The *Reynolds* Standard and Local Reapportionment

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I. Foreword

Since the Supreme Court's decision in *Baker v. Carr*, a groundswell of litigation has thrust the courts into the political arena. Preceding the landmark opinion in *Reynolds v. Sims* a brace of Georgia cases brought forth two principles. The first is that all voters within an election district must count equally; the second is that election districts must be composed of substantially equal numbers. Congressional representation systems failing to meet these criteria were declared unconstitutional under article I, section 2 of the federal constitution.

Next to be attacked were the state legislatures, heavily weighted as they are in favor of rural representation. But in these cases, the courts have chosen as the constitutional measuring rod an innovation of the equal protection clause and have cast the issue in terms of a civil right rather than due process or a guarantee of republican government. Profound analysis of the Supreme Court's decisions as they affect constitutional theory and the science of democratic government is called for. What is attempted here is to capture at a moment of time, the reflections upon local waters of federal and state reapportionment decisions and to offer some conclusions and caveats.

The revolutionary effects of the *Reynolds* standard as it penetrates the vitals of county boards and city councils go far beyond problems of public administration and governmental organization. For we are in the realm of a right of the governed—a constitutional right to cast a vote of equal weight. But in implementing that right by an inflexible mathematical standard, do we lose sight of other considerations such as the virility of our two-party system and

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2. For the Court's earlier concern to avoid the political thicket, see *Colegrove v. Green*, 328 U.S. 549 (1946).


5. For the litigation pertaining to New York State, see *infra*, Part III.


effective representation of minority interests? Quantitative equality of representation can be satisfied by at-large elections or multi-member districts, which could, however, under the winner-take-all rule, emaciate an opposition party and checkmate minority groups. Qualitative equality of representation would seem to require a system of single-member districts, built upon historic, geographic and socio-economic communities of interest. Such a system easily runs aground when battered by mathematical tests, for counties, villages and towns have grown up unaware of the requirement that their population should conform to exact multiples of a representational norm.

The difficult decision in drawing up a representation plan is one of districting, for it is not too onerous to decide the other variable elements. To avoid the frustration of a redistricting which conforms to mathematical equality tests but which makes no sense politically, reapportioning bodies have tried fractional and weighted voting. These devices, in turn, raise questions of democratic theory and practice.

It is not surprising that local governments have resisted the task of reapportionment. Erie County, to which specific references will be made in the succeeding discussion, is no exception. Its Board of Supervisors, representing with equal weight densely populated urban areas and sparsely populated rural regions, illustrates an advanced stage of malapportionment. Redistricting is the paramount problem.

But as this county and other local governments work out a solution acceptable to the courts, one cannot close the book and ignore the larger issue raised. Political theorists and constitutional lawyers who watch the movement of the law, must sense the creative development which the equal protection clause is now undergoing. If the ultimate goal is fair, effective representation, then the present re-structuring to achieve equal representation is but a first step.

II. ELEMENTS OF A REPRESENTATION PLAN

In devising a plan of representation, the responsible legislative body must first reach a decision on each of the several variable components of an overall scheme. It must decide the size of the legislature, the basis of representation, the kind(s) of districts and the “power” of each legislator’s vote.

Basis of Representation

Population as the mathematical sum of individuals within a governmental unit is the fundamental concept on which apportionment is based. At least four variations of the population base may be cited.

Census population is the total of all inhabitants within the unit, e.g., within the state or county. Unquestionably, this is a valid starting point for allocating legislative representation.

9. See infra, Part II.
10. See Proposed Plans I & II for redistricting Erie County towns, in the Appendix.
Citizen population is census population exclusive of aliens. New York State has utilized citizen population since 1894.11 Two of the apportionment plans offered by the special session of the state legislature (December, 1964) were based on citizen population.12 The Supreme Court in WMCA, Inc. v. Lomenzo13 expressed no opinion on New York’s use of citizen population. The three-judge district court, to which the case was remanded, observed that the present method of enumeration “affects all areas of the state substantially equally” and therefore produces no discriminatory results.14 Consequently, at the present time, a citizen population base appears acceptable to the courts.16

A third classification of population is derived from the number of enrolled voters—those registered by the appropriate board of elections. Both the Citizens’ Committee10 and the Joint Legislative Committee17 suggested this basis. But the three-judge district court in WMCA, Inc. v. Lomenzo declared the invalidity of an enrolled voter base at least for purposes of New York state legislative apportionment.18

Lastly, voting population, i.e., enrolled voters who exercised their franchise in the last presidential or gubernatorial election, has been advanced as a proper basis for representation. The Joint Legislative Committee strongly preferred the actual-voter measure10 and argued that it achieved a one-man, one-vote result. Thus, if there were two districts of equal population, each entitled to one representative, and if in the first district 50 per cent of the population voted while in the second district 25 per cent voted, then twice as many votes were required to elect the representative of the first district. Reapportionment would give the first district an additional representative. The three-judge federal court

11. N.Y. Const. art. III, §§ 4, 5.
12. See infra, p. 130. The New York Citizens’ Committee on Reapportionment observed that citizen population has been traditionally utilized in New York, and that there may be, at the present time, an insufficient disparity between the numbers of citizens and residents to warrant the additional cost of a citizen census. But the Committee recommended that the citizen base be re-evaluated before a permanent plan is devised. N.Y. Citizens’ Committee on Reapportionment, Report to Governor Nelson A. Rockefeller 13-14 (1964) (hereinafter cited as Citizens’ Comm. Rep.).
15. See Seaman v. Fedourich, 45 Misc. 2d 940, 258 N.Y.S.2d 152 (Sup. Ct. 1965) (legislative reapportionment case, admitting as evidence of population only the federal census figures and requiring that state hospital inmates be included in the district totals).
did not find this reasoning persuasive. It invalidated two of the four plans proposed by the New York legislature because their actual-voter base would operate to disadvantage populous areas and produce imbalance rather than correct it.\textsuperscript{20}

**Districting**

Having decided the basis on which the allocation of representatives is to be predicated, the apportioning authority must next draw the districts and decide the method of counting representative votes.

All the legislators might be elected at-large from one multi-member district.\textsuperscript{21} The practical financial problems of running a county-wide campaign would arouse objections from political parties to such a plan. Secondly, the electorate would be faced with long and confusing ballots. Furthermore, it is problematic whether a legislator so elected would be accepted as "representative" in the traditional sense, where the separate voices of cities and towns have long been heard in county deliberations.

Election at-large might be made more palatable if the county—taking Erie as an illustration—were subdivided into at least two Buffalo and two town districts with a certain number of representatives elected by each of the four districts. Again, this would run counter to the individual spirit of the towns and to the concept that there be a clear nexus between the representative and the elector he represents.

The operation of a system of large, multi-member districts raises important problems in democratic government.\textsuperscript{22} Not only is a legislative body chosen from such districts less likely to represent social, economic, geographic or racial interests of significant (though not majority) proportions, but also it makes even more indirect the relationship between the governed and the government by the interposition of middlemen—legislators who do not reflect their constituencies. Multi-member districting, furthermore, may have serious consequences for our two-party system. This system which has proven to be the keystone of stable, democratic government in the United States cannot operate effectively where one party, though possessing a majority in certain districts is consistently swept aside in at-large elections.\textsuperscript{23}

Thus far the courts have not expressed a conclusive evaluation of a multi-member district system.\textsuperscript{24} A representation plan composed of both multi-member and single-member districts was approved by the Supreme Court in a recent opinion, *Fortson v. Dorsey*, containing some dictum which may prove prospec-

\textsuperscript{20} 238 F. Supp. 916, 924 (S.D.N.Y. 1965).
\textsuperscript{22}  Dixon, *supra* note 6, at 323.
\textsuperscript{23}  For the same reason, it is not suggested that proportional representation be employed as a substitute for the single-member district system of representation since the former may produce a fractionalization of parties resulting in weak and divided opposition and/or an insecure coalition in power.
tively meaningful.\textsuperscript{25} The three-judge district court in Pennsylvania, however, has raised the issue of the constitutional right to subdistricting.\textsuperscript{26} Therefore, although a range of choice for types of districting is still open to the authors of new representation plans, future developments may narrow the range.

A pattern of districts could be laid out for a county—using a single-member or single- and multi-member districts—which totally disregards present town and city boundaries. Thus a purely numerical calculation of equal population segments could be employed to redistrict a county. This would seem an undesirable alternative. The district electorate might be composed of fragments of several governmental units with the result that the representative might be unrepresentative of any or all of them. Furthermore, the necessary liaison between county and town or county and city in carrying out certain functions, \textit{e.g.}, health, zoning, protection, finance, would be destroyed or at least impaired. A more efficient and acceptable system would be to reconcile population districting with present political boundaries by groupings of smaller, contiguous units.

Whether as strong a case can be made for town lines as is made for the inviolability of counties is open to question. The county has been the favored child in New York systems of representation. Since the first state constitution of 1777 the county has been protected as an entity. The retention of county lines is based on historic and functional considerations. The important, wide range of governmental duties of the county are discussed in the New York Citizens’ Committee report.\textsuperscript{27} The present constitutional state apportionment provides that each county (with the exception of Fulton and Hamilton) is entitled to at least one Assemblyman. Senate districting is founded on the county unit although some multi-county districts are provided. The theory that preservation of the county as a basic unit of state apportionment deters gerrymandering has also been advanced. But the caveat of \textit{Reynolds v. Sims},\textsuperscript{28} that the integrity of political subdivisions must yield to district equality, should not be ignored. On the functional basis, the town has a much weaker claim to necessary political individuality, although historically it, like the county, has maintained its identity.

\textbf{Voting}

In addition to deciding the basis of representation and the geographical boundaries of districts, the authors of a reapportionment plan must determine the voting power of each legislator. Either in conjunction with present city wards, city and town voting districts, or with newly drawn districts, one of several methods of assigning votes to county legislators may be adopted. Each legislator may be given one vote or a weighted vote or a fractional vote. If the present

\textsuperscript{25} See infra, p. 129.


\textsuperscript{28} 377 U.S. 533, 580-81 (1964).
number of Erie county legislators is maintained, and they continue to be elected by the present constituencies, representatives of the more populous areas must be assigned extra (weighted) votes in proportion to the least populous electoral unit.

From the point of view of democratic theory, such a system may be challenged. One elected official with five or ten votes does not necessarily represent the various interests of his community. His deviation from the ideal, composite representative is magnified by the extra votes he casts and he may distort rather than reflect the views of his district.

The court in WMCA declined to evaluate the validity of weighted voting at the county level;\(^{29}\) but other judicial signposts point to an ultimate pronouncement that this method is unconstitutional.\(^{30}\)

Fractional voting permits each existing district to elect at least one legislator. A unit of population is selected as the basis for one vote. Districts encompassing multiples of one unit elect as many members as they have units. A district possessing less than one unit of population would have a proportionate fraction of one vote. Thus if the unit were 10,000, a district of 5,000 would return one legislator with one-half vote; a district of 20,000 would return two legislators each with one full vote.

Fractional voting presents problems in the area of democratic representation. Does the legislator with one-half or one-quarter vote—who has a full voice in committee decisions, etc.—"over-represent" his electorate?

Although the Citizens' Committee\(^{31}\) and the Joint Legislative Committee\(^{32}\) saw merit in fractional voting, the court in WMCA did not condone its use at the state level. The criticism that fractional voting over-emphasizes rural representation may be lodged at the county as well as the state level. Therefore, fractional voting and weighted voting appear to be legally uncertain devices on which to predicate a reapportionment scheme.

The foregoing consideration of the alternative choices in base of representation, districting and voting should suggest that the judicial edict of one-man, one-vote cannot be translated into practical politics simply by dividing a unit into squares each with exactly X number of citizens or people. Inevitably, there is pressure to maintain as much of the status-quo as possible, and to argue the justification of large or small deviations from the judicial standard. For the leeway, if there are any, one must examine the decisions of the federal and state courts in the cases testing different schemes of apportionment.

III. The Standard Unfurled

A review of the abundant literature following in the wake of Baker v. Carr\(^{33}\) is not within the scope of this paper. Rather, attention will be directed to the

\(^{29}\) 238 F. Supp. 916, 924 (S.D.N.Y. 1965).
\(^{33}\) 369 U.S. 186 (1962).
comments of the courts bearing upon the application of the new constitutional standard to local representation.

_Reynolds v. Sims_ transmuted the equal congressional districts rule of _Wesberry v. Sanders_ to an equal state legislative districts rule, commanded by the equal protection clause of the fourteenth amendment. And it is the equal protection clause which has provided the nucleus for the many apportionment decisions post-dating _Reynolds_. _Reynolds_ laid down a 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." While refuting an intent to insist on mathematical exactitude in compliance with its standard, the court after raising "other considerations," nonetheless, recapitulates with but minor variations its dominant population theme.

Two aspects of the opinion which have been seized upon as possible mitigations of the standard in its application to cities and counties are the flexibility and political subdivisions "concessions." It has been ventured that the courts may demand less punctiliousness in districting for state as contrasted with federal legislators; deviations from a numbers standard might be tolerated where vindicated by a rational state policy.

Secondly, the Court recognized that local governmental entities are often required to perform important functions and that it may be sensible to maintain the integrity of these units in formulating legislative districts. Preservation of natural and historic boundaries appeared to the court a valid alternative to "indiscriminate" districting, the latter affording "an open invitation to partisan gerrymandering." It might be permissible, said the court, to preserve the individual voices of political subdivisions in one house of a state legislature.

Neither of these theoretical meliorations has been accepted thus far in an apportionment case. At the same time that the _Reynolds_ majority seemed to allow some leeway for the representation of political subdivisions, it took no exception to the district court's view that counties were "merely involuntary political units ... created ... to aid in the administration of state government." And, in language which may be marshalled in rebuttal to the demands of local units for special consideration, the Court warned:

> But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

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34. 377 U.S. 533 (1964).
37. _Id._ at 578-80.
38. _Id._ at 579.
39. _Ibid._
40. _Id._ at 578.
41. _Id._ at 548.
42. _Id._ at 581.
The other decisions which were handed down with Reynolds (Alabama) on June 15, 1964 upset the apportionment schemes in New York, Maryland, Virginia, Delaware and Colorado. In reading the June 15 cases and considering the ten memorandum decisions that followed on June 22, what authority can be found for exempting a county or city reapportionment from total compliance with the mathematical standard of Reynolds? What judicial tests have been applied?

In the Virginia case, Davis v. Mann, two additional factors were considered. The population basis used in the allocation of legislative seats could not be adjusted to exclude temporary residents (here military personnel concentrated in a few districts). Secondly, an intent to balance urban and rural interests would not exonerate or validate a numerical malapportionment.

In Roman v. Sincock as in Tawes, the Court observed that the state legislature has authority to enact a stop-gap plan pending permanent revision of apportionment to accord with the one-man, one-vote principle.

The Colorado case is noteworthy for two declarations of the Court. In evaluating a reapportionment of the lower chamber (by state constitutional amendment), the Court found that a population-variance ratio of 1.7:1 and a voters-electing-a-majority proportion of 45.1 per cent indicated that the Colorado House was at least arguably apportioned on a population basis. None of the other June 15 decisions had spoken in such specific terms. Secondly, the Court made it clear that notwithstanding the electorate's approval of the Colorado reapportionment amendment, the resulting plan was not invulnerable to the Court's censure. (By virtue of the amendment, the House had been realigned to meet the population test, but the Senate, reflecting geographic and sociologic factors as well as population, had been retained as previously constituted.) The Court insisted that both houses must be representative of population.

The opinion in Meyers v. Thigpen, one of the memorandum decisions, reaffirmed the Lucas declaration of the Court's power to override the "voice of the people" of a state even when expressed through initiative referendum and constitutional amendment. "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority

47. 377 U.S. 656 (1964).
of a State's electorate . . . . The other decisions of June 22, 1964 affecting the state legislatures of Florida, Illinois, Oklahoma, Idaho, Connecticut, Michigan, Iowa, and Ohio did not bring to light any permissible deviations from the population standard of Reynolds.51

A more recent Supreme Court opinion emphasizes the hegemony of the mathematical standard enthroned by the June, 1964 decisions. Before the appeal was decided, Dorsey v. Fortson52 had, together with Drew v. Scranton,53 seemed to sound the knell for multi-member districts at least where such districts were used side by side with single-member districts. The district court had held that it was unconstitutional to elect state senators at large in two-thirds of the districts whereas other senators were elected from individual senatorial districts. The case was initiated by the minority party in the belief that subdistricting would enhance its opportunity to elect a few legislators. It was urged that at-large voting operated to cancel out minority representation.

Mr. Justice Brennan in the opinion delivered in January, 1965 limited the issue of equal protection to

whether county-wide voting in the seven multi-district counties results in denying the residents therein a vote “approximately equal in weight to that of” voters resident in the single-member constituencies. . . . [W]e cannot say that it does. There is clearly no mathematical disparity. Fulton County, the State’s largest constituency, has a population nearly seven times larger than that of a single-district constituency and for that reason elects seven senators.54

Even though under the system used in the counties containing more than one senatorial district, the senatorial nominees were required to be residents of the district they sought to represent, Justice Brennan stated that such senators were the “county’s and not merely the district’s senator.” Therefore, the contention that the choice of the population of one district might be swept aside in the county-wide vote did not trouble the court. The mathematical standard having been satisfied, arguments directed toward effective or fair representation seemed irrelevant.

The Pennsylvania case55 is at variance with the final Dorsey result, indicating that there may be a protected right to subdistricting. In a measure, this is what the challenging voters were arguing for in Dorsey by their contention that the county-wide, multi-district system in Georgia suppressed racial and political minorities. These cases raise the issue of gerrymandering, which appears

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51. For a criticism of the Court’s pre-occupation with mathematics, see Dixon, Recent Developments in Reapportionment, Address Before the Conference of Chief Justices (Aug. 6, 1964).
in the New York supreme court decision, Matter of Orans,\(^5\) and which was central to Wright v. Rockefeller.\(^6\) But Dorsey did not foreclose the possibility of future judicial examination of a constitutional right to effective representation. Justice Brennan conceded the following: "It might well be that, designedly or otherwise, a multi-member 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. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster."\(^5\)

Does this mean that multi-member districts in a heterogeneous community may become constitutionally perilous once the issue has been formulated more convincingly than it was in Wright v. Rockefeller? As a refinement of the population standard, or as a separate requirement, the single-member district system may be emerging from the equal protection clause.

New York State Reapportionment

\(^5\) WMCA, Inc. v. Lomenzo\(^6\) involved a challenge to the constitutional apportionment of the New York state legislature.

The Supreme Court, finding a "... significant undervaluation of the weight of votes of certain ... citizens merely because of where they happen to reside\(^6\) held that the New York constitutional scheme was invalid under the equal protection clause. It contained:

a built-in bias against voters living in the State's more populous counties. And the legislative representation accorded to the urban and suburban areas becomes proportionately less as the population of those areas increases.\(^6\)

The majority reiterated the principle laid down in Reynolds: "... the Equal Protection clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis."\(^6\)

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\(^5\) 377 U.S. 633 (1964). Plaintiffs, citizens residing in Kings, Bronx, Nassau, New York and Queens counties brought an action against state and local officials in federal district court on May 1, 1961. They alleged that article III, sections 2 to 5, of the New York Constitution was violative of the fourteenth amendment by providing for a legislative apportionment which underrepresented the populous areas of the state. The district court acceded to plaintiffs' request to convene a three-judge district court. The latter dismissed the complaint on the ground that the issues were nonjusticiable. WMCA, Inc. v. Simon, 202 F. Supp. 741 (1962). On appeal, the Supreme Court vacated the dismissal and remanded in the light of Baker v. Carr. WMCA, Inc. v. Simon, 370 U.S. 190 (1962). Following a hearing, the district court dismissed the complaint on the merits holding that the system of state legislative apportionment in New York was not unconstitutional. WMCA, Inc. v. Simon, 208 F. Supp. 365 (1962). Plaintiffs appealed to the Supreme Court.


\(^6\) Id. at 654.

\(^6\) Id. at 653.
On remand, the district court issued an order on June 27, 1964 declaring the state apportionment scheme void, providing for 1964 elections under the present system but limiting the term of the legislators elected to one year, and requiring that the legislature enact a valid reapportionment by April 1, 1965 to be implemented in the elections of November, 1965.

Pursuant to the order, the New York legislature passed the Reapportionment Compliance Act on December 22 and 23, 1964 which contained the following four plans:

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The Legislature preferred Plan D and intended this to be the law.

The three-judge district court denied motions to stay or enjoin state court proceedings relating to the Reapportionment Compliance Act and to declare the invalidity of the Act under the New York constitution. Judge Waterman declining to rule on the allegation of political gerrymandering, limited the issues to the equal protection considerations and the population standard of Reynolds. The question before him was “whether a vote for assemblyman or senator in one district is debased or diluted in relation to a vote for assemblyman or a senator in another district . . . ”

The district court invalidated Plans C and D on the grounds that fractional voting did not comport with the fourteenth amendment. The “basic standard of equality” would be violated where a representative with one-sixth of a vote could fully participate in debates, committee work and party caucuses. “The Assemblyman who represents only one-sixth of a district can theoretically give each constituent six times as much representation in these respects as the Assemblyman who represents a full district.”

This full “unit of participation” despite fractional voting power, was, under the two Plans, granted only to the sparsely populated counties. The court noted that New York City and Nassau County (which seem to have been the yardsticks in the federal cases) did not enjoy these apparent advantages of fractional representation. But in footnote 2 of the opinion, the court stated: “We express no opinion on the use of fractional or

63. N.Y.L. 1964, chs. 976, 977, 978, 979, 981.
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weighted voting either as a temporary device to remedy malapportionment or in governmental organs below the state level.\textsuperscript{66}

The court invalidated Plans B and D because of their provision for an actual-voter base. This aspect of the Plans would operate to reduce New York City's representation in the legislature, raising an "inference of discrimination against city-dwellers."\textsuperscript{6} Footnote 3 added, however: "We express no opinion on the validity of a voter basis under other circumstances.\textsuperscript{67}

Applying the Supreme Court tests of population-variance and minimum percentage required to elect a majority of legislators, the court found for Plan A that the former produced a ratio of 1.15:1 for the Senate and 1.21:1 for the Assembly, and the latter yielded 49.4 per cent for the Senate and 49.3 per cent for the Assembly. Next, the court tested the allocation of representatives under Plan A with a mathematically exact distribution, and found that there was a high degree of correlation. The Plan appeared to "pass" the mathematical tests extremely well.\textsuperscript{68}

To summarize what may be learned from the courts' reasoning in the federal cases bearing directly on the New York situation, one may venture that: (1) the judiciary is alert to the "built-in bias" in this state against populous areas and, consequently, it cannot be presumed that indications of such bias at the county level will be ignored; (2) while there has been no ruling on fractional or weighted voting except on the state level, the general arguments attacking such procedures apply with equal validity to county legislatures; (3) a voter base for apportionment at the county level may yield the same discriminatory results obtained for the state, and would therefore constitute a precarious foundation for a county plan.

IV. TESTS FOR COMPLIANCE WITH THE SUPREME COURT STANDARD

The controlling standard for election of Congressmen and of state senators and assemblymen is that every resident within the boundaries of the state must be able to exercise an equal vote. The general, pre-Reynolds standards affecting representation plans are also operative; for example, the compactness of districts, the contiguity of territories contained in a district, the "good faith" (public-mindedness, objectivity, intelligent judgment) of the body charged with formulating apportionment and districting systems.\textsuperscript{69} The good faith standard has been applied without difficulty by the courts to disapprove a proposed districting which was geared to the self-preservation of incumbents.\textsuperscript{70}

66. \textit{Id.} at 924.
67. \textit{Id.} at 925.
68. \textit{Id.} at 927. For discussion of these mathematical tests, see \textit{infra}, Part IV.
69. The court in Holt v Richardson, 240 F. Supp. 724, 730 (D. Hawaii 1965) elaborated upon the "factors" which a reapportioning body should weigh: "... community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and ... the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State."
The new equal representation standard, however, has given birth to mathematical tests. Three have recurred with increasing frequency in the decisions of this last year. The first is the population variance ratio (X:1). The most populous district (X) is compared with the least populous district (1) to determine the maximum difference in population represented by one legislative seat or vote. Thus if X equals 100,000 and 1 equals 10,000, the ratio is 10:1. The most populous district has ten times as many persons to be represented by one legislator as the least populous. Stated another way, a resident of the smallest district has a vote "worth" ten times as much as a resident of the largest. A perfectly apportioned legislature would yield a ratio of 1:1.

A second test is based on deviations from a representational norm.\(^7\) Given the total population of a state (or county, etc.) and the number of legislative seats to be apportioned, the norm (average population per legislator) is obtained by simple division. The norm equals 100 per cent and the suggested, permissible range of deviation is 85 per cent to 115 per cent or ±15 per cent.\(^7\)

Thirdly, the courts have applied what may be termed the least percentage capable of electing a majority of legislators test. To determine this percentage, one must arrange districts in order from the least to the most populous. District populations, beginning with the least populous district, are accumulated until a majority of legislative seats has been reached. This cumulative sub-total divided by the total population indicates the smallest percentage which technically could control the legislature. A perfectly apportioned legislature would yield approximately 50 per cent.

Another "test" (or perhaps better termed a composite criterion) which the courts have employed is an evaluation of the overall effect of a plan, whether discrepancies in apportionment of one house are balanced in the other or whether deviations are cumulatively exacerbated rather than minimized.\(^7\) This need to evaluate the "totality" of a representative scheme is frequently expressed in the cases, but the bases on which the court’s judgment should be formulated are not firmly established.

The courts applying a population variance ratio refer back to the Lucas case for the spare guidance offered by the Supreme Court. The opinion expressed in Lucas was that a ratio of 1.7:1 for the Colorado House was arguably satisfactory compliance with the principle of equal protection.\(^7\) The Reynolds decision indicates that a 2:1 ratio would be an unconstitutional dilution of the

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71. This test was advocated by political scientists fourteen years ago, see 45 Am. Pol. Sci. Rev. 154-55 (1951).
72. H.R. 5505, 89th Cong. 1st Sess. (1965) provides that: “Each such [Congressional] district shall at all times be composed of contiguous territory, in as compact form as practicable; . . . no district established in any State for the Ninetieth or any subsequent Congress shall contain . . . more than 15 per centum greater or less than the average [district population] . . . .” The bill was passed by the House; hearings have been held on it in the Senate.
votes in the most populous districts.\textsuperscript{75} The Supreme Court in \textit{Lomenzo}\textsuperscript{76} found (and disapproved) a ratio of 3.9:1 for the New York Senate and 21:1 for the Assembly based on the existing apportionment formula. The federal district court in affirming reapportionment Plan A found satisfactory ratios of 1.15:1 for the Senate and 1.21:1 for the Assembly.\textsuperscript{77} In \textit{Schaefer v. Thomson},\textsuperscript{78} the district court pronounced as invidiously discriminatory a proposed state Senate apportionment embodying a 10:1 ratio. An extreme variance is exemplified in the California state Senate districts; the district court noted that the ratio was 450:1 and denied any attempt to justify such a disparity.\textsuperscript{79} At the other end of the spectrum, the district court refused to approve a reapportionment plan for the Nebraska legislature solely on the ground that the population variance ratio was only 1.6:1.\textsuperscript{80} A reapportionment of the Minnesota legislature resulting in a ratio of 4:1 for the state Senate and 7:1 for the House was rejected by the district court.\textsuperscript{81} A ratio of approximately 20:1 for New Jersey Senate districts prompted the state court to require immediate redistricting.\textsuperscript{82} Patent malapportionment was found by the district court in the Missouri House of Representatives where one legislator represented as few as 4000 people and another legislator represented as many as 50,250, a ratio of 12.5:1.\textsuperscript{83}

The deviation from the norm test was applied in the Nebraska case\textsuperscript{84} to bar a plan which resulted in five out of fifty districts exceeding the norm and in six districts falling short of the norm by more than 15 per cent. In the Missouri decision, the district court struck down a reapportionment statute which would have permitted a deviation from the quotient or norm of 25 per cent.\textsuperscript{85} In \textit{Toombs v. Fortson},\textsuperscript{86} the district court found deviations of minus 36.9 per cent to plus 24 per cent in a proposed apportionment for the Georgia House. The language of the opinion indicates that this court would place more emphasis on compliance with the range of deviation test than with the population variance

\textsuperscript{75} 377 U.S. 533, 562 (1964).
\textsuperscript{76} 377 U.S. 633, 648 (1964).
\textsuperscript{77} 238 F. Supp. 916, 927 (S.D.N.Y. 1965).
\textsuperscript{78} 240 F. Supp. 247 (D. Wyo. 1964).
\textsuperscript{79} Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1965). The court remarked at 582: "Defendants' contention that population is not the only basis for apportioning of seats in the State Senate and that a diffusion of political power between urban and rural areas is permissible cannot be sustained, as such a position is the antithesis of the doctrine which Reynolds v. Sims . . . and all its companion cases have established."
\textsuperscript{80} League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (D. Neb. 1965). The court placed more reliance on the deviation from the norm test than the variance ratio, but seemed to place greatest emphasis on its evaluation of the overall effect of the proposed plan. The Supreme Court of New Jersey approved an interim reapportionment plan for the state legislature which embodied a population variance ratio of 1.6:1. Jackman v. Bodine, (Sup. Ct. of New Jersey, No. A-137, April 23, 1965).
\textsuperscript{81} Honsey v. Donovan, 236 F. Supp. 8, 19 (D. Minn. 1964).
\textsuperscript{82} N.Y. Times, April 1, 1965, p. 39, col. 4.
The test based on the minimum percentage of population which could elect a majority (and hence control the legislature) was applied by the Supreme Court to the New York legislature under the present constitutional formula. The Court found that the proportions of 41.8 per cent for the Senate and 34.7 per cent for the Assembly indicated unconstitutional apportionment. Under the legislature’s Plan A, the proportions would be 49.4 per cent for the Senate and 49.3 per cent for the Assembly. The Colorado (lower house) proportion which was not disapproved or expressly affirmed by the Supreme Court was 45.1 per cent. In the Minnesota case, 39.1 per cent for the upper chamber and 35 per cent for the lower house were unacceptable to the court.

The figures in the preceding paragraphs illustrate the mathematical measurements the courts have utilized in testing the compliance of state legislative reapportionment proposals with the equal protection mandate. One can deduce that a population variance ratio of 2:1 will not pass muster, that a percentage electing a majority of less than 45 per cent (Lucas) may not be acceptable, and that deviations exceeding plus or minus 15 per cent may also invalidate a plan.

These same tests are being applied to county and other local governments. An approximation of their results for Erie County reveals the dimensions of its present malapportionment. Erie County has a population variance ratio of 54.9:1, deviations from the norm of 10 per cent to 533 per cent and a proportion capable of electing a majority of supervisors of 26 per cent. Thus, if the established tests are applied by a court to Erie County, there is little doubt that the present scheme of representation will be declared unconstitutional.

The three major tests for measuring compliance with the Reynolds standard are easy to apply, and quickly bring to light the extreme incidences of malapportionment. Can the tests be satisfactorily correlated? In a close case, reliance on

87. "We decline to set a mathematical formula to be followed but we do hold that a variance of more than 15 percent would be difficult, if not impossible, to justify. It may be that there will be some later elucidation by the Supreme Court on this complex question but until such event occurs, we will base any test as to the reasonableness of variances on the departure figure of 15 percent." Id. at 70.
93. Based on 1960 census figures, Tonawanda (the most populous district) has 105,032 people and Wales (the least populous district) has 1,910 people. Therefore the variance is 105,032:1,910 or 54.9:1. See Appendix, Table I.
94. The present norm is 19,685. The extremes of population deviation from the norm are found in Wales, 1,910 and Tonawanda, 105,032 (1960 federal census figures).
95. The 28 least populous wards and towns have a total population of 275,086. The proportion this total bears to the total population of Erie County, 1,063,000 yields the minimum percentage of population which can, theoretically, elect a majority of supervisors.
LOCAL APPORTIONMENT

one formula to the exclusion of the others might be decisive.98 The tests appear to become more absolute and inflexible with repeated use. Furthermore, they stifle the exercise of judgment and the consideration of other factors in the electoral process which cannot be calibrated on a percentage scale. Professor Dixon contends:

An occasional extreme ratio or percentage deviation has no adverse impact on majority rule; it may be the best way, if not the only way, to provide effective minority representation along with majority rule.97

V. LOCAL REAPPORTIONMENT IN NEW YORK

Chief Justice Warren's formulations of the one-man, one-vote standard in Reynolds98 have been interpreted by subsequent litigants antithetically, to insist on strict numerical equality of votes or to vindicate "... divergences ... based on legitimate considerations incident to the effectuation of rational state policy...."98 Interpretation of the Court's language in recent, local reapportionment decisions is presented below. In each case, attention is focused on the "considerations" which have been offered to justify exemption from the standard. While emphasis is on New York decisions, a few cases from other jurisdictions are included because of their precedential value.

The most obvious challenge to the application of Reynolds v. Sims is that the fourteenth amendment affects only state legislatures. In an early case, Brouwer v. Bronkema,100 defendants contended that the equal protection clause safeguards the equal voice of electors in the choice of state legislators but not in the choice of a county board, dependent for its existence, powers and mode of selection on the will of the state legislature.101 As to such a derivative legislature, plaintiffs had no fundamental right of election. Defendants' second argument was based on the allegation that the Kent County board was an administrative rather than a legislative body.102 Thirdly, defendants claimed that the county board was immune from the requirements of the equal protection clause because some of its members were appointed rather than elected. The court refused to recognize any of these grounds as a valid reason for non-compliance. "The State may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it must
do so to a legislative body apportioned to the same 'basic constitutional stand-

ard'.103

In Sonneborn v. Sylvester,104 a case analogous to Brouwer, the Supreme Court of Wisconsin reached a similar result. It was here argued that the county legislature derived its powers from statutory rather than from constitutional sources, and hence was not subject to the equal representation requirement. The court declared that the rationale of Reynolds "... applies equally as well to a statutory right to vote ..."105 and that the fourteenth amendment governs apportionment of legislatures below the state level.

A three-judge federal court in Bianchi v. Griffing rendered the first decision applying Reynolds to New York county boards of supervisors.106 The court, itself, posed the central questions: "... how far should the federal judiciary go, or interest itself, in extending Reynolds v. Sims to local governmental bodies ..."?107 And, does the equal protection clause apply to the method of electing the officials of hamlets, villages, school, fire, sewerage and water districts, towns, cities or counties ... or only in some restricted class of definably important voting occasions.[?]108

The court found no difficulty in drawing an analogy between state and county representation. It ruled that the Suffolk County board of supervisors, as the legislative organ of the county, must be representative of population, and that the apportionment of a local legislature was not a matter solely of state concern.

Defendants did not contest the disparity of representation of the ten towns of Suffolk, but argued that the voters had approved the apportionment by their adoption of the Suffolk charter in 1958.109 The court rejected this justification, citing Lucas110 for the proposition that voter approval could not validate an unconstitutional scheme. The egregious inequality of representation (demonstrated by a population variance ratio of 130:1 and a population proportion of 10 per cent capable of electing one-half of the board)111 could be corrected by the state legislature or by a charter amendment initiated by the voters or by the Suffolk supervisors.

Following the Bianchi decision, the courts of the state of New York became the forum for litigating the constitutionality of several county representation systems. Defendant state and local officials in Goldstein v. Rockefeller112 urged

105. Id. at 55, 132 N.W.2d at 255.
107. Id. at 1000.
108. Id. at 999.
109. N.Y.L. 1958, ch. 278. Section 201 of the Suffolk Charter provides that the county board is to consist of a supervisor from each town. Section 203 provides that each supervisor shall have one vote.
no grounds for exemption of the Monroe County board of supervisors from the equal representation standard.\textsuperscript{113} In this action for a declaratory judgment, the New York supreme court ruled on several points affecting state statutes as well state constitutional provisions. Present apportionment of Monroe County was held violative of the equal protection clause of the Federal Constitution and sections 1 and 11 of article I of the New York Constitution.\textsuperscript{114} The court also declared that section 150 of the New York County Law ("the supervisors in the several cities and towns . . . shall constitute the board of supervisors of the county") was unconstitutional as its application resulted in the current composition of the Monroe County board of supervisors.\textsuperscript{115}

The apportionment of the county board of Broome County was challenged in \textit{Augostini v. Lasky}, decided in July, 1965.\textsuperscript{116} Plaintiffs moved for summary judgment to declare present representation and voting on the board unconstitutional and to declare sections 150\textsuperscript{117} and 153\textsuperscript{118} of the New York County Law and section 11\textsuperscript{119} of the New York Second Class Cities Law void. Defendants (board of supervisors) contended that the New York supreme court lacked jurisdiction since the complaint presented a federal question. The court refuted this argument in the following terms:

\ldots no reason or justification exists for differentiating, so far as that right [equal representation] is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal law-making bodies.\textsuperscript{120}

Defendants in \textit{Augostini} further alleged as an affirmative defense that measures to correct malapportionment had been submitted to the voters of Broome County in 1963 and 1964 and that the electorate had "soundly defeated" such proposals. The court dismissed the argument summarily.\textsuperscript{121} The court also concluded that section 150 of the County Law and section 11 of the Second Class Cities Law, as applied to Broome County, violated the fourteenth amendment.\textsuperscript{122}

The extension of the \textit{Reynolds} standard to municipal legislatures in New

\textsuperscript{113} The Monroe board of supervisors parallels the structure of the Erie County Board: one large town accounting for the largest segment of population, a major city divided into wards, and sparsely populated towns. Each ward and town elects one member to the board. The population variance ratio is 24:1. Twenty-five per cent of the population can theoretically elect a majority of supervisors. 45 Misc. 2d at 782, 257 N.Y.S.2d at 1000.

\textsuperscript{114} Guaranteeing the right to vote and equal protection.

\textsuperscript{115} Goldstein v. Rockefeller, 45 Misc. 2d 778, 788, 257 N.Y.S.2d 994, 1006 (Sup. Ct. 1965).

\textsuperscript{116} 46 Misc. 2d 1058, 262 N.Y.S.2d 594 (Sup. Ct. 1965).

\textsuperscript{117} Providing that the supervisors of the towns and cities constitute the county board of supervisors.

\textsuperscript{118} Providing that action by the county board shall be based on affirmative vote of a majority of the total board membership.

\textsuperscript{119} Providing for the election of a supervisor from each city ward.

\textsuperscript{120} Augostini v. Laskay, 46 Misc. 2d 1058, 1060, 262 N.Y.S.2d 594 (Sup. Ct. 1965).


\textsuperscript{122} The court noted that 20 per cent of the county's population could elect a majority of supervisors.
York was foreshadowed by the county cases. The groundwork was also laid by the three-judge federal court decision in *Ellis v. Mayor and City Council of Baltimore.*[^123] In that case, disparities of district population produced representation ratios which denied the electorate equally weighted votes in the selection of city legislators. In *Seaman v. Fedourich,*[^124] the apportionment of the Common Council of Binghamton, New York was at issue. The established voting procedure in Binghamton paralleled that of New York county boards of supervisors; each councilman represented one ward, and each exercised one vote regardless of ward population.

Defendants' threshold contention that the supreme court lacked subject matter jurisdiction over the apportionment of a city legislature was rebuffed by the trial court.[^125] It proceeded to the substantive constitutional issue and concluded that Binghamton's existing representation scheme was invalid.[^126] Councilmanic elections were barred pending the submission of a plan that would satisfy the *Reynolds* standard.

This decision of the supreme court prompted the Common Council of Binghamton to adopt Local Law No. 1 (1965) which reapportioned representation on the basis of new councilmanic districts. The same court was asked by the plaintiffs to declare the new law unconstitutional on the grounds that it, like its predecessor, did not satisfy the judicial standard of equal protection.[^127] The defendants (a majority of the Council) justified the new plan as one which honored "natural, geographic subdivisions," and reflected population changes since the last federal census.[^128]

The question of whether or not statistical data, unofficially procured, may support a reapportionment plan became a sharp issue. The trial court refused to accept anything but the federal census as evidence of population distribution.[^129] The defendants' adjustments to the 1960 census figures (reflecting their estimates of population flow in and out of wards) were rejected. Neither would the court permit exclusion of State Hospital inmates from the count of residents.[^130] Secondly, the trial court brushed aside the consideration of "natural, geographic subdivisions" where its effect was to subvert population equality.[^131]

[^126]: The ninth ward has a population of 542, the fourth ward, 11,426 based on 1960 census figures. The court applied the "least percentage" test and found that 27 per cent of the population could theoretically elect a majority of the Council. *Id.* at 943, 258 N.Y.S.2d at 155.
[^128]: *Id.* at 290, 258 N.Y.S.2d at 1010.
[^129]: *Id.* at 292, 258 N.Y.S.2d at 1011.
[^130]: *Id.* at 291, 258 N.Y.S.2d at 1011. Compare the Virginia apportionment case, *Davis v. Mann,* 377 U.S. 678, 691 (1964) in which defendants sought unsuccessfully to exclude military personnel.
[^131]: *Id.* at 292, 258 N.Y.S.2d at 1011.
These attempts in the trial court to assuage the rigor of Reynolds were, therefore, unsuccessful.

The appellate division and the Court of Appeals affirmed the trial court decision in Seaman. The Court of Appeals deemed the constitutional issue settled and addressed itself to the collateral point of population data. It agreed with the trial court that a local representation plan must achieve substantial district equality based on the latest official census figures. The significance of the opinion, however, lies in the Court's criticism of the mathematical performance of the redistricting proposal whether measured on the basis of 1960 census figures or on the basis of defendants' adjusted figures.

Using the 1960 figures, the Court of Appeals found a population variance ratio of 2:1, and, with specific reference to this ratio, unanimously declared the proposed reapportionment unconstitutional. Calculations based on the data available in the opinion yield a minimum percentage capable of electing a majority of 49 per cent, and a range of deviation of 73 per cent to 145 per cent. The 49 per cent result for the second test looks quite favorable; but it may not be a reliable indicium in this case because the small number of districts (seven) might tend to magnify the significance of the middle district. On the basis of the population variance and deviation tests, however, the reapportionment clearly fails to come within the limits established by federal court decisions.

In its dictum, the Court of Appeals expressed disapproval of the Binghamton redistricting even when tested on the basis of the controverted population data put forward by the defendants. These adjusted figures show smaller inter-district discrepancies than the federal census revealed. The population variance test results in a 1.4:1 ratio; deviations from the norm are 83 per cent to 115 per cent. If the dictum may be interpreted as a disapproval of these results, the Court is applying criteria more severe than those in Lucas and subsequent cases. Is the Court maintaining that in a relatively small, compact area (such as the city of Binghamton) there is no justification for relatively minimal deviations and that the equal population standard will be more strictly enforced for municipalities than it is for state or county units?

One additional development in the New York application of the Reynolds standard must be noted; it reaches beyond legislative apportionment and districting. The federal district court in McMillan v. Wagner has held that administrative bodies created by the state must comply with the one-man, one-vote requirement. The Board of Estimates of the City of New York as constituted permitted equal votes by borough presidents irrespective of the populations they represented. Respondents sought immunity from the standard on

133. 16 N.Y.2d at 103, 209 N.E.2d at 783, 262 N.Y.S.2d at 450.
134. Ibid.
135. Calculations are based on the figures given in the opinion; 16 N.Y.2d at 100, 209 N.E.2d at 781, 262 N.Y.S.2d at 448.
136. 64 Civ. 2160 (S.D.N.Y. Mar. 22, 1965) (Mimeo.)
the ground that the City Charter vests legislative power in the City Council and that the Board of Estimates is primarily concerned with aiding the Mayor in directing the business affairs of the City. Since there was no delegation of legislative power to the Board, so the argument ran, its apportionment need not comply with the fourteenth amendment.

The district court noted the powers vested in the Board (appropriations, budget, zoning, etc.) and observed that even if these were not legislative powers they were governmental powers and were delegated by the state. The legislative versus administrative classification, stated the court, was specious. For in Gray v. Sanders, the Supreme Court had declared that each citizen is entitled to a vote of equal weight for state governor. "No state office could be more clearly executive-administrative, and not legislative, than that of governor." Therefore, the right of a New York City resident to equal representation on a quasi-legislative or administrative body is no less than the right to equal representation in the state legislature.

The New York decisions reviewed above are of one voice in proclaiming that the equal protection clause reaches at least the county and city levels of government, and quite possibly beyond. The constitutional analysis in Brouwer lays the foundations for further extension. The question raised in Bianchi—does the fourteenth amendment penetrate to every hamlet and fire district—is not academic. If the state empowers any elective (or partially elective) agency to discharge governmental functions, the constitutional right to equal representation becomes, automatically, controlling. Furthermore, in these decisions there was no dilution of the strict population standard in its application to local, governmental bodies.

VI. Conclusions

What principles can be extracted or extrapolated from recent decisions to serve as guides for formulating a permanent reapportionment plan? The old, "common sense" standard that districts be composed of compact, contiguous areas still applies. The "good faith" standard has not been abandoned and has been a basis for invalidating plans designed to protect the seats of incumbents. The courts have also indicated that they will appraise a plan in its totality; this criterion has appeared where a balancing of discrepancies might be justified in a bicameral reapportionment. But the standard which now overrides all other considerations is that the votes throughout an electoral unit must be of equal weight.

It is too early to conclude, on sound legal grounds, that a system based on multi-member districts or elections at-large will be overturned, for both devices are compatible with an equality-of-votes standard. It is not premature, however, to caution that a combined single- and multi-member district scheme may be found to deny the electors in the multi-member districts an equal opportunity

137. Id. at 13.
to achieve representation. Single-member districting still remains the most effective method to reflect community interests and to contribute to the viability of our two-party system.

Fractional and weighted voting, while countenanced by a few courts as a temporary compromise will probably be invalidated as an adulteration of the Reynolds standard. The trinity of one-man, one-vote, one-voice is already discernible in the doctrinal firmament.

How will a proposed reapportionment be evaluated by the courts? Three major tests have been employed: the population variance ratio, the minimum percentage of voters capable of electing a majority of the legislative body and the deviation from the norm tests. No court has ventured to lay down the exact mathematical performance that will be required. In Lucas, a 1.7:1 variance was arguably acceptable; but in one recent New York case, Seaman v. Fedowich, the dictum points to disapproval of a 1.4:1 ratio. For the second test, we can assume that the result should be within a few percentage points of 50 per cent. The deviation from the norm test is formulated to allow a permissible range of 85 per cent to 115 per cent. Most courts do not apply all of the three tests; they also vary in the emphasis placed on the results of any one of the tests. However, the population variance ratio appears to be the measure most frequently used. It would be clearly inadvisable to exceed the Lucas ratio.

What are the prospects for an early judicial retreat from the mathematical battlements erected by Reynolds? None appear in sight. Subsequent decisions have applied and re-applied formulae with little, if any, flexibility. The basic drive—toward equality of voting power—is right and over-due; but its expression in mechanical forms which permit no weighing of competing values discriminates against important, non-numerical elements involved in representative government. Such an approach makes no allowance for the functional interrelationship of different levels of government or for the responsibility, in a democracy, to heed pressing, minority views. It is difficult, or even impossible, to give consideration to these factors and, at the same time, to draw districts of equal population. Where a district plan includes but a few extreme deviations, mathematical comparisons using a weighted system might reveal that the discrepancies, over-all, are unsubstantial.

At the present time, arguments addressed to the preservation of historic political subdivisions have no chance of success where a proposed plan does not meet the tests. It is, therefore, a problem of political ingenuity to draw boundaries which dissect as few counties and towns as possible but which, at the same time, enclose approximately equal segments of population. This must be done if there is merit in salvaging at least some community representation. The expectation that a lesser degree of compliance might be demanded in local districting (as

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opposed to congressional or state districting) has not materialized. In fact, a unicameral county or city legislature may be held to a higher standard; there is no second chamber to compensate for discrepancies in equality of representation. In small, compact units of government, the trend might follow the opinion in Seaman, that even allegedly "minor" deviations will not be tolerated. Since the courts have not mitigated the standard to preserve the county as a unit of representation, it can hardly be expected that city wards will be the object of judicial indulgence.

The long-range prospects for the Supreme Court's return to its traditionally more flexible approach are not so dim. Flawless, mathematical equality of districts does not guarantee meaningful representation. There are some adumbrations in the cases that the equal protection clause may harbor more than a quantitative guarantee. It is not inconceivable that a situation might arise in which a representation plan is computer-perfect, but the district map reveals such blatant gerrymandering that it would be at least improbable that the legislative body could fairly reflect the electorate. If the issue is sidestepped in such a case (as it has been in past cases involving allegations of gerrymandering) it cannot be indefinitely ignored. For while the Court's concern with the right of the electorate to choose a genuinely representative government is now confined primarily to numbers, it has by no means emerged from the political thicket.

APPENDIX

PRESENT AND PROPOSED APPORTIONMENT OF ERIE COUNTY

An analysis of the population represented by each of the 54 members of the Erie County board of supervisors reveals an advanced stage of malapportionment. Approximately one-half of the total population of 1,063,000 resides in the city of Buffalo, the other half in outlying towns and two cities. The voting figures show that Buffalo is two-thirds Democratic and that the towns are two-thirds Republican. Therefore, an equipoise of both population distribution and political affiliation characterizes Erie County.

The first of the tables that follow summarizes the application of the three mathematical tests to present county apportionment. In each case, the results far exceed the permissible range of inter-district disparity.

Proposed Plans I and II suggest possible schemes of districting for the towns and cities outside Buffalo. No plan is advanced for district boundaries within Buffalo since the author has not studied the characteristics of the wards and since, generally, ward lines have been less inflexible and resistant to change than town lines.

Plan I is predicated on a ten-member board of supervisors, Plan II on a twenty-six member board. A different theory of legislative function inheres in each plan. The first accords with the preference for a small, deliberative body whose members are in close communication on all problems of administration and policy. The second Plan relies on the operation of a committee system for effective deliberation by smaller groups.

Neither the present nor the future administration of Erie County would seem to demand a legislative body larger than a twenty-six member board. A body of such size can reflect present communities of interest and operate efficiently.
**TABLE I**

**APPLICATION OF TESTS TO PRESENT APPORTIONMENT OF ERIE COUNTY**

<table>
<thead>
<tr>
<th>54 Member Board of Supervisors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Population:</td>
</tr>
<tr>
<td>Population of Buffalo:</td>
</tr>
<tr>
<td>Population outside of Buffalo:</td>
</tr>
<tr>
<td>Population Variance Ratio:</td>
</tr>
<tr>
<td>(Most populous district, Town of Tonawanda, 105,032; Least populous district, Town of Wales, 1,910)</td>
</tr>
<tr>
<td>Least Percentage Electing a Majority:</td>
</tr>
<tr>
<td>(Proportion of 28 least populous wards and towns to total county population)</td>
</tr>
<tr>
<td>Range of Deviations from the Norm:</td>
</tr>
<tr>
<td>(Norm = 19,685. Extreme deviations, Town of Wales, 1,910 and Town of Tonawanda, 105,032)</td>
</tr>
</tbody>
</table>

* Population figures for all Tables are based on the federal census of 1960.

**TABLE II**

**PROPOSED PLAN I**

<table>
<thead>
<tr>
<th>10 Member Board of Supervisors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Supervisors per District</td>
</tr>
<tr>
<td>Vote per Supervisor</td>
</tr>
<tr>
<td>Districts within Buffalo</td>
</tr>
<tr>
<td>Districts outside of Buffalo</td>
</tr>
<tr>
<td>District Norm</td>
</tr>
</tbody>
</table>

*Composition of Five Districts Outside of Buffalo*

<table>
<thead>
<tr>
<th>One</th>
<th>Tonawanda</th>
<th>105,032</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two</td>
<td>Grand Island, City of Tonawanda, Amherst, Clarence</td>
<td>107,272</td>
</tr>
<tr>
<td>Three</td>
<td>Cheektowaga, Lancaster</td>
<td>109,661</td>
</tr>
<tr>
<td>Four</td>
<td>Lackawanna, West Seneca, Hamburg</td>
<td>104,496</td>
</tr>
<tr>
<td>Five</td>
<td>Orchard Park, Evans, Brant, Eden, North Collins, Collins, Concord, Sardinia, Boston, Colden, Holland, Wales, Aurora, Elma, Marilla, Alden, Newstead</td>
<td>104,012</td>
</tr>
<tr>
<td>Six to Ten</td>
<td>Buffalo</td>
<td>530,473</td>
</tr>
</tbody>
</table>

Population Variance Ratio (for five districts outside Buffalo) = 1.05:1
Range of Deviations from the Norm (for five districts outside Buffalo) = 98% to 103%
### LOCAL APPORTIONMENT

#### TABLE III
**PROPOSED PLAN II**

<table>
<thead>
<tr>
<th>26 Member Board of Supervisors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Supervisors per District</td>
</tr>
<tr>
<td>Vote per Supervisor</td>
</tr>
<tr>
<td>Districts within Buffalo</td>
</tr>
<tr>
<td>Districts Outside of Buffalo</td>
</tr>
<tr>
<td>District Norm</td>
</tr>
</tbody>
</table>

**Composition of Thirteen Districts Outside of Buffalo**

<table>
<thead>
<tr>
<th>District</th>
<th>Description</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>Tonawanda (part)</td>
<td>38,000</td>
</tr>
<tr>
<td>Two</td>
<td>Tonawanda (part)</td>
<td>38,000</td>
</tr>
<tr>
<td>Three</td>
<td>Tonawanda (remainder)</td>
<td>29,032</td>
</tr>
<tr>
<td></td>
<td>Grand Island</td>
<td>9,607</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>38,639</td>
</tr>
<tr>
<td>Four</td>
<td>City of Tonawanda</td>
<td>21,561</td>
</tr>
<tr>
<td></td>
<td>Amherst (part)</td>
<td>20,800</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>42,361</td>
</tr>
<tr>
<td>Five</td>
<td>Amherst (remainder)</td>
<td>42,037</td>
</tr>
<tr>
<td>Six</td>
<td>Cheektowaga (½)</td>
<td>42,028</td>
</tr>
<tr>
<td>Seven</td>
<td>Cheektowaga (½)</td>
<td>42,028</td>
</tr>
<tr>
<td>Eight</td>
<td>Lackawanna</td>
<td>29,564</td>
</tr>
<tr>
<td></td>
<td>West Seneca (part)</td>
<td>10,000</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>39,564</td>
</tr>
<tr>
<td>Nine</td>
<td>West Seneca (remainder)</td>
<td>23,644</td>
</tr>
<tr>
<td></td>
<td>Orchard Park</td>
<td>15,876</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>39,520</td>
</tr>
<tr>
<td>Ten</td>
<td>Clarence, Newstead, Lancaster</td>
<td>44,697</td>
</tr>
<tr>
<td>Eleven</td>
<td>Hamburg</td>
<td>41,288</td>
</tr>
<tr>
<td>Twelve</td>
<td>Alden, Elma, Marilla, Aurora, Wales, Colden, Holland, Boston</td>
<td>41,927</td>
</tr>
<tr>
<td>Thirteen</td>
<td>Evans, Brant, Eden, North Collins, Collins, Concord, Sardinia</td>
<td>40,384</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>530,473</td>
</tr>
</tbody>
</table>

Fourteen to Twenty-Six — Buffalo

Population Variance Ratio (for thirteen districts outside Buffalo) | 1.18:1

Range of Deviations from the Norm (for thirteen districts outside Buffalo) | 93% to 109%