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interpretation was applied by the Supreme Court of New Jersey in the case of *State v. Hawthorne*⁵⁴ to a statute very similar to that involved in the *Luck* case.⁵⁵ The New Jersey court in criticizing the *Luck* procedure pointed out one very significant weakness; the discretionary approach may well result in much appellate controversy because each trial court judge will, when applying the procedure, give it an application reflecting his own interpretation of the statutory policy.⁵⁶ Although this may be true, at the present time (only three years after the *Luck* decision) it seems certain that with the passage of time a set of rules will be pronounced by the courts which will provide trial courts with some very definite guidelines by which they may formulate their decisions. Even though the procedure under *Luck* is not completely defined at present, nevertheless, it seems preferable to any other techniques now in general use.

James Alan Harris

West Virginia Apportionment of 1964—Constitutional?

I INTRODUCTION

Apportionment of state legislatures has been the subject of considerable litigation since the Supreme Court of the United States decided six years ago that such controversies were justiciable.¹ The Court's subsequent decision, *Reynolds v. Sims*,² holding that both houses of a state legislature must be apportioned on a population basis, was the basis for further attacks upon the already beleaguered state legislatures.

⁵⁴ 49 N.J. 130, 228 A.2d 682 (1967).

⁵⁵ In relevant part N.J.S.A. 2A:81-12, (1952), provides: "For the purpose of affecting the credibility of any witness . . . his convictions of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence. . . ." The court in *State v. Hawthorne*, 49 N.J. 130, 135 228 A.2d 682, 684 (1967), considering the history of the statute as well as its language, stated that "in the context 'may' connotes an authorization, a grant of permission to the parties to civil or criminal actions to show the witness' criminal conviction by testimonial examinations or by production of the record. Plainly the option was intended to be given to the State and the defendant in a criminal case, and the plaintiff and defendant in a civil case." The court found the construction given to D.C. CODE 14-305 by the Court of Appeals of the District of Columbia Circuit to be "strained and not justified by the context of the statute." *Id.* at 684.

⁵⁶ *State v. Hawthorne*, 49 N.J. 130, 228 A.2d 682 (1967) (concurring opinion).

¹ *Baker v. Carr*, 369 U.S. 186 (1962).

² 377 U.S. 533 (1964).

These decisions seem to have had little effect on the apportionment of the West Virginia Legislature. The last apportionment of the West Virginia Legislature was the apportionment of 1964,³ shortly before *Reynolds* was decided. The purpose of this note is to consider the constitutionality of the apportionment of 1964 in view of *Reynolds* and subsequent decisions of the United States Supreme Court.

II. STATISTICAL ANALYSIS OF THE APPORTIONMENT OF 1964

A. *The House of Delegates*

The apportionment of 1964 provides for both single and multi-member districts in the House of Delegates and fixes the number of delegates at 100.⁴ The population of West Virginia according to the 1960 Census is 1,860,421.⁵ Ideally, then, each delegate would represent 18,604 people.⁶ Preston County, having a population of 27,233 and represented by one delegate, has 8,629 more people than an ideal district would.⁷ This is the largest deviation from an ideal district at plus 46 per cent.⁸ Monroe County, also represented by one delegate, has a population of 11,584—7,020 below the number of people in an ideal district.⁹ Monroe County's population varies from that of an ideal district by minus 38 per cent, making it the largest variation below the ideal district.¹⁰ The total variation between the high and low deviations is 84 percentage points.¹¹ The ratio of the populations between the districts having the largest deviation from the average population per delegate is 2.35 to 1.¹²

Thirty-five per cent of the state's population live in 24 districts which have populations over or under that of an ideal district by at least 10 per cent.¹³ These 24 districts elect 34 of the 100 members

³ W. VA. CODE ch. 1, art. 2, §§ 1-2 (Michie 1966).

⁴ W. VA. CODE ch. 1, art. 2, § 2 (Michie 1966).

⁵ 51 WEST VIRGINIA BLUE BOOK vii (1967).

⁶ 1,860,421 (population) divided by 100 (number of delegates) equals 18,604.

⁷ See Appendix A.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; Preston (46%) plus Monroe (38%).

¹² See Appendix A; Preston (27,233) divided by Monroe (11,584) equals 2.35.

¹³ See Appendix A; First, Second, Fourth, Seventh, Barbour, Boone, Braxton, Brooke, Clay, Fayette, Hampshire, Logan, Marion, Mason, Mineral, Monroe, Nicholas, Preston, Putnam, Randolph, Roane, Summers, Taylor, Webster; 643,230 divided by 1,860,421 equals 35%.

of the house of Delegates.¹⁴ Forty-six per cent of the people—the percentage of people residing in districts having populations less than the ideal—could elect 51 delegates, or a majority of the one-hundred-member House of Delegates.¹⁵

B. The Senate

The number of senators is fixed by the apportionment of 1964 at 34 with two senators representing each of the seventeen senatorial districts.¹⁶ Ideally, using the 1960 population of West Virginia, each district would represent 109,436 people.¹⁷ The fifth district has a population of 147,179 and contains a larger number of people than any other district.¹⁸ The fifth district has 37,743 more people than an ideal district would and varies from the ideal by plus 34 per cent.¹⁹ The second district with a population lower than any other district at 74,384 varies from the ideal by 35,052.²⁰ This is a deviation of minus 32 per cent from the ideal population per district.²¹ The variation between the high and low deviations is 66 percentage points.²² The ratio of the most populous district, the fifth, to the least populous, the second, is 1.98 to 1.²³

Fifty-eight per cent of the state's population live in 10 to 17 senatorial districts which vary from the population of the ideal district by at least 10 per cent.²⁴ These ten districts elect twenty of the thirty-four members of the Senate. Forty-seven per cent is the minimum number of people who could elect a majority of 18 members in the thirty-four member Senate.²⁵

¹⁴ *Id.*

¹⁵ See Appendix A; Second (1), Third (1), Fifth (1), Sixth (1), Barbour (1), Boone (2), Braxton (1), Brooke (2), Cabell (6), Clay (1), Hampshire (1), Kanawha (14), McDowell (4), Mercer (4), Monroe (1), Ohio (4), Roane (1), Summers (1), Taylor (1), Webster (1), Wyoming (2) (51 delegates); 856,067 divided by 1,860,421 equals 46%.

¹⁶ W. VA. CODE ch. 1, art 2, § 1 (Michie 1966).

¹⁷ 1,860,421 (population) divided by 34 (number of senators) equals 54,718.

¹⁸ See Appendix B.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*; Fifth (34%) plus Second (32%).

²³ See Appendix B; Fifth (147,179) divided by Second (74,384) equals 1.98.

²⁴ See Appendix B; first, second, fourth, fifth, seventh, ninth, tenth, eleventh, fifteenth, and seventeenth; 1,088,237 divided by 1,860,421 equals 58%.

²⁵ See Appendix B; second, third, fourth, tenth, eleventh, twelfth, thirteenth, fifteenth, and sixteenth; 869,627 divided by 1,860,421 equals 47%.

III. NATIONAL GUIDELINES

*Reynolds v. Sims*²⁶ held that both houses of a bicameral legislature must be apportioned on a population basis. The test formulated to ascertain the impairment of a voter's rights under the equal protection clause is whether the vote is substantially diluted compared with the votes of others who live in a different part of the state.²⁷ The Court, in *Reynolds*, did not state a specific mathematical formula to determine the constitutionality of apportionment plans. Rather, the Court said that each apportionment case must be decided on its own peculiar facts. While numerical guidelines from other Supreme Court decisions will not be controlling on the apportionment of 1964, they will certainly be an indication of the constitutionality of the present apportionment of the West Virginia Legislature.

Ratios of populations of the districts having the largest deviations above and below the theoretical ideal equalling 12.7 to 1²⁸, 12 to 1²⁹, 6 to 1³⁰, 4.7 to 1³¹, 4.36 to 1³², 7.4 to 1³³, 1.31 to 1³⁴, and 1.41 to 1³⁵ have all been held unconstitutional by the Court. Similar ratios in state senates have been declared void—3.6 to 1³⁶, 2.65 to 1³⁷, and 1.30 to 1³⁸. The corresponding ratios under the apportionment of 1964 in West Virginia are 2.35 to 1³⁹ in the house and 1.98 to 1⁴⁰ in the Senate.

Perhaps the best way to consider the constitutionality of the West Virginia Apportionment of 1964 is to compare it statistically with *Swann v. Adams*,⁴¹ the Court's most recent decision in the area of legislative apportionment.

Swann began as a suit by residents of Dade County, Florida, challenging the constitutionality of a Florida legislative reapportionment. Under the Florida plan, the highest and lowest deviations

²⁶ 377 U.S. 533, 568, (1964).

²⁷ *Id.*

²⁸ *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

²⁹ *Roman v. Sincock*, 377 U.S. 695 (1964).

³⁰ *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964).

³¹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

³² *Davis v. Mann*, 377 U.S. 678 (1964).

³³ *Crawford County Bar Ass'n v. Faubus*, 251 F. Supp. 998, (E.D. Ark. 1965), *affd*, 383 U.S. 271 (1966).

³⁴ *Kilgarlin v. Hill*, 386 U.S. 120 (1967).

³⁵ *Swann v. Adams*, 385 U.S. 440 (1967).

³⁶ *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964).

³⁷ *Davis v. Mann*, 377 U.S. 678 (1964).

³⁸ *Swann v. Adams*, 385 U.S. 440 (1967).

³⁹ See note 12 *supra*.

⁴⁰ See note 23 *supra*.

⁴¹ 385 U.S. 440 (1967).

from the ideal in the upper house were plus 15.09 per cent and minus 10.56 per cent.⁴² The corresponding deviations in West Virginia under the apportionment of 1964 are plus 34 per cent and minus 32 per cent.⁴³ The ratio between the largest and the smallest district was 1.30 to 1⁴⁴ in the Florida Senate. The corresponding ratio in West Virginia is 1.98 to 1.⁴⁵ Under the Florida reapportionment, the deviation from average population per senator was greater than 10 per cent in twelve districts.⁴⁶ In West Virginia a deviation greater than 10 per cent exists in ten of the seventeen districts.⁴⁷ The minimum number of persons who could elect a majority of the Florida Senate was 48.38 per cent.⁴⁸ The minimum number of West Virginians who can elect a majority of the Senate is 47 per cent.⁴⁹ Statistical comparisons between the Florida and West Virginia lower houses are similar to those in the respective Senates.⁵⁰ In every case, West Virginia under the apportionment of 1964 has a larger variation from the ideal than did Florida under the contested plan.⁵¹

The district court held the Florida plan constitutional. However, the United States Supreme Court reversed saying that the deviations in the Florida plan were not *de minimis* (10 per cent low + 15 per cent high equal 25 percentage points in the Senate) and no acceptable reasons for the greater than *de minimis* deviations were given.⁵² This 25 per cent figure in Florida compares with a 66 per cent⁵³ figure in West Virginia.

IV. LEGITIMATE CONSIDERATIONS OTHER THAN POPULATION

Reynolds v. Sims states that the only legitimate consideration other than population in an apportionment plan is to "effectuate a rational state policy."⁵⁴ However, even an intent to institute a rational state policy in an apportionment plan will not save the plan if its effect is to submerge population as the principal consideration.⁵⁵

What, then, are legitimate considerations? By dicta, the Court has indicated that 1) integrity of political subdivisions, 2) compact

⁴² See Appendix C.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Swann v. Adams*, 385 U.S. 440 (1967).

⁵³ See note 22 *supra*.

⁵⁴ 377 U.S. 533, 579 (1964).

⁵⁵ *Id.* at 581.

and contiguous districts, 3) staggered terms of office, and 4) combinations of single, multiple, and flatorial member districts are rational state policies.⁵⁶ These considerations have been reiterated as legitimate in subsequent cases.⁵⁷ However, if the policy being implemented is discriminatory, irrational, or arbitrary in any manner as is the case when historical, economic, or pressure group interests are protected, there can be no legitimate consideration.⁵⁸

Interestingly, the West Virginia Constitution has sections which seem to be both opposed to and in complete accord with the *Reynolds* decision. One provision⁵⁹ guarantees equal representation for all citizens of the state. Is this not the very essence of *Reynolds*? Article 6, section 4 of the West Virginia Constitution calls for senatorial districts which are compact, contiguous, and "as nearly as practicable, equal in population." This wording is quite similar to that of Chief Justice Warren's in *Reynolds*. However, the West Virginia Constitution also contains a section that gives any county having three-fifths of the ratio of representation (being total population divided by the number of delegates in the lower house) a delegate.⁶⁰ In theory, this means that counties varying up to minus 40 per cent from the ideal population per delegate will get one delegate. Since Monroe County has a variation of minus 38 per cent⁶¹, it would seem that theory and practice merge. This provision may be contrary to both article II, section 4 of the West Virginia Constitution guaranteeing equal representation and the equal protection clause of the fourteenth amendment.⁶² Article VI, section 6 appears to be purely historical, arbitrary, irrational and discriminatory.⁶³ Such a section would not appear to be constitutional under *Reynolds*.⁶⁴

⁵⁶ *Id.* at 578-79.

⁵⁷ *E.g.*, *Swann v. Adams*, 385 U.S. 440, 444 (1967).

⁵⁸ *Swann v. Adams*, 385 U.S. 440, 447 (1967); *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

⁵⁹ W. VA. CONST. art. II, § 4.

⁶⁰ W. VA. CONST. art. VI, § 6.

⁶¹ See note 10, *supra*.

⁶² *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶³ Preston County, having a population of 27,233, is given one delegate while Boone County with a population of 28,764—only 1,531 more people—is represented by two delegates. Clay and Monroe counties with a combined population of 23,526 each have one delegate. Mason County which has only one delegate has a population of 24,459—more than the combined population of Clay and Monroe. The second and fifteenth districts have a combined population of 166,447 and a total of four senators. The fifth district with 147,179 people—less than 20,000 fewer—receives only one-half the representation that the second and fifteenth do.

⁶⁴ *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

V. CONCLUSIONS

The apportionment of 1964 contains wide percentage deviations from what an ideal district would and therefore does not seem to be constitutional under the *Reynolds'* standard—absent a rational state policy behind the large deviations from an ideal district. It is difficult to reach any other conclusion considering the number and magnitude of the deviations from the ideal district existing in both House and Senate districts.

Giving a delegate to a county having barely three-fifths of the ratio of representation (as in the case of Monroe County presently) surely violates the Supreme Court decisions on apportionment. Moreover, the mistakes of the past will probably be magnified in the future because of continuous population shifts.⁶⁵

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⁶⁵ U.S. Dept. of Commerce, Population Estimates, P-25, No. 401, at 17 (1968). According to this recent population estimate, Boone County with two delegates in the house has only two hundred more people than Preston County represented by one delegate.

APPENDIX A

House of Delegates†

District	Number of Delegates	Population	Variance*	Per cent Variance***
First	2	42,167	+ 4,959	+13
Second	1	16,054	- 2,550	-14
Third	1	17,401	- 1,203	- 6
Fourth	2	44,582	+ 7,374	+20
Fifth	1	16,996	- 1,608	- 9
Sixth	1	18,001	- 603	- 3
Seventh	1	20,389	+ 1,785	+10
Barbour	1	15,474	- 3,130	-17
Boone	2	28,764	- 8,444	-23
Braxton	1	15,152	- 3,452	-19
Brooke	2	28,940	- 8,268	-22
Cabell	6	108,202	- 3,422	- 3
Clay	1	11,942	- 6,662	-36
Fayette	3	61,731	+ 5,919	+11
Hampshire	1	11,705	- 6,899	-37
Hancock	2	39,615	+ 2,407	+ 6
Harrison	4	77,856	+ 3,440	+ 5
Jackson	1	18,541	- 63	**
Jefferson	1	18,665	+ 61	**
Kanawha	14	252,925	- 7,531	- 3
Lewis	1	19,711	+ 1,107	+ 6
Lincoln	1	20,267	+ 1,663	+ 9
Logan	3	61,570	+ 5,758	+10
Marion	3	63,717	+ 7,905	+14
Marshall	2	38,041	+ 833	+ 2
Mason	1	24,459	+ 5,855	+31
McDowell	4	71,359	- 3,057	- 4
Mercer	4	68,206	- 6,210	- 8
Mineral	1	22,354	+ 3,750	+20
Mingo	2	39,742	+ 2,534	+ 7
Monongalia	3	55,617	- 195	**
Monroe	1	11,584	- 7,020	-38
Nicholas	1	25,414	+ 6,810	+37
Ohio	4	68,437	- 5,979	- 8
Preston	1	27,233	+ 8,629	+46
Putnam	1	23,561	+ 4,957	+27
Raleigh	4	77,826	+ 3,410	+ 5
Randolph	1	26,349	+ 7,745	+42
Roane	1	15,720	- 2,884	-16
Summers	1	15,640	- 2,964	-16
Taylor	1	15,010	- 3,594	-19
Upshur	1	18,292	- 312	- 2
Wayne	2	38,977	+ 1,769	+ 5
Webster	1	13,719	- 4,885	-26
Wetzel	1	19,347	+ 743	+ 4
Wood	4	78,331	+ 3,915	+ 5
Wyoming	2	34,836	- 2,372	- 6

† Source: 51 West Virginia Blue Book 284 (1967).

* equals population minus (number of delegates x 18,604)

** less than ½ of one per cent

***per cent variance =
$$\frac{\text{population of district} - (\text{number of delegates} \times 18,604)}{18,604}$$

APPENDIX B

Senate†

District	Number of Senators	Population	Variance*	Per cent Variance***
First	2	136,992	+27,556	+25
Second	2	74,384	-35,052	-32
Third	2	108,671	- 765	- 1
Fourth	2	94,223	-15,213	-14
Fifth	2	147,179	+37,743	+34
Sixth	2	111,101	+ 1,665	+ 2
Seventh	2	110,601	+ 1,165	+ 1
Eighth	2	126,463**	+17,027	+16
Ninth	2	112,662	+ 3,226	+ 3
Tenth	2	95,430	-14,006	-13
Eleventh	2	96,177	-13,259	-12
Twelfth	2	98,863	-10,573	-10
Thirteenth	2	105,617	- 3,819	- 3
Fourteenth	2	119,334	+ 9,898	+ 9
Fifteenth	2	92,063	-17,373	-16
Sixteenth	2	104,199	- 5,237	- 5
Seventeenth	2	126,463**	+17,027	+16

† Source: 51 West Virginia Blue Book 260 (1967)

* equals population minus (number of senators x 54,718)

** equals one-half the population of Kanawha County

***per cent variance = $\frac{\text{population of district} - (\text{number of delegates} \times 54,718)}{109,436}$

109,436

APPENDIX C

SENATE:	Florida*	West Virginia**
1) High deviation.....	+15.09%	+34%
2) Low deviation.....	-10.56%	-32%
3) Ratio of High to Low.....	1.30 : 1	1.98 : 1
4) Number of districts deviating from ideal by 10% or more.....	12	10 of 17
5) Minimum percentage who could elect a majority.....	48.38%	47%
HOUSE:		
1) High deviation.....	+18.28%	+46%
2) Low deviation.....	-15.27%	-38%
3) Ratio of High to Low.....	1.41 : 1	2.35 : 1
4) Number of districts deviating from ideal by 10% or more.....	13	24 of 47
5) Minimum percentage who could elect a majority.....	50.43%	46%

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

** Appendix A, Appendix B.