Duquesne Law Review

Volume 14 | Number 3 Article 9

1976

# Federal Courts - Supervisory Power - Court-Ordered Legislative Apportionment

David R. Johnson

FEDERAL COURTS—SUPERVISORY POWER—COURT-ORDERED LEGISLATIVE APPORTIONMENT—The Supreme Court of the United States has held that unless there is adequate justification, a federal court-ordered plan for reapportionment of a state legislature must avoid use of multimember districts and achieve population equality with only de minimis variation.

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

The North Dakota Constitution provided for a senate comprised of one senator from each of 9 senatorial districts.[1] The house ranged from 60 to 140 members;[2] at least one representative was required for each county.[3] After each decennial census, the balance of the house was to be apportioned by the Legislative Assembly or by a designated committee[4] if the assembly did not act. After the legislature failed to apportion following the 1960 census, the designated committee devised a plan that was later voided for constitutional deficiencies.[5] After two subsequent apportionments created by the legislature were similiarly invalidated,[6] the Federal District Court

1. N.D. CONST. art. II, § 29.

2. *Id.* § 32.

3. *Id.* § 35.

4. *Id.* The committee included the chief justice of the supreme court, attorney general, secretary of state and the majority and minority leaders of the house of representatives.

5. State *ex rel.* Lein v. Sathre, 113 N.W.2d 679 (N.D. 1962). The court determined that population variances in the plan made it clear the apportioning committee had not used population as the basis for division. This violated the state's constitution, which commanded alignment of districts as equally as reasonably possible to population. *Id.* at 684-85.

A year earlier, the North Dakota Supreme Court had dismissed a writ to stop issuance of the plan, stating that the committee was performing a legislative function and could not be challenged until its work was completed. State *ex rel.* Aamoth v. Sathre, 110 N.W.2d 228 (N.D. 1961). Plaintiffs next sought relief in federal court under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988 (1970), but the three-judge district court stayed the proceedings on the grounds that the state court should be the first to rule on the validity of the apportionment plan. Lein v. Sathre, 201 F. Supp. 535 (D.N.D. 1962).

6. A new apportionment was devised by the legislature in 1963. Although the district court held the plan did not meet constitutional standards, it denied injunctive relief because of the approaching 1964 elections. Paulson v. Meier, 232 F. Supp. 183, 188 (D.N.D. 1964). The 1965 Legislative Assembly would have a de facto status and should devise a new apportionment. *Id.* at 190. This result was prompted by the decision of the United States Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), which established general guidelines for the apportionment of state legislatures. *See* text at notes 20-21, 38-41 *infra*. A new apportionment in 1965 was declared unconstitutional in Paulson v. Meier, 246 F. Supp. 36, 39 (D.N.D. 1965), *quoting* Reynolds v. Sims, 377 U.S. 533, 568, 577, 578 (1964). The court held the basis for apportionment of both houses should be population, but mathematical exactness was not required and

for North Dakota issued its own apportionment plan.[7] The court's plan, which included multimember districts[8] and some population variances, was challenged and upheld in the state supreme court.[9] By this time, however, the 1970 census had been taken and the district court was petitioned to devise a new plan to compensate for shifts in population.[10] Because the 1972 election was approaching, an interim plan was implemented.[11]

After the election and a rejection by referendum vote[12] of another legislative apportionment,[13] the district court permanently adopted

---

some variances would be permissible if based on valid state considerations. 246 F. Supp. at 39. The plan before the court, however, was not a "good faith" attempt which satisfied constitutional requirements. *Id.* at 43. The voting strength of four persons in one area was less than that of three persons in another; a region one-eighth the size of another had greater voting strength. *Id.* at 39-41.

7. Previously, the court assumed the legislature would implement a valid plan. Since the Legislative Assembly had a "reasonable and adequate opportunity" and did not properly reapportion, the task fell upon the court. 246 F. Supp. at 43-44. The court was aware that its plan was "not perfect" since it included five multimember districts and violated county lines in 12 instances, but neither was it arbitrary or discriminatory. The court emphasized that county lines could not always be followed if the one-man, one-vote standard was used and that problems caused by multimember districts could be solved by remedial legislation. *Id.*

8. Multimember districts are those in which more than one legislator is elected at large.

9. State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53 (N.D. 1971). The plan was challenged on the grounds it violated N.D. CONST. art. II, § 29, which prohibited more than one senator per senatorial district. The court held the first sentence of § 29 violated the equal protection clause of the United States Constitution, since the restriction did not allow for future population changes as required by Baker v. Carr, 369 U.S. 186 (1962) and subsequent cases. 184 N.W.2d at 57-58.

10. Chapman v. Meier, 372 F. Supp. 363 (D.N.D. 1972). Shifts in population since 1960 had produced population variances of 96 percent. Population variance is the deviation from average population per representative in the most overrepresented area combined with the deviation from average population per representative in the most underrepresented voting districts. The range indicated by the 1970 census was from 67 percent above the average to 29 percent below the average. *Id.* at 365.

11. *Id.* The plan was stipulated as interim because it included five multimember districts created by the court in Paulson v. Meier, 246 F. Supp. 36 (D.N.D. 1965). In light of Connor v. Johnson, 402 U.S. 690 (1971), and Connor v. Williams, 404 U.S. 549 (1972), where the Supreme Court had ruled against multimember districts created by district courts, the *Chapman* court felt "it would be improper" to permanently adopt the court-fashioned plan. The court permitted the plan to remain in effect through the 1972 elections, however, so as not to disrupt the elective processes. Chapman v. Meier, 372 F. Supp. 363, 366 (D.N.D. 1972).

12. N.D. CONST. art. II, § 25 grants the state's citizens power to propose laws by an initiative petition and reject laws passed by the legislature with a referendum petition. When the voters nullified the apportionment which included multimember districts, they also voted down an initiative petition for a constitutional amendment that would have allowed exclusively single-member districts. Chapmen v. Meier, 420 U.S. 1, 12 (1975).

13. The legislature had passed the plan over the veto of the governor, whose chief objection was the inclusion of multimember districts. 420 U.S. at 12.

the 1972 plan.[14] This plan, which was brought before the United States Supreme Court in *Chapman v. Meier*,[15] provided that 18 of 51 senators would be elected from five multimember districts[16] and included some substantial population variances.[17] The Supreme Court voided the plan[18] on the basis that a court-ordered apportionment plan of a state legislature must avoid multimember districts and establish population equality with little more than de minimis variation except where greater deviation is rationally required by significant state considerations.[19]

The relevant precedent concerning multimember districts began with *Reynolds v. Sims*,[20] which stated in dictum that the particular

14. Chapman v. Meier, 372 F. Supp. 371 (D.N.D. 1974). The court emphasized the plan observed natural barriers, provided districts connected by good roads, honored county lines and cured the earlier population defects. *Id.* at 374-75.

15. 420 U.S. 1 (1975). Jurisdiction was assumed under 28 U.S.C. § 1253 (1970), which allows direct appeal on an action that must be heard by a three-judge district court. A mild jurisdictional problem was presented since the guidelines for determining the types of cases a three-judge panel must hear refer only to constitutional challenges to state statutes. *Id.* § 2281. The Supreme Court, however, decided the constitutionality of a state *apportionment* was among the issues to be determined by a three-judge district court. 420 U.S. at 13-14. *See* White v. Regester, 412 U.S. 755, 760 (1973) (the claim that an apportionment case need not be heard by a three-judge district court is "frivolous").

16. The district court apparently realized judicially-created multimember districts were troublesome, and attempted to justify its plan. It felt Supreme Court decisions did not compel exclusively single-member districts, especially where multimember districts would not result in the underrepresentation of minorities or unresponsive legislators. The issue of multimember districts was considered a clear political issue to be resolved by the voters and the legislature. Chapman v. Meier, 372 F. Supp. 371, 377 (D.N.D. 1974).

The majority was rigorously criticized in a dissent by Judge Bright, who felt multimember districts were outside the court's permissible discretion after Connor v. Johnson, 402 U.S. 690 (1971). 372 F. Supp. at 388 (Bright, J., dissenting). No valid state policy supported the creation of the districts; North Dakota had never used multimember districts before they were introduced by a federal court, and since then they had been the source of continuing controversy. Judge Bright foresaw no great difficulty in implementing single-member districts. *Id.* at 391-92.

17. The variations ranged from 8.71 percent below the average to 11.43 percent above the average. 372 F. Supp. at 375. Noting variances of 16, 10, and 8 percent had been held constitutional, the court said its plan was valid since even larger deviations could be tolerated when areas were more sparsely settled and no minorities were adversely affected. *Id.* at 379. Judge Bright doubted the variances met constitutional standards, particularly since they were not justified by any rational state policy. *Id.* at 393-95 (Bright, J., dissenting).

18. Chapman v. Meier, 420 U.S. 1 (1975). Mr. Justice Blackmum delivered the unanimous opinion of the Court.

19. *Id.* at 26-27. For an example of a policy justifying a population variance see Mahan v. Howell, 410 U.S. 315 (1973) (deviation of 16.4 percent was necessary to avoid splitting political subdivisions).

20. 377 U.S. 533, 579 (1964).

needs of a state might call for multimember districts. Although there were no multimember districts in the plan before the *Reynolds* Court, they were suggested as a means by which a state could adhere to population standards while maintaining diversity between houses of the legislature. *Reynolds* cautioned, however, that multimember districts posed certain problems.[21] Multimember districts were allowed in *Fortson v. Dorsey*,[22] which held that equal protection did not require exclusive use of single-member districts. A three-judge district court had held that an apportionment including single and multimember districts automatically resulted in invidious discrimination. The Supreme Court reversed, but its holding was limited to a declaration that multimember districts were not "*per se* bad."[23] The Court suggested in dictum that multimember districts might be impermissible if "designedly or otherwise" they functioned to "minimize or cancel out the voting strength of racial or political elements of the voting population."[24]

*Connor v. Johnson*[25] was the first case in which the Supreme Court considered a court-created plan with multimember districts. In the lower court, multimember districts had been described as "not ideal" but their use had been permitted in view of the ap-

21. The Court referred to Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964), decided the same day, which discussed problems in multimember districts. Reynolds v. Sims, 377 U.S. 533, 579 n.58 (1964). *Lucas* noted that multimember districts were not "constitutionally defective" but that such districts might be undesirable for an area. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 731 n.21 (1964). The practical problems with multimember districts included increased difficulty in making an intelligent choice among numerous candidates on long ballots, the lack of identifiable constituencies within districts and the fact that residents did not have a delegate specifically responsible to them. *Id.* at 731. *Chapman* pointed out that criticism of multimember districts had been "frequent and widespread," 420 U.S. at 15-16, and offered that possible advantages of single-member districts included avoiding confusion engendered by a large slate of candidates, preventing dominance of an entire slate by a slim majority, reducing campaign costs and avoiding bloc voting. *Id.* at 20.

22. 379 U.S. 433 (1965).

23. *Id.* at 438.

24. *Id.* at 439. Although multimember districts were upheld in *Fortson*, this dictum subsequently provided a standard by which other apportionments were found unconstitutional. *See* Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 674 (1972) [hereinafter cited as Carpeneti].

The Court applied the *Fortson* test in Burns v. Richardson, 384 U.S. 73 (1966) and approved a plan utilizing multimember districts. The *Burns* Court noted the situation in which such districts might be invalid: when "districts are large in relation to the total number of legislators"; when legislators are not residents over the whole district; and when multimember districts are used in both houses of a state legislature. *Id.* at 88.

25. 402 U.S. 690 (1971).

proaching filing deadline for the 1971 election. The Supreme Court felt the matter too important to delay action and postponed the filing deadline 10 days so single-member districts could be created.[26] This disruption of the state electoral process illustrated the Court's strong preference for single-member districts in court-created plans, but the Court implied there would be occasions in which a district court could properly utilize multimember districts.[27] It was not clear whether the Court's reluctance to approve multimember districts[28] extended to state-initiated plans; however, this question was apparently answered in the negative four days later when a legislative apportionment with multimember districts was upheld in *Whitcomb v. Chavis*.[29] In *Whitcomb*, a district court had voided the state's apportionment for cancelling the voting strength of a poor racial minority in one county by the use of multimember districts. Without mentioning *Connor*, the Supreme Court held a legislative apportionment with multimember districts was not constitutionally defective unless there was proof of an adverse impact upon a group's voting power.[30] Proof was lacking in the case presented to the district court.

It was possible that contrary results were reached in *Connor* and *Whitcomb* because the Court was applying different standards to

---

26. *Id.* at 692-93.

27. The implication arose from the Court's qualified statement that single-member districts were preferable "as a general matter." *Id.* at 692. *See* 50 N.C.L. REV. 104, 115 (1971).

28. It was possible the Court was beginning to agree with commentators who had criticized the use of multimember districts. *See* Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966); Carpeneti, *supra* note 24, at 691-99; Dixon & Hatheway, *The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards*, 10 WM. & MARY L. REV. 888, 903 (1969); 50 N.C.L. REV. 104 (1971); 3 SETON HALL L. REV. 178 (1971).

29. 403 U.S. 124 (1971).

30. The Court discussed the long debate over multimember districts and their inherent difficulties, but declared these problems were not constitutionally controlling. *Id.* at 158-60. The Court found no proof of discrimination against racial or political groups nor any evidence that voters from multimember districts in general were overrepresented, even with bloc voting. *Id.* at 146-47. The district court had abused its discretion because its conclusion had no factual support and it had failed to explore more limited alternatives.

*Whitcomb* established an especially rigorous standard for challenges to multimember districts, even though the case presented a racial claim based on equal protection grounds. Although suits of this nature are usually favored, the plaintiffs were given a burden of proof that was almost impossible to meet: they had to show that the multimember districts "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." Indeed, the Court noted the burden of proof had never been met. *Id.* at 144. *But see* White v. Regester, 412 U.S. 755 (1973) (burden was met).

legislative and court apportionments, but the distinction was not explicitly articulated.[31] The Court did not address the discrepancy between *Connor* and *Whitcomb*[32] until *Chapman*, when it stated that multimember districts would be viewed differently if the plan were court-created.[33] The legislature was entrusted with formulating state policy as expressed in apportionment plans; federal courts were not.[34] Since the use of multimember districts must be justified by rational state policy, state legislatures are the only appropriate bodies that can implement such districts unless they have been used as a matter of state policy in previous legislative apportionments or

31. It was also suggested that although Mississippi implemented multimember districts in 1964, districts there had previously long been subdivided and the court's imposition of at-large districts in *Connor* did not really further established state policy. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 146 (1971). Since *Whitcomb* involved a northern state, there was also speculation that a different standard had been established based on the location of the apportioned state. The rationale was that in the North there was less chance multimember districts would be used to promote racial discrimination. 50 N.C.L. REV. 104, 113 (1971). Another explanation was that *Whitcomb* merely fell under an exception to the general rule established by *Connor*. *Id.* at 115. *See* note 24 *supra*. On the other hand, it has been pointed out that since the plaintiff's four suggested single-member plans were discarded in *Connor* and a multimember plan adopted without explanation, the Court may have examined *Connor* "with a particularly critical eye." 50 N.C.L. Rev. 104, 116 (1971). Perhaps the best distinction is that *Whitcomb* was based on a minimum constitutional standard defining what is permissible, while *Connor* represented what is "best." The theory is that the Supreme Court's supervisory power enables it to impose rules on the lower federal courts which are not constitutional requirements. Hence, the Court determined single-member districts were desirable for policy reasons and required their use when the district courts implemented their own plans. *See* 50 N.C.L. REV. 104, 115 (1971). *Cf.* East Carroll Parish School Bd. v. Marshall, 96 S. Ct. 1083 (1976) (Court expressly withheld approval of district court's constitutional views on at-large elections and found the district court had abused its discretion in not initially ordering a single-member reapportionment plan).

32. Between *Whitcomb* and *Chapman*, the Supreme Court upheld court-created multimember districts in Mahan v. Howell, 410 U.S. 315 (1973), and disallowed such districts in a state-initiated apportionment in White v. Regester, 412 U.S. 755 (1973). However, each case was clearly limited to its facts. In *Mahan*, malapportionment of military personnel and the pressing time limitations created by an approaching election made the plan acceptable. 410 U.S. at 331-33. In addition, the plan was only interim. In *White*, the Court found Mexicans and Negroes had been closed out of the political processes of Texas by multimember districts. Hence, the plan violated the standards established in *Fortson* and *Whitcomb*. White v. Regester, 412 U.S. 755, 767 (1973).

33. 420 U.S. at 18-19.

34. *Cf.* Mahan v. Howell, 410 U.S. 315, 332 (1973) (remedial interim apportionment traditionally a function of district courts); Burns v. Richardson, 384 U.S. 73, 97-98 (1966) (district court may implement a remedial or permanent plan if the legislature does not); Davis v. Mann, 377 U.S. 678, 690, 693 (1964) (after legislature had had an ample opportunity to apportion, federal court need not wait for state court to act regarding apportionment); Reynolds v. Sims, 377 U.S. 533, 586 (1964) (judicial relief available if legislature does not act; until legislature acts, an interim remedy is appropriate).

are implemented by courts on a remedial or temporary basis.[35] Hence, federal courts devising legislative apportionments are generally precluded from initiating the use of multimember districts. Since district courts must apportion according to the supervisory guidelines established by the Supreme Court,[36] the implementation of multimember districts in court-created plans can be proscribed even though the use of such districts is not per se unconstitutional.[37]

Development of the principles applicable to population variances likewise began with *Reynolds v. Sims*,[38] which held that states must do their best[39] to apportion districts "as nearly of equal population as practical"; slight variances were permissible if necessary to implement rational state policy.[40] The Court refrained from establishing any precise constitutional tests,[41] in order to allow for consideration of special circumstances in each state. In *Swann v. Adams*,[42] the Court invalidated a legislative apportionment with a large population variance. Significantly, the Court demonstrated great impatience with population variances. The *Swann* Court appeared to read *Reynolds* as requiring adequate justification for even minimal

35. 420 U.S. at 18-19.

36. Connor v. Johnson, 402 U.S. 690, 692 (1971).

37. 420 U.S. at 18. The Court reminded that it had exercised its supervisory power in Connor v. Johnson, 402 U.S. 690 (1971), when it ruled that a district court should use single-member districts unless this presented "'*insurmountable difficulties*.'" 420 U.S. at 18. As a general rule, multimember districts are allowed in court plans only when their use promotes a state interest. *Id.* at 27. In *Chapman*, the Court found multimember districts furthered no state policy. Multimember senate districts had been established in North Dakota by the district court in the apportionments of 1965, 1972 and 1974. The legislature's 1973 act implemented such districts but the statute was voided by referendum. *See* note 12 *supra*. Furthermore, examination of the lower court record, 372 F. Supp. at 392, showed it would not be extremely difficult to develop a plan utilizing only single-member districts. 420 U.S. at 21. The district court was ordered to devise a plan using only single-member districts, provided the Legislative Assembly did not enact a constitutionally valid apportionment in the meantime. *Id.*

38. 377 U.S. 533 (1964).

39. This means "an honest and good faith effort" to attain approximate population equality between districts in apportionments of legislatures. *Id.* at 577.

40. *Id.* The Court stated the standard was not as strict as the one-man, one-vote requirement for congressional redistricting established in Wesberry v. Sanders, 376 U.S. 1 (1964). 377 U.S. at 577-81. "Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577. *See id.* at 579; *cf. id.* at 622 (Harlan, J., dissenting). For a discussion of the troublesome aspects of population standards see Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 742 (1964) (Clark, J., dissenting); *id.* at 749 (Stewart, J., dissenting); Baker v. Carr, 369 U.S. 186, 323 (1962) (Frankfurter, J., dissenting).

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

42. 385 U.S. 440 (1967).

variances.[43] Justified variances, however, were not necessarily minimal. This was illustrated in *Mahan v. Howell*,[44] which upheld a deviation of 16.4 percent on the ground the divergence was needed to further rational state policy.

Until *Chapman*, the Court had not stated that the acceptability of population variances depended on whether they appeared in a state-created or court-fashioned apportionment. *Chapman* expressed this distinction by requiring "population equality with little more than *de minimis* variation"[45] in court plans, while continuing the Court's reluctance to impose this rule as a constitutional standard that would be applicable to legislative plans.[46] The Court lim-

43. In *Swann*, the Court rejected an apportionment for failure to rationalize population variances of 25.6 percent in the senate and 33.6 percent in the house. Although the variances were large, the Court indicated minor deviations must also be justified. *Id.* at 444. The case seemed to suggest that the Court was tightening the *Reynolds* requirement, that justifications for population variances would be rigorously reviewed and that even adequate justification could result in no more than minor variations. *See* R. DIXON, DEMOCRATIC REPRESENTATION IN LAW AND POLITICS 445 (1968). Subsequent cases demonstrated, however, that variations under 10 percent are valid even without justification. *See* Gaffney v. Cummings, 412 U.S. 735 (1973) (7.83 percent deviation allowed without justification); White v. Regester, 412 U.S. 755 (1973) (9.9 percent deviation permitted without justification).

44. 410 U.S. 315 (1973). In *Mahan* the Court approved the plan by concluding the state was following a rational policy of maintaining subdivision lines and that the variance was within tolerable limits. *Id.* at 326. This was challenged in a dissent by Justice Brennan, who said a "critical government interest" was needed to justify such variances, *id.* at 340 (Brennan, J., dissenting), and that none had been shown. *Id.* at 345. The Court had noted that although the 16 percent variation "approach[ed] tolerable limits," it was substantially less than deviations the Court had previously held invalid. *Id.* at 329. Justice Brennan, however, pointed out that substantially lower variances had been ruled constitutionally impermissible by many lower courts. *Id.* at 336 (Brennan, J., dissenting). After *Mahan*, the Court held a 7.83 percent deviation permissible in Gaffney v. Cummings, 412 U.S. 735 (1973). It claimed *Mahan* did not hold that any deviation from exact population equality among state legislative districts violated equal protection, or that it was invalid absent justification. *Id.* at 743.

White v. Regester, 412 U.S. 755 (1973) allowed a deviation of 9.9 percent, reasoning the Supreme Court had not held that "*any* deviations from absolute equality, however small, must be justified" but that larger deviations require justification. *Id.* at 763-64. In *Gaffney*, the Court warned that too stringent standards would in essence press the duty to apportion upon federal courts. 412 U.S. at 749. Exaggerated adherence to mathematical standards would lead to repeated apportionments just to obtain smaller deviations. *Id.* at 750-51. With court-created apportionments, however, the same considerations are not present. Since courts are already apportioning, there is no threat of apportionments being forced upon them. Moreover, federal court plans are usually interim so the specter of repeated apportionments would not be a problem. Therefore, there is no harm in establishing very strict standards for these plans through the use of the supervisory power of the Supreme Court.

45. 420 U.S. at 27.

46. In neither White v. Regester, 412 U.S. 755 (1973) nor Gaffney v. Cummings, 412 U.S. 735 (1973) did the Court explicitly accept a de minimis standard. Rather, the rule seemed to be that unless invidious discrimination was proven by a plaintiff, variations of under 10

ited the higher standard for court plans when it stated greater divergencies in such plans would be acceptable if needed to further "important and significant" state policies.[47] The separate standard serves as a clear reminder that courts redistrict only because the legislature has failed to do so,[48] and then only to implement approximate population equality which is subject in some instances to legitimate state policies.

*Chapman* may produce a benefit in terms of assuring that when federal courts undertake the state function of legislative apportionment[49] the result will be the most equitable apportionment possible. Court plans must meet the constitutional tests, but they must also pass the higher standards established through the Supreme Court's use of its supervisory power. This may, however, reduce the effectiveness of court-ordered plans of reapportionment, which are often used to provide a prompt remedy when legislatures have failed to act. Exceptionally high standards may slow the formulation of court-ordered plans. There is one way to reconcile the conflict. If *Chapman* were limited to only *permanent* court-created plans, it would reserve the courts' power to establish less than perfect plans

---

percent in state-created plans need not be justified. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 20.

47. 420 U.S. at 27. The proposed rationale was that North Dakota's sparse population called for larger deviations to avoid excessively large districts. It was argued that the plan was justified because the state had no victimized minorities, and that a state policy of maintaining geographic boundaries was being furthered. The Court disagreed, asserting that *all* underrepresented citizens were affected by the plan. Moreover, the fact that North Dakota was thinly populated meant individual votes carried more weight; this probably required a *stricter* standard for apportionment. Finally, the Court found the state's own apportionment plan had abandoned the policy of maintaining particular boundaries. *Id.* at 24-26. Furthermore, had the district court given reasons for its plan, the apportionment would still have been unacceptable since the disparity level was well beyond that allowed even state plans. The court's plan had a population variance of 20.14 percent. The largest deviation in a state-created plan that had been allowed, even with justification, was 16.4 percent in Mahan v. Howell, 410 U.S. 315 (1973).

48. *See* 420 U.S. at 19, 21, 24-27.

49. The role of federal courts in reapportionment was well summarized by the Court in White v. Weiser, 412 U.S. 783, 794 (1973). The Court noted that reapportionment is generally a legislative function; court-created plans should be used only if the legislature does not apportion according to federal constitutional requirements in a timely fashion after having an adequate opportunity to do so. When it does apportion, a federal court should adhere to the policies of the state, as articulated in the state's statutes and constitution or inferred from apportionment schemes devised by the legislature, as long as the state policy does not lead to an unconstitutional result. In general, a court must not "pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *Id.*

as a remedial measure and would inhibit courts from making state policy in the form of permanent legislative apportionments.

*David R. Johnson*

CRIMINAL LAW—CONSPIRACY—WHARTON'S RULE—ORGANIZED CRIME CONTROL ACT OF 1970—The Supreme Court of the United States has held that separate convictions for conspiracy to commit and completion of a federal gambling offense are not subject to the presumption of merger created by Wharton's Rule because Congress intended to retain each offense as an independent weapon in combating organized crime.

*Iannelli v. United States*, 420 U.S. 770 (1975).

In the fall of 1970, United States Attorney General Mitchell authorized wiretaps on the telephones at the Robert E. Iannelli residence in suburban Pittsburgh, Pennsylvania.[1] The evidence gathered was used to indict Iannelli and several others on charges of conspiring to violate and violating § 1955 of Title 18,[2] a federal gambling statute which outlaws combinations of five or more persons to conduct, finance, manage, supervise, direct or own a gambling business prohibited by state law. One of defendants' pretrial motions urged dismissal of the conspiracy count brought under §

1. United States v. Iannelli, 339 F. Supp. 171, 174 (W.D. Pa. 1972).

2. 18 U.S.C. § 1955 (1970). This section of the Organized Crime Control Act of 1970 imposes upon violators a fine not in excess of $20,000 and/or imprisonment for not more than five years. As used in § 1955, an "illegal gambling business"

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $20,000 in any single day.

*Id.*

Title 18 of the United States Code defines an illegal gambling business in § 1955 as meaning, *inter alia*, one which has a gross revenue of $20,000 in any single day. This is a misprint, as the Statutes at Large report the requirement for gross revenue in any single day at $2,000. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803, 84 Stat. 937. In 18 U.S.C.A. § 1955 (Supp. 1976), the figure reported is $2,000. The Supreme Court listed the requirement at $2,000 but inaccurately cited the United States Code for this purpose. Iannelli v. United States, 420 U.S. 770, 772 n.2 (1975).