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# REAPPORTIONMENT IN CALIFORNIA COUNTIES

William H. Stoffers\*

Legislative apportionment constitutes one of the most controversial problems of state and local governments in the United States. The battle has now moved west into California counties. Until recently most of this controversy has concerned itself with judicial opinions on the apportionment of state legislatures. This controversy reached its climax in *Baker v. Carr*.<sup>1</sup>

In *Baker* the plaintiffs alleged that the Tennessee Apportionment Act of 1901 was unconstitutional and sought an injunction restricting the defendants from conducting any further elections under the act. They alleged that the act violated the fourteenth amendment of the United States Constitution in its disregard of the apportionment prescribed by the Tennessee state constitution or of any standard, thereby effecting a gross disproportion of representation to voting population. Upon appeal the Supreme Court reversed the judgment and remanded the case to the district court.

The Tennessee constitution required a census every ten years beginning in 1871 and reapportionment of representatives after each census. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. However, in the sixty years following the 1901 apportionment all proposals for reapportionment in both houses of the General Assembly failed to pass.

Tennessee made no provision for popular initiative, and in the words of Justice Clark "the majority of the voters have been caught up in a legislative strait jacket."<sup>2</sup>

The decision is not one on the merits, but solely on procedure. Justice Stewart in his concurring opinion explains that the court does not decide whether a state may weigh the vote of one county or district more heavily than that in another.<sup>3</sup> He states:

The Court today decides three things and no more: (a) that the court possessed jurisdiction of the subject matter; (b) that a justici-

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<sup>1</sup> 369 U.S. 186 (1961).

<sup>2</sup> *Id.* at 259

<sup>3</sup> *Id.* at 265.

able cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) that the appellants have standing to challenge the Tennessee apportionment statutes.<sup>4</sup>

If *Baker* stands for nothing else, it stands for the proposition that courts may pierce the political thicket and require reapportionment by judicial mandate.

#### CALIFORNIA SUPERVISORIAL DISTRICTS

Each of the fifty-eight California counties is governed by a board of supervisors. Forty-seven of these counties are general law counties, *i.e.*, counties governed by general law rather than a charter. This article deals primarily with the election of boards of supervisors of general law counties.

Our first state constitution, that of 1849, provided for the establishment by the Legislature of a system of county and town governments. It authorized the Legislature to provide for the election of a board of supervisors in each county. Statutes were adopted creating boards of supervisors in the various counties.

In 1879 the present constitution was adopted. Section 1 of article XI provided that the counties were to be recognized as legal subdivisions of the state. Under section 5 the Legislature was to provide for the election or appointment of boards of supervisors, sheriffs, county clerks, district attorneys and other officers.

In 1883 the Legislature adopted chapter 75 to establish a uniform system of county and township governments. Section 13 of the chapter provided for a county board of supervisors consisting of five members. Section 16 required each board of supervisors to district its county into five supervisorial districts as nearly equal in population as possible.

#### THE CALIFORNIA NEED FOR REAPPORTIONMENT

Pursuant to this legislative direction, the board of supervisors of each general law county districted its county into supervisorial districts, presumably nearly equal in population. Many of the California counties did not again change their district boundaries, although great population growth occurred. As a result many counties found their districts to vary greatly in population. A study conducted in 1960 by the Grass Valley Junior Chamber of Commerce revealed that the majority of boards of supervisors in thirty-

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<sup>4</sup> *Ibid.*

five of the forty-seven general law counties was elected by less than fifty per cent of the counties' registered voters.<sup>5</sup> In the writer's own county of Monterey three supervisorial districts contained less than twenty per cent of the county's population and registered voters.

Section 25001 of the California Government Code provides that the board may change the boundaries of any or all of the county districts by a two-thirds vote. The section goes on to require the district to be "as nearly equal in population as may be. . . ." However, when it establishes boundaries, the board may consider such factors as: "(a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the districts."

Incumbent supervisors have been reluctant to redistrict their counties. The failure to redistrict has been blamed in part on the belief that a rural minority needs to be protected, desire of the board members to maintain themselves in office, apathy, a desire on the part of a majority of the population of the county that the *status quo* be maintained, and the fact that, to redistrict, four of the five supervisors must concur.

#### ATTEMPTS TO COMPEL REAPPORTIONMENT

There have been numerous attempts to redistrict the supervisorial districts of California counties. These efforts may be divided into three broad categories—judicial action, adoption of initiative redistricting ordinances, and legislative action.

##### *Judicial Efforts*

The first significant attempt to redistrict supervisorial boundaries by judicial action is found in *Peterson v. Board of Supervisors of San Mateo County*.<sup>6</sup> In *Peterson* petitioners sought a writ of mandate from the superior court to command the board of supervisors of the county to redistrict. The petition alleged that the five districts had not been changed since they were established in 1901; that the population of the county had greatly increased since then; that the vote of a registered voter in District No. 4 was equal to 14 votes in District No. 2, the vote of a voter of District No. 5 was equal to 19 votes in District No. 2 and 16 votes in District No. 1. The petition stated that registered voters of District No. 2

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<sup>5</sup> California Junior Chamber of Commerce, Supervisorial District Representation Survey (1961).

<sup>6</sup> 93 Cal. App. 490, 269 Pac. 743 (1928).

had filed a petition with the County Clerk of San Mateo County asking that the board of supervisors redistrict the county by ordinance and to change the boundaries of the supervisorial districts so that they would be as nearly equal in population as possible, in conformity with section 4029 of the Political Code. The petitioners claimed that the board unlawfully refused to grant their petition to redistrict the county.

The board of supervisors filed a demurrer which was sustained. On appeal the action of the trial court was affirmed. The district court of appeal decided that nothing in the code imposed a duty on boards of supervisors to change boundaries of districts because of inequalities in population. But if a board decided to redistrict, then it would have to make the district as nearly equal in population as possible.<sup>7</sup> A petition to have the case heard by the California Supreme Court was denied.

The *Peterson* rule was followed in *Dozier v. Board of Supervisors*.<sup>8</sup> Here mandamus was sought to compel the board of supervisors of Shasta County to redistrict because of inequality in population of supervisorial districts.

In affirming the denial of a writ by the trial court, the district court of appeal questioned the power of the court to compel redistricting. Following *Peterson*, the court decided that the board of supervisors had complete discretion to decide whether or not to redistrict. The court held that the question of equality of representation was not one entirely of population.<sup>9</sup> Again the supreme court refused to grant a hearing.

#### *Redistricting by Initiative Ordinance*

In 1956 an attempt was made to redistrict Monterey County by initiative ordinance. After a bitter campaign, redistricting forces were defeated. The vote: "Yes": 18,165; "No": 24,823.

Some, however, have had more success. Kern County was redistricted by initiative in 1934; Modoc County, in 1952; and Nevada County, in 1960. In 1956 the threat to use an initiative to redistrict Glenn County spurred the board of supervisors to adopt a modest readjustment of supervisorial boundaries, although the alteration still permitted "minority rule" on the board.<sup>10</sup>

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<sup>7</sup> *Id.* at 494, 269 Pac. at 744.

<sup>8</sup> 130 Cal. App. 746, 20 P.2d 726 (1933).

<sup>9</sup> *Id.* at 747, 20 P.2d at 727.

<sup>10</sup> HALL, COUNTY SUPERVISORIAL DISTRICTING IN CALIFORNIA 51 (1961).

*Legislative Action*

In the 1961 session of the California Legislature, Assembly Bill 2100 was introduced. This bill provided that supervisorial districts in general law counties were not to vary in population more than twenty-five per cent from the average at the time of adjustment of district boundaries. In other words, no district was to contain less than fifteen per cent nor more than twenty-five per cent of a county's population. Boards of supervisors were to redistrict within four months after the adoption of the bill and by October of the year following each federal census. If a board failed to act, a supervisorial redistricting commission made up of certain elected county officers was to redistrict the county. While the bill passed the Assembly by a vote of 77-0, it failed in the Senate.

The 1961 Legislature did pass a bill adding section 25009 to the Government Code requiring the appointment of a Citizens Advisory Committee to study and report on the need, if any, of supervisorial redistricting.

## GRIFFIN V. BOARD OF SUPERVISORS

Following the decision of the United States Supreme Court in *Baker v. Carr*, new hope came to those who claimed to be discriminated against by the disparity in population of supervisorial districts.

Monterey County was an ideal test case for those who wanted to attempt judicial action. In Monterey County the disparity of population exceeded 60 to 1. One district contained over fifty per cent of the county's population, while another contained less than one per cent.

In September 1962 Allen Griffin, publisher of the Monterey Peninsula Herald and a leader in the unsuccessful 1956 initiative attempt, filed with the Monterey County Board of Supervisors a formal demand that the board redistrict the supervisorial districts upon a population basis. The demand was based on the precedent of *Baker v. Carr*.

The board did not comply with this demand. Early in January 1963 Mr. Griffin filed a petition for a writ of mandate with the California Supreme Court, declaring that the legal question was:

Is the rationale of the United States Supreme Court decision of *Baker v. Carr* applicable to the population malapportionment of the Monterey County supervisorial districts and are voters invidiously discriminated against in violation of the Fourteenth Amendment?

In support of his petition Griffin cited *Baker v. Carr* as holding

that invidious discrimination against classes of voters violates the fourteenth amendment of the United States Constitution. He discussed *Baker* at length, as well as some of the comments on the case, and rested his case on this decision.

Petitioner alleged that the fact that such invidious discrimination was being practiced in Monterey reflected no reasonable policy, but merely an arbitrary and capricious failure of the board of supervisors to act. The petition stated that the districts were established in 1886 and had never been changed, though the population had so drastically changed that less than 7.3 per cent of the registered voters of the Monterey County elected a majority of the board. The voting population, it was alleged, was constituted so that 8 per cent of the registered voters resided within the 1st District, 33 per cent resided in the 2d District, 8 per cent resided in the 3d District, only 1 per cent resided in the 4th District, while 50 per cent resided in the 5th District. The vote of a resident of the 4th District was worth thirty-six times that of one in the 5th District.

Petitioner then alleged that he filed a request asking the board to redistrict and that the board refused to redistrict Monterey County in violation of the constitutional rights of the petitioner and the class he represented. He charged that the voters of the 5th District were invidiously discriminated against and deprived of their rights to equality of representation under the California and United States constitutions. He further charged violations of the equal protection guaranteed under the fourteenth amendment and condemned the board for bestowing special privileges upon one class of citizens not granted to others.

Petitioner asserted that the conditions in Monterey constituted the worst malapportionment existing in California and argued that the system of "rotten boroughs" should not be allowed. Equality—the equal worth of human beings—is a basic premise of democratic American society.

The board of supervisors relied on two defenses: (1) that section 25001 of the Government Code is a permissive section and that the *Peterson* and *Dozier* cases held that the board of supervisors had no duty to take any affirmative action; and (2) that *Baker v. Carr* was inapplicable to the supervisorial districting of Monterey County.

In August of 1963 the California Supreme Court filed its unanimous opinion in *Griffin v. Board of Supervisors*.<sup>11</sup> The opinion

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<sup>11</sup> *Griffin v. Board of Supervisors of Monterey County*, 60 A.C. 271, 384 P.2d 421, 33 Cal. Rptr. 101 (1963).

is very brief and general. It makes no mention of *Baker v. Carr*. The court ordered issuance of a peremptory writ of mandate directing the Monterey County Board of Supervisors to redistrict the supervisorial districts within a reasonable time in accordance with section 25001 of the Government Code. The court retained jurisdiction to determine whether the writ was complied with and to take further steps if the board did not show compliance within a reasonable time.

The court considered Government Code section 25001 and determined that "under this section apportionment according to population is the primary goal in redistricting, and the other factors enumerated may only be given subsidiary effect and cannot warrant large deviations from equality of population."<sup>12</sup> The court went on to say that conditions in Monterey County, where one district had fifty per cent of the electorate and another merely one per cent, obviously constituted a "drastic deviation" from equality of population. The disparity could not be justified by the factors enumerated in section 25001.<sup>13</sup>

In dismissing the board's contention that section 25001 is merely permissive and not mandatory, the court said:

We cannot agree with the contention that section 25001 by providing that the board "may" change district boundaries, leaves the matter of redistricting entirely to the board's discretion and that therefore the board cannot be required to redistrict however unreasonable its refusal to do so may be. The section, in setting forth the primary standard to be applied, uses the mandatory language that the districts "shall be" as nearly equal in population as may be.<sup>14</sup>

The court then referred to its ruling in another case where districts were required to be redistricted periodically to prevent drastic population differences even where no statute expressly authorized redistricting.<sup>15</sup> In discussing the discretion of the board to redistrict or not the court said:

Although section 25001 gives a board of supervisors some discretion in deciding whether redistricting has become necessary to conform to the standard there set forth, this discretion is not unlimited, and where there are drastic deviations from equality of population the refusal to redistrict is an abuse of discretion.<sup>16</sup>

The court went on to expressly disapprove the *Dozier* and *Peterson*

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<sup>12</sup> *Id.* at 274, 384 P.2d at 422-23, 33 Cal. Rptr. at 102-03.

<sup>13</sup> *Id.* at 275, 384 P.2d at 423, 33 Cal. Rptr. at 103.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, citing *Blotter v. Farrell*, 42 Cal. 2d 804, 811, 270 P.2d 481, 485 (1954).

<sup>16</sup> *Id.* at 275, 384 P.2d at 421, 33 Cal. Rptr. at 103.

cases insofar as they held that the board of supervisors has unlimited discretion to refuse to redistrict irrespective of how unequal in population the districts may be.<sup>17</sup>

The court uses two terms: (1) "large deviation" and (2) "drastic deviation." The court appears to say that when a board of supervisors redistricts pursuant to section 25001, the result must not be a "large deviation" from equality of population; while section 25001 gives the board some discretion in deciding whether redistricting is necessary, if there is "drastic deviation" from equality of population, the board has a duty to redistrict which may be enforced by a writ of mandate. Will the court refuse to issue a writ of mandate where the deviation is large, but not drastic?

#### CONSEQUENCES OF THE GRIFFIN RULE

Following the *Griffin* decision, redistricting activity occurred in many of California counties and several suits were filed in superior courts to force reluctant boards to act.

In Monterey County the board of supervisors in obedience to the writ of mandate set about redistricting that county. After several months the board in December 1963 finally adopted a redistricting ordinance.<sup>18</sup>

The *Griffin* decision gave no definite standard as to how great a deviation from equality of population would be allowed. How much weight would a board be permitted to give to topography, geography, cohesiveness, contiguity, integrity, compactness of territory, and community of interest? The supreme court in the *Griffin* case has said that these factors could be given only a subsidiary effect and that they could not warrant large deviations from equality of population.

In its redistricting ordinance the board divided Monterey County into districts having population and registered voter percentages as follows:<sup>19</sup>

District No.	Population 1960	Registered Voters 1963
1	17.94%	16.53%
2	21.42%	26.00%
3	11.25%	9.26%
4	24.85%	12.05%
5	24.54%	36.16%

<sup>17</sup> *Ibid.*

<sup>18</sup> Monterey County, Calif. Ordinance 1329.

<sup>19</sup> *Griffin v. Board of Supervisors of Monterey County*, 60 A.C. 741, 742, 388 P.2d 888, 889, 36 Cal. Rptr. 616, 617 (1964).

A majority of the population resided in three districts; in other words, no two districts contained a majority of the population. However, the population disparity exceeded 2 to 1 and the voter registration disparity was almost 4 to 1.

#### THE NEW ORDINANCE IS TESTED

Immediately following the adoption of the redistricting ordinance by the Monterey County Board of Supervisors, Mr. Griffin filed a petition for further proceedings with the California Supreme Court. The court issued an order to show cause, and the matter was argued before the supreme court on January 8, 1964.

The petitioner, Griffin, contended that the board of supervisors had not complied with the writ of mandate and that the deviation of 2 1/5 to 1 was, in fact, a large deviation. In support he quoted the Supreme Court of Michigan:

When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is constitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed.<sup>20</sup>

In response the board of supervisors argued that it had obeyed the writ. It pointed out that the three districts with the least population had an excess of 50 per cent of the population; that new District No. 3, while it contained only 11.25 per cent of the county's population, contained well in excess of 71 per cent of the land area of the county; that new District No. 4, although it contained almost 25 per cent of the county's population, had only about 2 per cent of the county's land area.

The board pointed out that California boards of supervisors are unlike other legislative bodies. It argued that while city councils, state legislatures, and the Federal Congress adopt laws which affect the entire area within a city, state, or the nation, a board of supervisors adopts laws affecting only the *unincorporated* area; that the county's exercise of its police power (zoning, planning, building, sanitary, fire and traffic regulations, etc.) applies only to the unincorporated area of the county, which area contains for the most part the lightly populated, rural portion of the county; and that these factors would justify a greater disparity than 2 to 1.

In oral argument the board urged that to increase the population of the 3d District (Salinas Valley), which contained only 11.25 per cent of the population, but 71 per cent of the land area, would

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<sup>20</sup> Scholle v. Hare, 367 Mich. 176, 183, 116 N.W.2d 350, 355 (1962).

require taking in a portion of the City of Salinas or of the urban Monterey Peninsula. Such an extension, it was argued, would mean a complete disregarding of one or more of the factors mentioned in Government Code section 25001.

On February 3, 1964, the California Supreme Court filed its unanimous decision upholding the validity of the Monterey County ordinance.<sup>21</sup> The court noted that under this ordinance the ratio between the districts of the highest and lowest population is slightly more than 2.2 to 1. The petitioner contended that this deviation is so large that the ordinance did not meet the requirements of either Government Code section 25001 or the equal protection clause in the federal constitution. The court, however, pointed out that the new ordinance brought about a great improvement over the prior system under which a majority of the population resided in former District No. 5 and elected only one supervisor, while former District No. 4 with 0.86 per cent of the population also elected one supervisor. The court stated that under the ordinance a majority of the members of the board will be elected in districts having a majority of the population and that the previous ratio between the districts of highest and lowest population of 61.8 to 1 has been reduced to 2.2 to 1.

The court decided that the largest district in land area need not be enlarged to equalize its small population with that of other districts because "cohesiveness, and community interests are sufficient to warrant the extent to which the ordinance adopted by the board deviates from equality of population." The court then cautioned:

Each case involving a problem of this type must be considered by itself upon the basis of all the facts and circumstances present with regard to the particular county, and our decision should not be read as indicating that a disparity of population such as that resulting from the ordinance will necessarily be sustained in other cases.<sup>22</sup>

Having decided that the redistricting ordinance complied with section 25001, the court then treated the petitioner's contention that the requirements of the equal protection clause of the federal constitution had not been met. The court pointed out that several cases involving the apportionment of districts for the election of state legislators have held that such factors as those listed in section 25001 should be considered to determine whether there has been a denial of equal protection. The court states that it is obvious that

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<sup>21</sup> *Griffin v. Board of Supervisors of Monterey County*, 60 A.C. 741, 388 P.2d 888, 36 Cal. Rptr. 616 (1964).

<sup>22</sup> *Id.* at 745, 388 P.2d at 891, 36 Cal. Rptr. at 619.

such factors apply with equal force to the apportionment of county districts insofar as the constitutional guarantee is concerned.<sup>23</sup> In fact, the court seems to go further when it states:

Moreover, in view of difference between county and state governments, there are additional considerations applicable to county districting which can justify a departure from equality of population. County governments perform a number of important functions for unincorporated areas which are ordinarily performed entirely or in large part by city governments in incorporated areas.<sup>24</sup>

The court enumerates several examples of such services performed by the county government for the unincorporated areas of the county. Noting that the districts favored in the redistricting ordinance of Monterey County are rural districts, the court holds "that the disparity in population created by the ordinance does not result in a denial of equal protection."<sup>25</sup>

This latest expression of the supreme court in the *Griffin* case sets out some broad guide lines for supervisorial apportionment both insofar as state law and the equal protection clause of the federal constitution is concerned. It also draws a significant distinction between county and state legislatures with respect to the application of the equal protection clause of the fourteenth amendment.

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*