

Michigan Law Review

Volume 63 | Issue 2

1964

Congressional Apportionment: The Unproductive Search for Standards and Remedies

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Election Law Commons](#), [Fourteenth Amendment Commons](#), [Jurisdiction Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Michigan Law Review, *Congressional Apportionment: The Unproductive Search for Standards and Remedies*, 63 MICH. L. REV. 374 (1964).

Available at: <https://repository.law.umich.edu/mlr/vol63/iss2/7>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTES

Congressional Apportionment: The Unproductive Search for Standards and Remedies

The increasingly complex problems of elucidating congressional apportionment standards and granting appropriate relief when voting rights have been materially diluted were again brought to the fore in the recent districting decision of *Calkins v. Hare*.¹ This federal district court decision is illustrative of the uncertainty caused by the Supreme Court's opinion in the landmark case of *Wesberry v. Sanders*.² Although *Wesberry* resolved two previously contested issues by ruling that congressional apportionment disputes are susceptible of judicial determination³ and by setting a standard of population equality in delimiting districts,⁴ two associated questions were left unanswered. First, even though *Wesberry* established that districts are to be defined in terms of practicable equality, the Court did not indicate what latitude, if any, would be acceptable.⁵ Second, the opinion is void of any suggestions for remedial action to be applied in those cases where a state's districting scheme is found to be outside the bounds of practicable equality.

In *Calkins*, plaintiffs brought an action in a three-judge federal district court contesting the constitutionality of the 1963 Michigan congressional apportionment act⁶ and seeking an injunction restraining state officials from conducting elections pursuant to the challenged statute. In light of *Wesberry*, plaintiffs urged that the disparity in population among the districts was contrary to article I, section 2 of the Constitution, which provides that members of the House of Representatives shall be chosen "by the People of the several States." Data from the 1960 census⁷ disclosed a ratio of 1.6 to 1 between the most populous district with 494,068 persons and the least populous

1. 228 F. Supp. 824 (E.D. Mich. 1964).

2. 376 U.S. 1 (1964). For a comprehensive discussion of the history of congressional districting cases, see Carpenter, *Wesberry v. Sanders: A Case of Oversimplification*, 9 VILL. L. REV. 415 (1964); Comment, 63 COLUM. L. REV. 98 (1963); Note, 13 AM. U.L. REV. 200 (1964); Note, 15 MERCER L. REV. 504 (1964).

3. *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). The suit had been dismissed in the court below, *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), on the ground that *Colegrove v. Green*, 328 U.S. 549 (1946), precluded judicial review of assaults on congressional districting as involving "political questions." Prior to *Wesberry v. Sanders*, considerable doubt existed as to whether *Baker v. Carr*, 369 U.S. 186 (1962), the landmark case involving apportionment of state legislatures, was decisive on the justiciability of questions regarding inequality in congressional districts. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 69 (1962).

4. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

5. "The Court's 'as nearly as is practicable' formula sweeps a host of questions under the rug. How great a difference between the population of various districts within a state is tolerable?" *Id.* at 21 n.4 (Harlan, J., dissenting).

6. Mich. Pub. Act No. 249 (June 13, 1963).

7. All ratios presented herein are based on 1960 census figures.

with 305,984. Although the defendant contended that the voting population, rather than the total population, of each district was the relevant comparative statistic, the court considered it clear that *Wesberry* contemplated use of the total population of each district.⁸ On final hearing, the court unanimously found that the debasement of voting power in some districts and its enhancement in others was unconstitutional and, over the dissent of one judge, granted plaintiff's motion for an injunction.⁹ The decree provided that, pending enactment of substitute legislation, congressmen from Michigan shall be nominated and elected from the state at large.¹⁰

It would appear that precise equality in population among congressional districts is not mandatory.¹¹ However, *Calkins* reflects the considerable amount of frustration in the lower courts as they attempt to define permissible inequality.¹² The difficulty arises from the fact that these tribunals have been left, unassisted by the Supreme Court, to fabricate a mathematical formula from the meager material of an interdict on "invidious discrimination"¹³ and a mandate that districts must be practicably equal in population. To accomplish this task, the judiciary has utilized a myriad of comparisons to delineate the amount of disproportion among districts in question. Although the court in *Calkins* discussed the average divergence from uniformity and the absolute difference in population between adjoining districts, it was largely impressed by the magnitude of the ratio showing the dissimilarity between the most and least inhabited districts. This latter technique has been utilized in numerous recent decisions, and it provides a convenient and consistent statistic to show, by way of empirical analysis, how inconclusive has been the pattern of the post-*Wesberry* cases.

8. *But see* Mr. Justice Harlan's dissent, *Wesberry v. Sanders*, 376 U.S. 1, 21 n.4 (1964). Pending before the House Committee on the Judiciary is a proposed constitutional amendment providing that Representatives in Congress shall be apportioned among the states on the basis of registered voters. H.J. Res. 1053, 88th Cong., 2d Sess. (1964).

9. Complete equity in apportionment is obtainable only by some system of proportional representations. See Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 114 n.35 (1962); Laughlin, *Proportional Representation: It Can Cure Our Apportionment Ills*, 49 A.B.A.J. 1065 (1963).

10. *Calkins v. Hare*, 228 F. Supp. 824, 830 (E.D. Mich. 1964). The success of this decree is evidenced by the fact that the Michigan legislature repealed the invalid provision, Mich. Pub. Act No. 249 (June 13, 1963), and replaced it with MICH. STAT. ANN. § 4.22 (1964), effective Aug. 28, 1964.

11. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Calkins v. Hare*, *supra* note 10, at 829. Relocation and growth of the population also preclude exact equality of districts. See Schattschneider, *Urbanization and Reapportionment*, 72 YALE L.J. 7 (1962).

12. "It may be argued that now there is a clear standard, but the debate as to what is 'as near as practicable' continues." *Calkins v. Hare*, *supra* note 10, at 833 (O'Sullivan, J., dissenting).

13. Invidious discrimination is that which is arbitrary and not reasonably justifiable. Israel, *supra* note 9, at 109.

Wesberry was brought before the Supreme Court on facts showing that the ratio between the largest and smallest districts in Georgia was 3.03 to 1.¹⁴ The Court held that this discrepancy represented an unconstitutional dilution of voting power in the smaller district.¹⁵ The only additional "guideline" offered by the Supreme Court to date is a per curiam affirmation approving a district court decision in Texas which held that a disparity of 4.4 to 1 is invidiously discriminatory and unconstitutional.¹⁶ It is manifest that this incongruous differential offered no clue as to how nearly equal districts must be to comport with the Court's general requirements in *Wesberry*.

Thus, the principal case, which found a population dissimilarity of 1.6 to 1 to be invalid, and a district court decision in *Meeks v. Anderson*,¹⁷ following less than a month later, represent the first significant refinements of the unconstitutional variance found in *Wesberry*. In *Meeks*, it was held that a ratio of 1.44 to 1 between the most and least populous districts in Kansas was too large.¹⁸ In emphasizing that only one factor, population, may be taken into account in apportioning, the language of the court was so strong that it cast some doubt on the accuracy of previous generalities that districts do not have to be precisely equal in population.¹⁹ The Supreme Court, however, indicated soon thereafter that, at least as regards state legislative apportionment, it is a practical impossibility to arrange districts so that each one has an identical number of residents and that mathematical precision is hardly a workable constitutional requirement.²⁰ On the strength of this precedent, the New Hampshire Supreme Court was of the opinion that a discrepancy of 1.2 to 1 was not so great as to require a finding of gross disproportion in representation or invidious discrimination between the respective voters in the state's two districts.²¹ The force of this statement is impaired, however, by the alternative ground offered as dispositive

14. Georgia's fifth congressional district included 823,680 persons compared with only 272,154 in the ninth district. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

15. *Id.* at 4. Four days after the decision was rendered, the Georgia General Assembly reapportioned the state's districts which now range in population from 329,738 to 455,575 persons, a ratio of 1.38 to 1. Comment, 35 Miss. L.J. 402, 416 (1964).

16. *Bush v. Martin*, 224 F. Supp. 499 (S.D. Tex. 1963), *aff'd per curiam*, 376 U.S. 222 (1964). The largest district included 951,527 persons compared with only 216,371 in the smallest.

17. 229 F. Supp. 271 (D. Kan. 1964) (decided April 24).

18. The disparity ran from a low of 373,583 persons in the fifth district to a high of 539,592 in the first. *Id.* at 272.

19. *E.g.*, *Clark v. Carter*, 218 F. Supp. 448, 451 (E.D. Ky. 1963); *Thigpen v. Meyers*, 211 F. Supp. 826, 831 (W.D. Wash. 1962), *appeal pending*, 376 U.S. 902 (1964); *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 187 (W.D. Wis. 1962); *Lisco v. McNichols*, 208 F. Supp. 471, 476 (D. Colo. 1962). See note 11 *supra*.

20. *Roman v. Sincock*, 377 U.S. 695 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

21. *Levitt v. Maynard*, 202 A.2d 478 (N.H. 1964). The first district included 331,818 persons compared with 275,103 in the second district.

of the case; the court asserted that even if the apportionment were thought to be constitutionally defective, it was too near elections to grant injunctive relief.²² The petition for declaratory judgment was continued pending legislative action. Thus, it is uncertain how much weight can be attributed to the court's initial opinion that a discrepancy of the magnitude of 1.2 to 1 is not discriminatory. In addition to the fact that the above results do not represent binding law outside the respective jurisdictions that produced them, it is manifest that they have only limited value as precedent enunciating definite and refined standards for resolving future districting contests.²³

No less important than the establishment of tolerance standards is the quest for an appropriate solution when an apportionment scheme is found invalid. From a practical viewpoint, it appears that positive relief should come from the judiciary. Congressional action has been ineffective in producing even approximate equality among districts. In addition, the prospect of affirmative action by the state legislatures, at least until recently, has been remote.

Congressional abdication in this area is clearly demonstrated by history. From 1789 to 1842, a number of states regularly elected their congressmen at large.²⁴ Thereafter, Congress promulgated certain guidelines, the general import of which was to promote the district system, eliminate multiple-member constituencies, and require, at least *pro forma*, that the districts not only be reasonably equal in population but also that they be composed of "contiguous and compact territory."²⁵ With minor variations, these basic requirements were re-enacted by Congress every ten years through 1911.²⁶ However, in 1920, Congress declined to reapportion after the census,²⁷ and finally, in 1929, the requirements of equality, contiguity, and compactness were intentionally omitted.²⁸ Evolving from this 1929 legis-

22. New Hampshire primaries are held on the second Tuesday in September. N.H. REV. STAT. ANN. § 56:4. The case was decided July 16, 1964.

23. It is interesting to note that in construing the equal protection clause prior to *Wesberry*, the Missouri Supreme Court held that there was no constitutional violation where districts varied from 378,499 to 506,854 persons. This gives a ratio of 1.34 to 1, which is approximately in the middle of the gap between the *Meeks* and New Hampshire cases. *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. 1962).

24. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 550 (1954).

25. In the election of 1842, Georgia, Mississippi, Missouri, and New Hampshire ignored the newly enacted statute, 5 Stat. 491 (1842), which required election of representatives by districts. Although objection was made as to this impropriety, the Representatives were seated. 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 309-10 (1907).

26. For a comprehensive discussion of early districting legislation, see Wechsler, *supra* note 24, at 550.

27. *Ibid.*

28. *Wood v. Broom*, 287 U.S. 1, 7 (1932). *But see Black, Inequities in Districting*

lation as amended, the present system provides for automatic redistribution of representation among the states after each census in addition to a procedure for electing Representatives when a state fails to prescribe new districts following a change in its allotted delegation.²⁹ With this minor exception, Congress has left the actual mechanics of the districting system entirely within the states' discretion.

Only twice has the seating of a member been challenged on grounds that his district did not reflect the required standard of equality.³⁰ No action was taken in either instance, however, because the matter was considered too delicate.³¹ There was a similarly uneventful occurrence in 1951 when President Truman, in his message to Congress, outlined certain criteria for apportioning districts.³² Basically his proposal was to restore the requirement of practicable population equality among districts, which he defined to preclude deviations in excess of fifty thousand above or below a norm of 350 thousand persons per district.

The inability of state legislatures to correct abuses found in congressional apportionment is apparent from the fact that inequality of representation in those bodies exceeds that found among congressional districts.³³ Thus, the rural interests, which are frequently overrepresented in Congress, enjoy an even larger margin of voting power in the state legislatures and thereby dominate the very political machinery by which congressional malapportionment could be cured.³⁴

The judiciary could, of course, perpetuate this dilemma by declining to act.³⁵ The majority in *Calkins*, however, was impressed by the perplexity confronting the complaining voters and viewed its responsibility as extending beyond affording declaratory judgment; consequently, a decree was issued enjoining election officials from enforcing the invalid districting statute and calling for elections at large, pending enactment of substitute legislation.³⁶ This

for Congress, 72 YALE L.J. 13, 18-21 (1962), where the author contends that the Court misconstrued congressional intent.

29. 46 Stat. 26 (1929), as amended, 55 Stat. 761 (1941), 2 U.S.C. § 2a (1958).

30. Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1093-94 (1958).

31. *Id.* at 1094.

32. 97 CONG. REC. 114 (1951).

33. See Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90 (1962).

34. Traditional recognition given to area and other nonpopulation factors has greatly inflated the relative influence of rural voters as compared to urbanites and more recently to suburbanites. See Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 YALE L.J. 23 (1962). Potential relief from the rural imbalance now exists as a result of Supreme Court rulings that both houses of state legislatures must be apportioned on a population basis. See WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).

35. See *Calkins v. Hare*, 228 F. Supp. 824, 829 (E.D. Mich. 1964).

36. *Id.* at 830.

disposition, although severely censured in some quarters,³⁷ offers much to recommend it. Concededly, the ordering of an election at large of a state legislature would violate those state constitutions which provide that state legislators must be elected by substate units,³⁸ in which event either there would be no *de jure* legislature or the legitimacy of the legislature would rest solely on a court decree.³⁹ However, this same reasoning does not apply to the United States House of Representatives. Congress would continue to conform to the United States Constitution even though its members were elected at large from the respective states.⁴⁰ In addition, the command to conduct at-large elections may be phrased in simple terms, and all the inescapable political decisions are confined to the legislature, which is the traditional forum for such matters. Furthermore, the probability of redistricting is high since the recalcitrants, presumably a minority interest,⁴¹ would incur the greatest proportionate loss in an election at large. Finally, recourse to ordering a state to elect its entire congressional delegation at large does not rest on untried ground, having been adopted twice by the United States Supreme Court⁴² and once by the Virginia court.⁴³ In all three instances, the legislatures responded by reapportioning before the next election.⁴⁴

At-large elections appear particularly attractive when compared to the principal alternatives of inaction or permitting the courts themselves to frame all the changes necessary in the apportionment system.⁴⁵ Most courts have refused to undertake directly the task of redrawing a state's districts,⁴⁶ although this view has not been adopted with unanimity.⁴⁷ Notwithstanding the general merits of ordering elections at large, however, additional expense and inconvenience to both candidates and voters makes this solution increas-

37. *E.g.*, *Gong v. Bryant*, 230 F. Supp. 917 (S.D. Fla. 1964). See Comment, 39 N.Y.U.L. Rev. 264, 266 n.14 (1964).

38. Black, *supra* note 28, at 15.

39. *Ibid.*

40. See *Alsup v. Mayhall*, 208 F. Supp. 713 (S.D. Ala. 1962); *White v. Frink*, 274 Ala. 49, 145 So. 2d 435 (1962).

41. See text accompanying note 34 *supra*.

42. *Carroll v. Becker*, 285 U.S. 380 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932).

43. *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932).

44. Lewis, *supra* note 30, at 1088. Affirmative action was also achieved by the decree in *Calkins*. See note 10 *supra*.

45. Such an assertion of power by a court would be met with a negative reaction. Mr. Justice Frankfurter observed, "Surely a Federal District Court could not itself re-map the State. . . ." *Baker v. Carr*, 369 U.S. 186, 328 (1962) (dissenting opinion). *But see* Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 228-30 (1964).

46. *E.g.*, *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 228 F. Supp. 956 (D. Md. 1964); *Bush v. Martin*, 224 F. Supp. 499 (S.D. Tex. 1963), *aff'd per curiam*, 376 U.S. 222 (1964).

47. *E.g.*, *Moss v. Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd sub nom.*, *Williams v. Moss*, 378 U.S. 558 (1964); *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *aff'd sub nom.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

ingly less desirable as the election date approaches.⁴⁸ In a recent Supreme Court decision,⁴⁹ it was suggested that a court should at least consider the proximity of an approaching election and the mechanics of state election laws before awarding immediate relief. Another cause of dilatory judicial response is the belief that the legislature will eradicate the problem after it is informed of the inequity.⁵⁰ Unfortunately, this deference has often proved too optimistic, as some states have failed to respond even after repeated admonitions from the courts.⁵¹

The enormity of the existing problem is apparent from the observation of Mr. Justice Harlan that, under one potentially acceptable formulation, all but thirty-seven congressional districts are outside the requirement of practicable equality.⁵² In addition, population projections indicate that the current disproportion will increase as people continue to concentrate in urban and suburban complexes.⁵³ Therefore, it can be seen from both major remaining deficiencies in the judicial attempt to promote reapportionment—uncertain standards and inadequate remedies—that there is an urgent need for Congress to exercise its general supervisory power over the elections of its members. Failure to act cannot be justified on grounds of absence of authority. The drafters of the Constitution anticipated the possibility of malapportionment⁵⁴ and provided federal power to overcome it.⁵⁵ Recent pragmatic experience with the application of this doctrine clearly demonstrates that effective implementation depends upon Congress providing a legislative vehicle by which transgressions may be uniformly detected and alleviated.⁵⁶

48. See, e.g., *Gong v. Bryant*, 230 F. Supp. 917 (S.D. Fla. 1964); *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962); *White v. Anderson*, 394 P.2d 333 (Colo. 1964); *Guntert v. Richardson*, 394 P.2d 444 (Hawaii 1964).

49. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

50. E.g., *Meeks v. Anderson*, 229 F. Supp. 271 (D. Kan. 1964); *Levitt v. Maynard*, 202 A.2d 478 (N.H. 1964).

51. See *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964); *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 228 F. Supp. 956 (D. Md. 1964).

52. *Wesberry v. Sanders*, 376 U.S. 1, 21 (1964) (Harlan, J., dissenting).

53. See *Schattschneider*, *supra* note 11.

54. *Lewis*, *supra* note 30, at 1072.

55. U.S. CONST. art. I, § 4, "The Times, 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. . . ."

56. Subsequent to the *Wesberry* decision, on February 17, 1964, several measures were brought before the House of Representatives: H.R. 11650, 88th Cong., 2d Sess. (1964), providing that districts shall not vary more than 20% from the average of all the districts in the state; H.R. 11844, 88th Cong., 2d Sess. (1964), providing that no district shall vary more than 15% from the average of all the districts in the state; H.R. 12309, 88th Cong., 2d Sess. (1964), providing for a mid-decade census in 1965 to reapportion the House.