidence before this court makes it obvious that one senator, as a matter of fact, can adequately and successfully handle all of the committee assignments necessary to give full representation to the County of Kauai. The evidence also satisfies this court that a legislator's vote (per se) is not the major value of legislative representation. It has been compared to but the tip of the iceberg, and the evidence here makes it manifest that the major power of a legislator lies in his influence with and upon his fellow legislators, with his power as a committee member, as a committee chairman, and as a party leader. This court can but conclude that the effect of fractional voting, as reflected in Hawaii's 1968 Constitution, would in fact dilute the value of the votes of those living outside the County of Kauai, as well as, conceivably, in futuro, those living outside any basic island unit whose population, upon any future reapportioning, could not qualify for two senators or three representatives. Paragraph 12 of Article III, section 4, along with Article XVI, section 3, must be stricken down as constitutionally impermissible.

Chapter 3
LEGISLATIVE APPORTIONMENT

PART I. INTRODUCTION

The changing degrees of court involvement with, and the evolution of, the constitutional standards shaping state legislative apportionment have greatly affected the constitutional apportionment provisions in Hawaii. The unique geographical and social factors characteristic of the State, however, have at the same time set the basic framework to which the dynamics of reapportionment have been applied. This chapter relates how the most recent constitutional standards for apportionment have been applied and incorporated in the Hawaii State Constitution. Consideration of Hawaiian legislative apportionment in this chapter begins with the State's Constitutional Convention of 1968.[1] Coverage of the 1968 Convention is followed by a summary recounting the court's examination of the apportionment provisions established by the convention. This chapter closes with a review of the events surrounding the reapportionment plan adopted by the 1973 Legislative Reapportionment Commission.

PART II. REAPPORTIONMENT AND THE CONSTITUTIONAL CONVENTION OF 1968

The reapportionment problem was the genesis of the Hawaii Constitutional Convention of 1968 and its resolution was the motivating purpose of the convention. In February of 1965 the U.S. District Court for the District of Hawaii held the provisions of the state constitution apportioning the senate invalid because they violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[2] To fill the void, it ordered in March 1965, among other things, that the legislature submit to the people at the 1966 general election the question of whether or not a constitutional convention should be called. This was the initial step prescribed by the state constitution (Art. XV, sec. 2) for convening a constitutional convention. In compliance therewith the legislature enacted Act 280, Session Laws of Hawaii 1965, providing for such a plebiscite.

Subsequently, the District Court's March 1965 order was superseded[3] and vacated,[4] but Act 280, Session Laws of Hawaii 1965, was still effective. And, in accordance with its terms, the electorate, at the 1966 general election, voted on the question of whether or not a constitutional convention should be called. The vote was 119,097 to 62,120 in favor of a convention. Accordingly, the legislature at its 1967 session passed Act 222 providing for the convention.

As the foregoing shows, the constitutional convention originated in the March 1965 order of the U.S. District Court and its main purpose was the adoption of new legislative apportionment provisions to replace those that were declared invalid as well as other related apportionment provisions.

In 1967 the legislature authorized election of 82 convention delegates on a nonpartisan basis without a primary. The election was held June 1, 1968. Sixty-three delegates were elected from Oahu and 19 from the neighbor islands. During the 58 official convention days between July and October of 1968, the convention retained the bicameral legislative structure and apportioned 25 seats to the senate and 51 seats to the house of representatives. Specific provisions detailing districting boundaries for both houses were enumerated.

Reapportionment was provided through the appointment of a Reapportionment Commission whose procedure for election and operation was set out. This commission was given the duty of reapportioning both houses of the legislature at eight-year intervals commencing with the year 1973. The reapportionment provision required the commission to use a two-tiered apportionment strategy. Using the total number of registered voters from the preceding general election as a population basis, the commission was to first apportion the members of each house among four basic island units using the method of equal proportions. The four basic island units were (1) Hawaii; (2) Maui, Molokai, and Lanai; (3) Oahu; and (4) Kauai and Niihau. The second step involved the drawing of districting lines for the seats from both houses within each of the basic island units. There was also an express proviso that no basic island unit should be allocated less than one member in each house of the legislature.

The apportionment provisions contained in the constitution further provided that the representation of any basic island unit initially allocated less than a minimum of two senators and three representatives should be augmented with enough senators or representatives necessary to attain the minimum. In such a case, each of those legislators would exercise a fractional vote based upon the number allocable to that basic island unit as determined by the registered voter basis.

The apportionment provisions adopted by the convention were presented to the Hawaii electorate for ratification as two separate issues--one proposing the apportionment and districting details and the other setting out the procedure for future apportionment. Both issues were overwhelmingly supported by the voters in the November 1968 election. The proposal for legislative apportionment received 119,223 affirmative, and only 34,367 negative votes. Similarly, a total of 122,239 votes were cast in favor of the reapportionment structure while only 31,351 opposed.[5]

PART III. BURNS V. GILL: THE COURT LOOKS AT THE 1968 CONSTITUTIONAL AMENDMENTS

At all times subsequent to the District Court's order of August 17, 1966 and during the State Constitutional Convention of 1968, the Court retained jurisdiction over the reapportionment of Hawaii's Legislature. The reapportionment provisions of the constitutional changes adopted by the 1968 Convention and the Hawaii electorate were scrutinized by the District Court which announced its decision in July of 1970.[6] In summary, the Court held that:

1. Hawaii's two-tier legislative apportionment plan apportioning all representatives and senators initially among basic island units and thereafter drawing district lines within the islands themselves, gave fuller and more meaningful representation to voters of those districts within each basic island unit than they could possibly have under any other scheme of apportionment.

2. Use of the method of equal proportions under Hawaii's unique geographical, social, and political realities did not bring about invidious results and was constitutionally permissible.

3. The registered voter basis was the most accurate means of implementing the one-man, one-vote ideal in Hawaii.

4. A fractional voting scheme was not permissible in Hawaii without a showing of extraordinary circumstances in the State.

5. The reapportionment provision that no basic island unit would receive less than one member of each legislative house could not be permitted to stand.

The Court began its analysis by reiterating that no one particular deviation or variance from an ideal of absolute equality of voting, per se, invalidates an apportionment scheme. Rather, the Court articulated the principle that it was the totality of the apportionment scheme and its resultant effect on representativeness that determines the constitutional validity and compliance to the one-man, one-vote principle. Within those guidelines, the Court went on to analyze the method of equal proportions as a mechanism of apportionment.

Finding that there was a good faith effort to produce the best and most workable constitution, the Court went on to hold that it was satisfied with the convention's conclusion that if the voters were to have functional representation in their state legislature, each basic island unit should be given meaningful recognition therein. The Court pointed to Hawaii's uniquely centralized government structure and many other insular factors like the geographic and economic differences among each of the islands. No evidence of systemic or partisan gerrymandering or invidious discrimination was found by the Court and it upheld the district lines within each of the basic units. The Court went on to conclude that:[7]

> ...in Hawaii the rigid implementation of the one-man, one-vote principle at the State legislative level, an end which could be achieved only by deliberately and artificially chopping up communities with mutuality of political interest and attaching them to other areas with no basic mutuality between the two whatsoever, would result in a complete loss of meaningful representation to a multitude of island voters. The evidence before us satisfies this court that the two-tier apportionment plan adopted by the Constitutional Convention, i.e., initially apportioning all representatives and senators among basic island units and thereafter drawing district

> lines within the islands themselves, now gives fuller and more meaningful representation to the voters of the several districts within each basic island unit than they could possibly have under any other scheme of apportionment. This court reaches that result in spite of the fact that differences in the number of voters per district exist not only between the several districts within each basic island unit, but also exist between districts throughout the State. This court is satisfied that the geographical insularity and the past and present political and social history of the several basic island units virtually compelled the Convention to adopt the method of equal proportions in districting the State of Hawaii.

The Court recognized, however, that the deviations of voters per district, when measured on a percentile basis, superficially appeared to be of such a magnitude as to be impermissible.[8] In conceding that the deviations appear to exceed the limitations imposed by the United States Supreme Court's decisions regarding congressional apportionment,[9] the Court pointed out that a state legislative apportionment plan was involved in the case before it. The Court reasoned that the distinction placed the Hawaii reapportionment plan within the framework for evaluation prescribed by Reynolds v. Sims.[10] For example, the Court found that although Kauai's senatorial voters appear seriously shortchanged at first glance, only some 2,400 voters would seem to have a senatorial voting power loss. The "loss", however, was deliberately and meaningfully compensated for by providing three representatives for those same Kauai voters. The Kauai voters gained representative voting power with a -16.0 per cent deviation. The basic island unit's voting power in the senate was balanced by its voting power in the house and the Court did not find any significant dilution of voting power. Instead, the Court concluded that:[11]

> Of the 25 representative districts painstakingly, intelligently and in good faith laid out for Hawaii's people, only 5 had less than +/-2.0% deviation from average. It would be surplusage to set forth in this decision, one by one, the justification given this court for each district variation. Each variation was thoroughly analyzed and the basis for each was fully exposed to this court, as the record will clearly show.
>
> This court finds that the reasons given for the several variations fully justify the districts created and the variations resulting. This court can only conclude that Hawaii's apportionment scheme was based substantially on population and the equal-population principle has not been diluted in any significant way.

> Even if contrary conclusions could rationally be drawn from the evidence before us, this court agrees with Mr. Schmitt that specifically as to Oahu, immigration into Hawaii and the mobility of its population is such that the percentile figure of today is meaningless tomorrow. The demand for housing on Oahu has been so great that so many fully-populated subdivisions have been built up since 1968 as to render almost every deviation percentile, throughout Oahu, meaningless.
>
> The population projections for the various neighboring islands and the amount of subdivision planning now going on in each such island, likewise indicate that 1973 will demand a complete reevaluation of the present districting of each basic island unit.
>
> This court is satisfied that for the purpose of setting up Hawaii's legislature, the percentile variations which were present as of the summer of 1968 are no longer meaningful, but nevertheless, as of 1970, the present districts do give Hawaii the most reasonable and practical implementation of the sought-for ideal of one-man, one-vote. The 1968 apportionment plan need not be stricken down.
>
> If more were needed, in 1973, by virtue of the new constitutional requirement, there must be a reapportionment of the State of Hawaii. The percentile deviations of 1968 and the unknown deviations of 1970 will undoubtedly be changed in 1973, and this court is satisfied that the Reapportionment Commission, just as the 1968 Constitutional Convention, will use every rational means to attempt to effectuate the optimum or "ideal" suffrage goal mandated by the Court.

Relying upon the United States Supreme Court decision in Burns v. Richardson,[12] the District Court also upheld the use of registered voters as the basis for Hawaii's apportionment. Stating that the distribution of legislators on the chosen basis was not substantially different from that which would result from using any other permissible population basis, the Court agreed that because of the fluctuating military and tourist populations in the State, the use of total population as the basis for apportionment would lead to "grossly absurd and disastrous results".[13] It was noted also that no statutory or constitutional provision inhibiting the voting franchise of military or any other citizen group existed.

Finding that there were no extraordinary circumstances present in the reapportionment scheme and scene, the Court further refused to approve the fractional voting provision adopted by the State. In doing so, the Court stated:[14]

> The evidence before this court makes it obvious that one senator, as a matter of fact, can adequately and successfully handle all of the committee assignments necessary to give full representation to the County of Kauai. The evidence also satisfies this court that a legislator's vote (per se) is not the major value of legislative representation. It has been compared to but the tip of the iceberg, and the evidence here makes it manifest that the major power of a legislator lies in his influence with and upon his fellow legislators, with his power as a committee member, as a committee chairman, and as a party leader. This court can but conclude that the effect of fractional voting, as reflected in Hawaii's 1968 Constitution, would in fact dilute the value of the votes of those living outside the County of Kauai, as well as, conceivably, in futuro, those living outside any basic island unit whose population, upon any future reapportioning, could not qualify for two senators or three representatives. Paragraph 12 of Article III, section 4, along with Article XVI, section 3, must be stricken down as constitutionally impermissible.

Finally, the District Court struck down the last clause of paragraph 11, section 4, Article III, of the Constitution stating that "...no basic island unit shall receive less than one member in each house". Over the dissent of District Judge Tavares, the Court concluded that almost the same phraseology had uniformly caused similar constitutional provisions to be struck down.[15] The Court felt that if the time comes when a basic island unit is not entitled to one member for either house, the state constitution would have to be amended to establish a different basis of apportionment. Quoting Reynolds v. Sims the Court pointed out that if carried too far, allocating one seat in each house to each political subdivision might result in a total subversion of the equal population principle.[16]

PART IV. LEGISLATIVE REAPPORTIONMENT BY COMMISSION[17]

The 1968 Constitutional Convention inserted a constitutional provision establishing 1973 as a reapportionment year.[18] The provision calls for the creation of a nine-member reapportionment commission whose duty is to formulate a reapportionment plan which becomes law upon publication. The president of the senate, the speaker of the house of representatives, the minority party leader of the senate, and the minority party leader of the house

each appoints two members. The ninth member and chairman of the commission is selected by a vote of the eight appointed commissioners.[19]

A commission so appointed met between March and July of 1973 to apportion the 25 seats in the senate and the 51 seats in the house of representatives among the basic island units of Hawaii, Maui, Kauai, and Oahu. The commission also determined the senate and house districts and their apportioned number of seats within each of those basic island units. In developing the apportionment and districting plan for the state legislature, it first familiarized itself with the legal and social aspects relevant to its tasks. After conducting a series of public hearings throughout the State, the commission began developing criteria by considering numerous alternative plans submitted by advisory councils of each of the basic island units, private citizens, and the commissioners themselves. After consideration, the commission selected one of the alternatives as its proposed plan and provided for its widespread dissemination throughout the State. Next, another series of public hearings were held in each of the basic island units. Subsequent to the hearings, the commission took other testimony and considered other plans before adopting the final apportionment plan.

The reapportionment plan adopted by the commission allocates the total number of members of the state senate and the house of representatives among the four basic island units as follows:

Basic Island Units	Senators	Representatives
Island of Hawaii	3	5
Islands of Maui, Lanai, Molokai, and Kahoolawe	2	4
Island of Oahu and all other islands not specifically enumerated	19	39
Islands of Kauai and Niihau	1	3
Total	25	51

There was no change from the 1968 apportionment in the numbers of senators apportioned among the basic island units; however, with respect to the house of representatives, the basic island unit of Hawaii lost one representative and the basic island unit of Oahu gained one representative, while the other basic island units remained unchanged. The last house seat allocable to the basic island unit of Oahu under the reapportionment provisions of the Constitution[20] was allocated to the basic island unit of Kauai. This was done because the commission found that, if the last house seat were allocated to Oahu under the method, it would operate to cancel out and minimize the voting strength of the voters in Kauai to the extent of denying them equal protection of the laws.

While the state constitution apparently mandates the use of the method of equal proportions to apportion among the basic island units, the commission believed that, in view of the context in which the 1968 Constitutional Convention of the State of Hawaii adopted the use of the method, the commission had an inherent duty to consider the effect of the use of the method and to make necessary adjustments to insure that the actual allocation of legislators among the basic island units satisfies the Equal Protection Clause.

In view of the Supreme Court's admonition in Burns v. Richardson,[21] that the use of the method of equal proportions does not necessarily result in a constitutional apportionment; the full awareness of that caveat by the 1968 Constitutional Convention; and the approval of the reapportionment provision in the state constitution covering the use of the method of equal proportions by the District Court in Burns v. Gill,[22] with the full awareness of that caveat, the commission found that a blind observance of and adherence to the use of the method of equal proportions by the commission, in that instance, would only fall short of the true intendment of the provision. The commission therefore concluded that it was incumbent upon it to assess the effect of the use of the method of equal proportions and to make such adjustments necessary to comport with the commands of the Equal Protection Clause.

The commission studied the effect of the use of the method of equal proportions by comparing the per cent by which each basic island unit's average number of voters per legislator deviated from the statewide average when Kauai

was allocated three and two representatives, respectively, and Oahu was allocated 39 and 40 respectively. By the method of equal proportions, the last representative seat was allocable to Oahu because of the inability of Kauai's registered voter count to command that last seat. Assigning that last seat to Oahu, however, resulted in a severe underrepresentation for Kauai in the house by +18.52 per cent.[23] Similarly, in the senate, Kauai's registered voter count was unable to command a second senate seat; but the assignment of only one senate seat resulted in underrepresentation in the state senate by +16.19 per cent. When the senate and house were combined and viewed together, the per cent deviation of the average number of registered voters per legislator for the basic island unit of Kauai reflected a significant underrepresentation of +17.75 per cent from the statewide average. On a senate-house combined basis, the total per cent variation between the basic island units with the largest (Kauai) and smallest (Maui) number of registered voters per legislator was 25.57 per cent.

Because of the gross underrepresentation of +18.52 per cent and +16.19 per cent that resulted in both the house and the senate, respectively, and the marked disparity of 25.57 per cent between the basic island units with the largest and smallest number of registered voters per legislator by assigning only two representative seats to the basic island unit of Kauai, the commission assigned the last seat, otherwise allocable to Oahu, to Kauai. By assigning three representatives to Kauai, minimization of voting strength of a Kauai voter was avoided without significant detriment to Oahu. With three representatives, Kauai is overrepresented in the house with a per cent deviation from statewide average of -20.98, which when coupled with the senate underrepresentation of +16.19 per cent from the statewide average produces a combined per cent deviation from the statewide average number of registered voters per legislator of -11.69 per cent. The overrepresentation created for Kauai in the house was largely offset by the underrepresentation in the senate for Kauai. In its prescience, the United States Supreme Court in Reynolds v. Sims, had remarked that "apportionment in one house (of a bicameral legislature) could be arranged so as to balance off minor inequities in the representation of certain areas in the other house."[24]

With three representatives for Kauai, the total per cent variation between the basic island units with the largest (Oahu) and smallest (Kauai) number of registered voters per legislator was reduced to 13.55 per cent. When faced with the choice of a 17.75 per cent underrepresentation for Kauai on a senate-house combined basis if only two house seats were allocated or an 11.69 per cent overrepresentation for Kauai on a senate-house combined basis if three house seats were allocated, not only the one man-one vote principle but also common sense and fairness dictated the commission, in distributing three house seats to Kauai, particularly when the effect thereof was miniscule to Oahu which already has an overwhelming majority and control of both the state senate and house. For these reasons, the commission concluded there was sufficient justification in this instance to assign three representatives to the basic island unit of Kauai.

As apportioned by the commission, the basic island unit of Oahu with 77.72 per cent of the statewide total registered voters of 337,837, has 39 representatives and 19 senators, or 76.3 per cent of the legislators; the basic island unit of Hawaii with 10.35 per cent of the total registered voters has five representatives and three senators or 10.5 per cent of the legislators; the basic island unit of Maui with 7.28 per cent of the total registered voters has four representatives and two senators, or 7.9 per cent of the legislators; and the basic island unit of Kauai with 4.65 per cent of the total registered voters has three representatives and one senator, or 5.3 per cent of the legislators. Each basic island unit has been allocated to it that certain number of legislators which very closely reflects the proportion of the statewide total registered voters within such basic island unit. Indeed, the variation between the per cent of the total registered voters and the per cent of total number of legislators allocated to each basic island unit hardly differs from that which had been approved by the U.S. District Court in its review of the 1968 Constitutional Convention apportionment plan.[25]

Deviations Among Districts

In developing the senate and house districting plans, the commission was guided by the overriding requirement that the number of registered voters per

legislator in all districts be substantially equal to the number of registered voters per legislator. The commission imposed upon itself a working rule that deviations from the basic island unit's average number of registered voters per legislator should be kept to within 5 per cent of the average. While it was extremely difficult to design districts which in every way adhered to the districting criteria set forth in the state constitution and still remain within the 5 per cent limit, the commission was able to construct districts which substantially complied with the criteria and kept deviations within 5 per cent of the basic island unit's average number of registered voters per legislator. But the plan adopted by the commission[26] even when examined as an integrated bicameral system, appeared not to comport with the high standards established by the United States Supreme Court. However, the commission relied upon the unique circumstances and problems of apportionment in Hawaii to bring its plan within the bounds of constitutional permissibility.

The very narrow and minimal deviations from the basic island unit's average number of registered voters per senator or representative as shown in Appendix A reflect the honest and good faith effort by the commission to construct districts as nearly of equal population as practicable. It is plainly evident that the larger statewide deviations which require justification result from the use of the two-tiered apportionment method of first allocating the number of members of each house among the four basic island units by the method of equal proportions and then apportioning the members so allocated to each basic island unit among the districts therein such that the average number of registered voters per member in each district is as nearly equal to the average for the basic island unit as practicable. This apportionment process by the method of equal proportions perforce maintains the integrity of the boundaries of the basic island units. These island units are not only basic but are historical, geographical, and political units with a strong identity of interest. The U.S. District Court in Burns v. Gill,[27] recognized these and other factors which justified the 1968 Constitutional Convention's conclusion that if the voters are to have functional representation in their Hawaii state legislature each basic island unit must be given meaningful recognition therein. The U.S. District Court was satisfied in that case that the geographical insularity and the past and present political and social history of the several

basic island units virtually compelled the 1968 Constitutional Convention to adopt the method of equal proportions in districting the State of Hawaii and thereby maintain the integrity of the boundaries of the basic island units.

All of the factors then recognized by the U.S. District Court as justification for the use of the method of equal proportions were present and as valid in 1973 as they were then. In Mahan v. Howell,[28] the U.S. Supreme Court held that Virginia's objective of preserving the integrity of political subdivision lines was rational and justified a total per cent variation of 16.4 per cent between the largest and smallest districts. In this instance, the commission found that Hawaii's objective of preserving the integrity of the boundaries of the basic island units is rooted on a rational state policy and that the total per cent variation between the basic island units with the largest and smallest number of registered voters per legislator of 13.6 per cent resulting therefrom was justified thereby.

Court Review of the 1973 Reapportionment Plan

Even given the commission's painstaking rationale supporting its adopted reapportionment plan, the commission's work was not to escape the scrutiny of the courts. Any registered voter in the State is allowed by the Hawaii Constitution to petition the State Supreme Court to redress any error made in a reapportionment plan or to take action effectuating the purposes of the Constitution's reapportionment provisions.[29] Two such petitions were filed with the Court regarding the 1973 reapportionment plan.

The first petition heard by the Hawaii Supreme Court, Boshard v. 1973 Legislative Reapportionment Commission,[30] urged a withdrawal and subdivision of the first senatorial district embracing all of the basic island units of Hawaii. In a short, per curiam opinion, the Court concluded that the petitioners failed to prove any constitutional violation on the part of the Reapportionment Commission and denied the petition. The Reapportionment Commission's plan proposed no change to the prior districting scheme involving three at-large senators from Hawaii. Many individuals and persons representing community

and business groups from Kailua, Kona, had come before the commission and voiced their concern that the effect of three at-large senators from Hawaii was a submergence of the political voting strength of the people of Kona. They argued that all three senators were residents of Hilo in East Hawaii whose interests were not the same as those of the Kona residents in West Hawaii and that a Kona resident could never be elected because Hilo is the predominant population center on the island.

After considering the matter, however, the commission concluded that it was impractical to have smaller senatorial districts in the basic island unit. The commission found that the difficulty in structuring smaller senatorial districts was demonstrated by the Kona residents themselves who submitted various proposals. Regarding those proposals, the commission reported:[31]

> Their first proposal divided Hawaii generally into a two-member East Hawaii and a one-member West Hawaii. While this may have solved the problem of Kailua, Kona, residents, it only created a distinct submergence of North Hamakua to Kona. As the proposal only shifted Kona's concern to some place else, the Kona residents admitted that the first proposal was not acceptable.
>
> Their second proposal sought to create three single-member districts, Hilo being one single-member district and the rest of the island generally divided into a north district and a south district. Again this proposal did not eliminate the submergence worry as the large north district had remote pockets of small and diverse communities subject to dominance by Kailua, Kona. Moreover, the second proposal split Kona in two. This put a resident of North Hilo living just outside of Hilo proper into the same single-member district as a resident in Kailua, Kona. Thus, this proposal did not satisfy the alleged concern of the Kailua, Kona, residents that the interests of East Hawaii differ from those of West Hawaii. Finally, the Hilo senatorial district as structured under the second proposal was nearly the same in geographic boundaries or slightly smaller than the house district of South Hilo. Districts which serve both as representative and senatorial districts were severely criticized as being "political monoliths" by the U.S. District Court (Hawaii) in Holt v. Richardson, 240 F. Supp. 724, and the commission has sought to avoid such creations.
>
> The third proposal created the Hilo area as one single-member district and the rest of the island as a two-member district. The submergence possibility was as present here as in the other two proposals. And, again, a political monolith was created.

Stating that three senators running at large from Hawaii is particularly appropriate for preserving the unity and integrity of the island as a basic unit, the commission was convinced that the plan was the fairest one available at the time. Countering the arguments made by the Kona residents, the commission responded:[32]

> Nothing can be gleaned from the presentation made by the Kona residents that would indicate that they are any less represented by the present incumbent senators than are the residents of Hilo or other parts on Hawaii. The commission finds that Kona has not suffered deprivation of State legislative attention and support. Kona has been given emphasis as a tourist destination area and has received its due share in capital improvements, including a new airport. Nothing has been shown to indicate that Kona is any less disadvantaged in other State programs when compared to other parts of the island of Hawaii or the State. Many of the complaints aired by the Kona residents appeared to rest on county problems. While the commission appreciates the desire of the Kona residents to have a resident of Kona represent them in the State senate, the commission is not persuaded that disaffection (of which they complain) on the part of a legislator is avoided by the mere election of a local person. Moreover, the commission is not persuaded that a senator from Kona can never be elected in an islandwide race. The commission is reminded of a Kona resident who was elected county chairman a few years ago in an islandwide race, and of a State house member from the tiny island of Lanai who is regularly reelected to office while running against candidates in more populous Wailuku and Lahaina.

The Supreme Court, in denying the voter petition thusly, upheld the commission's scheme apportioning three at-large senators to the first senatorial district.

A second petition to the Hawaii Supreme Court, Blair v. Ariyoshi,[33] requested that the Legislative Reapportionment Commission be compelled to adhere to the "equal proportions" mandate of the state constitution. The petition maintained that, notwithstanding the underrepresentation of the basic island unit of Kauai in the senate, a reapportionment plan must comply with the literal meaning of Article III of the Hawaii Constitution requiring usage of the method of equal proportions. The Court denied the petition, in a per curiam decision stating that the method of equal proportions should be construed to permit the Reapportionment Commission to consider the effect of apportionment in one house of the legislature in balancing off inequities in the representation

of certain areas in the other house. In so holding, the Court quoted heavily from the final report of the Reapportionment Commission. In addition, the Court reasoned that in light of the federal District Court's declaration that the State's fractional voting provision was unconstitutional,[34] the apportionment plan balancing the senatorial and representative voting power of the Kauai residents was a reasonable one made with a good faith effort to achieve statewide voter equality.

By striking down challenges to the apportionment plan designed by the Reapportionment Commission, the Court validated the representational basis for the present state legislature. Current constitutional provisions call for a reapportionment commission to meet again in 1981.

Chapter 4
SCHOOL DISTRICT APPORTIONMENT

The reach of the Fourteenth Amendment and the one-man, one-vote principle has been widely extended during the last 15 years. What began with the Court's initial recognition of justiciability over state legislative apportionment in 1962[1] has now been extended to almost all popularly elected bodies performing governmental functions. Hawaii's Board of Education, whose members are selected by popular election, has not escaped the reach of the one-man, one-vote principle.

Although the 1968 State Constitutional Convention did address issues dealing with the Board of Education, extensive treatment of questions regarding the constitutionality of an apportionment scheme was not required. Developments involving the legality of the Board of Education's apportionment have only taken place since the 1968 convention.

This chapter deals with issues relevant to the reapportionment of the state Board of Education. The judicial framework established by the Supreme Court will introduce the discussion of Board of Education apportionment in Hawaii. It is followed by a detailed examination of the significant events affecting Board of Education apportionment in the years since the 1968 Constitutional Convention.

SCHOOL DISTRICT APPORTIONMENT, GENERALLY

The Equal Protection Clause of the Fourteenth Amendment, first applied to state legislative apportionment in Reynolds v. Sims,[2] has been extended to the election of local governmental bodies.[3] The United States Supreme Court, in a 1970 case, Hadley v. Junior College District,[4] decided that the Fourteenth Amendment and the "one-man, one-vote" principle apply to the election of local government officials. The case involved the apportionment of a public school district.

The controversy in Hadley v. Junior College District[5] dealt with a Missouri junior college district composed of separate school districts within the Kansas City area. State law allowed separate school districts to form consolidated junior college districts by referendum. Eight school districts including the Kansas City School District combined to form the Junior College District of Metropolitan Kansas City. Six trustees were elected to conduct and manage the necessary affairs of that district. In the case of the Kansas City School District the apportionment plan resulted in the election of three of the six trustees from that district. Since that district contained approximately 60 per cent of the apportionment population base, its residents brought suit claiming that their right to vote was being unconstitutionally diluted. The Supreme Court agreed, holding that "the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight as far as is practicable, as that of any other voter in the junior college district."[6]

In addressing the broader issue, the Court traced the line of cases extending the Fourteenth Amendment to the election of local government officials. The Court noted the holding in Avery v. Midland County[7] that "a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised 'general governmental powers over the entire geographic area served by the body' (citation omitted)."[8] After comparing the powers of the Junior College District[9] to those of the commission in Avery,[10] the Court concluded that the holding was applicable. The Court said:[11]

> We feel that these powers [of the Junior College District], while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here. (footnote omitted)

The Court in Hadley rejected the argument that types of local governmental elections should be distinguished by their purposes.[12] Instead,

the Court held that the one-man, one-vote principle must be applied to all popular elections of local government bodies performing governmental functions.[13] In concluding the Court said:[14]

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

The Court did acknowledge that there may be exceptions to that general rule. Specifically, it was noted that there may be certain elected functionaries whose duties are so removed from normal governmental activities and so disproportionately affecting different groups that a popular election in compliance with Reynolds might not be required.[15] The Court found no evidence placing the Junior College District trustees within that exception. The Court ended by saying that:[16]

> ...Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term.

The Court closed its discussion[17] by stating that the legitimate political goals of ideal government representation are not inhibited by the extension of the equal population principle to lesser elected bodies. A number of alternative representational schemes found to be constitutionally permissible (1) requiring candidates to be residents of certain districts not containing equal numbers of people while being elected at-large;[18] (2) selection to official body by appointment rather than election;[19] and (3) governmental experimentation with representational schemes,[20] were reviewed before the Court emphasized its holding in Gray v. Sanders.[21] It affirmed that:[22]

> ...once a State has decided to use the process of popular election and "once the class of voters is chosen and their qualifications

> specified, we see no constitutional way by which equality of voting power may be evaded." (citation omitted)

Thus, in extending the applicability of the one-man, one-vote principle generally to all popularly elected public bodies performing governmental functions, the Supreme Court has concomitantly directed the guidelines contained in the line of cases regarding legislative apportionment and districting to elected public school district representatives. A recent Louisiana case, East Carrol Parish School Board v. Marshall[23] dealing with the use of multimember districts for school board members is illustrative. There the Supreme Court in examining the malapportionment of both a parish police jury[24] and a school board, applied its prior holdings regarding its preference for single-member districts[25] to a lower court ruling. It appears that the Court's rulings in cases involving school district apportionment is to be merged with those authorities regarding the one-man, one-vote principle and following Reynolds.

It must be noted, however, that the Court's decisions regarding school district apportionment are only applicable to those districts where the state or local government has chosen to select members of the district's governing body by popular election. The Court has made clear that there is "no constitutional reason why state or local officers of the nonlegislative character involved here [Board of Education] may not be chosen by the governor, by the legislature, or by some other appointive means rather than election."[26] Furthermore, "the fact that each [appointed] official does not 'represent' the same number of people does not deny those people equal protection of the laws."[27] Where school district members are appointed rather than elected there appears to be less rigid guidelines for compliance with constitutional equal protection requirements. Thus, the extent to which state and local governments continue to choose popular election as the mode of selection for school district members in the future may be determinative of the extent to which their representativeness may be held subject to judicial accountability.

BOARD OF EDUCATION APPORTIONMENT IN HAWAII

The Hawaii State Constitution, in Article IX, section 2, establishes a Board of Education elected by the public. The Constitution states:[28]

> There shall be a board of education composed of members who shall be elected by qualified voters in accordance with law. At least part of the membership of the board shall represent geographic subdivisions of the State.

This provision was ratified by the voters of the State in the general election of 1964. The specific number of members and composition of the board were left for determination by the state legislature.

The statutory provision affecting the Board of Education under the constitutional amendment was adopted in 1966.[29] An 11-member Board of Education was created. Eight of the board members were to be elected from school board districts and the remaining 3 elected at-large from the City and County of Honolulu in accordance with the constitutional requisite for at least partial representation by geographic areas. A total of seven school board districts and an at-large district apportioned the 11 board members as follows:[30]

> ...The board of education shall consist of eleven members. Eight members shall be elected by the qualified voters of the respective school board districts and three members shall be elected at-large in the City and County of Honolulu. The school board districts, the at-large district and the number of members to be elected from each, shall be as follows:
>
> First school board district (Hawaii): the island of Hawaii comprising the first, second, third, fourth and fifth representative districts, two members;
>
> Second school board district (Maui): the islands of Maui, Molokai (including the county of Kalawao), Lanai and Kahoolawe comprising the sixth and seventh representative districts, one member;
>
> Third school board district (Honolulu): that portion of the island of Oahu comprising the twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth representative districts and the second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth precincts of the eleventh representative district, one member;

> Fourth school board district (Central Oahu): that portion of the island of Oahu comprising the nineteenth and twenty-second representative districts, one member;
>
> Fifth school board district (Leeward Oahu): that portion of the island of Oahu comprising the twentieth and twenty-first representative districts, one member;
>
> Sixth school board district (Windward Oahu): that portion of the island of Oahu comprising the twenty-third and twenty-fourth representative districts, one member;
>
> At-large district (Oahu): the city and county of Honolulu, three members; and
>
> Seventh school board district (Kauai): the islands of Kauai and Niihau comprising the twenty-fifth representative district, one member.

This provision was recodified several times but not altered. The 11-member Board of Education had been in existence for approximately four years before the United States Supreme Court decided the case of Hadley v. Junior College District.[31]

Although Hadley dealt generally with locally elected governing bodies performing governmental functions, it specifically involved a junior college district board's apportionment. Because the Supreme Court applied the one-man, one-vote principle under the Fourteenth Amendment to the apportionment of the Hadley board membership, the Hawaii Attorney General was asked by the State's chief election officer if the holding was applicable to the Hawaii Board of Education and also whether its 11 members were unconstitutionally apportioned.[32]

Although admitting that the powers of the Hawaii Board of Education were not as extensive as that of the board in Hadley, the Attorney General concluded that "[t]he members of the State Board of Education are governmental officials performing governmental functions."[33] Taking into account the relevant Supreme Court authorities regarding reapportionment under the Equal Protection Clause, the Attorney General then examined the representativeness of the Board's apportionment scheme. Based on the number of voters registered in 1968, the population variance reported was:

County	No. of Members	No. of Reg. Voters	Deviation*
Hawaii	2	27,266	-38.6%
Maui	1	17,934	-19.3%
Oahu	7	187,062	+20.3%
Kauai	1	12,111	-45.5%

*Percentage deviation from the statewide average number of registered voters per member (22,216) derived by dividing the total number of registered voters (244,373) by the total number of board members (11).

Comparing the voter information to the criteria established in the apportionment cases decided by the Supreme Court, the Attorney General decided that "it is clear that the Board of Education is malapportioned and therefore cannot pass constitutional muster."[34] Although the Attorney General's opinion did not specifically address itself to the matter, it is important to distinguish whether the state constitutional provision or the state statute was unconstitutional. The constitutional provision only established a board whose members were to be elected and requiring that it partially include representatives from geographic areas. The statute, on the other hand, determined the size of the board and the basis for apportionment and districting of its members. The Board of Education was not malapportioned because of the constitutional provision but rather because of the statutory requirements for membership selection. This distinction is important for the purposes of understanding the process for fashioning a legislative remedy.

An attempt to remedy the malapportionment was quick to follow in the 1970 legislature. A bill enacted by the legislature in April called for an amendment to the state constitution.[35] It proposed to change the provision requiring selection of Board of Education members by popular election. The proposal instead left the method of board member selection for determination by legislative statute[36] and allowed for membership by election or appointment. The reasoning behind the proposal was contained in a legislative committee report:[37]

> Your Committee at its hearing heard testimony on various plans to reapportion the Board on the principle of one-man-one-vote as espoused by the United States Supreme Court. Your Committee learned that mathematical exactitude was approached with each increase in the number of members. This would mean, therefore, that in order to meet the test of constitutionality, the school board would have to be composed of twenty-five members, depending on the degree of mathematical exactitude demanded by court decisions.
>
> However, it is the feeling of your Committee that a board of more than 15 members is too large and unwieldy to be practicable. Therefore, the idea of continuing our Board as an elective body is hereby rejected as a political concept, worthy though it may be but impractical and obsolete under the one-man-one-vote ruling of the courts.
>
> Your Committee feels that the State Constitution, as presently worded, restricts the legislature from considering other than electoral means for the selection of members of the State Board of Education. Hence, a change in our Constitution as proposed in this bill is recommended.

The Hawaii electorate, however, did not ratify the constitutional change, rejecting it by a vote of 116,390 to 70,587.[38] Although 14 bills dealing with the Board of Education's apportionment scheme were also proposed during the 1971-72 legislative sessions, none were enacted.[39]

In a 1972 hearing, Leopold v. State of Hawaii,[40] the federal District Court examined the apportionment of the State Board of Education. Because the population deviation based on the number of voters registered in 1970 was 45.5 per cent below and 20.3 per cent above population equality for each board member, both parties agreed that school board districts were malapportioned. However, recognizing that the state legislature should be given an opportunity to act, the Court concluded that Court action was not appropriate at that time. The Court instead, after holding that the school board districts were indeed unconstitutionally malapportioned, postponed the fashioning of relief contingent upon the state legislature's failure to do so before the 1974 elections. Notwithstanding the Court's resolution to take action before the 1974 elections, the 1973 legislature failed to correct the Board of Education's malapportionment.

Although four proposals regarding Board of Education membership were submitted in the 1973 legislative session,[41] none were passed.[42] The

legislature's failure to act provided the basis for another motion for the Court to reapportion the school board districts. After a hearing on the request, the District Court again decided to refrain from acting.[43] Determining that there was still time for a court-designed reapportionment before the next election if the legislature again did not take action in its 1974 sessions, the Court was greatly influenced by the availability of the 1973 Reapportionment Commission's findings. The Court appears to have accepted the argument that the Reapportionment Commission's report "should be of significant assistance to the legislature in formulating an acceptable plan for redistricting of school districts in the 1974 legislative session. School districts and legislative districts bear a significant relationship; school districts are defined in terms of representative districts."[44] Thus, the state legislature was given yet another opportunity to deal with the malapportioned school board districts while the Court retained jurisdiction on the matter.

During the 1974 legislative session, a total of 13 bills involving the membership of the Board of Education were considered. Six proposals[45] called for an appointive method of selection for board members. The remaining were alternative reapportionment plans under the popular election system. In considering the 13 proposals, the legislators were aware that the span of deviation from the ideal number of registered voters per board member had grown from 67.3 per cent in 1970 to 71.03 per cent in 1972.[46] In spite of this information and the Court's orders of 1972 and 1973, the state legislature again failed to adopt a plan resolving the malapportionment problem. An examination of one of the plans reveals the difficulty of constructing a workable plan.[47] The prevailing legislative sentiment is expressed by the following passage:[48]

> During a public hearing during this session, your Committee received begrudging support for a thirty-nine member board. Your Committee shares the public's reluctance to approve such a large board. But it also appreciates the public testimony which recognized that, under existing State constitutional provisions for an elected board and under court-mandated constitutional requirements for reapportionment, the range of acceptable options is small.

The 39-member board plan had a total deviation of 14.23 per cent[49] but it was rejected because of its size. The inability of the legislature to agree on a

constitutionally acceptable Board of Education structure compelled the Court to take action.

In an order dated June 19, 1974, the federal District Court reapportioned the State Board of Education. The membership of the board was changed from 11 to 9 elected from two multimember districts.[50] The Court ordered that 7 of the 9 members be elected on an at-large basis from the City and County of Honolulu (known as School Board District No. 1) and that the other two members be elected on an at-large basis from the remaining counties of the State (known as School Board District No. 2). Based on the 1972 total of registered voters, the 7-member Oahu district was overrepresented by 0.06 per cent and the non-Oahu district was underrepresented by 0.22 per cent. The court-created 9-member board had a total population deviation of 0.28 per cent. It was under this scheme that the voters of Hawaii elected the members of the Board of Education in the 1974 election.

The Court's order superseded the Hawaii statute[51] determining the composition and apportionment of the Board of Education. The Court order will remain undisturbed and elections held under the 9-member plan until either the legislature adopts an alternative apportionment scheme, or the state constitution is amended. No bills proposing to reapportion school board districts were introduced during the 1977 legislative session.

Throughout the debate regarding the board's malapportionment, the alternative of an appointive rather than an elective system continued to reappear. It is clear that the method of selecting board members is a threshold issue to the apportionment question. If the present elective system is maintained, it is settled that the apportionment scheme for the Board of Education must comply with the Court's one-man, one-vote framework.

Chapter 5
CONGRESSIONAL APPORTIONMENT

PART I. INTRODUCTION

Interest in fair representation has not been confined to the state legislative arena. Over the years, concern has been expressed from time to time over fair representation in the House of Representatives of the United States Congress.[1] More recently, the Congress has required since 1967 that its representatives from the various states be elected from single-member districts.[2] In Hawaii, a 1969 statute complying with the congressional act, created two representative districts each holding one of the two seats in the house of representatives apportioned to the State of Hawaii.[3] However, concomitant to the statutory directives, the United States Supreme Court has decided a number of cases involving congressional apportionment and districting which established a number of parameters to the reapportionment process.

This chapter explores the impact of congressional districting statutes and the Court decisions bearing on the election of Hawaii's two representatives to the U.S. Congress. In particular, this chapter examines (1) the criteria for a proper and valid districting system in the election of U.S. representatives, and (2) the extent to which the state constitution should prescribe, if at all, the congressional districts or the method by which the districts should be set.

The first of these issues poses a number of problems, most of which are similar to those discussed in the preceding chapters of this study in connection with the subject of reapportioning the state legislature. The second issue is a narrow aspect of a much broader question of the proper scope (in terms of the degree to which details should be spelled out) of a fundamental document such as the state constitution. This broader question is also treated elsewhere in this constitutional convention study. In this chapter, these issues are discussed only as they apply peculiarly to the question of congressional districting.

PART II. POWER OF CONGRESS OVER APPORTIONMENT AND DISTRICTING

The same rural-urban shift in population which prompted the concern for fair representation in the state legislatures is equally behind the drive for fair representation in the U.S. House of Representatives. The shift in population from country to city had caused not only a disparity in representation in the state legislatures, but also a disparity in representation in the U.S. House. The state legislatures which were reluctant to reapportion themselves were equally reluctant to realign the congressional districts as the population shifted.

While the cause for the concern for fair representation in both the state legislatures and the U.S. House of Representatives is essentially the same, there is one essential difference in the problem of apportioning congressional seats from the problem of apportioning state legislative seats. State legislative apportionment is the sole responsibility of the states. Congressional apportionment, however, is the joint responsibility of both the states and the federal government.

The respective roles of the states and the federal government may be described by drawing a technical distinction between the act of "apportioning" and the act of "districting". "Apportionment" with respect to congressional representation refers to the act of allocating the total number of representatives among the 50 states. "Districting" refers to the act of dividing a state into districts from which the representatives allocated to the state are to be elected. Apportionment is an act reserved exclusively to the federal government; districting, although traditionally the province of state governments, has come under the guidelines of both the state and federal governments.

Congressional Power Over Apportionment

The act of apportioning the total number of seats in the U.S. House of Representatives among the 50 states is governed by the U.S. Constitution.[4] The constitutional provisions require that the total number of representatives be

apportioned among the states according to population; that a census be taken every 10 years; and that each state be entitled to at least one representative.

The Constitution does not expressly require that the U.S. House of Representatives be reapportioned after each census. However, except for the census of 1920,[5] the Congress has in fact required a reapportionment after each decennial census. Prior to 1920, reapportionment was accomplished by a specific apportionment plan passed by Congress. After the failure to reapportion following the 1920 census, Congress enacted a permanent apportionment law making reapportionment automatic after each census.[6]

Automatic apportionment of the 435 seats in the U.S. House of Representatives is accomplished under the Act, by the President of the United States.[7] Within a designated time period following the census, the President transmits to Congress a statement showing the whole number of persons in each state and the number of representatives apportioned to each state using the method of equal proportions, except that no state is to receive less than one member. Unless changes to the President's plan are made, the clerk of the U.S. House submits to each governor, within a designated time, a certificate indicating the number of representatives to which the state is entitled in subsequent Congresses.[8]

Congressional Power Over Districting

While the power of the Congress to apportion its seats among the states is expressly contained in the U.S. Constitution, the document is silent as to whether states entitled to more than one seat must elect their representatives from congressional districts. That is, the Constitution does not specify whether the members of the House must be elected at large, or from single or multimember districts. Moreover, it does not expressly designate the authority for districting in the Congress. Historically, this absence of constitutionally granted districting power in the Congress has provided the basis for much debate. However, the power of the Congress to require districting within the states is derived, if at all, from Article I, section 4, of the U.S. Constitution, which states:

> The time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. (Emphasis added)

The U.S. Supreme Court has assumed the authority to affect congressional districting,[9] but has made no direct ruling on the power of the Congress to require the states to district. However, the Court's statements in several cases lend strong support to the proposition that the Congress may constitutionally require districting for representatives.[10] Based on its constitutional authority to pass laws affecting the election of its members, the Congress has enacted a number of provisions regarding congressional districting.[11]

The most recent congressional legislation affecting representative districting was adopted in 1967.[12] The statute provides that in any state entitled to more than one seat, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative...."[13] Although the Supreme Court has held that at-large elections do not per se violate the Constitution,[14] the 1967 statute mandates the use of only single-member congressional districts. The Act, prescribes no other standards for district configuration or population size. In the absence of congressional standards on districting, the courts have played an important role in formulating specific guidelines.

PART III. RELEVANT CRITERIA FOR CONGRESSIONAL DISTRICTING: THE PRINCIPLE OF "EQUAL POPULATION"

The decision of the Supreme Court in Wesberry v. Sanders[15] was not entirely unexpected in light of the Court's previous holdings regarding the constitutionality of election procedures.[16] Wesberry was the first case decided by the U.S. Supreme Court that dealt directly with the issue of the standards that must be observed in establising congressional districts. Unexpected, however, was the Court's reliance, not on the equal protection clause of the Fourteenth Amendment, but on Article I, section 2. That constitutional provision reads:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States....

The Court relied on Article I, section 2, rather than on the equal protection clause of the Fourteenth Amendment, although the complainants' case was focused almost entirely on the Fourteenth Amendment and touched only lightly on Article I, section 2. The Court's ruling in the Wesberry case is as follows:[17]

> We hold that, construed in its historical context, the command of Art. I, §2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's....To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention....

In arriving at its decision, the Court traced the constitutional convention history on the framing of Article I, section 2, and quoted extensively from the speeches made by the delegates at the convention.

The Court's decision in the Wesberry case that congressional districts must be equal in population "as nearly as is practicable" raises two related questions: (1) What is meant by "equal as nearly as is practicable"? (2) Who must be included and who may be excluded in determining "population"? Since the Surpeme Court's 1964 holding in Wesberry, the standards for congressional districting have been distinguished from those for state legislatures by a series of decisions.[18] Through those cases the Court, although articulating further guidelines for what is "equal as nearly as is practicable", has not ruled expressly on the constitutionality of the alternative criteria for population upon which congressional districting may be based.

The key words in the Wesberry case are "as nearly as is practicable". In relying upon this phrase to describe the degree of equality in population required among congressional districts within a state, the Court has acknowledged that "it may not be possible to draw congressional districts with mathematical precision".[19] It held, nonetheless, that:[20]

> It would defeat the principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.... (Emphasis added)

There is nothing in the Wesberry opinion to indicate that some deviation (other than that which cannot possibly be avoided) is permissible even if there is some reasonable "justification". In contrast to the Wesberry case, in the state apportionment case of Reynolds v. Sims,[21] the Court stated that there may be some deviations from the strict, equal-population standard in districting state legislative seats "based on legitimate considerations incident to the effectuation of a rational state policy", so long as the "overriding objective [is]...substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State". (Emphasis added)[22] The Court thus recognized the use of political, natural, or historical boundary lines to avoid indiscriminate districting that invites partisan gerrymandering, to accord political subdivisions some independent representation, and to maintain compactness and contiguity, even though the use of such lines may cause some departures from the equal-population principle.[23] It also noted in Lucas v. Forty-fourth General Assembly of Colorado,[24] that "deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house".[25]

Although slight deviations, based on legitimate considerations which are "incident to the effectuation of a rational state policy" are constitutionally permissible with respect to the apportionment of seats in either or both houses of a state legislature, it does not follow that such deviations are equally, constitutionally permissible with respect to the apportionment of seats to the U.S. House of Representatives. In the case of congressional districting, it appears that "legitimate considerations", permitting deviations from the equal-population principle, are few, if any, and that there is need for a stricter

adherence to equality in numbers than in the case of apportionment of a state legislature. The language of the Court in Wesberry v. Sanders strongly suggested this. Even while conceding that it may not be possible to draw districts containing mathematically equal population, the Court strongly pressed for equality, thus:[26]

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us. (Emphasis added)

That there is a difference in the degree to which the equal-population principle must be adhered to between congressional districts and state legislative districts was intimated by the Court in Reynolds v. Sims:[27]

> ...some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. (Emphasis added)

Reiterating the difference between congressional and state legislative districting in Kirkpatrick v. Preisler[28] the U.S. Supreme Court specified that a good faith effort to achieve mathematical equality was required where congressional districting is involved by saying:[29]

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which

> quality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," (citation omitted) the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. (citation omitted) Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small. (emphasis added)

In rejecting a de minimus numerical standard for population variation among districts, the Court required that absent a good-faith effort to obtain numerical equality, a justification for each variance must be shown. However, the Court was clear that a good-faith effort requires that the resulting population variances be unavoidable. The Court explained that:[30]

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

In Kirkpatrick, the Missouri legislature produced a makeshift districting bill that was recognized to be nothing more than an expedient political compromise. The Court concluded that the resulting population variances among the state's congressional districts were not unavoidable. Furthermore, noting the population variances in a decision accompanying Kirkpatrick, the Court indicated that with the 3.13 per cent deviation above and 2.84 per cent deviation below the ideal district, "it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable."[31] The Court then turned to the question of whether the avoidable population variations were shown to be justified.

The Court denied that Missouri had satisfactorily justified the population variances among the districts by first holding that "to accept population variances, large or small, in order to create districts with specific interest

Constitution requires equal population among all districts, not only within defined sections, of a state.

New York's districting plan constructed 31 of the total 41 congressional districts within seven sections defined as homogeneous regions. Within each of the seven regions, a number of single member congressional districts were delineated. Each of the districts of a region were virtually identical in population. For example, in the Queens County region, there were four districts having an average population of 434,672 and a maximum deviation from that average of 120.

Stating that population need be equalized among all congressional districts within the state, and without even noting that the scheme included districts with population variances from 6.488 per cent above and 6.608 per cent below the ideal district, the Court concluded that constructing equal districts within regions of a state is unconstitutional. The Court reasoned that:[37]

> ...The general command, of course, is to equalize population in all the districts of the State and is not satisfied by equalizing population only within defined sub-states. New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in Kirkpatrick that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations. Equality of population among districts in a substate is not a justification for inequality among all the districts in the State.

In 1973 the Court again addressed a controversy concerning congressional districting. In the Texas case of White v. Weiser[38] the Court was faced with the question of whether population variances among the State's congressional districts were unavoidable. While recognizing that the percentage deviations of the plans before it were smaller than those invalidated in Kirkpatrick, the Court

orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people"[32] contrary to the state's contention that variances were necessary to avoid fragmenting areas with distinct economic and social interests and, resultingly, diluting their effective representation. The Court also rejected the state's argument that considerations of practical or partisan politics producing a reasonable legislative compromise adequately justified the deviations. Missouri's adjustments for population, i.e. military personnel, students, and population trends, the court further held, were made in an inaccurate manner and were not valid justifications for population variations. The Court did recognize that "[w]here these [population] shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them."[33] But the Court was careful to note that:[34]

> By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner.

Finally, the Court held that claims of geographic compactness are generally unconvincing justifications for deviations from equality.

In summary, the Court established that population deviations in congressional districts may be justified by a showing a good-faith effort even though including limited population variances that are not avoidable. Percentage deviations 3.13 above and 2.84 below the ideal were held to be not unavoidable. Although stating that even avoidable variances may be justifiable, the Supreme Court was not satisfied with the reasons offered by the State of Missouri and did not definitively establish guidelines for justifications that would be satisfactory. These holdings were to be repeated in the decision of a companion case which was argued before the Court together with Kirkpatrick.[35]

In Wells v. Rockefeller, New York attempted to satisfy constitutional requisites by minimizing population variances for the congressional districts within geographical regions of the state.[36] Rejecting the New York scheme for minimum deviation among the districts within homogeneous regions of the State, the Court relied upon Kirkpatrick and held that Article I, section 2, of the U.S.

concluded that the population variations among the districts were not unavoidable.

The districting plan adopted by the state contained percentage deviations exceeding and smaller than the ideal district population by 2.43 and 1.70 per cent, respectively. The Court noted that the 4.13 per cent total deviation was lower than the 5.97 per cent of Kirkpatrick and the 13.1 per cent found Wells.[39] However, the presence of alternative plans with deviations smaller than the 4.13 per cent contained in the proposal enacted by the Texas legislature, was determinative of the Court's findings that the state's districting scheme was unacceptable. An alternative scheme, Plan B, closely resembling the enacted plan, had a total deviation of 0.149 per cent. Still another alternative, Plan C, contained districts whose total percentage deviation from numerical equality was 0.284. The Court concluded that the percentage deviations in the enacted plan were smaller than those invalidated in Kirkpatrick and Wells, but they were not "unavoidable." The districts were not as mathematically equal as reasonably possible. The existence of Plans B and C showed that the deviations were avoidable.[40] Without elucidating the details of Texas' contention that the variances were justified because they avoid fragmenting political subdivisions, the Court went on to hold that:[41]

> ...,as in Kirkpatrick and Wells, "we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries.

Determining that the District Court was correct in rejecting the enacted plan, the Court further concluded by overruling the choice of Plan C over Plan B. Without relying on the fact that the total percentage deviation of Plan B was less than that of Plan C, the Supreme Court again expressed its preference for honoring state policies by stating:[42]

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the

> requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary."
>
> * * *
>
> Given the alternatives, the court should not have imposed Plan C, with its very different political impact, on the State. It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements. (Emphasis added)

Although this holding suggests that the Court may be relaxing its numerical standards for congressional districting, White was not clear as to the extent to which the ideal of mathematical equality among districts could be compromised by valid state policies.[43]

In reviewing the U.S. Supreme Court's decision, it appears that there is a clear line of cases now distinguishing the standards for congressional and state legislative districting. The "equal as nearly as is practicable" standard for congressional districting under Article I, section 2, of the Constitution permits only those population variances that are unavoidable despite a good-faith effort to achieve numerical equality. The Court has used strong language to indicate that almost complete numerical equality will be required. It also appears that the existence of an alternative plan with a lower population variation among its districts that honors state policies renders the higher deviation of an adopted scheme unconstitutional. Through such reasoning, a districting plan with percentage deviation of 4.13 has been struck down. On the other hand, a plan with a 0.149 per cent deviation has been found to comply with the Constitution's requisites for population equality. Absent a showing of a good faith effort to achieve population equality among all districts in the state, each variance, no matter how small, must be justified. The U.S. Supreme Court has yet to definitively establish which justifications satisfy constitutional standards of population equality in such cases. It has acknowledged, however, that there may be valid state policies and preferences that should be observed in shaping those standards and determining the level of population variance from absolute equality tolerable.

PART IV. "POPULATION"

The word, "population", in "equal-population" is troublesome in congressional districting. In Wesberry v. Sanders,[44] the Court did not define the term "population". The Court has yet to squarely address this matter.

For purposes of legislative apportionment, the Court held in Burns v. Richardson [45] that "the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured"[46] and that "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime or for mental illness" may be excluded from the apportionment base by which "legislators are distributed and against which compliance with the Equal Protection Clause is to be measured".[47] The decision was based on the equal protection clause of the Fourteenth Amendment.[48] In contrast, the congressional apportionment case of Wesberry v. Sanders, relied not on the Fourteenth Amendment, but on Article I, section 2, of the Constitution.[49] This difference in constitutional base raises the following question: can it be inferred from the Court's decision in the Burns case, that exclusions from population base, which are permissible under the equal protection clause (aliens, transients, short-term and temporary residents, felons and those mentally ill), are equally permissible under Article I, section 2, of the U.S. Constitution? There are several factors which suggest that such inference be made with caution.

First, the Court is stricter in imposing standards for congressional districting than for state legislative apportionment and has clearly distinguished the specifications applicable.

Second, the Court in the Burns case carefully limited its holding regarding permissible exclusions from the population base to the equal protection clause of the Fourteenth Amendment. Thus, the Court said, "the Equal Protection Clause does not require the States to use total population figures" (emphasis added),[50] and that aliens, etc., may be excluded from the *apportionment base* "against which compliance with the Equal Protection Clause is to be measured". (emphasis added)[51]

Third, Article I, section 2, of the U.S. Constitution, as amended by section 2 of the Fourteenth Amendment, requires that the total number of U.S. Representatives be apportioned among the 50 states on the basis of the "whole number of persons" in each state. It requires that a census be taken every ten years to determine this "whole number of persons". It expressly excludes from the enumeration only "Indians not taxed". Since Indians not taxed are expressly excluded, by the general rules of construction, all other persons are impliedly included in the "whole number".[52]

The federal census, accordingly, takes into account and includes in the count of each state, aliens and short-term or temporary residents. It even includes those serving on-board ships which are temporarily at berth within the state. Actual apportionment of the total U.S. Representatives is then made on the basis of this "total count".

Since the constitution requires that the total number of representatives be apportioned among the states on the basis of "total population", it may logically be argued that districting within the states for congressional seats must also be based on "total population". This was the position taken by the Supreme Court of Appeals of the State of Virginia in Wilkins v. Davis.[53] There, the Virginia Court rejected the argument that if the military were excluded from the population base, the congressional districts would be as nearly equal in numbers as practicable.[54]

Some support for the Virginia Court's view can be found in Wesberry v. Sanders.[55] There the word, "People", found in the first clause of Article I, section 2, of the U.S. Constitution was linked to the word, "Number", found in the second clause which requires that representatives be apportioned among the several states "according to their respective Numbers". Thus, the Court said:[56]

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.

In footnote 30, appended to the above quote, the Court noted:[57]

> While "free Persons" and those "bound to Service for a Term of Years" were counted in determining representation, Indians not taxed were not counted, and "three-fifths of all other Persons" (slaves) were included in computing the States' population.

The Court then quoted extensively from the speeches of the delegates at the constitutional convention which stressed equality in the "numbers of people" among congressional districts;[58] and the Court made no attempt to distinguish "people" for purposes of districting within a state from "people" for purposes of apportioning representatives among the states.

Although the U.S. Supreme Court had an opportunity to expressly establish what are acceptable population measures in redistricting through considerations of adjustments for population resulting in district variances, it refrained from doing so in Kirkpatrick v. Preisler.[59] The Court there was not explicitly confronted with the issue of valid measures of population but the lower court,[60] although not required to address the matter, had examined the question in detail in an appendix incorporated in its decision. The lower court concluded that only federal decennial census figures can be used in cases involving congressional redistricting by saying:[61]

> The constitutional history of Art. I, §2 would seem to make it apparent that the Founders included the decennial census in that section as a central instrument specifically designed to control and adjust the constitutionally required future apportionment of the House of Representatives. It would seem historically incongruous not to require the use of the constitutional decennial census in the establishment of congressional districts within the States. A rejection of the federal decennial census as the exclusive guideline for congressional districting would have grave and particular significance in future congressional reapportionment cases.
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> * * *
>
> ...The idea of apportionment of representatives among the States based on the federal census and the notion that the districting within the States for election of federal representatives may be based on some sort of state census would seem to be basically inconsistent with the primary reason for the Founder's insistence that the constitutionally required decennial census be a federal

> census. The self-interest of at least sectors of particular States to manipulate their own local census figures would obviously have a drastic impact on the composition of the House of Representatives.
>
> * * *
>
> We feel that the constitutional significance of the census should and must be maintained in congressional redistricting cases. The Supreme Court as yet has not directly considered the problem; and we need not, and therefore do not, reach the precise question discussed.

The District Court in Kirkpatrick clearly established a basis upon which the Surpeme Court could have resolved the definitional problem.[62] Instead, the Court chose to evade the issue basing its holding on the method by which the adjustments to the scheme using total population had been made. In doing so, the Court stated:[63]

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

This language suggests a preference for a total population basis for redistricting, but much more beyond that cannot be gleaned. What may be said, nonetheless, is that the Court chose not to deal with the issue at that time, nor has the Court dealt with the problem to date. The Court's reasons for doing so can only be surmised but the question will remain unresolved until it is met squarely.

While no definitive authority on this question exists, a recent decision involving congressional districting sheds light on how the federal District Court

may resolve the issue regarding redistricting in Hawaii. In Hirabara v. Doi,[64] a memorandum decision, the Court implied that registered voters is an acceptable basis for redistricting. Though the Court was not asked to and did not face the issue in its opinion, the footnoted reference may be significant. Describing the malapportionment between congressional districts measured by registered voters, the Court noted that "Registered voters were determined to be a not invalid basis for reapportionment in Hawaii by Burns v. Richardson...."[65] This statement may be overbroad because the Burns case cited dealt with legislative, not congressional, apportionment and districting. However, that the Court meant what it said may be supported because of the unique geographic and demographic factors characterizing Hawaii upon which the Supreme Court relied in Burns. While the federal district may permit registered voter counts as a basis for redistricting in Hawaii, it remains to be seen whether such a conclusion is upheld by the Supreme Court. To the extent that the District Court in Hirabara reflects how this question will be resolved in the future, those wishing to overturn the state's reliance on registered voters must anticipate litigation at the appellate levels.

PART V. CONGRESSIONAL DISTRICTING IN HAWAII

The 1967 Congressional Act requiring states to establish single-member congressional districts did not necessitate Hawaii's compliance with the statute until the election of 1970.[66] Prior to that time, Hawaii's two congresspersons were elected at-large.

The Hawaii State Constitutional Convention, meeting in 1968, was aware of the need to apportion the State's congressional districts,[67] but elected not to provide for such districting through constitutional provision. Two proposals dealing with congressional districting were introduced in the Committee on Apportionment and Districting of the convention. Neither proposal was passed by the committee.[68] The records of the convention do not indicate the reasons for not incorporating a districting procedure or the districts themselves among their proposed constitutional amendments. The districting activities of the state legislature elected in 1968 perhaps reflect the convention's preference for a non-constitutional remedy for the need to district Hawaii's congressional seats.[69]

The statute enacted by the state legislature in 1969 resulted in a compact and contiguous, substantially urban, first congressional district, and a second congressional district which was composed of the suburban, rural, and agricultural communities of Oahu and the generally agricultural other islands.[70]

Because of the concentration of more than one-half of the population of Hawaii in the highly industrial and commercial city of Honolulu and its surrounding suburban areas, it appeared most appropriate to carve out as much of that area as contained one-half of the registered voters and determine that area to be the first congressional district; and determine the rest of the island of Oahu and the other islands of the State as the second congressional district. A combination of existing state representative districts was used in constructing the districting boundaries of the two congressional districts, but "there was no deliberate intent in trying to preserve the integrity of political subdivisions or the homogeneity of interests of persons grouped together in particular districts".[71]

The districting was based on the number of registered voters in the State. Justifying its choice of registered voters as the determinant of population for the purposes of districting, a legislative committee said:[72]

> At this time and for the 1970 election, registered voter basis appears to be the only meaningful base for Hawaii. In the few years last past, Hawaii has wrestled with this problem of the apportionment base, most recently by the Hawaii Constitutional Convention of 1968 in its reapportionment and redistricting of the State for state elections. The Constitutional Convention made a thorough review and study of the several apportionment bases and concluded that the registered voter base should be used. Your Committee agrees. The facts upon which the Constitutional Convention based its conclusion have not materially changed, and the analysis and reasoning are still very valid and applicable. More specifically, your Committee concurs with and adopts the reasons and conclusions of the Constitutional Convention in selecting the registered voter basis....

The latest registered voter count compiled in 1968 was used in the 1969 districting statute. The percentage by which the number of registered voters per representative in each of the districts deviates from the average number of

registered voters per representative totalled 1.18.[73] The legislature believed that the resulting plan created congressional districts as equal as practicable.[74]

The 1969 statute delineating Hawaii's congressional districts did not provide for future redistricting. However, the legislature was fully aware of the effect the 1970 federal census might have on the newly formed districts. In that light, the districting scheme was seen as a temporary measure complying with the federal law mandating the formation of single-member congressional districts in Hawaii for the 1970 elections:[75]

> Whatever congressional plan the legislature may devise for the 1970 election is subject to change after the 1970 census, pursuant to the permanent apportionment Act of 1929 unless, of course, the population estimate made today holds true for 1970. In that sense it is a temporary measure to primarily comply with Public Law 90-196. The 1970 census might well provide the legislature with a new outlook toward a more permanent congressional districting plan. Your Committee notes that the first state reapportionment commission will be constituted in 1973 so that legislation may be timely enacted after the 1970 census and before 1973 to allow the reapportionment commission to assume the congressional districting duties.

The potential for legislation authorizing the 1973 state reapportionment commission to undertake the function of redistricting the congressional seats was not to be actualized although two amendments updating the statute numbers and representative district numbers delineating the congressional districts were enacted.[76] Eight bills realigning congressional district boundaries were introduced during the 1974 and 1976 state legislatures. No bill adjusting the boundaries of Hawaii's two congressional districts was adopted between 1974 and 1976, although the population deviation measured in 1974 was 4 per cent, and in 1976 was 6.84 per cent. One redistricting scheme rejected by the 1974 legislature (S.B. No. 2043, 1974) would have resulted in a deviation of 0.04 per cent[77] and a 1976 plan (S.B. No. 1992, 1976) also not adopted reduced the 6.84 per cent to 0.18 per cent.[78] Both redistricting proposals were based on registered voters as the measure of population and they maintained the substantially urban-agricultural basis for districting found in the initial 1969 statute.

Based on the 6.84 per cent population deviation and the legislature's failure to adjust the congressional district boundaries during the 1976 legislative session, a suit was filed in the federal District Court.[79] The suit, requesting that the Court perform the redistricting, was heard by a three-judge panel two months before the scheduled primary election. None of the parties to the suit contested that the districts were indeed malapportioned. However, the Court, in an unpublished opinion, rejected that contention.[80] Using strong language, the Court found the malapportionment to be only 4.97 per cent based on 1974 voter registration roles. The 6.84 per cent deviation relied upon by the parties represented the number of voters remaining registered in 1975 after the 1974 election. It was a "post-purge" figure reflecting the number of actual voters in 1974. Emphasizing that such an actual voter count must be supplemented by the fact that 1974 was a non-presidential election year which characteristically has lower voter turnout, the Court concluded that the figures used "were completely misleading and virtually meaningless for the purpose of evaluating the constitutionality of the apportionment scheme.... By relying on those figures, plaintiff and defendant [had] led [the] court into a wild-goose-chase."[81] The Court thus held that the imbalance in voter representation was not "invidious" and dismissed the action.[82] Given the Court's reluctance to intervene, it was understandable that the legislature took no action regarding congressional districting during its following session. No bills were introduced during the 1977 session on this point.

To summarize, the state's role in congressional apportionment and districting is limited to delineating the representational boundaries of Hawaii's two single-member districts. The U.S. Supreme Court has set rigorous standards for making the population of such districts as equal as is practicable. However, the basis for determining population has yet to be definitively set by the Court. As a consequence, Hawaii's congressional districts presently are set to reflect the registered voter instead of the more customary census population of the state. Even based on such a population measure, current boundaries demark districts whose population deviations are only arguably within the constitutional standards set by the U.S. Supreme Court. Such a situation undermines the stability of the election process because of the potential for challenging its results. To the extent that the state legislature has evidenced

its inability to remedy such situations, consideration of alternative districting mechanisms such as by reapportionment commission or constitutional amendment may be required in the future.

Chapter 6
SELECTING THE APPORTIONMENT BASE

PART I. INTRODUCTION

Within the legal framework provided by the Supreme Court's decisions, there are many questions which must be resolved by individual states in devising permanent state constitutional provisions for reapportionment. Each state must determine the apportionment formula and the apportionment procedure best suited to its unique representational goals. In both of these areas, there is a great need for creative endeavor, for the designing of a representative system to achieve the political and social needs of a community is too important a task to be reduced to mere compliance with uniform criteria enunciated by the courts. Equally weighted votes do not, in themselves, guarantee a good system of apportionment and representation.

In devising an apportionment formula, a state must first determine the basis for allocating representation within and among the constituent parts of the political system. This raises the threshold question of what means for measuring population is desirable. In answering this question, a basic policy decision must be made regarding which people should be counted in the apportionment base.

In the United States, the traditional measure of population for apportionment purposes has been total population as reported by the federal decennial census. The prime example is the apportionment of the U.S. House of Representatives where the members are apportioned among the several states according to census population figures. The use of census population figures in congressional apportionment is mandated in the United States Constitution.[1] Consistent with congressional apportionment practices, the majority of states have also adopted total population as their apportionment base. A recent survey of apportionment provisions for state legislatures reveals that 43 states specify either total population or total inhabitants as their population measure.[2]

The meaning of the term "population", however, is not restricted to the total population figures derived from the federal census. The courts have required that there be substantial equality of population among the districts created by an apportionment scheme. But, except for the potential questions regarding congressional districting discussed earlier, the choice of the exact measure of population has been left largely up to the individual states.[3] As a consequence, a number of states, including Hawaii, presently rely upon population measures for apportionment different from the total census population figures. Moreover, different population measures may be adopted for different purposes. The question regarding apportionment base arises whenever legislative, school board, and county reapportionment occurs. There are presently no constitutional, statutory, or judicial limitations on what population measure must be used for each type of elected body.

A minority of 7 states use other than total population figures for apportionment.[4] Nebraska and New York rely upon federal census totals of population but exclude aliens from their apportionment base. Idaho uses actual voter counts. Eligible voters is the population base for Rhode Island's senate and the Massachusetts legislature. Finally, aside from Hawaii, Vermont uses registered voters as the population measure for their house of representatives.

In Hawaii, the 1968 Constitutional Convention settled on eligible voters as the most appropriate apportionment base for the state. As a matter of policy, eligible voters was adopted because it excluded nonresidents, transients, aliens, incompetents, felons, and minors. However, since data regarding eligible voters in Hawaii were not readily available for computational purposes, the convention settled on registered voters as an accurate estimation. The convention found that the registered voter base produced a distribution of apportioned legislators substantially equal to that which would have resulted from the eligible voter population base.[5] The convention reached its conclusion after carefully examining various alternative measures of population. However, since 1968, circumstances may have changed sufficiently for reconsideration of the various alternative population measures.[6]

PART II. CRITERIA FOR ANALYZING APPORTIONMENT BASES

In the analysis below, 5 measures of population are compared. They are total population, state citizens, registered voters, actual voters, and eligible voters. Each of the alternative apportionment bases has a number of different characteristics and each possesses advantages and disadvantages from the point of view of both theory and actual practice. Selection of an apportionment base involves considerations that can be placed in 3 categories--data availability, effect on the basic island units, and representational policy.

Data Availability

Whichever measure of population is adopted, practical considerations regarding the availability of such data is a key feature. Regardless of how theoretically sound a population measure may be, the cost of acquiring necessary population information may mitigate against its adoption. Two concerns regarding data availability are relevant for apportionment purposes. First, how detailed is the available data broken down? The population base chosen must provide adequate detail for the purpose of fine distinctions in representative districting. Second, how frequently does the population data become available? To the extent that outdated population information does not reflect changes in demographic patterns, distortions in representation occur. Both these considerations must be accounted for in the selection of an apportionment base.

Effect on Basic Island Units

The proportion of representatives allocated to each county of the state can differ significantly depending upon the apportionment measure of population selected. This is because, assuming continued reliance on the method of equal proportions, the apportionment base determining which groups are counted in the population measure is related to the number of representatives apportioned to the different basic island units and representative districts. This can be

explained by the fact that the various islands in the state have different demographic and social characteristics. Because such trade-offs are involved, the choice of apportionment base represents a political judgment of which base provides Hawaii with the type of representative system best suited to meet its peculiar needs.

Representational Policy

Selection of a particular population measure definitionally includes or excludes different groups of individuals located within the state. For example, minors are included in a total population count but they are excluded from those residents eligible to vote. The apportionment base chosen, thus, reflects a fundamental policy decision regarding who should be represented by elected officials. Neither the constitution[7] nor democratic theory mandates how population must be counted.[8] States are not required to "include aliens, transients, short-term, or temporary residents, or persons denied the vote for conviction of crime" in order to comply with the Equal Protection Clause.[9] Nonetheless, to the extent that any group is or tends to be excluded from the apportionment base, a "distortion" in representation occurs. A more important point to keep in mind, however, is that because there is no truly correct definition of who should be covered by the population measure, all potential apportionment bases alter the representational process in some manner. The problem therefore turns upon whether inclusion or exclusion of certain groups most appropriately reflect the desired representational characteristics of Hawaii.

A number of groups can be identified for the purpose of comparing the effect of alternative population measures. They are described below:[10]

Temporary Residents

Persons within this category are either affiliated with the armed forces or other transient civilians located in Hawaii on a short-term basis. There is no reliable estimate of how large a portion of Hawaii's population this group represents. However, some idea of the size of this group is reflected by data regarding military personnel and their dependents. They averaged 120,000 persons and represented more than one-tenth of Hawaii's total population

between 1970 and 1975.[11] During the same period, approximately 55,400 in that group were in the armed forces. The members of this group tend to live close to the few large military installations on Oahu. If military-affiliated persons reflect the temporary resident population in Hawaii then the size of this group is not insignificant.[12] Moreover, the U.S. Supreme Court has prohibited the exclusion of persons from the apportionment base solely on the basis of their military affiliation.[13]

Aliens

Persons falling in this category are not United States citizens. In 1976, this group totaled almost 70,000 and represented 8 per cent of Hawaii's total population.[14] What is more noteworthy is the fact that this group has grown in size by 22 per cent since 1970.

Minors

Approximately one-third of Hawaii's peoples fall within this category. Estimates of the persons below 18 years old approximate 32 per cent of the total 1976 population.[15] The size of this group appears to be decreasing relative to total population,[16] but evidence suggests that minors are not proportionally distributed among the 4 major island groups.[17]

How each of these groups is affected by different population measures can be seen by a comparative analysis. In the section below, 5 alternative apportionment bases are analyzed against the practical, political, and representational concerns raised.

PART III. COMPARISON OF POPULATION MEASURES

Five alternative apportionment bases--total population, state citizens, registered voters, actual voters, and eligible voters--were compared on the basis of 6 issues raised above. The findings of such an analysis are summarized in the following table.

Registered Voters. As an apportionment base, registered voter counts are easily discernible. Registered voter figures are easily obtained from lists kept by clerks of the different counties and they are broken down by legislative precincts and districts.[18] Such information is presently generated every 2 years when regularly scheduled elections take place. Registered voter figures

ALTERNATIVE APPORTIONMENT BASES

	REGISTERED VOTERS	TOTAL POPULATION	STATE CITIZENS	ACTUAL VOTERS	ELIGIBLE VOTERS
DATA BREAKDOWN	Available by voter precincts	Available by census tracts	Not presently available	Available by voter precincts	Partially available by census tracts
DATA AVAILABILITY FREQUENCY	Every 2 years	Every 5 years	Not presently available	Every 2 years	Every 5 years
EFFECT ON TEMPORARY RESIDENTS	Tend not to be included	Included	Tend not to be included	Tend not to be included	Included
EFFECT ON ALIENS	Excluded	Included	Excluded	Excluded	Excluded
EFFECT ON MINORS	Excluded	Included	Included	Excluded	Excluded
EFFECT ON BASIC ISLAND UNITS	No	Yes	Yes	Slight	Yes

reflect population shifts within a state and automatically eliminate those ineligible to vote.[19] In contrast to total population, a registered voter base would clearly accord substantially equal weight to the votes of all qualified voters. Furthermore, use of registered voters as the population measure may well provide an incentive for political parties and other organizations interested in government to register voters and otherwise encourage greater participation in the political process.

A potential problem involved in the use of registered voters is the failure of areas of declining population to purge or eliminate those not voting from the voting lists.[20] This problem does not exist in states like Hawaii where persons are automatically removed from the lists when they fail to vote in an election.[21]

Probably the biggest objection to the use of a registered voter base is that it excludes certain groups in the community that may deserve legislative representation, such as minors, aliens, temporary residents such as transients in the military who tend not to register to vote, and the politically alienated. There may be those who argue on theoretical grounds that those who cannot vote are still entitled to legislative representation through inclusion in the apportionment base.[22] In addition, it is alleged that a registered voter base discriminates against certain socioeconomic groups who register to vote in lower proportions than other groups. This assumption, however, is not conclusively borne out by the available evidence.[23] In any case, possible hazards such as this may well be eliminated or substantially reduced by massive state voter registration drives or by the built-in incentive to register under a voter registration apportionment standard.[24]

As indicated above, registered voters is the apportionment base presently identified in the Hawaii Constitution.[25] Because this measure of population was the foundation for the 1973 reapportionment commission's work, continued reliance on the registered voter count would insignificantly affect the basic island units.[26] The registered voter base remains a viable measure of population for apportionment purposes in Hawaii.

Total Population. The U.S. Bureau of the Census gathers and disseminates total population statistics. Until 1976, the Bureau of the Census was authorized to conduct a decennial census every 10 years. In that year, however, the Congress passed a statute authorizing a mid-decade census starting 1985.[27] Thus, starting 1980, census data will be available every 5 years.

The data generated by the federal census are broken down by census tracts and enumeration districts which can serve as a basis for the construction of representative districts. For the purpose of elections in Hawaii, however, census tract boundaries do not presently coincide with those for election precincts. Census data reported according to precinct boundaries can be produced because federal statutes allow the states to specify the types of population tabulations desired. States must make such a request to the census bureau 3 years prior to the census.[28]

Use of a total population base is justifiable on the basis of representational policy. This is because any base other than total population discriminates against some groups in the community. It is therefore argued that all inhabitants of a state, regardless of their citizenship or voting status, deserve inclusion in the apportionment base. Under this line of reasoning, any deviation from total population results in a distortion of representation.[29] Specifically, the total population figures derived from the federal census include those in the armed forces and their dependents, transient persons temporarily residing in a geographic area, aliens, and all minors.[30]

On the other hand, use of a total population base where high concentrations of aliens, children, or temporary residents exist may result in a substantial distortion of the weight of votes cast for district representatives. A district's population may be large but the number of persons actually voting may be very small.[31] As a consequence, in districts with equal populations, the weight of a person's vote is greater where fewer persons vote. Also, for those who feel that elected officials should reflect only persons deserving of representation or those with a real stake in governance outcomes, total population as an apportionment base is viewed as a distortion of the legitimate representation base of the state.

Adoption of total population as the apportionment base would have an effect on Hawaii's 4 basic island units. Present constitutional requirements for apportionment based on registered voters allocated proportionately among the island units tends to give Maui, Kauai, and Hawaii more representation per capita than Oahu. That is because the registered voter rate is higher in relation to total population on those islands. This phenomenon is indicated by the following table.

THE PROPORTION OF POPULATION REGISTERED TO VOTE IS HIGHER ON NEIGHBOR ISLANDS[32]

Basic Island Unit	1968	1972	1976
Maui	41%	50%	52%
Kauai	42	51	53
Oahu	34	40	38
Hawaii	44	51	52
Statewide	35	42	41

As a result, assuming the use of the method of equal proportions, total population as the apportionment measure would change the present allocation of elected representatives assigned to the island units. For example, based on population data from 1976, Oahu would be allotted 42 seats in the state house of representatives.[33] Registered voter data from the same year would entitle Oahu to only 38 of the 51 seats.[34] A proportionally identical apportionment would result if the size or bicameral structure of the legislature were altered.

Within each basic island unit, the total population apportionment base would also affect the delineation of representative districts. For example, the largest legislative district in terms of total population would be the area including Schofield Barracks. That district would consist predominantly, if not entirely, of military personnel who traditionally exhibit low voter registration rates.

In summary, total population must be considered as a feasible mechanism for representational apportionment. Starting in 1980, federal census data will be available every 5 years and in detail sufficient for drawing district boundaries. While on the one hand, total population has the advantage of not discriminating against any group of residents, on the other hand it tends to distort the representational process by equally weighting all persons, e.g., infants and adults are counted the same. Adoption of the total population apportionment base would change the present representational allocations among the basic island units.

State Citizens. The Supreme Court has indicated that a state citizen base may be the ideal measure of state population.[35] It presents no danger of grossly distorting the weight of votes or of excluding citizen groups which deserve representation but who are ineligible to vote, such as minors. The state citizen measure excludes aliens and tends not to include transient, temporary residents.

Use of the state citizen measure, however, has serious practical problems. There is presently no available data that could provide accurate counts of how many persons in Hawaii qualify as state citizens. A special state census would be required in order to generate the information needed with adequate frequency and with sufficient detail. Such a state census would prove to be a costly undertaking.[36] Problems with developing an accurate count would be accentuated further by the complexity of formulating workable criteria as to who qualifies as a state citizen.

Because data regarding state citizens are unavailable, it is not clear what effect its adoption as an apportionment base would have on the basic island units. One group that will have a substantial effect on present representational allocations among the basic island units is minors. They are presently excluded from the apportionment base. In contrast, the state citizen measure counts minors in the apportionment base. The inclusion of this large group potentially could advantage an island with a high fertility rate. Available evidence suggests that minors will continue not to be proportionately located among the basic island units. The birth rate is lowest on Oahu where most of the state's

residents live.[37] The inclusion of minors may significantly affect the representational apportionment among the islands in the future. Because the current apportionment base tends to exclude transient military and other temporary residents, those groups would also not affect the basic island units. However, notwithstanding the effect on the various islands, districting considerations accounting for where minors reside on an island may be necessary with the state citizen measure.

The state citizen measure of population, while an attractive alternative for apportionment purposes, is not a pragmatic option. A special state census is necessary for generation of the types of information required. The alternative would also affect present representational relationships among the basic island units significantly.

Actual Voters. Use of an actual voter measure of state population possesses many of the same practical advantages as a registered voter base. The necessary statistical data are readily available from the state elections office and are conveniently broken down by legislative districts. Figures are available biennially and actual voting figures quickly reflect population shifts within a state while automatically eliminating those not eligible to vote.

Some defend use of an actual voter base on the grounds that it provides a more accurate picture of participation in the political process than any of the alternative bases. They hold that voting is not only a right, but also a duty. The nonvoter is, in a sense, "punished" for lack of political interest through the curtailment of representation in the nonvoter's district.[38] Those who favor actual voters argue that use of a more inclusive population base accords the votes of certain individuals greater weight than others simply because large numbers of persons in their districts stay away from the polls.

Arguments for use of actual voters are countered by the advocates of total population on the grounds that a legislator is the representative of all members of a district. Under this reasoning, all inhabitants should be included in the apportionment base regardless of their voting status. Actual voter counts exclude minors and aliens and tend to exclude temporary and politically

alienated residents. Use of actual voter data may present the same danger of discriminating against certain socioeconomic groups or racial minorities as a registered voter base is alleged to do.[39]

Another major disadvantage of the actual voter count is the comparatively unstable nature of these figures. The rate of voter turnout may vary among districts depending on the particular election figures used. A natural disaster or epidemic confined largely to a particular locale may prevent large numbers of eligible voters from turning out to vote and thus result in underpresentation for those areas. Voters also tend to exercise their voting right in greater proportion when highly controversial contests are involved.[40]

Related to the stability of the actual voter count is its effect on the basic island units. Voter registration rates tend to be higher on the neighboring islands than on Oahu, and in addition the voter turnout on Kauai, Maui, and Hawaii may also be higher than on Oahu. Presidential election year data indicates that registered voters turn out to vote in higher proportions on the neighbor islands.

REGISTERED VOTERS ON OAHU TURN OUT TO VOTE
IN LOWER PROPORTIONS THAN THE NEIGHBOR ISLANDS[41]

Basic Island Unit	1968	1972	1976
Oahu	87.53%	84.04%	84.97%
Hawaii	91.77	88.01	86.85
Kauai	91.33	90.56	87.49
Maui	88.96	85.35	82.71

Dr. Dan Tuttle reports that the lower voter turnout on Oahu is explainable because of the influence of migrants from the mainland and their characteristically low propensity to vote. People in Hawaii tend to vote in higher proportions than in other states on the mainalnd. Tuttle further concluded that the low 1976 voter turnout on Maui reflects the island's change in voter population over the past few years. Tuttle expects Maui voting patterns to more closely reflect that of Oahu because of the size of the mainland migrant population there. This factor along with the low interest in the local elections in that year account for the poor showing of Maui voters.[42] Thus, to the

extent that the actual voter base differs from the registered voter base, due to neighbor island voting trends, adopting that apportionment base would tend to push representation away from Oahu.

Few practical constraints to using the actual voter count of population can be raised. The data are available frequently and in great detail. However, actual voter data might not be the preferred apportionment base because of its tendency to exclude numerous groups and to penalize those not exercising their right to vote. The basic island units might also be significantly affected by a change from the present registered voter measure to an actual voter count.

Eligible Voters. An eligible voter standard rests on the belief that only those who meet a state's qualifications for voting deserve inclusion in the apportionment base. The eligible voter measure is more inclusive than a registered voter or actual voter standard and is not subject to fluctuations due to the circumstances of a particular election. As a result, many temporary residents, including transient military personnel tend to fall within the standard.[43] However, aliens, minors, incompetents, and felons are generally not considered qualified voters.[44] Adjusting for such excluded groups raises a practical limitation to the eligible voter measure as an apportionment base.

The only direct method for determining the number of eligible voters is to subtract those excluded from voting from total population figures. As indicated above, federal census data will be available every 5 years beginning in 1980. Such population information can be broken down by census tracts and enumeration districts for the purposes of representative districting. Though such census data can easily be adjusted for minors, comparable alterations for aliens, mental incompetents, felons, and transient nonresidents may be more problematic. Census tabulations do not presently account for felons or mentally incompetent persons, but because they tend to reside in institutional settings, it is likely that accurate adjustments are possible. In contrast, aliens and other persons not considering themselves Hawaii residents are not easily allocable to the different electoral districts. Neither detailed information regarding alien locational patterns nor estimates of those not intending to reside in Hawaii permanently and where they live are presently available. The potential size of

both these groups may significantly undermine the legitimacy of districting boundaries based on estimates of where aliens and nonresidents are located. Because of the speculative nature of such estimates, the eligible voter standard may not be a feasible population base for apportionment purposes.

Adoption of the eligible voter measure would affect the present apportionment of representation among the basic island units but it is not clear as to what that magnitude would be. The direction of the effect, however, can be inferred. Using the method of equal proportions, registered voter data, and eligible voter estimates from 1970, the apportionment among the basic island units was compared.[45] Adoption of an eligible voter population base would tend to apportion representation toward Oahu and away from the neighbor islands. For example, the 1970 registered voter base would have allocated 41 representative and 19 senate seats to Oahu while under the eligible voter count the number of slots in the 2 houses would have been 42 and 21, respectively.[46] That the eligible voter base would tend to shift apportionment away from the neighbor islands and toward Oahu is understandable since almost all military personnel, a group that tends not to register to vote, reside on Oahu.[47] The strength of such an effect is not easily ascertainable because current breakdowns of eligible voter information is not available. What is certain is that the eligible voter base would have a substantial effect on the politics of representative districting. An indication of how much of an effect the eligible voter base would have on districting is reflected by the fact that the number of military personnel on Oahu equal more than one-fifth of the registered voters on the island.[48]

There is currently no specific measure of eligible voters in Hawaii. It is possible to estimate, with fair accuracy, the count of eligible voters by adjusting census population data. However, such estimates may prove to be inadequate for the purposes of drawing representative district boundaries. Fewer groups would be excluded from the apportionment measure than presently the case, if the eligible voter base were adopted. As a consequence, the eligible voter count might substantially affect the representational scheme currently integrating the basic island units.

Having determined its apportionment base and who are represented by those public officials elected in the state, a more detailed look at other elements of the apportionment formula is in order. Given the tool for counting the "population" to be contained in a representational district, a next step involves the drawing of the lines delineating district boundaries. It is to the concerns created by how those district boundaries are drawn that the following chapter turns.

Chapter 7
APPORTIONMENT AND DISTRICTING

PART I. INTRODUCTION

The apportionment process raises still other issues beyond those concerning the principle of equal population, the range of variation in population permitted, or even which measure of population is selected. A remaining group of questions that have been touched upon in previous chapters involves representative districting. This aspect of apportionment is important because districting and how it is undertaken affect the representation of individuals, political parties, and other interests within the state. Districting involves the drawing of boundary lines defining the geographic area from which a public official is elected.

No districting plan can be strictly neutral with regard to all parties, for the drawing of district lines will always reflect the selection of certain values or interests which are not based solely on population. Every line drawn on an apportionment map makes one or more policy choices. For this reason, most districting questions are political in nature, requiring resolution by the individual states rather than legal determination by the courts.[1]

The issues regarding representational districting can be grouped into 3 categories, namely, district structure, electoral systems, and criteria for how boundary lines are established. Questions involving district structure relate to the controversy over single and multiple member representative districts. Although structural alternatives such as floterial districts and the place system could be included in this discussion, they more properly should be viewed as variations of the multimember district concept. Accordingly, treatment of multimember districts in the text below generally refer with equal weight to floaterial districts and the place system.

District electoral systems involve how those within the district elect their representatives. How votes are cast and tabulated provide the focus of the

questions in this category. Four alternative voting schemes are considered. A third set of issues deal with how district boundaries are drawn. Even acknowledging that the districting process inherently reflects political choices, it may still be desirable to place limitations upon how those preferences may be shaped. Districting standards guard against overt gerrymandering and a number of guidelines are offered.

PART II. REPRESENTATIONAL STRUCTURE

Throughout history there has been considerable controversy over whether a representative system should be based on single or multiple member districts, and what the political effects of each are. Contrary to the popular view that single-member districts have been the predominant types of district used for election of American state legislators, the multimember district is in the American tradition quite as much as is the single-member district.

The most recent survey of districting arrangements in use in the states[2] reveals that 26 states choose all their legistors from single member districts exclusively. In contrast, while no states use multimember districts exclusively in both legislative bodies, 9 rely on them exclusively for one house of their legislature. Also, 18 states, including Hawaii, use a combination of single and multiple member districts for their legislative bodies.[3] The evidence indicates that a majority of the states show a preference for single-member representative districts. But a large number continue to rely upon districts with more than one representative.

In the State of Hawaii, multimember districts traditionally have been an acceptable structure for representative districting.[4] For example, until 1970 when federal law mandated the formation of single-member districts, the state's 2 congresspersons were elected at-large throughout the state[5] and the state's elected school board is still composed of members who represent large multimember districts.[6] Most debates regarding districting in Hawaii, however, have involved the state legislature. Both the 1968 Constitutional Convention and the 1973 reapportionment commission concluded that a combination of single and

multimember districts was most appropriate given the state's demographic characteristics. Single-member districts were preferred where homogeneous socio-economic communities were geographically separable from adjoining areas and multimember districts would cover inordinately large land areas that were sparsely populated. Some multimember districts were desirable in order to prevent dividing areas with substantial community homogeneity, to minimize arbitrary boundary delineations, and to account for the mobility of people in a rapidly growing area.[7] It is within this context that the questions of representational structure arise.

Whether to create single or multiple member districts can be a subject of considerable controversy. Unfortunately, there is very little empirical evidence to support the arguments for or against either alternative, although the following discussion attempts to present the evidence that does exist. For the most part, it is not known what the practical effects are of using one districting *arrangement rather* than the other.

Most of the effects commonly alleged to follow from the use of single-member districts, in contrast to multimember districts, are actually due simply to the smaller or less heterogeneous nature of the single-member district, rather than to the fact that only one representative is apportioned to the district. When discussing single and multimember districts, it can generally be assumed that, in any state with an elected body of a limited size, multimember districts will be larger and encompass more diverse interests than will single-member districts. This close interrelationship of what are actually 3 separate district characteristics--size, degree of heterogeneity, and number of legislative representatives--should be kept in mind when evaluating the following claims regarding the effects of single and multimember districts.

In evaluating single and multiple member districts, a number of issues regarding the representational process are significant. One question involves whether the number of persons elected structurally affects the relationship between the representative and the representative's constituency. Another relates to whether the structure of the representative district influences how public officials view the problems they face. The district structure may also

make a difference in how effective pressure groups and political parties are with those elected. Another issue involves the type of effects the structure may have on who gets elected. Would minority group representation affect the district structure? Still another factor is whether the tendency to gerrymander is related to whether single or multiple member districts are adopted? Each of these questions is addressed separately.

DISTRICT STRUCTURES AFFECT THE REPRESENTATIVE PROCESS

Impact of District Structure	Single-Member Districts	Multimember Districts
Representative/constituent relationship	- closer representative ties to constituents	- increased representative independence
	- representative more visible	- alternative access points to political process by constituents
Representative view of problem	- narrow concern for local issues	- broader perspective of larger issues
Pressure group and political party influence	- representatives less dependent	- greater representative reliance
	- organizations are weakened	- stronger organizations
Effect on election characteristics	- greater emphasis on voter personality	- attracts better-qualified candidates
	- simple ballot format	- election emphasis on issues and parties
		- possible greater voting power
Minority group representation	- representation for minority areas	- potential for party sweeps
	- discourage minority parties	- allow multi-party system
		- dilutes minority strength

Opportunities for gerrymandering	- more susceptible to gerrymandering	- less opportunities for gerrymandering

Legislator-Constituent Relationship

One of the most common arguments offered in favor of single-member districts is that they promote a closer relationship between legislator and constituent than is possible in multimember districts. It is held that a single district representative is more "visible" to constituents and can more easily be held accountable to them at the polls than can the several representatives of a multimember district.

There is little, if any, evidence to support these arguments however. Interviews with legislators in states which have either decreased the size of their multimember districts or switched to single-member districts appear to support the claim that representatives of smaller districts are forced to be more responsive to the desires of their constituents. On the other hand, some legislators are less pleased than others with this aspect of single-member districting because an increase in constituent pressures lessens their independence. This concern can be perceived in another light. To the extent that district pressures are parochial and inconsistent with needs of the larger political body, close dependence upon district constituents may not be desirable. Other legislators view the dependence on constituents as a strengthening of the representative system. Still, it may be argued that when the citizen has 2 or more district representatives the citizen has greater access to the political process than when there is only one representative.[8] The lack of empirical data in this area does not allow for more than an arguably theoretical basis for stating that officials elected from single-member districts are more responsive than their counterparts selected at-large.

View of State Problems

While small single-member districts may offer the advantage of providing a close relationship between voter and legislator, this relationship may tend to be

concerned with local issues only and to ignore the broader issues facing the state. In particular, it may fragment the approach to statewide economic assistance and improvement programs. Legislators may tend to judge major legislative issues in terms of merely narrow local interests rather than in light of the best interests of the state as a whole. A representation system consisting solely of single-member districts would tend to create representatives responsive only to the problems and needs of a very small part of the total population. Fairly included under such a belief would be the related worry that a system of single-member districts may tend to encourage the building of personal, small community political machines and discourage representatives from coping with larger problems of general concern to the state or with large groups within the state. It may inhibit the building-up of coherent political party organizations which may demand some loyalty of individual representatives on major issues. It may also weaken the decision-making body itself because representatives loyal to different interests and with narrow perspectives may tend to abdicate their responsibility for determining matters of major interests.[9] Such contentions, however, cannot be documented by conclusive empirical evidence.

Pressure Group and Political Party Influence

Because single member district representatives tend to have a more direct relationship with their constituents, it is claimed that they are less dependent on any political party and more amenable to interest group pressures than are the representatives of multimember districts. Since the representatives from the small constituency are usually forced to have a more local point of view and to serve local interests more carefully if they are to survive at the polls and since such legislators usually have closer personal ties with their constituents, they usually feel a greater responsibility to them but less responsibility to any party organization outside their own district. This in turn makes them more susceptible to the demands of pressure groups--particularly those groups which are presumed to be strong in their district. As a consequence, it is further argued that parties tend to become weak, decentralized, and undisciplined. It has been contended that the large district is desirable in order to strengthen

parties, promote party discipline, and, thereby, enable the majority party not only to enact its program but also to be held responsible for that program at the polls.[10] In an attempt to predict the effects that changes from multiple to single-member districts have on party unity, one researcher concluded that as officials become more responsive, it is likely that there will be a decline in the unity within each party and also within metropolitan representative delegations as a whole.[11]

Such predictions are highly speculative. There is no evidence to prove or disprove such an argument. There is no collection of conclusive data, for example, proving that legislators from single-member districts are more subject to the influence of pressure groups than are those from multimember districts. Indeed, no one has ever devised an objective measure for the influence of pressure groups on legislators. On the other hand, an old study in Indiana actually contradicted the claim that multimember districts foster greater party cohesion and loyalty in the legislative party than do single-member districts. During sessions on roll calls which were clearcut party-line votes, Indiana's single-member district legislators supported their political party as consistently as did multimember district legislators. In fact, in one session the Marion County delegation (Indiana's largest multimember delegation) was distinctly less loyal to the party than were its single-member district colleagues.[12] Obviously, in most states the influence of pressure groups and political parties on legislators will depend on many factors other than simply the structure of its representative districts. The outcome may depend on a number of factors other than districting--gubernatorial leadership, the skill of party leaders, local and factional developments, and electoral trends.[13]

Effects on District Elections

The number of representatives apportioned to a legislative district is alleged to affect several aspects of the electoral process in the district. First of all, multimember districts are assumed to attract better-qualified candidates to run for legislative office than single-member districts. If true, this is likely due simply to the larger population of the multimember district and the corresponding greater supply of able potential candidates.

Secondly, it is argued that in single-member district elections, there is a greater emphasis on the candidates personally, while in multimember districts elections focus attention on parties and issues rather than on personalities. This, in turn, is supposed to be due in part to the long ballot in multimember districts which makes it difficult for voters to adequately discriminate among the individual candidates and thus forces them to rely more on party labels.

On the other hand, a multimember district ballot with a large number of legislative candidates, in addition to the other offices being voted on in the same election, makes a rational choice by the voter difficult if not impossible. This is especially true in the primary elections where the number of candidates normally will be far larger than the number of persons to be nominated. A lengthy and cumbersome ballot greatly weakens voter control over the nomination and election of legislators, and places a premium on ballot position, name familiarity, party label, or newspaper and other interest group endorsement.[14] Such effects, however, are likely to have less significance the smaller the size of the multimember district.

Finally, another aspect of the electoral process alleged to be affected by the number of district representatives is the "voting power" exercised by the electors in each district. In the case of Fortson v. Dorsey,[15] the appellees argued that the voting weight of electors in the multimember districts was less than that of voters in single-member districts. However, in the Hawaii case of Burns v. Richardson,[16] the plaintiff argued exactly the opposite, that voters in multimember districts exercise greater voting power than electors in single-member districts. The brief for Governor John A. Burns cited the opinion of a Pennsylvania district court on this issue:[17]

> ...each voter should participate in the selection of one of the representatives only. For since the persons elected are to comprise a boiled down reflection, as it were, of the larger electorate, and since each of them, therefore, in a very real sense stands in the assembly in the place of a group of voters, it would appear to interfere with and dilute the voting rights of others for a voter to participate in the election of more than one representative.

One researcher has devised a mathematical measure of effective voting power in an attempt to demonstrate that districting systems using a mixture of single and multimember districts, or multimember districts of different sizes, produce inequities in the voting power and representation of citizens.[18] The researcher claims that when multimember districts are granted representation proportional to their populations, they are actually being given more representatives than are necessary to compensate for the decrease in the individual citizen's voting effectiveness. The researcher concludes that:[19]

> Legislative systems employing districts electing different numbers of representatives inequitably allocate greater voting power to voters in the most populous districts. This discrimination, which is inherent in all such systems, is proportional to the square root of the district population and may easily reach the magnitude of a constitutional deprivation.

However, in light of the U.S. Supreme Court's approval of multimember districts, it may be assumed that this claim of unequal voting power in mixed districting systems is more a matter of theoretical mathematics than of constitutional or political consequence.

Representation of Interests

The type of district used in a state apportionment plan is alleged to affect not only the voting power of individual citizens, but also the representation of political, social, economic, and racial groups in a state. On the one hand, it is claimed that multimember districts produce legislators more representative of different group interests than single-member districts, when used in conjunction with certain electoral systems, such as proportional representation or cumulative voting. However, when used in conjunction with the simple plurality electoral system (presently used by all states with multimember and single-member districts, except Illinois), recent evidence indicates that single-member districts may yield the more "representative" legislatures.[20]

The recent claim that single-member districts assure the election of persons representing a wider variety of interests than is likely in multimember

districts is most obviously true in the case of party representation, although the effect varies widely among certain states. One study examined the actual electoral results over a decade in 3 states which used multimember districts during the past decade--Indiana, Michigan, and Ohio.[21] All are two-party states in which party strength is very evenly matched, although some of the multimember districts were one-party dominated. In Indiana, only 4 out of 45 multimember elections in the study period split partywise. In Michigan, all of the 85 multimember district elections of the past decade were party sweeps!

In contrast, election results in Ohio's multimember districts over the same decade indicated fairly wide representation of both political parties. Twenty-seven of Ohio's 69 multimember district elections split most of the time between the 2 political parties. What accounts for the differences in multimember district election results between Indiana and Michigan on the one hand, and Ohio on the other? The most likely explanation is Ohio's office-block style ballot which offers no opportunity for effortless straight ticket voting as do the ballots in the other 2 states. It might also be due to less partisanship on the part of the voters in Ohio, or a closer match of the parties within the districts. The author of the 3-state study concluded that a party sweep is the usual occurrence in multimember districts, but the frequency depends upon the balance of party strength and the amount of straight-ticket voting.[22]

An analysis of Hawaii's electoral results reveals that Hawaii's multimember district elections follow much more closely the pattern of Ohio, than of Indiana or Michigan (see Appendices E and F). Twenty-six out of Hawaii's 97 multimember district elections for the house of representatives since 1968 split partywise, allowing some minority representation. Similarly, in contrast, 5 of the 19 single-member district seats were won by a member of the state's minority party. For the senate, 9 out of 21 multimember district elections, or 43 per cent were split between the 2 major parties.

Although majority party sweeps in multimember districts do appear to be the rule in several mainland states, it is clear that in Hawaii multimember districts tend to produce legislative delegations representative of both political parties. This may be due in part to the relatively small size of our multimember

districts, the well-informed nature of our electorate, and our office block style ballot, all of which tend to increase voter discrimination and prevent the "blind" straight ticket voting which produces party sweeps in other states.

In a second area regarding minority representation, it has often been asserted that single-member districts discourage minor parties and promote a strong two-party system, whereas multimember districts allow the development of a multi-party system. Single-member districts are said to discourage a multi-party system from developing because only 2 parties can contend for electoral victory with any hope of success. Therefore, it is argued, the 2 major parties are strengthened while minor parties are destroyed.

The historical evidence, however, does not support the proposition that single-member districts strengthen the two-party system. It appears instead that:[23]

> ...while single-member districts discourage the development of multi-party systems, they may not contribute to maximizing competition between two parties but rather tend to become dominated over long periods of time by a single party.

In addition, there is no evidence that multimember districts result in encouraging third parties or in weakening the two-party system. The states using multimember districts tend not to have multi-party systems, while New York, one of the few states using single-member districts exclusively, has long had a strong third or often fourth party on its ballot.[24]

The effects of single-member and multimember districts on the party system depend partly on what voting system is used in the district. A system of proportional representation in a multimember district is indeed likely to encourage the development of minor parties, but when coupled with the simple plurality election, multimember districts appear no more likely than single-member districts to foster the growth of minor parties. In fact, if a minor party's electoral strength is concentrated geographically, it may have a better chance of winning a few seats under the single member than under the multimember system. Moreover, the rise and growth of a two-party or a

multi-party system depends not only on the number of legislators chosen in a district, but also upon the voting system used to elect those legislators and other factors as well.[25]

Thirdly, the effects of single and multimember districts on the representation of social, economic, and racial groups is a difficult area of interest representation to measure. In mainland counties containing a substantial proportion of Negro voters, single-member districting appears to ensure the election of a greater number of Negro legislators than likely under at-large elections. In metropolitan counties in Georgia, Ohio, Tennessee, and Texas, changes to single-member districting resulted in a substantial increase in the number of Negro representatives elected to office. There are differences of opinion, however, about how this actually affects the influence of Negro citizens in the legislature. A study of a large multimember district in Florida (Dade County) came up with the noteworthy finding that some Negroes in that area are opposed to single-member districting because under such a plan they would achieve a few Negro representatives at the price of an equal or greater number of highly conservative white legislators from other areas in the county.[26]

In addition to the broader representation of partisan and racial interests, it is argued that single-member districts will assure representation of a larger range of socioeconomic interests than will multimember districts. To the extent that the 2 political parties represent different socioeconomic interests, this may result from the greater balance in party representation that results from the use of single-member districts in some states. Furthermore, single-member districts, together with residence requirements, forces both parties to nominate candidates who are more heterogeneous in geographical and socioeconomic terms. One of the effects of single-member districting in Davidson County (Nashville), Tennessee was to break up a concentration of legislators who had resided in the wealthiest part of the city. Districting tends to assure the representation of a wider variety of interests, and enhances the prospects that metropolitan delegations will be more heterogeneous in socioeconomic as well as racial terms.[27]

Opportunities for Gerrymandering

A common criticism of single-member districts is that they are more susceptible to partisan gerrymandering than are multimember districts. This is true in the sense that use of small single-member districts requires the drawing of many more district lines than does the use of a few large multimember districts. This is particularly a problem in crowded metropolitan areas, where there are often no jurisdictional lines or other relevant criteria on which to base district lines.[28]

> There probably are insurmountable obstacles to ideal apportionment in a megalapolis, but one possibility is the use of several rather medium-sized multi-member districts, as illustrated by Multnomah County [Oregon]. Whether those districts are any less artificial than would be sixteen single-member districts is dubious but surely it is easier to draw five districts, somewhat regional, with more objectivity than sixteen SMD's [single member districts].... (Emphasis added)

In its own way, a multimember district can also result in a partisan gerrymander. This possibility was acknowledged by the Supreme Court in Fortson v. Dorsey[29] when it stated:

> It might well be that designedly or otherwise, a multimember apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.

It can be argued, however, that "The larger and more visible the district...the more the districting process is subject to popular inspection, and thus, to some degree of popular control...."[30]

Another consideration is that population changes will more drastically affect the boundaries of many small single-member districts than would be true of a few large multimember districts. This means that if small single-member districts are employed, more frequent reapportionments and redistricting will be required. Each revision of district boundaries will offer additional opportunities for gerrymandering, while rapid population shifts may create serious

inequalities among the districts before the decade is over and it is time to redistrict.

It is evident from the above discussion that both single-member districts and multimember districts have certain advantages as well as disadvantages. Neither system is ideal. Any choice between the two will necessarily be based on the convention's answers to questions of public policy. Perhaps the most realistic approach to the question of single and multimember districts is to admit that neither arrangement in and of itself is an effective guarantee of equitable representation. Each possesses the potential for inequitable treatment of the various individuals and groups comprising the constituency. In addition, the results of either type of district are due in large part to the influence of many factors other than simply the number of legislators apportioned to a district. Some of these other influences are the homogeneous or heterogeneous nature of the district, the size of the district in terms of its population, the degree of political competition within the district, the electoral system used, and even the type of electoral ballot used. Any attempt to structure an adequate apportionment system requires an awareness of these many interrelationships and their bearing on the representative nature of the entire apportionment system.

PART III. ELECTORAL SYSTEMS IN MULTIMEMBER DISTRICTS

An electoral system determines which candidates are elected when the voters of a district have cast their ballots. That is, they establish the ground rules as to how citizens vote, how their votes are tallied, and which candidates are victorious. Though conceptually, electoral systems are independent of how districts are structured, meaningful discussion of alternative systems only applies to the multimember district setting. This is because only one scheme, the single-ballot-plurality vote, can be used in both single and multiple member districts. Other electoral systems can be used only where multimember districts allow more than one candidate to be elected. Together with the single-ballot-plurality system, 3 different voting schemes are examined in this part. The 3

alternatives--the limited voting scheme, the cumulative voting system, and the proportional representation alternative--are designed to increase the opportunities for minority representation in a multimember district.

Single-Ballot-Plurality System

The single-ballot-plurality vote allows each person to vote for a number of candidates equal to the number of seats apportioned to the district. The candidates with a plurality of votes in the district are elected. In an at-large election using this system, the party that wins the district, however closely, gets all the representation. There is no possibility of minority party representation. On the other hand, in multimember districts using the place system it is possible for the candidates of more than one party to win seats in any given election, particularly if the seats are listed separately on the ballot.

There are 2 variations of the simple plurality system presently in use in multimember districts:

(1) At-Large Election--This version of the plurality electoral system requires all candidates in a multimember district to run against the entire field of candidates. Those receiving a simple plurality of votes for the number of seats available are elected (used in Hawaii).

(2) Place System--Coming into more widespread use in multimember districts is the "place" method, which requires that each candidate reside in a subdistrict which has been allocated one of the district's seats. The candidates who each receive the highest vote for the specific places for which they are running are elected, although they are voted on by the electorate of the entire district. (See chapter 2 of this study for a more detailed explanation of this system.)

Limited Voting

This system derives its name from the fact that it limits each elector to voting for a number of candidates which is less than the number to be elected in the elector's district. For example, in a 3-member district, each elector would

be entitled to cast 2 votes. The obvious purpose of the system is to provide legislative representation for the largest minority or minorities in each district. Whether it does, in fact, do so depends upon how large the minority party is, how disciplined it and the majority are, and how many candidates each party offers for the 3 seats.[31]

No state has ever adopted the limited voting system for the election of state legislators, although it is used to elect various county commissioners and city councils. In a sense, many multimember district voters in Hawaii informally utilize such a system by refraining from casting all the votes they are entitled to, with the intent of giving greater effect to the votes cast for their favorite candidates. Such a technique, often called "plunking", may be an awkward way of weighting one's vote, but it is certainly legally permissible and politically justifiable.[32]

Cumulative Voting

Unlike limited voting, this system allows voters to cast a number of votes equal to the number of seats apportioned to their district and to divide these votes in any way they choose. For example, if 3 representatives are to be elected from a district, voters can cast all 3 of their ballots for one candidate, or 2 for one candidate and one for another, or one for each of 3. Under this method, in most districts the stronger party elects 2 members and the minority party is virtually guaranteed a member in each district.

The purpose of the cumulative voting system is to facilitate minority party representation. In Illinois, where this system has been used to elect the house of representatives since 1872, "[i]t has in fact worked to ensure minority party representation, and very few districts have ever been swept by one party."[33] However, a heavily criticized feature of the system is that it tends to reduce competition in the general election. Like the limited vote, it makes a party's success depend upon its nominating just the right number of candidates and upon its supporters casting their votes according to instructions.[34]

Proportional Representation

Under this system, a party wins a proportion of representation roughly equivalent to its proportion of the popular vote. It is believed to assure an almost perfect proportional reflection of the preferences of various groups and divisions in an electorate. For example, if used to elect a state legislature, all candidates could run at-large throughout the state or be grouped in multimember districts. Voters would rank the candidates in order of preference, and candidates polling a predetermined quota of the votes cast would be elected and their excess votes counted for second choice candidates and so on. This allows the electors a free choice among candidates without dissipating their votes.[35]

No form of proportional representation has ever been used for the election of state legislators. However, in American cities in which the system has been used, it has generally produced the result that it was designed to produce--it has usually elected a city council that represents various shades of opinion in the city.[36] However, the system is criticized for producing long ballots, and highly complicated tallying, and for threatening to splinter the 2 major parties. Also, precisely because it does yield a more accurate representation of the diverse groups in the political community, a proportional representation system tends to reduce legislative majorities.

In summary, preference for the single-ballot-plurality system or one of the other 3 alternatives presented depends upon a policy choice between 2 types of democratic systems.[37] The single-ballot-plurality system used in a general election results in the formation of a stable majority supporting the outcomes of the political and government processes. Minority groups in the electorate are blanketed by such a majority because those groups had and lost their opportunity for making themselves into a plurality or majority during the election process. In contrast, the 3 voting schemes increasing the opportunities for minority representation offer a system of changeable but continuing legislative minorities. Their primary function is to reflect and secure expression of the group divisions of opinion in the electorate and only secondarily to produce majority support for the conduct of government.

PART IV. DISTRICT BOUNDARY GUIDELINES

In addition to specifying the type of district to be used for the apportionment and election of public officials, an apportionment formula may also include additional provisions designed to guarantee a fair and equitable districting process. Hawaii's present constitution includes provisions as to how legislative district boundaries are to be drawn. In part, such districting standards are necessitated by the constitution's call for periodic redistricting by a reapportionment commission. The commission is presently vested with full power to redistrict the seats of the state legislature[38] and the standards can be seen as guidelines in how it can accomplish that task in a nonarbitrary manner. Although such districting guidelines apply only to those elected to the state legislature it is possible for similar standards for other elected bodies to be developed and inserted into the state constitution. It is therefore worthwhile to examine the alternative types of districting guidelines that minimize the potential for gerrymandering district boundaries.

Generally, there are 2 alternative constitutional strategies for representational districting. First, the constitution can fix representative district boundaries. That is, the details of each district's borders can be set out specifically through a constitutional provision. Secondly, the constitution can provide for general criteria as to the manner in which boundaries of representative districts are to be drawn. It is this second approach that was adopted by Hawaii's 1968 Constitutional Convention.

It is generally cautioned that legislative districts not be permanently frozen in the constitution. Instead, most apportionment authorities advise that the power of fixing district boundaries be assigned to the state's apportionment agency, whether this be the legislature, an executive officer, or a commission. Unless this power is so granted, it may be impossible in the future to achieve periodic reapportionments which conform to the Supreme Court's "one-man, one-vote" ruling. This is particularly true in the case of small single-member districts. When district boundaries are frozen in the constitution, any redistricting change needed to accomplish equitable reapportionment must go through the lengthy constitutional amendment process. The undesirability of

fixing district boundaries in the constitution has been pointed out by the National Municipal League in the commentary attached to its Model State Constitution:[39]

> One cardinal rule is that the geographic boundaries of legislative districts should not be permanently fixed in the constitution because of the mobility of Americans. Whatever system is used, it should be one in which needed changes can be easily made following every decennial census.

The major argument offered in favor of permanently fixing district lines in state constitutions is that this practice eliminates all opportunity for gerrymandering districts at the time of each decennial census. However, the inequities fostered by inflexible districts which cannot be periodically redrawn to accommodate population shifts within a state are sure to far outweigh the slight opportunities for gerrymandering under a constitutionally prescribed periodic redistricting system. It must be noted that in contrast, such arguments against constitutionally fixing boundaries for legislative districts may not apply with equal force where congressional or other elected bodies are concerned.[40] Regardless of the argument's applicability to other elected bodies, it is still more important to review the kinds of criteria for drawing legislative district boundaries that may be desirably set out in a state constitution.

The delineation of district lines, whether done by a constitutional convention or by a designated apportionment agency, involves a consideration of political forces. As the Supreme Court noted in Reynolds v. Sims, "Indiscriminate districting without regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[41] It is thus important that nonpartisan standards be used for the drawing of district lines.

In Hawaii, the standards added to the state constitution after the 1968 Constitutional Convention can be broken down into 2 groups--absolute restrictions and decision-making considerations.[42] The absolute restrictions on how the designated apportionment agency establishes representative districts are:[43]

(1) Legislators must be apportioned among the basic island units by the method of equal proportions.

(2) No district shall extend beyond the boundaries of any basic island unit.

(3) No district shall be so drawn as to unduly favor a person or political faction.

(4) Except in the case of districts encompassing more than one island, districts shall be contiguous.

(5) No more than 4 members shall be elected from any district.

Four other guidelines fall within the nonmandatory category. A committee report from the 1968 Constitutional Convention explains that they are criteria "that should be considered in any decision concerning districting and that the balance be struck among them is a matter for case by case determination".[44] The 4 standards state:[45]

(1) Insofar as practicable, districts shall be compact.

(2) Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams, and clear geographical features, and when practicable shall coincide with census tract boundaries.

(3) Where practicable, representative districts shall be wholly included within senatorial districts.

(4) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Prior to 1968, the Hawaii Constitution contained no such guidelines for drawing district lines.[46] The reasons for including such provisions require a consideration of many factors.

First, legislative districts in Hawaii were traditionally based on "ahupuaa" and similar historic political and land divisions. Such means of districting had several disadvantages. Traditional Hawaiian land divisions did not coincide with federal census tract lines. They therefore dictated to a certain extent the population base which the state could use for apportionment purposes. So long as district lines did not coincide with census lines, accurate use of federal

census data for apportionment purposes was impossible. In addition, even where apportionment was not based on census population figures, district boundaries comparable with those used in Census Bureau publications were useful in correlating age, race, occupation, income, and similar data with voting behavior.[47] Definite, easily observable boundaries were important for the collection of accurate statistics. However, many of the political and land divisions were bounded by imaginary lines cutting across cane fields or through the middle of city blocks. The U.S. Bureau of the Census refuses to use those boundaries for statistical purposes because of the difficulties involved in collecting accurate data from such areas. This was because streets, streams, major mountain ridges, and permanent fences are regarded as more suitable boundaries for statistical purposes.[48]

Since 1968, Hawaii's political boundaries have been drawn for the most part to follow distinguishable landmarks such as streams, streets, mountain ranges, and other geographical characteristics.[49] However, the political boundaries adopted under such guidelines still are not identical in all instances with those lines delineating federal census tracts.

Second, as a further guarantee of equitable districting, it has been suggested that a state's apportionment formula specify a maximum number of legislative representatives allowable to any multimember district.[50] Growth in a district's population beyond this point would require subdividing the larger district into 2 smaller multimember districts.

The purpose of such a provision is to guard against the future development of out-sized multimember districts which place an undue burden on the individual voter. For example, the National Municipal League notes that multimember districts in some heavily populated areas may better avoid the hazards of gerrymandering than the single-member districts officially recommended in their Model State Constitution, but that "Voters should not, however, be called upon to pass judgment on more than three or four legislative positions."[51]

Is there an optimum size for multimember districts? One researcher feels that:[52]

> Too small a number of members (2 or 3) may not provide for the effective representation of the varied interests of constituents and may be more subject to single-party sweeps. A very large number of members (7 or more) may make it difficult for voters to distinguish the records for individual members and to make an informed choice among candidates.

The view of 2 prominent writers in the area of districting is that a district should be subdivided whenever it is entitled to 4 or 5 legislative members, but that districts in metropolitan areas of from 2 to 3 members are superior in many respects to single-member districts. Their opinion is that each legislative district should be "large enough to provide visibility for its district lines and for its legislative delegation, but without becoming so large that the voter is faced with the long ballot problem of voting for eight, ten, fifteen or twenty members of the legislature".[53]

Of the 22 states using multimember districts in their lower house of the legislature, only 8 have districts containing 7 or more seats. Among them, Washington and Vermont stand out with 13 and 15 seats, respectively, in their largest districts.[54] Like Hawaii, 12 state legislatures have lower chambers with 4 or less representatives in the largest districts. The smaller-sized multimember districts would require that districts be appropriately subdivided when justified by substantial population growth, and would guard against the natural tendency of apportionment agencies to continue increasing the number of representatives allotted to a district rather than perform the necessary redistricting function.

Third, gerrymandering is, in the very narrowest sense, the drawing of legislative districts so as to maximize the electoral strength of a particular group, normally the dominant political party in the state. Gerrymandering can be accomplished in 2 ways: (1) the opposition party's vote can be spread out among a number of districts so that the party can carry few, if any, districts; or (2) the opposition party's vote can be concentrated in a few districts so that its strength will be dissipated in the form of large electoral margins in these few

districts.[55] Through use of these 2 devices, districts can be constructed that are absolutely equal in population but which unduly favor one political party or another.

"Compactness" and "contiguity" are 2 common districting standards mentioned in constitutions and in statutes. Compactness generally means consolidated rather than spread out, or square or circular rather than long and skinny. However, no precise geometric measure of compactness has been widely accepted. Contiguity, on the other hand, refers to the requirement that each district be a "single land parcel", so that a person can travel from any one point in the district to any other point without going through another district.[56] Both of these standards have been acknowledged by the U.S. Supreme Court to be legitimate districting considerations. Since 1968, the state's constitution has included a provision requiring that legislative districts be compact and contiguous.

Finally, some authorities have held, that compactness and contiguity safeguards against gerrymandering have not been very effective, and that what is needed is a constitutional statement of more specific standards with which to limit the discretion of the apportionment agency.[57] The only specific districting standard available, however, appears to be the population deviation requirement discussed in an earlier section of this study. There is no such precise percentage measure of deviation from a standard of compactness, although contiguity appears to be sufficiently precise to permit its application without difficulty.[58]

Specifying the observance of political and land division lines or federal census tract boundaries in drawing district lines and establishing a maximum size for multimember districts in the state constitution may be regarded as additional safeguards against gerrymandering. A variety of other approaches are also being used in the different states. The Delaware Constitution has specified that each legislative district be composed of contiguous territory, be bounded by ancient boundaries, large roads, streams, or other natural geographical features, and not be so created as to unduly favor any person or political party. An Indiana statute has provided that counties may be joined to

form a house district only if they have similar social, economic, and geographic interests. A New York constitutional convention recommended that the constitution say simply that "gerrymandering for any purpose is prohibited".[59]

In Hawaii, the state constitution contains 3 guidelines designed to serve the same function. Individuals and political groups cannot be unduly advantaged by the redistricting process and representative districts are to be contained within larger senatorial districts where possible. Furthermore, discrete, minority, socioeconomic groups are protected against being submerged in large representative districts. In spite of their constitutional status, however, it remains to be seen whether such imprecise restraints against gerrymandering will be subject to rigorous judicial analysis.[60]

Utilization of modern computer techniques to assure proper groupings of citizens into compact and contiguous districts has been suggested as perhaps the surest way to minimize opportunities for partisan gerrymandering. Development of such techniques is being carried out by the National Municipal League, as well as by other individuals and groups. However, it must be remembered that it is impossible to devise a politically neutral apportionment and districting system. Even the decision on which of the computer programs to use is basically a political judgment, for certain types of political values are more readily given expression in one type of computer program than in another. Computer programs explicitly and implicitly promote particular values. Once political judgments have been made, only then is reliance on the computer possible.[61]

It will always be impossible to completely eliminate all political considerations from the apportionment and districting process, for this process is by its very nature political. The significant question is not whether there is politics in reapportionment. Rather, the question is how much politics in relation to the other factors influence the decisions. A well-thought out constitutional apportionment and districting formula can do much to limit the influence of narrow partisan interests and to ensure that Hawaii's districting system will serve the best interests of all the people of the state.

Chapter 8
MACHINERY FOR APPORTIONMENT

PART I. INTRODUCTION

Effective machinery is required to guarantee periodic reapportionment in accordance with a specified apportionment formula. In the past, state legislatures traditionally were vested with the responsibility for reapportionment. But the failure of those bodies to perform those functions and the absence of effective enforcement mechanisms together contributed to the reapportionment problems of the 1960's.[1] Since that time, much in the way of judicial intervention and constitutional restructuring has occurred to insure periodic utilization of the lawfully established reapportionment mechanisms.

For example, the Hawaii State Constitution adopted in 1950 called for gubernatorial reapportionment of the house of representatives every 10 years.[2] Demographic changes in the state, however, necessitated more frequent review of legislative apportionment, especially considering the lack of reapportionment provisions concerning the state senate. As a consequence, constitutional amendments stemming from the 1968 Constitutional Convention redistricted the legislature and created a reapportionment commission to perform future reapportionments.[3] The switch from executive apportionment machinery to reliance on a commission was based on the policy preference for an impartial instrument for allocating state legislators. It is the work product of that reapportionment commission that provides the present representational scheme for the state legislature.

Notwithstanding the relative newness of the state's reliance on the commission as an apportionment mechanism,[4] constructive modifications have been recommended by the commission. Reference here is to the recommendations offered by the 1973 reapportionment commission.[5] In considering such recommendations, it is important to fully appreciate the structure within which they fit and the scope of alternative mechanisms available. This chapter provides an overview of the various apportionment mechanisms adopted and

relied upon by different states. In the sections that follow, 4 basic questions regarding apportionment mechanisms are addressed. First, what are the alternative apportionment agencies and what are their relative merits? Secondly, what are the possible types of apportionment functions that such an agency could perform? Thirdly, what are the alternative procedures for enforcing the requirement for periodic reapportionment? Lastly, what frequency of reapportionment is desirable? Each query is examined separately.

PART II. APPORTIONMENT AGENCIES

Who should have the initial responsibility for periodic state apportionment and districting? This is one of the principal questions involved in providing for any state apportionment procedure. The U.S. Supreme Court has never passed on the question of what state agency should be responsible for the apportionment and districting function. As a consequence, there are no judicial restrictions or standards as to what agencies can or cannot lawfully be assigned the apportionment function. Each state therefore is at liberty to choose among alternatives as to the agency best suited to the political needs of the state. Three mechanisms stand out as the mechanisms relied upon by the states.[6] They are the state legislature, executive officials, and boards or commissions. A fourth alternative, computer apportionment, also is considered in the analysis. The arguments regarding each mechanism can be summarized as follows:

NO APPORTIONMENT AGENCY IS COMPLETELY FREE OF POLITICAL INFLUENCES

Agency	Arguments For	Arguments Against
Legislature	- knowledge and experience regarding political representation - comports to separation of powers doctrine	- failed to act in the past - self-interested and partisan; open to gerrymandering

Agency	Arguments For	Arguments Against
		- not subject to court writs
Executive officials	- governor easily singled out for accountability	- open to partisan gerrymandering
	- court review of actions	
Commission (nonpartisan)	- removed from legislature	- potential for gerrymandering
	- objective in nature; independent	- not accountable to political forces
	- statewide orientation	
	- automatic	
Commission (bi-partisan)	- removed from legislature	- potential for deadlock
	- protects interests of majority party	- potential for gerrymandering
	- automatic	
Electronic computer	- automatic and objective	- programs reflect political values of programmers; benign gerrymandering

Political forces and values are able to influence different apportionment agencies to varying degrees. These findings are explained below.

The Legislature

The state legislature has been the traditional agency assigned the reapportionment task. A large majority of the states continue to rely on this mechanism for reapportionment.[7] Those who favor retaining the legislature as the apportionment agency argue that the primary responsibility for apportioning seats in the legislature should logically be placed with the legislature itself. Apportionment is a function which can best be accomplished by the elected branch of government, because of the knowledge and experience that legislative members bring to the task. In addition, it has been argued that the "separation

of powers" principle requires that the legislature, rather than the executive or judiciary, be responsible for legislative apportionment.[8]

Those who oppose the legislature's having the initial responsibility for apportionment cite the past failures of state legislatures to reapportion according to constitutional requirements. They argue that the self-interest and partisanship of legislators normally interfere with prompt and fair reapportionment and redistricting. It is also pointed out that the legislature is not subject to court mandamus, so that enforcement is much more difficult than in the case of nonlegislative apportionment agencies.

Executive Officials

Both the governor and the chief election officer of the state (the lieutenant governor in Hawaii, the secretary of state in most mainland states) have been suggested as appropriate apportionment agencies. However, this apportionment mechanism is presently employed by only 2 states whereas 3 states relied upon executive officials in 1964.[9]

Among the reasons for giving the governor responsibility for apportionment is that the people can easily single the governor out for retribution at the polls in the event that there is a failure to perform apportionment duties, or to perform them unfairly. "It is difficult to punish a legislature that has done a job of gerrymandering but a governor, running for reelection on a statewide basis, is subject to reprisal."[10] In addition, the state supreme court can be given constitutional authority to force the governor to comply with apportionment duties.

Vesting responsibility in the state's chief election officer may be appropriate in those states where the constitutional apportionment formula leaves little discretion to the apportionment agency. To the extent that a clear and precise formula can be specified in the state constitution, then the chief election officer has only the administrative job of giving effect to the constitutional mandate.[11]

A strong argument against vesting the apportionment and districting function in an elected executive official is that there still is an opportunity for partisan gerrymandering.

Like vesting the apportionment power in the state legislature, far too much depends on the fortuitous factor of which political party or faction controls the apportionment machinery at the critical point when the task must be accomplished.[12]

Commission or Board

States appear to be giving increasing consideration to the creation of special boards or commissions to perform the apportionment and districting task. For example, 5 states used boards and commissions in 1964. The number rose to 6 in 1968 and presently 8 states provide for special reapportionment agencies.[13] These bodies take 2 forms--nonpartisan or bipartisan--and may differ in their specified size and qualifications.

Nonpartisan or Bipartisan. The National Municipal League recommends that the responsibility for periodic reapportionment be assigned to a nonpartisan commission or board, appointed by the governor with no restrictions on membership. The board would prepare a reapportionment plan within a specified period of time following each decennial census, and would submit this plan to the governor for promulgation. The governor could modify the plan if the governor accompanied the published plan with the reasons for changes. The plan would have the force of law upon publication.[14]

It is argued that such a nonpartisan commission, serving in an advisory capacity to the governor, provides machinery for apportionment that is: (1) wholly removed from the legislature, (2) statewide in orientation, and (3) as nearly automatic as possible. It also makes one publicly elected official ultimately responsible for the apportionment plan. A disadvantage may be the possibility that such a commission would reflect narrowly partisan views and interests that lead to gerrymandering.[15]

A variation of the nonpartisan commission plan would be a constitutionally fixed commission with sole responsibility for the apportionment and districting function, removed from even the control of the governor. Members of the commission could be drawn from groups not normally associated with partisan politics--groups such as state or local bar associations, the universities, and other professional groups. The purpose of this "blue-ribbon" commission would be to place the apportionment and districting task in the hands of citizens who have no direct personal interest in legislative districting. Opponents of the plan object to vesting the power in a body that would not be responsible either directly or indirectly to the electorate, and that may not have the time, ability, or interest to do the job.[16]

An alternative to the nonpartisan commission discussed above would be a bipartisan apportionment and districting commission. This appears to be the most popular type of commission presently being adopted for use in newly apportioned states. The composition and selection of this type of commission could take several forms. First, an equal number of members could be appointed by the state organizations of the 2 major political parties. A variation of this plan authorizes the governor to select the members of the commission from those recommended by each party. A third possibility would be composed of each party's leaders in both houses of the legislature. In Hawaii, the reapportionment commission is a variation of this third alternative.

The proponents of the bipartisan commission argue that it ensures that the interest of the 2 major parties will be protected in any reapportionment plan. The opponents of such an arrangement contend that the representatives of the political parties, in or out of the legislature, would be motivated primarily by the desire to maximize their party's legislative strength. Furthermore, an evenly balanced bipartisan body is likely to result in a partisan deadlock.[17]

Size and Qualifications of Commissions. One problem involved in creating a commission or board is whether it should have an odd or even number of members. A bipartisan commission composed of an equal number of members from each party is likely to be deadlocked in the same way as legislative bodies which have been unable to reapportion when evenly divided. A commission with

an uneven number of members probably has the advantage of guaranteeing that some plan will be agreed upon and presented to the public. The problem is how the "swing-vote" should be chosen. "No matter how non-partisan the tie-breaker may be, his action will inevitably favor one party over the other and thereby place him in an extraordinarily difficult position."[18]

Another problem relates to whether any restrictions should be placed on eligibility for membership on the commission. The constitutions of Michigan and Missouri, for example, exclude legislators and other public officials from membership on the bipartisan commission. An alternative may be to limit the number of legislators and other public officials on the commission.[19]

The Hawaii Reapportionment Commission. The commission provided for in the current Hawaii Constitution resolves each of the above issues in particular ways. The rationale for adopting the commission structure was based on a belief that political office holders cannot carry out the redistricting task in an impartial and objective manner and that those affected by reapportionment react positively to a proposal only if a nonpartisan or bipartisan body is involved.[20]

The commission created consists of 9 members. The president of the senate and the speaker of the house of representatives each selects 2 members. Members of each house belonging to the party or parties different from that of the president or the speaker choose 2 members of the commission. The 8 members so selected appoint the ninth member who serves as chairperson of the commission. The commission acts by a majority vote of its membership and establishes its own procedures unless provided by law. Before 120 days after the commission is formed, it develops a reapportionment plan, which becomes law after its publication. Members of the commission hold office until the reapportionment plan becomes effective or as provided by law. No member of the reapportionment commission is eligible to become a candidate for election to either house of the legislature in either of the first 2 elections under any such reapportionment plan.[21]

As determined by the constitution the reapportionment commission was formed and met in 1973. In developing a workable allocation of legislative

representation, commission members devised a number of suggestions for facilitating future commission work. It is worthwhile to outline the major recommendations offered by the 1973 commission here.[22]

(1) Time Limitations

Time limitations for the completion of the work of the commission are necessary. Without a definite completion date, the work of the commission can drag on for too long a period. However, such time limitation should be reasonable and the state constitution should be amended to allow the commission 150 to 180 days for the completion of its work, rather than the present 120 days.

(2) Initial Public Hearings

Future reapportionment commissions should provide for the holding of initial public hearings, whether conducted by the commission itself or by the basic island units' advisory councils. They serve the purpose of alerting the general public to the impending commission's work and providing the public an opportunity to assist the commission in the development of the criteria to guide reapportionment and districting.

(3) Publicity

Lack of public awareness and understanding of the commission and its function resulted in sparse public turn-out at the initial series of hearings conducted. As a result, the commission recommended that the state election officer publicize the nature of the commission's work early in the reapportionment year.

(4) Frequency of Reapportionment

The state constitution should be amended to provide for reapportionment and districting every 6, rather than every 8 years.

(5) Role of Advisory Councils

Each future reapportionment commission, very early in its work, should provide for a meaningful role for the advisory councils and should provide appropriate guidelines for the councils to follow in recommending apportionment and districting plans for their respective basic island units.

(6) Precinct Size

The office of the lieutenant governor should create precincts that are smaller in size than they are currently.

(7) Maps

An agency of the state government should be designated as the respository of maps with the duty of insuring that up-to-date maps are available to government agencies for a variety of purposes.

Changes to constitutional provisions regarding reapportionment may well include some of those recommendations.

Electronic Computers

Electronic computers are mentioned for use in reapportionment and redistricting. It is felt that use of computer techniques will increase the automatic and objective nature of a state's periodic apportionment procedure. However, the various computer techniques which have so far been developed for use in districting each emphasize slightly different political values.[23] For example, several available programs place high emphasis on drawing homogeneous legislative districts, while another program constructs districts which are heterogeneous in nature in order to maximize political competition in the districts. Thus, the choice of which computer program to use still requires a prior political judgment by an apportionment agency responsible for implementing the computer techniques.[24] To date, no state has adopted electronic computers and their programs as the primary mechanism for reapportionment.

In summary, regardless of who has the original responsibility for periodic state apportionment and districting, political questions will be involved, for the reapportionment process is by its very nature political. This is true in varying degrees depending upon whether the legislature, the governor, a commission, or an electronic computer performs the necessary reapportionment. The process of apportioning elected officials has political and partisan implications simply because these positions are representative and elective. Under such

circumstances it is inevitable that there be political significance at all stages of the apportionment process.

PART III. TYPE OF FUNCTIONS

As court decisions delineating the reach of the one-man, one-vote doctrine evolved, the type of elected bodies touched by the standard grew. What started with an examination of how federal representatives were elected to Congress[25] has now spread past state legislative bodies[26] to all local officials elected to perform general governmental functions.[27] In Hawaii, the extension of this doctrine has changed the structures of 4 types of representative districts--congressional, legislative, school board, and county council districts. Whether a constitutionally recognized apportionment agency should be restricted to apportioning and districting the state legislature as in the past is a question worthy of constitutional debate. While the rules and procedures for allocating representative seats is similar for each of the 4 types of elected officials, the constituencies and political considerations involved vary.

Regardless of which apportionment agency is adopted, it may be vested with jurisdiction to apportion and district various types of representative districts. Present constitutional provisions for the reapportionment commission cover only the state legislature and it is debatable whether, absent express constitutional language, additional reapportionment functions affecting congressional and school board[28] districts could be delegated to the commission. Notwithstanding issues of constitutional construction and interpretation, amendments to the constitution may expressly empower an apportionment agency to take on expanded types of functions. Such changes could specifically set out the types of representative districts the agency is empowered to restructure. In the alternative, constitutional provisions could vest the agency with open-ended jurisdictional authority that is defined by state laws.[29]

In either case, those with the responsibility for determining what types of reapportionment functions the agency should have jurisdiction over must address 2 questions. First, what types of reapportionment and districting is

best performed by a state agency? In answering this, the magnitude of the state interest and the intensity of the local concerns involved are key factors to be noted. Secondly, if some type of apportionment is most appropriately performed by a state agency, which particular agency is best suited for that apportionment and districting function? Different apportionment instruments may be best suited for handling a particular type of reapportionment. Factors to be weighed in making such a determination include the potential for partisan gerrymandering, enforcement feasibility, and accountability to political considerations.

As in other areas involving reapportionment and districting, questions regarding the jurisdiction of the state apportionment agency or agencies cannot be totally divorced from the political context in which they arise. To the extent, nonetheless, that issues of enforceability and regularity of reapportionment are intertwined with the extensiveness of constitutional provisions dealing with different types of representative districts, more than purely political judgments are involved.

PART IV. ENFORCEMENT PROCEDURES

Many states are realizing that, in order to ensure prompt and effective reapportionment, it may be necessary to provide for an enforcement procedure in case the agency having the initial responsibility for reapportionment fails to act. In those states where the legislature is given original jurisdiction for apportionment, an intermediate agency, such as a commission, may be empowered to devise an apportionment plan in case of legislative inaction. If this second agency fails to act, then recourse can be had to the supreme court of the state. In states which vest original jurisdiction in a nonlegislative apportionment agency, failure of this agency to act in a specified period of time and according to constitutional prescription may result in direct recourse to the courts.

Rather than being limited, as in the past, to declaring a particular apportionment constitutional or unconstitutional, it has been recommended that

state courts be empowered to review all apportionments made by the state apportionment agency. In addition, it is recommended that state constitutions provide the courts with appropriate remedies to apply when they find that the apportionment agency has failed to act in accordance with the provisions of the state and federal constitutions.[30]

Remedies state courts may be constitutionally empowered to use for enforcement include: (1) requiring election of legislators at-large, (2) enjoining the holding of elections for filling legislative seats, (3) nullification of acts of an unconstitutionally apportioned legislature; and (4) issuance of writs of mandamus against a nonlegislative apportionment agency.[31] The Hawaii Constitution presently provides for this latter remedy.

The Hawaii Supreme Court has been vested with jurisdiction to compel the appropriate persons to perform their duty or correct errors in reapportionment. The court is further empowered to take any other action necessary to effectuate the constitutional provisions regarding reapportionment. Court action may commence after a registered voter submits a petition within 45 days following noncompliance with the constitution.[32]

Aside from the function of judicial review and enforcement, most observers agree that courts of law are not appropriate agencies for actually preparing apportionment plans. Courts are ill-equipped to undertake reapportionment or redistricting because of the lack of a technical staff and technical facilities. Furthermore, their performance of this function as a regular duty would cast them into a "political thicket" and jeopardize the integrity of the judiciary.[33]

PART V. FREQUENCY OF APPORTIONMENT

A final consideration in designing a total state apportionment procedure is the desired frequency of apportionment. This frequency should be specified in the constitution, and should be related to the availability of the official statistics required by the reapportionment formula of the state. However, the

availability of apportionment data, is a major constraint in formulating workable periods for reapportionment.

Alternative frequencies of reapportionment depend upon when apportionment base statistics become available. The 2 best possibilities for an apportionment base turn on federal census data or voter registration information. Thus, the breadth of reapportionment frequency possibilties can be set as either multiples of 5 years or 2 years. For example, voter related figures offer periods of 2, 4, or 6 years. In contrast, 5- or 10-year intervals are possible if census based apportionment data are used.

Independent of such limitations are the primary concerns regarding reapportionment frequency. Generally, setting a frequency for reapportionment involves a trade-off between representational stability and representational relevance. On the one hand, frequent reapportionments insure that the representational basis for public elections reflects demographic and mobility characteristics. For example, where a population is fast growing and highly dynamic, frequent reapportionment may be desirable to minimize the population imbalance among districts resulting from mobility over time. On the other hand, less frequent reapportionment enhances stability in legislative processes. Extremely frequent apportionment undermines the concept of legislative tenure and tends to confuse voters. Within such a context and taking into account the constraints of available data, workable alternative reapportionment periods worthy of consideration involve 5, 6, 8, and 10 years.

Decennial Apportionment

Although the U.S. Supreme Court has said that decennial reapportionment is not a constitutional requirement, it has also said that "decennial reapportionment appears to be a rational approach to readjustment of legislative representation", and that "compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation".[34]

For those states which use total population as their apportionment base, it is logical for reapportionment to take place immediately following the announcement of the results of the federal decennial census. A large majority of states fall within this category. In doing so, they have set their frequency for apportionment at every 10 years. The decennial census occurs once every 10 years at the turn of the new decade.[35] The Census Bureau has rapid means of computation available so new reapportionments are possible in time for the first elections after the census.

Six-Year versus Eight-Year Apportionments

Hawaii's Constitution presently calls for reapportionment every 8 years. Since registered voters have been adopted as the state's apportionment base and such data are available every 2 years, there has been debate regarding whether the constitutional provision should call for 8- or 6-year apportionment periods. Recently, the 1973 reapportionment commission has recommended a 6-year interval for apportionment and districting.

The 6-year interval tends to decrease the imbalance of population among the representative districts. The commission noted that Hawaii's population grows at uneven rates throughout the state and population centers shift from place to place.[36] The commission felt that the longer 8-year period increases the imbalance of population among the representative districts. Moreover, the commission was of the opinion that in any case of conflict between the principle of equality in representation and the term of legislative office, the former should take precedence. Rather than the frequency of apportionment following or accompanying the term of office, the term of office, if necessary or desired, should be adjusted to the frequency of apportionment.[37] In explaining this argument, the commission reviewed the origin of the current 8-year provision of the Constitution.

During the 1968 Constitutional Convention, the initial proposal of the committee on legislative apportionment and districting was for a 6-year cycle. The proposal was changed by the convention to the current 8-year cycle when

the then staggered terms of office of senators were eliminated and all senators were made to run at once for coterminus 4-year terms. It was felt to be logical to cause reapportionments to occur at the end of each 2, 4-year senate terms of office, rather than at times which fall in the middle of a 4-year term. Notwithstanding the reapportionment commission's preferences, where such coterminus 4-year terms are involved, a 6-year call for reapportionment creates a complex election system.

For example, assuming nonstaggered 4-year terms, the effects of reapportionment could be viewed in 12-year blocks. After an initial apportionment and districting, the reapportionment in the sixth year would occur in the second year of the second term of office since the prior apportionment. The reapportionment plan adopted in that sixth year could either become applicable immediately thereby divesting an officeholder from 2 years of the term to which the officeholder had been elected or in the alternative, become applicable after the full term had expired. The effect of the former alternative would be a 4-2 sequence of elective terms. Under the latter, the initial two 4-year terms of the 12-year period would be based on one apportionment plan. The third 4-year term would be under the new plan but a third reapportionment would take place during the last year of that term. Within a 12-year period marked by two reapportionments, the first 8 years would reflect one apportionment plan and the remaining 4 years governed by a second representational scheme. The magnitude of complexity and possible modifications increases tremendously where the 4-year terms are staggered.[38]

Five-Year Apportionments

The availability of census population data every 5 years allows for apportionment every 5 years. Breakdowns from the 1980 federal decennial census will be available in 1981 and 5 years later, similar data will be produced by the mid-decade census. As explained above, the mid-decade census will initially be conducted in 1985 and take place again every tenth year.[39]

States presently using population figures for their apportionment base have the option of reviewing their representational schemes as frequently as every 5 years. However, this option will not be without its drawbacks. First, even where the terms of office affected were 2 years, the plan operational after the decennial census would include 3 full elected terms. After the mid-decade census, the apportionment scheme created would be in effect for 2 terms before a new plan would be imposed. Beyond the imbalance between the earlier and later years of the decade, the relevance of the 5-year review to minimize representational imbalance would diminish where longer, e.g. 4-year terms were involved.

Secondly, the information from the mid-decade census could not be used for congressional districting. The federal law states that:[40]

> Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

But the federal laws do not prohibit the use of such data for legislative or other apportionment purposes.

In summary, the apportionment base adopted is a major determinant as to how frequently reapportionments may be scheduled. Regardless of whether voter-based or census-oriented data are required for apportionment, scheduled reapportionments less than every 10 years is feasible. However, under the registered voter or actual voter measures of population, apportionment frequencies tend to be limited to 6- or 8-year intervals. Other apportionment bases using the census data are confined to 5-year periods between reapportionments.

FOOTNOTES

Chapter 1

1. Alfred de Grazia, "General Theory of Apportionment," 17 *Law and Contemporary Problems* 256 (1972).

2. John H. Romani, "Legislative Representation," Salient *Issues of Constitutional Revision*, ed. John P. Wheeler, Jr., State Constitutional Studies Project, Series I, No. 2 (New York: National Municipal League, 1961), p. 25.

3. *Hadley v. Junior College District*, 397 U.S. 474 (1970).

4. Gordon E. Baker, *The Reapportionment Revolution* (New York: Random House, 1966), p. 188.

5. U.S., Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures* (Washington: U.S. Government Printing Office, 1962).

6. Baker, pp. 20-21.

7. Congressional Quarterly Service, *Representation and Apportionment* (Washington: 1966), p. 10.

8. Baker, p. 27.

9. William J. D. Boyd, *Changing Patterns of Apportionment* (New York: National Municipal League, 1965), p. 25.

10. Pennsylvania, Constitutional Convention, 1967-68, Preparatory Committee, *Legislative Apportionment*, Reference Manual No. 6 (Harrisburg: 1967), p. 1.

11. Romani, p. 48.

Chapter 2

1. The Illinois congressional districts, each electing one congressman, had been established in 1901 on the basis of the 1900 census. There had been no reapportionment thereafter. Because of shifts in population, by the 1940's, the districts were grossly malapportioned. The smallest district had a population of only 112,000 whereas the largest had a population of 900,000.

2. 376 U.S. 1, 7-8 (1964).

3. 377 U.S. 533, 554 (1964).

4. *Ibid.* at 560-561.

5. *Ibid.* at 562-563.

6. *Ibid.* at 567-568.

7. *Ibid.* at 568.

8. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964); *Maryland Committee v. Tawes*, 377 U.S. 656, 674 (1964).

9. *Ibid.* at 577.

10. *Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964); *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, n. 27 (1964).

11. *Burns v. Richardson*, 384 U.S. 73, 84 (1966); *Cf. Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964); *Lucas v. Forty-fourth General Assembly of Colorado*, 377, U.S. 713, 715 (1964); *Chapman v. Meier*, 420 U.S. 1, 15 (1975).

12. *Avery v. Midland County et al.*, 390 U.S. 474 (1968); *Chikasuye v. Lota*, 50 Haw. 511, 444 P. 2d 904 (1968).

13. *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Leopold v. State of Hawaii*, 72-3582 (D. Haw., order redistricting Hawaii school board, June 19, 1974).

14. 377 U.S. 533 (1964).

15. 377 U.S. 713, 736 (1964).

16. *Ibid.*

17. 377 U.S. 533, 573 (1964).

18. *Ibid.* at 575.

19. *Ibid.* at 573.

20. Most states use inhabitants as shown in the federal census or inhabitants minus certain groups such as aliens or untaxed Indians. A few use registered voters or actual voters. National Municipal League, *Apportionment in the Nineteen Sixties* (New York: 1967).

21. 384 U.S. 73, 91 (1966).

22. *Ibid.* at 92. An example of an invalid classification is one that would exclude all servicemen regardless of their local residence or eligibility for Hawaii state citizenship. *Davis v. Mann*, 377 U.S. at 691; *Cf. Carrington v. Rash*, 380 U.S. 89.

23. 384 U.S. 73, 92 (1966).

24. *Ibid.* at 95.

25. *Ibid.* at 93.

26. *Ibid.*

27. *Ibid.* at 95.

28. *Ibid.* at 95-96.

29. *Davis v. Mann*, 377 U.S. 691 (1964).

30. *Burns v. Richardson*, 384 U.S. 73, 93 n. 22 (1966).

31. *Ibid.* at 96.

32. *Reynolds v. Sims*, 377 U.S. 533, 583, 584 (1964).

33. *Burns v. Richardson*, 384 U.S. 73, 96 (1966).

34. *Roman v. Sincock*, 377 U.S. 695, 710 (1964).

35. *Ibid.* n. 21.

36. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

37. *Ibid.* at 581.

38. *Ibid.* at 578-581; see *Swann v. Adams*, 385 U.S. 440, 444.

39. *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

40. *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 735, n. 27 (1964).

41. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

42. *Ibid.* at 579-580.

43. *Lucas v. Forty-fourth General Assembly of Colorado*, 377, U.S. 713, 738 (1964).

44. *Ibid.* at 738.

45. *Davis v. Mann*, 377 U.S. 678, 692 (1964).

46. It is necessary to note that four indices of representativeness have been used. They can be described as follows:

    (a) The minimum percentage of the population capable of electing a simple majority of the legislative body, referred to as *the Dauer-Kelsay index*. The districts are arranged in ascending order of population. Counting down the list from the low population end until a majority of legislative seats have been accumulated, one then computes what percentage of the electorate is represented by the seats so accumulated. It has been stated that "the index provides the best overall view of the pattern of apportionment. Its weaknesses are that it may, especially in the case of large legislatures, obscure some rather dramatic disparities between districts and that it offers no way of evaluating representation accorded various geographic areas or identifiable groups. The scale can, for example, hide the facts that there are significant disparities amongst a few districts and that there is a resulting inequality between, say, rural and urban representation". (*Burns v. Richardson*, 384 U.S. 73, 96 (1966))

    (b) The ratio of the largest to the smallest districts, referred to as *the population variance ratio*. It is computed by dividing the population of the largest district by the population of the smallest. It points up the worst of the inequities but does not indicate the overall pattern of representation. (Paul T. David and Ralph Eisenberg, *Devaluation of the Urban and Suburban Vote, A Statistical Investigation of Long-Term Trends in State Legislative Representation*, Vol. 1 (Charlottesville: University of Virginia, Bureau of Public Administration, 1961), p. 7, cited by California, Legislature, Assembly, Committee on Elections and Reapportionment, *Reapportionment in California; Consultants' Report to the Assembly*, Assembly Committee Reports, Vol. 7, No. 9, April, 1965, p. 27.)

    (c) *The relative value of the votes*. It is calculated by dividing the population in the average or ideal district (the total population of the state divided by the number of seats in a house) by the population of the respective individual districts. Districts of less than average size will have an index of more than 1, while districts of more than average size will have an index of less than 1. By allowing the grouping of districts in terms of their characteristics such as urban or rural, it facilitiates comparison of the relative representativeness of the plan among the various groups. (See parenthetical citation in (b) above for reference.)

    (d) *The percentage deviation from the ideal*. This is related to the preceding index in that it is another measure of the relative value of the franchise. The percentage deviation is calculated by dividing the numerical deviation from the average or ideal (the difference, plus or minus, between the average or ideal and the actual number represented by a legislator) by the average or ideal number.

47. *White v. Regester*, 412 U.S. 755, 764 (1973).

48. Even if the total deviation is *de minimis*, the plan may violate the Equal Protection Clause if it is designedly or otherwise minimizes or cancels out the voting strength of a racial or other political element of the population. *Gaffney v. Cummings*, 912 U.S. 735 (1973). The *Gaffney* case was decided at the same time as *White v. Regester*. In *Gaffney*, Connecticut's apportionment plan had a total deviation of 1.81 per cent in the Senate and 7.83 per cent in the House. These deviations were held to be *de minimis*.

49. *White v. Regester*, 412 U.S. 755, 764 (1973).

50. 410 U.S. 315 (1971).

51. *Chapman v. Meier*, 420 U.S. 1 (1975).

52. The dissenting justices in *White v. Regester* make the same observation. See *Gaffney v. Cummings*, 412 U.S. 735 (1973).

53. 410 U.S. 315 (1973).

54. *Kilgarlin v. Hill*, 386 U.S. 120 (1967).

55. *Swann v. Adams*, 385 U.S. 440 (1967) (Senate plan).

56. *Ibid.* (House plan).

57. *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (Senate plan).

58. *Ibid.* (House plan).

59. 377 U.S. 533 (1964).

60. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

61. 384 U.S. 73 (1966).

62. *Ibid.* at 88.

63. *Ibid.* at 88-89.

64. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

65. In *White v. Regester*, 412 U.S. 755 (1973) the Court, inter alia, upheld a lower court order to disestablish multimember districts. Evidence from two separate Texas counties supported the conclusion that "the political processes leading to nomination and election were not equally open to participation by the group(s) in question--that their members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice" (p. 766). In Dallas county, a white dominated organization controlling the Democratic Party candidate slate did not need Black support to win elections. The political separation therefore did not exhibit good-faith concern for the political and other needs of that minority community. Furthermore, their political organization relied upon racial campaign tactics to defeat candidates from the Black community. Under such circumstances, the lower court was warranted in finding that the Black community had been effectively excluded from participation in the Democratic primary selection process and kept out of the political process in a reliable and meaningful manner.

In a second county, Bexar County, special circumstances supported the conclusion that the multimember district, as designed and operated, invidiously excluded Mexican-Americans from effective participation in political life.

There the U.S. Supreme Court noted that it had previously found invidious discrimination to exist against Mexican-Americans in Bexar County. Mexican-Americans had long suffered from discriminatory treatment in the fields of education, employment, economics, health, and politics. Based on the residual effect of such discrimination and the totality of circumstances, the Court upheld the conclusion that Mexican-Americans were effectively removed from the political processes of Bexar County and that single-member districts were necessary to remedy the effects of past and present discrimination. The invalidation of the multimember districts in *White v. Regester* was based on the history of political discrimination against Blacks and Mexican-Americans and the residual effects of such discrimination upon those groups.

In a companion case, however, the Court held that a multimember districting plan that achieves an approximation of the statewide political strengths of the two major parties is not constitutionally impermissible. The districting scheme in *Gaffney v. Cummings*, 412 U.S. 735 (1973) purposefully reflected a "political fairness principle" resulting in an allocation of political power in the state between the Republican and Democratic parties. The Court reasoned:

> *The very essence of districting is to produce a different--a more "politically fair"--result that would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment.... The reality is that districting inevitably has and is intended to have substantial political consequences.*
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> * * *
>
> *...Within the limits of the population equality standards of the Equal Protection Clause, they seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its officeholders. What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.*
>
> * * *
>
> *...But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State. (412 U.S. 735, 753-754).*

Upholding the consideration of political consequences in the districting process, the Court concluded that neither racial nor political groups had been fenced out of the political process and their voting strength was not invidiously minimized. In doing so, the Court recognized the inherent relationship between districting and cancellation or dilution of voting strength. The act of delineating district boundaries for representational purposes is a political one enhancing or diminishing the voting strength of one group at the expense of another.

66. 45 U.S.L.W. 4221 (U.S. Mar. 1, 1977).

67. See *Whitcomb v. Chavis*, 403 U.S. 124, 153-160 (1971).

68. 45 U.S.L.W. 4221, 4227 (U.S. Mar. 1, 1977).

69. *White v. Regester*, 412 U.S. 755 (1973).

70. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

71. See *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731 (1964).

72. *Ibid. Cf.*, however, *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965), for the suggestion that the at-large representative serves all residents in the subdistricts. Furthermore, while the Court mentioned these potential weaknesses of multimember districts in *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731 n. 21 (1964), it noted that it does "not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects... that might well make the

adoption of such a scheme undesirable to many voters residing in multimember counties."

73. This possibility was rejected absent concrete proof in *Whitcomb v. Chavis*, 403 U.S. 124, 147 (1971).

74. 420 U.S. 1 (1975).

75. *Ibid.*

76. See, *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) and *Conner v. Finch*, 45 U.S.L.W. 4528 (U.S. May 31, 1977).

77. In *Mahan v. Howell*, 410 U.S. 315 (1973), a lower court faced with severe time pressures created a multimember district two weeks before the filing deadline for the primary election. The facts there indicate that an unconstitutional discrimination against military personnel invalidated part of the reapportionment plan in dispute. A malapportionment existed because 36,700 military persons were assigned to a representative district containing their "home port" rather than their residences. Fearing that a delay required to properly draw up single-member districts would disrupt the scheduled election, the district court fashioned a temporary multimember district. The Supreme Court concluded that the facts presented a "singular combination of unique factors" and affirmed the lower court's decision. In another case, *Conner v. Williams*, the Court was asked to invalidate election results. In setting aside that challenge, the Court noted that multimember districts had been created as temporary representational mechanisms in order to allow the election to proceed as scheduled. The lower court also had retained jurisdiction and had appointed a special master to fashion single-member districts with substantially equal numbers of population prior to the next election. The Court therefore refused to disturb the challenged election results.

78. 45 U.S.L.W. 4528 (U.S. May 31, 1977).

79. For example, there are a number of questions that can be raised. Does the decision mean that court-ordered creation of single-member districts may be challenged on the basis of dilution of minority voting strength? If it does, then what criteria will be used to determine if power is in fact being diluted? Furthermore, what evidence is necessary to demonstrate an actual dilution of voting strength? Would the Court's concern be equally as great if political rather than racial minority voting strength were involved? If dilution of voting strength is not a valid basis for challenging court-ordered districting and only reflects the Supreme Court's exercise of its supervisory authority, of what significance is the fact no long-standing state policy for following local boundaries in legislative districting existed? To what extent can district court's, in adopting neutral guidelines for reapportionment, deviate from recognized state policies for legislative districting, e.g. use of existing local boundaries?

80. *Davis v. Mann*, 377 U.S. 678, 686 n. 2 (1964).

81. 377 U.S. 533, 579 (1964).

82. California, Legislature, Assembly, Committee on Elections and Reapportionment, *Reapportionment in California Consultants' Report*, pp. 37-39.

83. *Ibid.*, p. 39.

84. 252 F. Supp. 404 (S.D. Tex. 1966).

85. *Ibid.* at 421.

86. *Kilgarlin v. Hill*, 386 U.S. 120 (1967).

87. Code of Georgia Annotated §§47-101, 47-119.

88. California, Legislature, Assembly, Committee on Elections and Reapportionment, *Reapportionment in California; Consultants' Report*, p. 39.

89. 379 U.S. 433 (1965).

90. It is interesting to note that since *Fortson* in 1965, the Georgia General Assembly has been reapportioned a number of times. The latest such apportionment took place in 1974 by an amendment to the Code of Georgia Annotated §§47-101, 47-102. The amendment did not include "places" in senatorial districting. However, the amendment does require candidates' designation of "Representative Posts" in multimember representative districts.

91. 387 U.S. 112 (1967).

92. *Davis v. Dusch*, 361 F. 2d 495 (1966).

93. *Ibid.* at 497.

94. *Ibid.* at 498.

95. *Dusch v. Davis*, 387 U.S. 112, 115-116 (1967).

96. *Ibid.* at 116-117.

97. *Ibid.* at 117.

98. 421 U.S. 477 (1975).

99. *Ibid.* at 480.

100. *Ibid.* at 480-481, see *Keller v. Gillian*, 454 F.2d 55 (1972).

101. National Municipal League, *Apportionment in the Nineteen Sixties*, glossary.

102. *Morris v. Board of Supervisors*, 273 N.Y.S. 2d 453 (1966); *Graham v. Board of Supervisors*, 273 N.Y.S. 2d 419 (1966).

103. *Thigpen v. Meyers*, 231 F. Supp. 938 (1964).

104. *WMCA Inc. v. Lomenzo* 238 F. Supp. 916 (1965); *Bannister v. Davis*, 263 F. Supp. 202 (1966); *Sixon v. Adams*, 262 F. Supp. 225 (1967); *Morris v. Board of Supervisors of Herkimer Co.*, 273 N.Y.S. 2d 453 (1966); *Jackman v. Bodine*, 205 A. 2d 735 (1964); *Franklin v. Krause*, 338 N.Y.S. 2d 561 (1972); *Brown v. State Election Board, Oklahoma*, 369 P. 2d 140 (1962).

105. *Burns v. Gill*, 316 F. Supp. 1285, 1299-1301 (1970).

106. *Hawaii Const.* Art. III, sec. 4, par. 12.

107. *Burns v. Gill*, 316 F. Supp. 1285, 1301 (1970).

Chapter 3

1. For a full discussion of legislative apportionment prior to 1968, see *Article III: The Legislature*, Hawaii Constitutional Convention Studies (Honolulu: Legislative Reference Bureau, University of Hawaii, 1968), vol. II.
2. *Holt v. Richardson*, 238 F. Supp. 468 (1965).
3. 240 F. Supp. 724 (1965).
4. *Burns v. Richardson*, 384 U.S. 73 (1966).
5. *Results of Votes Cast, General Election, 1968* (Honolulu: Office of the Lieutenant Governor, 1968).
6. *Burns v. Gill*, 316 F. Supp. 1285 (1970).
7. *Ibid.* at 1293.
8. See Appendix A.
9. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969).
10. 377 U.S. 533 (1964).
11. *Burns v. Gill*, 316 F. Supp. 1285, 1299 (1970).
12. 384 U.S. 73 (1966).
13. *Burns v. Gill*, 316 F. Supp. 1285, 1293 (1970).
14. *Ibid.* at 1301.
15. *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA Inc. v. Lomenzo*, 238 F. Supp. 916 (1965).
16. *Burns v. Gill*, 316 F. Supp. 1285, 1301 n.75 (1970).
17. Discussion taken from Hawaii, 1973 Legislative Reapportionment Commission, *Report and Reapportionment Plan* (Honolulu: 1973).
18. *Hawaii Const.* Art. III, sec. 4, par. 1.
19. *Ibid.* at par. 2.
20. *Ibid.* at par. 11.
21. 384 U.S. 73, 77 n.4 (1966).
22. 316 F. Supp. 1285 (1970).
23. See Appendix A.
24. 377 U.S. 533, 577 (1964).
25. In *Burns v. Gill*, 316 F. Supp. 1285, 1296 (1970), the U.S. District Court had before it the following allocation of legislators:

	% of Total Registered Voters	No. of Rep.	No. of Senators	% of Total No. of Legislators Allocated
Oahu	76.3	38	19	75.0
Hawaii	11.3	6	3	11.8
Maui	7.5	4	2	7.9
Kauai	4.9	3	1	5.3

26. See Appendix A.
27. 316 F. Supp. 1285 (1970).
28. 410 U.S. 315 (1973).
29. *Hawaii Const.* Art. III, sec. 4, par. 15.
30. 55 H. 89 (1973).
31. Hawaii, 1973 Legislative Reapportionment Commission, *Report and Reapportionment Plan* (Honolulu: 1973), p. 22.
32. *Ibid.*, p. 23.
33. 55 H. 85 (1973), *cert. den.* 416 U.S. 945 (1974).
34. *Burns v. Gill*, 316 F. Supp. 1285 (1970).

Chapter 4

1. *Baker v. Carr*, 369 U.S. 186 (1962).
2. 377 U.S. 533 (1964).
3. *Avery v. Midland County*, 390 U.S. 474 (1968).
4. 397 U.S. 50 (1970).
5. *Ibid.*
6. *Ibid.* at 52.
7. 390 U.S. 474 (1968).
8. *Hadley v. Junior College District*, 397 U.S. 50, 53 (1970).
9. The Junior College District trustees could levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college. *Ibid.* at 53.
10. The Midland County Commissioners established and maintained the county jail, appointed numerous county officials, made contracts, built roads and bridges, administered the county welfare system, performed duties in connection with elections, set the county tax rate, issued bonds, adopted the county budget, built and ran hospitals, airports, and libraries, fixed school district boundaries, established a housing authority, and determined the election districts for county commissioners. *Avery v. Midland County*, 390 U.S. 474, 476-477 (1968).
11. *Hadley v. Junior College District*, 397 U.S. 50, 53-54 (1970).
12. "If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in 'important' elections, but good judgment and common sense tell us that what might be a

vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery*, *supra*, at 482, and it must also be rejected." *Ibid.* at 55-56.

13. The Court reasoned as follows:

This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor--these officials are elected by popular vote.

When a Court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one persons's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

Ibid. at 54-44.

14. *Ibid.* at 56.

15. *Ibid.*

16. *Ibid.*

17. The court also conceded that the Missouri statute did, to a limited extent, comply with the one-man, one-vote principle but still held that it did not comport to constitutional standards. The text of the court's reasoning is contained below:

In this particular case the "one man, one vote" principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33-1/3% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between 33-1/3% and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and 66-2/3% of the enumeration it elects three trustees, and if one district has more than 66-2/3% it elects four trustees. This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33-1/3%, 50%, or 66-2/3% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required, Weberry, supra, at 18, Reynolds, supra, at 577, but a plan that does not automatically discriminate in favor of certain districts is. (footnotes omitted) Ibid. at 56-58.

18. *Dusch v. Davis*, 387 U.S. 112 (1967).

19. *Sailors v. Board of Education*, 387 U.S. 105 (1967).

20. *Ibid.*

21. 372 U.S. 368 (1963).

22. *Hadley v. Junior College District*, 397 U.S. 50, 59 (1970).

23. 424 U.S. 636 (1976).

24. In Louisiana, the police jury is the governing body of the parish. Its authority includes construction and repair of roads, levying taxes to defray parish expenses, providing for the public health, and performing other duties related to public health and welfare. *La. Rev. Stat.*, sec. 33:1236 (1950).

25. *Chapman v. Meier*, 420 U.S. 1, 17-19 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Williams*, 404 U.S. 549, 551 (1972); *Connor v. Johnson*, 402 U.S. 690, 692 (1971).

26. *Sailors v. Board of Education*, 387 U.S. 105, 108 (1967).

27. *Hadley v. Junior College District*, 397 U.S. 50, 58 (1970).

28. *Hawaii Const.* Art. IX, sec. 2.

29. Sess. Laws of Hawaii 1966, Act 50 codified in *Hawaii Rev. Stat.*, sec. 13-1.

30. *Ibid.*

31. 397 U.S. 50 (1970).

32. Att'y Gen. Ops. No. 70-5 (March 9, 1970).

33. *Ibid.* at 5.

34. *Ibid.* at 6.

35. Senate Bill 1689-70, Fifth Legislature, 1970, State of Hawaii.

36. "There shall be a board of education composed of members who shall be selected in accordance with law." *Ibid.*, sec. 2.

37. Senate Conference Committee Report No. 6-70 on Senate Bill 1689-70, Fifth Legislature, 1970, State of Hawaii, pp. 2-3.

38. *Results of Votes Cast, General Election, Tuesday, Nov. 3, 1970* (Honolulu: Office of the Lieutenant Governor, 1970).

39. *1971 and 1972 Final Cumulative Index of Bills and Resolutions* (Honolulu: Legislative Reference Bureau, 1972).

40. Civ. No. 72-3582 (D. Haw., Sept. 14, 1972) (Order postponing relief but retaining jurisdiction).

41. House Bills 51, 531, and 932 and Senate Bill 39, Seventh Legislature, 1973, State of Hawaii.

42. Two of the proposals are worth nothing. One was virtually identical to the 1970 constitutional amendment rejected calling for statutory board member selection and allowing for appointment. The other proposal attempted to change the number and composition of the board in order to comply with the Court's preference for legislative reapportionment. Although the bill was passed by the House, it was not acted upon by the Senate before the close of the 1973 session.

43. *Leopold v. State of Hawaii*, Civ. no. 72-3582 (D. Haw., Aug. 2, 1973) (Order postponing relief but retaining jurisdiction.)

44. *Ibid.* memorandum in opposition to motion for judgment, affidavits of James Funaki and Morris Takushi, May 23, 1973.

45. Senate Bills 2207 and 2210 and House Bills 2717, 2718, 3035, and 3036, Seventh Legislature, 1974, State of Hawaii.

46. It was reported that the deviations were as follows:

School Districts	Registered Voters	No. of Members	No. of Voters per Members	Deviation from Statewide Average No.	Deviation from Statewide Average %
Hawaii	34,958	2	17,479	- 13,233	- 43.09
Maui	24,581	1	24,581	- 6,131	- 19.96
Kauai	15,701	1	15,701	- 15,011	- 48.88
Oahu	262,597	7	37,514	+ 6,802	+ 22.15
	337,837	11		Span -	71.03

Statewide average registered voters per member - 30,712

Memorandum to Joint Interim Committee on Education, Legislative Auditor, Nov. 20, 1973, p. 11.

47. In a report addressing a 39-member board, the senate committee on education best expressed this difficulty:

...Your Committee believes that because of geographical considerations in Hawaii, the preservation of basic island units constitutes a rational state policy. That such preservation should be maintained has been vigorously argued by the citizens of the neighbor islands. Your Committee agrees with the neighbor islanders that the disparities in population density and life-styles between Oahu and the neighbor islands are pronounced enough to preserve representation on the board by basic island units.

Your Committee examined a wide range of reapportionment plans. ...Some of the proposals incorporate the concept of electing the members in statewide elections. One variant proposed a school district residency requirement for candidates. Another particular variant of the statewide election included the proposal that, in the primary election, the voters would vote for only the candidates in their particular school district but that, in the general election, the voters would vote for all candidates in a statewide election. In effect, this particular variant limits the voter's right to vote for all candidates in the primary, and at this point it is not clear how vulnerable this might be to

consitutional challenge. In any event, your Committee has serious reservations that sufficient and qualified candidates can be attracted to run on a statewide basis. A statewide race is an expensive proposition, and it does not appear to your Committee that a position on the board of education is sufficient inducement to persuade citizens to mount statewide campaigns. Moreover, to have the individual voter select nine or eleven candidates from a list of eighteen or twenty-two names grossly violates the sound election principle of the short ballot. There is the additional consideration that, given the population balance in this State, the voters of Oahu would be the dominant voice in ultimately deciding who sits on the board. In view of these disadvantages, your Committee does not believe that election of board members in statewide elections, including the requirement of school district residency or (even if constitutional) the variant of primary elections by districts, offers a sound basis for board reapportionment.

* * *

Of all the alternatives examined by your Committee, a thirty-nine member board was the smallest size to fall within the tolerable limits established by the courts if the integrity of basic island units is to be preserved.

Senate Standing Committee Report No. 169-74 on House Bill No. 932, Seventh Legislature, 1974, State of Hawaii, pp. 2-3.

48. *Ibid.*, p. 3.

49. *Ibid.*, p. 4.

50. A line of cases, *Chapman v. Meier*, 420 U.S. 1, 17-19 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Williams*, 404 U.S. 549, 551 (1972); *Connor v. Johnson*, 402 U.S. 690, 692 (1971), have held that federal district courts fashioning reapportionment plans may use multimember districts where there are unusual circumstances even though there is a preference for single member districts.

51. *Hawaii Rev. Stat.*, sec. 13-1.

Chapter 5

1. Representation in the United States Senate evokes no similar concern, since the U.S. Constitution, in Article I, section 3, and the Seventeenth Amendment, expressly provides that each state shall be entitled to no more and no less than two senators.

2. 2 U.S.C.A. sec. 2c.

3. 1969 Haw. Sess. Laws, Act 209.

4. *U.S. Const.*, Art. I, sec. 2; amend. XIV, sec. 2.

5. Lawrence F. Schmeckebier, *Congressional Apportionment* (Washington, D.C.: Bookings Institute, 1941), p. 120.

6. 46 Stat. 23 (1929). For an extended discussion concerning the history of the congressional power over apportionment, see *Hawaii Constitutional Convention Studies: Article III: The Legislature, Vol. II* (Honolulu: The University of Hawaii, 1968).

7. 2 U.S.C.A., sec. 2.

8. *Ibid.*

9. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

10. *Colgrove v. Green*, 328 U.S. 549 (1946); *Smiley v. Holm*, 285 U.S. 355 (1931); *Wood v. Brown*, 287 U.S. 8 (1932); *Mahan v. Hume* 287 U.S. 575 (1932).

11. *U.S. Const.*, Art. I, sec. 4. For an extended discussion concerning the history of congressional districting, see *Hawaii Constitutional Convention Studies: Article III: The Legislature, Vol. II*, (Honolulu: The University of Hawaii, 1968).

12. P.L. 90-196.

13. 2 U.S.C.A., sec. 2c.

14. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

15. *Ibid.*

16. See *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963).

17. 376 U.S. 1, 8 (1964).

18. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *White v. Weiser*, 412 U.S. 783 (1973).

19. 376 U.S. 1, 18 (1964).

20. *Ibid.* at 14.

21. 377 U.S. 533 (1964).

22. *Ibid.* at 579.

23. *Ibid.* at 578-581.

24. 377 U.S. 713 (1964).

25. *Ibid.* at 735 n. 27.

26. 376 U.S. 1, 18 (1964).

27. 377 U.S. 533, 578 (1964).

28. 394 U.S. 526 (1969).

29. *Ibid.* at 530-531.

30. *Ibid.* at 531.

31. *Ibid.* at 532.

32. *Ibid.* at 533.

33. *Ibid.* at 535.

34. *Ibid.*

35. See *Wells v. Rockefeller*, 394 U.S. 542 (1969).

36. *Ibid.*

37. *Ibid.* at 546.

38. 412 U.S. 783 (1973).

39. *Ibid.* at 790.

40. *Ibid.*

41. *Ibid.* at 791.

42. *Ibid.* at 795-796.

43. In this regard, two passages in the *White* case are worth noting. The Court ignored the state's assertion that the enacted plan represented its good faith effort to promote "constituency-representative relations". Using curious language, the Court, in suggesting that such an interest may be sufficient for justifying deviations among districts, nonetheless, referred to the lower population variance of Plan B. The language of the Court is contained below:

> *The State asserts that the variances present in S.B. 1 nevertheless represent good-faith efforts by the State to promote "constituency-representative relations", a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives. We do not disparage this interest. We have, in the context of state reapportionment, said that the fact that "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." (citation omitted) But we need not decide whether this state interest is sufficient to justify the deviations at issue here, for Plan B admittedly serves this purpose as well as S.B. 1 while adhering more closely to population equality. S.B. 1 and its population variations, therefore, were not necessary to achieve the asserted state goal, and the District Court was correct in rejecting it.* (footnotes deleted, emphasis added) *Ibid.*, pp. 791-792.

Notwithstanding the above passage, the Court went on to reaffirm its rigorous adherence to an absolute numerical equality standard for congressional districting in the paragraph that followed. The Court said:

> *Appellant also straightforwardly argues that Kirkpatrick and Wells should be modified so as not to require the "small" population variances among congressional districts involved in this case to be justified by the State. S.B. 1, it is urged, absent proof of invidiousness over and above the population variances among its districts, does not violate Art. I, §2. It is clear, however, that at some point or level in size population variance do import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation. Appellant concedes this and would locate the line differently than the Court did in Kirkpatrick and Wells. Keeping in mind that congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb Kirkpatrick and Wells. This is particularly so in light of Mahan v. Howell, 410 U.S. 315 (1973), decided earlier this Term, where we reiterated that the Wesberry, Kirkpatrick, and Wells line of cases would continue to govern congressional reapportionments, although holding that the rigor of the rule of those cases was inappropriate for state reapportionments challenged under the Equal Protection Clause of the Fourteenth Amendment. Ibid.* pp. 792-793.

44. 376 U.S. 1 (1964).

45. 384 U.S. 73 (1966).

46. *Ibid.* at 91.

47. *Ibid.* at 92.

48. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall... deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, sec. 1.

49. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...." *U.S. Const.* Art. I, sec. 1.

50. 384 U.S. 73, 91 (1966).

51. *Ibid.* at 92.

52. Lawrence F. Schmeckebier, *Congressional Apportionment* (Washington: Bookings Institution, 1941) 88-89. The author's discussion centers around the status of aliens. See also Joel Francis Paschal, "The House of Representatives: Grand Deposition of the Democratic Principle?," 17 *Law and Contemporary Problems* 286-287 (1952), where the author states that section 2 of the Fourteenth Amendment "was deliberately worded to force the continued inclusion of aliens."

53. 205 Va. 805 (1965).

54. The Court said:

> *We are not convinced that the military personnel constitute a permissible exclusion. There was evidence that the military-related personnel were included in ascertaining that Virginia's population entitled her to ten congressmen.... Ibid.* p. 808.

55. 376 U.S. 1 (1964).

56. *Ibid.* at 13.

57. *Ibid.* at 13 n. 30.

58. "Repeatedly, delegates rose to make the same point: that it would be unfair, unjust, and contrary to common sense to give a small number of people as many Senators or Representatives as were allowed to much larger groups--in short, as James Wilson of Pennsylvania put it, 'equal numbers of people ought to have an equal

no. of representatives...' and representatives 'of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.'" *Ibid.* at 10-11.

"Madison in the Federalist described the system of divisions of States into congressional districts, the method which he and others assumed States probably would adopt: 'The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives.' '[N]umbers,' he said, not 'only are a suitable way to represent wealth but in any event 'are the only proper scale of representation.'" *Ibid.* at 15.

"Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said: '[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.'" *Ibid.* at 17.

59. 394 U.S. 526 (1969).

60. *Preisler v. Secretary of State of Missouri*, 279 F. Supp. 952 (1968).

61. *Ibid.* at 1002-1004.

62. It is important to note that there are a number of federal District and State Court decisions addressing the population measure issue. Two of them cited in *Kirkpatrick* (279 F. Supp. 952, 1003) accept the notion that figures other than from the federal decennial census are acceptable measures of population for purposes of congressional redistricting. The 1966 District Court case from Kansas (*Meeks v. Avery*, 251 F. Supp. 245 (1966)) permitting the state legislature's usage of state census figures, was never reviewed by the Supreme Court. Although an Ohio District Court held similarly in 1967, the Supreme Court, without addressing the merits of the case in a per curium decision, reversed the lower court, *Lucas v. Rhodes*, 389 U.S. 212 (1967). Both cases appeared to rely upon *Burns v. Richardson*'s (384 U.S. 73 (1966)) holding regarding the Fourteenth Amendment and state legislative apportionment. The District Court in *Kirkpatrick* rejected that reasoning by limiting *Burns* to state apportionment.

63. *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-535 (1969).

64. Civ. No. 76-0245 (D. Haw., Sept. 9, 1976).

65. *Ibid.*, p. i.

66. P.L. 90-196. The Act required all states, except Hawaii and New Mexico to establish single Congressional districts by 1968. Hawaii and New Mexico were allowed until 1970.

67. See *Hawaii Constitutional Convention Studies: Article III: The Legislature, Vol. II*, (Honolulu: The University of Hawaii, 1968).

68. Proposals 248 and 278, Constitutional Convention, 1968, State of Hawaii.

69. Senate Bills 670 and 671 and House Bills 6, 997, 998, and 999, Fifth Legislature, 1969, State of Hawaii.

70. 1969 Haw. Sess. Laws, Act 209.

71. Senate Standing Committee Report No. 885 on House Bill 6 p. 2.

72. *Ibid.*, p. 4.

73. The deviation was described as follows:

Congressional District	No. of Representatives	No. of Registered Voters	% Deviation from Av. No. of R. V. Per Representative (122,186.5)
First	1	122,904	+0.59
Second	1	121,469	-0.59

House Standing Committee Report No. 621 on House Bill 6, p. 2.

74. In describing the basis for the districting boundaries selected which produced the ±0.59 deviation, one legislative committee report said:

Your Committee believes that the plan recommended herein divides the State into congressional districts that are as nearly equal as is practicable. In order to achieve this equality, it was necessary to cut across the tenth representative district lines and divide and allocate the precincts therein between the congressional districts. The smallest unit by which election results are compiled and tabulated is the precinct.

* * *

...Thus, the precinct could not be practicably cut up to achieve a deviation smaller than ±0.59. Several combinations of the precincts within the tenth representative district were tried in the division of them between the two congressional districts to achieve an even closer equality than a deviation of ±0.59, but the size of the precincts and/or location of them made it impracticable to arrive at any other division than that recommended by your Committee....

Ibid. pp. 2-3.

75. Senate Standing Committee Report No. 885 on House Bill 6, p. 7.

76. 1970 Hawaii Sess. Laws, Act 26; 1972 Hawaii Sess. Laws, Act 77.

77. Senate Standing Committee Report No. 232 on Senate Bill 2043, Seventh Legislature, 1974, State of Hawaii.

78. House Standing Committee Report No. 795 on Senate Bill 1992, Eighth Legislature, 1976, State of Hawaii.

79. *Hirabara v. Doi*, Civ. No. 76-0245 (D. Haw., Sept. 9, 1976).

80. *Ibid.*

81. *Ibid.*, p. 5.

82. A noteworthy caveat in *Hirabara v. Doi* warrants further discussion. Aside from the fact that the 4.97 per cent deviation reflected by the "*correct*" figures was beyond the *de minimus* standard set by the Supreme Court, the court hinted that *Hirabara* could be distinguished from other congressional apportionment authorities. Pointing to the Supreme Court's requirement for only reasonable, periodic adjustment in representation, the three-judge panel stated that the State was not compelled to redistrict in *Hirabara*. The court said:

> *That the Hawaii legislature, upon noting the 1974 "off-year" imbalance of ±4.97%, sua sponte undertook to reevaluate its 1970 plan and attempt reapportionment is most commendable. As indicated above, it was not compelled to do so. It is obvious, from their concern, that Hawaii's legislators are aware of the implied caveat of Burns v. Richardson, quoted in the above paragraph. Certainly the 1976 unavailing efforts of the legislature to reapportion the congressional districts do not fall within the condemnation of White v. Weiser, 412 U.S. 783 (1973); Kirkpatrick v. Preisler, supra; and Wells v. Rockefeller, 394 U.S. 542 (1969). Ibid.*, pp. 6-7.

It is not clear from the above passage how *Hirabara* does not fall within the ambit of congressional apportionment authorities. It may be explained because unlike the *White*, *Kirkpatrick*, and *Wells* cases cited, *Hirabara* involved a malapportionment caused by demographic population trends over time rather than legislative action. Even acknowledging *Hirabara* as an unpublished opinion not representing formal case authority for future controversies, whether this is the explanation is significant from the standpoint of understanding the judicial posture of the federal courts in Hawaii. To the extent that legislative action or long-standing malapportionment is required before the court will intervene, parties would be encouraged to not look to the courts for relief where congressional districts have population deviations.

Perhaps an altogether different explanation of the court's decision in *Hirabara* involves time constraints. During the controversy, the court was offered five alternative districting plans by the Attorney General's office. Each would have complied with constitutional requisites for congressional districting. Refusing to adopt any, the court said, "What the legislature had been unable to do in three months, this court was requested to do within two weeks. This is a task which the court would not propose to undertake. *Ibid.*, p. 7.

Chapter 6

1. *U.S. Const.*, Art. I, sec. 2.

2. See Appendix B.

3. *Burns v. Richardson*, 384 U.S. 73 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

4. See Appendix B.

5. Hawaii, Constitutional Convention 1968, *Proceedings*, Vol. I, Standing Committee Report No. 58, pp. 241-244.

6. For example, federal census data will now be available every 5 years; since voter residency requirements have been held unconstitutional elsewhere, the disparity between eligible and registered voters may no longer be insubstantial; and the size of the alien population in Hawaii has increased greatly since 1968.

7. *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

8. But see *Davis v. Mann*, 377 U.S. 678, 691 (1964) where the court prohibited the exclusion of the military from the population measure.

9. *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

10. Two groups not discussed should also be noted:

    Tourists--Visitors to Hawaii totaled 78,500 during an average day in 1976. This figure represents 8 per cent of all persons in the islands. The number of tourists have steadily increased since 1970 when they accounted for 5 per cent of all persons on the islands. While visitors to Hawaii potentially could be an important consideration in which apportionment base could be selected, they are not included in the analysis of various population measures. This is because all of the apportionment bases considered affect tourists in the same way. Tourists are excluded from all of the population measures examined.

    Felons and Mental Incompetents--Approximately 300 felons could be found in Hawaii correctional institutions in 1975. The number of persons falling within the mentally unsound mind category, however, is more difficult to estimate. This is because there are at least 16 different subcategories of mental illness, each with different implications for competency. Suffice it to say, like felons, the size of this group is virtually insignificant relative to the state's total population. (It can be noted that the 1975 State Department of Health Statistical Report indicates 7,090 persons were treated by their Mental Health Division. That figure cannot be relied upon as an estimation of mental incompetents because it includes illnesses like alcoholism and because alternative treatment facilities in the private sector exist.) This group also is not included in the analysis of population measures because it is a relatively insignificant portion of Hawaii's total population. Furthermore, analytical findings would only be explicable on the basis of whether population measures stemmed from voter qualifications.

11. Hawaii, Department of Planning and Economic Development, *State of Hawaii Data Book 1976: A Statistical Abstract* (Honolulu: 1976), p. 11; hereinafter referred to as Data Book 1976.

12. It must be cautioned that is a very gross approximation. Many military affiliated persons have resided in the state for many years and consider themselves permanent residents. On the other hand, many nonmilitary, transients arrive in Hawaii yearly. Those with short-term job transfers and migrants to the state who return to the mainland after a few months or a year belong in this category. At present there is no way of determining the magnitude of these counterveiling factors. Telephone interview with Robert C. Schmitt, State Statistician, Department of Planning and Economic Development, 23 June 1977.

13. *Davis v. Mann*, 377 U.S. 678 (1964).

14. *Data Book 1976*, p. 25 and Hawaii, Department of Planning and Economic Development, *Population of Hawaii 1976* (Honolulu: 1977), Table 1.

15. *Data Book 1976*, p. 23.

16. Minors constituted 37 per cent of the population in 1970. *Ibid.*

17. Census data from 1970 reveal that those under 18 tend to reside on Hawaii and Kauai in slightly higher proportions. While the proportion of minors on Oahu was 35.6, Hawaii, Maui, and Kauai's population was 36.4, 36.3, and 36.8 per cent under 18, respectively. *Ibid.*, p. 22. That minors tend to be located in greater proportions on the neighbor islands is supported by a chi-square analysis which determines if the observed proportions are significantly different from each other. For further elaboration on this statistical device, see Hubert M. Blalock, *Social Statistics* (New York: McGraw-Hill, 1960), pp. 212-221. Using 1970 census data, the breakdown of those under 18 years of age for the four basic island units was as follows:

Basic Island Unit	*Under 18*	*Total Population*
Oahu	*224,400*	*630,528*
Hawaii	*23,111*	*63,468*
Kauai	*10,944*	*29,761*
Maui	*16,739*	*46,156*

A chi-square analysis indicates that when compared, the proportion of total population composed of those under 18 is significantly different among the four basic island units. The chi-square calculated equalled 24.48. Minors are not dispersed among the four basic island units in equal proportions.

18. *Hawaii Rev. Stat.*, sec. 11-11.

19. William J.D. Boyd, *Changing Patterns of Apportionment* (New York: National Municipal League, 1965), p. 18.

20. John H. Romani, "Legislative Representation," *Salient Issues of Constitutional Revision*, ed. John P. Wheeler, Jr., State Constitutional Studies Project, Series I, No. 2 (New York: National Municipal League, 1961), p. 48.

21. *Hawaii Rev. Stat.*, sec. 11-17.

22. See Brief for John A. Burns, p. 23, *Burns v. Richardson*, 384 U.S. 73 (1966).

23. See Stanley Kelley, Jr., Richard E. Ayres and William G. Bowen, "Registration and Voting: Putting First Things First," *American Political Science Review*, 51(2) (June, 1967), pp. 359-377.

24. "The Question of Population" (Legislative Reference Bureau, University of Hawaii, Request No. B-0638, 1964), p. 9.

25. *Hawaii Const.* Art. III, sec. 4.

26. See footnote 34 of this chapter regarding the difference in apportionment between use of 1976 and 1972 voter data.

27. 13 U.S.C.A. 141 (1977).

28. 13 U.S.C.A. 141(c) (1977).

29. Romani, p. 40.

30. See U.S., Department of Commerce, *1970 Census Users Guide*, Part I (Washington: 1970), p. 93.

31. California, Legislature, Assembly Committee on Elections and Reapportionment, *Reapportionment in California, Consultants' Report to the Assembly*, Assembly Committee Reports, Vol. 7, No. 9, April 1965, p. 15.

32. See Appendix C.

33. A comparison of state legislative apportionment using the method of equal proportions was conducted using data from 1976. The methodology for calculation set out by Schmeckebier was used for data regarding total population and registered voters. See, Laurence F. Schmeckebier, *Congressional Apportionment*, The Brookings Institution, 1941. Assuming that the size of both houses in the bicameral system remain unchanged, the following apportionment plans were developed:

	Total Population Base[a]			Registered Voter Base[b]		
Basic Island Unit	Representatives	Senators	Total Legislators	Representatives	Senators	Total Legislators
Oahu	42	20	62	38	19	57
Hawaii	4	2	6	6	3	9
Maui	3	2	5	4	2	6
Kauai	2	1	3	3	1	4
State	51	25	76	51	25	76

a. *Population figures used here are estimates calculated by Department of Planning and Economic Development in Population of Hawaii 1976, Statistical Report 119, 1977, Table II.*

b. *Based on voter registration in Results of Votes Cast, General Election, Tuesday, November 2, 1976, p. 134.*

34. Present apportionment for Oahu is 39 seats. The disparity can be explained by the fact that existing representational allocations are based on 1972 voter information. While Oahu accounted for almost 78 per cent of all registered voters in the state that year, Oahu's share had fallen to 76 per cent in 1976.

35. *Burns v. Richardson*, 384 U.S. 73, 90-97 (1966).

36. For example, documents from the 1968 Constitutional Convention estimated that such a census would have cost $1 million in 1964. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 58, p. 243.

37. Data from 1975 shows that the fertility rate of Oahu was 18.0 per 1,000 residents. In contrast the fertility rates of Hawaii, Kauai, and Maui were 18.5, 19.0, and 19.1, respectively. Hawaii, Department of Hawaii, *Statistical Report, Department of Health, State of Hawaii, 1975* (Honolulu: 1976), p. 10.

38. Boyd, p. 18.

39. *Ibid.*, pp. 18-19.

40. A further argument may be made that in some states members of one party may tend to turn out far more heavily in a gubernatorial election year whereas the other party's voters may turn out in greater force for presidential elections.

41. The figures displayed in this table were calculated from registered voter totals and the number of votes cast found in *Results of Votes Cast, General Election*, published by the Office of the Lieutenant Governor, State of Hawaii, for the years 1968, 1972, and 1976.

42. Interview with Dr. Daniel Tuttle, Jr., Professor of Educational Administration, University of Hawaii, and President of Public Affairs Advisory Services, Inc., June 28, 1977.

43. Hawaii laws provide that "No member of the armed forces of the United States, his spouse or his dependent is a resident of this State solely by reason of being stationed in the State." *Hawaii Rev. Stat.*, sec. 11-13. Notwithstanding this provision, applicants for voter registration need only affirm their subjective intention to make Hawaii their legal residence. Unless such a statement is challenged by a qualified voter, registration clerks must accept the applicant's assertion of residence as prima facie evidence of resident status. *Hawaii Rev. Stat.*, sec. 11-15. Even if the applicant's intention to make Hawaii the applicant's residence were questioned, the applicant needs only to state a "present intention of establishing his permanent dwelling place within such precinct." *Hawaii Rev. Stat.*, sec. 11-13(2). Read together, the residency requirement for voter eligibility does not foreclose those affiliated with the armed forces from inclusion in the eligible voter count.

44. Present state constitutional provisions exclude aliens, minors, incompetents, and felons from eligibility to vote. Hawaii Const., Art. III. The 1978 Constitutional Convention may address the issue of whether these groups should continue to be excluded in the future. For treatment of the question, raised by this issue, see Hawaii Constitutional Convention Studies 1978, Article II: Suffrage and Elections, (Honolulu: Legislative Reference Bureau, 1978).

45. The number of eligible voters was estimated by subtracting minors from the total population count.

46. The breakdown of apportionment using the method of equal proportions would have been as follows:

	Eligible Voters		*Registered Voters*	
	House	*Senate*	*House*	*Senate*
Oahu	*42*	*21*	*41*	*19*
Hawaii	*4*	*2*	*5*	*3*
Kauai	*2*	*0*	*2*	*1*
Maui	*3*	*1*	*3*	*2*

The estimates of eligible voters used in the analysis were developed from *Data Book 1976*, p. 22. The registered voter count for 1970 was reported in the *State of Hawaii Data Book 1971: A Statistical Abstract*, p. 39. It is interesting to note that following the methodology for computing the method of equal proportions described by Schmeckebier in *Congressional Apportionment*, The Brookings Institution, 1941, the basic island unit of Kauai does not qualify for a senate seat under the eligible voter base.

47. In 1976, more than 99 per cent of the 126,700 military personnel in the state were located on Oahu. Hawaii, Department of Planning and Economic Development, *Military Personnel and Dependents in Hawaii*, Statistical Report 115 (Honolulu: 1976), p. 4.

48. Such a comparison does not account for the fact that some in the armed forces may and do register to vote in Hawaii. But even in accounting for this fact, it must still be noted that the number of military dependents is greater than the military personnel figure. In 1976, the number of military persons stationed in Hawaii was 59,737 but their dependents totaled 66,957. *Ibid.* Even adjusting for the fact that some dependents are not qualified to vote because of their youth, it still cannot be concluded that the military related population would have an insubstantial effect on how district boundaries are delineated.

Chapter 7

1. Discussion of the limitations posed by the courts in this area can be found in chapter 2. In particular, see those parts dealing with fractional voting and multimember districting.

2. See *Book of the States, 1976-77* (Lexington, Ky.: Council of State Governments, 1976).

3. See Appendix D for detailed breakdown.

4. See Bertram Kanbara, Yukio Naito, and Patricia Snyder, *Article III: The Legislature*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), Vol. II, pp. 15-22.

5. See chapter 5.

6. See chapter 4.

7. For a full development of these arguments, see Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Journals and Documents, pp. 247-249; and Hawaii, *Report and Reapportionment Plan of the 1973 Legislative Reapportionment Commission, 1973*, pp. 16-17.

8. Kanbara, Naito, and Snyder, p. 73; California, Legislature, Assembly, Committee on Elections and Reapportionment, Reapportionment in California, *Consultants' Report*, pp. 61-62.

9. Kanbara, Naito, and Snyder, p. 73; Brief for Elmer F. Cravalho, et al., pp. 31-32.

10. Kanbara, Naito, and Snyder, p. 74; Ruth G. Silva, "Compared Values of the Single- and the Multi-Member Legislative District," *Western Political Quarterly*, 17(3) (September, 1964), pp. 506-507.

11. See, Kanbara, Naito, and Snyder, p. 75.

12. Kanbara, Naito, and Snyder, p. 74; Howard D. Hamilton, "Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Floterial Districts," *Western Political Quarterly*, 20(2, Part I) (June, 1967), pp. 328-329.

13. Kanbara, Naito, and Snyder, p. 75; Malcolm Jewell, "The Effects of Legislative Districting in Metropolitan Counties," Paper prepared for delivery at the National Conference on Government, National Municipal League, Milwaukee, Wisconsin, November 12-15, 1967, p. 14.

14. Kanbara, Naito, and Snyder, p. 75; *Reapportionment in California*, p. 63; and Hamilton, p. 323.

15. 379 U.S. 433 (1965).

16. 384 U.S. 73 (1966).

17. Kanbara, Naito, and Snyder, p. 76; *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964) 326, cited in Brief for John A. Burns, p. 79.

18. Kanbara, Naito, and Snyder, p. 76; John F. Bayhal III, "Multi-Member Electoral Districts--Do They Violate the 'One Man, One Vote' Principle," *Yale L. Jour.*, 75(8) (July, 1966), pp. 1309-1338.

19. Kanbara, Naito, and Snyder, p. 76; *Bayhall III*, p. 1337.

20. Kanbara, Naito, and Snyder, p. 77; see Jewell generally.

21. Hamilton, pp. 324-325.

22. *Ibid.*, p. 325.

23. Kanbara, Naito, and Snyder, p. 79; "Districting and the Size of the Legislature" (Legislative Reference Bureau, University of Hawaii, Request No. B-0654, 1964), p. 3.

24. Kanbara, Naito, and Snyder, p. 79; *Reapportionment in California*, p. 61.

25. Kanbara, Naito, and Snyder, p. 80; Silva, p. 515.

26. Manning J. Dauet and Michael Lynds, "Multi Member Districts in Dade County: Study of a Problem and a Delegation," *Florida State University Government Research Bulletin*, 2(5) (November, 1965), p. 5.

27. Kanbara, Naito, and Snyder, p. 79; Jewell, p. 6.

28. Hamilton, p. 330.

29. 379 U.S. 433, 439 (1965).

30. Paul T. David, "One Member vs. 2, 3, 4, or 5," *National Civic Review* (February, 1966), pp. 75, 80.

31. Kanbara, Naito, and Snyder, p. 83; Silva, p. 748.

32. Kanbara, Naito, and Snyder, p. 83; "Reapportionment" (Legislative Reference Bureau, University of Hawaii, Request No. B-2427, 1965), p. 6.

33. Kanbara, Naito, and Snyder, p. 84; *Reapportionment in California*, p. 64.

34. Ruth G. Silva, "Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District," *Western Political Quarterly*, 17(4) (December, 1964), p. 751.

35. Kanbara, Naito, and Snyder, p. 84; Silva, "Relation of Representation and the Party System," p. 742.

36. Kanbara, Naito, and Snyder, p. 84; Silva, "Relation of Representation and the Party System," p. 759.

37. Kanbara, Naito, and Snyder, p. 84; "Districting and the Size of the Legislature," p. 5.

38. *Hawaii Const.* Art. III, sec. 4.

39. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 47; hereinafter cited as *Model State Constitution*.

40. In fact, the recent controversies over congressional districting described in chapter 5; the court's reluctance to set the district boundaries where the state has not adopted a districting plan; and the unavailability of federal mid-decade census data for congressional districting purposes (13 U.S.C.A. sec. 141) together suggest that the boundaries for Hawaii's two congressional districts be expressly set out in the constitution or the power to set them be given to the Reapportionment Commission. On the other hand, other bodies such as the state school board and county councils may be analogized to the state legislature. Even regarding those bodies, however, it may still be desirable to constitutionally provide for guidelines in how their districts are to be delineated in the state constitution.

41. 377 U.S. 533, 578-579 (1964).

42. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 265.

43. *Hawaii Const.* Art. III, sec. 4.

44. Hawaii Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 265.

45. *Hawaii Const.* Art. III, sec. 4.

46. See Kanbara, Naito, and Snyder, pp. 85-91.

47. *Ibid.*, p. 87.

48. *Ibid.*

49. *Hawaii Const.* Art. III, sec. 4.

50. Kanbara, Naito, and Snyder, p. 88; John H. Romani, "Legislative Representation," *Salient Issues of Constitutional Revision*, ed. John P. Wheeler, Jr., State Constitutional Studies Project, Series I, No. 2 (New York: National Municipal League, 1961), p. 48.

51. *Model State Constitution*, p. 44.

52. Kanbara, Naito, and Snyder, p. 88; "Districting and the Size of the Legislature," p. 6.

53. Kanbara, Naito, and Snyder, p. 89; David, pp. 75-76.

54. See Appendix D.

55. Kanbara, Naito, and Snyder, p. 89; *Reapportionment in California*, p. 39.

56. Kanbara, Naito, and Snyder, p. 89; *Congressional Quarterly Service, Representation and Apportionment* (Washington: 1966), p. 26.

57. Kanbara, Naito, and Snyder, p. 90; Romani, p. 43.

58. Kanbara, Naito, and Snyder, p. 90; Pennsylvania, Constitutional Convention, 1967-68, Preparatory Committee, *Legislative Apportionment*, p. 33.

59. Kanbara, Naito, and Snyder, p. 90; *Legislative Apportionment*, p. 33.

60. It is interesting to note that these provisions in article III, section 4, have yet to be challenged. In *Boshard v. 1973 Legislative Reapportionment Commission* (1973), 55 Haw. 89, 515 P.2d 1249, the controversy regarding the first senatorial district including the Kona area was challenged on the basis of the constitutional requirement of compactness.

61. Kanbara, Naito, and Snyder, p. 90.

Chapter 8

1. See Bertram Kanbara, Yukio Naito, and Patricia Snyder, *Article III: The Legislature*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), Vol. II, for background of reapportionment problems.

2. *Hawaii Const.* Art. III, sec. 4 (1950).

3. *Hawaii Const.* Art. III, sec. 4.

4. The Reapportionment Commission met in 1973 and another scheduled reapportionment, unless otherwise preempted, is to take place in 1981.

5. See Hawaii, *Report and Reapportionment Plan of the 1973 Legislative Reapportionment Commission*, 1973, pp. 28-34.

6. An alternative that is not considered in the analysis that follows involves reliance on the courts. No state has adopted this mechanism as the primary agency for apportioning elected bodies. Indeed, delegating the reapportionment task to the courts as a regular undertaking would tend to undermine the concept of a separation of powers and judicial independence as well as impose a duty which the courts are not equipped to meet. Many states instead rely upon the judiciary system as a last resort to the resolution of basic problems regarding political representation.

7. See Appendix B.

8. Kanbara, Naito, and Snyder, p. 74.

9. Presently, only Alaska and Maryland rely on the executive for apportionment. In 1964, Alaska, Arizona, and Hawaii placed the reapportionment function on the executive.

10. William J.D. Boyd, *Changing Patterns of Apportionment* (New York: National Municipal League, 1965), p. 26.

11. Kanbara, Naito, and Snyder, p. 95; Pennsylvania, Constitutional Convention, 1967-68, Preparatory Committee, *Legislative Apportionment*, pp. 41 and 46; hereinafter cited as Pennsylvania Preparatory Committee.

12. Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (to be published in 1968), cited in Pennsylvania, Constitutional Convention, 1967-68, Preparatory Committee, *Legislative Apportionment*, p. 47.

13. See *Book of the States*, published by Council of State Governments for the years 1964-65, 1968-69, and 1976-77.

14. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), pp. 48-49.

15. Pennsylvania Preparatory Committee, p. 42.

16. This plan was recommended by the National Municipal League in 1963; but since then the League has withdrawn this proposal from its Model Constitution.

17. Pennsylvania Preparatory Committee.

18. *Ibid.*

19. *Ibid.*

20. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 58, p. 259.

21. *Hawaii Const.* Art. III, sec. 4.

22. Hawaii, Legislative Reapportionment Commission, *Report and Reapportionment Plan*, 1973, pp. 28-34.

23. Terry B. O'Rourke, *Reapportionment: Law, Politics, Computers*, American Enterprise Institute for Public Policy Research, Domestic Affairs Studies, No. I (Washington, D.C.: 1972).

24. *Ibid.*

25. *Westberg v. Sanders*, 376 U.S. 1 (1964).

26. *Reynolds v. Sims*, 377 U.S. 533 (1964).

27. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College District*, 397 U.S. 50 (1970).

28. Treatment of the reapportionment cases from Hawaii have not indicated those regarding local governments. This is not to say that there have been no controversies regarding the composition of locally elected bodies. In fact, in *Chikasuye v. Lota*, 51 Haw. 443 (1969), reh. den. 51 Haw. 477, the court's decision lead to major restructuring of the Honolulu City Council and amendment of the City and County Charter. Local government apportionment has been omitted from the foregoing analysis because of the long home-rule tradition in Hawaii, the relatively small state interest involved in local apportionments and the fact that each county has taken care of its own problems. It is possible that local apportionment may in the future rise to a significant level of interest warranting state action. For present purposes, however, it need only be stated that treatment of local government apportionment in the state constitution is possible and would have legal effect.

29. In a sense, the state legislature identified itself as the apportionment agency for congressional and school board representation. The constitution is silent as to who is empowered to perform the reapportionment and districting functions in these areas. As a consequence, the legislature has stepped in and taken action in the form of legislative proposals. No questions regarding the legislature's constitutional authority to perform the apportionment functions have been raised.

30. U.S., Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures* (Wash: 1962) p. 65.

31. *Ibid.*

32. *Hawaii Const.* Art. V, sec. 4.

33. Pennsylvania Preparatory Committee, p. 45.

34. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

35. The decennial census should not be confused with the mid-decade census.

36. Hawaii, *Legislative Apportionment Commission*, p. 33.

37. *Ibid.*

38. If staggered four-year terms were assumed, it might be argued that six-year apportionment periods were preferred to eight-year intervals. Under the eight-year system, half of the staggered seats would experience two full terms of office. The other half would be chopped up in a 2-4-2 year sequence of terms. Candidates for such seats would be at a disadvantage. In contrast, under the six-year plan, both halves of the stagger would be affected similarly. One-half would experience a 4-2 length of office and the other half would be elected under a 2-4 sequence of terms. In both situations, however, the stagger prevents those elected to the four-year terms to serve the length of that period.

39. 13 U.S.C.A. sec. 141.

40. *Ibid.*

Appendix A

PERCENTAGE DEVIATIONS RESULTING FROM 1968 AND 1973 REAPPORTIONMENTS

After the apportionment provisions to Hawaii's constitution were adopted in 1968, each basic island unit's average number of registered voters per legislator and the per cent by which they deviated from the statewide average number of registered voters per legislator were as follows:

HOUSE

Island Unit	No. of Rep.	No. of Registered Voters	Island Average Registered Voters Per Representative	Per Cent Deviation from State Average of 4,967*
Oahu	38	193,107	5,082	+ 2.3
Hawaii	6	28,596	4,766	- 4.1
Maui	4	19,029	4,757	- 4.2
Kauai	3	12,510	4,170	-16.1

SENATE

Island Unit	No. of Senators	No. of Registered Voters	Island Average Registered Voters Per Representative	Per Cent Deviation from State Average of 10,130**
Oahu	19	193,107	10,164	+ 0.3
Hawaii	3	28,596	9,532	- 5.9
Maui	2	19,029	9,514	- 6.1
Kauai	1	12,510	12,510	+23.5

**Total statewide number of registered voters (253,242) divided by the total number of representatives (51).*

***Total statewide number of registered voters (253,242) divided by the total number of senators (25).*

When the apportionment plans for both the house and senate were viewed together, the following average number of registered voters per legislator for each basic island unit and the per cent by which such average deviates from the statewide average was reflected:

Basic Island Unit	No. of Legislators (Rep. & Sen.)	No. of Registered Voters	Island Av. No. of R.V. per Legislator	% Deviation from Statement Av. No. of R.V. per Legislator (3,332)*
Oahu	57	193,107	3,388	+1.7
Hawaii	9	28,596	3,174	-4.7
Maui	6	19,029	3,171.5	-4.8
Kauai	4	12,510	3,127.5	-6.1

The percentage by which the number of registered voters per representative in each district deviated from the average number of registered voters per representative follows. Two deviation percentages are given, one reflecting the deviation from the basic island unit's average and the other reflecting the deviation from the statewide average.

	Rep. Dist.	No. of Reps.	No. of Reg. Voters	Reg. Voters per Rep.	% Dev. from Island Unit Av. No. of Reg. Voters per Rep.	% Dev. from Statewide Av. No. of Reg. Voters per Rep. (4965.53)*
Hawaii	1	1	4,377	4,377.0	- 8.2	-11.9
	2	2	10,115	5,057.5	+ 6.1	+ 1.9
	3	1	4,766	4,766.0	0.0	- 4.0
	4	1	4,517	4,517.0	- 5.2	- 9.0
	5	1	4,821	4,821.0	+ 1.2	- 2.9
Maui	6	2	9,223	4,611.5	- 3.1	- 7.1
	7	2	9,806	4,903.0	+ 3.1	- 1.3
Oahu	8	2	10,449	5,224.5	+ 2.8	+ 5.2
	9	2	9,973	4,986.5	- 1.9	+ 0.4
	10	2	10,449	5,224.5	+ 2.8	+ 5.2
	11	2	10,012	5,006.0	- 1.5	+ 0.8
	12	3	14,949	4,983.0	- 1.9	+ 0.4
	13	3	15,597	5,199.0	+ 2.3	+ 4.7
	14	2	10,155	5,077.5	- 0.1	+ 2.3
	15	2	10,504	5,252.0	+ 3.3	+ 5.8
	16	2	11,099	5,549.5	+ 9.2	+11.8
	17	2	9,137	4,568.5	-10.1	- 8.0
	18	2	10,363	5,181.5	+ 2.0	+ 4.3
	19	2	10,533	5,266.5	+ 3.6	+ 6.1
	20	3	14,812	4,937.3	- 2.8	- 0.6
	21	1	5,725	5,725.0	+12.7	+15.3
	22	2	9,296	4,648.0	- 8.5	- 6.4
	23	3	14,105	4,701.7	- 7.5	- 5.3
	24	3	15,949	5,316.3	+ 4.6	+ 7.1
Kauai	25	3	12,510	4,170.0	0.0	-16.0

**Total statewide registered voters (253,242) divided by the total number of representatives (51).*

Following the 1973 reapportionment, each basic island unit's average number of registered voters per legislator and the per cent by which such average deviated from the statewide average number of registered voters per legislator was as follows:

Basic Island Unit	No. of Legis.	No. of Reg. Voters	No. of RV Per Legis.	% Deviation from SW Av.
House				
State	51	337,837	6,624	
Hawaii	5	34,958	6,992	+ 5.55
Maui	4	24,581	6,145	- 7.23
Oahu	39[40]	262,597	6,733[6,565]	+ 1.64[- 0.89]
Kauai	3[2]	15,701	5,234[7,851]	-20.98[+18.52]
Senate				
State	25	337,837	13,513	
Hawaii	3	34,958	11,653	-13.76
Maui	2	24,581	12,291	- 9.04
Oahu	19	262,597	13,821	+ 2.27
Kauai	1	15,701	15,701	+16.19
Combined				
State	76	337,837	4,445	
Hawaii	8	34,958	4,370	- 1.68
Maui	6	24,581	4,097	- 7.82
Oahu	58[59]	262,597	4,528[4,451]	+ 1.86[+ 0.13]
Kauai	4[3]	15,701	3,925[5,234]	-11.69[+17.75]

In the table above, the figures in brackets denote what would have been if Kauai were allocated two representatives and Oahu were allocated forty representatives under the method of equal proportions.

The house districting plan adopted by the 1973 Reapportionment Commission created 27 house districts. The districting plan and the percentage by which the number of registered voters per representative in each district deviates from the average number of registered voters per representative is shown on the following table. Two deviation percentages are given,

one reflecting the deviation from the basic island unit's (B.I.U.) average and the other reflecting the deviation from the statewide average.

	Rep. Dist.	No. of Reps.	No. of Reg. Voters	Reg. Voters per Rep.	% Dev. from Basic Island Unit Av. No. Reg. Voters per Rep.	% Dev. from Statewide Av. No. of Reg. Voters per Rep.
Hawaii	1	1	6,832	6,832	- 2.3	3.1
	2	2	14,098	7,049	0.8	6.4
	3	1	7,165	7,165	2.5	8.2
	4	1	6,863	6,863	- 1.9	3.6
Maui	5	2	12,114	6,057	- 1.4	- 8.6
	6	2	12,467	6,234	1.4	- 5.9
Oahu	7	2	13,575	6,788	0.8	2.5
	8	2	13,787	6,894	2.4	4.1
	9	2	13,364	6,682	- 0.8	0.9
	10	2	13,788	6,894	2.4	4.1
	11	2	13,199	6,600	- 2.0	- 0.4
	12	2	13,582	6,791	0.9	2.5
	13	3	20,214	6,738	0.1	1.7
	14	2	13,685	6,842	1.6	3.3
	15	2	13,543	6,772	0.6	2.2
	16	2	13,109	6,554	- 2.7	- 1.0
	17	2	13,440	6,720	- 0.2	1.4
	18	2	13,681	6,840	1.6	3.3
	19	2	12,981	6,490	- 3.6	- 2.0
	20	2	12,955	6,478	- 3.8	- 2.2
	21	2	13,413	6,706	- 0.4	1.2
	22	2	12,965	6,482	- 3.7	- 2.1
	23	1	6,733	6,733	0.0	1.6
	24	2	13,971	6,986	3.8	5.4
	25	2	13,802	6,901	2.5	4.2
	26	1	6,810	6,810	1.1	2.8
Kauai	27	3	15,701			-21.0

The senate districts and the number of senators apportioned to each along with the percentage by which the number of registered voters per senator in each district deviated from the average number of registered voters per senator is shown on the following table.

Senatorial District	No. of Senators	R.V. per Senator	No. of Registered Voters	% Deviation from Basic Island Unit's Av. No. of R.V. per Senator	% Deviation from State-wide Av. No. of R.V. per Senator
1	3	11,653	34,958	0.0	-13.8
2	2	12,290	24,581	0.0	- 9.0
3	3	14,207	42,621	2.8	5.1
4	4	13,746	54,985	-0.5	1.7
5	4	13,816	55,265	0.0	2.2
6	4	13,803	55,212	-0.1	2.1
7	4	13,628	54,514	-1.4	0.8
8	1	15,701	15,701	0.0	16.2

Deviations from the basic island unit's average is shown only for those senatorial districts on Oahu. The only meaningful measure of deviation in the other island units is the statewide average, since each island unit is a single senatorial district.

On the island of Oahu, deviation in all five districts from the statewide average number of registered voters per senator did not exceed 5.1 per cent. The deviations in the senatorial districts of Hawaii, Maui, and Kauai were -13.8 per cent, -9.0 per cent and +16.2 per cent, respectively. The commission felt however, that the seemingly large deviations in the senatorial districts of Hawaii, Maui, and Kauai were substantially balanced off when the senate and house were considered together, and the deviations of Hawaii, Maui, and Kauai, on a combined basis are reduced to 1.68 per cent, 7.82 per cent, and 11.69 per cent, respectively, as shown by the table below:

Basic Island Unit	No. of Legis.	No. of Reg. Voters	No. of Reg. Voters per Legis.	% Deviation from Statewide Av.
State	76	337,837	4,445	
Hawaii	8	34,958	4,370	- 1.68
Maui	6	24,581	4,097	- 7.82
Oahu	58	262,597	4,528	+ 1.86
Kauai	4	15,701	3,925	+11.69

When the house districts and the senate districts were combined and read together, the number of registered voters per legislator in each district deviated from the statewide average number of registered voters by no more than 11.7 per cent. The following table reflects this finding.

REPRESENTATION PER LEGISLATOR BY SENATORIAL DISTRICTS
FINAL REAPPORTIONMENT PLAN
1973 LEGISLATIVE REAPPORTIONMENT COMMISSION
STATE OF HAWAII
July 13, 1973

Senate District	House District	R.V. in House District	No. of House Seats	No. of Senate Seats	No. of Legislators in Senate District	R.V. in Senate District	Av. No. of R.V. per Legislator	Deviation R.V.	Deviation %
	1	6,832	1						
	2	14,098	2						
1	3	7,165	1	3	8	34,958	4,370	- 75	- 1.7
	4	6,863	1						
	5	12,114	2						
2	6	12,467	2	2	6	24,581	4,097	- 348	- 7.8
	22(Port.)	1,305	0.2						
	23	6,733	1						
3	24	13,971	2	3	9.2	42,621	4,633	188	4.2
	25	13,802	2						
	26	6,810	1						
	18(Port.)	3,976	0.6						
	19	12,981	2						
4	20	12,955	2	4	12.4	54,985	4,434	- 11	- 0.2
	21	13,413	2						
	22(Port.)	11,660	1.8						
	14(Port.)	5,468	0.8						
	15	13,543	2						
5	16	13,109	2	4	12.2	55,265	4,530	85	1.9
	17	13,440	2						
	18(Port.)	9,705	1.4						
	11	13,199	2						
	12	13,582	2						
6	13	20,214	3	4	12.2	55,212	4,526	81	1.8
	14(Port.)	8,217	1.2						
	7	13,575	2						
	8	13,787	2						
7	9	13,364	2	4	12	54,514	4,543	98	2.2
	10	13,788	2						
8	27	15,701	3	1	4	15,701	3,925	- 520	- 11.7
Total		337,837	51	25	76	337,837	4,445		15.9

Average deviation 3.9

Appendix B

STATE LEGISLATIVE APPORTIONMENT

Table 1

APPORTIONMENT OF LEGISLATURES: SENATE

State or other jurisdiction	Initial reapportioning agency	Present apportionment by	Year of most recent apportionment	Number of seats	Number of districts	Number of multi-member districts	Largest number of seats in district	Percent deviation in actual v. average population per seat: Greatest +	Greatest −	Average population each seat (a)
Alabama	L	FC	1972	35	35	0	1	0.67	0.72	98,406
Alaska	G,B	SC	1974	20	16	3	3	14.0	8.4	15,118
Arizona	L	L	1972(b)	30	30	0	1	0.4	0.4	59,083
Arkansas	B	B	1971	35	35	0	1	2.0	1.49	54,923
California	L	SC	1973	40	40	0	1	1.92	1.02	499,322
Colorado	L	L	1972	35	35	0	1	2.48	0.67	63,129
Connecticut	L(c)	B	1971	36	36	0	1	3.9	3.9	84,228
Delaware	L	L	1971	21	21	0	1	1.4	0.9	26,100
Florida	L(c)	L	1972	40	19	14	3	0.62	0.53	169,773
Georgia	L	L	1972	56	56	0	1	2.3	2.0	81,955
Hawaii	B	B	1973	25	8	7	4	16.2	13.8	13,513(d)
Idaho	L	L	1974	35	35	0	1	5.45	5.03	20,371 (h)
Illinois	L(c)	L	1973	59	59	0	1	0.8	0.6	188,372
Indiana	L	L	1972	50	50	0	1	4.7	1.6	103,872
Iowa	L(c)	SC	1972	50	50	0	1	0.0	0.0	56,507
Kansas	L	FC	1972	40	40	0	1	2.56	2.02	56,231
Kentucky	L	L	1972	38	38	0	1	3.07	3.02	84,791
Louisiana	L	FC, L	1972	39	39	0	1	5.6	8.8	93,415
Maine	L(c)	SC	1972	33	33	0	1	1.52	1.54	30,111
Maryland	G	G, L	1973	47	47	0	1	5.3	4.7	83,455
Massachusetts	L	L	1973	40	40	0	1	3.53	3.67	138,493(e)
Michigan	B	SC	1972	38	38	0	1	0.0	0.0	233,753
Minnesota	L	FC	1972	67	67	0	1	1.88	1.83	56,870
Mississippi	L	FC	1975	52	39	12	3	1.12	0.92	42,000
Missouri	B	B	1971	34	34	0	1	4.9	4.9	137,571
Montana	B	B	1974	50	50	0	1	6.33	6.75	13,888
Nebraska	L	L	1971	49	49	0	1	1.4	1.1	30,280
Nevada	L	L	1973	20	10	3	7	7.7	9.6	24,437
New Hampshire	L	L	1972	24	24	0	1	3.25	4.0	30,154(f)
New Jersey	B	B, SC	1973	40	40	0	1	2.85	1.39	179,278
New Mexico	L	L, SC	1972	42	42	0	1	4.85	4.48	24,190
New York	L	L	1971	60	60	0	1	0.9	0.9	304,021
North Carolina	L	L	1971	50	27	18	4	6.30	6.89	101,641
North Dakota	L	FC	1975	50	49	1	2	3.16	3.1	12,355
Ohio	B	B	1971	33	33	0	1	1.05	0.95	322,788
Oklahoma	L(c)	L	1971	48	48	0	1	0.5	0.5	53,317
Oregon	L(c)	S, SC	1971	30	30	0	1	1.2	0.7	69,713
Pennsylvania	B	B	1971	50	50	0	1	2.29	0.03	235,949
Rhode Island	L	L	1974	50	50	0	1	17.0	0.0	17,800
South Carolina	L	L	1972	46	16	13	5	3.18	6.75	56,316
South Dakota	L(c)	L	1971	35	28	3	5	2.4	3.3	19,035
Tennessee	L	L	1973	33	33	0	1	7.1	7.4	118,914
Texas	L(c)	B	1971	31	31	0	1	2.3	2.2	361,185
Utah	L	L	1972	29	29	0	1	4.64	6.38	36,527
Vermont	L(c)	L	1973	30	13	11	6	8.17	8.48	14,824
Virginia	L	FC	1971	40	38	1	3	5.2	4.5	116,212
Washington	L	FC	1972	49	49	0	1	0.91	0.7	68,428(f)
West Virginia	L	L	1964(g)	34	17	17	2	34.5	31.0	54,718
Wisconsin	L	L	1972	33	33	0	1	0.71	0.55	133,877
Wyoming	L	L	1971	30	16	9	5	27.9	21.6	11,080
Virgin Islands	L	L	1972	15	3	2	7	N.A.	N.A.	4,461

Abbreviations: B—Board or Commission; FC—Federal Court; SC—State Court; G—Governor; L—Legislature; S—Secretary of State; N.A.—Not available.

(a) Population figures in most instances are based on the 1970 federal census. West Virginia: population figures valid at time of last legislative apportionment.

(b) Effective 1976 election.

(c) Constitution or statutes provide for another agent or agency to reapportion if the Legislature is unable to do so.

(d) Average number of registered voters per seat.

(e) Based on 1971 special State Decennial Census of state citizens.

(f) Based on civilian or nonstudent population.

(g) Further consideration anticipated in 1976.

(h) Based on number of votes polled at prior election.

Table 2

APPORTIONMENT OF LEGISLATURES: HOUSE

State or other jurisdiction	Initial reapportioning agency	Present apportionment by	Year of most recent apportionment	Number of seats	Number of districts	Number of multi-member districts	Largest number of seats in district	Percent deviation in actual v. average population per seat: Greatest +	Greatest −	Average population each seat (a)
Alabama	L	FC	1972	105	105	0	1	1.08	1.15	32,802
Alaska	G, B	SC	1974	40	22	10	6	14.0	15.0	7,559
Arizona	L	L	1972(b)	60	30	30	2	0.4	0.4	29,541
Arkansas	B	B	1971	100	84	10	3	6.3	3.1	19,233
California	L	SC	1973	80	80	0	1	1.94	1.90	249,661
Colorado	L	L	1972	65	65	0	1	0.97	1.09	33,993
Connecticut	L(c)	B	1971	151	151	0	1	1.0	1.0	20,081
Delaware	L	L	1971	41	41	0	1	2.6	2.3	13,368
Florida	L(c)	L	1972	120	45	24	6	0.2	0.1	56,591
Georgia	L	L	1974	180	154	17	4	4.87	4.79	25,502
Hawaii	B	B	1973	51	27	22	3	8.2	21.0	6,624(d)
Idaho	L	L	1971	70	35	35	2	5.45	5.03	10,186 (i)
Illinois	L(c)	L	1973	177	59	59	3	0.8	0.6	62,791
Indiana	L	L	1972	100	73	20	3	1.0	1.0	51,936
Iowa	L(c)	SC	1972	100	100	0	1	0.0	0.0	28,253
Kansas	L	L	1973	125	125	0	1	6.5	4.8	18,223
Kentucky	L	L	1972	100	100	0	1	3.1	3.9	32,193
Louisiana	L	FC, L	1972	105	105	0	1	4.6	4.6	34,697
Maine	L(c)	SC	1974	151	119	11	10	5.0(e)	5.0(e)	6,581
Maryland	G	G, L	1973	141	47	47	3	5.3	4.7	27,818
Massachusetts	L	L	1973	240	240	0	1	9.94	9.06(f)	23,232(g)
Michigan	B	SC	1972	110	110	0	1	0.0	0.0	80,751
Minnesota	L	FC	1972	134	134	0	1	1.99	1.97	28,404
Mississippi	L	FC	1975	122	84	27	4	1.06	0.93	18,171
Missouri	B	SC	1971	163	163	0	1	1.2	1.3	28,696
Montana	B	B	1974	100	100	0	1	7.83	7.65	6,944
Nebraska	Unicameral Legislature			...	...	...	...	...	...	...
Nevada	L	L	1973	40	40	0	1	10.9	12.1	12,218
New Hampshire	L	L	1971	400	159	109	11	25.3	19.3	1,813(h)
New Jersey	B	B, SC	1973	80	40	40	2	2.85	1.39	89,639
New Mexico	L	L, SC	1972	70	70	0	1	4.92	4.95	14,514
New York	L	L	1971	150	150	0	1	1.8	1.6	121,608
North Carolina	L	L	1971	120	45	35	8	8.2	10.2	42,350
North Dakota	L	FC	1975	100	49	49	4	3.16	3.1	6,178
Ohio	B	B	1971	99	99	0	1	1.05	0.95	107,596
Oklahoma	L(c)	L	1971	101	101	0	1	1.0	1.2	25,338
Oregon	L(c)	S, SC	1971	60	60	0	1	1.33	0.88	34,856
Pennsylvania	B	B	1971	203	203	0	1	2.98	0.04	58,115
Rhode Island	L	L	1974	100	100	0	1	17.0	0.0	8,900
South Carolina	L	L	1974	124	124	0	1	4.98	4.97	20,819
South Dakota	L(c)	L	1971	70	28	28	10	2.4	3.3	9,518
Tennessee	L	L	1973	99	99	0	1	2.0	1.6	39,638
Texas	L(c)	L	1975	150	150	0	1	5.8	4.7	74,645
Utah	L	L	1972	75	75	0	1	6.72	5.95	14,124
Vermont	L(c)	L	1974	150	72	39	15	10.58	9.36	1,820(d)
Virginia	L	L	1972	100	52	28	7	9.6	6.8	46,485
Washington	L	FC	1972	98	49	49	2	0.91	0.7	34,214(h)
West Virginia	L	L	1973	100	36	25	13	8.17	8.01	17,442
Wisconsin	L	L	1972	99	99	0	1	0.96	0.93	44,626
Wyoming	L	L	1971	62	23	12	11	41.16	45.47	5,362
Virgin Islands	Unicameral Legislature			...	...	...	...	...	...	...

Abbreviations: B—Board or Commission; FC—Federal Court; SC—State Court; G—Governor; L—Legislature; S—Secretary of State.

(a) Population figures in most instances are based on the 1970 federal census.

(b) Effective 1976 election.

(c) Constitution or statutes provide for another agent or agency to reapportion if the Legislature is unable to do so.

(d) Average number of registered voters per seat.

(e) Approximate. No exact figures were available.

(f) This figure excludes two geographical island districts whose deviations are −73.5 and −81.77.

(g) Based on 1971 special State Decennial Census of state citizens.

(h) Based on civilian or nonstudent population.

(i) Based on number of votes polled in prior election.

SOURCE: Book of the States, 1976-77 (Lexington: Council of State Governments, 1976) p. 42-43, as updated by LRB staff.

Appendix C

POPULATION AND REGISTERED VOTER BREAKDOWNS BY ISLAND UNITS

The figures in the text were extracted from the following:

	MAUI	KAUAI	OAHU	HAWAII	STATE
1968					
Population[1]	48,350	31,281	629,604	66,007	775,242
Registered Voters[2]	19,800	13,076	211,853	29,370	274,199
Rate	41%	42%	34%	44%	35%
1972					
Population[3]	49,234	30,838	660,125	68,363	808,560
Registered Voters[4]	24,581	15,701	262,597	34,958	337,837
Rate	50%	51%	40%	51%	42%
1976					
Population[5]	57,500	34,100	718,400	76,600	886,600
Registered Voters[6]	29,743	18,063	275,479	39,760	363,045
Rate	52%	53%	38%	52%	41%

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[1] *Population of Hawaii, 1969, DPED Statistical Report No. 66, Table 3.*

[2] *Results of votes cast, General Eelection, Tuesday, November 5, 1968.*

[3] *State of Hawaii Data Book 1973, A Statistical Abstract, DPED, p. 9.*

[4] *Results of votes cast, General Election, Tuesday, March 1972, p. 98.*

Appendix D

USE OF SINGLE- AND MULTI-MEMBER DISTRICTS FOR STATE LEGISLATURES

STATE	SINGLE-MEMBER DISTRICTS USED EXCLUSIVELY		MULTI-MEMBER DISTRICTS USED EXCLUSIVELY		SINGLE- AND MULTI-MEMBER DISTRICTS IN COMBINATION	
	HOUSE	SENATE	HOUSE	SENATE	HOUSE	SENATE
Alabama	X	X				
Alaska					X(6)	X(3)
Arizona		X	X(2)			
Arkansas		X			X(3)	
California	X	X				
Colorado	X	X				
Connecticut	X	X				
Delaware	X	X				
Florida					X(6)	X(3)
Georgia		X			X(4)	
Hawaii					X(3)	X(4)
Idaho		X	X(2)			
Illinois		X	X(3)			
Indiana		X			X(3)	
Iowa	X	X				
Kansas	X	X				
Kentucky	X	X				
Louisiana	X	X				
Maine		X			X(10)	
Maryland		X	X(3)			
Massachusetts	X	X				
Michigan	X	X				
Minnesota	X	X				
Mississippi					X(4)	X
Missouri	X	X				
Montana	X	X				
Nebraska	UNICAMERAL					X(7)
Nevada	X					
New Hampshire		X			X(11)	
New Jersey		X	X(2)			
New Mexico	X	X				
New York	X	X				
North Carolina					X(8)	X(4)
North Dakota			X(4)			X(2)
Ohio	X	X				
Oklahoma	X	X				
Oregon	X	X				
Pennsylvania	X	X				
Rhode Island	X	X				
South Carolina	X					X(5)
South Dakota			X(10)			X(5)
Tennessee	X	X				
Texas	X	X				
Utah	X	X				
Vermont					X(15)	X(6)
Virginia					X(7)	X(3)
Washington		X	X(2)			
West Virginia				X(2)	X(13)	
Wisconsin	X	X				
Wyoming					X(11)	X(5)

Numbers in parentheses indicate largest number of seats in district.

SOURCE: *The Book of the States 1976-77, p. 42-43, Lexington: Council of State Governments, 1976.*

Appendix E

PARTY DISTRIBUTION OF SEATS IN MULTIMEMBER DISTRICTS OF THE HAWAII HOUSE OF REPRESENTATIVES

DISTRICT	1968		1970		1972		1974		1976	
	DEMO.	REP.	DEMO.	REP.	DEMO.	REP.	DEMO.	REP.	DEMO.	REP.
A	2	1	1	1	1	1	2	0	2	0
B	3	1	2	0	2	0	1	1	2	0
C	1	3	2	0	1	1	1	1	2	0
D	1	1	1	1	1	1	1	1	1	1
E	4	0	0	2	1	1	2	0	2	0
F	3	0	2	0	2	0	1	1	2	0
G	3	0	2	0	2	0	2	0	2	0
H	2	0	1	2	1	2	0	2	0	2
I	4	0	1	2	2	1	2	0	2	0
J	3	2	2	0	2	0	2	1	2	1
K	4	0	2	0	2	0	2	0	2	0
L	0	4	2	0	2	0	1	1	1	1
M	3	0	2	0	2	0	2	0	1	1
N			2	0	2	0	2	0	2	0
O			2	0	2	0	2	0	2	0
P			3	0	3	0	2	0	2	0
Q			1	1	1	1	2	0	2	0
R			1	2	1	2	2	0	2	0
S			0	3	1	2	1	1	2	0
T			2	1	2	1	0	2	0	2
U							0	2	0	2
V							3	0	3	0
TOTAL	33	12	31	15	33	13	31	15	36	10
SINGLE-MEMBER DISTRICT	5	0	3	2	2	3	4	1	5	0
HOUSE	38	12	34	17	35	16	35	16	41	10

Appendix F

PARTY DISTRIBUTION OF SEATS IN MULTIMEMBER DISTRICT ELECTIONS FOR HAWAII SENATE

	1968		1970		1974	
	DEMO.	REP.	DEMO.	REP.	DEMO.	REP.
	2	1	2	1	2	1
	1	1	2	0	2	0
	2	1	1	2	1	2
	4	0	3	0	4	0
	4	0	4	0	4	0
	0	4	1	3	2	2
	3	1	2	2	2	2
TOTAL	16	8	15	8	17	7
SINGLE-MEMBER DISTRICT	1	0	1	0	1	0
SENATE	17	8	16	8	18	7