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Apportionment in North Dakota: The Saga of Continuing Controversy

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NOTE

APPORTIONMENT IN NORTH DAKOTA: THE SAGA OF CONTINUING CONTROVERSY

I. INTRODUCTION

The problem of reapportioning the state legislature has troubled North Dakota for the past eight decades.[1] The longevity of the problem may be explained, in part, by the array of issues which must be considered whenever a reapportionment plan is devised.[2] This Note will examine the issues surrounding the reapportionment controversy, including the basic constitutional apportionment standards as defined by the United States Supreme Court. The Note will also discuss the history of apportionment in North Dakota and will conclude by proposing an alternative to apportionment by a legislature.

II. BASIC CONSTITUTIONAL PARAMETERS IN APPORTIONMENT

Apportionment was regarded as a nonjusticiable political question[3] until 1962 when the United States Supreme Court

1. *See* Dobson, *Reapportionment Problems,* 48 N.D.L. REV. 281, 283 (1972).

2. *See* Dixon, *The Warren Court Crusade For the Holy Grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219 n.4.

3. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (three of seven justices who participated in the decision agreed that the apportionment issue was nonjusticiable). In *Colegrove* qualified voters in Illinois brought an action in federal court to restrain the officers of the state from holding an election. *Id.* at 550. The voters alleged that the state's congressional districts lacked compactness of territory and approximate equality of population. *Id.* at 551. The United States Supreme Court stated that no court could "remap" a state's voting districts and that the remedy for unfairness in districting was to be found in the state legislatures or Congress. *Id.* at 553-56.

decided *Baker v. Carr.*[4] The plaintiffs in *Baker* alleged that the Tennessee General Assembly's failure to reapportion the state constituted a debasement of their votes in violation of the equal protection guarantees of the fourteenth amendment.[5] The Court, after describing a number of potential political questions,[6] held that the question of apportionment, although political in nature, was not necessarily a "political question."[7] The Court held that the federal district court should not have dismissed the case for lack of jurisdiction and therefore remanded for a determination of the equal protection challenge.[8]

After allowing courts to decide certain questions involving democratic representation, the *Baker* Court left unresolved the problem of designing a standard for determining what constitutes a denial of equal protection in legislative apportionment. The United States Supreme Court's later answer to the problem was the adoption of the "one man-one vote" doctrine.[9]

The first case to apply the "one man-one vote" doctrine to invalidate a state apportionment plan was *Gray v. Sanders.*[10] In *Gray* the plaintiff, a qualified voter, sought to restrain the use of Georgia's county unit system as a basis for counting votes in a primary election.[11] The Court stated that once the geographic unit

4. 369 U.S. 186 (1962). Prior to *Baker* the Supreme Court decided Gomillion v. Lightfoot, 364 U.S. 339 (1960), which involved a gerrymandering claim by Black voters in Tuskegee, Alabama. *Id.* at 340. The Court agreed that the claim was justiciable, relying on the fifteenth amendment. *Id.* at 341-43.

5. Baker v. Carr, 369 U.S. 186, 187-88 (1962). The Tennessee apportionment plan, as adopted in 1901, resulted in 37% of the voters electing 20 of the 33 senators and 40% of the voters electing 63 of the 91 members of the house. *Id.* at 253.

6. *Id.* at 217. The Court stated that certain types of issues may be nonjusticiable under the guarantee clause of article IV of the United States Constitution. *Id.* at 210. The Court described potential political questions as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

7. *Id.* at 209, 226-27, 237.

8. *Id.* at 237.

9. The cases establishing and laying the groundwork for the doctrine were Reynolds v. Sims, 377 U.S. 533 (1964),Wesberry v. Sanders, 376 U.S. 1 (1964), and Gray v. Sanders, 372 U.S. 368 (1963).

10. 372 U.S. 368 (1963).

11. *Id.* at 370. The Georgia apportionment plan at issue in *Gray* allowed the candiate who won a plurality of the popular vote in any county in the primary election to take all of the county's electoral units. The complaint alleged that while one unit vote represented 938 Echols County residents,

for which a representative is to be chosen is designated, the equal protection clause requires that every person in the unit have an equal vote.[12] Thus, emphasizing the concept of political equality in the United States, the Court announced the doctrine of "one man-one vote."[13]

Shortly after *Gray* was decided, the United States Supreme Court applied the "one man-one vote" doctrine to invalidate a Georgia congressional districting statute.[14] In *Wesberry v. Sanders*[15] the plaintiffs, qualified voters, alleged that the statute violated the federal constitution by depriving them of the right to have their vote equivalent to the votes of other Georgians.[16] The Court examined the history of the United States Constitution[17] and held that article I, section 2, in providing that United States Representatives be chosen by the people of the several states, requires that, as nearly as practicable, one man's vote be worth as much as another's.[18]

Four months after *Wesberry,* in its decision of *Reynolds v. Sims,* the United States Supreme Court applied the "one man-one vote" doctrine to state legislative apportionments.[19] In *Reynolds* the plaintiffs contended that as a result of Alabama's growth between 1900 and 1960, several counties in the state were being discriminated against with respect to the allocation of legislative

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another unit vote represented 92,721 Fulton County residents. Thus, one resident of Echols County had 99 times the voting power of one resident of Fulton County. *Id.* at 371.

12. *Id.* at 379. The Court stated, "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . Every voter's vote is entitled to be counted once." *Id.* at 379-80.

13. *Id.* at 381. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote." *Id. But see* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973) (water storage district system in which only landowners could vote for the board of directors was found to be an exception to *Reynolds* and not violative of equal protection clause).

14. Wesberry v. Sanders, 376 U.S. 1 (1964). The Georgia statute, enacted in 1931, created 10 state districts, which designated one United States Representative to a district with a population of 823,680, while also designating one representative to a district with a population of 272,154. *Id.* at 2.

15. 376 U.S. 1 (1964).

16. *Id.* at 3. The plaintiffs alleged a violation of article I, section 2, clause 1 of the Constitution of the United States which states in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. CONST. art. I, § 2, cl. 1.

17. 376 U.S. at 9-18. The Court interpreted the history of the Constitution as follows:

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.

Id. at 13-14 (footnotes omitted).

18. *Id.* at 7-8.

19. 377 U.S. 533 (1964).

representation.[20] The Court held that the equal protection clause and the "one man-one vote" doctrine require that both houses of a state legislature, as well as the state's congressional districts, be apportioned on a population basis.[21] The State argued that membership in one of its houses could be apportioned in the same manner as the United States Senate where each state, regardless of population, has two seats.[22] The Supreme Court, rejecting this federal analogy argument, stated that while the original thirteen colonial states were at one time independent, sovereign entities,[23] the political subdivisions of a state have never been considered sovereign entities.[24] Therefore, the equal protection clause requires that both houses of a state legislature be apportioned on an equal population basis.[25]

In *Reynolds* the Supreme Court recognized that state legislatures need not be apportioned with the same degree of precision required for congressional districts.[26] If a state can demonstrate "legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible."[27]

Litigation following *Reynolds* revolved around districting questions left unanswered by the *Reynolds* and *Wesberry* Courts. One of these was the uncertainty as to what should be used as the apportionment base (the population figures upon which the apportionment is based). Although most states use the United States Census Bureau count as the apportionment base,[28] in one instance the United States Supreme Court has allowed a narrower

20. Reynolds v. Sims, 377 U.S. 533, 540 (1964). Alabama had not been reapportioned in sixty years, even though the population had increased from 1,828,697 to 3,244,286. *Id.* at 542 n.7. Population variance ratios of 41 to 1 and 16 to 1 existed in the Senate and House of Representatives respectively. *Id.* at 545. Population variance ratio is defined as the ratio comparing the population of two districts, the largest and smallest. *See* T. O'ROURKE, REAPPORTIONMENT: LAW, POLITICS, COMPUTERS (1972). In *Reynolds* the plaintiffs contended that the ratios resulted in the denial of their "equal suffrage" in free and equal elections in violation of the fourteenth amendment. 377 U.S. at 540.

21. *Id.* at 575-76.

22. *Id.* at 571.

23. *Id.* at 573. A similar analogy was made by the lower federal court in *Gray* in comparing the county unit system with the electoral college. 372 U.S. at 376. The United States Supreme Court rejected the analogy. *Id.*

24. 377 U.S. at 575.

25. *Id.* at 575-76. In conclusion the Court stated: "[T]he Equal Protection clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Id.* at 566.

26. *Id.* at 578-79.

27. *Id.* at 579. The Court stated that the following would be considered as general constitutional standards constituting "legitimate considerations:" (1) The maintenance of subdivisions; (2) the compactness of contiguous territories; and (3) legitimate political subdivisions and natural or historical boundaries. *Id.* at 578-79. The Court declared that states are to apportion "as nearly of equal population as is practicable." *Id.* at 557. *But see* Chapman v. Meier, 420 U.S. 1 (1975) (all of these considerations found by the Supreme Court to be unpersuasive).

28. *See, e.g.*, Chapman v. Meier, 420 U.S. 1 (1975); Gaffney v. Cummings, 412 U.S. 735 (1973); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

base. In *Burns v. Richardson*[29] the Court allowed Hawaii to use the number of registered voters as the base.[30] The Court's holding may be limited, however, because the districts created by the Hawaii Legislature were not substantially different from the districts created in a plan using the traditional census base.[31]

Another problem states faced involved the type of district a state could implement in an apportionment plan. The state could use single-member, multimember,[32] or floterial districts.[33] Of the three types, the validity of multimember districts has been most frequently questioned under the equal protection clause. The United States Supreme Court, in addressing the problem of multimember districts, has stated that multimember districts are valid as long as the various districts are of substantially equal population[34] and that the voting strength of a racial or political element of the voting population is not diluted.[35]

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29. 384 U.S. 73 (1966).

30. Burns v. Richardson, 384 U.S. 73 (1966). The *Burns* Court explained that apportionment bases need not be limited to total population figures:

> The holding in *Reynolds v. Sims,* as we characterized it in the other cases decided on the same day, is that "both houses of a bicameral state legislature must be apportioned substantially on a population basis." We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.

Id. at 91-92 (footnotes omitted). *See also* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (apportionment based on United States citizenship). *But see* Davis v. Mann, 377 U.S. 678 (1964) (voting strength of an area cannot be reduced because it contains military personnel).

31. *Id.* at 93. In using the registered voters base, the state may have to reapportion more often that every 10 years. *Id.* at 96.

32. A multimember district is one in which two or more legislators are elected at large by the voters of one district. *See* Whitcomb v. Chavis, 403 U.S. 124, 127-28 (1971).

33. A floterial district is a legislative district that includes within its boundaries several separate districts or political subdivisions, which independently would not be entitled to an additional representative, but whose conglomerate population entitles the entire area to another seat in the legislature. *See* Davis v. Mann, 377 U.S. 678, 686 n.2 (1964).

34. Reynolds v. Sims, 377 U.S. 533, 579 (1964). In *Reynolds* the United States Supreme Court stated the following: "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*

35. 384 U.S. at 88. In *Burns v. Richardson* the Supreme Court held that the equal protection clause does not require that even one house of a bicameral state legislature consist of single member election districts. The Court added, however, as follows:

> [A]pportionment schemes including multimember districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

Id. (citing Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

Although multimember districts are deemed permissible in certain situations,[36] disenchanted voters have challenged the right of federal district courts to require the use of multimember districts in a court-ordered reapportionment plan.[37] The United States Supreme Court has stated that single-member districts are generally preferable to multimember districts in a court-ordered plan.[38]

An additional problem encountered in applying the *Reynolds* standards to the districting of state legislatures is that of gerrymandering.[39] The United States Supreme Court has been reluctant to invalidate reapportionment plans on the grounds of political gerrymandering;[40] however, racial gerrymandering has been recognized as being potentially unconstitutional.[41] In *Wright v. Rockefeller*[42] voters challenged New York's congressional

36. *See* Lucas v. Colorado General Assembly, 377 U.S. 713 (1964). In *Lucas* the Court explained in a footnote:

> 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.

Id. at 731 n.21. In Fortson v. Dorsey, 397 U.S. 433 (1965), the Supreme Court held that the use of multimember districts was not per se unconstitutional. *Id.* at 438-39. Under Georgia's apportionment plan for senatorial districts there were a number of counties that were comprised of several districts. Instead of electing only one senator from the district in which they resided, the voters of the county elected, on a county-wide basis, the number of senators equal to the number of districts in the county. *Id.* at 435. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971) (use of multimember districts in Indiana bicameral legislature not per se illegal; however, state was ordered to reapportion due to excessive population variations in the Senate (28.20%) and House of Representatives (24.78%)); White v. Regester, 412 U.S. 755 (1973) (state's multidistricting plan struck down in view of history of official racial discrimination relating to right to vote).

37. Connor v. Johnson, 402 U.S. 690 (1971). In *Connor* interested parties had submitted to the federal district court four plans that utilized single member districts. The *Connor* Court, however, issued its own apportionment plan, which used single and multimember districts in each House. *Id.* 690-91.

38. *Id.* at 692. In a later case the United States Supreme Court stated: "[U]nless there are persuasive justifications, a court ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimus* variation." Chapman v. Meier, 420 U.S. 1, 26-27 (1975) (footnote omitted). *See also* Wise v. Lipscomb, 437 U.S. 535 (1978) (federal court plans are held to stricter standards on review).

39. Gerrymandering has been defined as discriminatory districting, which operates to unduly inflate the political strength of one group and deflate that of another. Dixon, *supra* note 2, at 255. *See also* Greater Houston Civil Council v. Mann, 440 F. Supp. 696 (S.D. Tex. 1977) (lower federal court held that city-wide multimember district did not discriminate against Black and Mexican American minorities). To date, neither racial nor political gerrymandering has been an issue in the North Dakota litigation. Chapman v. Meier, 420 U.S. 1, 19 (1975).

40. Gaffney v. Cummings, 412 U.S. 735 (1973). Connecticut's legislative apportionment plan was based upon the "political fairness principle." *Id.* at 752. The plan achieved a rough approximation of the statewide political strengths of the two major parties and provided each party with a proportionate number of legislative seats. *Id.* at 738. The Supreme Court found no violation of the equal portection clause. *Id.* at 752. *See also* Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. LEG. 825, 835 (1977).

41. *See* Wright v. Rockefeller, 376 U.S. 52 (1964).

42. 376 U.S. 52 (1964).

apportionment statute.[43] The voters alleged that irregularly shaped districts had been drawn on the basis of race in violation of the fourteenth amendment due process and equal protection clauses.[44] The Supreme Court held that because there was no indication that the state had drawn the lines contriving to segregate on the basis of race, there was no violation of the fourteenth amendment.[45] Although the Supreme Court refused to recognize racial gerrymandering as unconstitutional per se,[46] the Court indicated that a plan may be found to violate the equal protection clause when it can be proved that the legislature intended to discriminate against voters because of their race or place of origin.[47]

Finally, states must be concerned with the problem of population deviation. In *Reynolds* the Court held that states are required to make a good faith effort to construct districts that would adhere to the standard of substantial population equality.[48] Although a strict standard of population equality is required for congressional districting,[49] under *Reynolds,* state legislative districting may be subject to greater population deviations, provided the state is able to justify any deviations.[50] Thus the United States Supreme Court held that a Missouri congressional district plan which had a maximum population variance of 3.3 percent was invalid because the state lacked valid justifications.[51]

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43. *Id.* at 53.
44. *Id.* at 53-55.
45. *Id.* at 58.
46. *Id.* at 56-58.
47. *Id. See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960). Black residents of Tuskegee, Alabama were denied their preexisting right to vote in municipal elections under a new municipal incorporation. *Id.* at 340-41. The Supreme Court stated that "[w]hen a legislature singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Id.* at 346.
48. Reynolds v. Sims, 377 U.S. 533, 577 (1964). The Court in *Reynolds* described the deviation requirement as follows:

> 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.

Id. at 577 (footnote omitted). *See also* Mahan v. Howell, 410 U.S. 315 (1973) (Court indicated broader latitude permitted in state legislative apportionment).
49. In Wesberry v. Sanders, 376 U.S. 1 (1964), the Supreme Court required states to draw their congressional districts so that as nearly as practicable one man's vote is worth as much as another's. *Id.* at 7-8.

In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court indicated that its *Wesberry* language was to be read literally, when it struck down a congressional districting plan in which the most populous district exceeded the ideal by 3.13%. *Id.* at 528-29. *See also* White v. Weisler, 412 U.S. 783 (1973) (congressional plan in which the most populous district exceeded the ideal by 2.43% was struck down).
50. Reynolds v. Sims, 377 U.S. 533, 579 (1964). *See also supra* note 27.
51. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). In *Kirkpatrick* the United States Supreme Court

On the other hand, in a case involving a state legislative districting plan, the Court held that a total deviation of 9.9 percent was permissible without any special justifications.[52] Further, when a state can justify the need for a deviation greater than 9.9 percent, the Court has held the plan valid.[53]

Although the United States Supreme Court has established several principles governing the constitutionality of various apportionment plans, the law in this area is by no means definite.[54] Also complicating the task of reapportioning is the highly political matter of who should be responsible for drafting a plan. In North Dakota the state legislature has in the past been designated the task. Its success in formulating constitutional plans, however, has not been free from controversy. The remainder of this Note will discuss the history of apportionment law in North Dakota and suggest an alternative to apportionment by a legislature.

III. THE HISTORY OF APPORTIONMENT IN NORTH DAKOTA

Problems with reapportionment have existed in North Dakota since its territorial days.[55] When the Constitutional Convention convened in 1889, delegates encountered the problems of establishing the basic elements of the legislative districting and of drawing a map for the first elections.[56] The delegates drafted, and the people of the state approved, sections 26, 29, 32, and 35 of the Constitution of the State of North Dakota to govern the state's apportionment.[57]

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stated that the adoption of a fixed numerical standard that would excuse population variances without regard to circumstances would only serve to encourage legislators to strive for a *de minimis* range of variation rather than population equality. *Id.* at 530-31.

52. White v. Regester, 412 U.S. 755 (1973) (Texas apportionment plan consisted of 79 single member districts and 11 multimember districts and had a total deviation of 9.9% and an average deviation of 1.82%).

53. Mahan v. Howell, 410 U.S. 315 (1973) (United States Supreme Court upheld Virginia reapportionment plan, which had a maximum variation of 16.4%, based on the state's rational justification of maintaining the integrity of political subdivisions). *See also* Abate v. Mundt, 403 U.S. 182 (1971) (New York apportionment plan for Rockland County government, which had a total deviation of 11.9%, upheld based on the assertion of the long tradition of overlapping functions and dual personnel in the county government and on the fact that the plan contained no built-in bias favoring particular political intents or geographic areas). *But see* Chapman v. Meier, 420 U.S. 1 (1975) (United States Supreme Court held a North Dakota apportionment plan that had a 20% deviation invalid, stating that the State's justification of maintaining the integrity of political subdivisions was unpersuasive).

54. *See* Swann v. Adams, 385 U.S. 440, 445 (1967) (fact that one variation from the norm is approved in one state has little bearing on the validity of a similar variation in another state).

55. *See* Dobson, *supra* note 1.

56. *Id.* at 282.

57. Section 26 of article II of the North Dakota Constitution stated: "The Senate shall be composed of not less than thirty nor more than fifty members." N.D. CONST. art. II, § 26 (1889) (amended, 1960)(found unconstitutional in Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964)). Section 29 of article II of the North Dakota Constitution stated:

In the years following the first constitutional convention, the legislature at various times changed the size of the legislative body.[58] In 1931 the North Dakota Legislature completed what was to be its last effected reapportionment to this date.[59] Although the legislature was required by the North Dakota Constitution to reapportion after the federal census of 1940 and 1950, it failed to do so.[60] The state's apportionment plan remained the same until 1959 when the state legislature attempted to work out a permanent solution.[61] Since 1959 the apportionment of North Dakota has been the subject of various legislative enactments and court battles,[62] all of which have left unsolved the problem of how to apportion North Dakota.

A. REAPPORTIONMENT AFTER 1960 CENSUS AND THE 1962 ELECTIONS

In 1959 the Thirty-sixth Legislative Assembly passed Resolution M, which amended sections 26, 29, and 35 of the

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> The legislative assembly shall fix the number of senators, and divide the state into as many senatorial districts a there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territories; and no portion of any county shall be attached to any other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law.

N.D. CONST. art. II, § 29 (1889) (amended 1960) (found unconstitutional in Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964)).

Section 32 of article II of the North Dakota Constitution stated: "The house of representatives shall be composed of not less than sixty, nor more than one hundred forty members." N.D. CONST. art. II, § 32 (1889) (current version N.D. CONST. art. IV, § 8).

Section 35 of article II of the North Dakota Constitution stated:

> The members of the house of representatives shall be apportioned to and elected at large from each senatorial district. The legislative assembly shall, in the year 1895, and every tenth year cause an enumeration to be made of all the inhabitants of this state, and shall at its first regular session after each such enumeration, and also after each federal census, proceed to fix by law the number of senators, which shall constitute the senate of North Dakota, and the number of representatives which shall constitute the house of representatives of North Dakota, within the limits prescribed by this Constitution, and at the same session shall proceed to reapportion the state into senatorial districts as prescribed by this Constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts; provided, that the Legislative Assembly may, at any regular session, redistrict the state into senatorial districts, and apportion the senators and representatives respectively.

N.D. CONST. art. II, § 35 (1889) (amended 1960) (found unconstitutional in Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964)).

58. *See* Dobson, *supra* note 1, at 283-85.

59. 1931 N.D. Sess. Laws ch. 7. *See also* Dobson, *supra* note 1, at 284-86; *infra* notes 60-188 and accompanying text.

60. *See* Brief of Amicus Curiae at 2, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

61. *See* 1959 N.D. Sess. Laws ch. 438, S. Con. Res. M.

62. Chapman v. Meier, 420 U.S. 1 (1975); Chapman v. Meier, 407 F. Supp. 649 (D.N.D. 1975); Chapman v. Meier, 372 F. Supp. 363 (D.N.D. 1972), *rev'd,* 420 U.S. 1 (1975); Paulson v. Meier, 246 F. Supp. 36 (D.N.D. 1965); Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964); Lein v. Sathre, 201 F. Supp. 535 (D.N.D. 1962); State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53 (N.D.

constitution.[63] The resolution was voted on and approved by the people on June 28, 1960.[64] Sections 26 and 32, as amended, permanently fixed the number of senators and representatives, while section 29, as amended, permanently fixed the district boundaries as they existed at the time of the adoption of the amendment.[65] Additionally, section 35, as amended, provided that districts consisting of more than one county should have at least as many representatives as there are counties in the district.[66] Amended section 35 also imposed upon the legislative assembly the duty of apportioning members of the House of Representatives at the first regular session after each federal decennial census.[67] In the event the legislature failed to apportion the state during the first session, section 35, as amended, provided that the duty to apportion fell upon a special apportionment group.[68]

In 1961 the legislative assembly failed to adopt an apportionment plan as required by section 35. In accordance with section 35, the apportionment group convened and attempted to develop a plan within the constitutionally allotted ninety days.[69]

1971); State *ex rel.* Lein v. Sathre, 113 N.W.2d 679 (N.D. 1962); State *ex rel.* Aamoth v. Sathre, 110 N.W.2d 228 (N.D. 1961).

63. State *ex rel.* Lein v. Sathre, 113 N.W.2d 679, 682 (N.D. 1962). Senate Concurrent Resolution M, a resolution for amendment of sections 26, 29, and 35 of the North Dakota Constitution relating to the establishment of senatorial districts, representation from such senatorial districts in the house of representatives, and the manner of reapportioning members elected to the house of representatives after each federal decennial census, proposed to amend the Constitution as follows:

> Section 26. The senate shall be composed of forty-nine members.
>
> . . . .
>
> Section 29. Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more.
>
> . . . .
>
> Section 35. Each senatorial district shall be represented in the House of Representatives by at least one representative except that any senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to apportion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial districts. If any legislative assembly whose duty it is to make an apportionment shall fail to make the same as herein provided it shall be the duty of the chief justice of the supreme court, attorney general, secretary of state, and the majority and minority leaders of the House of Representatives within niney days after the adjourment of the legislature to make such apportionment and when so made a proclamation shall be issued by the chief justice announcing such apportionment which shall have the same force and effect as though made by the Legislative Assembly.

1959 N.D. Sess. Laws ch. 438, S. Con. Res. M.

64. 1961 N.D. Sess. Laws ch. 405.

65. *See supra* note 63.

66. *Id.*

67. *Id.*

68. *Id. See also* State *ex rel.* Lein v. Sathre, 113 N.W.2d 679, 682 (1962).

69. Throughout the 1961-62 litigation, the apportionment group consisted of North Dakota

The plan conceived by the group, referred to as the Burgum Plan, enlarged the House of Representatives from 113 to 115 and resulted in a reduced representation of some urban areas.[70] Prior to the lapse of the ninety day period, a suit was brought before the North Dakota Supreme Court by an urban resident challenging the constitutionality of the plan.[71] The North Dakota Supreme Court in *State ex rel. Aamoth v. Sathre* held that the action was technically premature and the petitioner's request for relief was denied.[72] A few months later the Burgum Plan was again challenged, this time in federal district court.[73] In *Lein v. Sathre*[74] the plaintiffs, qualified voters in North Dakota, requested declaratory and injunctive relief.[75] The plaintiffs contended that the Burgum Plan would create substantial inequality in the voting strength of individual voters in various districts.[76] This challenge was directed primarily at the portion of section 35 that allowed a district with more than one county to have an additional representative for each county in the district.[77] The plaintiffs claimed that the provision disregarded population and distributed political power unequally.[78]

The United States District Court for the District of North Dakota held that because the earlier *Aamoth* action had been brought prematurely, the issues had not been properly presented to the North Dakota Supreme Court.[79] As such, the plaintiffs' action was stayed, pending the determinations of the North Dakota

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Supreme Court Chief Justice P. O. Sathre, Attorney General Leslie R. Burgum, Secretary of State Ben Meier, and State Representatives Ben Wolf (R-Zeeland) and Arthur Link (D-Alexander). Lein v. Sathre, 201 F. Supp. 535, 536 (D.N.D. 1962).

70. The Burgum Plan was based upon 49 senatorial districts and 115 representatives. According to section 35, as amended, each senatorial district received one representative for each county in the district. The remaining seats to be allotted totaled 54. To apportion these 54 seats, the Burgum Plan gave an additional representative to districts with populations over districts over 24,000, four additional representatives to districts over 36,000. *See* Deposition of Leslie R. Burgum at 14, Lein v. Sathre, 201 F. Supp. 535 (D.N.D. 1962).

71. State *ex rel.* Aamoth v. Sathre, 110 N.W.2d 228 (N.D. 1961).

72. *Id.* at 231 (opinion by Strutz, J.; Morris, Burke, Teigen, and Lynch, JJ., concurring; Sathre, C. J., did not participate). The North Dakota Supreme Court stated that section 35 of the North Dakota Constitution provided for an apportionment group that was legislatively appointed. This group had not yet completed its work. No proclamation had been issued by the chief justice announcing apportionment, and the 90-day period within which action by the apportionment group was required had not expired. Since no proclamation had been made and the 90-day period had not expired, the court held that the action of the apportionment group was not complete and, therefore, not subject to challenge in the courts. *Id.*

73. Lein v. Sathre, 201 F. Supp. 535 (D.N.D. 1962).

74. 201 F. Supp. 535 (D.N.D. 1962).

75. *Id.* at 538. This action was decided approximately two months before Baker v. Carr, 369 U.S. 186 (1962). *See supra* note 4 and accompanying text.

76. 201 F. Supp. at 538. The defendants contended that the court had no jurisdiction because the action was political in nature, and the right of equality of voting strength was not guaranteed by either the Constitution of the United States or by the Civil Rights Act. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 542 (three judge panel comprised of Vogel, Davies, and Register, JJ.).

Supreme Court.[80]

The plaintiffs returned to the North Dakota Supreme Court requesting relief in the action *State ex rel. Lein v. Sathre.*[81] In this action the plaintiffs asked the North Dakota Supreme Court to declare the Burgum Plan void as violative of the North Dakota Constitution[82] and to restrain the secretary of state from holding elections for the members of the House of Representatives until a constitutional plan was adopted.[83]

In order to determine the validity of the challenged Burgum Plan, the North Dakota Supreme Court examined two mathematical methods of calculating population distributions in voting districts. The two methods, which have been used in other states for apportioning, are referred to as the "Equal Proportion formula" and the "Major Fraction formula."[84] The North Dakota Supreme Court, using the two formulas for comparison purposes, found that there was a disparity between the number of representatives allotted for each district under the Burgum Plan and the number of representatives allotted for corresponding districts apportioned under both the Equal Proportion method and the Major Fraction method.[85] The difference between the Burgum Plan and the two formulas affected sixteen districts, or approximately one-third of the districts in the state.[86] The North Dakota Supreme Court, in concluding that the disparity indicated that the apportionment group's Burgum Plan was not based upon population, declared the Plan void.[87] The Court further stated that the lack of a valid apportionment plan under section 35 would not

80. *Id.* at 542. Judge Davies dissented, asserting that the court presently had jurisdiction. *Id.*

81. 113 N.W.2d 679 (N.D. 1962).

82. *Id.* at 681-82 (no question arising under the United States Constitution was presented to the North Dakota court).

83. *Id.* at 687.

84. *Id.* at 685. For an explanation of the Equal Proportion formula and Major Fraction formula, *see generally* Shaw v. Adkins, 202 Ark. 856, 153 S.W.2d 415 (1941).

85. 113 N.W.2d at 686. For an example of the differences among the three methods, compare the number of representatives for each district below:

District No.	County	Population	Burgum Plan	Major Fraction	Equal Proportion
29	WARD	42,041	5	7	7
36	MCINTOSH, LOGAN	12,071	3	2	2
7	GRAND FORKS	20,514	3	4	4
37	RICHLAND	8,303	2	1	1

Id.

86. *Id.* at 687.

87. *Id.* The court stated:

> The variance of ratios and the degree of each variance, which we have pointed out, and the many departures from the results of the formulas shown by the table impel us to hold that the apportionment made by the group violates the constitutional mandate of apportionment according to the population of the several districts and is void.

Id. (opinion by Morris, J; Burke, Teigen, Lynch, JJ., concurring; Strutz, J., dissenting in part).

prevent the secretary of state from conducting the general election.[88] Therefore, for purposes of the upcoming election, the last valid apportionment law, adopted in 1931, would be used to determine the voting districts.[89] The plaintiffs did not return to the federal district court where the action had been stayed.

In 1963, with the next meeting of the legislative assembly, an apportionment plan was adopted when the assembly passed House Bill 653.[90] Notwithstanding the North Dakota Supreme Court's decision in *State ex rel. Lein v. Sathre,* the plan was adopted in accordance with sections 26, 29, and 35 of article II of the North Dakota Constitution, as previously amended.[91] In *Paulson v. Meier*[92] the plaintiffs, qualified voters of North Dakota, brought suit in federal court to have sections 26, 29, and 35 and section 54-03-01 of the North Dakota Century Code (House Bill 653) declared unconstitutional as being violative of the equal protection clause of the fourteenth amendment.[93] The United States District Court for the District of North Dakota evaluated the plaintiffs' assertions in light of *Reynolds v. Sims.*[94] The three judge district court held that North Dakota's existing apportionment plan failed to assure all citizens an equally effective vote in the election of representatives and significantly undervalued the weight of the votes of certain citizens merely because of their residence.[95] The United States District Court, therefore, declared sections 26, 29, and 35, as amended, and section 54-03-01 violative of the equal protection guarantees of the fourteenth amendment.[96]

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88. *Id.*

89. *Id.* The last valid apportionment law was the 1931 apportionment. 1931 N.D. Sess. Laws ch. 7.

90. 1963 N.D. Sess. Laws ch. 345.

91. Paulson v. Meier, 232 F. Supp. 183, 184 (D.N.D. 1964). House Bill 653 reduced the size of the house from 113 to 109, decreasing the number of representatives from each of the five most populous districts by one and giving one seat to District 37 (part of Richland County). Affidavit of Dr. John Bond, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

92. 232 F. Supp. 183 (D.N.D. 1964).

93. Paulson v. Meier, 232 F. Supp. 183, 184 (D.N.D. 1962). Section 54-03-01 of the North Dakota Century Code (House Bill 653) created the situation in which 26 districts with 26 senators represented 212,199 people; 23 districts with 23 senators represented 420,247 people; and seven of the twenty-three districts with seven senators represented 239,068 people. The plaintiffs contended that this scheme constituted invidious discrimination. *See* Plaintiff's Trial Brief at 2, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

94. 377 U.S. 533 (1964). *See also supra* notes 20-27 and accompanying text.

95. 232 F. Supp. at 187. The federal district court stated that sections 26 and 29 of the constitution and section 54-03-01 failed to consider population as a prime factor. *Id.* at 186. The court emphasized population deviations presented in House Bill 653, noting the following examples: District 43 (Renville County - 4,698) one senator; District 29 (Minot and part of rural Ward County - 42,041) one senator; and District 9 (Fargo - 38,494) one senator. *Id.* Furthermore, the court stated that the multicounty district plan of section 35 was invalid. *Id.* at 186-87. Examples of the disparities within the multicounty plan of section 35 are as follows: District 39 (Billings, Bowman, Slope, and Golden Valley counties - 10,660) four representatives; District 25 (Dickey County - 8,147) one represenative; and District 3 (Walsh County - 8,423) two representatives. *Id.* at 187.

96. *Id.* at 186 (opinion by Register, J., Vogel, J. concurring; Davies, J. dissenting in part, asserting that the court should not permit a de facto legislative assembly to meet, legislate, and attempt to enact a reapportionment law in 1965).

The three judge district court did not stop at declaring the challenged plan and constitution sections void. The court also considered the 1931 apportionment plan and found it to be unconstitutional.[97] In sum, the court concluded that all of North Dakota's legislative apportionment law was invalid.[98] Recognizing that the state was without a constitutional apportionment law, the court drew several conclusions. First, because the state had already held a primary election that year, the court did not feel inclined to require the state to go through the expense of nullifying those results and of holding a special primary election under a court-ordered apportionment plan.[99] Second, the court felt that in fairness the state ought to be given an opportunity to comply with the requirements of the recently decided *Reynolds* case.[100] Third, the court determined that the next legislative assembly should be elected under existing law (the 1931 plan) and be given de facto status for the next session (1965) at which time the legislature would adopt a valid apportionment plan.[101]

B. 1965 LEGISLATIVE ASSEMBLY AND 1966-1970 ELECTIONS

At the time of the judgment in *Paulson v. Meier,* and prior to the meeting of the Thirty-ninth Legislative Assembly (1965), a subcommittee of the North Dakota Legislative Research Committee was engaged in rewriting the North Dakota

97. *Id.* at 187.

98. *Id.* The court held as follows:

> We therefore hold that the 1931 apportionment statute is vulnerable to the same consititutional attack as its amendment, and we hereby find and declare it to be constitutionally invalid. We further find and declare that any and all existing laws of this state relating to legislative apportionment which limit or prescribe district areas or boundaries, or apportion the members of the legislative assembly on any basis other than population, are unconstitutional and void. It is our conclusion, and we so hold, that there is no constitutionally valid legislative apportionment law in existence in the State of North Dakota at this time.

Id.

99. *Id.*

100. *Id.* at 189-90.

101. *Id.* at 190. The court described the situation as follows:

> We hold that the Thirty-ninth Legislative Assembly (1965) of North Dakota, consisting of members elected under existing law, will have a de facto status; that at such regular session it should promptly devise and pass legislation creating and establishing a system of legislative districting and apportionment consistent with federal constitutional standards; that the effective date of this Order and Decree will be stayed until after the 1964 general elections have been held and for a reasonable time after the commencement of the 1965 Legislative Assembly in order to afford such Assembly a reasonable and adequate opportunity to enact such apportionment legislation.

Id. The de facto status is "used to characterize an officer, a government, a past action, or state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate." *Id.* at 191 n.1.

Constitution. The committee, realizing that the Thirty-ninth Session would have an enormous task in reapportioning the state, proceeded to study and prepare an apportionment plan to present to the legislature. To help prepare the plan, the subcommittee engaged the services of R. R. Smith, a specialist in legislative apportionment.[102] The plan devised by Smith, after two public hearings, was approved by the committee and submitted to the 1965 Assembly as Senate Bill 39.[103]

Senate Bill 39 caused "considerable consternation" among the members of the legislature.[104] A problem evolved from the fact that county lines were disregarded and five multimember districts were formed.[105] The consternation caused an inundation of alternative plans to be presented to the legislature. Although all plans were based on Smith's population figures, each plan retained the county boundary lines that suited the particular drafter's purpose. The legislature finally narrowed the viable alternatives to Senate Bill 39, the Dobson Plan (which came in three alternative plans and retained all county lines), and the Johnson Plan (which was similar to Senate Bill 39 but which also considered economic and social factors, particularly those of the area west of the Missouri River).[106]

The legislature did not adopt an apportionment plan until the last day of the session. This plan, House Bill 566, was written by the majority and minority leaders of each house and the two chairmen of the state and federal committees.[107] A question of good faith, or lack thereof, loomed over the newly enacted bill to the extent that Governor William Guy allowed House Bill 566 to become law without his signature on July 1, 1965.[108]

Following the enactment of the new apportionment law, the defendant from the 1964 *Paulson v. Meier* case filed a motion for dismissal and clarification with the United States district court.[109] The plaintiffs objected to the motion stating that the legislature had failed to apportion according to federal constitutional standards

102. *See* Brief Amicus Curiae at 4, Paulsen v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

103 *Id.* Senate Bill 39 divided the state into forty-nine senatorial districts, with two representatives in each district. The total population deviation of Senate Bill 39 was 27.98%. *Id.* Total population deviation is determined by taking the populations of the most populated and least populated districts and calculating the percentage difference between each of the two districts as against the average population per district. The resulting two percentages added together equal the total population deviation.

104. *Id.*

105. *Id.*

106. *Id.* at 5, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

107. *Id.* at 6, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

108. N.D. Cent. Code § 54-03-01 (1965). *See also* Brief Amicus Curiae at 1, Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964); Dobson, *supra* note 1, at 286.

109. Paulson v. Meier, 246 F. Supp. 36, 38 (D.N.D. 1965).

and alleged that House Bill 566 was discriminatory and not consistent with constitutional standards.[110] Further, the plaintiffs asked that the district court devise an apportionment plan which would be consistent with *Reynolds*.[111]

In response to the plaintiffs' request, the United States district court agreed to determine the validity of House Bill 566. The district court, in evaluating House Bill 566, recognized that *Reynolds* permitted some flexibility in population deviation by allowing states to maintain political subdivisions and to provide for compact districts of contiguous territory if these factors were a part of a rational state policy.[112] The total variation in House Bill 566 diluted the voting strength of more than one-eighth of the population of the state.[113] The United States district court found no "apparent rational design" to justify the variations, nor any state policy that would merit special consideration.[114] Moreover, the defendant failed to show any unusual circumstances that would have given validity to the plan.[115] The district court thus concluded that House Bill 566 had failed to meet the "good faith effort" test[116] of establishing districts that were substantially equal in population.[117] The court, therefore, denied the defendant's motion and declared House Bill 566 unconstitutional as a violation of the equal protection clause.[118]

Upon finding House Bill 566 invalid, the United States district court had to determine how the state should be apportioned. The defendant requested that House Bill 566 remain valid for an interim period, during which time the bill would be rewritten according to the court's direction.[119] The district court, however, rejected the request and after evaluating and restructuring parts of Senate Bill 39, adopted it as the new apportionment plan for North Dakota.[120] The new plan, although court-ordered, represented the first plan since 1931 to be fully

110. *Id.*
111. *Id.*
112. *Id.* at 39. *See* Reynolds v. Sims, 377 U.S. 533, 577-79 (1964).
113. 246 F. Supp. at 41. The variation in House Bill 566, at times, exceeded the ratio of 1.3 to 1. *Id.* at 39, 40. The ratio compared voting strength of a person in one district with the voting strength of a person in a different district. The ratio was based on the total population in each district and the number of representatives from that district. The variation of one district was 19.4% above the average ratio of one senator and two representatives per 11,933 persons. *Id.* at 39.
114. 246 F. Supp. at 42.
115. *Id.* The court found that the plan was not the result of an attempt to keep legislative districts within county lines, but the result of an "eleventh hour" compromise, which did not consider population as a basis for fair and equitable representation. *Id.*
116. *Id.* at 43. *See also* quoted language from *Reynolds supra* note 48.
117. 246 F. Supp. at 43.
118. *Id.* (opinion by Register, J.; Vogel and Davies, JJ., concurring).
119. *Id.*
120. *Id.* at 44-46.

implemented. The plan remained unsuccessfully challenged[121] until the 1970 census complicated matters.

C. REAPPORTIONMENT AFTER THE 1970 CENSUS AND THE 1972-1974 ELECTIONS

In 1971 the task of reapportioning North Dakota was further complicated by a political dispute over the possible use of multimember districts, the increase in size of the two military bases located in the state, and the United States Census Bureau's failure to acknowledge township and precinct boundaries when the 1970 census was conducted.[122] Understandably, the 1971 legislative assembly failed to reapportion the state. For the sixth time in ten years an action was commenced challenging the apportionment of North Dakota.[123] Unlike prior cases, however, the issues presented in *Chapman v. Meier*[124] were eventually decided by the United States Supreme Court.

In *Chapman* the plaintiffs alleged that the court-ordered plan from *Paulson v. Meier* in 1965 no longer reflected the shifts in population indicated by the 1970 census and, as such, the plan no longer complied with the guarantees of the equal protection clause.[125] Initially, the plaintiffs sought to have the three judge federal district court issue a court-ordered apportionment plan that would do the following: (1) Declare the 1965 plan invalid; (2) limit districting to single-member districts; (3) be based on the 1970 census figures; and (4) restrain the secretary of state from administering the primary election laws under the 1965 plan.[126]

On May 22, 1972, the United States District Court for the District of North Dakota entered an order declaring the 1965 plan invalid.[127] The court stated that sufficient time existed to effect a

121. *But see* State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53 (N.D. 1971). In *Stockman* the petitioners contended that the multimember districts created by the district court in *Paulson v. Meier* violated section 29 of the North Dakota Constitution. *Id.* at 55. The petitioners argued that only the first portion had not been affected by the district court's ruling in *Paulson*. *Id.* at 56. The North Dakota Supreme Court assumed that when section 29 had been ratified by the voters, the section as a whole, rather than individual portions, had been voted on. Thus, the court held that if one portion of section 29 was invalid, the entire section was invalid. *Id.*

122. *See* Dobson, *supra* note 1, at 287.

123. Chapman v. Meier, 372 F. Supp. 363 (D.N.D. 1972), *rev'd*, 420 U.S. 1 (1975). *See* Paulson v. Meier, 246 F. Supp. 36 (D.N.D. 1965); Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964); Lein v. Sathre, 201 F. Supp. 535 (D.N.D. 1962); State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53 (N.D. 1971); State *ex rel.* Lein v. Sathre, 113 N.W.2d 679 (N.D. 1962); State *ex rel.* Aamoth v. Sathre, 110 N.W.2d 228 (N.D. 1961).

124. 372 F. Supp. 363 (D.N.D. 1972), *rev'd*, 420 U.S. 1 (1975).

125. Chapman v. Meier, 372 F. Supp. 363, 364 (D.N.D. 1972), *rev'd*, 420 U.S. 1 (1975).

126. *Id.*

127. *Id.* at 364 (per curiam opinion; Bright, Benson, Van Sickle, JJ., participating). The court stated that shifts in the population had created constitutionally impermissible variations in the apportionment plan. *Id.*

new apportionment plan before the 1972 primary deadline for the filing of petitions for ballot access.[128] The apportionment plan was to be designed by the United States district court with the help of three special masters.[129] The court gave the masters a set of guidelines to follow in designing a new apportionment plan.[130] A plan referred to as the Dobson Plan was adopted by the district court "for the 1972 election only."[131]

The Dobson Plan provided for thirty-eight senatorial districts, five of which were multimember.[132] In light of a recent United States Supreme Court decision stating that single-member districts were preferable to large multimember districts in court-ordered plans,[133] the district court attempted to minimize the number of multimember districts in the Dobson Plan.[134] The district court concluded, however, that a discontinuation of the existing multimember districts would disrupt the elective process, and therefore retained those districts within the Plan for the 1972

128. *Id.* Although the action was instituted in November 1971, a three judge district court was not requested until the plaintiffs filed an amended complaint on May 8, 1972. Chapman v. Meier, 372 F. Supp. 371, 382 (D.N.D. 1974). Candidates for legislative offices had to file the petitions to get their names on the ballot prior to July 27, 1972. *Id.* at 364 n.1.

129. 372 F. Supp. at 364-65. Special masters included Mr. R. R. Smith of Grand Forks, North Dakota; Mr. Richard Dobson of Minot, North Dakota; and Mr. Thomas K. Ostenson of Fargo, North Dakota. *Id.* at 364.

130. *Id.* at 364. The following guidelines were given to the Commission:

a. The Commission shall try to conform new legislative districts to the existing districts.
b. The Commission shall not substantially change the size of the Legislature.
c. Natural geographic barriers shall be observed.
d. Existing political subdivision lines should be observed, in so far as possible.
e. In the event the Commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator os senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972.

Id. at 377.

131. *Id.* at 367. For text of Dobson Plan, *see* Chapman v. Meier, 372 F. Supp. 363, 369-71 (N.D. 1972), *rev'd,* 420 U.S. 1 (1975). The statistical comparison of the 1965 Plan and Dobson Plan included:

	1965 Plan	Dobson Plan
Number of Districts	39	38
Number of Senators	49	51
Number of Representatives	98	102
County lines broken	13	10
Avg. pop. per senator	12,907	12,113
Most populous district	14,214	13,176
Least populous district	11,339	10,728
Pct. diviation over avg.	10.1%	8.8%
Pct. deviation under avg.	12.1%	11.4%
Deviation ratio	1.25 to 1	1.23 to 1

Id. at 365 n.4. The plan recognized that the interests of the persons residing on the military bases were more "closely aligned" with urban interests and therefore were included within the populations of nearby urban districts. *Id.* at 365.

132. *Id.* at 365-66.

133. *See* Connor v. Johnson, 402 U.S. 690, 691 (1971).

134. 372 F. Supp. at 365-67.

elections.[135]

The court concluded by ordering the special masters to continue work on a permanent plan that would be constitutionally valid.[136] The defendants asked the court to refrain from implementing a plan which would be in effect beyond the 1972 elections, explaining that the 1973 legislative assembly ought to have an opportunity to adopt its own plan.[137] The United States district court granted a stay on its adoption of a "permanent" plan, stating that it was unlikely that any prejudice would result by deferring the action.[138] The court, however, ordered that the North Dakota attorney general file a report concerning any action taken by the legislative assembly.[139]

The legislative assembly enacted a new apportionment bill, House Bill 1042, in February 1973. The bill contained the same multimember districts as the Dobson Plan, but broke fewer county lines.[140] The legislature overrode the veto of Governor Arthur Link, and House Bill 1042 became law.[141]

In the ensuing months, the implementation of House Bill 1042 was suspended by a referendum petition.[142] On December 4, 1973, a special election was held and the referendum was defeated.[143] The vote nullifying House Bill 1042 resulted in the state's once again being without a valid apportionment law.

After the special election, the defendant in the still pending *Chapman* proceeding requested the United States district court to adopt the Dobson Plan as the "permanent" apportionment plan.[144] The plaintiffs, however, objected to the reinstitution of the Plan because of the existence of multimember districts and the Plan's population variance.[145] Notwithstanding the objection, the court adopted the Dobson Plan as North Dakota's permanent apportionment law.[146] The court held that the use of the

135. *Id.* at 366.

136. *Id.* at 368. The special masters were to submit a plan to the district court by November 10, 1972. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* note 131 for Dobson Plan statistics; *see also* 1973 N.D. Sess. Laws ch. 411, House Bill 1042. House Bill 1042 provided for 37 legislative districts, each having one senator and two representatives, except for the five multimember districts. The total deviation was 6.8% and the average population in the district was 12,355. Chapman v. Meier, 420 U.S. 1, 12 (1975).

141. 372 F. Supp. at 387.

142. 1973 N.D. Sess. Laws at 1549. Along with the referendum, an initiative petition was circulated which proposed an amendment to the North Dakota Constitution. The amendment would have created a commission to reapportion North Dakota and would have mandated single member districts. 372 F. Supp. at 387.

143. Chapman v. Meier, 420 U.S. 1, 12 (1975).

144. 372 F. Supp. at 374.

145. *Id.* at 373.

146. *Id.* at 379 (opinion by Benson, J.; Van Sickle, J., concurring; Bright, J., dissenting).

multimember districts was a political question, which should be resolved by the electorate or the legislature.[147] With regard to population variances, the court stated that "once a plan has been formulated . . . [and] fairly meets the constitutional requirements, a court should not continue to sift and shuffle abstract figures solely to arrive at a mathematically perfect plan."[148]

The plaintiffs appealed to the United States Supreme Court in *Chapman v. Meier.*[149] The Supreme Court described the controversy in the opening statement of the *Chapman* opinion as the culmination of a ten year struggle, which had been totally ineffectual on the legislative side.[150]

The issue presented to the United States Supreme Court in *Chapman* concerned both the multimember districts and the population variance. The Court noted three basic rules with regard to multimember districts. First, multimember districts are not per se unconstitutional.[151] Second, when district courts create apportionment plans, single-member districts should be utilized.[152] Third, a district court may use multimember districts when "unique factors" are articulated which justify the usage.[153]

Applying the rules to the facts in *Chapman,* the United States Supreme Court first analyzed the history of multimember districts in North Dakota. The Court found that multimember districts had traditionally existed in the House of Representatives but not in the Senate.[154] The Court determined, therefore, that state policy did not justify the use of multimember districts in the Senate. Further, the Court found that the defendants had not articulated any "unique circumstances" which justified an exception to the state policy.[155]

The *Chapman* Court also concluded that its preference for single-member districting over court-ordered multimember districting[156] was not dependent upon an allegation of

147. *Id.* at 377

148. *Id.* at 379.

149. 420 U.S. 1 (1975). Probable jurisdiction was noted by the United States Supreme Court at 416 U.S. 966 (1974).

150. Chapman v. Meier, 420 U.S. 1, 3 (1975).

151. *Id.* at 15. *See also* White v. Regester, 412 U.S. 755, 765 (1973).

152. 420 U.S. at 18. *See also* Connor v. Johnson, 402 U.S. 690, 692 (1971).

153. 420 U.S. at 19. *See also* Mahan v. Howell, 410 U.S. 315, 333 (1973); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation,* 120 U. PA. L. REV. 666, 694-95 (1972).

154. 420 U.S. at 14. Only four instances of multimembership on the senate side have existed: (1) court-ordered multimember districts in *Paulson* (1965); (2) those imposed as temporarily expedient immediately before the 1972 election; (3) those established by provisions of House Bill 1042, enacted by the 1973 legislature; and (4) those applied by the United States district court as a "permanent solution" in the judgement presently under review. *Id.* at 14-15.

155. *Id.* at 19.

156. Connor v. Johnson, 402 U.S. 690 (1970) (United States Supreme Court stated a general preference for single-member districts in court-ordered plans).

discrimination.[157] Thus, the defendant's assertion that no minorities were discriminated against by the Plan failed.[158] As such, the Court held that single-member district should be restored in North Dakota unless the district court could articulate "unique circumstances" justifying the continuation of multimember districts or unless the 1975 legislative assembly should institute the use of multimember districts.[159]

The second aspect of the North Dakota plan challenged by the plaintiffs was the population disparities between the various senatorial districts. The United States Supreme Court found a variance of 20.14 percent in the North Dakota plan. This variance was considered "constitutionally impermissible in the absence of significant state policies . . . ."[160] In an attempt to overcome the burden of proof, four reasons for the variance were submitted by the defendants. The reasons included the following: (1) The absence of electorally victimized minorities; (2) the fact that North Dakota is sparsely populated; (3) the geographic division of the state by the Missouri River; and (4) the goal of observing political subdivisions.[161] The Court found none of these reasons persuasive.[162] The Court stated that the lack of a minimization or cancellation of the voting power of a particular voting or political group did not justify a twenty percent variance.[163] The Court observed that the vote of each individual in a state with a small population may be even more important to the outcome of the election than in a larger state.[164] Moreover, legislative history indicated a nonadherence to geographic and political lines in the state.[165] Thus, the defendants failed to present significant state

157. 420 U.S. at 20.
158. *Id.*
159. *Id.* at 21.
160. *Id.* at 24.
161. *Id.* at 24-25.
162. *Id.* at 25-26.
163. *Id.* at 24. The Court stated that "[a]ll citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group." *Id.*
164. *Id.* at 25. The Court stated:

> [S]parse population is not a legitimate basis for a departure from the goal of equality. A State with a sparse population may face problems different from those faced by one with a concentrated population, but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, particular emphasis should be placed on establishing districts with as exact population equality as possible. The District Court's bare statement that North Dakota's sparse population permitted or perhaps caused the 20% deviation is inadequate justification.

Id. at 24-25. (footnote omitted).
165. *Id.* at 25. The Court discussed the legitimacy of the defendant's arguments regarding the observation of geographic and political lines as follows:

policy to justify the plan, and the population variance was significantly impermissible.[166] The Court reversed the judgment of the district court and remanded the case for further proceedings. In reversing, the United States Supreme Court expressed its hopes that the North Dakota Legislative Assembly in 1975 would enact a constitutional plan.[167]

D. REAPPORTIONMENT IN NORTH DAKOTA 1975-1980

Using the Supreme Court's decision from *Chapman* as a guide, the 1975 legislative assembly went about the task of reapportioning the state. The legislature produced Senate Bill 1497, referred to as Dobson II.[168] Unique to the Dobson II Plan was an opening section that detailed the legislative intent and justifications behind the plan.[169] The legislature apparently had interpreted the *Chapman* holding as indicating that a statement of intent would alleviate any problems with the use of multimember districts and a high

> [T]he suggestion that the division of the State caused by the Missouri River and the asserted state policy of observing existing geographical and political subdivision boundaries warrant departure from population equality is also not persuasive. It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines. As the dissenting judge in this case noted, appellee's counsel acknowledged that reapportionment proposed by the Legislative Assembly broke county lines, 372 F. Supp., at 393 n. 22, and the District Court indicated as long as a decade ago that the legislature had abandoned the strict policy. *Paulson v. Meier,* 246 F. Supp., at 42-43. Furthermore, a plan devised by Special Master Ostenson demonstrates that neither the Missouri River nor the policy of maintaining township lines prevents attaining a significantly lower population variance.

Id. (footnote omitted).

166. *Id.* at 26. The Court noted that the factors cited by the defendants could be neither controlling nor persuasive when plans such as the Ostenson plan (5.95% population variance) exist. *Id.* In conclusion, the Court stated:

> [U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

Id. at 26-27 (footnote omitted).

167. *Id.* at 27. (opinion by Blackmun, J., for a unanimous Court). The Court expressed its hopes as follows:

> We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. . . . It is to be hoped that the 1975 North Dakota Legislative Assembly will perform that duty and enact a constitutionally acceptable plan. If it fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem.

Id.

168. Chapman v. Meier, 407 F. Supp. 649, 650 (D.N.D. 1975).

169. Section one of Senate Bill 2497 states in part, as follows:

> SECTION 1. LEGISLATIVE FINDINGS AND DECLARATIONS. The legislative assembly finds and declares that:

population variance. The Dobson II Plan still contained one multimember district and a high population variance [170]

1. The senate should be maintained from forty-eight to fifty-two members in order to effectively represent the citizens of the state and to adequately review and study proposed legislation. By providing for such a size senate, a certain population variance is assured due to a combination of factors referred to in this section; however, although a legislative apportionment plan could possibly be formulated with a smaller population variance than the plan provided by this Act, such a plan would necessitate a smaller legislative assembly with geographically large legislative districts which would substantially reduce the personal contact citizens have with their elected legislators. Such geographically large legislative districts would result from the fact that the state has a population density of only 8.9 residents per square mile and, in some instances, portions of the state comprise relatively uninhabited territory of up to 72 square miles.

2. Traditionally and historically, except for court-fashioned legislative apportionment plans, the state legislative assembly has been comprised of single-member senate districts and multi-member districts.

3. Multi-member senate districts should be avoided in legislative apportionment plans unless a unique combination of factors justifies very limited use of multi-member senate districts . . . .

4. The state has a policy dating from statehood in 1889 of preserving county boundaries in legislative apportionment plans. This policy was firmly established in section 29 of the state constitution which provided that "no portion of any county shall be attached to any other county, or part thereof, so as to form a district" and, although the section was amended in 1960, the substance of the amendment was to preserve the legislative districting plan then in effect which recognized county lines in every district.

. . . .

6. The natural boundary caused by the Missouri River is very real in that one-third of the state lies west of the river, and of the three hundred fifty-five mile length of the river only six crossings exist, four of which are located in urban areas. Any legislative district crossing the Missouri River would cause extreme hardship to the residents of the district and to the electoral process.

7. The sparse population of rural areas of the state, combined with the policy of maintenance of political subdivision boundaries and recognition of the natural boundary caused by the Missouri River, justifies deviations from population equality in legislative districts with this unique combination of factors.

. . . .

13. Adoption of a legislative reapportionment plan substantially different from current North Dakota legislative apportionment would require that all state senators again stand for election in 1976, and additional drastic changes in legislative district boundaries would increase voter disenchantment with the legislative process and reduce the personal relationships many persons have with their elected representatives.

. . . .

15. Because of the state policies which encourage the minimization of disruption of electoral processes and the preservation of as many county lines as practicable, the present legislative apportionment plan is the best and most reasonable plan for the state until a new census is conducted which includes population figures collected on a township and city block basis which would enhance the ability to reapportion on the basis of equal representation. Present census figures available for the 1970 census show that the census districts do not coincide with established township boundaries and, except for the city of Fargo, provide no accurate block census figures for the five largest cities of the state.

16. The methods and procedures employed by the census bureau in taking the census and the creation of census districts do not coincide with the boundaries of political subdivisions of the state. In an attempt to obtain accurate population data for political subdivisions and for block areas within certain cities, population figures have been interpolated and calculated under methods designed to reflect the population of those areas. Recognition is made of the fact that in fashioning the original legislative reapportionment plan, similar methods and procedures were used by the courts involved.

1975 N.D. Sess. Laws ch. 463.

170. Chapman v. Meier, 407 F. Supp. 649, 650 (D.N.D. 1975). The *Chapman* court of 1975 explained that "[u]nder Dobson II, the North Dakota Legislature merely modified the Dobson Plan [which was the subject of the earlier *Chapman* litigation] by subdividing the multi-senator districts

A challenge of Dobson II was brought before the United States district court in the 1975 remanded case of *Chapman v. Meier*.[171] The plaintiffs contended that the 20.17 percent population deviation of the Dobson II Plan was too high.[172] Further, it was alleged that Dobson II was actually the same plan as Dobson I and, as such, was invalid under the equal protection clause.[173]

The United States district court decided two issues in the remanded *Chapman* case. The first issue involved the problem of whether the variances in Dobson II constituted a constitutional violation.[174] Citing a recent United States Supreme Court decision,[175] the three judge district court stated that districts with deviations larger than 9.9 percent would not be tolerable without justification based on significant state policy.[176] As such, the state must justify the 20.17 percent variation.

The district court evaluated the justifications adopted by the state as found in the opening section of Senate Bill 2497, Dobson II. This section purportedly reiterated the state policy considerations presented by the state to the United States Supreme Court in *Chapman* (1974). Upon reevaluating the primary justification of preserving county lines, the district court held the justification insufficient and the Dobson II Plan unconstitutional.[177] The district court permanently enjoined the implementation of the Dobson II Plan and ordered Special Master Ostenson to revise an earlier plan[178] and to submit the plan to the court.[179]

The Ostenson Plan, along with the plans of other interested parties, was submitted to the district court.[180] On December 17, 1975, the court adopted a "final plan" and declared that the plan would govern the 1976 election and subsequent elections until duly modified.[181] This court-ordered plan has served as North Dakota's

into single-senator districts — with one exception." *Id.* at 650. "Consequently, the net result of the Legislature's passage of Dobson II was the enactment of an apportionment plan with substantially the same deviations and total population variance found in Dobson but with only one multi-senator subdistrict." *Id.*

171. 407 F. Supp. 649 (D.N.D. 1975).

172. Chapman v. Meier, 407 F. Supp. 649, 650 (D.N.D. 1975). The plaintiffs did not challenge the establishment of a multi-senator subdistrict or the establishment of districts or subdistricts. *Id.*

173. *Id.* at 651.

174. *Id.*

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

176. 407 F. Supp. at 651.

177. *Id.* at 654 (violation of equal protection clause of fourteenth amendment) (opinion by Van Sickle, J., Bright, J., concurring; Benson, J., dissenting in part).

178. *Id.* The Ostensen Plan was submitted to the district court in 1972 in the original *Chapman v. Meier*. The district court at that time adopted the Dobson Plan. Chapman v. Meier, 372 F. Supp. 363, 367 (D.N.D. 1972), *rev'd*, 420 U.S. 1 (1975). *See also supra* note 164 (quote of United States Supreme Court indicating preference for Ostensen Plan).

179. 407 F. Supp. at 654.

180. *Id.* at 663. A public hearing was held on October 22, 1975. The district court devised a final plan drawn from all the material that was submitted to the court. *Id.*

181. *Id.* For text of the "final plan" see Chapman v. Meier, 407 F. Supp. 649, 665-69 (1975).

apportionment law until this time.

In 1977 the North Dakota Legislature began the long process of "housecleaning" the laws of the state in order to begin the decade of the eighties with a clean slate.[182] In 1979 the legislature resolved to finally repeal sections 26 through 44 of article II of the North Dakota Constitution and to adopt new apportionment provisions in their place.[183] The resolution was placed on the general election ballot in November 1980 and was defeated.[184] Because of the defeat, North Dakota was left without any state constitutional or statutory law governing the state's reapportioning process. For the purposes of the 1980 election, the court-ordered plan of *Chapman* (1975) was still effective.[185] In light of the 1980 census, it can be expected that this plan will be challenged in the same manner as the court-ordered plan was challenged after the 1970 census.[186] It can also be expected that, due to the shift of population in North Dakota since 1970,[187] the "final plan" will also be found

182. In 1977 the legislative assembly resolved that section 214 of the North Dakota Constitution, which dealt in part with the original legislative apportionment, be repealed. 1977 N.D. Sess. Laws ch. 607. The resolution went before the people and was approved on September 5, 1978. 1979 N.D. Sess. Laws ch. 691.

183. House Concurrent Resolution No. 3001 states in relevant part as follows:

> Section 1. The senate shall be composed of not less than thirty nor more than fifty-two members and the house of representatives shall be composed of not less than sixty nor more than one hundred four members, which jointly are designated as the legislative assembly of the State of North Dakota
> Section 2. Senators shall be elected for terms of four years, and representatives for terms of two years.
> . . . .
> Section 5. The legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The districts as thus ascertained and determined after the 1980 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census, or until changed by law.
> The legislative assembly shall guarantee as nearly as practicable, that every person is equal to every other person in the state in the casting of ballots for legislative candidates. One senator and at least two representatives shall be apportioned to each senatorial district and be elected at large or from subdistricts thereof. The legislative assembly may combine two senatorial districts only when a single-member senatorial district includes a federal facility or federal installation, containing over three-fourths of the population of a single-member senatorial district, and may provide for the election of senators at large and representatives at large or from subdistricts thereof.

1979 N.D. Sess. Laws ch. 710.

184. 1981 N.D. Sess. Laws ch. 663.

185. *See supra* note 180 and accompanying text.

186. *See supra* note 124 and accompanying text.

187. An example of the shift of the population in North Dakota is exemplified by the following comparison:

County	1980 Population	1970 Population
Burleigh	54,839	40,714
Cass	88,243	73,653
Emmons	5,838	7,200
Grand Forks	66,088	61,102
Morton	25,069	20,310
Mountrail	7,663	8,437
Stark	23,703	19,613

unconstitutional. Recognizing the probable unconstitutionality of the present plan and the historical frustration of the North Dakota Legislature in its apportioning attempts, the legislature should consider alternatives to legislative apportionment.[188]

IV. ALTERNATIVES TO LEGISLATIVE REAPPORTIONMENT

A. COMPARATIVE REAPPORTIONMENT LAWS

Prior to discussing an alternative to reapportionment by the legislature, it may be helpful to briefly address existing state reapportionment practices, in particular, who is initially responsible for drafting an apportionment plan.[189] Responsibility for designing an apportionment plan is normally delegated by the state's constitution.[190] In several states, however, statutory law

Walsh	15,381	16,251
Wells	6,983	7,848
Williams	22,263	19,301

U.S. Dept. of Commerce, Bureau of Census, *1980 Census of Population and Housing,* 1-11 (Preliminary Reports, 1980).

188. The problem for apportionment by the legislature is enhanced also by the federal district court's declaration in *Paulson v. Meier* that sections 26, 29, and 35 of the North Dakota Constitution are invalid. *See supra* notes 63, 70, 103, and accompanying text. The district court's striking down of these sections and the failure of the legislature, *see supra* note 182, and people of North Dakota, *see supra* notes 182-84, to adopt any new laws to replace these sections may give rise to challenges directed at the legislature's authority to adopt a reapportionment plan. The lack of statutory or state constitutional directives may give rise to a situation in North Dakota in which there is a mandate for a new apportionment plan, but no expressed authorization for any state governmental body to adopt a new plan. It is for this reason also that the legislature should consider adopting new laws governing the apportionment process. *See also* N.D. CENT. CODE § 54-03-01.5 (Supp. 1979) (statute fails to specifically designate reapportionment authority).

189. In *Reynolds* the United States Supreme Court stated that legislative reapportionment is primarily a matter for legislative consideration, but when the legislature fails, judicial relief becomes appropriate. 377 U.S. at 586. Between 1962 and 1972, court-ordered apportionment plans were devised for at least 21 states because the state reapportionment procedure failed to produce acceptable results. Those states include the following: Alabama, Alaska, Arizona, Illinois, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Washington, and Wyoming. Adams, *A Model State Reapportionment Process, supra* note 40, at 851 n.96.

190. ALA. CONST. art. IX, §§ 199 & 200; ALASKA CONST. art. VI, §§ 3-11; ARIZ. CONST. art. 4, pt. 2 § 1; ARK. CONST. art. 8, amend. 45; CAL. const. art. XXI, § 1; COLO. CONST. art. V, §§ 46-48; CONN. CONST. art. 3, § 6; DEL. CONST. art. II, §§ 2 & 2A; FLA. CONST. art. III, § 16; GA. CONST. art. III, §§ 2-801 & 2-901; HAWAII CONST. art. IV, § 1-10; IDAHO const. art. III, §§ 2 & 4; ILL. CONST. art. IV, § 3; IND. CONST. art. 4, §§ 5 & 6; IOWA CONST. art. III, §§ 34-36; KAN. CONST. art. 10, § 1; KY. CONST. § 33; LA. CONST. art. III, § 6; ME. CONST. art. IV, pt. 1 §§ 2 & 3, art. IV, pt. 3 § 1-A, art. IV, pt. 2 § 3; MD. CONST. art. III, §§ 2-5; MASS. CONST. amend. art. CI, §§ 1 & 2; MICH. CONST. art. 4, § 6; MINN. CONST. art. IV, § 3; MISS. CONST. art. 13, § 254; MO. CONST. art. III, §§ 2, 7, 10 & 45; MONT. CONST. art. V, § 14; NEB. CONST. art. III, § 5; NEV. CONST. art. 4, § 5; N.H. CONST. pt. 2, arts. 9, 9a & 26; N.J. CONST. art. IV, § 3, ¶1; N.M. CONST. art. IV, § 3; N.Y. CONST. art. III, §§ 4 & 5; N.C. CONST. art. II, §§ 3 & 5; OHIO CONST. art. XI, § 21; OKLA. CONST. art. V, § 11A; ORE. CONST. art. IV, § 6; PA. CONST. art. II, §§ 16 & 17; R.I. CONST. amend. XIII, § 1 & amend. XIX, § 1; S.C. CONST. art. III, § 3; S.D. CONST. art. III, § 5; TENN. CONST. art. 4, §§ 4-6; TEX. CONST. art. III, §§ 25-28; UTAH CONST. art. IX, §§ 2-4; VT. CONST. ch. II, §§ 13, 18 & 73; VA. CONST. art. II, § 6; WASH. CONST. art. II, §§ 2 & 3; W. VA. CONST. art. VI, §§ 1-10; WIS. CONST. art. IV, § 3 & art. XIV, § 12; WYOM. CONST. art. 3, §§ 48-50 & art. III, § 3.

supplements the constitutional delegation.[191] Generally, the responsibility to reapportion has been conferred on one of three authorities. In two states, Alaska and Maryland, the Governor is responsible for drafting an apportionment plan;[192] in thirty-six states the legislature is responsible;[193] and in eleven states special apportionment commissions are established to reapportion the state.[194]

Currently, North Dakota appears to be the only state in which the status of the apportionment law is unclear.[195] In part this is due to the fact that North Dakota may have neither a statutory nor a constitutional law dealing with apportionment.[196]

B. REAPPORTIONMENT COMMISSIONS

In view of North Dakota's apparent lack of delegation of apportionment authority,[197] and the North Dakota Legislature's difficulties in formulating plans that will survive constitutional challenges,[198] the state should consider the creation of a reapportionment commission as a possible solution to its recurring apportionment problems. At present, eleven states have commissions, which are primarily responsible for designing apportionment plans.[199] The creation of a commission may eliminate the conflict of interest that frequently exists in state reapportionment procedures.[200] Additionally, a commission may improve state legislative processes by eliminating the need for the legislature to deal directly with the time-consuming function of apportioning the state.[201] Finally, a plan developed by a

191. DEL. CODE ANN. tit. 29, §§ 801-08 (1979); FLA. STAT. § 10.001-06 (Supp. 1981); HAWAII REV. STAT. §§ 25-1 to -7 (Supp. 1980); IND. CODE ANN. §§ 3-3-2-1, -2 (Burns 1972); IOWA CODE ANN. §§ 42.1-.7 (West Supp. 1981); MICH. COMP. LAWS ANN. §§ 4.11, .15 (1981); MONT. CODE ANN. §§ 5-1-101 to -110 (1981); N.M. STAT. ANN. §§ 2-7-2; -8-2; -8- (1978); VT. STAT. ANN. tit. 17, §§ 1901-1909 (Supp. 1981).

192. *See supra* note 190.

193. Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See supra* notes 190 & 191.

194. Arkansas, Colorado, Hawaii, Maine, Michigan, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Vermont. *See supra* notes 190 & 191.

195. *Id.*

196. In North Dakota no valid statutory or constitutional provision delegating the authority to apportion exists. See discussion of history of apportionment in North Dakota, *supra* notes 55-188.

197. *See supra* notes 98 & 196 and accompanying text.

198. *See supra* notes 55-189 and accompanying text.

199. The states are Arkansas, Colorado, Hawaii, Maine, Michigan, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Vermont. *See supra* note 190.

200. For general discussion of apportionment commissions and a Model Reapportionment Act that uses a commission, see Adams, *A Model Statute Reapportionment Process, supra* note 40, at 854.

201. *Id.* at 855.

nonpartisan commission may be viewed as being fair to all concerned, thereby minimizing troublesome litigation.[202]

Membership on apportionment commissions varies from state to state.[203] Generally, the power over appointment to the commission is granted to the members of the political parties,[204] although in Arkansas the members are specifically designated.[205] In Montana and Pennsylvania the majority and minority leaders of both houses each select one member, and those four members jointly select the fifth member.[206] In Colorado the chief justice of the state supreme court selects four members of the commission, the legislative department appoints four members, and the executive department appoints three.[207] In Vermont the chief justice appoints the special master of the commission, and the Governor appoints the citizen members,[208] while in Missouri the Governor selects the members of the commission from lists submitted to him or her by the two major political parties.[209]

In several states the apportionment law specifically forbids the commission members to have political or governmental affiliations.[210] Further, in three states the members are chosen from specific regions of the state.[211]

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202. *Id.* at 857.

203. For example, in Arkansas the board consists of the Governor, the secretary of state, and the attorney general. ARK. CONST. amend. 45, § 1. In Maine the state constitution provides that the commission shall consist of thirteen members. ME. CONST. art. IV, pt. 3, § 1-A.

204. *See* ME. CONST. art. IV, pt. 3, § 1-A; MICH. CONST. art. 4, § 6; HAWAII REV. STAT. § 25-2 (1979); N.J. CONST. art. IV, § 3 ¶1; and OHIO CONST. art. XI, § 1.

205. For members of Arkansas commission, *see supra* note 203.

206. *See* MONT. CONST. art. V, § 14 and PA. CONST. art. II, § 17.

207. Article five, section 48(1)(a) of the Colorado Constitution states the following:

> After each federal census of the United States, the senatorial districts and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission consisting of eleven members, to be appointed and having the qualifications as prescribed in this section. Of such members, four shall be appointed by the legislative department, three by the executive department, and four by the judicial department of the state.

COLO. CONST. art. V, § 48(1)(a).

208. Section 1904(a) of title 17 of the Vermont Statutes Annotated begins as follows: "There is hereby created the legislative apportionment board, consisting of a special master designated by the chief justice of the supreme court. . . ." VT. STAT. ANN. tit. 17, § 1904(a) (1968).

209. MO. CONST. art. III. § 2.

210. Section six of article four of the Constitution of Michigan states, in part, as follows:

> No office or employees of the federal, state or local governments, excepting notaries public or members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective.

MICH. CONST. art. 4, § 6. *See also* MONT. CODE ANN. § 5-1-105 (1981); VT. STAT. ANN. tit. 17, § 1904 (1968).

211. *See* MONT. CODE ANN. § 5-1-102 (1981); MICH. CONST. art. 4, § 6; COLO. CONST. art. V, § 48(1)(c).

The basic duty of the commission is to apportion the state. In fulfilling that duty the commission must ensure that both the public and the legislature are aware of its actions. Thus, most states require public hearings and publication of the proposed apportionment plan.[212]

Subsequent to the initial publication and public hearings, the commissions are required to review comments or criticisms, and make any necessary corrections.[213] A plan is then adopted and filed by the commission. In two states the plans are submitted to the legislature for approval.[214] One state requires that the plan be submitted to its supreme court for review.[215] In any event, if the plan is not challenged, after a specified period of time the plan becomes final.[216] Most states grant the state supreme court original jurisdiction to review the plan.[217]

As an alternative to apportionment by the legislature, North Dakota should consider the formation of a reapportionment commission. A model reapportionment process,[218] utilizing various

212. *See e.g.*, COLO. CONST. art. V, § 48; HAWAII REV. STAT. § 25-2 (1979); MICH. CONST. art. 4, § 6; MONT. CODE ANN. § 5-1-108 (1981); ME. CONST. art. IV, pt. 3, § 1-A; OHIO CONST. art. XI, § 1.

213. For example, the Hawaian statute provides, in pertinent part:

> At least one public hearing on the proposed reapportionment plan shall be held in each basic island unit after initial publication of the plan. At least twenty days' notice shall be given of such public hearing. The notice shall include a statement of the substance of the proposed reapportionment plan, and of the date, time and place where interested persons may be heard thereon. The notice shall be published at least once in a newspaper of general circulation in the basic island unit where the hearing will be held. All interested persons shall be afforded an opportunity to submit data, views, or arguments, orally or in writing, for consideration by the commission. After the last of such public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final legislative reapportionment plan. Within ten days after filing of the final reapportionment plan, the chief election officer shall cause to be published in a newspaper of general circulation in the State, the final legislative reapportionment plan which shall, upon publication, become effective as of the date of filing and govern the election of members of the next five succeeding legislatures.

HAWAII REV. STAT. § 25-2 (1979).

214. ME. CONST. art. IV, pt. 3, § 1-A; MONT. CODE ANN. 5-1-110 (1981). In Montana the commission submits its "plan to the legislature by the 10th day of the first regular session after its appointment or after the census figures are available." MONT. CODE ANN. 5-1-109 (1981).

215. *See* COLO. CONST. art. V, § 48.

216. In Michigan the plan becomes final 60 days after publication, provided the plan is not challenged. MICH. CONST. art 4, § 6. In Hawaii the plan becomes final effective the date of filing. HAWAII REV. STAT. § 25-2 (1979); and in Arkansas an apportionment plan becomes final 30 days from the filing date. ARK. CONST. amend. 45, § 4.

217. *See* MICH. CONST. art 4, § 6.

218. The model proposal includes both a Model State Act and a Model Constitutional Amendment. Adams, *A Model State Reapportionment Process, supra* note 40, at 851. The amendment establishes a reapportionment commission, sets out the criteria to be used by the commission in the development of a plan, and provides for judicial review. *Id.* at 852. The Model Act implements the amendment, defines the reapportionment criteria, and establishes the duties, powers, and method of appointment of the commission. *Id.*

aspects of existing state procedures,[219] has been suggested. The Model Act provides for the establishment of a five-member, nonpartisan commission[220] whose duty it would be to develop a reapportionment plan.[221] The state supreme court would have jurisdiction to hear challenges to the plan proposed by the commission.[222]

The establishment of a reapportionment commission is not a new idea in North Dakota. In 1973 the voters in North Dakota disapproved, by a vote of 43,178 to 53,831, an initiated constitutional amendment that would have established a legislative districting commission to apportion the state.[223] The commission would have been composed of nine members.[224] The majority and minority leaders of each House would have designated two members, and these eight commissioners would have selected a ninth.[225] None of the commissioners would have been legislators, and the North Dakota Supreme Court would have had the authority to review the commission's plan and to order changes.[226]

All attempts to apportion North Dakota since 1973 have been unsuccessful.[227] These attempts have included the following: An unconstitutional senate bill;[228] the defeat on the November 1980 general election ballot of a resolution to repeal a portion of the North Dakota Constitution and to adopt new apportionment

219. Currently, in Montana and Pennsylvania the majority and minority leaders of both houses select one member to the commission, and these four select a fifth member. *See supra* note 206. Michigan, Montana, and Vermont forbid political or governmental affiliations on the part of the commission members. *See supra* note 210. Public hearings regarding the proposed apportionment plan are currently required under the laws of Colorado, Hawaii, Michigan, Montana, Maine, and Ohio. *See supra* note 212. Review of the commission's plan is placed in the state supreme court in most states. *See supra* note 217.

220. Adams, *A Model State Reapportionment Process, supra* note 40, at 867. Section (b) of the Model Constitutional Amendment states the following:

> In each year ending in zero and at any other time of court ordered reapportionment, a commission shall be established to prepare a reapportionment plan for state legislative and congressional districts. The commission shall consist of five members, none of whom may be public officials. The president of the senate, the speaker of the house, the minority leader of the senate, and the minority leader of the house shall each select one member. The four members so selected shall select, by a vote of at least three members, a fifth member who shall serve as the chair. The legislature shall establish by law qualifications of commissioners and procedures for their selection and the filling of vacancies. The legislature shall establish by law the duties and powers of the commission and shall appropriate funds to enable the commission to carry out its duties.

Id.

221. *Id.*

222. Adams *A Model State Reapportionment Process, supra* note 40, at 880.

223. 1973 N.D. Sess. Laws ch. 607. The amendment was disapproved, along with a referred measure, during a special election held on December 4, 1973. *Id.*; 1973 N.D. Sess. Laws ch. 602.

224. 1973 N.D. Sess. Laws ch. 607.

225. *Id.*

226. *Id.*

227. *See supra* notes 144-88 and accompanying text.

228. *See supra* notes 169-79 and accompanying text.

provisions instead;[229] the occurrence of the 1980 federal census; and the anticipated challenge to the *Chapman* (1975) court-ordered plan.[230] It appears, therefore, that it is again time for North Dakota to consider adoption of a nonpartisan reapportionment commission, such as that proposed by the Model Act.[231]

It is clear that many benefits may be achieved by the creation of a properly appointed, nonpartisan apportionment commission. By granting the commission authority to study, prepare, propose, hold hearings, ultimately adopt and file a plan, which may be subject to some type of judicial review, the legislature could avoid the many problems inherent in adopting apportionment plans. It should also be evident that the legislature should not attempt to devise a constitutional amendment or statute that would require the legislature to approve the plan. Such a measure would defeat the purpose of the apportionment commission, *i.e.*, taking the burdensome task of apportioning the state from the legislature.

V. CONCLUSION

The controversy over the reapportionment of North Dakota continued as the 1981 legislative assembly concluded its regular session. As has happened in the past, the legislature did not reapportion the state during the regular session.[232] It is anticipated that the legislature will meet in a special session late in 1981 to reapportion the state.[233]

Among the usual political difficulties inherent to reapportionment, the 1981 legislature may be faced not only with the problem of seeing that a constitutional plan is adopted but also with the problem of determining who should draft the plan and how the plan should be approved.[234] It is suggested that the legislature consider the alternative of having a nonpartisan committee perform the task of apportioning. In doing so, the legislature may save the state the expense of more litigation while at the same time leaving itself free to deal with other matters.

In the event the legislature decides to do the reapportioning itself, legislators should remember that apportioning a state must not result in a conflict between rural and urban interests or

229. *See supra* notes 182-84 and accompanying text.
230. *See supra* notes 186-87 and accompanying text.
231. *See supra* notes 218-22 and accompanying text.
232. 1981 N.D. Sess. Laws ch. 720.
233. *Id.*
234. Currently, North Dakota is probably the only state in the United States that does not have any express law governing the apportionment process. *See supra* notes 182-96 and accompanying text.

Republicans against Democrats. As stated by one writer, "Reapportionment should not be thought of in terms of a conflict of interests . . . . In the long run, the interests of all in an equitable system of representation that will strengthen state government is far more important than any temporary advantage to an area enjoying overrepresentation."[235] The accuracy of this statement is exemplified by the extensive litigation to which North Dakota has been subjected in the area of apportionment. To avoid further judicial intervention, the legislature will have to develop an approach to apportionment that ensures fair and equal representation to all voters.

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235. Commission on Intergovernmental Affairs, *A Report to the President for Transmittal to the Congress*, 39-40 (U.S. Government Printing Office, 1955).