

REFERENCE MANUAL NO. 6



Legislative Apportionment



THE PENNSYLVANIA

CONSTITUTIONAL CONVENTION — 1967-1968

The Preparatory Committee for the Constitutional Convention has prepared a series of nine Reference Manuals for the information of the delegates to the Convention. They are intended to give delegates general information on the Convention, to present a brief history of the several constitutions of Pennsylvania, and to provide pertinent information concerning each of the subject areas that the Convention is authorized to consider. The nine Manuals are—

- No. 1 The Convention
- No. 2 Constitutions of Pennsylvania -
Constitution of the United States
- No. 3 A History of Pennsylvania Constitutions
- No. 4 Local Government
- No. 5 The Judiciary
- No. 6 Legislative Apportionment
- No. 7 Taxation and State Finance
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LEGISLATIVE APPORTIONMENT

The Pennsylvania Constitutional Convention
1967-1968

Legislative Apportionment

REFERENCE MANUAL NO. 6



Prepared for the Delegates by
THE PREPARATORY COMMITTEE
Raymond J. Broderick, Lieutenant Governor, *Chairman*

Commonwealth of Pennsylvania
CONSTITUTIONAL CONVENTION

1967-1968

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Foreword

Act Number 2, adopted in March, 1967 and ratified by Pennsylvania's voters the following May, authorizes the convening of a Constitutional Convention on December 1, 1967, for a period of three months.

The Act also provides for a Preparatory Committee, to be composed of the Lieutenant Governor and twelve officers of the General Assembly, listed opposite. The Act further stipulates that: "The Committee shall initiate any studies, inquiries, surveys or analyses it may deem relevant through its own personnel or in cooperation with any public or private agencies, including institutes, universities, foundations or research organizations."

Responding to this assignment, the Preparatory Committee appointed a staff under the direction of John W. Ingram, to plan and coordinate its studies. It also appointed four Directors, each commissioned to direct studies in one of the four subject areas within the jurisdiction of the Convention.

In commissioning the studies, the Preparatory Committee directed the staff to trace the historical development of each subject; to analyze judicial interpretations, experience in other states, and national trends; to identify the issues and to compile alternative proposals for constitutional changes to be considered by the Convention. Specific instructions were given the directors to refrain from making any evaluation of alternative proposals cited in the studies, it being the intent of the Preparatory Committee that such evaluations are the proper function of the Convention.

Results of the studies in each area are presented in a series of Reference Manuals, specifically intended to serve as reference sources to which the delegates might turn during their deliberations for information on the many and complex questions which may come before the Convention.

One of the eminent authorities whom the Preparatory Committee was privileged to have serve as Director was David Stahl, Solicitor of the City of Pittsburgh. Mr. Stahl directed the studies and preparation of this Manual on Legislative Apportionment.

The Preparatory Committee owes a debt of gratitude to Mr. Stahl for

contributing his time and skill to this assignment. Except for his extraordinary personal sacrifice, this Manual could not have been completed within the very limited allotment of time. The Committee also acknowledges the cooperation of the City of Pittsburgh for making Mr. Stahl available for this project.

The Committee is pleased to submit this Reference Manual to the Convention delegates, for whose assistance it is intended.

Raymond J. Broderick

Chairman

Preface

Following the organization of the Preparatory Committee for the Pennsylvania Constitutional Convention of 1967-68, the Committee established four task forces to prepare background materials for each of the four subjects within the jurisdiction of the Convention. One of these subjects was legislative apportionment covered by Sections 16, 17 and 18 of Article II of the Constitution.

The mandate of the Preparatory Committee to the Directors for each of the task forces was two-fold: (1) to develop a simple, readable manual on each topic for use by the Convention delegates as a source of issues, ideas and information; and (2) to refrain from any express or implied recommendations to the Convention on specific proposals for constitutional revision.

A third restriction implicit in the assignment of the task forces was the element of time. Summer schedules, printing deadlines, the relatively short span between the organization of the Preparatory Committee and the start of the Convention, and the breadth of the subject matter involved, all combined to limit the scope of the product of the task forces, or at least of this one.

Perhaps this was all for the best. It forced those working on the apportionment manual to compress their materials into a direct and succinct exposition of the subject. In fact, the three-month limitation on the Convention itself would appear to call for a background manual that provides a quick and ready reference to the issues confronting the delegates.

Those of us who worked on the preparation of this manual hope that it will prove to be useful to the Convention delegates in accomplishing their work. At the same time we want to encourage the delegates to examine the vast amount of literature on legislative apportionment, much of which will be available in the convention library.

I want to express my personal gratitude to the staff and research assistants listed below, and to the many secretarial assistants, all of whom shared the trials and tribulations of producing this manual. For all of them, as for

myself, it will have been worth the effort if the result in 1968 is a modernized constitution for Pennsylvania in the four areas which the Convention is authorized to cover.

David Stahl,

Director, Legislative Apportionment

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Introduction

In early America, the population was largely agrarian and was rather evenly distributed across the countryside. Legislative representation in the first states, while not mathematically precise, was deemed fair and equitable in that agrarian society. "Between 1790 . . . and 1889 . . . every state admitted to the Union entered with a constitution providing for representation based principally on population in both houses of the legislature."^{1*}

As the country became industrialized, changing residence patterns produced serious apportionment and districting problems. From 1860 to 1960, the population of the United States increased from 31.4 million to 179.3 million.² During this same 100-year period, the percentage of people classified as "urban" increased from 19.8% to 69.9%.³ The population changes, however, were not reflected in legislative representation:

"In many states, including . . . Pennsylvania, the constitutional formula was adjusted to preserve legislative control in the areas of declining population. . . . The device was, of course, to make population of slight or at least diminished importance in one or both houses. . . . Where amendment of the state constitutional formula was not practicable . . . a number of state legislatures simply ignored the state constitutional provisions for periodic . . . reapportionment to take into account population changes."⁴

The overwhelming majority of the state legislatures simply refused to reapportion or redistrict from 1901 to 1962. "It is virtually impossible to find an example from 1901 to 1962, of an apportionment fairly and equitably performed which was voluntarily initiated by a state legislature. . . ."⁵ The result, by any standard, was malapportionment. The most populous district in the Vermont House of Representatives, for example, contained 987 times more people than did the least populous district. In the California Senate, this ratio was 422 to 1.⁶

The unrepresentative character of state legislatures was considered to have had an effect upon many vital governmental operations. Large cities and

*Footnotes will be found at the end of each part.

suburban communities complained of discriminatory practices in the division of state revenues, the sharing of tax burdens, the allocation of grants-in-aid, the provision of state services, and the degree of home rule. Because needed funds and services were not supplied by state governments, metropolitan areas turned to the Federal Government where they had greater influence. The consequence of the Federal Government's response to these needs was increasing federal involvement in state affairs.

Following the United States Supreme Court's landmark decision in *Baker v. Carr* in 1962,⁷ "the lower federal courts, the state courts and even the state legislatures moved with almost surprising alacrity toward good faith compliance. . . . By the end of 1964, reapportionment had either been completed, or substantial steps had been taken toward apparently satisfactory compliance, in most of the states."⁸

In Pennsylvania, the 1874 Constitution contained a number of restrictive provisions that made it virtually impossible to reflect population changes in a completely fair system of representation. In addition, the Legislature did not always attempt to redraw legislative districts after each federal census. Although there were some calls for constitutional and legislative reforms, no action was taken until after *Baker v. Carr*.

The General Assembly enacted new apportionment and districting laws early in 1964; the Pennsylvania Supreme Court struck them down the same year as violating federal constitutional standards.⁹ When the Legislature subsequently failed to adopt a new reapportionment and districting formula, the Court itself reapportioned and redistricted both houses in 1966.¹⁰

In March 1967, the General Assembly enacted the limited constitutional convention enabling act¹¹ (later ratified by the electorate at the primary election in May, 1967) which contemplates revision of the present constitutional provisions on apportionment and districting. The Convention is empowered to review and revise sections 16, 17 and 18 of Article II of the Pennsylvania Constitution. These sections deal with the number of legislators in the General Assembly, the method by which legislative districts are determined, the apportionment of legislators to those districts, and the legislature's mandate to reapportion and redistrict after every federal census.

In order to avoid confusion in discussing legislative representation, a distinction should be made between apportionment and districting. *Apportionment* refers to the distribution of legislative seats among previously-established units entitled to representation. Population equality is the only measure for determining the fairness of an apportionment. An apportionment is said to be satisfactory when the difference in the number of inhabitants per legislator in any two districts cannot be reduced by the transfer of one seat from either district to the other. *Districting* refers to drawing the boundaries of each legislative district. The usual measures for determining the equity of a districting plan are not only population equality but also contiguity and compactness.¹²

In providing for a system of legislative representation, the Constitutional Convention will be concerned primarily with the following questions:

1. How many members should be in each house of the State Legislature?¹³
2. What standards, consistent with the Federal Constitution, should be established for drawing the boundaries of State legislative districts, e.g.,
 - (a) Should multi-member districts be permitted?
 - (b) Should there be adherence to political subdivision boundaries, where possible?
 - (c) What restrictions, if any, may be placed on districting in an effort to limit gerrymandering?
3. What should be the total population base for apportionment and districting—population, citizen population or voting population?¹⁴
4. What agency should perform the apportionment and districting functions—the Legislature or some other agency? What happens if the Legislature or another agency having the initial responsibility fails to act properly?
5. What should be the frequency of reapportionment?

Notes to Part I

1. McKay, *The Reapportionment Decisions: Retrospect and Prospect*, 51 A.B.A.J. 128, 130 (1965). In the majority of these states, however, there were additional requirements, such as adherence to political subdivision lines, resulting in substantial population inequalities, which would not now be deemed constitutional.
2. Hardy, *Metropolitan Reorganization*, Utah L. Rev. (1966) 517
3. *Ibid.*
4. McKay, note 1 *supra*, 130.
5. Boyd, CHANGING PATTERNS OF APPORTIONMENT 25, National Municipal League (Sept. 1965).
6. McKay, note 1 *supra*, 130.
7. *Baker v. Carr*, 369 U.S. 186 (1962). In this case, the United States Supreme Court declared that the Equal Protection Clause of the Fourteenth Amendment gave the federal courts jurisdiction in apportionment cases, see text at note 20, *infra*.
8. McKay, note 1 *supra*, 131.
9. *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).
10. *Butcher v. Bloom*, 420 Pa. 305, 216 A.2d 457 (1966).
11. Act No. 2, approved March 15, 1967.
12. Ruth C. Silva, *Apportionment*, 1 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (New York: Macmillan *et al.*, 1968); Laurence F. Schmeckebier, *Congressional Apportionment* (Washington: Brookings, 1941) 70; Elmer C. Griffiths, *The Rise or Development of the Gerrymander* (Chicago: Scott, Foresman & Co., 1907), 15-22, 26-29, 120. Federal practice makes a sharp distinction between apportionment and districting by vesting the two functions in separate agencies. The Federal Government apportions congressional seats among the states, each of which divides its territory into congressional districts. Some states have used a similar system by apportioning legislative seats to each local unit, which then divides its area into legislative districts. In most states the apportionment and districting functions actually constitute one procedure and are performed by the same agency. The terms "apportionment," "districting," "reapportionment" and "redistricting" are used interchangeably in the text.

13. The Pennsylvania Constitution does not prescribe the size of the Legislature in a separate section. The number of members in each house is tied in to the apportionment scheme established by §§ 16 and 17 of Article II. It appears, therefore, that the Convention may make recommendations concerning the size of each house.

It is questionable, however, whether the Constitutional Convention may consider the *terms* of the members of the General Assembly. The apportionment proposal submitted by the Pennsylvania Bar Association to the Preparatory Committee contains a provision for adjusting the terms of senators and representatives in the elections following reapportionment after each census.

The problem arises because the terms of Senators and Representatives are fixed at four years and two years, respectively, by Article II, Section 3 of the Constitution. This section is *not* among the portions of the Constitution within the purview of the Convention under Act No. 2. Section 7(a) of the Act provides:

"... the constitutional convention shall have the power . . . to make recommendations to the electorate on the following subjects only (1) Legislative Apportionment (now covered by sections 16, 17 and 18 of Article II of the Constitution) . . ." [Then follows a description of the three other topics to be covered by the Convention.]

Section 7 states further:

"(c) In dealing with the subject matter as described by this section, the convention may recommend the transfer to another article of any provision contained in those articles, or it may recommend its modification, deletion, repeal; the substitution of an entirely new provision or its continuation without change.

"(d) The convention shall make its recommendations regarding legislative apportionment as a replacement for the existing sections 16, 17 and 18 of Article II of the Constitution, and shall arrange its recommendations on the other subjects assigned to it in separate articles."

Because the bicameral character of the Legislature is also fixed by a provision of the Constitution (Article II, Section 1) which is not within the scope of Act No. 2 of 1967, it does not appear that the Convention may consider the issue of a unicameral or bicameral legislature.

14. Total population corresponds, of course, to the federal census data. Citizen population excludes aliens. Voter population may refer to registered voters or to eligible voters, whether registered or not, or to actual voters.

The Federal Constitutional Background

Prior to 1962 the federal¹⁵ and Pennsylvania¹⁶ courts held that state legislative malapportionment was not a "judicial question."¹⁷ Apportionment and districting, the courts said, involve the very structure of government itself and should be dealt with by the legislative branch, where various political factors not susceptible to judicial treatment may be considered. During the first half of this century, as population patterns were undergoing rapid changes, inequalities of representation became greater. At the same time, the Equal Protection Clause of the Fourteenth Amendment was receiving increasingly greater attention from the courts in cases involving the rights of individuals.

In 1962, the Supreme Court of the United States considered a Tennessee case that was brought under federal statutes designed to redress alleged deprivation of constitutional rights.¹⁸ The claim was that the plaintiffs were denied equal protection by the alleged debasement of their votes, caused by the state statute apportioning members of the legislature among the counties. They cited one instance where a legislator from Chattanooga had 19 times as many people in his district as a representative from a rural county. Thus, a vote cast for a legislator in the rural county had roughly 19 times the weight of one cast in Chattanooga.¹⁹ The plaintiffs argued that residing in an under-represented district was like having the ballot box stuffed against them or having their ballots torn up or not counted. The lower court dismissed the case without ruling on the substantive constitutional issue, and the plaintiffs appealed to the United States Supreme Court.

In a landmark decision, *Baker vs. Carr*, the Court reversed, saying that the equal protection clause of the Fourteenth Amendment applies to the apportionment and districting of state legislatures and that the judicial standards under the clause were sufficiently developed to deal with these problems.²⁰ The case was remanded to the lower court so that it could be determined

whether the plaintiffs' rights were violated by the existing apportionment and districting statutes. The Supreme Court laid down no specific standards for making this determination.

Baker vs. Carr did not consider what the courts should do to rectify the situation if they found a malapportioned state legislature. The Supreme Court held only that the Fourteenth Amendment required courts to hear such cases and that it was up to the lower courts to "fashion relief" if violations of constitutional rights are found. Because state courts must also enforce the Federal Constitution, they, too, must entertain such suits.

Guidelines for apportionment were first developed by the United States Supreme Court in six state apportionment cases decided in 1964.²¹ In *Reynolds vs. Sims*,²² where the key principles were enunciated, the Court held that (1) both houses of the state legislature must be apportioned and districted substantially on the basis of population,²³ and (2) population equality²⁴ is to be controlling in the establishment of legislative districts.

In *Lucas vs. General Assembly*,²⁵ the Court held invalid a 1962 amendment to the Colorado Constitution providing for apportionment of one house of the legislature partly on the basis of population and partly on the basis of geographic factors. The significance of the *Lucas* decision is that the constitutional amendment had been approved by a majority of the voters in each of Colorado's districts in preference to a proposed amendment for the apportionment of both houses solely on the basis of population. The Court observed that an individual's rights may not be abridged by popular vote.

In discussing the scope of the equal-population principle in *Reynolds*, the Court said:

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."²⁶

The Court then stated that legislative districts may deviate slightly from population equality in two respects. First, representation in one house could be arranged "so as to balance off minor inequities in the representation of certain areas in the other house . . ."²⁷ Secondly, the Court recognized that some weight may be given to political boundaries: "It may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State . . ."²⁸ Such apportionment and districting, however, still must be based substantially on population, and the resulting population disparities between districts cannot deviate from the equal-population principle in any significant way."²⁹

In permitting districts to be drawn with some variation in population in order to take account of political subdivisions, the Court said:

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. . . ."³⁰

The Court proceeded to identify the factors which may not be used to support deviations from the population standard:

" . . . So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing."³¹

In a more recent case, the Supreme Court has said that variations from population equality might also be justified not only to maintain compactness and contiguity in legislative districts but also to give recognition to natural boundary lines.³²

The Court stopped short in *Reynolds* from fixing any permissible limits on variations in population among legislative districts:

" . . . For the present we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. . . ."³³

In the six cases decided by the Court in 1964, the inequalities were so pronounced that there was actually no need to decide how much of a population variance would be permissible under the particular circumstances in each state.³⁴

The United States Supreme Court decided two cases, in 1967, involving lesser variances. In *Swann v. Adams*,³⁵ the Court invalidated the re-districting of both houses of the Florida legislature. The population of

Senate districts ranged from 15.09% below the norm to 10.56% above the norm, constituting a population-variance-ratio of 1.30:1. Of the 48 senatorial districts, one deviated from the norm by more than 15%, another five by more than 14%, and six additional districts by more than 10%. A majority of the Senators represented districts containing 48.38% of the State's total population. In the lower house (with some multi-member districts) the population ranged from 18.28% below the norm to 15.27% above, constituting a population-variance ratio of 1.41:1. Two districts varied from the norm by more than 18% and another by more than 15%. Seven of the total of 117 representatives were elected in these three offending districts. Ten other districts, having 22 representatives, varied by more than 10%.

A few months later, in *Kilgarlin v. Hill*,³⁶ the Court found unconstitutional the redistricting plan for the Texas House of Representatives. The most populous district was 11.6% over the norm and the least populous was 14.8% below; this range of deviation constitutes a population-variance-ratio of 1.31:1. For the 150 representatives, the deviation was greater than 10% in twelve single-member districts, and 55 representatives would have been elected from eight multi-member districts, each of which varied from the norm by more than 6%. Population variations in multi-member districts have been said to be more serious than in single-member districts because they allegedly magnify the disparities in individual voter strength.³⁷

Generalizations about these two cases are difficult to make. The Court cautioned that the fact that a population deviation of 10% to 15% approved in one state has little bearing on whether a similar variance in another state will be upheld.³⁸ *Swann* and *Kilgarlin* did, however, have two characteristics in common. A substantial number of representatives in both came from districts that varied from the norm by more than 10%; both involved population variances between the largest and the smallest districts in excess of 25%.

It should be emphasized that in neither case did the state attempt to justify the deviation found to be improper. The Court said that, where the apportionment system deviates from the principle of population equality as much as it did in these cases, the burden of proof is upon the state to justify the deviations. If the state fails to justify them, the apportionment plan will be invalidated.

Notes to Part 2

15. *Colegrove v. Green*, 328 U.S. 549 (1946).

16. *Butcher v. Rice*, 397 Pa. 158, 153 A.2d 869 (1959).

17. Justice Felix Frankfurter's frequently quoted "political thicket" passage, in a case challenging Illinois' obsolete congressional districting statute, reflects the earlier position of the courts:

"To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. . . . The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that

circumscribe judicial action. . . ." *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

Justice Frankfurter reiterated this position in his dissent in *Baker v. Carr*, 369 U.S. 186, 266 (1962).

18. 42 U.S.C. 1983, 1988.

19. Since representation was based on total population rather than number of voters, this would be arithmetically exact only if the proportion of voters to total population in each district was exactly the same. The 19:1 ratio, however, does give a rough approximation of the relative influence of the voters in each district.

In *Reynolds v. Sims*, the Court compared this weighting of popular votes to permitting some persons to vote a number of times and others only once:

"It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five or 10 times for their legislative representatives, while voters living elsewhere could vote only once. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. . . ." 377 U.S. 533, 562 (1964).

20. 369 U.S. 186 (1962).

In *Reynolds v. Sims*, the Supreme Court said that population inequality between districts amounted to restricting the right to vote of electors residing in the under-represented districts:

"The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964).

21. *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).

The cases deal with the following states respectively:—Alabama, New York, Maryland, Virginia, Delaware and Colorado.

22. Case cited note 21, *supra*.

23. 377 U.S. 533, 568 (1964). The Court then proceeded to reject the federal analogy argument, i.e., that the basis for representation in the United States Senate justified basing representation in one house of a state legislature on factors other than population. The Court said:

"The right of a citizen to equal representation and to have his vote weighed equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States effectively submerge the equal-population principle in the apportionment of seats in the other house. . . ." *Id* at 576.

There have been subsequent efforts, thus far unsuccessful, both in Congress and by petitions from the states, to deprive the federal courts of jurisdiction over apportionment cases and to amend the United States Constitution to authorize the states to base representation in one house of the legislature of factors other than population. See the discussion of Congressional activity on State reapportionment in Congressional Quarterly Service, *Representation and Apportionment*, 27-37 (1966).

24. This is the "one-person-one-vote" doctrine first enunciated by Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), not strictly an apportionment case, which invalidated Georgia's county-unit system of nominating candidates for state offices. The more colorful phrase, "one-man, one-vote," apparently was popularized by the news media. Professor Ruth C. Silva credits the popular version to Anthony Lewis of the New York Times: *Silva, One Man, One Vote and the Population Base in APPORTIONMENT AND REPRESENTATION: Legislative Reapportionment in Theory and Practice* (Chicago: Rand McNally & Co., 1968) note 7.

25. *Lucas v. Colorado General Assembly*, *supra* note 21.

26. 377 U.S. 533, 577 (1964).

27. *Ibid*. The Court also discussed this principle in the *Lucas* case:

" . . . Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house. But, on the other hand, disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature,

- and may therefore render the apportionment scheme at least constitutional suspect. . .”
Lucas v. Colorado General Assembly 377 U.S. 713, 735, note 27 (1964).
28. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).
 29. *Ibid.*
 30. *Id.*, 578-579.
 31. *Id.*, 579-580.
 32. *Swann v. Adams*, 385 U.S. 440, 444 (1967).
 33. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).
 34. For example, in *Reynolds v. Sims*, Alabama proposed two apportionment plans. The first gave each county at least one seat in the state senate and thereby reduced the percentage of the state's total population represented by a senatorial majority from 25% to 19%. The maximum population variance among senatorial districts was increased to 59 to 1. In the house, each county was to have at least one representative; the population-variance ratio was reduced to a little less than 5 to 1. Under the other plan, with still at least one senator from each county, the senate could be controlled by 37% of the population, and the house would have a maximum population-variance ratio of 5 to 1. No part of either plan was found constitutionally acceptable.
 35. *Swann v. Adams*, 385 U.S. 440 (1967).
 36. *Kilgarlin v. Hill*, 386 U.S. 120 (1967).
 37. See Banzhaf, *Multi-Member Electoral Districts—Do They Violate “One Man, One Vote” Principle*, 75 Yale L. J. 1309 (1966).
 38. *Swann v. Adams*, 385 U.S. 440, 445 (1967).

*The Pennsylvania Background*³⁹

A. Legislative Apportionment Before 1874

Constitution of 1776

Pennsylvania began its legislative history as a state with a single-house legislature provided by the Constitution of 1776. Unicameralism was an inheritance from the colonial period.

Representation in the legislature was a crucial issue in the Convention of 1776. There had been a long, bitter controversy between the eastern and western parts of the Commonwealth over the denial of equitable representation in the colonial assembly to the rapidly growing western counties. The Convention declared that "representation in proportion to the number of taxable inhabitants is the only principle that can at all times secure liberty and make the voice of a majority of the people the law of the land."

The Constitution directed that there be an enumeration of taxable inhabitants every seven years and a reapportionment following each enumeration. Temporarily, six representatives were assigned to the City of Philadelphia and six to each of the counties. The term of office was one year.⁴⁰

Constitution of 1790

The Convention of 1789 provided for a bicameral legislature, but the provisions respecting representation in the lower house were carried over from the 1776 Constitution. The new constitution fixed the number of Representatives at no more than 100 nor less than 60. The requirement that each county should have at least one representative was also added; this guarantee did not apply to any county that might be created in the future. The annual election of representatives was retained.⁴¹

The Legislature was to determine the number of members in the newly-created Senate. It could not exceed one-third or be less than one-fourth the number of representatives. Senators were to be elected for four-year terms.

The Constitution directed the Legislature to divide the state into senatorial districts and permitted multi-member districts, although no district could elect more than four Senators. Neither the City of Philadelphia nor any county could be divided in the creation of a district. This meant that Philadelphia could not have more than four senators. A district could be composed of two or more counties if they were adjoining.⁴²

Constitution of 1838

The Constitution of 1838 continued the septennial reapportionment and redistricting of both houses according to the number of taxable inhabitants. The provisions for Senatorial apportionment were changed. No Senatorial district could elect more than two Senators. The new constitution carried over the earlier charter's prohibition against dividing any city or county in the creation of a Senatorial district but made an exception for any city or county entitled to more than two Senators. No city or county could have more than four Senators so that Philadelphia's representation continued to be limited as it had been in the 1790 Constitution.⁴³

In 1857, by constitutional amendment, the size of the House was set at 100 members, to be elected from single-member districts.⁴⁴

B. Legislative Apportionment in Constitution of 1874

The 1874 Constitution introduced a number of basic changes:

- (1) Decennial reapportionment after the United States census was substituted for septennial enumeration and reapportionment;
- (2) Total population rather than taxable inhabitants was to serve as the population base for representation;
- (3) The size of the House was approximately doubled, and Senate membership was increased to fifty;
- (4) A more complex formula was established for both House and Senate representation;
- (5) Restrictions on representation from the most populous counties were embodied in a variety of new provisions;
- (6) With the change to biennial sessions, the members of the House were given two-year terms. The four-year term was retained for Senators with half of the membership to be elected in each general election.

1. Senate Representation

The 1874 Constitution increased the number of Senator to 50, to be elected from single-member districts. It modified Philadelphia's representation in the Senate by prohibiting any city or county from having more than one-sixth of the total number of Senators.

DEBATE IN THE CONVENTION OF 1872-1873

Debate in the convention focused on the limitation of Philadelphia's representation in the Senate although the increased size of the two Houses and the question of single-member versus multi-member districts were also the subject of some controversy.

The Constitutions of 1790 and 1838 set the minimum size of the Senate at one-fourth of the number of House members. With the size of the House increased from 100 to approximately 200, a 50-member Senate seemed logical.

The proposed limitation of Philadelphia's representation to one-sixth of the Senate's membership generated bitter protest by the Philadelphia delegates. All the other delegates seemed to be arrayed against the Philadelphians; even Allegheny County, with its rapidly growing population, sided with the less populous counties so that the one-sixth limitation was finally adopted.

Under the Constitution of 1838, the City of Philadelphia had been entitled to four Senators and Philadelphia County to an additional Senator. When the City and County were consolidated, representation had been reduced from five to four (out of 33). On the basis of the 1870 census, Philadelphia had one Senator for 168,000 people; Allegheny County, one for 87,400; Montgomery, one for 81,000; Fayette and Greene, one for 69,000. The one-sixth limitation would still prevent equal representation for Philadelphia.

Supporters of the limitation on Philadelphia agreed that population should be used as the basis for representation, but they insisted that an adjustment should be made where the concentration of population and wealth brings disproportionate power. They argued that the greater capacity of Philadelphia to organize politically would place the rest of the State at its mercy. Cities were painted not only as centers of political corruption but also as unproductive consumers of the products of rural society. It was charged that Philadelphia and Pittsburgh virtually dominated the state legislature and that Philadelphia controlled all important committees.

The Philadelphians denied that they controlled the state; they pointed to the fact that a Philadelphian had not been a Governor or a United States Senator for fifty years. They also argued (1) that they paid more than one-third of all state taxes and were therefore entitled to a numerically fair share in representation; (2) that Philadelphia suffered more interference from the legislature than any other community, and (3) that, if they could not have equal representation, then they should have home rule.⁴⁵

There was disagreement within the Convention on the method for electing Senators. Should they be elected at large, from multi-member districts, single-member districts, or from some combination of single-member and multi-member districts?

There was a small but determined group of delegates who urged the use of either cumulative voting⁴⁶ or a limited vote plan.⁴⁷

The Committee on Suffrage, Elections and Representations was chaired by Charles Buckalew, the Convention's Democratic leader, who had written a book on proportional representation. He proposed the election of all Senators at large under a limited vote plan with one-half of the Senators to be elected every two years. This plan, Buckalew argued, would not only provide for minority representation but would also elevate the quality of the men elected; each party's state convention would be under strong inducement to choose its best men. Also, each party could select able men otherwise excluded from a successful career in politics because they lived in a county where their party was a permanent minority.⁴⁸ Critics of the proposal questioned the advisability of placing the selection of Senators in party conventions; they doubted that such a system would improve the quality of convention choices.⁴⁹

The single-member district plan was finally adopted.⁵⁰

2. House Representation

The Constitution of 1874 increased the size of the House to a minimum of 200, with a somewhat higher figure likely due to fractional ratios and the guarantee of one member of each county. Multi-member districts were permitted.

DEBATE IN THE CONVENTION OF 1872-1873

Enlargement of the House from 100 to approximately 200 was designed not so much to satisfy the basic tenets of any theory of representation as to make the House less susceptible to the undue influence of vested economic interests.

The Convention's Republican leader, Wayne MacVeagh, opposed any increase in the size of the House. Since the new constitution outlawed special legislation, which presumably had been the principal source of alleged corruption, MacVeagh saw no need for a larger House. He contended that, in the future, the Legislature would be called upon to act on issues affecting the state as a whole rather than on laws of purely local concern. A smaller body would lend greater prestige to membership and thereby attract more capable men to seek a legislative seat. MacVeagh contended, moreover, that a legislative body of 100 or more members cannot be a deliberative body. He proposed that the Senate have 17 members and the House 50 members. In his view, this concentration of responsibility, far from lending itself to corruption, would promote greater integrity.⁵¹

There were others who opposed enlarging the House beyond 100 members. They pointed out that the Convention had already provided adequate safeguards by limiting legislative powers and procedures so that increased membership was unnecessary.⁵²

The Committee on the Legislature believed that a more numerous House was desirable and recommended a House of 150 members. This size was approved by the convention on second reading but was later changed.⁵³

The question of the size of the House became inseparable from a second issue—the basis of representation. The larger the size of the House, the smaller would be the average population per member. Thus the guarantee of one member to each county would distort the representative character of the house *less* than would be the case if a smaller house, and consequently a larger population ratio, were adopted. Overriding the decision on second reading, the basic size of the House was raised to 200.⁵⁴

The consensus of the convention was that the county should serve as the basic unit of representation and that the number of representatives assigned to each county should be based on population but that each county should be entitled to at least one representative.

Buckalew and others challenged the fairness of such an arrangement. They claimed that the voters would reject a plan so “ridiculous, absurd and unreasonable.” Philadelphia was already discriminated against in the Senate; the less populous areas should not be given an advantage in both Houses. Separate representation should not be guaranteed to the six smallest counties, it was asserted, and no county with less than half a ratio should have its own Representative.⁵⁵

The delegates from Philadelphia strongly opposed the guarantee of a Representative to the least populous counties. One delegate contended that the plan was designed to give representation to acres rather than population. Philadelphia with a population of 674,000 would be given only 20 representatives, while the least populous counties with a total population of only 634,000 would have 49 representatives.

Buckalew introduced an alternate proposal that combined the eleven least populous counties into five districts but preserved the principle of a separate representative for all but these eleven counties. Philadelphia would be allowed 28 representatives out of 150. This won the support of the Philadelphia delegation. As one Philadelphia delegate put it, this gave representation for every man, woman and child in the small counties, but it “does not give representation to hemlock trees, or beech or maple trees. It gives representation to people.”⁵⁶

Delegates from the less populous counties rejected the plan outright for several reasons. Important agricultural, timber, coal, and oil interests were located in the less populous counties. These counties wanted a greater voice in the General Assembly. Moreover, the less populous counties often had diverse interests, and they did not want to share a representative with another county with which they had little in common. Lastly, the poor facilities for transportation and communication led to the desire to have the Representative situated close to all of his constituents.

Whatever the logic, the less populous counties controlled a majority of the Convention on this issue. The Convention approved the requirement that each county have at least one Representative; at the same time the membership of the House was increased to approximately 200. Under the census of

1870, a divisor of 200 yielded a quotient of 17,500—the so-called ratio for apportionment.

The decision to use a population ratio for apportioning representatives among the counties raised a second problem. No county's population was likely to be an exact multiple of the apportionment ratio. How should fractions be handled in the distribution of seats? The original proposal of the Committee on the Legislature provided for apportioning an additional seat to a county having a remainder of more than a half ratio.⁵⁷

The proviso finally adopted was that counties with fewer than five representatives would receive an additional representative for a remainder of at least a half a ratio, but counties with five or more representatives must have a full extra ratio for each seat apportioned, thus losing the seat even if the remainder just misses a full ratio.⁵⁸ The decision to have approximately 200 rather than 150 as the divisor to obtain the ratio for representation lessened the opposition of the more populous counties because the unrepresented remainders would be smaller.

Another controversial issue was whether to retain the existing single-member district system. Some delegates contended that this system would bring representation closer to the people, especially when combined with the increased membership of the House. Buckalew, who had been the author of the 1857 Constitutional amendment establishing single-member districts, now opposed retention of the existing system. In his view, the single-member district system tended to "degrade and lower the tone and character of representation in legislative bodies." He claimed that the quality of Philadelphia legislators had declined after adoption of the single-member system.⁵⁹

The convention finally resolved this issue by permitting the General Assembly to create multi-member districts or single-member districts or both. While the convention did not expressly prescribe nor prohibit multi-member districts, it did provide that no district may elect more than four Representatives. Under the provision of Article II, Section 17, therefore, the General Assembly was given tacit authority to set up single-member districts, multi-member districts, or any combination of the two, with districts electing one to four representatives.

Separate representation was provided for cities having a full ratio of population or more. Cities in counties with more than four ratios would have to be districted, of course, but not necessarily into single-member districts.

3. Legislative Apportionment

Article II, Section 18, provides:

The General Assembly at its first session after the adoption of this Constitution, and immediately after each United States decennial census, shall apportion the State into Senatorial and Representative Districts agreeably to the provisions of the two preceding sections.

DEBATE IN THE CONVENTION OF 1872-1873

The apportionment section, though vigorously debated, was not so controversial as Sections 16 and 17 had been. The language of the proposal on second reading was almost identical to that of the final draft adopted by the Convention.⁶⁰

The delegates agreed that there should be reapportionment and redistricting as soon as possible after the new decennial census figures became available. They did not agree, however, upon whether the Legislature should be entrusted with the reapportionment functions. Since the Legislature's past failures were not those of omission, the Convention was not as concerned with compelling reapportionment as it was with a means of insuring equitable reapportionment that would conform with the spirit of the new constitution.

The difficulty with reapportionment by the General Assembly itself, Buckalew said, was that members of the two houses "are personally interested in making districts in which they can be re-elected to their respective houses." They are controlled by "the seductive, silent, efficient action of self-interest." As an alternative to vesting the apportionment and districting functions in the Legislature, he proposed that the task be performed by a commission elected by the two houses. The proposed commission was to be composed of twelve members with four elected by the Senate and eight by the House under a system of limited voting.⁶¹

After rejecting Buckalew's proposal, the Convention considered several variations of his scheme. One proposal called for a popularly elected commission to be chosen at large under a limited voting system. Another plan proposed a mixed system under which the Legislature would establish Senatorial districts but local commissions would divide the multi-representative counties into a single-member district.⁶²

MacVeagh believed that the legislative body, having been "reformed" by the Convention, could be trusted with reapportionment. He suggested that the Convention might prescribe appropriate norms to limit legislative discretion. It might provide, for example, that no district should have a deviation from the population norm of more than 10%.

By a close vote, the Convention approved reapportionment by the Legislature without incorporating any such safeguards, although it did admonish the General Assembly to apportion districts in conformity with Sections 16 and 17 of Article II "immediately" after each decennial census.

In 1874 the Legislature was reapportioned and districts redrawn in conformity with the new constitution. The Legislature's subsequent record on this matter was erratic. The Legislature waited for seven years before reapportioning after the census of 1880, and it did not reapportion again until 1906. There was no apportionment after the 1910 census, but the Legislature acted promptly after the next census and redistricted the state in 1921.

Both houses were reapportioned and redistricted in 1937, but the legislation was improperly drawn and was set aside by court action. In 1953, the

House districts were redrawn, but the Senate was not redistricted. The 1921 Senate apportionment remained the basic law for senatorial districts until the State Supreme Court redistricted the State in 1966. The constitutional mandate of Section 18 was clearly ignored for a long period prior to *Baker vs. Carr*.

C. Legislative Apportionment in Pennsylvania after *Baker vs. Carr*

1. Litigation in the Courts

Shortly after the United States Supreme Court decided *Baker vs. Carr*, complaints were filed in the Court of Common Pleas of Dauphin County seeking to enjoin elections for Pennsylvania's Legislature under the existing apportionment statutes. Although the Dauphin County Court denied the petition in order to give the Legislature an opportunity to enact new apportionment and districting laws at its 1963 session, the court retained jurisdiction in the case.⁶⁴

At its regular session in 1963, the Legislature took no action on reapportionment. At a special session called in 1963, the General Assembly enacted two reapportionment statutes, which were to become effective January 9, 1964. The plaintiffs in the Dauphin County Court suit then petitioned the Pennsylvania Supreme Court to take immediate jurisdiction in view of the approach of the 1964 legislative elections. The Court directed the Dauphin County Court to hear the case and remit its findings to the Supreme Court.

Meanwhile, in November 1963, a similar proceeding had been instituted in a federal district court. The federal court held, in April, 1964, that the Pennsylvania Reapportionment Acts of 1964 and certain provisions of the Pennsylvania Constitution violated the Fourteenth Amendment of the United States.⁶⁵ On appeal, the United States Supreme Court vacated the lower court's decision because the same issues were pending in the Pennsylvania Supreme Court.⁶⁶

While the Pennsylvania Supreme Court was deliberating *Butcher vs. Bloom*, the United States Supreme Court handed down the decision in *Reynolds* and its companion cases.⁶⁷

In the first *Butcher* case, the Pennsylvania Supreme Court held that the 1964 apportionment and districting for both houses violated the *Reynolds* standard of substantially equal representation according to population.⁶⁸ The Pennsylvania Court pointed out that the plan for the House of Representatives provided for single-member districts varying from 4,485 to 81,534 in population. This meant that one elector in the most populous district, Clearfield County, had only one-eighteenth the weight of one elector in the least populous district, Forest County.⁶⁹ Other less populous counties were similarly over-represented, e.g., one representative for Sullivan County with only 6,251 inhabitants and one for Cameron County with only 7,856. The Court also

pointed out that, while the 39th Senatorial District had a population of 352,629, the 14th District had only 129,851. Similarly, the 10th, 20th, and 39th Senatorial Districts contained more than twice the populations of the 14th, 33rd and 36th.

When the General Assembly enacted the apportionment statutes, it did not have the benefit of the guidelines set forth in *Reynolds vs. Sims*, which was decided six months later. Consequently, the Court refused to enjoin the approaching elections and allowed the elections to take place under the Acts of 1964; but it retained jurisdiction and gave the Legislature until September 1, 1965, to reapportion both houses properly.

When the Legislature failed to meet this deadline, the Court itself undertook the task of reapportionment. The Court allowed any interested party to submit proposals. After considering these proposals, the Court handed down its own apportionment plan early in 1966—in time for the primary elections.⁷⁰

2. Present Status of Sections 16 and 17 of Article II

Although sections 16 and 17 of Article II have never been formally amended, they have actually been modified by judicial decisions. Section 16 contains the following features:

The State shall be divided into fifty senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one Senator.

Each county containing one or more ratios of population shall be entitled to one Senator for each ratio, and to an additional Senator for a surplus of population exceeding three-fifths of a ratio, but no county shall form a separate district unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more Senators, when such county may be assigned a Senator on less than four-fifths and exceeding one-half of a ratio; and no county shall be divided unless entitled to two or more Senators.

No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators.

No ward, borough or township shall be divided in the formation of a district.

The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty.

No court decision has affected the provision fixing the number of senatorial districts at fifty.⁷¹

“Compact and contiguous” is a standard which the United States Supreme Court has embraced in *Reynolds* and other cases.⁷²

The phrase “as nearly equal in population as may be” follows the *Reynolds* standard of population equality.⁷³

The clauses providing for handling of fractional ratios are doubtless void under *Reynolds* because they patently violate the equal-population principle.⁷⁴

Under the ruling in *Reynolds* and other cases, the provision prohibiting senatorial districts from cutting across the boundary lines of political sub-

divisions must be interpreted to mean "insofar as possible without violating the Fourteenth Amendment." In *Butcher*, the Court said: "We must emphasize that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied. . . ." ⁷⁵

The one-sixth limitation appears to be void on its face as it is contrary to the equal-population principle.

Section 17 contains the following features:

The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred.

Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio.

Every city containing a population equal to a ratio shall elect separately its proportion of the representatives allotted to the county in which it is located.

Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.

The Pennsylvania Supreme Court said in the first *Butcher* case that the requirement that the State's population be divided by 200 in order to secure an apportionment ratio recognizes the equal-population principle. ⁷⁶

The State Supreme Court invalidated the one-member-per-county requirement as being palpably unconstitutional in light of the gross disparities in county population.

The provision for handling fractional ratios is just as clearly void for house districts as for senatorial districts.

Dealing with multi-member districts in the first *Butcher* case, the Court said:

"... In light of the Constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." ⁷⁷

Implicit in Section 17 is the prohibition against the crossing of the boundaries of political subdivisions. In the first *Butcher* case, the State Supreme Court said that this requirement cannot supersede the principle of population equality. It said further that Section 17 . . .

"... must be interpreted to require that counties with small populations, if necessary, be joined with other counties for the purpose of electing and sharing a representative. We hold that no provision of Section 17 prohibits the division or combination of

counties in the formation of districts where the population principle cannot otherwise be satisfied."⁷⁸

3. *Permissible Variations in Pennsylvania*

When the Supreme Court of Pennsylvania decided the first *Butcher* case, it had only the general guidelines of the *Reynolds* and its companion cases to follow. The reapportionment cases dealt with population disparities which were so great that only general guidelines were laid down for applying the equal protection clause to state legislative representation. These cases did not set maximum limits within which deviations from the equal representation principle will be allowed to stand.

In redistricting Pennsylvania two years later, the State Supreme Court did not rely on any guidelines from other state courts or from the lower federal courts. As its standard, the Court used the *Reynolds* principle of "substantial equality of population among the districts."

Under the Court's 1966 plan for the Senate, the most populous district has 248,695 inhabitants and the least populous has 205,319. Thus, the 26th District is 21% more populous than the 34th District,⁷⁹ and the maximum deviation is 9.8% from the state-wide average. The twenty-six senators elected in the twenty-six least populous districts are elected from districts that contain 50.1% of the State's population.⁸⁰

The departure from population equality is greater among House districts than in Senatorial districts. House District 149 has 64,529 people while District 99 has only 47,908, so that the former has 34% more people than the latter. The most populous district contains 14% more inhabitants than the statewide average while the least populous district has 15.3% fewer people than the state-wide average. The 102 representatives from the least populous districts are elected from districts that contain 47.03% of the State's population. Forty-nine of the 203 House districts deviate in population from the State-wide average by at least 10%.

While the plan for senatorial representation appears to conform to federal standards, there may be some question about the House plan—particularly in light of two cases decided by the United States Supreme Court in 1967.⁸¹ An analysis of Pennsylvania's House districts indicates that their population variances may be as serious as those invalidated by the Court in these two cases—one in Texas and the other in Florida.⁸²

The Supreme Court indicated in the Florida case, however, that deviations in population found acceptable in one state do not necessarily foretell the outcome in another. The Court said that "the fact that a 10% or a 15% variance from the norm is approved by one state has little bearing on the validity of a similar variance in another state"⁸³

It should also be emphasized that in both of the 1967 cases decided by the United States Supreme Court the states did not attempt to justify the devia-

tions, and the plaintiffs were held to have made a sufficient case under the equal protection clause.

Notes to Part 3

39. For a comprehensive discussion of Pennsylvania's constitutional history, see BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT, University of Pittsburgh Press (1960); WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA (1907).
40. Constitution of 1776, §17.
41. Constitution of 1790, art. I, §§1, 2 and 4.
42. Constitution of 1790, art. I, §§5, 6 and 7.
43. Constitution of 1838, art. I, §§2, 4 (House) and §§4, 5, 6 and 7 (Senate).
44. Charles Buckalew, Democratic Leader of the 1872-1873 Convention, said that the provision for single-member districts had been adopted as a consequence of Philadelphia's city-county consolidation in 1854. With its enlarged boundaries, Philadelphia had 18 representatives. If they were elected at large, the entire delegation would be of one party. This would or could determine partisan control of the House. Debates of the Constitutional Convention to Amend the Constitution of Pennsylvania, 1872-1873 (hereinafter cited as *Debates*) V, 197.
45. *Debates*, II, 170-208.
46. Under a "cumulative voting" plan, if three members are to be chosen in a multi-member legislative district, each elector has three votes and may distribute them as he sees fit. He may give one vote to each of three candidates or he may give two or even three votes to one man. This method usually results in reflecting each party's electoral strength more closely in the Legislature thus elected.
47. Under "limited voting," an elector's vote is limited to less than the full number of candidates to be elected. If three members are to be elected from a multi-member legislative district, for example, each elector would vote for no more than one or two candidates. This usually results in giving two seats to the majority party and one to the strongest minority party. This device has not been used for electing members of the Legislature in Pennsylvania or elsewhere but has long been used for the election of county commissioners in Pennsylvania in accordance with a constitutional requirement. Pa. Const., Art. XIV, §7.
48. *Debates*, V, 511-15. See, also, remarks of Lilly, 522, Judge Woodward, 527-531, Governor Curtin, 533-535.
49. MacVeagh, *id.*, 515-517; Gov. Bigler, 521-522; Biddle, 522-524; Judge Black, 532-533.
50. *Id.*, 658.
51. *Id.*, 362-363.
52. See, e.g., remarks of Broomall, *id.*, 407-408, Cochran, 425-426, Baer, 431-433.
53. Committee Proposal, *id.*, 361; approval on second reading, *id.*, 695. MacVeagh, commenting on the original report of this Committee (*id.*, 1-239), reported a diversity of opinion among that Committee's members on the subject of the size of the houses; the original sense of the Committee, as indicated by sections 21 and 22 of the report, was that the existing numbers (33 and 100, respectively) should be retained, *id.*, 327-9. These two sections, which involved other issues as well as size, were recommitted to the Committee. When the report was reached in the Committee of the Whole, the new version proposed 50 and 150, respectively, *id.*, V, 361.
54. Suggested by Andrew Curtin, *id.*, VII, 10; argument regarding reduction of inequities in representation, *id.*, 171; formal approval, *id.*, 167.
55. *Id.*, 667.
56. Lilly, *id.*, 669, Wetherhill, *id.*, 668. Cf. Chief Justice Earl Warren's similarly colorful language in *Reynolds v. Sims*, 337 U.S. 533, 561, 580 (1964):
"Legislators represent people, not trees or acres. Legislators are elected by voters not farms or cities or economic interests. . . ."
"Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote."
57. *Debates*, VII, 22.
58. *Id.*, V, 661.
59. *Id.*, VII, 30.

60. *Id.*, 178.
61. *Id.*, 190-1. The text of this proposal appears on page 180. Buckalew had earlier proposed a commission composed, *ex officio*, of the Secretary of the Commonwealth, the Secretary of Internal Affairs, and the Attorney General, *id.*, V, 544.
62. Buckalew's proposal was defeated by a vote of 57 to 47, *id.*, VII, 212. Under one plan, the local commission was to be composed *ex officio* of the common pleas judges, county commissioners, and sheriff; still another provided for an elective commission chosen under a limited vote plan, *id.*, 212-218.
63. The vote was 49 yeas to 44 nays, *id.*, 218-219.
64. *Butcher v. Trimarchi*, 28 D. & C. 2d 537 (C.P. Dauphin Co. 1962). State courts have jurisdiction over suits attacking the validity of state apportionments plans under the federal constitution. *Maryland Committee v. Tawes*, 377 U.S. 656 (1964). The Court said in *Maryland* that "the same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court . . ." *Id.*, 674.
65. *Drew v. Scranton*, 229 F. Supp. 310 (U.S.D.C. M.D. Pa. 1964).
66. *Scranton v. Drew*, 379 U.S. 40 (1964).
67. *Butcher v. Bloom*, 415 Pa. 438, 203 A. 2d 556 (1964).
68. 415 Pa. at 457, 203 A. 2d at 567.
69. This would be precisely exact, of course, only if the ratio of voters between the two districts was the same as the ratio of total population. The 1/18 figure, however, does represent a rough approximation of relative voter influence.
70. *Butcher v. Bloom*, 420 Pa. 305, 216 A. 2d 457 (1966).
71. For a discussion of the size of state legislatures, see Part 4 A.
72. "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. . . ." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).
73. *Id.*, 568.

In a recent case involving a similar phrase in the Philadelphia Home Rule Charter, the Pennsylvania Supreme Court interpreted the "as nearly as possible" language of §2-102 of the Philadelphia Charter to be no different in effect from Art. II, Sec. 16 of the Pennsylvania Constitution providing for districts "as nearly equal in population as may be." The Court refused to strike down an apportionment ordinance, under §2-102, despite the fact that the plaintiffs' alternative plan was 2% closer to mathematical equality. "So to hold," reasoned the Court, "would invite a multiplicity of attacks on redistricting legislation by disgruntled factions based on what amounts to *de minimis* approaches to mathematical equality." *Newbold v. Osser*, 425 Pa. 478, 488, 230 A. 2d 54, 59 (1967).

The standard framed in the proposed constitutions for New York and Maryland would provide for districts as nearly equal in population "as practicable." See Appendix B and Appendix C *infra*.

74. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).
75. *Butcher v. Bloom*, 415 Pa. 438, 463, 203A. 2d 556, 570 (1964).
76. *Id.*, 464, 203 A. 2d 571.
77. *Id.*, 467-468, 203 A. 2d 573.
78. *Id.*, at 465, 203 A. 2d 571.
79. The United States Supreme Court has used a number of mathematical tests for measuring compliance with the population-equal standard of *Reynolds*:
 1. "Population variance ratio." This is the ratio of the most populous district to the least populous district. (Example: where the populations of the largest and smallest districts are 150,000 and 100,000, respectively, the population-variance-ratio is 1.5:1).
 2. "Deviations from a representational norm." The norm equals the total population divided by the number of representatives. (Example: where the state population is 10,000,000 and the number of members of the House is 200, the norm equals 50,000 people. A single-member district containing 55,000 people would be underrepresented by 10%).
 3. "Percentage of districts deviating from the norm." This test is a variation of #2. (Example: where 25 districts of a 200-member house have populations greater than the norm by 10% or more, and where 25 other districts have populations less than the norm by 10% or more, the percentage of districts deviating from the norm by 10% or more would be 25%).

4. "Least percentage capable of electing a majority" or "electoral percentage." In applying this test, the districts are arranged in order from the least to the most populous. Beginning with the least populous district, the populations of the districts are added together until a sufficient number has been combined to achieve a majority of representatives in the legislature. This population sub-total is divided by the total population to see how far the quotient deviates from the ideal of 50%.

See generally *Swann v. Adams*, 385 U.S. 440 (1967); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); and *King, The Reynolds Standard and Local Reapportionment*, 15 Buffalo L. Rev. 120, 131, 35 (1965).

80. *Butcher v. Bloom*, 420 Pa. 305, 369, 216 A.2d 471 (1966)

81. *Swann v. Adams*, 385 U.S. 440 (1967); *Kilgarlin v. Hill* 386 U.S. 120 (1967).

82. See table below.

83. *Swann v. Adams*, 385 U.S. 440, 445 (1967).

	<i>Pennsylvania Senate</i>	<i>Pennsylvania House</i>	<i>Swan v. Adams Florida Senate</i>	<i>Kilgarlin v. Hill Texas House</i>
Range of Deviations Between Largest and Smallest Districts	19.1	29.3%	26.46%	26.48%
% by Which <i>Largest</i> District Deviates from Representational Norm	9.8	15.3	10.56	11.64
% by Which <i>Smallest</i> District Deviates from Representational Norm	9.3	14.0	15.9	14.84
% of Districts Deviating from Representational Norm in Excess of 10% (Except for <i>Kilgarlin</i>)	0	24.1	25	The deviation from the average population per representative is greater than 10% in 12 single member districts, and a total of 55 representatives would be elected from eight multi-member districts in which the population per representative varies from the ideal by more than 6%.
Population Variance Ratio	1.21:1	1.34:1	1.30:1	1.31:1
Smallest % of Voters Theoretically Able to Elect Majority of House	50.1	47.03	48.38	— (Not available)

Issues in State Legislative Representation

In considering revision of Sections 16, 17 and 18 of Article II of the Pennsylvania Constitution, it is important to identify the specific issues that may arise in framing the constitutional provision on legislative representation. In addition to the issues covered in this Section, the question of the proper agency to perform the apportionment function, and the question of frequency of apportionment are treated in Section V.

A. Number of Senators and Representatives.⁸⁴

There are no federal constitutional limitations on the size of state legislatures.⁸⁵ Therefore the Convention appears to have the power to consider the number of members to be in each House of the General Assembly.

The size of state legislatures ranges from less than 50 in Nebraska's unicameral legislature to 400 in New Hampshire's lower house.⁸⁶

In their testimony before the Pennsylvania Constitutional Convention Preparatory Committee, both the Pennsylvania Bar Association and the Southwestern Pennsylvania Chapter of the Americans for Democratic Action recommended that the membership of the Senate and House be 50 and 210, respectively.

The Pennsylvania AFL-CIO recommended that the Senate have a membership of 50 and the House 200 and that each Senate district be composed of four House districts.

The Bar Association of the City of New York made a similar recommendation to the 1967 New York Constitutional Convention. It suggested that the number of house seats should bear a specified numerical relation to the number of senate seats. It also suggested that the New York Constitution set a minimum and maximum number of senators rather than a fixed number. This was premised on the belief that a fixed number of seats makes it diffi-

cult to give consideration to factors other than strict population. The Bar Association feared, however, that allowing the legislature to have unlimited discretion in determining the number of legislators could lead to other problems "which the mere population equality principle could not avoid—for example, increasing or decreasing the number of seats to render ineffective some particular minority view."⁸⁷

The New York Constitutional Convention, in its proposed article on the legislature, did not adopt any particular ratio of house to senate seats. The Convention simply recommended that New York have a Senate of 60 members and an Assembly of 150 members.⁸⁸

The Interim Report of the Constitutional Convention Commission for the 1967 Maryland Convention recommends that the number of members of each house be prescribed by the legislature.⁸⁹

The Committee for Economic Development urges that the total membership of both houses of a state legislature should not exceed 100.⁹⁰

B. Population Base for Apportionment

Equality of population is the most important criterion in devising the system of representation for state legislatures. Speaking for the Court in *Reynolds v. Sims*, Chief Justice Warren said, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."⁹¹

How is population to be defined? The great majority of states simply use the total population figures derived from the federal census.⁹² A few states have developed a narrower concept of "population" by excluding certain categories of persons. For example, the population base for apportionment in New York is citizens, i.e., total population less aliens.

In Hawaii, presumably because of the large number of service personnel stationed there, the population base has been the number of registered voters. The United States Supreme Court upheld the Hawaii practice "... only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."⁹³

The Supreme Court seemed to say that total population is the only constitutionally acceptable population base and that the use of a narrower population base would be invalid if it were to produce a significantly different apportionment or districting plan.⁹⁴

The decision of the Supreme Court in the Hawaii case has been criticized on the ground that the facts did not support the Court's conclusion that the use of total population would have produced substantially the same apportionment as the use of registered voters did.⁹⁵

The National Municipal League's Model State Constitution uses total population but excludes several categories of persons—"inmates of such

public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law.”

Both the Constitutional article on the legislature proposed by the New York Constitutional Convention and the recommendation of the Maryland Constitutional Convention Commission provide for the use of the federal census figure (total population) as the population base for apportionment. The groups appearing before the Preparatory Committee of the Pennsylvania Constitutional Convention similarly proposed the use of the federal census as the population base.

C. Population Variance

The United States Supreme Court has not laid down any specific rules to govern the permissible population variations between legislative districts.

In *Roman v. Sincock*,⁹⁶ the United States Supreme Court rejected an attempt to establish a precise arithmetic standard. The lower court had ruled that any plan where the most populous district had over 50% more people than the least populous would be invalid. In reversing the decision the Supreme Court said:

“In our view the problem does not lend itself to any such uniform formula and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.”⁹⁷

In *Reynolds vs. Sims*, the Court had also declared that “Mathematical exactness or precision is hardly a workable constitutional requirement.”⁹⁸

Despite the Court’s refusal to establish strict “mathematical” guidelines, the results in two recent decisions—*Swann vs. Adams*⁹⁹ and *Kilgarlin vs. Hill*,¹⁰⁰—may shed some light on what is meant by substantial equality of population. In both cases, the populations in a substantial number of the states’ legislative districts deviated from the statewide average by more than 10%. In *Swann*, the Florida Senate districts ranged from a deviation of 15.09% below the norm to 10.56% above, for a population variance ratio of 1.30 to 1 between the largest and the smallest districts. In the Florida House the deviations ranged from 18.28% below the norm to 15.27% above for a ratio between the largest and smallest districts of 1.41 to 1. In *Kilgarlin*, the Texas House districts ranged from 14.84% below the norm to 11.64% above, for a ratio of 1.31 to 1 between the most populous and the least populous districts. The Court found these deviations to be great enough to invalidate the apportionment plans which were before it.

Any conclusions drawn from these cases must be carefully qualified, however. The Court cautioned that a deviation from the norm of 10% to 15% approved in one state has little bearing on whether a similar deviation in another state will be held to be valid.¹⁰¹ The most that can be said is that a significant number of deviations above the 10% figure, or a population variance between the largest and smallest districts in excess of 25%, may invalidate an apportionment scheme in the absence of clear justification.

Several state constitutions specify the permissible range of population variation. New Jersey permits a range of deviation from 80% to 120% of the average population per district.¹⁰² Maine allows a maximum deviation of 10% in each senatorial district. A number of states simply provide that the apportionment and districting of the legislature must comply with the United States Constitution.

Other states follow the conventional test of requiring the population of each legislative district to be "as nearly equal in population as may be." This is the recommendation of the Pennsylvania Bar Association.

The standard provided for in New York's proposed Constitution and in the recommendation submitted to the Maryland Constitutional Convention is "as nearly equal [in population] as practicable"; in Rhode Island's proposed constitutional revision the standard recommended is "as nearly equal in population . . . as is reasonably possible."^{102a} In *Reynolds v. Sims*, the Court said that the equal protection clause requires the states to construct districts "as nearly of equal population as is practicable."¹⁰³ Elsewhere in its opinion, the Court declared that "the overriding objective must be substantial equality of population among the various districts."¹⁰⁴ It would appear, therefore, that the test of substantial equality can be met by the use of the phrase "as nearly equal as practicable."

In their testimony before the Preparatory Committee for the Pennsylvania Constitutional Convention, both the AFL-CIO and the ADA suggested that the State Constitution should provide that no district should deviate in population more than 10% above or 10% below the average population for all districts. This would allow for a maximum population variance ratio of approximately 1.22 to 1 between the least populous and the most populous districts.

D. Separate Representation for Local Government Units

The United States Supreme Court has repeatedly emphasized that population equality is the principal criterion for legislative apportionment and districting.¹⁰⁵ Other factors, however, apparently may be given consideration in establishing a system of representation:

"So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect

to the apportionment of seats in either or both of the two houses of a bicameral state legislature."¹⁰⁶

Some apportionment plans have tried to give consideration to such factors as geography,¹⁰⁷ history¹⁰⁸ and economic interests.¹⁰⁹ The Supreme Court has taken a dim view of this practice:

"... [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Consideration of area alone provides an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. . . ."¹¹⁰

The maintenance of political-subdivision boundary lines is the principal non-population factor considered by the courts. In the past, adherence to political-subdivision boundaries was one device used to limit the influence of metropolitan communities in state legislatures. Many states, including Pennsylvania, guaranteed each county at least one representative in the lower house.¹¹¹ Thus, one of the basic problems that the United States Supreme Court faced in determining the constitutionality of state apportionment and districting plans was whether separate representation for each county was an acceptable justification for deviation from the standard of population equality.

In *Reynolds vs. Sims*, the Court answered the question with a qualified "yes" and underscored the qualification that legislative districts must still be substantially equal in population:

"A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymander. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population."¹¹²

Even if a political subdivision does not have sufficient population to justify separate representation, it may still be desirable to keep it entirely within a single legislative district instead of dividing it between two or possibly more districts. *Reynolds* would permit consideration of this factor so long as no substantial population inequality results from preserving a political subdivision intact.

New York's proposed apportionment article states that "wherever practicable, boundaries of pre-existing political subdivisions and geographic boundaries shall be used as district boundaries." There is no reference to political subdivision boundary lines in the Maryland proposal.¹¹³

The recommendations made to the Pennsylvania Constitutional Convention Preparatory Committee would generally prohibit the crossing of political boundary lines unless "absolutely necessary."

E. Coterminous Senate and House Districts

As previously indicated, the Pennsylvania AFL-CIO has suggested a Senate of 50 members and a House of 200 members, with each senatorial district composed of four house districts. Since the adoption of the Constitution of 1874, Pennsylvania has had approximately four times as many representatives as senators but there has been no direct geographical relationship between Senate and House districts.

In commenting on coterminous districts, the New York Temporary State Commission on the Constitutional Convention said:

"In favor of coterminous Senate and Assembly districts is the greater ease of public identification of local districts that would result and the simplification of party political organization. Against coterminous districts is the argument that variations in the arrangement of Senate and Assembly district lines may afford differing bases of representation, bringing this perspective to bear on legislative problems, thus serving to justify the retention of two Houses."¹¹⁴

The New Jersey Constitution of 1966 provides for coterminous Senate and Assembly districts. Each single-member Senate district constitutes an Assembly district with two members. Each multi-member Senate district is divided into a number of Assembly districts equal to the number of Senators allotted to that district, with each Assembly district having two members.

F. Single-Member and Multi-Member Districts

Before the Supreme Court of Pennsylvania reapportioned the Legislature in 1966, Pennsylvania had a mixture of single-member and multi-member districts in the House.

A Federal District Court ruled that Pennsylvania's multi-member district system denied equal protection of the laws to the people residing in single-member districts.¹¹⁵ The State Supreme Court did not go that far but did say that no compelling reason had been shown to justify the pattern of multi-member districts provided for in the 1964 statute and that it would be more "prudent" to provide for single-member districts only.¹¹⁶

In *Reynolds v. Sims*, the Court commented that "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts."¹¹⁷

Later, when a multi-member district scheme was specifically challenged in *Burns v. Richardson*, the Supreme Court said that the "Equal Protection Clause does not require that at least one House of a bicameral state legislature consists of single-member districts."¹¹⁸

The multi-member district is vulnerable, however, when it is used for the purpose of limiting the electoral power of a political or racial minority:

"Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multi-member districts will constitute invidious discrimination only if it can be shown 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."¹¹⁷

Similarly, in a case from Georgia, the Supreme Court rejected a challenge to multi-member districts:

"Our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. 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."¹²⁰

Thus, the mere allegation that an apportionment plan includes multi-member districts in order to limit the electoral power of a racial or political minority is insufficient to invalidate the plan. Evidence to support the alleged discrimination must appear in the record.¹²¹

The multi-member system is alleged to give special weight to the votes of the electors in multi-member districts.¹²² For example, in a single-member district with 56,000 inhabitants, each voter would participate in the election of only one member. But, in a multi-member district with a population of 280,000, each voter would participate in choosing 5 members although the two districts would meet the criterion of population equality with exact precision. In addition, the residents of a multi-member district would have more representatives whom they might urge to support or oppose any proposed legislation.

Those favoring an apportionment plan containing multi-member districts argue that it may improve the caliber of persons seeking to become candidates for state legislatures and minimize the effect of narrow, sectional views.¹²³

Multi-member districts can be found in at least one house in 33 states,¹²⁴ particularly in the more densely populated areas. New Jersey's 1966 Constitution, for example, provides for a mixture of single-member and multi-member districts in the Senate and only multi-member districts in the lower House.

The proposals of the New York and Rhode Island Constitutional Con-

ventions call for single-member districts for both houses. The recommendation to the Maryland Constitutional Convention permits single- or multi-member districts, or both, in the two houses; multi-member senatorial districts would be limited to two senators and House districts would be limited to six.

The groups appearing before the Pennsylvania Constitutional Convention Preparatory Committee uniformly recommended single-member districts for both houses of the Legislature. The National Municipal League's Model State Constitution similarly provides for single-member districts only.¹²⁵

G. Gerrymandering

Gerrymandering has been defined as "the artful technique of drawing district lines for partisan advantage."¹²⁶ A dominant party can gerrymander legislative districts in two ways. (1) It can concentrate the opposition party's electoral strength in a few districts so that this strength is dissipated in large electoral margins in these districts. (2) It can divide the opposition party's electoral strength among a number of districts so that the opposition can carry few, if any, districts. Most gerrymanders combine both devices.

The Supreme Court has not said directly whether it will assume jurisdiction to consider allegations of gerrymandering when the districts otherwise comply with the principle of population equality. Where a substantial departure from population equality is shown, an allegation of gerrymandering appears to be unnecessary although it has sometimes been made.

Several decisions of the United States Supreme Court indicate that the Court will look into racial gerrymandering.^{126a} The position of the Court on political gerrymandering as an issue under the Fourteenth Amendment is far less clear.^{126b}

In *Newbold v. Osser*,¹²⁷ involving apportionment of Philadelphia's City Council, the Pennsylvania Supreme Court stated that gerrymandering *per se* does not present either a federal or state constitutional question:

"Although the court below apparently recognized that gerrymandering *per se* does not, as far as is known, raise any cognizable federal constitutional claim against reapportionment legislation, it concluded on the basis of *Butcher v. Bloom*, 415 Pa. at 463, 203 A.2d 556, that gerrymandering *per se* does raise a cognizable state constitutional claim. This is indeed a puzzling conclusion in light of the fact that the only reference to gerrymandering on page 463 of our opinion in the first *Butcher* case in 415 Pa., 203 A.2d 556 appears in a lengthy quotation from the Supreme Court of the United States' opinion in *Reynolds v. Sims*, 377 U.S. 533, 578-579, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964). Moreover, an examination of that quotation makes it clear that the Supreme Court of the United States was speaking only of gerrymandering in the context of a situation where substantial equality of population among districts was not present. Thus, there is no basis on page 463 of our first *Butcher* opinion in 415 Pa., 203 A.2d 556, nor is there any other basis in Pennsylvania's present Constitution or laws for the proposition that gerrymandering

per se, as distinct from departure from explicit constitutional or statutory requirements of compactness or contiguity, may constitute the sole basis upon which a legislative plan of apportionment may be judicially invalidated."¹²⁸

Some states have attempted to prevent gerrymandering in their constitutions, and others, by statute. The Delaware Constitution specifies that each legislative district must be composed of contiguous territory, must be bounded by ancient boundaries, large roads, streams or other natural geographical features, and may not be so created as to unduly favor any person or political party. An Indiana statute provides that counties may be joined together to form a senate district only where this is required to meet federal constitutional standards and that counties may be joined to form a house district only if they have similar social, economic and geographical interests. The New York Constitutional Convention has recommended that the constitution say simply that "gerrymandering for any purpose is prohibited."

In addition to the criterion of population equality, there are three basic restrictions traditionally used to check gerrymandering—compactness, contiguity, and the observance of political-subdivision boundaries. A flat requirement that a political subdivision must be contained wholly in the same legislative district could not be implemented because many large cities or counties would have to be divided in order to comply with the equal population principle.

Several groups appearing before the Pennsylvania Constitutional Convention Preparatory Committee recommended a provision prohibiting political subdivision lines to be crossed except where "absolutely necessary," meaning where necessary to prevent inequalities in population. The New York Constitutional Convention proposed a requirement that political subdivision boundaries and natural geographic boundaries be used as district boundaries "wherever practicable."¹²⁹

The standard of "contiguity" is sufficiently precise to permit it to be applied without difficulty. While the concept of "compactness" is quite imprecise, modern statistical methods can apparently be applied to give precision to the term. Computer programs are being developed in order to minimize or even preclude the possibility of gerrymandering.¹³⁰

H. Bicameralism¹³¹

Because the United States Supreme Court has ruled that population equality must be controlling in the apportionment of both houses of a bicameral legislature, one might ask whether bicameralism still performs the function of representing interests in one house different from those represented in the other.

The Supreme Court has pointed out that the two houses would still not represent precisely the same interests so long as the district boundaries in one house do not correspond to the district boundaries in the other house.¹³²

Since members of the less numerous house, the state senate, would normally be elected from larger districts, they would be less tied to the more localized interests than would representatives elected from smaller districts.

Moreover, where senators have longer terms than representatives, as in Pennsylvania, senators may have greater freedom than do representatives in voting on legislation without having to face an immediate campaign for re-election. In addition, a longer senatorial term would contribute to greater experience, continuity, and stability in the Legislature.

The Interim Report of the Maryland Constitutional Convention Commission lists the main arguments on the issue of bicameralism and unicameralism:

Bicameralism:

1. A bicameral legislature is embedded in the State's tradition and is well accepted by the people; it should be given a further opportunity to prove its merits under reapportionment.

2. Two houses provide a technical review and tend to minimize careless legislation.

3. A second house provides a check on hasty legislation and on legislation prompted by "popular passions."

4. A two-house system permits "graduation" from the lower house to the upper and thereby aids in developing a group of experienced and capable legislators.

5. A bicameral legislature is more difficult to corrupt than a unicameral legislature.

6. With a bicameral system one would expect a larger legislature and the citizens might feel that this would increase the possibility that they would know someone in the legislature.

7. A bicameral system allows different representation in the two chambers of differing interests, such as rural and urban interests, and divergent economic interests.

8. The diffusion of power in a bicameral system reduces the inclination of the legislature to accumulate governmental power in its own hands.

9. A bicameral system permits the defeat of undesirable but popular legislation where outright opposition to the legislation would be politically dangerous.

Unicameralism:

1. The reapportionment of state legislatures on the basis of the "one man, one vote" rule eliminates the traditional reason for a two-house legislature in which one house is apportioned according to population and the other according to geography.

2. Membership in a unicameral legislature confers greater prestige than membership in a bicameral body, thus encouraging more highly qualified persons to seek legislative office.

3. The legislative process is more efficient and is conducive to a more thorough consideration of matters before the legislature.

4. The traditional rivalry between the two houses, which often has an undesirable effect on the course or content of legislation, is ended.

5. The responsibilities of individual legislators are clearer, for measures cannot be advocated by the members of one house with the expectation that the bill will subsequently be killed by the other house.

6. Opportunities for lobbying are reduced.
7. Reporting of legislative events is made easier and public awareness, interest and understanding of legislative operations and the progress of specific bills are increased.
8. There is no need for a conference committee, whose secret sessions often constitute a "third house," to settle differences between the two houses.
9. The cost of operating the legislature is reduced.

Notes To Part 4

84. The power to determine the number of senators and representatives appears to be within the scope of the Convention since the size of each house is governed by Article II, Sections 16 and 17. See note 13, *supra*.
85. The United States Supreme Court has indicated that the size of the legislature is a matter for the determination of the state. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).
86. See Appendix A *infra*.
87. Report of the Special Committee on the Constitutional Convention, Legislative Apportionment, the Association of the Bar of the City of New York (April, 1967). The *Model State Constitution* contains a similar proposal. It provides for a lower house with maximum and minimum size limits and for a senate which will "not exceed one-third, as near as may be, the number of assemblymen. . . ." The exact numbers are fixed by the legislature. *Model State Constitution*, National Municipal League, §4.02 (bicameral alternative), 6th ed. 1963. See Appendix D *infra*.
88. See Appendix B *infra*.

The proposed new constitution adopted by the Rhode Island Constitutional Convention on September 11, 1967, to be submitted to the voters for approval, recommends a Senate of 40 members and a House of 100 members.

The other features of the Rhode Island proposal relating to legislative apportionment are:

1. Single member districts in the Senate and House, "apportioned on the basis of population, consistent with federal constitutional standards."

2. The initial agency to perform the apportionment function is the legislature, and in the event of its failure to act within a specified period, the State Supreme Court is required to draw up an apportionment plan. This scheme is set forth in Article IV, Section 5 of the proposed constitution:

"Sec. 5. Immediately upon the adoption of this constitution and thereafter following any new census taken by the authority of the United States or this state, the general assembly shall apportion the state into forty senatorial districts and one hundred representative districts, each as nearly equal in population and as compact in territory as is reasonably possible. Districts shall, as far as feasible, follow town or city lines. In the event that the general assembly shall not make the apportionment required by this constitution within six months after this constitution becomes effective, or, in the case of subsequent apportionments, during the first regular session of the general assembly commencing after the completion and publication of the census, the supreme court shall promulgate within six months thereafter an apportionment plan which shall have the effect of law."

3. In addition to the requirement that apportionment "be consistent with federal constitutional standards", therefore, it should be noted that the above-quoted section also establishes the standard of "as nearly equal in population and as compact in territory as is reasonably possible" and requires that town or city boundary lines be followed "as far as feasible."

89. See Appendix C *infra*.

90. "In our judgment, no state legislature should have more than 100 members in total; smaller states would be better served by still fewer members. In all states, sessions should be annual,

without time limitations for adjournment. Committees should be few in number, organized along broad functional lines, and supplied with strong staff support. Public hearings should be held on all major legislation. Legislators should serve four-year terms and receive salaries commensurate with their responsibilities and equal to at least half that of the governor.

"These measures would aid state legislatures in over-coming widespread distrust and suspicion, as reapportionments have begun to do. Smaller size would elevate membership status, increase visibility, and help in recruiting qualified candidates. Once legislatures are restructured, members should receive no less than \$15,000 annually in the smaller states, or half the pay of a Congressman. Salaries in 'full-time' legislatures of larger states should be substantially higher, ranging to at least \$25,000 under current conditions. Even for part-time legislators full-time availability is required, and this should be recognized. Legislative discretion in many fields could be more readily broadened, once these steps have been taken." MODERNIZING STATE GOVERNMENT 20, Committee for Economic Development (July, 1967).

91. 377 U.S. 533, 562 (1964).

92. See Appendix A *infra*.

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

94. In an earlier decision the Court of Appeals for the Fourth Circuit held invalid a Baltimore councilmanic apportionment plan where the use of registered voters as a population base would produce a result different from total population. *Ellis v. Baltimore*, 352 F. 2d 123 (C.A., 4th Cir. 1965). It was shown in the case that two districts of approximately equal total population would have a different number of councilmen because of a 33% disparity in the number of registered voters in the two districts.

Professor Ruth C. Silva, of Pennsylvania State University, has developed the thesis that the use of a total population base may actually produce voter inequalities among legislative districts:

"... [I]f . . . a uniform ratio [voters to total and/or citizen population] is not present, use of any population base that is broader than actual voters simply magnifies the electoral power of the voter who lives in a district where relatively large numbers of non-voters reside. . . .

"If two districts—A and B—each have 11,000 inhabitants and each is represented by one legislator but district A has 10,000 voters and 1,000 non-voters while district B has 1,000 voters and 10,000 non-voters, then each voter in district B would have ten times as much electoral power in choosing a legislator as would one voter in district A. It should not be imagined that this model is wholly theoretical. . . ." Silva, *One Man, One Vote and the Population Base*, in REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE, (Chicago; Rand McNally & Co. 1968), note 17 and accompanying text.

It does not appear that the Supreme Court has been presented squarely with the position articulated by Professor Silva.

95. *Id.*, notes 77-84 and accompanying text.

96. 377 U.S. 695 (1964).

97. *Id.*, 710, followed in *Butcher v. Bloom*, 415 Pa. 438, 203 A. 2d 556 (1964).

98. 377 U.S. 533, 577 (1967).

99. 385 U.S. 440 (1967).

100. 386 U.S. 120 (1967).

101. *Swann v. Adams*, 385 U.S. 440, 445 (1967).

102. In light of the *Swann* and *Kilgarlin* cases, this provision is of doubtful constitutionality.

The National Municipal League would include a maximum permissible population variance but no figure is recommended in the model provision:

"All districts shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than — per cent."

Model State Constitution; see Appendix D.

The Maryland Constitutional Convention Commission expressly rejected a proposal that no legislative district deviate from the norm by more than five per cent. See Appendix C.

102a. See Appendix B, Appendix C and note 88, *supra*.

103. 377 U.S. 533, 577 (1964).
104. *Id.*, 579.
105. *Reynolds vs. Sims*, 377 U.S. 533 (1964).
106. *Id.*, 579.
107. *Lucas vs. Colorado General Assembly*, 377 U.S. 713, 738 (1964).
108. *Maryland Committee vs. Tawes*, 377 U.S. 656 (1964).
109. *Lucas*, note 107, *supra*.
110. *Reynolds vs. Sims*, 377 U.S. 533, 579 (1964).
111. Another device was to limit the number of representatives that could be apportioned to any city or county.
112. 377 U.S., 533, 580-581 (1964).
113. The preservation of political boundary lines is not universally favored. The report of the New York Temporary State Commission on the Constitutional Convention points out that there is a contrary view:

"It might be argued that it is not necessary to adhere to local political boundaries in drawing legislative districts. The argument would be that the districting agency should be free to construct districts based on natural counties and affinities among groups of counties, with due regard to topography, economic interests, accessibility and facility for travel and communication, even if this involved cutting across counties and other local political units. In response, it is said that this crossing would create serious risks of partisan gerrymandering." REPORT ON STATE GOVERNMENT OF THE NEW YORK TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION 62 (1967).

114. *Id.*, 63
115. See notes 65-66, *supra*, and accompanying text.
116. *Butcher v. Bloom*, 415 Pa. 438, 203 A. 2d 556 (1964).
117. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). In *Lucas v. Colorado General Assembly*, 377 U.S. 713, 731, n.21 (1964), the Supreme Court said:

"We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

The Pennsylvania Supreme Court spoke similarly in *Butcher v. Bloom*, 415 Pa. 438, 467, 203 A. 2d 556, 572 (1964).

118. 384 U.S. 73, 88 (1966).
119. *Ibid.*
120. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)
121. *Supra* note 118 at 88.
122. Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 *Yale L. J.* 1309 (1966). The merits of this allegation depend on the electoral system used in the multi-member district. Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District*, 17 *WESTERN POLITICAL QUAR.* 742-769 (1964).
123. *Cf.* debate in convention leading to Constitution of 1874, text at note 59, *supra*. See Silva, *Compared Values of the Single- and Multi-Member Legislative District*, 17 *western political Quar.* 504-516 (1964). See, also, justification offered by the Hawaii legislature for the multi-member system in *Burns v. Richardson*, 384 U.S. 73, 89, n. 15:

"(1) Single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved the balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5)

- population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development."
124. REPRESENTATION AND APPORTIONMENT 65, Congressional Quarterly Service (1966).
125. Since *Baker v. Carr*, the "floterial" district has been gaining some attention. In *Davis v. Mann*, the United States Supreme Court has defined this form of district as follows:
 "The term floterial districts is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned . . ." 377 U.S. 678, 686, n.2 (1964)
- An example given by the Court illustrates the use of floterial districts:
 "... the City of Lynchburg, with a 1960 population of 54,790, is itself allocated one seat in the Virginia House of Delegates under the 1962 apportionment plan. Amherst County, with a population of only 22,953, is not given any independent representation in the Virginia House. But the City of Lynchburg and Amherst County are combined in a floterial district with a total population of 77,743. Presumably, it was felt that Lynchburg was entitled to some additional representation in the Virginia House, since its population significantly exceeded the ideal House district size of 36,669. However, since Lynchburg's population did not approach twice that figure, it was apparently decided that Lynchburg was not entitled, by itself to an added seat. Adjacent Amherst County, with a population substantially smaller than the ideal district size, was presumably felt not to be entitled to a separate House seat. The solution was the creation of a floterial district comprising the two political subdivisions, thereby according Lynchburg additional representation and giving Amherst County a voice in the Virginia House, without having to create separate additional districts for each of the two political subdivisions." Id, 686-687, n.2
- Floterial districts—usually composed of one or more political subdivisions—allow districts with a wide range in population without violating the principle of population equality. This sharing of a representative among districts can be employed in a wide variety of ways. It could involve two or more districts, one or more representatives for each floterial district, or even non-contiguous districts in the same floterial district. The floterial district can be used on the one hand to preserve separate representation for political subdivisions and to equalize population disparities between districts in a single-member district system. On the other hand, the floterial district may also be a device for gerrymandering.
126. Boyd, CHANGING PATTERNS OF APPORTIONMENT 21, National Municipal League (1965).
- 126a. See *Gomillion v. Lightfoot*, 364 U.S. 399 (1960), where Alabama attempted to change the city boundaries of Tuskegee from a square to a twenty-eight sided figure which removed all but four or five of its 400 Negro voters from the city limits without removing one white voter or resident. See, also, *Wright v. Rockefeller*, 376 U.S. 52 (1964).
- 126b. In a concurring opinion in *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965), signed only by himself, Justice Harlan observed that in upholding the lower court decision the Supreme Court was also affirming the district court's ruling that partisan gerrymandering is not a Fourteenth Amendment issue.
- In *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967), the Supreme Court implied that it was proper to consider both types of gerrymandering when it said:
 "We also affirm the [lower] court's judgment insofar as it held that appellants had not proved their allegations that H.B. 195 was a racial or political gerrymander violating the Fourteenth Amendment, that it unconstitutionally deprived Negroes of their franchise and that because of its utilization of single-member, multi-member and floterial districts it was an unconstitutional 'crazy quilt'."
- The Supreme Court did reverse the lower court in *Kilgarlin*, however, because of unacceptable population variances. See note 100, *supra*, and accompanying text.
- For the view that the Supreme Court must inevitably deal with political gerrymandering, see *Reapportionment*, 79 Harv. L. Rev. 1220-1283 (1966).
127. 425 Pa. 478, 230 A. 2d 54 (1967).
128. 425 Pa. 478, 488-489, 230 A. 2d 54, 59-60 (1967).

129. Appendix B, *infra*.

130. See Silva, *Reapportionment and Redistricting*, Scientific American (Nov., 1965) 20, 26-27. Professor Silva's article contains a detailed discussion of computer districting. She concludes that "compared with the costly present process of redistricting in the political arena—costly in time as well as in money and general confusion—districting by computer is objective and strikingly inexpensive. Once the general principles of representation have been agreed on, the legislative districting of a state can be accomplished in a few days at a cost of only a few hundred dollars." *Ibid*.

See also REPRESENTATION AND APPORTIONMENT 26, Congressional Quarterly (1966).

It should be noted that computer districting may also be used to gerrymander with greater precision.

131. Because the bicameral character of the Pennsylvania Legislature is fixed by Article II, Sec. 1 of the Constitution, which is not within the scope of Act 2 of 1967, it does not appear that the Convention may consider the question of unicameralism.

132. "We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 576 (1964).

In urging the continuation of the bicameral system, Philip P. Kalodner, in submitting the proposals of the Southeastern Chapter of the Americans for Democratic Action to the Preparatory Committee, said:

"In such a system, even though both houses are required to be apportioned as the basis of population, the differing terms of service, the different geographical areas represented and the difference in size of those geographical areas will all create a certain divergence of viewpoint which properly serves the 'check and balance' philosophy of American government. In addition, a bicameral legislative process provides desirable insurance against the hasty enactment of legislation which has not been sufficiently exposed to public analysis and decision."

Both The Interim Report of the Maryland Constitutional Convention Commission and the Model State Constitution of the National Municipal League contain alternate provisions for a unicameral legislature.

Agency and Frequency of Apportionment

The United States Supreme Court has never passed on the question of what state agency—the legislature or some other agency—should perform the functions of apportionment and districting.¹³³ The Convention is therefore free to choose an existing agency or create a special one to perform this task.

Two principal questions involved in providing for apportionment and districting are: (1) who should have the initial responsibility for performing the apportionment and districting functions;¹³⁴ (2) what procedure should be followed if the agency having the initial responsibility fails to act?

A. Apportionment Agencies

1. The Legislature

In Pennsylvania as well as in most other states, apportionment and districting have traditionally been the responsibility of the legislature. Arguments favoring this approach stress the knowledge and experience that the members of the legislature bring to this task.¹³⁵ Opponents argue that the legislators' self-interest and partisanship will normally interfere with prompt and fair reapportionment and redistricting.¹³⁶

While increasing consideration is being given to the creation of other apportionment agencies,¹³⁷ it is still the prevailing practice for the legislature to have initial responsibility in this field.¹³⁸

2. Elected Executive Officials

One type of plan suggests that initial responsibility should be vested in elected executive officials. Either the Governor alone, or an ex officio body consisting of the Governor and other elected officials, such as the Secretary of

State,¹³⁹ would perform the task of reapportionment. Approximately six states have vested this function in such elected officials.

Those favoring this arrangement argue that elected officials would be responsible to the electorate for their failure to act or for their abuse of power. Opponents of the plan contend that such an arrangement would be an open invitation to gerrymandering.¹⁴⁰

3. Executive Commission

The National Municipal League recommends that reapportionment be undertaken by a commission, or board, appointed by the Governor without restrictions on membership. The board would prepare an apportionment plan within ninety days of its appointment. The Governor would be bound to publish the recommendations made by the board. Whether or not the board made any recommendations, the Governor would be required to promulgate a redistricting plan within 90 to 120 days after the date of the board's appointment. He would also be required to accompany his plan with an explanation of any changes made in the board's recommendations.¹⁴¹

One suggested advantage of this proposal is that it makes the Governor unmistakably responsible for the apportionment plan. It also provides some assurance that reapportionment will be accomplished. A disadvantage may be the possibility that such a commission will reflect narrowly partisan views and interests that will lead to gerrymandering.

4. Bipartisan Commission

The composition and selection of a bipartisan commission could take several forms. An equal number of members could be appointed by the state organizations of the two political parties.¹⁴² A variation of this plan could authorize the Governor to select the members of the commission from separate lists of nominees recommended by each of the state party organizations.¹⁴³ A third possibility would be the creation of a commission composed of each party's leaders in both houses of the legislature, with the Governor serving as chairman.¹⁴⁴

The proponents of a bipartisan commission argue that it ensures that the interests of the two major parties will be protected in any reapportionment plan. The opponents of such an arrangement contend that the representatives of the political parties, in or out of the legislature, would be motivated primarily by the desire to maximize their party's legislative strength. Furthermore, a partisan deadlock is likely in an evenly balanced bipartisan body.¹⁴⁵

The New York Constitutional Convention approved a plan for a 5-man bipartisan commission to be the initial apportionment and districting agency. The commission would consist of four persons to be appointed by the majority and minority leaders of the two houses of the legislature and a chairman appointed by the state's highest court.¹⁴⁶

5. Constitutionally Fixed Commission

Several proposals have been made for a non-partisan commission fixed by the state constitution. These proposals generally suggest that the members of the commission be drawn from groups not normally associated with partisan politics—groups such as state or local bar associations, the universities, and the law schools.¹⁴⁷

The purpose of establishing this type of commission is to try to remove apportionment from the rough-and-tumble of partisan politics and place the task in the hands of citizens who have no direct personal interest in legislative districting. Opponents of the plan object to vesting this power in a body that would not be responsible either directly or indirectly to the electorate, and that may not have the time, ability or interest to do the job.

6. Mixed Commission

A mixed commission would be composed not only of representatives of political parties but also of persons drawn from bar associations, universities, and from other non-partisan groups.¹⁴⁸ The number of legislators and other public officials would be limited; a majority of the commission would consist of persons not actively engaged in politics. The goal is to give a greater non-partisan cast to the commission. The alleged advantages and disadvantages of this proposal are similar to those applicable to the constitutionally fixed commission.

7. Size, Qualifications and Authority of Commissions

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

A commission with an uneven number of members probably has the advantage of guaranteeing that some plan will be agreed upon and presented to the public. The problem is how the swing-man should be chosen. No matter how non-partisan the tie-breaker may be, his action will inevitably favor one party over the other and thereby place him in an extraordinarily difficult position. In New Jersey, this problem is handled by having the Chief Justice appoint the swing-man.¹⁴⁹

The proposed plan of the New York Constitutional Convention for a bipartisan apportionment commission calls for a five-member body to be selected by the majority and minority leaders of the legislature with the chairman to be appointed by the state's highest court.

Another problem relates to whether any restrictions should be placed on eligibility for membership on the commission. The constitutions of Mich-

igan and Missouri, for example, exclude legislators and other public officials from membership on the bipartisan commission. An alternative may be to limit the *number* of legislators and other public officials on the commission.

B. Procedure If Initial Apportionment Agency Fails to Act.

In order to ensure prompt and effective reapportionment, it has been suggested that, where the legislature or other agency having the initial responsibility for apportionment fails to act, an intermediate agency should be provided before resort is had to the courts. Some states provide that if the legislature fails to reapportion a commission shall have this responsibility.¹⁵⁰

Both the Pennsylvania Bar Association and the Americans for Democratic Action have suggested three-step procedures. The PBA plan would require the Legislature to reapportion and redistrict at the first regular session at which new census figures become available. If the Legislature fails to do so before adjourning, the Governor would be required to call a special session for the sole purpose of drawing an apportionment and districting plan. If this special session fails to reapportion within 120 days after it has been convened, the State Supreme Court, on the petition of the Attorney General, would be required to draft an apportionment and districting plan. Several states now provide that if the legislature fails in its duty to reapportion a court should undertake the task.¹⁵¹

The ADA proposal would require the Governor to convene a 5-member commission whenever the Legislature fails to reapportion by the end of its regular session. The commission would be composed of the Governor and the majority and minority leaders of both houses of the Legislature. A majority of the commission's members would be authorized to adopt a plan. If the commission fails to produce a plan within 120 days after the end of the regular legislative session, the State Supreme Court would have the obligation of reapportioning and redistricting.

One proposal designed to induce the legislature to reapportion is to require it to stay in session until this duty is performed.¹⁵² The League of Women Voters suggests as a sanction to compel reapportionment the withholding of legislators' salaries until an apportionment plan is adopted.

Another approach to ensure reapportionment and redistricting is contained in the recommendation submitted to the Maryland Constitutional Convention. This proposal would require the Governor to submit an apportionment plan to the legislature; the legislature could then adopt either the Governor's plan or a plan of its own. If the legislature fails to act within a prescribed period, however, the Governor's original plan would become law.¹⁵³

C. Role of the Courts

State constitutional provisions relating to legislative representation must meet the requirements of the United States Constitution. Every apportion-

ment plan is, therefore, subject to possible scrutiny by a state or federal court. Aside from this function of judicial review, most observers agree that a court is not the proper agency for preparing apportionment plans. Not only are courts ill-equipped to undertake reapportionment or redistricting because of the lack of a technical staff and technical facilities, but their performance of this function as a regular duty would also be likely to cast them into a "political thicket" and thereby jeopardize the integrity of the judiciary. Nevertheless, as experience in Pennsylvania and other states has shown, the courts may be compelled to draw up apportionment or districting plans where the other branches of government having the initial responsibility have failed to act.

D. Apportionment Agencies in Other States

More than three-fourths of the states now vest the responsibility for apportionment and districting in the legislature.¹⁵⁴ A number of these states provide for the possibility that the legislature may fail to discharge this responsibility. Some states give secondary responsibility to reapportion and redistrict to a commission.¹⁵⁵ In Iowa and Maine, the highest court of the state becomes the apportionment agency if the legislature fails to act. Oregon places this responsibility on the Secretary of State if the legislature has not performed the task.

Various states have given a commission the initial responsibility for apportionment and districting.¹⁵⁶ In Michigan and Missouri, the State Supreme Court reapportions if the commission fails to act. In Alaska and Hawaii, the Governor has this initial responsibility. In Arizona the Secretary of State apportions legislative seats to the counties, which then divide their respective areas into legislative districts.

E. Frequency of Apportionment

Just as the United States Constitution provides for a decennial reapportionment of the United States House of Representatives,¹⁵⁷ most state constitutions call for the reapportionment and/or redistricting of legislatures after each federal census.

Although the United States Supreme Court said that *decennial* reapportionment is not a constitutional requirement, it has also said that "decennial reapportionment appears to be a rational approach to readjustment of legislative representation" and that "compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation."¹⁵⁸ The Court added:

"We do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable, but if reapportionment were accomplished with less frequency it would assuredly be constitutionally suspect."¹⁵⁹

In *Burns v. Richardson*,¹⁶⁰ in which the Supreme Court permitted the use of registered voters as the population base, the Court suggested that more frequent reapportionment—every four or eight years—might be appropriate.

There is a movement in Congress to have a census taken every five rather than every ten years. A five year census raises the question of whether it is desirable to reapportion more frequently than once in every ten years. More frequent reapportionment may not be desirable due to its possible effect on the legislators' tenure and on the stability of the legislature in general. It may be well not to alter legislative districts more than once a decade unless there is a federal constitutional mandate to do so.

Most states require reapportionment after each federal decennial census. A few states provide for reapportionment and/or redistricting every 10 years but not immediately after the census. (Illinois, every 10 years after 1963; Florida, every 10 years starting with 1965.) Utah reapportions after each federal *and state* census; a state census was commenced in 1905 and has been conducted every 10 years thereafter, thus Utah reapportions every 5 years. Maine requires reapportionment at least once within every period of no less than 5 years and no more than 10 years.

The New York and Maryland proposals provide for redistricting after each federal decennial census, as do the recommendations made to the Pennsylvania Constitutional Preparatory Committee.

Notes to Part 5

133. The United States Supreme Court seems to recognize the power of a state to determine the apportionment agency. *Scott v. Germano*, 381 U.S. 407 (1965).

134. See note 12 and accompanying text, *supra*, for discussion of the terms "apportionment and districting." These terms, and the terms "reapportionment" and "redistricting," are used interchangeably in the text.

135. In the first *Butcher v. Bloom* case in 1964, where the State Supreme Court gave the Legislature another opportunity to redistrict, the Court said:

"The task of reapportionment is not only the responsibility of the Legislature, it is also a function which can be best accomplished by that elected branch of government. The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the legislative process, make it the most appropriate body for the drawing of lines dividing the state into senatorial and representative districts" 415 Pa. 438, 461, 203 A. 2d 556, 569 (1964).

136. "A legislature both houses of which are controlled even narrowly by one party will not exercise much bipartisan fairness in reapportioning unless the governor with his veto power is of the other party.

* * *

"A major drawback of vesting all reapportionment authority in the legislature alone is that a bipartisan apportionment then can never eventuate except through the unpredictable circumstances of divided government, i.e., possession either of one house or of the governorship by the opposition party Without such divided government, a strict partisan approach can be expected. Also, even if there be a divided government when the time comes to perform the reapportionment function, there is no guarantee of speedy accomplishment of reapportionment. If the political forces deadlock rather than nego-

tiate a bipartisan apportionment, the way will then be open to unpredictable judicial action on apportionment." From chaps. 13 and 14 of a forthcoming book by Professor R. G. Dixon, Jr., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS*, to be published by Oxford University Press, New York, in the Spring of 1968.

137. Boyd, William J. D., *Changing Patterns of Apportionment*, National Municipal League (Sept. 1965).

138. See Appendix A.

139. In some states, the Secretary of State is an elective officer.

140. "Under this method [apportionment by partisan elected officials], as in vesting apportionment exclusively in the legislature itself, far too much depends on the fortuitous factor of which political party controls the apportionment machinery at the critical point when apportionment must be accomplished. . . .

* * *

"... Functionally viewed, there seems to be little distinction between accomplishing reapportionment by the device of a partisan commission in which the governor is the dominant figure . . . and vesting exclusive power in the governor. None of these systems commend themselves to one concerned with maintaining bases for effective two-party competition as well as accomplishing a periodic apportionment." See note 136, *supra*, at ch. 14.

141. National Municipal League, *Model State Constitution* (6th ed. 1963). See appendix D.

142. Mich. Const. art. IV, §6; N.J. Const. art. IV, §3.

143. Mo. Const. art. III, §§2, 7. The Missouri provision is cited with approval by the Committee for Economic Development, *Modernizing State Government* (July 1967). The C.E.D. stated:

"The role of the legislature should be limited to amendment of the proposed plan within a specified time, relieving that body—at least initially—of painful decisions certain to affect individual members adversely. Under this plan judicial intervention would become the rare exception." (p.37)

144. Statement of Philip P. Kalodner, Vice-Chairman and Chairman, State Affairs Committee, Southeastern Pennsylvania Chapter of Americans for Democratic Action, before the Legislative Apportionment Committee of the Preparatory Committee for the Constitutional Convention.

145. *Op. cit. supra* note 137.

146. For text of New York proposal, see Appendix B.

147. This proposal was contained in a constitutional amendment introduced in the New York Legislature in 1962. See Report on State Government of Temporary State Commission on the New York Constitutional Convention 66, (1967).

148. McKay, *Reapportionment: the Law and Politics of Equal Representation*, 270, the Twentieth Century Fund (1965).

149. N.J. Const. art. IV, §3, pars. 1 and 2, as adopted November 8, 1966.

Professor R. G. Dixon, Jr., suggests that a more perfect and more enduring form for guaranteeing completion of the apportionment function in fair fashion may be the device of a bipartisan commission with the tie-breaker appointed by the entire bench of a state's highest court, as has been suggested for New York. See note 136, *supra*, at ch. 14.

150. Ill. Const. art. IV, §8.

151. Io. Const. art. III, §35; Me. Const. art. IV, Sec. 3, par. 1.

152. The Report of the Woodside Commission (1959) 22, recommended that, if the Legislature should fail to reapportion during its regular session, the Governor would call a special session and the Legislature could not adjourn *sine die* until it had completed redistricting.

Similarly, the Florida Constitution, art. VII, Sec. 3, provides that if the Legislature fails to redistrict, the succeeding session of the Legislature should do so at a regular or special session. If this second session of the Legislature also fails, the governor calls an extraordinary session which may not adjourn until a valid redistricting plan is established.

153. Interim Report of the Constitutional Convention Commission of Maryland, p. 56 (1967). See Appendix C.

For proposal of the Rhode Island Constitutional Convention, see note 88, *supra*.

154. See Appendix A.

- 155. Ibid.
- 156. Ibid.
- 157. U.S. Const. art. 2, §2, Cl. 3.
- 158. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).
- 159. Id. 584.
- 160. *Burns v. Richardson*, 384 U.S. 73 (1966).

Proposals for Legislative Representation

Contrary to the generally accepted principle that state constitutions should be drafted in broad form in order to allow for maximum flexibility, it has been suggested that greater detail may be required in the area of apportionment and districting.¹⁶¹ The experience in Pennsylvania and other states prior to *Baker v. Carr* has shown that even where the state constitution required periodic apportionment, the legislatures rarely reapportioned promptly or effectively. The concern for greater specificity is thus more than academic.

On the other hand, as the federal constitutional standards for legislative apportionment develop, their recitation in a state constitution, except in a general way, is not essential. The standards will apply in any event. In fact, detailed standards in a state constitution may be troublesome and confusing as the United States Supreme Court further refines its guidelines for apportionment and districting. It may be desirable, however, to specify both the agency responsible for periodic reapportionment and the procedure to follow if such agency fails to act.

A number of proposals for revising the apportionment and districting sections of the State constitution have been made in Pennsylvania from time to time. Apportionment and districting proposals have also been developed in constitutional conventions being held in other states in 1967—New York, Maryland and Rhode Island.^{161a} New York's convention approved a new article on the legislature which contains revised districting provisions. (Appendix B; the New York proposal is part of the revised constitution to be submitted to the electorate.) In Maryland an interim report submitted in May 1967 by a Constitutional Convention Commission proposes a draft article on the legislative branch containing new features for legislative representation (Appendix C). The districting section of the Model State Constitution formulated by the National Municipal League is set forth in Appendix D.

The earlier groups which studied constitutional revision in Pennsylvania, the Sproul Commission and the Earle Commission, made no proposals for changes in Article II, Sections 16, 17 and 18.

A. Woodside Commission¹⁶²

In its 1959 report, the Woodside Commission directed its principal recommendation on this subject to the method of compelling redistricting after every federal decennial census. It proposed that if the Legislature failed to redistrict both houses before the close of the regular session at which census figures are first available, the Governor would be required to call a special session immediately for the sole purpose of redistricting. The General Assembly would be prohibited from adjourning *sine die* until it completes this task.^{162a}

The Woodside Commission also recommended elimination of the Article II, Section 17 provision limiting the number of senators from any city or county to a maximum of one-sixth of the total number of senators.

B. Pennsylvania Bar Association

The first report of the Pennsylvania Bar Association's "Project Constitution," issued in 1963,¹⁶³ followed the Woodside Commission recommendations for the elimination of the restriction on the maximum number of senators from any city or county and the requirement for the call of a special session in the event the General Assembly should fail to redistrict for both houses after a decennial census.

A stronger alternative proposal for compelling redistricting, also suggested by the Pennsylvania Bar Association, contained the following features:¹⁶⁴

1. The General Assembly would be required to redistrict both houses within the first six months of the calendar year following the decennial census.
2. If the General Assembly should adjourn a regular session within the foregoing period without redistricting, the Governor would be required to call a special session to deal with the subject.
3. If the General Assembly should fail to redistrict within the six-month period, the task would be vested in an Apportionment Commission consisting of the Governor, who would be chairman, the Lieutenant Governor, the Auditor General, the State Treasurer, and the Speaker of the House of Representatives. The Governor would be required to convene the commission within 10 days after the end of the six-month period.
4. The Apportionment Commission would be required to complete its task within three months after the end of the six-month period. The districting plan drawn by the commission would have the effect of law when certified and filed with the Secretary of the Commonwealth.

5. The Supreme Court would have original jurisdiction to compel performance by mandamus or otherwise of any duty imposed by this proposal.

The report of the P.B.A. committee dealing with legislative apportionment stressed the importance of the problem:

"On a subject so fraught with political, sociological, and demographic complexities, unanimity of view was not to be expected. On one point, however, there was complete and emphatic concurrence: a constitutional way must be found to implement the constitutional mandate for periodic reapportionment."¹⁶⁵

While the legislative apportionment committee at that time favored the Apportionment Commission approach, it recommended this proposal as an alternative only because it considered it to be "quite controversial."

The committee rejected the suggestion that the pay and allowances of legislators be withheld if they failed to redistrict within one year. The committee said that "reluctance to go before the Legislature with a proposal to withhold pay and allowances, the paucity of precedents among states on the point, and the possibility of hardship to members of the Legislature who had tried to do their duty" were among the reasons for not following an earlier committee recommendation for withholding pay.¹⁶⁶

A later report of the P.B.A. Special Committee on Project Constitution, issued in 1966, again recommended elimination of the restriction on the maximum number of Senators allotted to any city or county and the removal of the provision in Article II, Section 17 that each county shall be entitled to at least one Representative.¹⁶⁷ This followed the United States Supreme Court's ruling in the 1964 reapportionment cases that representation in both houses of the State Legislature must be based on population equality.¹⁶⁸

The 1966 P.B.A. report also resubmitted the proposal for calling a special session if the General Assembly should fail to redistrict during its regular session following the decennial census. No reference was made in this report to the earlier alternate recommendation for an Apportionment Commission.

The proposals submitted by the Pennsylvania Bar Association to the Preparatory Committee for the Pennsylvania Constitutional Convention generally followed the prior recommendations made by the Association.¹⁶⁹

The P.B.A. proposal was endorsed by A Modern Constitution for Pennsylvania, Inc.¹⁷⁰

The principal features of the Revision to Article II, Sections 16, 17 and 18 submitted by the P.B.A are as follows:

1. The number of senators and representatives would be fixed at 50 and 210, respectively. Prior to the court-ordered redistricting in 1966, the size of the house fluctuated at slightly over 200, depending on the operation of the fractional remainder formula of Section 16 of Article II. While asserting that the convention may change the size of the Legislature, the P.B.A. considers it wise to keep the membership close to a number to which the people are accustomed.

2. Both houses would be composed of single-member districts.

While there is no flat constitutional prohibition against multi-member districts, the federal and state courts have indicated that the use of multi-member districts would be closely scrutinized and would be approved only if there are compelling reasons for their establishment.¹⁷¹

3. Senate and House districts would be required to be composed "of compact and contiguous territory as nearly equal in population as may be."

The requirement that districts be "contiguous and compact" is traditional and is intended to prevent gerrymandering. The term "contiguous" is fairly precise, although the proposal recommended to the Maryland Constitutional Convention would substitute the word "adjoining" for "contiguous" but retain the word "compact."¹⁷²

"Contiguity" has been defined as the "requirement that each district be a single land parcel, in other words, that a person can travel from any one point in the district to any other point without going through another district."¹⁷³

The term "compact" is not so precise. It has generally been defined in terms of symmetry:

"Compact generally means consolidated rather than spread out, that is, square or circular rather than long and skinny; however, no precise geometric measure of compactness has been widely accepted."¹⁷⁴

Professor Robert G. Dixon, Jr., of the George Washington University School of Law, believes that the standard of making legislative districts "as nearly equal in population as may be" may be inconsistent with the later restriction proposed by the P.B.A. that "unless absolutely necessary," no ward, borough or township shall be divided in forming a district. In other words, the limited flexibility afforded by the recognition of political subdivision boundaries could be offset by a strictly mathematical application of the "as nearly equal . . . as may be" formula. Professor Dixon recommends the substitution of the phrase "of substantially equal population," the language of the test laid down in *Reynolds v. Sims*.¹⁷⁵ He believes that the substitution of this language would provide greater flexibility, within constitutional limits, for giving weight to political subdivision boundaries and to other permissible non-population factors.

The Pennsylvania Supreme Court has interpreted a requirement in the Philadelphia Home Rule Charter that councilmanic districts must be as nearly equal in population "as possible" to mean substantially equal population.¹⁷⁶ If this construction is followed, the problem posed by Professor Dixon may not arise.

The comparable language recommended in New York and in Maryland is "as nearly equal as practicable" in population. This language, also used in *Reynolds v. Sims*,¹⁷⁷ may provide flexibility for deviating from strict population equality insofar as constitutionally permitted, if this should be deemed desirable.

4. In order to give recognition to local government boundary lines, no "ward, borough or township" would be divided unless "absolutely necessary."

The same restriction should probably apply to cities and counties.

5. The population base for apportionment would be "the officially certified figures of the United States census," in other words, total population.

As previously indicated, other measures of population such as "voters" (qualified, registered or actual), or "citizens," may be constitutionally proper. The P.B.A. proposal does not make specific reference to the *decennial* census figures although that was no doubt intended.

6. The P.B.A. recommends direct resort to the State Supreme Court if the Legislature fails to act in either a regular or special session following the census.^{177a}

If the Legislature should fail to redistrict within 120 days after the Governor has convened a special session, the Supreme Court would be required to divide the state into legislative districts "upon petition of the Attorney General." Should this recommendation be followed, it would be well to specify that the duty of the Attorney General to petition the Supreme Court is mandatory in order to avoid any possible interpretation that his power is discretionary.

In performing the districting function, the Supreme Court would be required to appoint a master or a board of masters to take testimony and make recommendations to the Court.

The alternate proposal for an Apportionment Commission made in the 1963 Report on Project Constitution is not part of the P.B.A.'s current recommendations for revision.

7. The new districts would be used at the first primary election occurring 60 days or more after a reapportionment law has become effective, with an appropriate adjustment of the legislators' terms.

The language of this portion of the PBA proposal is as follows:

"(e) At the first primary election occurring 60 days or more after a new apportionment has become effective, senators and representatives shall be nominated and, notwithstanding the provisions of Section 2 of this article, they shall be elected at the following municipal or general election.

"(f) Notwithstanding the provisions of Section 3 of this article, the terms of any representatives elected at a municipal election shall be three years, the terms of senators elected at such election from odd-numbered districts shall be three years, and the terms of senators elected at such election from even-numbered districts shall be five years. At the expiration of these terms all senators and representatives shall be elected at general elections, representatives for two years, and senators for four years."

Sections 2 and 3 of Article II of the Constitution provide for the election of members of the Legislature at the general election held in even-numbered years and for terms of four years for Senators and two years for Representa-

tives. The P.B.A. recommendation would modify these constitutional provisions by permitting the election of legislators in *municipal* elections held in odd-numbered years and by altering the terms of office. In view of the fact that Sections 2 and 3 of Article II of the Constitution are not before the Convention under Act No. 2 of 1967, there is a question as to whether the Convention would be empowered to adopt this part of the PBA proposal.

The PBA's rationale for adjusting terms might be clarified by the following example. Senators elected in a census year (1970), or two years prior thereto (1968), would probably be required under the PBA proposal to stand for election again in the next municipal election (1971) even though they had been elected for four years. To meet this problem, the P.B.A. proposes to adjust terms for the first election after reapportionment (e.g., 1971) by providing three-year terms for Representatives and three or five-year terms for Senators depending on whether they are elected from even-numbered or odd-numbered senatorial districts. This scheme would make it possible to return to the election of Senators and Representatives in *general* elections and to the resumption of fixed tenure during the decade before the next census.

The P.B.A. proposal seems to presume that reapportionment must become operative at the first election following the census (e.g., 1971) even though members of the Legislature are elected in even-numbered years (1972). The United States Supreme Court has not mandated redistricting in the year following the federal census. Protracted delay, however, is subject to judicial scrutiny.

If the new districts were to be used at the first *general* election following the census (e.g., 1972), this would eliminate the need for adjusting the tenure of Representatives. Adjustment of senatorial terms might still be necessary but only for half of the Senators.

While the courts and the Legislature undoubtedly have the power to curtail or adjust legislative terms in order to meet federal requirements for equitable representation,¹⁷⁸ it may be preferable to deal with the problem in the State constitution. An alternative to the PBA proposal, therefore, may be to give the General Assembly express authority to adjust terms of office where required by redistricting. Since the tenure of legislators is fixed in a section of the Constitution not before this convention, one may question whether the convention may indirectly alter tenure by providing for a system of representation that requires such alteration. It can be argued that, if the power to adjust terms of office is essential to enable the State to comply with federal constitutional requirements relating to districting, this power is tacitly granted to the Convention.

Some states minimize this problem by electing members of both houses for concurrent two or four year terms. The New York Constitutional Convention has proposed that the members of both houses be elected for two-year terms at elections held in even-numbered years. The interim report of the Maryland Constitutional Convention Commission recommends four-year

terms for members of both houses. The Model State Constitution proposed two year terms for all members of the legislature.¹⁷⁹

8. Districting plans adopted by the Legislature would become effective when the State Supreme Court has finally decided any appeal or when the last day for filing an appeal has passed and no appeal has been taken. Any redistricting made by the Supreme Court itself would become effective immediately.

C. Other Proposals

A.D.A.

The principal features of the proposal submitted by the Southeastern Pennsylvania Chapter of the Americans for Democratic Action are:¹⁸⁰

1. A 50-member Senate and a 210-member House.
2. Compact districts of contiguous territory "as nearly equal in population as may be."
3. Single-member districts.
4. "Unless division shall be absolutely necessary, no municipal or county boundary shall be divided in the formation of a district."
5. A requirement of a "maximum 10% deviation above and below the average [number of inhabitants per] district for the largest [most populous] and smallest [least populous] district respectively." This would "insure that the ratio of the largest district to the smallest district will not exceed 1.22:1."

The ADA points out that if the courts should establish a stricter criterion for population equality, "no harm will have been done by virtue of the existence of a constitutional limitation; while on the other hand should the courts either fail to establish a judicial limitation on deviation or should a less stringent limit be established . . . , the 10% limitation would be effective to insure that districts are as equal [in population] as may be." The ADA stated that "current House apportionment grossly violates the 10% rule."

6. The initial agency for redistricting should be the Legislature. Accompanying this recommendation is the following rationale:

"We recognize that apportionment by the Legislature tends to result in districts which are safe or safer for the existing legislators who perform the reapportionment, but we believe the advantage so obtained of a continuity of legislators outweighs the disadvantage of a somewhat less equal apportionment than might occur should the function be performed by an independent commission. The constitutional limitations we have proposed should sufficiently restrict the Legislature to assure that no gross inequality will occur."

7. The ADA recommends an intermediate step if the Legislature fails to reapportion before the end of a regular session. The Governor would be required to appoint a five-member commission, composed of himself and the majority and minority leaders of the Senate and the House. A majority of the commission could redistrict the state.

Should the commission fail to act within 120 days after the end of the legislative session (presumably meaning *sine die* adjournment), the Supreme Court would have the duty to redistrict.

If the Supreme Court should find a redistricting plan adopted by the Legislative or by a commission to be invalid, it would have power to redistrict the State.

The ADA believes judicial action should be utilized only as a "last resort" and that "judges should be relieved if at all possible of the problems of the political thicket."

AFL-CIO

In its testimony before the Preparatory Committee,¹⁸¹ the Pennsylvania AFL-CIO urged that "in the area of apportionment, specificity should be an exception to the general rule of draftsmanship" of state constitutions in "general terms . . . which allow considerable flexibility." "We take this position," the AFL-CIO said, "because of the history of past action and inaction by the state legislature."

The AFL-CIO stated further that the "keys to a democratic reapportionment process are clear and enforceable standards." The specific standards recommended by the AFL-CIO were:

"1. *Senate and House districts should be created on the basis of a substantially equal population standard or ratio.* Our present legislative plan was drawn largely with adherence to this standard. Invoking the use of this yardstick means the test of adequacy of any redistricting plan can be applied with ease since the criterion is largely mathematical. Again, we support the 'one man-one vote' ruling on population because the values of any other standards are difficult to justify.

"2. *The population standard should be strengthened by a stipulated variance above or below the norm of 10%.* This means that the highest ratio of population to representatives of the same House should not exceed the lowest ratio by more than 20%. It is felt that this deviation affords sufficient latitude to comfortably form or carve out legislative seats. The 10% variance is in line with a present proposal in Congress for establishing a permitted departure from the norm.

"3. *All legislative districts should be formed out of contiguous territory.* Presently, all Senate and House districts meet this test and are composed of adjoining municipalities or counties. This has not been a problem.

"4. *Each legislative district should be compact.* Although this is a very important safeguard against gerrymandering and required by the present constitution, it is neither grossly ignored or stretched out of meaning. Every legislative district is contiguous but not all districts are 'compact.' Guidelines as to the application of 'compact districts' should be set forth in the amended constitution. Many districts are not packed solid, compressed, or closely consolidated, but rather their territories are diffuse, stretched, and form salamanders. To be compact, legislative districts should tend toward the smallest possible boundary lines in proportion to the area enclosed.

"5. *Each legislative district should be assigned a number which should start at a common geographical location and be allotted in a normal, logical sequence or pattern.*"

In explanation of this point, the AFL-CIO said:

"The Senate districts are numbered in a helter-skelter arrangement The arbitrary assignment of numbers can lead to a very inconspicuous, sophisticated or refined, if not clever and politically expedient, type of gerrymandering."

"6. *We would urge the convention to adopt a provision calling for a division of the state into 50 senatorial and 200 representative districts and providing that each Senate district be subdivided into four coterminous House districts.*"

According to the AFL-CIO, the following advantages would flow from adoption of coterminous districts:

"1. It would simplify the creation of the House district by removing certain temptations to extend districts without regard for population, contiguity, or compactness.

"2. It would ease the administration and management of elections by keeping the ballot as short as possible so as not to diffuse public scrutiny. Furthermore, the opportunity of the electorate to participate in democracy and to more easily recognize their representatives would be enhanced.

"3. Coterminous districts will strengthen the links of inter-relationship between specific Senate-House delegations and work toward an undiluted and more meaningful representation of the constituency. Responsibility and rapport between the representative and the constituent would be maximized.

"4. This guideline would strengthen and simplify the judicial function by providing more precise standards as to the composition of the district."

As to the proper agency to perform the apportionment function, the AFL-CIO supported the PBA proposal for apportionment by the State Supreme Court if the Legislature fails to redistrict during its regular or special session.

League of Women Voters

The League of Women Voters of Pennsylvania generally supported the revisions proposed by the PBA.¹⁶¹ The League also referred to the possibility of initial or back-up districting by a commission although it did not directly endorse any specific proposal.

The League's general approach to revision of the State Constitution favors "a simple, uncluttered document setting forth the structure of government and the basic principles for its operation. . . . As constitutions are a statement of fundamental law, the best wearing have usually been the least complicated."

Notes to Part 6

161. See testimony of Harry Boyer, President of the Pennsylvania AFL-CIO, before the Constitutional Convention Preparatory Committee.

161a. For Rhode Island's proposals on apportionment, see note 88, *supra*.

162. See report on the Commission on Constitutional Revision (1959).

162a. The Scranton Commission, reporting in 1964, made a similar recommendation. Report of the Governor's Commission on Constitutional Revision (1964).

163. 34 P.B.A. Quart., No. 2A, 147 et seq. (1963).

164. *Id.*, 228.
165. *Id.*, 257.
166. *Id.*, 261.
167. See Report of the Special Committee on Project Constitution to the Annual Meeting of the Pennsylvania Bar Association, January 1966.
168. See note 21, *supra*.
169. See testimony of William A. Schnader before the Preparatory Committee.
170. See testimony of Robert Sidman, the organization's Executive Director, before the Preparatory Committee.
171. See Part 4 *F supra*.
172. See Appendix C *infra*.
173. *Representation and Apportionment* 26, Congressional Quarterly Service 1966.
174. *Ibid*.

Professor Ruth C. Silva, of Pennsylvania State University, has described compactness from the viewpoint of a political scientist.

"The district should be in one piece; it should be 'compact' (a word formerly defined in terms of topography and the means of travel and ease of communication between various parts of the district) and, as nearly as practicable, it should have common social, political and economic interests.

"Most views and measures of compactness have been conceived solely in geographic terms and have ignored population distribution and factors such as community of social, political and economic interest. Recently, however, James B. Weaver and Sidney W. Hess, Engineers at the Atlas Chemical Industries, have devised a measure of 'compactness' that indirectly recognizes such 'area factors' as community of interest as well as topography and the means of transportation. The Weaver-Hess plan enlists the aid of a computer in the districting process.

"The Weaver-Hess formula measures the proximity of the district's population to the district's center and aims to construct districts of maximum compactness around population centers. The closer the population is to the district's center, the more compact is the district. Since topography and the means of transportation often influence the distribution of population, and since population patterns often coincide with interest patterns, the Weaver-Hess concept of compactness tends to avoid splitting communities of economic or other interests to the extent that these interests coincide with areas of high or low population densities.

"This new concept of compactness is essentially a 'center of population gravity' idea. It is based on the moment-of-inertia principle and uses the statistical technique of least squares, which locates the line of 'best fit' to a series of data points in order to minimize the sum of squared distances from the points to the line. This 'moment of inertia' measure utilizes both area and population. . . .

"This concept of compactness suggests methods of area and demographic analysis that social scientists have long used successfully in drawing the boundaries of marketing, school and service districts. . . ." Silva, *Reapportionment and Redistricting*, Scientific American (Nov. 1965) 20, 26, 27.

175. 377 U.S., 533, 568 (1964)
176. See note 73, *supra*
177. 377, U.S. 533, 577 (1964)
- 177a. For comparable proposal made by the Rhode Island Constitutional Convention, see note 88, *supra*.
178. This power was exercised by the Pennsylvania Supreme Court when it redistricted the State in 1966. The Court shortened the term for half of the Senators to less than four years by requiring all 50 Senatorial seats to be filled in the 1966 election and by providing that half of the Senators would be elected for two-year terms. *Butcher v. Bloom*, 420 Pa. 305, 216 A. 2d 457 (1966). The Court said:
"It is well established that existing de facto office holders possess no vested tenure in public office. See *Hughes v. WMCA* and *Davis v. Mann*, 379 U.S. 694, 85 S. Ct. 713, 13 L. Ed. 2d 698 (1965) (per curiam)." 420 Pa. at 310, n.10, 216 A. 2d at 459, n. 10.
179. See Appendices B, C and D *infra*.

180. See testimony of Philip P. Kalodner, appearing for the ADA group, before the Preparatory Committee.
181. See testimony of Harry Boyer, President of the Pennsylvania AFL-CIO, before the Preparatory Committee.
182. See testimony of Mrs. Robert Farlow, President of the League of Women Voters of Pennsylvania, before the Preparatory Committee.

Local Government Apportionment

A. The Constitutional Background

The applicability of the "one-man, one-vote" principle to the apportionment of local legislative bodies, although acknowledged by a majority of the lower federal courts and state courts which have considered the issue, and by most commentators, has not been expressly decided by the United States Supreme Court.¹⁸³

In four cases dealing with local apportionment problems decided in 1967,¹⁸⁴ the Supreme Court avoided giving a direct ruling on this issue. Two of the appeals were disposed of on the basis of lack of jurisdiction.¹⁸⁵ A third involved a county board of education comprised of one member for each local school board regardless of the population of the local school district. The Court concluded that the county school board was essentially an administrative rather than a legislative agency so that the one-man one-vote principle was not applicable.¹⁸⁶

In the fourth case, the Court held that even if the one-man one-vote rule does govern local apportionment it was not applicable in the particular situation. The eleven members of a city council were elected *at large*, with the requirement that seven of the eleven members each reside in a different district. The Court said that this modified at-large plan did not violate the Fourteenth Amendment even though the seven districts ranged in population from 733 to 29,048.¹⁸⁷

The Pennsylvania Supreme Court, in the 1967 case of *Newbold v. Osser*,¹⁸⁸ reviewed a challenge to the redistricting of the City Council of Philadelphia and decided the case on the merits. The opinion in *Newbold*, issued just two days after the United States Supreme Court decided the four local apportionment appeals, did not discuss the question of whether the Fourteenth Amendment equal protection clause governs local apportionment. The Pennsylvania Supreme Court articulated the standard tests developed since *Baker vs. Carr*. The Court began its opinion with the somewhat cryptic foot-

note that, "Our disposition is consistent with the opinions of the Supreme Court of the United States filed May 22, 1967, . . ." ¹⁸⁹ citing the four cases in which the applicability of the equal protection clause had, of course, been left open.

The Philadelphia Home Rule Charter provides for a City Council of seventeen members, with seven members elected at large and ten elected from single-member districts, each district composed of "a ward or contiguous wards containing as nearly as possible the population factor obtained by dividing the City's population at the preceding decennial census by ten."

The districting plan adopted by the City Council resulted in deviations from the norm ranging from 7.8% for the most populous district to 6.9% for the least populous, for a population variance ratio of 1.15 to 1.

The parties contesting the Philadelphia districting ordinance proposed a plan which would result in the maximum deviation of 4.7% for the least populous district, for a population variance ratio of 1.13 to 1. They argued that the phrase "as nearly as possible" in the Home Rule Charter imposed a higher standard of equality of population than the requirements of the Federal Constitution; hence, the Court was bound to adopt the plan resulting in greater population equality.

The Pennsylvania Supreme Court held that "as nearly as possible" means the same as the "as nearly equal in population as may be" language in Article II, Section 16 of the Pennsylvania Constitution, and that both of these tests are the same as the equal population requirement of the reapportionment cases:

"Thus in light of the importance of permitting reapportionment by the Legislature wherever possible, we certainly do not think that the 'as nearly as possible' language of the Charter is to be read to permit judicial interference merely because an alternative plan is proposed whose average variation from the ideal is one half of one percent less than the Legislature's plan and whose maximum ratio is only 2% closer to mathematical perfection than the Legislature's plan. So to hold would invite a multiplicity of attacks on redistricting legislation by disgruntled factions based on what amounts to de minimis approaches to mathematical equality." ¹⁹⁰

The Court also said that the 1.15 to 1 population variance ratio and the deviations from the norm

"... do not deviate enough from the substantial equality of population tests laid down in this state's or federal reapportionment decisions to require that inquiry into compactness, preservation of historical or physical boundaries, or gerrymandering which inquiry is proper when the population deviation is substantial." ¹⁹¹

The Court then proceeded to reject a charge of gerrymandering on the ground that gerrymandering per se, i.e., unrelated to inequality of population among districts or to lack of compactness or contiguity, "does not, as far as is known, raise any cognizable federal constitutional claim against reapportionment legislation" nor any "cognizable state constitutional claim." ¹⁹²

B. Municipal Legislative Bodies

Members of local governing bodies in the United States are generally elected in four ways:¹⁹³

1. Nomination and election by districts or wards;
2. Nomination and election at large;
3. Nomination and election of part of the council or board at large and the remainder, usually the majority, by districts or wards;
4. Nomination by districts or wards and election at large.¹⁹⁴

More than 62% of American cities with populations of over 5,000 elect all councilmen at large. The ward system is quite prevalent in the very large cities and in the small ones. Most commission cities, and nearly three-fourths of council-manager municipalities, elect councilmen at large, while only 44% of the mayor-council cities do so. Approximately 17% of American cities elect councilmen by a combination of the at large and ward methods.¹⁹⁵

The present method of electing legislative bodies in the various classes of political subdivisions in Pennsylvania is shown in Table 3.¹⁹⁶

In all counties, cities (except Philadelphia), and townships of the second class, the election of the boards or councils is at large.

Philadelphia's seventeen member council is made up of seven councilmen elected at large and ten elected from districts. Each elector votes for one dis-

TABLE 1. METHODS OF COUNCILMANIC ELECTIONS IN
CITIES OVER 5,000*

<i>Form of Government or Population Group</i>	<i>Method of Election (%)</i>			
	<i>Number of Cities Reporting</i>	<i>At Large</i>	<i>At Wards</i>	<i>Combination of Wards & At Large</i>
FORM OF GOVERNMENT				
Mayor-Council	1,543	44	31	25
Commission	236	95	5	0
Council-Manager	1,127	74	13	12
Town Meeting	25	96	0	4
Rep. Town Meeting	21	86	14	0
POPULATION GROUP				
Over 500,000	26	42	27	31
250,000 to 500,000	27	67	7	26
100,000 to 250,000	94	67	16	18
50,000 to 100,000	229	55	20	25
25,000 to 50,000	465	65	18	17
10,000 to 25,000	1,089	64	19	17
5,000 to 10,000	1,122	60	25	15
All Cities over 5,000	3,052	62	21	17

*International City Managers Assn, *Municipal Year Book-1967*, Chicago, 1967.

TABLE 2 METHOD OF ELECTING GOVERNING BODIES IN BOROUGHs, CITIES AND TOWNSHIPS
IN PENNSYLVANIA, BY POPULATION GROUPS (LATE 1950's) *

Population Group	Boroughs		Cities		1st Cl. Twps			2nd Cls. Twps	Totals		
	A-L	Wards	A-L	Comb'n.	A-L	Wards	Comb'n.	A-L	At Large	Wards	Comb'n.
Over 1,000,000				1							1
500,000 to 1,000,000			1						1		
100,000 to 250,000			4						4		
50,000 to 100,000			9			1			9	1	
25,000 to 50,000	1	2	8			5			9	7	
10,000 to 25,000	10	37	24			17		10	44	54	
5,000 to 10,000	36	92	3		7	14	5	62	107	106	5
Under 5,000	679	85			17	3	6	1423	2117	87	5
Total	726	216	49	1	24	40	11	1495	2291	255	11

*Source: Charles F. LeeDecker, *Systems for Electing Governing Bodies of Pennsylvania Local Governments*, Institute of Local Government, Pa. State University, undated.

TABLE 3. METHOD OF ELECTING LOCAL LEGISLATIVE BODIES IN PENNSYLVANIA

Classification	Mandated Form of Government	Legislative Body		
		Number	How Elected	Term
Counties	Commission	3	At large	4 years Concurrent
First Class Cities Philadelphia (under <u>Home Rule Charter</u>)	Strong Mayor-Council	17 Councilmen	10 by district; 7 at large (Minority Representation)	4 years Concurrent

Second Class Cities (Pittsburgh)	Strong Mayor-Council	9 (5 plus one for every 75,000 pop. over 200,000, up to 500,000)	At large	4 years overlapping
Second Class A (Scranton)	Strong Mayor-Council	5 Councilmen	At large	4 years overlapping
Third Class Cities (Optional Charter Act) (Optional Charter Act)	Commission	4 Councilmen	At large	4 years overlapping
	Strong Mayor-Council	5, 7, or 9 Councilmen	At large	4 years overlapping
	Council-Manager	5, 7, or 9 Councilmen	At large	4 years overlapping
Boroughs	Weak Mayor-Council May elect by ordinance to operate under a Council-Manager Form	7 Councilmen (3 or 5 with Court approval if under 1,000 population or 1 or 2 from each ward if by ward. Maximum of 13 wards.	At large or by wards.	4 years overlapping
First Class Townships	Modified Commission. (May elect by ordinance to operate under a Council-Manager Form.)	Board of Commissioners Minimum of 5	At large or by ward or combina- tion if divided into less than 5 wards. Maximum of 15 wards.	4 years overlapping
Second Class Townships	Commission. May elect by ordinance to operate under a Council-Manager form.	Board of Supervisors—3 if over 10,000 pop. may increase to 5 with Court approval.	At large	6 years overlapping

trict councilman and five councilmen at large.¹⁹⁷ This limited voting plan assures minority party representation. Limited voting is also followed in counties where, by constitutional requirement, each elector votes for only two of the three county commissioners to be elected.¹⁹⁸

Boroughs and townships of the first class have the option of electing their councilmen and commissioners either by wards or at large.

A majority of the boroughs elect their councilmen at large. Where wards are used, each ward may elect one or two councilmen.¹⁹⁹ No other class of political subdivision in Pennsylvania provides for multi-member districts and the practice is not common in local government representation in the United States.

The 1966 Borough Code requires revision of ward lines where any ward varies from the average ward population by 50 per cent or more:

"If the latest official census of the United States shall disclose that in any borough the population of any ward exceeds by fifty per cent or more or is fifty per cent or more less than the average population of all the wards of such borough, the court of quarter sessions, upon application of the borough council or, in case of failure of the council so to apply, upon petition of any citizen of the borough, shall adjust the boundaries of any or all of the wards in such borough, for the purpose of more nearly equalizing ward populations throughout the said borough."²⁰⁰

First class townships may use a combination of the at large and ward methods where they are divided into less than five wards.²⁰¹ The ward system predominates in first class townships.

A revision of ward lines or change from a ward to an at large system generally is subject to approval of the Court of Quarter Sessions.²⁰²

The arguments in support of and against the ward and at large systems of local government representation are summarized below.²⁰³

ARGUMENTS FOR ELECTION BY WARDS

1. Election by wards ensures a geographic distribution of local legislators so that every section of the municipality is guaranteed representation.

2. The local legislative body will more accurately represent different community interests as wards often reflect distinct social, ethnic or economic groups.

3. Under the ward system, the voter is likely to have a more direct and personal knowledge about the qualities of the candidates seeking office; he is thereby enabled to make a more informed choice. There is also a closer voter identification with his representative.

4. The voter has a shorter and simpler ballot than he would have in an at large election.

5. Local legislators elected by wards know the needs of their areas better; they are in a better position to see that their district is not neglected when public improvements are made.

6. The ward system strengthens two-party government. Under this system it is more likely that the minority party will gain one or possibly a few councilmanic seats. This is particularly true if its strength is concentrated in certain areas of a municipality.

ARGUMENTS AGAINST ELECTION BY WARDS

1. Wards are often artificially bounded geographic areas indistinguishable from one another; they do not provide for the representation of distinct community interests.²⁰⁴

2. Representation by wards encourages a spirit of localism as a councilman may be more concerned with serving the interests of his ward rather than the interests of the community as a whole.

3. The ward system introduces into the local level of government the "pork barrel" approach to legislation. Trading among councilmen may develop, with each one seeking to secure public improvements for his own ward.

4. If residence in a ward is required for election, the caliber of the members of the legislative body may be lowered because some wards may not have as well-qualified councilmanic material as others.

5. The ward system results in unequal representation. Even if the municipality is not "gerrymandered," population shifts may result in inequalities of population.²⁰⁵

6. Under the ward system, a political party unable to win a community-wide majority vote may possibly dominate the legislative body if it can muster small pluralities in a majority of the wards.

ARGUMENTS FOR AND AGAINST THE AT LARGE SYSTEM

The "pros" and "cons" of the practice of elections at large are the reverse of those which have been advanced for the ward method.

The election of local legislators at large is said to have certain advantages. Ward boundaries are for all practical purposes obliterated. Gerrymandering is avoided. Political parties or other groups are able to put forward their best men no matter where they live, and well-qualified persons may be willing to run for local offices. Being elected from the municipality at large, the legislators will give more attention to community-wide problems than to the special interests of smaller districts. Finally, a council elected at large is usually a smaller and more effective body.

A number of disadvantages of the at large system have been cited. Political, racial, economic or other minority groups may be deprived of direct representation. A city-wide campaign is expensive, and the party or group with the most effective organization and the biggest purse may secure all the offices. An independent candidate may have little chance of election. There is a concern also that the councilmen will all come from only a few districts.²⁰⁶

The fundamental objection to the election at large method is that it may deny representation to minority parties or groups.²⁰⁷

C. Consideration of Local Apportionment by the Convention

It is not clear from an examination of Act No. 2 of 1967 whether the Convention has the authority to deal with apportionment of all classes of political subdivisions in Pennsylvania.

The Convention is expressly empowered to make recommendations on legislative apportionment which is now covered by Article II, Sections 16, 17 and 18. These sections, however, apply only to the State Legislature. May the Convention deal with local apportionment as part of the subject of local government?

Section 7(a) of Act No. 2 lists as one of the "subjects" of the Convention: "Local Government (now covered by Articles XIII, XIV and XV, and part of Article IX of the Constitution), . . ." The Act states further:

7(c). "In dealing with subject matter as prescribed by this section, the convention may recommend the transfer to another article or any provision contained in those articles, or it may recommend its modification, deletion, repeal, the substitution of an entirely new provision or its continuation without change."

Article XIII of the Constitution relates to the formation of new counties.

Article XIV lists the county officers required by the Constitution, authorizes the Legislature to establish other county officers and prescribes their election, qualifications, term of office and method of compensation.²⁰⁸

Article XV provides, among other things, for the incorporation of cities, the grant of home rule powers to cities, and the enactment of laws affecting the organization and government of cities and boroughs to become effective on approval of the electorate.

The section of the Constitution relating directly to the election of local (as well as state) officers is Article VI, Section 1, (formerly Article XII, Section 1):

"All officers whose selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law: Provided, That elections of State officers shall be held on a general election day, and elections of local officers shall be held on a municipal election day, except when, in either case, special elections may be required to fill unexpired terms."

Under the foregoing section, and under its inherent power to regulate the organization of local government, the Legislature determines the structure of political subdivisions and the method of electing local legislative officers.

Article VI is not one of the articles covered by Act No. 2 of 1967.²⁰⁹ Another constitutional provision relevant to local apportionment, also not covered in Act No. 2 of 1967, is Article VII, Section 9 (formerly Article VIII, Section 11). It reads as follows:

"Townships and wards of cities or boroughs shall form or be divided into election districts of compact and contiguous territory and their boundaries fixed and changed in such manner as may be provided by law."

The inclusion of Articles XIV and XV within the coverage of Act No. 2 of 1967 would appear to authorize the Convention to recommend apportionment provisions for counties and for cities and boroughs adopting home rule charters or optional organization laws with voter approval.

Whether the Convention may recommend the adoption in the Constitution of apportionment provisions for all classes of political subdivisions depends mainly on whether a liberal or strict construction is given to Act No. 2 of 1967.

Under a liberal view it could be argued that the Legislature intended to permit the Convention to consider all aspects of local government organization, including the apportionment of local legislative bodies.

A strict view of Act No. 2 of 1967 would limit the powers of the Convention to a revision of the present sections of the articles specifically listed and would not permit the addition of entirely new features not presently dealt with in the Constitution.

D. Constitutional Treatment of Local Legislative Apportionment

Assuming that the Convention does have the power to consider local legislative apportionment for all classes of political subdivisions, there are two possible courses the Convention may follow if it sees fit to make any recommendations in this area.

1. The Convention could either frame a constitutional provision applicable to all classes of political subdivisions, or it could treat different classes of political subdivisions separately. The specific points which might be covered in the Constitution would be comparable, in part, to the issues involved in the apportionment and districting of the State Legislature:²¹⁰

a. Size of local legislative bodies, i.e., the number of county commissioners, municipal councilmen, township commissioners or supervisors.

b. Election at large or by wards, with or without a limited voting feature. (Because wards do not have the same significance in the scheme of government as do political subdivisions, the consideration given to political subdivision boundaries in the establishment of state legislative districts would not be applicable to wards at the local level. Compactness and contiguity may be important in local districting.)

c. Population base, i.e., total (federal census) population, citizens, or qualified, registered or actual voters.²¹¹ A related question would be whether a uniform population base should be required for all political subdivisions.²¹²

d. Maximum permissible deviations from the equal population principle where the ward system is used.

e. Single-member or multi-member districts.

f. Gerrymandering.

g. Agency to perform the apportionment function—the State Legislature, local legislative bodies, courts, or statewide or local commissions.²¹³ An additional step may be the submission of a local reapportionment plan for approval by the electorate at a referendum.

h. Frequency of apportionment.

i. Function of the courts, in particular whether to retain the traditional role of the Court of Quarter Sessions in ward realignment or in a change from the ward to the at large method.

The Convention could recommend, again assuming its authority and intent to do so, the adoption of sections in the Constitution regulating some but not all of the above issues, thereby vesting power in the Legislature or in local legislative bodies to deal with matters not covered by the Constitution.^{213a}

2. The Convention could omit all mention of local apportionment from the Constitution. This would preserve the present pattern of delegating virtually complete authority to the Legislature (1) to determine whether a particular class of political subdivision should have an at large system, ward representation, or a combination of the two methods,²¹⁴ and (2) to adopt laws regulating the other local apportionment issues discussed above in connection with possible treatment in the Constitution.

Home rule charters could continue to be authorized, subject to such restrictions as the Legislature may wish to impose upon the apportionment of local governing bodies. Even apart from home rule, local legislative bodies could be given discretion in certain apportionment matters, depending upon the degree of state-wide uniformity considered to be desirable.

One of the principal arguments in favor of continuing to vest discretion over local representation in the Legislature, and refraining from placing any regulation in the Constitution, is the uncertainty of the law at this time. The United States Supreme Court has not ruled squarely on the question of whether the one-man one-vote doctrine applies to local government. If the Fourteenth Amendment is held to be applicable, the Court may develop standards and guidelines which differ from those governing state legislatures. It may, therefore, be premature to plunge into the "thicket" of local apportionment before the Supreme Court has laid out a clear path to follow.

Furthermore, if the Supreme Court should rule that local legislative representation must comply with federal constitutional requirements, it may still be preferable to provide for the greater flexibility and creativity possible through legislative rather than constitutional control. Judicial remedies are, of course, available to guard against any improper legislative action or against inaction.

The contrary view is that it is only a matter of time before the United States Supreme Court, following the lead of some state courts and lower federal courts, declares that the equal protection clause is applicable to local

government apportionment. Once this occurs, the constitutional standards for local apportionment will undoubtedly be the same as those enunciated in *Reynolds v. Sims* and its companion cases. According to this view, therefore, the adoption of constitutional provisions governing apportionment is as appropriate for local government as for state legislatures.

Even if the Supreme Court should rule that local apportionment is beyond the scope of the Fourteenth Amendment, it might be argued that a Convention revising the basic charter of state government should guarantee fair representation practices in local government as in the state legislature.

Notes to Part 7

183. For lower federal court decisions applying *Baker v. Carr* and its progeny to local apportionment, see *Ellis v. Baltimore*, 352 F.2d 123 (C.A., 4th Cir. 1965); *Delozier v. Tyrone Area School Board*, 247 F. Supp. 30 (D.C.W.D. Pa. 1965); *Bianchi v. Griffing*, 238 F. Supp. 997 (D.C.E.D. N.Y. 1965). See also *Newbold v. Osser*, 425 Pa. 278, 230 A.2d 54 (1967); and *Re-apportionment*, 79 Harv. L. Rev. 1228, 1270 (1966):

"County and municipal governments are subject to the provisions of the Fourteenth Amendment. Cities and counties have traditionally been regarded as agencies of the state government, and in cases involving racial discrimination the Supreme Court has repeatedly held that the Fourteenth Amendment applies to all state action 'whatever the agency of the state taking the action' . . . The state can, of course, constitutionally refuse to set up an elective process for the selection of municipal officials; it can appoint them all. But if it chooses an elective method, the Fourteenth Amendment imposes certain limits on its use of that method."

184. *Dusch v. Davis*, 87 S. Ct. 1554; *Moody v. Flowers, Board of Supervisors of Suffolk County v. Bianchi*, 87 S. Ct. 1544; *Sailors v. Board of Education of County of Kent*, 87 S. Ct. 1549.
185. *Moody and Bianchi, supra* note 184. The Court held that the courts below had erred in convening a three-judge court to hear the cases initially.
186. *Sailors v. Board of Education of County of Kent, supra* note 184.

In *Delozier v. Tyrone Area School Board, supra* note 183, an earlier case, a federal district court held the apportionment of a Pennsylvania school board to be subject to federal constitutional requirements. The School Reorganization Act of August 8, 1963, P. L. 564, 24 P.S. 3-303, provided for the creation of new school districts by the consolidation of former ones. The Act established a nine-member school board to be elected at large. As an alternative, it authorized an interim operating committee to divide the new district into a number of regions whose populations were "as nearly equal as possible" and whose boundaries were "compatible with election district boundaries." Under the Act, factors such as topography, pupil population, community characteristics and the like were to be considered. The interim operating committee created a regional plan based largely upon the former school district boundaries whereby one district of 410 people had almost seven times the voting power of another having 2,876 people.

The court found that many rational alternative plans could have been developed which would have complied with the topographical and other standards while doing far less violence to the principle of population equality. The court held that the plan of the interim board was invalid on the ground that it violated the equal protection clause of the Fourteenth Amendment. The court reasoned that the school board, being an elected body having the power to levy taxes, was a *legislative* body subject to the equal protection clause. "While school boards are subject to numerous limitations in the exercise of local powers," the court said, "these limitations are no less in scope or variety than the limitations imposed on other governmental subdivisions or municipal corporations. . . ." *Id.*, 35

In *Lynch vs. Torquato*, 343 F.2d 370 (C.A. 3d Cir. 1965), the Court of Appeals held the

equal protection clause inapplicable to the selection of a county political party chairman in a Pennsylvania county. The chairman was selected by a precinct unit voting system, and the alleged constitutional violation was the gross disparity in the number of registered party members between precincts, each of which had an equal vote in the election of the chairman. The court said:

"But the citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party. It is true that the right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental offices even though, not because, they are party enterprises . . ." *Id.*, 372

187. *Dusch vs. Davis*, *supra* note 184.

188. *Supra* note 183.

189. *Newbold vs. Osser*, 425 Pa. at 479, n.1, 230 A. 2d at 55, n.1 (1967)

190. *Id.*, 425 Pa. at 487, 230 A. 2d at 59.

191. *Ibid.*

192. See Part 4G, *supra*.

193. See, generally, Anderson and Weidner, AMERICAN CITY GOVERNMENT 403-407, Henry Holt & Co. (1954); Adrian, GOVERNING URBAN AMERICA 265-267, McGraw-Hill Book Co. (1961); Banfield and Wilson, CITY POLITICS 87-96, Harvard University Press (1963).

Other methods of electing legislative bodies are "proportional representation" and "cumulative voting." Few, if any, American municipalities use either of these methods.

A "weighted voting" system has been attempted in New York for representation on county boards of supervisors. Each district in the county, usually a town, elects one legislator who casts a number of votes proportionate to the population he represents. Weighted voting is similar in its effect to multi-member districts. It has been used principally as an interim remedial device.

194. The election of councilmen by wards was introduced into this country by the Dongan Charters of New York in Albany in 1686. In the other colonial boroughs, the at large voting system was used. At no time in United States history has either system entirely overshadowed the other. Election by ward appears to have had its greatest popularity in the nineteenth century. In the twentieth century, particularly with the growth of the commission and council-manager plans of government and strong mayor-council cities, there has been a definite trend toward the adoption of the at large system. *Ibid.*

195. See Table 1 on methods of councilmanic elections in cities over 5,000. Table 2 shows data, compiled in the late 1950's, on the use of the ward and at large methods in Pennsylvania.

196. School districts are not shown in Table 3. With the exception of some reorganized school districts, school boards are elected at large. See *Delozier v. Tyrone Area School Board*, *supra* notes 183 and 186. In Philadelphia and Pittsburgh the school boards are appointed. School district organization is not within the scope of the convention.

197. See *Newbold v. Osser*, *supra* note 183 and accompanying text.

198. Pa. Const., Art. XIV, §7.

A limited vote plan for New York City Council was upheld in several cases: *Blaikie v. Power*, 193 N. E. 2d 55 (N. Y. 1963), *appeal dismissed*, 375 U. S. 439 (1964); *Blaikie v. Wagner*, 258 F. Supp. 364 (D. C. S. D. N. Y. 1965).

199. Act of February 1, 1966, P. L. 1656, 53 P.S. 45812-45815. The two-member per ward limit was adopted in the 1966 Borough Code, and it is applicable to new ward revisions or changes in representation. Existing wards with three members may be continued.

200. Act of February 1, 1966, P. L. 1656, 53 P.S. 45601. Regardless of the procedure set forth in the Borough Code, judicial relief is no doubt available for substantial deviations from the norm of less than 50%, if federal constitutional requirements are applicable to local government.

201. Act of June 24, 1931, P. L. 1206, as amended, 53 P. S. 55504.

202. *Id.* at 53 P.S. 55401; Act of February 1, 1966, P. L. 1656, 53 P. S. 45601.

While local representation at large has generally been upheld, *Dusch v. Davis*, *supra* note 184, a change from a ward or district system to an at large plan in the selection of a

county party committee was held invalid where it served to prevent the election of Negro members. *Smith v. Davis*, 257 F. Supp. 901 (D. C. M. D. Ala. 1966)

The Report on Local Government of the New York Temporary State Commission on the Constitutional Convention, in discussing local apportionment, stated:

"... [A]t-large systems may come under future legal attack as the courts focus increasingly on attempts to achieve equal representation. At-large elections could be used by a racial majority in a community to bar, in effect, a minority group from representation on a city council. The majority would be able to attain an electoral majority in each contest and thereby gain complete control of council." p. 116

203. See note 193, *supra*.

204. *Cf.* consideration which may be given to political subdivisions in state legislative reapportionment: Part 4D, *supra*.

205. See note 200, *supra*, and accompanying text for discussion of revision of ward lines in boroughs where the population of a ward deviates from the average ward population by 50% or more. Even apart from such a provision, a judicial remedy for inequality in ward population would be available if the one-man one-vote principle applies to local government.

206. This objection would seem to have little foundation in fact as the practice in at large systems has generally been to select candidates from all sections of the municipality.

207. See discussion in note 202, *supra*.

208. Article XIV, Section 7 provides for the election at large of the three county commissioners for each county under a limited vote plan. Each elector may vote for no more than two persons.

209. Since Article VI governs the selection of officers not provided for in the Constitution, a Convention proposal to deal with the apportionment of local legislative bodies in Articles XIV or XV may be consistent with Article XII. The selection of local legislative officers could then be considered as "provided for in this Constitution."

210. See Parts 4 and 5, *supra*. *Cf.* recommended provision on local apportionment in proposed New York Constitution, note 213a, *infra*.

211. In *Ellis vs. Baltimore*, 352 F. 2d 123 (CA. 4th Cir. 1965), the court invalidated the use of a registered voter base because it would result in a different number of councilmen in several districts than if total population were used. See note 94, *supra*.

"Another problem in setting standards for local reapportionment is that the decennial census, which provides for roughly adequate figures for congressional and state districting, may be badly out of date for purposes of county and municipal apportionment. Housing developments, urban renewal demolitions, or even the building of a highway may drastically alter the distribution of population among voting districts within a very short time. On the other hand, the desire for stability and continuity in government may make continuous reapportionment impractical. Indeed, the largest compromise that the *Reynolds* principle will have to make will probably result from the fact that reapportionment simply cannot keep up with demographic changes within small areas." *Reapportionment*, 79 Harv. L. Rev. 1228, 1276 (1966).

212. Professor Robert G. Dixon Jr., made the following statement in a consulting report submitted to the Preparatory Committee:

"There do not seem to be strong reasons for specifying one apportionment base in the state constitution and requiring all local government units in the state to use that one base.

The results obtained in many situations will not vary greatly no matter which reapportionment base is used. In some situations, however, the factor of institutional population in certain parts of small counties may have a more serious distorting effect in regard to local reapportionment than in regard to state reapportionment.

It is recommended that the state constitution not specify a single apportionment base for use by all local governmental units in the state. This will permit, but not require, local units with special problems in regard to institutional or student population to use some valid base other than total population if desired."

213. See Part 5, *supra*.

Professor Dixon, commenting on this point, stated that "the decentralized nature of local legislative reapportionment, in contrast to the pinpointed single task of state legislative

- . reapportionment, may make an apportionment commission an awkward device to attempt
- . to utilize at the local level, and one in which public confidence might not readily be engendered."
- 213a. The article on Local Government proposed by the New York Constitutional Convention
- . would contain the following provision:
- . "In the year following each federal decennial census commencing with the nineteen
- . hundred seventy census, and at such other times as it may determine, the legislative body
- . of each local government shall district or redistrict the area over which it has jurisdiction.
- . In such districting or redistricting the standards set forth in section two of article three
- . [dealing with state legislative apportionment, see Appendix B] shall apply so far as applicable."
- 214. Article XIV, Section 7 of the Constitution provides for the election at large of county commissioners under a limited vote plan. Article XIV is within the scope of the Convention.
- .

APPENDICES

APPENDIX A

POPULATION OF STATES, SIZE OF LEGISLATURES, POPULATION BASE, METHOD OF APPORTIONMENT

	<i>State</i>	<i>Population^a</i>	<i>Size of Legislature^b</i>		<i>Method of Apportionment^c</i>	<i>Population Base For Apportionment^d</i>
			<i>Senate</i>	<i>House</i>		
	Alabama	3,266,740	35	106	Legislature	Number of Inhabitants
	Alaska	226,167	20	40	Governor advised by Board	Civilian Population
	Arizona	1,302,161	30	60	Secretary of State ¹	Number of ballots cast at preceding gubernatorial election.
76	Arkansas	1,786,272	35	100	Board	Population
	California	15,717,204	40	80	(1) Legislature; (2) Commission	Population
	Colorado	1,753,947	35	65	Legislature	Population
	Connecticut	2,535,234	36	177	(1) Legislature; (2) Commission	Population
	Delaware	446,292	18	35	Commission ²	Population
	Florida	4,951,560	48	119	Legislature ³	Population
	Georgia	3,943,116	54	205	Legislature	Population
	Hawaii	632,772	25	51	Governor ⁴	Registered Voters
	Idaho	667,191	35	70	Legislature	Number of votes polled at election for delegate to Congress.
	Illinois	10,081,158	58	177	(1) Legislature (2) Commission (3) At-large elections	Population
	Indiana	4,662,498	50	100	Legislature	Adult Population
	Iowa	2,757,537	61	124	(1) Legislature (2) Supreme Court	Population

Kansas	2,178,611	40	125	Legislature	"Based on state census"
Kentucky	3,038,156	38	100	Legislature	Population
Louisiana	3,257,022	39	105	Legislature	House—Population
Maine	969,265	32	151	(1) Legislature	Senate—No express standard
Maryland	3,100,689	43	142	(2) Supreme Court	Number of Inhabitants
Massachusetts	5,148,578	40	240	Legislature	Population
Michigan	7,823,194	38	110	Legislature	Legal Voters
Minnesota	3,413,864	67	135	(1) Commission	Population
Mississippi	2,178,141	52	122	(2) Supreme Court	
Missouri	4,319,813	34	163	Legislature	Population
Montana	674,767	55	104	Legislature	No express standards
Nebraska	1,411,330	49	(Unicameral)	(1) Commission	Population
Nevada	285,278	20	40	(2) Supreme Court	Population
New Hampshire	606,921	24	400	Legislature	Population ⁶
New Jersey	6,066,782	29	60	(1) Commission	Number of Inhabitants
New Mexico	951,023	42	70	(2) Chief Justice	
New York	16,782,304	57	150	Legislature	No express standards
North Carolina	4,556,155	50	120	Legislature	Number of Inhabitants
North Dakota	632,446	49	98	(1) Legislature	Excluding aliens
Ohio	9,706,397	33	99	(2) Board	Senate—Number of Inhabitants
Oklahoma	2,328,284	48	99	Commission	House—Population
Oregon	1,768,687	30	60	(1) Legislature	Population
				(2) Secretary of State	

State	Population ^a	Size of Legislature ^b		Method of Apportionment ^c	Population Base For Apportionment ^d
		Senate	House		
Pennsylvania	11,319,336	50	203	Legislature	Population
Rhode Island	859,488	50	100	Legislature	Senate—Qualified Electors
South Carolina	2,382,594	50	124	Legislature	House—Population
South Dakota	680,514	35	75	(1) Legislature	Population
Tennessee	3,567,089	33	99	(2) Commission	Based on Federal census
Texas	9,579,677	31	150	Legislature	Qualified Voters
Utah	890,627	28	69	(1) Legislature	Population
Vermont	389,881	30	150	(2) Commission	
Virginia	3,966,949	40	100	Legislature	Population
Washington	2,853,214	49	99	Legislature	Senate—Population
West Virginia	1,860,421	34	100	Legislature	House—Registered voters
Wisconsin	3,951,777	33	100	Legislature	No express standards
Wyoming	330,066	30	61	Legislature	Number of inhabitants excluding Indians not taxed and members of Armed services

a. 1967 World Almanac, based on 1960 United States Census.

b. Committee for Economic Development *Modernizing State Government*, pp. 80–81 (July, 1967), citing the *Book of the States*, 1966–1967, Vol. XVI (Chicago: Council of State Governments, p. 45, 1966)

c. Congressional Quarterly Service, Representation and Apportionment, pp. 68, 69 (1966).

d. Taken from C-Q (supra note C, at 66–85) and other sources.

1. *The Secretary of State* apportions representatives to the counties. Each county board then apportions the number allocated within its county.
2. *Strictly nominal provision*; legislature actually enacts the reapportionment plan.
3. If the Florida Legislature fails, the succeeding Legislature must reapportion at a regular or special session. If this second session fails, an extraordinary session is called and cannot adjourn until a reapportionment plan is established.
4. See Note 2, *supra*.
5. The Supreme Court of Michigan selects a plan from the plans submitted by the individual members of the reapportionment commission.
6. The legislature may make adjustments for persons temporarily residing in the state.
7. If the 10-member commission is deadlocked, the Chief Justice of the Supreme Court Appoints an eleventh member.

* From "Modernizing State Government," Committee for Economic Development 80 (1967)

APPENDIX B

Provisions on Legislative Apportionment approved by New York Constitutional Convention

STATE OF NEW YORK

Cal. No. 22

No. 1365—C

IN CONVENTION

August 1, 1967

Introduced by COMMITTEE ON RULES—(at the request of Mr. Shapiro, Chairman on behalf of Committee on Legislature)—read once and ordered printed and when printed, referred to the Committee on Legislature—reported by said committee without amendment, amended and reprinted and ordered to a second reading—read a second time, ordered amended and placed on the order of third reading and submitted to the Committee on style and arrangement

A PROPOSITION

To repeal article three of the constitution relating to the legislature and inserting a new article, in relation thereto

The Delegates of the People of the State of New York, in Convention assembled, do propose as follows:

Section 1. Article three of the constitution is hereby repealed and a new article three is inserted therein, to read as follows:

ARTICLE III

LEGISLATURE

Section 1. The legislative power of this State shall be vested in the Senate and Assembly. No law shall be enacted except by bill which shall be styled "The People of the State of New York, represented in Senate and Assembly, do enact as follows:"

§2. Notwithstanding section three of this article, the senate and assembly districts as now established are hereby continued until redistricted pursuant to section four of this article.

§3. *The senate shall consist of sixty members and the assembly shall consist of one hundred fifty members. The members of each house shall be chosen from single member districts for terms of two years at elections held in even-numbered years.*

§4. *a. In the calendar year following the federal decennial census of nineteen hundred seventy and each decennial census thereafter, the senate and assembly shall be redistricted as hereinafter provided, in accordance with the standards set forth in section five of this article.*

b. Not later than March first of each such calendar year, a redistricting commission shall be established to consist of five members, one of whom shall be appointed by the temporary president of the senate, one by the speaker of the assembly, one by the minority leader of the senate, one by the minority leader of the assembly, and one by the court of appeals who shall be the chairman. Any vacancy on the commission shall be filled in a like manner.

c. The commission shall prepare a senate and assembly redistricting plan and certify such plan to the agency designated by statute no later than December thirty-first of each such calendar year.

d. Any such senate and assembly redistricting plan when so certified shall be final except that the court of appeals at the suit of any citizen shall have original and exclusive jurisdiction of any action contesting the validity of such redistricting plan or any part thereof.

§5. *In redistricting senate, assembly and congressional districts, respectively, the following standards shall govern:*

(a) Districts shall be as nearly equal as practicable in total population as determined by the federal decennial census.

(b) Districts shall be contiguous and compact; and, wherever practicable, boundaries of pre-existing political subdivisions and natural geographic boundaries shall be used as district boundaries.

(c) Gerrymandering for any purpose is prohibited.

(d) No city block shall be divided.

APPENDIX C

Recommendation on Legislative Apportionment, Interim Report of Maryland Constitutional Convention Commission (1967)

Section 3.01 *Legislative Power.*

The legislative power of the State is vested in the General Assembly, which shall consist of two houses, the Senate and the House of Delegates.

Section 3.02. *Legislative Districts.*

The State shall be divided by law into districts for the election of members of the Senate and into districts for the election of members of the House of Delegates. Each district shall consist of compact and adjoining territory, and the ratio of the number of legislators in each district to the population of such district shall be as nearly equal as practicable.

Section 3.03. *Redistricting.*

Within three months after official publication of the population figures of each decennial census of the United States, the governor shall present to the General Assembly plans of congressional districting and legislative districting and apportionment. If the General Assembly is not in session, the governor shall convene a special session. The General Assembly shall by law enact plans of congressional districting and legislative districting and apportionment. If no plan has been enacted for any one or more of these purposes within four months prior to the final date for the filing of candidates for the next general election occurring after publication of such census figures, then the pertinent plan as presented to the General Assembly by the governor shall become law. Upon petition of any qualified voter, the Supreme Court shall have original jurisdiction to review the congressional districting and legislative districting and apportionment of the State and grant appropriate relief, if it finds that any of them does not fulfill constitutional requirements.

Section 3.04. *District Representation.*

At least one senator, but not more than two senators, shall represent each senatorial district. At least one delegate, but not more than six delegates shall represent each house district.

Section 3.06. *Election of Legislators.*

A member of the General Assembly shall be elected by the qualified voters

of the legislative district from which he seeks election, to serve for a term of four years beginning on the third Wednesday of January following his election.

Section 3.11. *Size of General Assembly.*

The number of members of each house of the General Assembly shall be as prescribed by law.

APPENDIX D

Model State Constitution, Sixth Edition (1963)

Article IV

THE LEGISLATURE

Section 4.01. *Legislative Power.* The legislative power of the state shall be vested in the legislature.

Section 4.02. *Composition of the Legislature.* The legislature shall be composed of a single chamber consisting of one member to represent each legislative district. The number of members shall be prescribed by law but shall not be less than _____ nor exceed _____. Each member of the legislature shall be a qualified voter of the state and shall be at least _____ years of age.

BICAMERAL ALTERNATIVE: Section 4.02 *Composition of the Legislature.* The legislature shall be composed of a senate and an assembly. The number of members of each house of the legislature shall be prescribed by law but the number of assemblymen shall not be less than _____ nor exceed _____, and the number of senators shall not exceed one-third, as near as may be, the number of assemblymen. Each assemblyman shall represent one assembly district and each senator shall represent one senate district. Each member of the legislature shall be a qualified voter of the state and shall be at least _____ years of age.

Section 4.03. *Election and Term of Members.* The members of the legislature shall be elected by qualified voters of the state for a term of two years.

BICAMERAL ALTERNATIVE: Section 4.03. *Election and Terms of Members.* Assemblymen shall be elected by the qualified voters of the state for a term of two years and senators for a term of six years. One-third of the senators shall be elected every two years.

Section 4.04. *Legislative Districts.*

(a) For the purpose of electing members of the legislature, the state shall be divided into as many districts as there shall be members of the legislature. Each district shall consist of compact and contiguous territory. All districts shall be so nearly equal in population that the population of the largest

district shall not exceed that of the smallest district by more than _____ per cent. In determining the population of each district, inmates of such public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

(b) Immediately following each decennial census, the governor shall appoint a board of _____ qualified voters to make recommendations within ninety days of their appointment concerning the redistricting of the state. The governor shall publish the recommendations of the board when received. The governor shall promulgate a redistricting plan within ninety to one hundred and twenty days after appointment of the board, whether or not it has made its recommendations. The governor shall accompany his plan with a message explaining his reasons for any changes from the recommendations of the board. The governor's redistricting plan shall be published in the manner provided for acts of the legislature and shall have the force of law upon such publication. Upon the application of any qualified voter, the supreme court, in the exercise of original, exclusive and final jurisdiction, shall review the governor's redistricting plan and shall have jurisdiction to make orders to amend the plan to comply with the requirements of this constitution or, if the governor has failed to promulgate a redistricting plan within the time provided, to make one or more orders establishing such a plan.

BICAMERAL ALTERNATIVE: Section 4.04. *Legislative Districts.*

(a) For the purpose of electing members of the assembly, the state shall be divided into as many districts as there shall be members of the assembly. Each district shall consist of compact and contiguous territory. All districts shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than _____ per cent. In determining the population of each district, inmates of such public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

(b) For the purpose of electing members of the senate, the state shall be divided into as many districts as there shall be members of the senate. Each senate district shall consist of a compact and contiguous territory. All districts shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than _____ per cent. In determining the population of each district, inmates of such public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

(c) Immediately following each decennial census, the governor shall appoint a board of _____ qualified voters to make recommendations within ninety days of their appointment concerning the redistricting of the state. The governor shall publish the recommendations of the board when received. The governor shall promulgate a redistricting plan within ninety to one hundred and twenty days after appointment of the board, whether or not it has made its recommendations. The governor shall accompany his plan with a message explaining his reasons for any changes from the recommendations of the board. The governor's redistricting plan shall be published in the manner provided for acts of the legislature and shall have the force of law upon such publication. Upon the application of any qualified voter, the supreme court, in the exercise of original, exclusive and final jurisdiction, shall review the governor's redistricting plan and shall have jurisdiction to make orders to amend the plan to comply with the requirements of this constitution or, if the governor has failed to promulgate a redistricting plan within the time provided, to make one or more orders establishing such a plan.

Section 4.05. *Time of Election.* Members of the legislature shall be elected at the regular election in each odd-numbered year.

Section 4.06. *Vacancies.* When a vacancy occurs in the legislature it shall be filled as provided by law.

Section 4.07. *Compensation of Members.* The members of the legislature shall receive an annual salary and such allowances as may be prescribed by law but any increase or decrease in the amount thereof shall not apply to the legislature which enacted the same.

Section 4.08. *Sessions.* The legislature shall be a continuous body during the term for which its members are elected. It shall meet in regular sessions annually as provided by law. It may be convened at other times by the governor or, at the written request of a majority of the members, by the presiding officer of the legislature.

BICAMERAL ALTERNATIVE: Section 4.08. *Sessions.* The legislature shall be a continuous body during the term for which members of the assembly are elected. The legislature shall meet in regular sessions annually as provided by law. It may be convened at other times by the governor or, at the written request of a majority of the members of each house, by the presiding officers of both houses.

Section 4.09. *Organization and Procedure.* The legislature shall be the final judge of the election and qualifications of its members and may by law vest in the courts the trial and determination of contested elections of members. It shall choose its presiding officer from among its members and it shall

employ a secretary to serve for an indefinite term. It shall determine its rules of procedure; it may compel the attendance of absent members, discipline its members and, with the concurrence of two-thirds of all the members, expel a member, and it shall have power to compel the attendance and testimony of witnesses and the production of books and papers either before the legislature as a whole or before any committee thereof. The secretary of the legislature shall be its chief fiscal, administrative and personnel officer and shall perform such duties as the legislature may prescribe.

BICAMERAL ALTERNATIVE: Section 4.09. *Organization and Procedure.* Each house of the legislature shall be the final judge of the election and qualifications of its members and the legislature may by law vest in the courts the trial and determination of contested elections of members. Each house of the legislature shall choose its presiding officer from among its members and it shall employ a secretary to serve for an indefinite term, and each house shall determine its rules of procedure; it may compel the attendance of absent members, discipline its members and, with the concurrence of two-thirds of all the members, expel a member, and it shall have power to compel the attendance and testimony of witnesses and the production of books and papers either before such house of the legislature as a whole or before any committee thereof. The secretary of each house of the legislature shall be its chief fiscal, administrative and personnel officer and shall perform such duties as each such house of the legislature may prescribe.

ANNEXES

*Testimony at Public Hearings
and Other Statements*

*Statement of Philip P. Kalodner, Vice-Chairman and Chairman,
State Affairs Committee, Southeastern Pennsylvania Chapter
Americans for Democratic Action, before Legislative
Apportionment Committee of the Preparatory
Committee for the Constitutional
Convention*

There are two areas of concern in the development of a scheme of legislative apportionment for Pennsylvania. They are:

- (1) The structure of the Legislature; and
- (2) The method of assuring the reapportionment of the Legislature after each Federal decennial census.

Each of these will be considered in turn.

I. THE STRUCTURE OF THE LEGISLATURE.

We believe that the current bicameral structure of the Legislature in Pennsylvania should be continued and that the utilization of a fifty member Senate and a two hundred ten member House with half of the Senate elected each two years for four year terms and with the entire House elected each two years, represents a correct balancing of the various concerns. In such a system, even though both houses are required to be apportioned on the basis of population, the differing terms of service, the different geographical areas represented and the difference in the size of those geographical areas will all create a certain divergence of viewpoint which properly serves the "check and balance" philosophy of American Government. In addition, a bicameral legislative process provides desirable insurance against the hasty enactment of legislation which has not been sufficiently exposed to public analysis and discussion. In view of these considerations, we believe a bicameral legislative structure should be continued in Pennsylvania.

Most of the current constitutional provisions with regard to various criteria to be utilized in the apportionment of such a Legislature have been held judicially to be unconstitutional and must therefore be eliminated. We recommend that there be substituted for such criteria those already suggested by the Pennsylvania Bar Association—to wit, that the districts be "compact and of contiguous territory," that they be "as nearly equal in population as may be" and that "each district shall be entitled to elect one" Senator or Representative. We believe further that both the Senatorial district and Repre-

sentative district sections should include a provision to the effect that unless division shall be absolutely necessary, no municipal or county boundary shall be divided in the formation of a district.

We would add however to the recommendations of the Pennsylvania Bar Association a provision in the Constitution establishing as one of the apportionment criteria a requirement that there be a maximum 10% deviation above and below the average district for the largest and smallest district respectively. Such a deviation would insure that the ratio of the largest district to the smallest district will not exceed 1.22:1. Naturally should the Supreme Court of Pennsylvania or of the United States subsequently establish a stricter criteria allowing less deviation, no harm will have been done by virtue of the existence of a constitutional limitation; while on the other hand should the Courts either fail to establish a judicial limitation of deviation or should a less stringent limit be established by them, the 10% limitation would be effective to insure that districts are as equal as may be. The current House apportionment grossly violates the 10% rule here recommended.

II. THE METHOD OF REAPPORTIONMENT.

We believe that in the first instance reapportionment is the responsibility of the Legislature and that the obligation to reapportion should be placed in the Legislature, to be performed before the close of the regular legislative session during which certified figures of the United States census are first available. We recognize that apportionment by the Legislature tends to result in districts which are safe or safer for the existing legislators who perform the reapportionment, but we believe that the advantage so obtained of a continuity of legislators outweighs the disadvantage of a somewhat less equal apportionment than might occur should the function be performed by an independent commission. The constitutional limitations which we have proposed should sufficiently restrict the Legislature to assure that no gross inequality will occur.

Should the Legislature be unable to agree on a reapportionment, we believe the Constitution should charge the Governor with the responsibility of appointing a commission consisting of himself, and the majority and minority leaders of the Senate and House with a majority of the members of such commission authorized to reapportion both the Senate and the House.

Should the Legislature not perform the apportionment prior to the end of the regular session and should the commission not perform the apportionment within 120 days after the end of the legislative session, then the Supreme Court of Pennsylvania should be constitutionally charged with the obligation to apportion the Commonwealth, should have original jurisdiction to do so and authority to appoint and fix the compensation of a master or board of masters for the taking of testimony and the making of recommendations.

Finally, should the apportionment be accomplished by either the Legislature itself or by the commission appointed by the Governor, the Supreme

Court should be charged with the authority and obligation to review the apportionment so accomplished on the petition of any citizen. In the event the legislative or commission apportionment is ruled to be invalid, the Supreme Court shall be given the authority itself to apportion the House and Senate in the same manner as it would utilize in the event the Legislature and commission failed to act in the first instance.

The principal difference between the recommendation here made and that made by the Pennsylvania Bar Association is the utilization of a commission appointed by the Governor to accomplish the apportionment in the event of the failure of the Legislature to act. The Pennsylvania Bar Association plan recommends judicial action in the absence of Legislative action. It is our view that judicial action is a last resort both because judicial review should be retained as a method of final relief after an initial apportionment by another agency and because judges should be relieved if at all possible of the problems of the political thicket. Thus, we have proposed the utilization of a commission appointed by the Governor. Since this commission will consist of five members, three of them being of the majority party and two of the minority party, it is most likely that some majority agreement will be reached and judicial action preserved as a method of final review. In turn, the threat of commission action should be sufficient to obtain legislative apportionment particularly since the likely political action of such a commission would be well known to the legislators.

*Statement to the Pennsylvania Constitutional Convention
Preparatory Committee, Task Force Hearing on
Apportionment, July 1967, by The League of
Women Voters of Pennsylvania*

I am speaking on behalf of the League of Women Voters of Pennsylvania, representing almost 7,000 members in 56 local Leagues throughout the state. The Constitution of the Commonwealth has been a major concern of the League for the past 14 years. In 1953 local Leagues began a concerted study of the Commonwealth's basic charter and the changes needed; the issue has not been off League programs since.

The League of Women Voters is not an association of legal experts or professional bill drafters; we *are* interested and concerned citizens whose purpose it is to promote the active participation of *all* citizens in government.

In general, the proposed Sections 16, 17 and 18 of Article II of the Constitution drafted by the Pennsylvania Bar Association are acceptable to, and have the support of the League of Women Voters. However, we would like to submit to this hearing the League's particular views on the legislative apportionment provisions of Pennsylvania's Constitution.

In Article II, Section 16 states in part, "The State shall be divided into . . . districts of compact and contiguous territory as *nearly equal in population* as may be . . ." Section 17 states in part, that the population of the State be divided ". . . as ascertained by the *most recent* United States census . . .," and Section 18, again, "The General Assembly . . . *immediately* after each United States decennial census *shall* apportion the State into senatorial and representative districts . . ."

Representation to the State's legislative body had been on the basis of population since colonial times. In the portions of Section 16 quoted the 1874 Constitution followed a precedent already well established. It also took cognizance in Sections 17 and 18 of the inevitability of change and the necessity of keeping as nearly current with it as possible. The legislature is charged with the responsibility of reapportioning every ten years. In the absence of any penalties for non-compliance with the constitutional mandate, it is not surprising that the General Assembly has repeatedly failed to perform this surgery upon itself. Governors, too, have been understandably reluctant to rouse possible legislative antagonism to their programs by very vigorous prodding to reapportion and redistrict. In state after state relief has been sought in the federal courts.

The State House of Representatives was apportioned on the basis of the 1920 census until 1953; the Senate on the same basis until 1963. Years of shifting population resulted in some districts being over-represented while others were deprived of their rightful voice. This is particularly true of suburban areas, which have experienced an explosive population growth. In the 1964 elections one suburban district with a 1960 population of 255,556 sent four Representatives to the House, while a rural county with a 1960 population of 4,485 sent one; a vote in the latter was worth 14 times more than a vote in the former. In the same election, one candidate campaigning for the Senate won the approval of 137,000 voters to be elected; another achieved the same status with only 29,000 votes.

If the legislature does not represent a majority of the people, it is less likely to be responsive to the people's needs. A truly representative legislature should provide an effective and strong state government.

The League of Women Voters of Pennsylvania favors mandatory apportionment of legislative representation after each decennial census to conform to population shifts, with penalties for failure to apportion. Leagues have concluded that the only fair and equitable basis for representation for both Houses is substantially on population. To single out any special group or interest for over-representation in the state legislature defeats the principles of a democratic and representative system of government, which seeks to represent the citizens equally and to protect minorities constitutionally.

As we have seen, mandates to reapportion are not self-executing. Unless some form of compulsion is provided, they are likely to be ignored. To compel compliance, some states provide for alternative measures, such as holding elections at large and special sessions limited to apportionment. Courts are sometimes called upon to take over the job. It might be proposed that legislators' pay be severed until they complete their apportionment task.

In some states, special commissions or committees are responsible for reapportionment completely relieving the legislature of this unwelcome responsibility. Such bodies may be designated in the constitution or appointed by the executive. Some function only if the legislature fails to act. Apportionment plans may be constitutionally subject to judicial review in a manner similar to that proposed by the Pennsylvania Bar Association.

Other factors and devices have had a part in the structuring and apportioning of legislatures, such as single member or multi-member districts, flotal and combination districts, weighted voting and use of political boundaries. However, as constitutions are a statement of fundamental law, the best wearing have usually been the least complicated. The League of Women Voters favors a simple, uncluttered document setting forth the structure of government and the basic principles for its operation. Population is the proper basis for representative government.

Thank you for this opportunity to present our views. We hope that there will be similar opportunities for citizens to be heard at public hearings during

the course of the convention, or before convention committees, in the four subject areas. We suggest that the more citizen involvement there is in the deliberations of the convention, the more the voters of the Commonwealth will feel that the constitution is truly their document and one deserving their close attention and support.

*Statement on the Provisions on Legislative Apportionment in
the Pennsylvania Constitution by A Modern Constitution
For Pennsylvania, Incorporated, Harrisburg,
Pennsylvania, July 20, 1967*

To the Members of the Preparatory Committee for the Pennsylvania Constitutional Convention of 1967

Gentlemen:

In the provisions of Resolution 2-A, amending several parts of Article II (the article on the Legislature) of the Constitution of 1874, which the voters approved at a state-wide referendum on May 16, 1967, the authors intentionally omitted any change to Sections 16, 17 and 18.

This omission was not a sign of approval of these sections. On the contrary, it was universally recognized that they were in conflict with the U. S. Supreme Court's interpretation of the one-man, one-vote provisions of the Federal Constitution.

However, in 1965, when Resolution 2-A was approved by the Legislature for the first time, as Senate Bill 531, the Federal requirement to guarantee equality of representation in all state legislatures had not yet been fully nor clearly expressed. Further, at the time of drafting, there was litigation pending on the subject in our own Pennsylvania courts, and the leaders of the General Assembly were trying to find a solution of their own that would conform our legislative representation to Federal requirements.

It was obviously not a time to make proposals for changing the Pennsylvania constitutional provisions on legislative apportionment. Therefore, Section 16 providing for the Ratio of Apportioning Senate seats, Section 17 providing for the apportionment of seats in the House of representatives, and Section 18 requiring the General Assembly to carry out the provisions of the two preceding sections, were left untouched.

(Parenthetically, it should be added that, regardless of the compatibility or incompatibility of Sections 16 and 17 with the U.S. Constitution, Section 18 has always been faulty because it lacked provisions for its enforcement on the frequent occasions when the General Assembly was unable or unwilling to reapportion itself, as required.)

Further, since the Pennsylvania Supreme Court acted on February 4, 1966, to apportion both Houses of the General Assembly in a manner consistent

with interpretations and orders of the U. S. Supreme Court, the need to amend these sections became less urgent. However, the need still exists and must be met in time to reapportion both Houses appropriately when the results of the next Federal census are made available in 1971. Fortunately, the voters of Pennsylvania authorized the forthcoming Constitutional Convention to prepare such an amendment, and to submit it to a state-wide referendum at the Primary Election next April. Hopefully, the Convention will recommend wisely and the voters will ratify their recommended amendment, and a possible constitutional crisis will be averted.

There is nothing to be gained by turning the clock back, and looking to the Pennsylvania Constitutions of 1838, 1790 or 1776 for appropriate ideas. These earlier constitutions based the apportionment on the number of taxpayers—a concept which would hardly do, today.

However, the Pennsylvania Bar Association, through the efforts of its Project Constitution Committee, has made original and, in our opinion, commendable proposals for amending these sections. A Modern Constitution for Pennsylvania, Inc., has studied several proposals covering the same ground. We find none as likely to meet all of Pennsylvania's requirements for years to come, as well as those currently laid down by the Federal Government.

The problem none of them seems to respond to as well as does the Bar Association proposal is: How can members of the State Senate, whose terms are not about to expire, continue to represent the constituents who elected them for the terms for which they were originally elected?

To illustrate, in 1964, 25 Senators were elected, each for a 4-year term, to represent the voters in odd-numbered districts. However, because of subsequent redistricting to comply with Federal requirements, they were not allowed to serve their full terms. In 1966, nominations and elections were held for all 50 Senatorial seats, with the terms of those from odd-numbered districts again being limited to two years. Therefore, half the seats in the Senate, from 1964 through 1968, will have been filled by Senators deprived the benefits of 4-year terms in the Senate, as provided in Article II, Section 3. And approximately half the citizens of Pennsylvania will have been deprived of the very considerable advantages of representation by 4-year Senators for the same period.

Comparison of this plan with comparable constitutional provisions of other states reveals nothing more appealing that would be consistent with Pennsylvania's traditions and best interests.

In many states, all members of both legislative houses are elected for concurrent 2- or 4-year terms, and the consequences of mid-term reapportionment fall equally on all.

Other states, regardless of the length of their legislators' terms and regardless whether those terms are staggered or not, seem to have chosen to

elect the entire membership of one or both houses at one time following reapportionment.

The proposal of the Pennsylvania Bar Association, which A Modern Constitution for Pennsylvania, Inc., approves as the best in prospect, recognizes that the U. S. Census reports, upon which re-districting must be based, are available and binding upon us in the first year of each decade—1951, 1961 and so forth.

The proposal first assures that re-districting will take place promptly by requiring:

(a) that the General Assembly do so;

(b) that, if the General Assembly should fail to do so, the Governor must call them into special session for the sole purpose of reapportionment;

(c) that, if the special session fails to do so within 120 days, the matter is to be decided by the Pennsylvania Supreme Court, with authority for the court to appoint and pay masters on boards to assist them in this duty;

(d) that the nomination of candidates for the entire reapportioned body take place at the first primary election 60 days or more following the reapportionment;

(e) that the election take place at the following general *or municipal* election;

(f) that if the election takes place at a municipal election, the terms of all representatives and those senators as are from odd-numbered districts shall be three years, and the terms of senators from even-numbered districts shall be five years;

(g) and, finally, that at the expirations of these terms, all representatives and senators shall be elected at general elections, the representatives for two-year terms, the senators for four years.

Please note that this procedure avoids such punitive provisions as denying compensation to legislators if they cannot agree on reapportioning, which has been advocated in other states.

It also avoids another commonly proposed device—a reapportionment commission, appointed by the majority leaders in the legislature, the governor, or the courts, individually or in varying combinations.

It leaves the solution of the problem primarily in the hands of the legislators, themselves, where it has always been. It invokes the other two branches of government only in the event that the General Assembly should fail to act. There are many who believe that the neglect of the Constitutional Convention of 1873 to anticipate such an eventuality was one of its greatest errors.

This procedure will not only preserve the traditional schedule for electing our General Assembly as nearly as possible, while conforming to the full requirements of the Federal Constitution and laws—it may well prove to be an

incentive to the General Assembly to act with unprecedented promptness in reapportioning itself in order to secure an extra year in office.

We urge the Constitutional Convention to consider this proposal favorably.

A Modern Constitution for Pennsylvania, Inc.

Richard C. Bond, President

Robert Sidman, Executive Director

*The Pennsylvania AFL-CIO Position on Legislative
Reapportionment, presented by Harry Boyer,
President, before the Preparatory Committee
for the Commonwealth of Pennsylvania
Constitutional Convention, 1967-1968*

Gentlemen:

The moment of the Constitutional Convention will be of singular importance to the Pennsylvania AFL-CIO. We strongly supported the unsuccessful campaign to call an unlimited convention in 1963 and we likewise supported the successful referendum on the convention for 1967.

The apportionment and malapportionment of the state House has been of the greatest interest to the labor movement. The Pennsylvania AFL-CIO, through a taxpayer's suit, took the cause of misrepresentation to the courts in 1964 and was successful in eliminating the unfairness of the multi-member districts.

Later, we hailed the "one man, one vote—one vote, one value" decision of the U. S. Supreme Court.

We continue to support the principle of this and companion decisions because their application will work for the fairest, fullest representation for each citizen—and this is the quintessence of democracy.

For the most part, state constitutions have been frequently criticized for trying to be so specific and detailed that the result has been to place officials in a strait-jacket. We are told that students of state government prefer provisions which have been drafted in general terms and which allow considerable flexibility to lawmakers.

However, we feel that in the area of apportionment, specificity should be an exception to the general rule of draftsmanship. We take this position because of the history of past action and inaction by the state legislature.

It has been difficult to get the General Assembly to reapportion itself after every census.

When they were finally moved into action, they adopted two invalid plans in 1964 and 1965.

The present districting plan of 1966 was created by the State Supreme Court because the Assembly had reached an impasse.

The present provisions of our constitution have been declared invalid by the courts and must be rewritten to conform to judicial decree. The Penn-

sylvania AFL-CIO hopes that the delegates to the Constitutional Convention will be conscientious enough to set the highest possible standards of fairness and reasonableness when they draft and adopt new apportionment language. The electorate next spring, as they ratify this constitutional change, should not be compelled to choose between a proposal which is "only-better-than-we-have-now" and the present unconstitutional provision. They could very well vote down a proposal which is only a partial remedy and continue to rely upon the judiciousness of the state courts.

The keys to a democratic reapportionment process are clear and enforceable standards.

The legislature should be allowed to redistrict itself but with discretion carefully circumscribed by formulae which will ensure equitable reapportionment.

To guarantee that every elector in the state should be as equally represented as is humanly possible to every other elector, regardless of where he votes within the state, the Pennsylvania AFL-CIO would like to recommend the following criteria to be clearly spelled out in the constitution so as to be incapable of being misconstrued:

**Senate and House districts should be created on the basis of a substantially equal population standard or ratio.* Our present legislative plan was drawn largely with adherence to this standard. Invoking the use of this yardstick means the test of adequacy of any redistricting plan can be applied with ease since the criterion is largely mathematical. Again, we support the "one man-one vote" ruling on population because the values of any other standards are difficult to justify.

**The population standard should be strengthened by a stipulated variance above or below the norm of 10%.* This means that the highest ratio of population to representatives of the same House should not exceed the lowest ratio by more than 20%. It is felt that this deviation affords sufficient latitude to comfortably form or carve out legislative seats. The 10% variance is in line with a present proposal in Congress for establishing a permitted departure from the norm.

Presently, the widest fluctuation in the state House between the smallest and largest populated districts is 19.6%, or 16,752 persons. Fifty of the 203 House districts exceed a 10% variance either above or below the norm. The Senate districts only vary as much as 19.2%, from the smallest to the largest, or 43,376 persons. We feel that a 30% contrast is excessive and the courts have strongly hinted that it may be judicially out of line.

**All legislative districts should be formed out of contiguous territory.* Presently, all Senate and House districts meet this test and are composed of adjoining municipalities or counties. This has not been a problem.

**Each legislative district should be compact.* Although this is a very important safeguard against gerrymandering and required by the present constitution, it is either grossly ignored or stretched out of meaning. Every legislative district is contiguous but not all districts are "compact." Guidelines as to the application of "compact districts" should be set forth in the amended constitution. Many dis-

tricts are not packed solid, compressed, or closely consolidated, but rather their territories are diffuse, stretched, and form salamanders. To be compact, legislative districts should tend toward the smallest possible boundary lines in proportion to the area enclosed.

**Each legislative district should be assigned a number which should start at a common geographical location and be allotted in a normal, logical sequence or pattern.*

In the early years, all districts were numbered in such an arrangement. However, today only the House districts follow in a mathematical and geographic design. The House numbers commence in Erie County and follow up and down across the state in a logical sequence. The Senate districts are numbered in a helter-skelter arrangement. For example, Senate Districts 1 to 8 are in Philadelphia County and District 9 is in adjoining Delaware County, but District 21 is located in Butler and Lawrence Counties without any connection through a mathematical sequence.

It should be noted here that the Senators serve staggered terms—half elected with the Governor and half the President—and the makeup of these districts has established voting patterns which historically follow the gubernatorial or presidential vote.

Therefore, the arbitrary assignment of numbers can lead to a very inconspicuous, sophisticated or refined, if not clever and politically expedient, type of gerrymandering.

Certain predictions as to the outcome of an election can be made through the assignment of a senatorial "swing district" to coincide with either the gubernatorial or presidential election.

Finally, we would like to recommend the adoption of an additional safeguard against the vexatious reapportionment problems of partisanship, legislative self-interest, and potential gerrymandering.

We would urge the convention to adopt a provision calling for a division of the state into 50 senatorial and 200 representative districts and providing that each Senate district be subdivided into four coterminous House districts.

Presently, of the 203 House seats, 62 cross over into two or more senatorial districts—and 17 of those are located in one county.

We see a number of advantages in the adoption of this standard:

1. It would simplify the creation of the House district by removing certain temptations to extend districts without regard for population, contiguity, or compactness.
2. It would ease the administration and management of elections by keeping the ballot as short as possible so as not to diffuse public scrutiny. Furthermore, the opportunity of the electorate to participate in democracy and to more easily recognize their representatives would be enhanced.
3. Coterminous districts will strengthen the links of inter-relationship between specific Senate-House delegations and work toward an undiluted and more meaningful representation of the constituency. Re-

sponsibility and rapport between the representative and the constituent would be maximized.

4. This guideline would strengthen and simplify the judicial function by providing more precise standards as to the composition of the district.

We urge the study of these proposals by the Preparatory Committee and by the delegates to the Constitutional Convention.

*Proposal of the Pennsylvania Bar Association Relative to
Legislative Apportionment, Submitted to the
Preparatory Committee for the
Constitutional Convention*

ARTICLE II—SECTIONS 16, 17 AND 18

Section 16. *Senatorial Districts; Ratio*—The State shall be divided into 50 senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one Senator. Unless division shall be absolutely necessary, no ward, borough or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty.

Section 17. *Representative Districts; Ratio*—The State shall be divided into two hundred ten representative districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one Representative. Unless division shall be absolutely necessary, no ward, borough or township shall be divided in the formation of a representative district. The representative ratio shall be ascertained by dividing the whole population of the State by the number two hundred ten.

Section 18. *Legislative Apportionment*—(a) Before the close of each regular session of the General Assembly at which the officially certified figures of the United States census first are available, the General Assembly shall apportion the Commonwealth into senatorial and representative districts. If the General Assembly fails to do so, the Governor shall immediately after final adjournment call the General Assembly into special session for the sole purpose of making the apportionments.

(b) If the special session fails within one hundred twenty days to complete its work, upon petition of the Attorney General, the Supreme Court shall apportion the Commonwealth into senatorial and representative districts and for that purpose the Supreme Court shall have original jurisdiction. To assist the court in performing this extraordinary task, the court shall appoint and fix the compensation of a master or a board of masters for the purpose of taking testimony and making recommendations to the court. The court shall conclude its work as expeditiously as possible and shall file the reapportionments in the same office in which acts of the General Assembly are filed. The reapportionments made by the court shall have the force of law.

(c) Any apportionment made by the General Assembly under Section 18, clause (a) shall be reviewable on appeal exclusively by the Supreme Court of Pennsylvania. Any such apportionment shall become effective when the Supreme Court has finally decided the appeal or when the last day for taking an appeal has passed and no appeal has been taken.

(d) Any apportionment made by the Supreme Court under Section 18, clause (b) shall become effective immediately.

(e) At the first primary election occurring 60 days or more after a new apportionment has become effective, senators and representatives shall be nominated and, notwithstanding the provisions of Section 2 of this article, they shall be elected at the following municipal or general election.

(f) Notwithstanding the provisions of Section 3 of this article, the terms of any representatives elected at a municipal election shall be three years, the terms of senators elected at such election from odd-numbered districts shall be three years, and the terms of senators elected at such election from even-numbered districts shall be five years. At the expiration of these terms all senators and representatives shall be elected at general elections, representatives for two years, and senators for four years.

*Statement of William A. Schnader on Legislative Apportionment
before the Preparatory Committee for the Penn-
sylvania Constitutional Convention*

Act No. 2 of 1967 requires the limited Constitutional Convention to supply provisions on Legislative Apportionment to take the place of the provisions now in Sections 16, 17 and 18 of Article II of the Constitution.

Sections 16 and 17 are plainly unconstitutional under the Constitution of the United States. Section 16 provides that (regardless of population) no city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators and Section 17 provides that (again regardless of population) no representative district shall elect more than four representatives and that each county shall have at least one representative.

These provisions run afoul of the decision of the Supreme Court of the United States in *BAKER v. CARR*, 369 U.S. 186 (1962).

Section 18 of Article II of our Constitution has proved to be completely ineffectual. It requires the Legislature to make a reapportionment "immediately" after each United States decennial census. The Legislature for many years simply refused to heed this injunction in Section 18.

In the proposal which we are offering to the Committee and the Convention we are recommending that the Senate shall consist of 50 Senators, each elected from a district "of compact and contiguous territory as nearly equal in population as may be" and that the House of Representatives consist of 210 Representatives each elected from a district similarly described. These provisions certainly conform to the decision of the Supreme Court of the United States.

In Section 18 we have provided that if the Legislature does not reapportion at the Session when the results of the new census are available, it shall be called back in special session at which no business shall be transacted except reapportionment. It is allowed 120 days to complete its task and if it has not then completed it, upon petition of the Attorney General, the Supreme Court is directed to make the new apportionment. However, the Supreme Court may appoint a Master or Masters to take testimony and make recommendations.

If anyone objects to the legislative apportionment his appeal goes directly to the Supreme Court and when the Supreme Court has decided the case on appeal or has made an apportionment, the apportionment is immediately effective.

If the apportionment is made more than 60 days before the next municipal election, Senators and Representatives must be elected at that time. However, instead of being permitted to serve only one year, representatives and one-half of the Senate would be permitted to serve for three years, and the other half of the Senate for five years.

When our proposal was before the Legislature in 1966, it was not approved because the Senate wanted some way found to permit a Senator elected for a four-year term with two years remaining when a new apportionment became effective, to serve out his full term.

The Bar Association Committee did not feel that there was any way possible to do this without violating the Supreme Court's "one-man, one-vote" rule. The three and five-year terms are suggested as in the nature of a compromise. How the members of the Preparatory Committee will view this proposal, we shall be very interested to learn as all of the members of the Preparatory Committee except the Chairman are members of the Legislative Department of the government.

The members of the Legislature are serving today under an apportionment made by the Supreme Court of Pennsylvania in *BUTCHER v. BLOOM*, 420 Pa. 305 (1966).

The Constitutional Convention may desire to change the number of Senators and of members of the House of Representatives or it may even wish to recommend to the voters the adoption of a unicameral legislature. However, it is the opinion of the Bar Association that the people will prefer to stick to a legislature composed of two houses of substantially the membership which they have today.

There are many devices for having apportionments made by others if the Legislature does not do its job in this respect. Some states have commissions composed of legislative and executive officers. We believe that our present proposal is much the best for Pennsylvania.

The present membership of the House of Representatives is 203. This number was fixed by the Supreme Court when it reapportioned the districts of the House in 1966. Previously, the House of Representatives had consisted of 210 members.

It will be a matter for the Constitutional Convention to decide whether the House membership shall be 210 as in the Bar Association's proposal, 203 as at present or some other figure.