IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE PETITION OF MARIA FRICA TUDELA PANGELINAN AND CHRISTINA-MARIE E. SABLAN FOR REAPPORTIONMENT AND REDISTRICTING

SUPREME COURT NO. CV-07-0015-OA

Cite as: 2008 MP 12

Decided June 27, 2008

Maria Frica Tudela Pangelinan and Tina-Marie E. Sablan, Saipan, Commonwealth of the Northern Mariana Islands, Petitioners.
Ian Cattlet, Legal Counsel, Commonwealth House of Representatives, for Invited Amicus Curiae Commonwealth House of Representatives.
Stephen Woodruff, Saipan, Commonwealth of the Northern Mariana Islands, for Invited Amicus Curiae Saipan Mayor's Office.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

PER CURIAM:

¶ 1 Maria Frica Tudela Pangelinan and Tina-Marie E. Sablan, as qualified Commonwealth voters, petitioned this Court to reapportion and redistrict the NMI House of Representatives pursuant to NMI Const. art. II, § 4(b). Petitioners argued the Reapportionment Act of 1991, 1 CMC §§ 1501-1504, impermissibly diluted Rota and Tinian votes in relation to Saipan because it apportioned the house of representatives by total population instead of by the number of United States citizens. Further, petitioners argued vote dilution was exacerbated by the increase in Saipan's noncitizen population in the years since the 1990 United States Census, which formed the basis of the Reapportionment Act of 1991. Petitioners sought to exclude noncitizens from the population count for legislative apportionment purposes.

¶ 2 Petitioners proposed a reapportionment and redistricting plan based on the Commonwealth's United States citizen population. Petitioners' proposed plan would have reduced Saipan representatives from sixteen to twelve, each representative to be elected from one of twelve revised election districts. Conversely, the NMI House of Representatives, an invited amicus curiae, argued apportionment should be based on total population, including noncitizens. The house maintained that election districts should not be altered, but that Saipan should be apportioned two additional representatives in order to maintain sufficient population equality across then-current election districts. The Saipan mayor, also an invited amicus curiae, supported petitioners' proposed election districts but agreed with the NMI House that Saipan must be apportioned two additional representatives. The Saipan mayor suggested electing twelve representatives from petitioners' proposed districts and the remaining six from super districts, each comprised from two of the twelve election districts proposed by petitioners.

¶ 3 After considering briefs and arguments, we rejected petitioners' and amici's proposed reapportionment and redistricting plans in favor of our own. *In re Pangelinan*, 2007 MP 14. We concluded that all Commonwealth residents, including noncitizens, should be counted for purposes of apportioning the NMI House of Representatives. *Id*. ¶ 12. And based on the total Commonwealth population as reported in the 2000 United States Census, we apportioned Saipan two additional representatives and redrew Saipan's election districts. *Id*. ¶¶ 13-14. However, given time constraints imposed by the upcoming 2007 election, we reserved jurisdiction to issue this supplemental opinion explaining our reasoning. *Id*. ¶ 8.

I

¶ 4 The NMI Constitution requires the house of representatives to be reapportioned or redistricted[1] at least once every ten years to ensure sufficient representational equality between Commonwealth residents. NMI Const. art. II, § 4(a). The principal responsibility rests with the legislature, which must reapportion the house within 120 days after publication of a decennial census. *Id*. However, if the legislature does not act within its prescribed time, the governor is charged with curing the deficiency and must within 120 days promulgate a reapportionment plan. *Id*. § 4(b). If the governor fails to act, any person qualified to vote may petition this Court to establish such a plan. *Id*.

¶ 5 Prior to our decision in *Pangelinan*, the house of representatives was last reapportioned in 1991. 2007 MP 14 ¶ 4. The Reapportionment Act of 1991 relied on the 1990 United States Census. *Id*.; 1 CMC §§ 1501 - 1504. No similar reapportionment occurred after the 2000 census. Accordingly, petitioners requested that this Court reapportion and redistrict the house of representatives. However, petitioners went beyond simply requesting the Court correct legislative and executive inaction. Petitioners also argued that the Reapportionment Act of 1991, by apportioning based on total population, impermissibly diluted Rota and Tinian votes in relation to Saipan.

¶ 6 The Reapportionment Act of 1991 granted Saipan and the northern islands an additional three seats in the house of representatives. 1 CMC § 1503. The legislature's stated purpose for reapportioning the house was to "comply with the 'one man-one vote' rule" requiring "each representative . . . represent approximately an equal number of residents in the Commonwealth." 1 CMC § 1502(b). Petitioners, however, argued the legislature violated the one man-one vote rule by counting nonresident workers – who are not United States citizens and are ineligible to vote – for apportionment purposes. According to petitioners, the legislature should have considered the NMI's unique status as the only United States jurisdiction where noncitizens outnumber citizens. Failure to consider this, petitioners argued, and failure to consider the vastly differing ratios of citizens to non-citizens on each island, caused the legislature to dilute the voting power of citizens on Rota and Tinian in relation to Saipan. By apportioning additional

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[1] Apportionment and districting refer to different methods of distributing representatives throughout a geographic area. Apportionment involves assigning a geographic area a certain number of representatives. Districting involves dividing a geographic area into separate election districts, each district electing its assigned number of representatives. Reapportionment and redistricting involve adjusting previous apportionment and districting plans. However, although the terms "reapportionment" and "redistricting" have distinct meanings, their common purpose of adjusting the distribution of representatives is often referred to as simply "reapportionment." Accordingly, unless the context indicates either reapportionment or redistricting individually, we refer to both methods collectively as "reapportionment."

representatives to Saipan and the northern islands based on the influx of nonresident workers, the 17,201 citizens residing on Saipan and the northern islands enjoyed sixteen representatives; a ratio of one representative per 1,075 citizens. By contrast, Rota had a single representative for 1,595 citizens and Tinian had a single representative for 1,286 citizens. Thus, by petitioners' logic, Rota and Tinian votes were diluted to sixty-seven percent and eighty-four percent, respectively, of Saipan votes.

¶ 7 The 2000 United States Census reported a total NMI population of 69,221, a significant increase from 1990. Petitioners point out, however, the ratio of noncitizens increased over the intervening decade, leaving citizens in the minority at 30,132. Thus, of the 62,398 people living on Saipan and the northern islands, only 25,909 were citizens. Of the 3,283 people living on Rota, only 2,266 were citizens. And of the 3,540 people living on Tinian, only 1,953 were citizens. Petitioners argued that if the house of representatives was not reapportioned to exclude noncitizens, vote dilution would continue. The sixteen representatives previously allotted to Saipan and the northern islands would represent 25,909 citizens, or one representative for every 1,619 citizens. Rota's representative would represent 2,266 citizens. Tinian's representative would represent 1,953 citizens. To remedy these alleged inequities, petitioners urged this Court to reapportion the house based solely on the number of United States citizens residing in the Commonwealth. Petitioners offered a reapportionment plan reducing Saipan and the northern islands to twelve representatives, each representative to be selected from one of petitioners' twelve suggested election districts.

¶ 8 In contrast to petitioners, the house of representatives and the Saipan mayor, as invited amici curiae, argued apportionment should be based on total population. They maintained petitioners' unconventional juxtaposition of "nonresidents," an immigration status, to "residents," as used by the NMI Constitution for apportionment purposes, was untenable. Further, the house of representatives argued: (1) Commonwealth apportionment has historically been based on total population; (2) this Court should follow the Ninth Circuit's holding in *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990), requiring legislative apportionment based on total population; and (3) most states, if not all, apportion their legislatures based on total population. Amici maintained that the need for representational equality necessitated increasing house membership by two seats, both apportioned to Saipan and the northern islands. But, whereas the house of representatives argued that the then-current election districts should be maintained, the Saipan mayor contended petitioners' election districts should be adopted and additional super districts created from them.

¶ 9 We found jurisdiction proper and established a modified reapportionment and redistricting plan. *In re Pangelinan*, 2007 MP 14 ¶¶ 7, 13-14. We concluded that, at least in the absence of contrary legislative action, apportionment should be based on the total number of persons residing in the Commonwealth. *Id.* ¶ 12. Based on these total population figures, we further concluded that Saipan should be apportioned two additional representatives in order to ensure "representation by each member . . . of approximately the same number of residents to the extent permitted by the separate islands and the distribution of population in the Commonwealth." *Id*. ¶¶ 13-14 (quoting NMI Const. art. II, §4(a)). Moreover, we redistricted Saipan into five election districts by grouping United States Census blocks, our only source of population figures. *Id*. ¶ 14. We then created the districts to "ensure sufficient representational equality" while maintaining "populations with historically and/or geographically similar interests." *Id*.

¶ 10 We recognized that the issues raised by petitioners involved "the historical, political, and legal relationship between the Commonwealth and the United States." *Id*. ¶ 8. We acknowledged the need to discuss the NMI and United States Constitutions, as well as the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801, note, *reprinted in* CMC at B-101 *et seq*. *Id*. However, because preparations for the November 2007 elections left little time to expound our conclusions, we reserved jurisdiction to release this supplemental opinion articulating our full reasoning. *Id*. ¶ 18. Accordingly, this opinion addresses our previous conclusions that all residents be counted for apportionment and that the house of representatives be enlarged and election districts redrawn in order to maintain sufficient representational equality.

¶ 11 Before discussing our conclusions, however, we first provide the necessary background against which they must be understood. United States courts rely on the one person, one vote principle when addressing legislative apportionment issues. The one person, one vote principle is the basis for petitioners' and amici's arguments regarding persons to be counted for apportionment and vote dilution. Section II of this opinion discusses the constitutional origins of the one person, one vote principle as it has evolved in federal courts. However, as with any constitutional standard, we may not simply assume one person, one vote applies in the Commonwealth, given our unique political-legal status. Instead, we must look to the Covenant in determining whether the constitutional provision giving rise to the one person, one vote principle is applicable in the NMI. Doing so requires an understanding of the basic structure of the United States-NMI relationship. Section III of this opinion outlines the balance between United States sovereignty and NMI local self-government. Section IV draws on Sections II and III to conclude the one person, one vote principle does not apply to NMI legislative apportionment in the same

fashion as it applies in other contexts. Finally, Section V explains our previous conclusions by reference to the NMI Constitution. This brief synopsis is explained in more detail below.

¶ 12 Petitioners' and amici's arguments rest on competing interpretations of the one person, one vote principle. So too does our previous opinion. The one person, one vote principle requires votes to be apportioned based on population so that voting power is equally distributed throughout the constituent population. In practice, this is achieved by dividing the constituent population into sufficiently equal election districts. Perfect numeric equality across election districts is the goal, but since that would prove an impractical standard, judicial inquiry focuses on the degree of deviation from perfect equality. Judicial inquiry must also consider the nature of the population numbers from which election districts are devised. Specifically, courts must determine whether any class of persons may be excluded from the apportionment population. Numeric equality means little if election districts are created based on invalid population figures. Section II addresses these issues through its discussion of the sources and evolution of the one person, one vote principle as it is has come to be applied throughout the United States.

¶ 13 As its history reveals, the one person, one vote principle is not a clearly defined constitutional dictate, but rather an ideal, the precise contours of which are contextually based. The one person, one vote principle applies to both congressional and state legislative elections, but its application derives from different constitutional sources. These different constitutional sources are products of different historical settings and result in different standards regarding the nature and extent of acceptable population deviations across election districts. Similarly, if the one person, one vote principle applies to NMI elections, we must look to the source of its application and the historical context in which it arose to determine the nature and extent of its application. This, in turn, requires us to consider whether and how the Covenant applies the one person, one vote principle to the NMI.

¶ 14 But before considering the Covenant's treatment of the one person, one vote principle, we step back to consider the Covenant's broader context. Section III addresses the political-legal relationship between the NMI and the United States. It discusses Covenant provisions balancing United States sovereignty with NMI local self-government, the legal issues Covenant drafters navigated to achieve a balance, and subsequent cases addressing that balance. Specifically, Section III focuses on the Covenant's attempts to limit congress's legislative authority and the United States Constitution's application in the NMI.

¶ 15 After discussing the history of the one person, one vote principle in federal jurisprudence, and after outlining the balance between United States sovereignty and NMI local self-government, Section IV returns to the specific issue before the Court. In Section IV we explain

our conclusion that, based on the Covenant's language and history, the NMI House of Representatives must be apportioned to a large degree based on population. However, the one person, one vote principle does not apply to NMI legislative apportionment in the same fashion as it applies to congressional or state elections.

¶ 16 Section V addresses the NMI Constitution's requirements for apportioning the house of representatives. We conclude the NMI Constitution permits legislative apportionment based on total population, including nonresident workers. We also conclude that major deviations from perfect representational equality must be justified in light of the concerns upon which the NMI Constitution's language regarding house apportionment was based.

II

¶ 17 The United States Supreme Court's apportionment cases provide the background against which petitioners' and amici's arguments, and our opinion, must be understood. In a series of cases beginning in the early 1960s the Court developed its one person, one vote rule. Broadly stated, one person, one vote requires voting power be equally distributed throughout the constituent population. The Supreme Court found one person, one vote applicable to both state apportionment and congressional districting plans, but its applicability in each instance derives from different constitutional sources. These different constitutional sources resulted in analogous but distinct requirements when implementing one person, one vote in each context. For instance, Supreme Court precedent makes clear that population deviations that are permissible across state election districts are only permissible across congressional districts if justified by a legitimate state interest. *Karcher v. Daggett*, 462 U.S. 725, 734 (1983). And, although it is unclear in either instance which persons, if any, may be excluded from the "population" upon which apportionment decisions are based, *Burns v. Richardson*, 384 U.S. 73, 92 (1966), the standard is likely lower for state election districts than for congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969). These issues are considered below.

The constitutional origins of the one person, one vote principle

¶ 18 The Equal Protection Clause of the United States Constitution is the source of the one person, one vote principle in state elections. The Supreme Court first recognized the viability of equal protection challenges to apportionment plans in *Baker v. Carr*, 369 U.S. 186, 199 (1962). Plaintiffs in *Baker*, Tennessee voters, alleged their votes were debased because the Tennessee General Assembly's 1901 apportionment, dubious even at that time, had not been modified despite Tennessee's large population growth and redistribution. *Id.* at 192. The district court held it lacked authority to entertain the question. *Id.* at 197. The Supreme Court, however, disagreed. Refuting the district court's reasoning, the Supreme Court found it had subject matter

jurisdiction over the issue because plaintiffs' equal protection claim was constitutional in nature. *Id*. at 200. Standing was proper since plaintiffs alleged a state action impaired their recognized constitutional right to vote. *Id*. at 207-08. And plaintiffs' claim did not present a nonjusticiable political question, but was instead "within the reach of judicial protection under the Fourteenth Amendment." *Id*. at 237.

¶ 19 *Baker* noted that judicial standards for addressing equal protection claims were "well developed and familiar." *Id*. at 226. But the Court did not articulate those standards, much less apply them to state legislative apportionment schemes. The question was again considered in *Gray v. Sanders*, 372 U.S. 368 (1963), where the Supreme Court found unconstitutional Georgia's primary system apportioning votes based on county units. The county unit system resulted in votes from more populous counties weighing less than votes from less populous counties. *Id*. at 379. The Court analogized voting disparity based on geographic location to vote dilution based on race or gender. *Id*. at 379. Just as the Fifteenth Amendment prohibits dilution of the black vote, and just as the Nineteenth Amendment prohibits dilution of the female vote, so too does the Equal Protection Clause prohibit dilution of votes based on those factors, as well as, among others, geographic location. *Id*. In language that would later become short-hand for its apportionment opinions, the Court noted, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only on thing – one person, one vote." *Id*. at 809.

¶ 20 Through its decision in *Gray*, the Supreme Court evidenced its willingness, first hinted at in *Baker*, to strike down state apportionment schemes weighing votes unequally as violative of the Equal Protection Clause. Yet *Gray* considered only voting equality between persons within a single state-wide election district. *Id*. at 808. It did not address whether similar concerns are implicated by population disparities across districts within a state. *Id*. at 806-07. *Gray's* language arguably foreshadowed this next step, however, and the Court specifically took it up a year later in *Wesberry v. Sanders*. 376 U.S. 1 (1964).

¶ 21 Plaintiffs in *Wesberry* were Georgia voters who argued population inequities across Georgia's congressional election districts diluted their votes in relation to those from less populous districts. *Id*. at 3. The Court agreed. *Id*. at 7. With language reminiscent of *Gray*, the Court condemned apportionment plans weighing certain votes greater than others based solely on geographic location within the state. *Id*. However, unlike *Gray*, *Wesberry* did not look to the Equal Protection Clause in requiring voter equality across congressional districts. Rather, *Wesberry* found one person, one vote applied to congressional districts by virtue of Article I, Section 2 of the United States Constitution. The Court determined "that, construed in its

historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id*. at 7-8.

¶ 22 Just four months after *Wesberry*, the Supreme Court released *Reynolds v. Sims*, 377 U.S. 533 (1964), its last major case extending the one person, one vote principle.[2] *Reynolds* involved plans to apportion both houses of the Alabama legislature by county, or by a combination of county and population. 377 U.S. at 537-45. The Court noted *Gray* and *Wesberry* offered guidance but were not controlling. *Id*. at 560. *Gray* established the principle of voting equality by requiring each vote in a state to be weighed equally. But *Gray* dealt only with state-wide elections, whereas *Reynolds* was concerned with voting equality across legislative districts within a state. *Id*. *Wesberry* established the principle of representational equality such that "representative government in this country is one of equal representation for an equal number of people." *Id*. at 560-61. Yet *Wesberry* addressed representational equality as it pertained to the house of representatives and based its reasoning on United States Constitution Article I, Section 2. *Wesberry*, 376 U.S. at 7-8. *Reynolds*, by contrast, considered a state legislative apportionment scheme challenged on equal protection grounds. *Reynolds*, 377 U.S. at 561.

¶ 23 The Court defined its task in *Reynolds* as "determining the basic standards and stating the applicable guidelines for implementing . . . Baker v. Carr." *Id*. at 559. And in reference to the facts before it, the Court questioned whether "any constitutionally cognizable principles . . . would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." *Id*. at 560-61. In answering that question, the Court began by noting the right to vote is personal and fundamental. *Id*. at 561-62. Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562. Extending the reasoning of *Gray* and *Wesberry*, the Court stated:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally

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[2] The Court later extended one person, one vote to local elections. *Avery v. Midland County, Tex.*, 390 U.S. 474, 484-85 (1968).

> sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

Id. at 562-63.

¶ 24 The Court noted voting in state legislative elections is often the principal means by which citizens participate in their state's representative government. *Id*. at 565. Voting equality in state legislative elections is therefore necessary to protect each citizen's "inalienable right to full and effective participation in the political process of his State's legislative bodies." *Id*. All voters in a state enjoy the same right to legislative representation, and that right may not be circumvented through legislative apportionment. Accordingly, "[p]opulation is, of necessity, the starting point for consideration and controlling criterion for judgment in legislative apportionment controversies." *Id*. at 567. The Court concluded that the Equal Protection Clause "demands no less than substantially equal state and legislative representation for all citizens, of all places as well as of all races." *Id*. at 568. Moreover, the Court determined both houses of a bicameral state legislature were equally bound by the Equal Protection Clause's requirement of population based apportionment. *Id*. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id*.

Population deviations across election districts

¶ 25 After *Reynolds*, the broad framework of the Supreme Court's one person, one vote jurisprudence crystallized. The Equal Protection Clause requires state legislatures to be apportioned based on population. Similarly, Article I, Section 2 of the United States Constitution requires states to divide their population into substantially equal congressional districts. Yet, for both state and congressional election districts, the degree of population equality, and justifiable deviations from population equality, remained for later cases to refine. These later cases gave rise to divergent legal standards, both premised on the one person, one vote principle, but each based on its respective constitutional source.

¶ 26 Although the *Reynolds* Court established the ideal of mathematic equivalency between state legislative districts, it realized more flexible standards were needed. *Id*. at 577. Perfect

numeric equality was impossible, and in some instances it might also be less desirable. "[A] State must make an honest and good faith effort" to apportion its legislature based on population, *id*. at 577, but there might also exist legitimate state interests justifying apportionment based on criteria other than population. *Id*. at 578. For instance, maintaining political subdivisions might be a legitimate objective, *id*., particularly if the goal in doing so is to protect a subdivision's political voice. *Id*. at 580. Other apportionment goals not based on population might also be upheld, so long as they are "legitimate considerations incident to the effectuation of a rational state policy." *Id*. at 579. However, the Court refrained from articulating a full constitutional standard. *Id*. at 578. It determined a case-by-case approach is the better alternative. *Id*.

¶ 27 In *Gaffney v. Cummings*, the Court determined the trend towards challenging ever-smaller population inequities meant it was "time to recognize . . . minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." 412 U.S. 735, 745 (1973). Accordingly, a maximum deviation of approximately eight percent is, by itself, insufficient to sustain an equal protection challenge. *Id*. at 751. Nor does a 9.9 percent maximum deviation make out a prima facie case of invidious discrimination. *White v. Regester*, 412 U.S. 755, 763 (1973). Indeed, "as a general matter . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thompson*, 462 U.S. 835, 842 (1983); *see also Conner v. Finch*, 431 U.S. 407, 418 (1977).

¶ 28 Subsequent Supreme Court decisions also considered state interests justifying population discrepancies above the ten percent *de minimis* threshold. Where justification is required, the operative question "is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'" *Brown*, 462 U.S. at 843. Applying this standard, the Court determined a long-standing legislative policy of maintaining political boundaries justified a 16.4 percent population deviation between districts, although 16.4 percent "may well approach tolerable limits." *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

¶ 29 Tolerable limits are likely lower for congressional districts. *Wesberry* determined U.S. Const. art. I, § 2 requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. The Court realized perfect numeric equality would be an unworkable standard, but, unlike its later decision in *Reynolds*, the Court did not point to state interests justifying departure from perfect equality. To the contrary, *Wesberry* indicated a more stringent standard for congressional districts. *Id*. at 18. The Court

stated, "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id*.

¶ 30 *Wesberry* made clear a state must divide its population into nearly equal congressional districts, but the Court's broad language provided little guidance for implementing this requirement. Recognizing the need to expound *Wesberry*, the Court noted in its next congressional districting case that it must "elucidate the 'as nearly as practicable' standard." *Kirkpatrick*, 394 U.S. at 528. The Court began by rejecting the argument that, similarly to state legislative districts, there was a *de minimus* threshold below which a state need not justify population deviations across congressional districts. *Id.* at 530; *Karcher*, 462 U.S. at 734. Rather, "the command of Art. I s 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick*, 394 U.S. at 531.

¶ 31 Population deviations "unavoidable despite a good-faith effort" has proved an exacting standard. *Id.* In *Kirkpatrick*, the Court determined it was "inconceivable" that a 5.97 percent deviation was unavoidable. *Id*. at 532. And the mere existence of alternative plans with lower deviations demonstrated a 4.13 percent deviation was avoidable. *White v. Weiser*, 412 U.S. 783, 790 (1973). Even a 0.7 percent deviation is impermissible where lesser deviations were readily achievable. *Karcher*, 462 U.S. at 739-40. However, avoidable deviations may be justified by legitimate, nondiscriminatory state interests, so long as the state demonstrates the deviation is required to secure its proffered objective. *Id*. at 740-741. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id*. at 740. And the degree of justifiable variation depends "on the size of the deviations, the importance of the State's interests, the consistency with which a plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* at 741.

Persons included in the apportionment population

¶ 32 In contrast to its decisions addressing allowable and justifiable population deviations, Supreme Court guidance is less clear regarding which segments of the population must be considered for purposes of representational equality. The Supreme Court indicates states have leeway to determine the population upon which their legislatures are apportioned. *Burns*, 384

U.S. at 92. Yet the federal circuits are split regarding deference to legislative apportionment decisions. And whether states may exclude any class of persons when crafting congressional districts remains uncertain. *See Kirkpatrick*, 394 U.S. at 534.

¶ 33 *Burns v. Richardson* is the only Supreme Court case considering which persons may be excluded from the "population" upon which a state legislative apportionment plan is based. *Burns* challenged an interim plan apportioning Hawaii's senate based on registered voters. 384 U.S. at 81. Apportioning based on registered voters rather than total population had pronounced negative consequences for certain districts, due largely to Hawaii's numerous non-registered military personnel. *Id*. at 90. Yet despite these disparities, the Court upheld the Hawaii legislature's apportionment plan.

¶ 34 Writing for the majority, Justice Brennan distinguished *Reynolds's* one person, one vote standard from the related question of which persons must be included in its calculus:

> 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. Indeed, in WMCA, Inc. v. Lomenzo . . . decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. 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. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Id. at 91-92. Despite such deference to legislative prerogative, however, the Court went on to note apportioning based on voter lists involves problems not considered by the *Reynolds* line of cases. *Id*. at 92. Intentional interference against persons desiring the franchise might dissuade would-be voters from registering, thus allowing "those in political power . . . to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process." *Id.* Unintentional or unforeseen events might also impact voter registration. For instance, "such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions" could dramatically impact voter registration. *Id*. at 93 (internal quotation and citation omitted).

¶ 35 The *Burns* Court warned against reading its opinion as an unqualified endorsement of apportionment based on registered voters. *Id*. at 96. The Court's language clearly indicates apportionment based on registered voters is only permissible insofar as registered voters are used as a proxy for other appropriate population measures. *Id*. at 93-96. Although apportionment based on registered voters produced large disparities compared with apportionment based on census-reported total population, the Court found Hawaii's unique circumstances justified the discrepancies. *Id*. at 94. Counting the large number of military personnel and tourists, primarily located in specific regions, would not have accurately represented the distribution of Hawaiian citizens. *Id*. By contrast, apportioning based on registered voters yielded results that "substantially approximated that which would have appeared had state citizen population been the guide." *Id*. at 96.

¶ 36 *Garza v. County of Los Angeles* considered a similar issue: whether apportionment based on the voting-age population is permissible. 918 F.2d at 775. *Garza* involved a challenge to the election districts for the Los Angeles County Board of Supervisors. *Id*. at 765. Plaintiffs argued the districting plan intentionally marginalized Hispanic voting strength in violation of the Voting Rights Act and the Equal Protection Clause. *Id*. at 766. The district court agreed, determining the Hispanic vote was diluted and that in adopting its districting plan, the county intentionally discriminated against Hispanic voters. *Id*. at 769. The resulting court-ordered redistricting plan created five districts, one of which had a Hispanic voting majority. *Id*. at 768. On appeal, Los Angeles County maintained the district court's plan diluted votes from the four other districts because the plan was based on total population in a county where much of the Hispanic population was noncitizen. *Id*. at 773. According to the county's reasoning, districting based on total population resulted in votes from the Hispanic majority district weighing more because the district contained fewer potential voters in relation to neighboring districts. *Id*. The county suggested districting based on the voting-age population instead. *Id*.

¶ 37 The Ninth Circuit affirmed the district court's plan. *Id*. at 777. It recounted the Supreme Court's language in *Burns* characterizing as political the decision of which persons to include for apportionment, but it noted court-ordered redistricting plans must produce districts with equal population in the absence of "'significant state policies.'" *Id*. at 774 (quoting *Chapman v. Meier*, 420 U.S. 1, 24 (1975)). Citing the California Elections Code and the California Supreme Court, *Garza* determined California law required districting based on total population. *Id*. at 774-75. The court didn't stop there, however. It proceeded to make clear its own conviction that representational equality was best guarded by districting based on total population. *Id*. at 774-75. The court stated, "[t]he purpose of redistricting is not only to protect the voting power of citizens;

a coequal goal is to ensure 'equal representation for equal numbers of people.'" *Id*. at 775 (quoting *Kirkpatrick*, 394 U.S. at 531). According to the court, the latter goal requires inclusion of all residents within the apportionment population. *Id*.

¶ 38 *Garza* found a protected interest in access to the political process. *Id*. Although voting is undoubtedly an important part of political access, it is not the only one. An individual's ability to present grievances to their elected representative is also protected, regardless of citizenship. *Id*. Thus, because "noncitizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care . . . they have a right to petition their government for services and to influence how their tax dollars are spent." *Id*. Minors also have a right to some degree of political participation despite being ineligible to vote. *Id*. However, access to an elected representative is lessened to the extent others also seek the representative's attention. Consequently, a districting plan that does not attempt to equalize population across districts, such as one based on voter population rather than total population, "ignores these rights in addition to burdening the political rights of voting age citizens in affected districts." *Id*.

¶ 39 In contrast to the majority's "equal representation" approach – that is, apportionment based on total population – Judge Kozinski's dissenting opinion in *Garza* argues "electoral equality" should be the guide. *Id*. at 781-82 (Kozinski, J. dissenting). Electoral equality is achieved by ensuring an equal number of voters across election districts, regardless of total population. *Id*. at 782. Judge Kozinski maintained electoral equality harmonizes with the Supreme Court's one person, one vote cases better than equal representation. *Id*. He noted the Supreme Court frequently refers "to the personal nature of the right to vote" and "a careful reading of the Court's opinions [addressing equal representation] suggests total population is viewed not as an end in itself, but as a means of achieving electoral equality." *Id*. at 782-83. Indeed, holding equal representation to be the ultimate goal of redistricting would conflict with *Burns*, which approved large population disparities across election districts. *Id*. at 784. Judge Kozinski, unpersuaded by the majority's equating the right to vote with the rights of aliens and the right of youth to political participation, noted that if electoral equality is the correct measure, the majority's approach dilutes the rights of voters. *Id*.

¶ 40 Two other federal circuits considered issues similar to that in *Garza*, and both rejected *Garza* in favor of what they determined to be *Burns's* more deferential approach. In *Daly v. Hunt*, the Fourth Circuit considered a challenge to a North Carolina law reapportioning and redistricting a county board of commissioners and board of education. 93 F.3d 1212, 1215 (1996). The challenged plan increased the maximum deviation between districts to 8.33 percent based on total population and 16.17 percent based on voting-age population. *Id*. at 1215-16. The

district court granted summary judgment for petitioners, finding the 16.17 percent deviation based on voting-age population violated the Equal Protection Clause. *Id*. at 1216. The court of appeals, however, found the district court's reliance on the voting-age population misplaced, especially in light of an acceptable deviation based on total population. *Id*. at 1227. Citing *Burns*, the court determined that "where electoral equality and representational equality cannot be achieved simultaneously" the matter "is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment." *Id.*

¶ 41 The Fifth Circuit reached a similar decision in *Chen v. Houston*, where plaintiffs challenged a city council districting plan that, although resulting in only an 8.63 percent deviation between districts based on total population, showed deviations far higher based on the voting-age population. 206 F.3d 502, 522 (5th Cir. 2000). The court determined the issue presented "a close question," but nevertheless found no equal protection violation. *Id*. at 523. Noting *Burns's* deference to the legislative process and the Fourth Circuit's reasoning in *Daly*, the court concluded that apportioning based on total population rather than potential voters was an "eminently political question [that] has been left to the political process." *Id*. at 528.

¶ 42 As recently as 2001, at least one Supreme Court justice recognized that the Court's language in *Burns* failed to adequately define a "permissible population basis" for apportionment purposes. *Chen*, 206 F.3d 502, *cert. denied*, 532 U.S. 1046 (Thomas, J. dissenting). Dissenting from the denial of certiorari in *Chen v. Houston*, Justice Thomas stated:

> Having read the Equal Protection Clause to include a "one-person, one-vote" requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined. We have never determined the relevant "population" that States and localities must equally distribute among their districts.

Id.

¶ 43 Neither is the permissible population basis clear for congressional districts. The Supreme Court approached this issue in *Kirkpatrick*, but did not resolve it. 394 U.S. at 534. The Court noted, "[t]here may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, s 2." *Id*. But the reference was only in passing. The Court went on to strike down on other grounds the congressional districting plan at issue, "assuming without deciding that apportionment may be based on eligible voter population . . . ." *Id*. At least one federal court has allowed congressional districts based on population figures excluding certain individuals. *Meeks v. Avery*, 251 F. Supp. 245, 249-50 (D. Kan. 1966) (upholding a congressional districting plan based on persons having established residency). But *Meeks* was decided three years before the Supreme Court's decision in *Kirkpatrick*. After

Kirkpatrick, courts might be less deferential to legislative decisions excluding persons from the congressional districting population. *See Travis v. King*, 522 F.Supp. 554, 571 (D. Haw. 1982) (finding that U.S. Const. art. I, § 2 requires states to utilize "total population federal census figures to apportion congressional districts within their boundaries").

III

¶ 44 The one person, one vote principle applies to both houses of a bicameral state legislature by virtue of the Equal Protection Clause. *Reynolds*, 377 U.S. at 568. It applies in a somewhat different manner to congressional districting because Article I, Section 2 of the United States Constitution requires representatives be elected "by the People of the several States." *Wesberry*, 376 U.S. at 7-8. This distinction is important because the constitutional source of the one person, one vote principle determines the legal standard by which courts must judge population deviations across election districts. Additionally, the constitutional source likely bears on the issue of whether apportionment plans must be based on total population, or whether a less inclusive population figure may be utilized. Petitioners and amici argue the one person, one vote principle also controls when apportioning seats in the NMI House of Representatives. They begin from the assumption the *Reynolds* line of cases controls, although they dispute how its dictates should be carried out, especially whether noncitizens must be included in the apportionment population.

¶ 45 *Reynolds's* application of the one person, one vote principle to state legislatures applies to the NMI House of Representatives only to the extent the Equal Protection Clause controls NMI legislative apportionment. In determining whether the Equal Protection Clause applies, we look first to the Covenant. This approach is necessary with any claim of federal preemption, as the applicability of federal directives to the Commonwealth cannot be taken for granted. But resort to the Covenant is particularly important in the present case given the dependency between the one person, one vote principle's source and its application. Just as the United States Supreme Court applies the one person, one vote principle differently to congressional and state apportionment schemes based on the differing context of their constitutional sources, so too must we consider the circumstances surrounding our founding document – the Covenant – in determining the extent to which one person, one vote circumscribes NMI legislative apportionment. However, before addressing NMI legislative apportionment specifically, we first discuss the broader political-legal relationship between the NMI and the United States as created by the Covenant.

Balancing NMI autonomy with federal sovereignty

¶ 46 When interpreting the Covenant, we look first to its plain language, just as we do when interpreting the NMI Constitution, *Northern Marianas College v. Civil Service Com'n*, 2007 MP 8 ¶ 9, statutes, *Oden v. Northern Marianas College*, 2003 MP 13 ¶ 10, and court rules, *Maliti v. Superior Court*, 2007 MP 3 ¶ 27. Only where circumstances render Covenant language indefinite will we consider interpretations contrary to its plain language. *See United States v. Borja*, 2003 MP 8 ¶ 9 (when interpreting NMI Constitution, "[w]e will apply the plain, commonly understood meaning of constitutional language unless there is evidence that a contrary meaning was intended") (internal quotation and citation omitted). Contrary interpretations may arise through, or be dispelled by, the contemporaneous Covenant analyses.

¶ 47 The legislative history of the Covenant is reflected, in part, in five contemporaneous documents interpreting the Covenant, including: (1) a Covenant analysis drafted by United States and NMI Covenant negotiators to "record the intention of the parties regarding certain provisions of the Covenant"[3] ("Drafting Committee Report); (2) a Covenant analysis prepared by the Marianas Political Status Commission[4] ("MPSC Memorandum"); (3) a Covenant analysis prepared for the Senate Committee on Interior and Insular Affairs[5] ("Senate Committee Report"); (4) a Covenant analysis prepared for the House Committee on Interior and Insular Affairs[6] ("House Committee Report"); and (5) a Covenant analysis prepared by the United States Administration[7] ("Administration Memorandum"). These documents (collectively "Covenant

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[3] Howard P. Willens & James M. Wilson, Jr., *Memorandum for Chairman, MPSC, and the President's Personal Representative*, "Report of the Joint Drafting Committee on the Negotiating History" (Feb. 15, 1975) *reprinted in Northern Mariana Islands: Hearing before the Senate Committee on Interior and Insular Affairs on S.J.Res. 107*, 94th Cong. 1st Sess. 785-91 (July 24, 1975).

[4] Marianas Political Status Commission, *Section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* (Feb. 15, 1975), *reprinted in To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands" and for Other Purposes: Hearing before a subcommittee of the House Committee on Interior and Insular Affairs on H.J.Res. 549, H.J.Res 550, and H.J.Res. 547*, [hereinafter *House Hearings*] 94th Cong., 1st Sess. 626-65 (July 14, 1975) *and Northern Mariana Islands: Hearing before the Senate Committee on Interior and Insular Affairs on S.J.Res. 107*, [hereinafter *Senate Hearings*] 94th Cong. 1st Sess. 359-496 (July 24, 1975).

[5] *Section-by-Section Analysis of the Covenant*, Report of the Senate Committee on Interior and Insular Affairs, S.Rep. No. 433, 94th Cong., 1st Sess. 65-94.

[6] *Section-by-Section Analysis of the Covenant*, Report of the House Committee on Interior and Insular Affairs, H.Rep. No. 364, 94th Cong., 1st Sess. 5-19.

[7] United States Department of Justice, Interior, *et al.*, *Section-by-Section Analysis of the Covenant*, *reprinted in House Hearings* 385-99.

analyses" or "analyses") are collected in a United States Department of Justice report prepared by Herman Marcuse[8] ("Marcuse").

¶ 48 The analyses are highly persuasive due to their close proximity in time and space to the Covenant. In the event Covenant language is called into doubt by a seemingly contrary interpretation given it in the analyses, the Covenant's plain language can only be overcome by convincing evidence the parties approving the Covenant adhered to the competing interpretation. Where the Covenant's plain language and the analyses agree, we consider such agreement dispositive. *See Fleming v. Dept. of Pub. Safet*y, 837 F.2d 401, 406 (9th Cir. 1988) (finding Eleventh Amendment immunity inapplicable in the NMI "[w]here the language of the Covenant is as clear as it is here, and the legislative history and purpose are not to the contrary"), *overruled on other grounds by DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992).

¶ 49 Our cases addressing the relationship between the NMI and the United States as expressed in the Covenant are very protective of NMI self-government. We have repeatedly expressed our understanding that the Covenant is an agreement between two sovereign peoples, rather than a unilateral act by the United States. *Wabol v. Villacrusis*, 1 NMI 34, 40 (1989), *overruled on other grounds by Wabol v. Villacrusis*, 958 F.2d 1450, 1458 (9th Cir. 1990); *Sablan v. Inos*, 3 NMI 418, 428 (1993), *overruled on other grounds by United States v. De Leon Guerrero*, 4 F.3d 749, 755 (9th Cir. 1993); *Sablan v. Tenorio*, 4 NMI 351, 361 n.43 (1996). We have supported our conclusions by reference to the United States' responsibility to prepare NMI residents for self-rule under the United Nations Trusteeship Agreement, *Sablan*, 3 NMI at 429, and the unique mutual consent provisions requiring both NMI and United States agreement before altering fundamental Covenant provisions. *Wabol*, 1 NMI at 40; *Sablan*, 3 NMI at 428; *Tenorio*, 4 NMI at 361 n.43. We have also expressed disapproval at being conceptualized, analogized, or treated as a United States "territory" when the Covenant clearly envisions a relationship in contrast to, rather than premised on, the conventional United States territory paradigm.[9] *Tenorio*, 4 NMI at 361 n.43.

¶ 50 Federal courts also recognize and uphold Covenant limitations on federal power. The Ninth Circuit noted in *Hillblom v. United States* that whereas the United States' authority over the NMI originally emanated from the United Nations Trusteeship Agreement, since the Trusteeship was terminated in 1986, that authority now "arises solely under the Covenant." 896 F.2d 426,

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[8] Herman Marcuse, *Covenant to Establish a Commonwealth of the Northern Mariana Islands (PL 94-241): Basic Document and Annotations* (Department of Justice, Sept. 1976).

[9] *See* Arnold W. Leibowitz, *The Marianas Covenant Negotiations*, 4 Fordham Int'l L.J. 19, 24, 24 n.19 (1980-81).

429 (1990). "The Covenant has created a 'unique' relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations." *De Leon Guerrero*, 4 F.3d at 754 (citing *North. Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir. 1984)).

¶ 51 Article I of the Covenant sets out the basic policy and legal-political framework governing the relationship between the NMI and the United States. Section 101 broadly asserts the Covenant's goal of ensuring NMI self-government while maintaining United States sovereignty. Of course local self-government and federal sovereignty are competing interests. Although they are not incompatible, the boundaries between them are not clear. The remaining sections of Article I provide some clarity. NMI self-government means the NMI people "will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." Covenant § 103. By contrast, United States sovereignty includes "complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands." Covenant § 104. Although United States sovereignty extends to legal and legislative matters, local NMI autonomy is insulated from federal overreach. Federal laws are supreme, but only "applicable" federal laws have any affect in the NMI and the Covenant is co-equal with them. Covenant § 102. And although the United States may legislate for the NMI, such legislation may not interfere with fundamental Covenant provisions. Covenant § 105.

¶ 52 Striking a balance between local autonomy and federal supremacy has remained a consistent theme throughout the Covenant's drafting and later interpretation. From the start of negotiations to the present day, the unique political status envisioned by NMI Covenant negotiators has given rise to legal questions requiring an equally unique approach to the conventional understanding of federal preemption. Limiting federal authority presented the NMI delegation a problem infrequently considered and for which precedent was lacking.[10] Nevertheless, the NMI secured concessions from the United States insulating certain sensitive areas from federal intrusion. Of particular importance, the Covenant constrains federal legislative authority from unilaterally modifying fundamental Covenant provisions. And the Covenant selectively applies federal constitutional provisions, limiting their application in favor of Covenant requirements that might be impermissible if the NMI were a state. Understanding why these Covenant provisions were included and how they were intended to accomplish their goals is a necessary prerequisite for determining whether federal law limits local discretion over a given issue.

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[10] *See* Leibowitz at 28 ("[B]oth sides agreed that, in defining the commonwealth relationship, they would be on the frontier of American constitutional law.")

Federal legislative authority in the NMI

¶ 53 One of the NMI's main concerns during Covenant negotiations was limiting federal legislative authority. Achieving this end would require careful drafting under any circumstances. But the drafters' task was further complicated because the United States maintained that congressional authority with respect to the NMI would flow from the Territorial Clause[11] of the United States Constitution.[12] Congress's authority to administer territories under the Territorial Clause is broader than its authority over states. *See Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 587 n.16 (1976). Consequently, limiting federal legislative authority was particularly important to protect NMI internal affairs from federal intrusion. Moreover, limiting federal authority was also necessary to protect the Covenant itself, by preventing subsequent federal legislation from unilaterally altering Covenant provisions. These twin goals of limiting federal legislative intrusion and preventing unilateral Covenant alteration were accomplished through Covenant § 105. Section 105 states:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II, and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

Covenant § 105. Because congress's legislative authority under the Territorial Clause is broad, Section 105 protects against legislation inadvertently affecting the NMI.[13] Federal legislation impermissible in the states, but permissible in the territories, does not apply to the NMI through inference; application to the NMI must be purposeful and express. However, unilateral

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[11] U.S. Const. art. IV, § 3, cl. 2 provides, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

[12] The Drafting Committee Report, Senate Committee Report, and MPSC Memorandum agree that United States legislative authority in the NMI rests, at least in large part, on the Territorial Clause. Marcuse at 10-11. *See also* Lebowitz at 25.

[13] "The purpose of this provision is to prevent any inadvertent interference by Congress with the internal affairs of the Northern Mariana Islands to a greater extent than with those of the several States." Marcuse at 10, 13 (excerpt from Senate Committee Report, Administration Memorandum). The language "insure[s] that legislation is not unintentionally applied to the Northern Mariana Islands." Marcuse at 11 (excerpt from House Committee Report). Indeed, it "assures that Congress will exercise its special authority under [the Territorial Clause] purposefully, after taking into account the particular circumstances existing in the Northern Marianas." Marcuse at 11 (excerpt from MPSC Memorandum).

legislation modifying fundamental Covenant provisions is completely barred, regardless of whether the NMI is expressly mentioned.[14]

¶ 54 This Court considered the degree to which NMI self-government is removed from federal authority in *Sablan v. Inos*, 2 NMI 388 (1991), *overruled by De Leon Guerrero*, 4 F.3d at 755. At issue was the validity of a federal statute authorizing the Inspector General of the United States Department of the Interior to audit the NMI tax system, and, to that end, subpoena confidential tax returns. *Id*. at 392-93. We held disclosure of plaintiffs' tax returns would violate their privacy rights. *Id*. at 393. Moreover, we determined the federal statute authorizing the audit was incompatible with NMI self-government and was therefore without force in the NMI. *Id*. at 397. We noted in a supplemental opinion that the federal statute, because it authorized the audit of all NMI government accounts, required NMI consent to be valid. *Sablan* 3 NMI at 427 (1993). Our reasoning rested on reading Covenant § 105's mutual consent provision together with Section 103's guarantee of self-government to require mutual consent for federal laws infringing upon local matters. *Id*. at 434. Because "the local tax system of the CNMI is an internal affair of the CNMI," mutual consent was required before the Inspector General could audit the tax system. *Id*. Absent mutual consent, "[t]he federal statute which authorizes the [Inspector General] to audit the local tax system of the CNMI infringes upon that right to self-government. Thus, it violates Section 103 of the Covenant, a fundamental provision, and is void and of no effect in the CNMI." *Id*.

¶ 55 Addressing the same issue, however, federal courts were less deferential to NMI self-government. In *United States v. De Leon Guerrero*, arising from the same dispute over the Inspector General's authority to audit NMI finances, the district court refused to read Section 105 together with Section 103 as cordoning off an area of local affairs immune from unilateral federal intervention. 1992 WL 321010, 22 (D.N.M.I. July 24, 1992), *aff'd on other grounds* 4 F.3d 749 (9th Cir. 1993). Rather, the court determined Section 103 only "provide[s] an *institutional right* of local self-government such that the United States may not exercise its maximum degree of plenary power available under the Territory Clause . . . of the United States Constitution." *Id*. (emphasis added). And Section 105 limited congress's legislative authority only insofar as congress "could not unilaterally modify the fundamental provisions of the Covenant . . . ." *Id*. at

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[14] From the NMI's perspective, Section 105's "mutual consent" provision was an essential part of the Covenant. Howard P. Willens & Deanne C. Siemer, *An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States* 86 (David Hanlon ed., University of Hawai'i Press 2002). The NMI delegation's "willingness to accept territorial status" was conditioned on limiting ongress's Territorial Clause power by requiring mutual consent before modifying fundamental Covenant provisions. *Honorable Accord* at 90. *See also* Leibowitz at 25-26.

23. The district court made clear it would not read Sections 103 and 105 together, or "elevat[e] . . . Covenant § 103 above all other provisions of the Covenant," to find the NMI's guarantee of local self-government included within it substantive areas of legislative authority off limits to federal intrusion. *Id*. at 22.

¶ 56 The district court read Covenant Sections 103 and 105 narrowly. On appeal, the Ninth Circuit took a somewhat broader approach. *De Leon Guerrero*, 4 F.3d at 755. Declining to adopt a mutual consent requirement for federal legislation intruding upon local affairs, the court nevertheless found intrusion upon local NMI affairs a factor to be considered in assessing the legitimacy of federal legislation:

> To give due consideration to the interests of the United States and the interests of the Commonwealth as reflected in Section 105, we think it appropriate to balance the federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI.

Id. Applying this balancing test, the court determined the federal interest in monitoring the substantial federal funds flowing through NMI coffers justified any intrusion into local affairs resulting from a federal audits of NMI accounts. *Id*.

¶ 57 Although not as protective of NMI self-government as our decision in *Sablan*, the wisdom of the Ninth Circuit's approach is not lost on this Court. Indeed, it should come as no surprise that Covenant provisions designed to balance NMI self-government with federal legislative authority would eventually give rise to a judicially-created balancing test. And weighing the legislation's underlying federal interest against its intrusion into local NMI affairs ensures the Covenant's competing interests are duly considered as the boundaries of federal legislative authority develop on a case-by-case basis. A similar approach is warranted in the related question of whether and to what degree the guarantee of NMI local self-government must yield to rights otherwise protected by the United States Constitution.

Applicability of the United States Constitution in the NMI

¶ 58 Covenant provisions limiting the federal constitution's applicability in the NMI must be understood alongside the series of United States Supreme Court opinions collectively referred to as the Insular Cases.[15] The Insular Cases considered congress's authority to govern United States

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[15] The Insular Cases include: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Grossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Dooly v. United States*, 183 U.S. 151 (1901); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). Other cases frequently cited as part of the Insular Cases include: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzalez v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendozana v. United States*, 195 U.S. 158 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono*

off-shore territories acquired toward the close of the nineteenth century. Upholding broad federal territorial powers, the Court found congress's authority to govern the territories implicit, as an incident of sovereignty, and explicit, through the Territorial Clause:

> [Our] cases . . . have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized peoples, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the states, did not leave to implication alone the power to govern and control territory owned or to be acquired, but, in the [Territorial Clause], expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as states, territories must be governed by laws.

Dorr v. United States, 195 U.S. 138, 146 (1904). Although congress's legislative authority over territories is broad, it is not unlimited and the degree to which it is limited "depend[s] upon the relation of the particular territory to the United States." *Id*. at 142. If a territory is "incorporated" into the United States – meaning the territory is "destined for statehood from the time of acquisition" – constitutional protections apply in full. *Examining Bd*., 426 U.S. at 599-600 n.30 (1976). By contrast, if a territory is not on path to becoming a state, and is thus "unincorporated," congress's Territorial Clause powers are "subject to such constitutional restrictions . . . as are applicable to the situation." *Dorr*, 195 U.S. at 143.

¶ 59 Limiting congress's legislative prerogative only by such restrictions "applicable to the situation" is an intentionally flexible standard designed to permit congress leeway in considering the territory's unique history and culture. *Id*. at 148-49. However, this flexibility does not permit congress to encumber "fundamental" constitutional rights of persons living in unincorporated territories. *Id*. The Territorial Clause must at times give way to competing constitutional provisions, namely those "express prohibitions on Congress" preventing it from passing ex post facto laws, bills of attainder, etc. *Id*. at 142. But also, "'even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed . . . .'" *Id*. at 147 (quoting *Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (White, J. concurring)).

¶ 60 The Insular Cases evidence general agreement among Court members in support of the proposition that certain rights are so fundamental that they are beyond the reach of congress, but no clear articulation of those rights readily presents itself. *See Examining Bd*., 426 U.S. at 599-600 n.30 ("[T]he question whether certain rights were or were not fundamental continued to

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v. United States, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

provoke debate among the Members of the Court . . . ."). Not only is the fundamental character of certain rights still at issue, the Court has not clearly identified the source of those rights. The Court's language has at times indicated fundamental rights may be intrinsic, while at other times indicating they are creatures of Anglo-American legal-political history. If fundamental rights may be understood as "inherent . . . principles which are the basis of all free government," *Dorr*, 195 U.S. at 147 (citing *Downes*, 182 U.S. at 291 (White, J. concurring)), then fundamental rights might find their support in natural law. However, if it is "the general spirit of the Constitution" that supports "fundamental limitations in favor of personal rights," then we may need look no further than the constitution itself. *Downes*, 182 U.S. at 268; *Dorr*, 195 U.S. at 146. Or perhaps we should consider both natural and constitutional law if fundamental rights are "principles of natural justice inherent in the Anglo-Saxon character." *Downes*, 182 U.S. at 280.

¶ 61 As with the source of fundamental rights, their distinguishing characteristics also remain unclear. In *Territory of Haw. v. Mankichi*, the Court determined the Newlands resolution, which annexed the Hawaiian Islands, was not intended to supplant Hawaii's criminal procedure by extending the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to conviction by unanimous jury. 190 U.S. 197, 218 (1903). Apparently relying on the substantive-procedural distinction, the Court noted:[16]

> [T]he two rights alleged . . . are not fundamental in their nature, but concern merely a method of procedure which sixty years of [contrary] practice had shown to be suited to the conditions of the [Hawaiian] islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

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[16] The territorial incorporation doctrine had not yet garnered majority support when *Mankichi* was decided, and the *Mankichi* Court specifically refused to address "the power of Congress to annex territory without, at the same time, extending the Constitution over it." 190 U.S. at 218. Nevertheless, the Court's conclusion that grand and petit jury rights are not fundamental builds off the Court's previous recognition that certain rights are beyond the reach of congress when administering territories. *Downes*, 182 U.S. at 268. Justice White, in his concurring opinion joined by Justice McKenna, makes the connection explicit:

> I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to me more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the 5th and 6th Amendments of the Constitution concerning grand and petit juries were not applicable to that territory, because whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian islands into the United States, and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes* v. *Bidwell* . . . .

Id. at 218-19 (White, J. concurring).

Id. However, certain procedural rights may be considered fundamental; for example, "personal rights declared in the Constitution" such as the guarantee that "no person could be deprived of life, liberty, or property without due process of law . . . ." *Balzac v. People of Porto Rico*, 258 U.S. 298, 312-13 (1922). This seeming inconsistency has not gone unnoticed by other courts. *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 619 (5th Cir. 1956).

¶ 62 Based on the Supreme Court's decisions in the Insular Cases, Covenant drafters knew federal courts would likely find certain constitutional protections applicable in the NMI regardless of any attempt to circumvent them. However, the Supreme Court's lack of clear guidance made it difficult to predict which constitutional rights were beyond congress's ability to infringe.[17] In an effort to minimize uncertainty, the drafters decided to specifically make certain constitutional provisions applicable, and specifically exempt from constitutional constraint certain Covenant provisions that might otherwise invite constitutional attack. Howard P. Willens & Deanne C. Siemer, *An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States* 175 (David Hanlon ed., University of Hawai'i Press 2002) [hereinafter *Honorable Accord*]. The drafters accomplished this by means of Covenant §§ 501(a) and 501(b), respectively. With language clearly recalling the Insular Cases, Section 501(a) makes certain constitutional provisions, "[t]o the extent they are not applicable of their own force," applicable in the NMI as if it were one of the states, and requires mutual consent before other constitutional provisions "which do not apply of their own force" are applicable in the NMI. Section 501(b) seeks to insulate essential Covenant provisions from constitutional infirmity regardless of

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[17] Although Howard P. Willens, one of the authors of the following passage, represented the NMI during Covenant negotiations, the view he and his co-author express likely approximated that of United States negotiators as well:

> In determining whether a particular constitutional right is so "fundamental" that it applies of its own force to an unincorporated territory, the Insular Cases considered whether the constitutional provision at issue was consistent with the needs, capacities, and established customs of the territory's inhabitants. The "fundamental" constitutional rights identified as applying of their own force in the unincorporated territories included certain aspects of due process and, apparently, the right to just compensation. Although the cases intimated that the broad spectrum of basic natural or personal rights – such as freedom of speech and the press, free access to courts of justice, entitlement to due process of law and to equal protection of the laws, and "such other immunities as are indispensable to a free government" – might also fall within the class of "fundamental" rights applicable to unincorporated territories, that question remained unanswered because the cases focused principally upon constitutional protections deemed not to apply *ex proprio vigore* to the unincorporated territories. Thus, for all that has been written, the incorporation doctrine and the resolution of the subsidiary question of what constitutional provisions apply to unincorporated territories remain confused and ambiguous.

Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1394-95 (1977) (citations omitted).

whether the contrary constitutional requirement is applicable in the NMI as an enumerated provision or of its own force.

¶ 63 Section 501(b) removes certain Covenant provisions from constitutional restriction, but it is incorrect to assume those Covenant provisions would fail in its absence. To understand Section 501(b) as preserving the Covenant in the face of conflicting constitutional authority is to assume the constitution supersedes the Covenant. That assumption, while not completely false, is misguided. The Covenant is co-equal with applicable constitutional provisions. Covenant § 102. And constitutional provisions are applicable in the Commonwealth in one of two ways, either because they are specifically made applicable through Section 501(a) or because they are "fundamental" and beyond the authority of congress to impugn.

¶ 64 Those constitutional provisions made applicable through Section 501(a) are on equal footing with other Covenant provisions. Neither trumps the other; both are controlling and any discrepancies must be reconciled. However, Section 501(b) states that applicable constitutional provisions may not "prejudice" certain enumerated Covenant guarantees. Thus, to the extent those applicable constitutional provisions are inconsistent with any of Section 501(b)'s enumerated Covenant provisions, the Covenant provision supersedes. By contrast, Section 501(b) likely has less impact on constitutional provisions made applicable due to their fundamental nature. If an alleged constitutional right is found to be fundamental for purposes of the Insular Cases, congress may not abridge that right despite its broad Territorial Clause powers. Thus, if congress was unable to consent to any of Covenant § 501(b)'s enumerated provisions, it is doubtful that Section 501(b) – itself a Covenant provision – would vest congress with such authority.[18]

¶ 65 The drafters' attempt to control constitutional application in the NMI was tested in *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984). At issue was whether the Sixth Amendment right to jury trial existed in the NMI despite Covenant Section 501's language to the contrary. *Id*. at 688. The court acknowledged Section 501's limited application of constitutional provisions constituted a vital aspect of United States-NMI relations. *Id*. at 685-86. Yet the court was unwilling to limit its analysis to the Covenant's language alone. *Id*. at 688.

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[18] A strong argument exists for modifying the reasoning of the Insular Cases to permit dispensing with an otherwise fundamental right where the people to whom the right would adhere, such as NMI residents, have consented – or demanded – that it not apply. This Court is in no position to effect such a change, but neither do we believe such considerations irrelevant. NMI voters overwhelmingly approved the Covenant and their approval should be weighted alongside any fundamental rights analysis. This is especially true since it was their approval, rather than a unilateral United States action, that applied the United States Constitution to the Commonwealth. The Ninth Circuit tacitly admitted as much. *See North. Mariana Islands v. Atalig*, 723 F.2d 682, 691 n.28 (9th Cir. 1984).

The court rejected the notion "that the Constitution applies in the NMI only to the extent provided for in the Covenant" and that "section 501 would . . . bar any challenge to the NMI's procedures based on the Sixth Amendment right to trial by jury." *Id.* Consequently, despite the Covenant's attempts to circumvent much of the Insular Cases' uncertainties, the court determined that whether a claimed constitutional right that is not provided by the Covenant, or is expressly disavowed, nevertheless adheres to the benefit of an NMI resident requires a fundamental rights analysis. *Id.*

¶ 66 The *Atalig* court quickly disposed of the operative issue because earlier Supreme Court decisions made clear the Sixth Amendment right to jury trial is not fundamental and therefore does not apply of its own force. *Id.* The district court, however, had reached the opposite conclusion despite applying the fundamental rights analysis of the Insular Cases. *Id.* at 689. The district court based its decision on *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), where the Supreme Court found the right to jury trial fundamental for purposes of the Fourteenth Amendment Due Process Clause and therefore required states to provide criminal defendants a jury trial in cases where federal courts would so provide. *Atalig*, 723 F.2d at 689. The district court read *Duncan* as abrogating the Insular Cases to the extent they found the right to jury trial is not fundamental. *Id.*

¶ 67 Rejecting the district court's reasoning, the Ninth Circuit distinguished the purpose of "fundamental rights" for due process purposes from that of the Insular Cases. *Atalig*, 723 F.2d at 689. Whereas the Due Process Clause incorporates to the states certain limitations on federal power in favor of fundamental rights, the Insular Cases were concerned with limitations on congress's power to govern United States territories under Article IV, Section 3, Clause 2 of the United States Constitution. *See id.* The court also contrasted the standards for determining fundamental rights in each case. For due process purposes, at least regarding procedural matters, a procedure is fundamental if it "'is necessary to an *Anglo-American* regime of ordered liberty.'" *Id.* (quoting *Duncan*, 391 U.S. at 149-50 n.14). In the Insular Cases context, however, fundamental rights are not tied to the Anglo-American tradition; the standard must allow for legal and cultural idiosyncrasies of the particular territory. *Id.* at 690. Consequently, the court determined that for purposes of the Insular Cases, fundamental rights were necessarily more universal in nature and, adopting Justice White's language by way of the majority opinion in *Dorr*, are "'those fundamental limitations in favor of personal rights' which are 'the basis of all free government.'" *Atalig*, 723 F.2d at 690 (quoting *Dorr*, 195 U.S. at 147).

¶ 68 The *Atalig* court left open the possibility that the Covenant's unique mutual consent provisions guaranteeing NMI self-government might justify increased deference to Covenant

language when applying the fundamental rights analysis to the NMI. *Atalig*, 723 F.2d at 691 n.28. The court was without need to expound this possibility because the non-fundamental nature of the right to jury trial was a well-established Supreme Court precedent. However, the Ninth Circuit's next occasion to consider a fundamental rights challenge to the Covenant required a more pioneering approach. In *Wabol*, the court addressed whether Covenant § 805, which restricts long term interest in NMI land to persons of NMI descent, violated the Equal Protection Clause. 958 F.2d 1450. The court framed the issue as whether "the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, [is] a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?" *Id*. at 1460.

¶ 69 In answering this question, the *Wabol* court noted *Atalig* provided the operative standard; namely, whether the right to acquire long-term interests in real property "is fundamental in th[e] *international* sense." *Id*. However, the court distinguished the issue in *Wabol* by contrasting the procedural right of trial by jury with the substantive right of land ownership. *Id*. Whereas the former is only one means of attaining a fair trial, and other alternatives may similarly achieve that end, the latter is an all or nothing proposition; the right to own land either exists or it does not.[19] *Id*. Still, the principle of "preserving Congress' ability to accommodate the unique social and cultural conditions and values of the particular territory" when considering whether a right should be deemed fundamental for purposes of territorial incorporation remained as valid for the *Wabol* court as it was in *Atalig*. *Id*.

¶ 70 The *Wabol* court also found favorable the D.C. Circuit's approach in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). Tracing its rationale to Justice Harlan's concurrence in *Reid v. Covert*, *King* determined the fundamental rights analysis must be informed by specific facts, not "unsubstantiated opinion," regarding the operation of an alleged right within the territory's particular cultural setting. *King*, 520 F.2d at 1147 (citing *Reid*, 354 U.S. 1, 75 (1957) (Harlan, J. concurring)). Regarding the specific question before it, the right to jury trial in American Samoa, the *King* court noted:

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[19] The *Wabol* court also reiterated the importance of maintaining a clear distinction between fundamental rights for purposes of the Insular Cases and the term's use in other contexts:

> It is . . . important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

Wabol, 958 F.2d at 1460 n.19.

> [I]t must be determined whether the Samoan mores and matai culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practical. In short, the question is whether in American Samoa 'circumstances are such that trial by jury would be impractical and anomalous.'

Id. at 1147 (quoting *Reid*, 345 U.S. at 75 (Harlan, J. concurring)).

¶ 71 The *Wabol* court found *King's* approach consistent with *Atalig* and determined it "sets forth a workable standard for finding a delicate balance between local diversity and constitutional command." *Wabol*, 958 F.2d at 1461. Thus, at least when the case involved a claimed substantive right, the operative question became "whether the claimed right is one which would be impractical or anomalous in [the] NMI." *Id*. The court answered this question affirmatively. It determined upholding equal protection guarantees despite congress's exempting land alienation restrictions would be impractical and anomalous in the Commonwealth due to the scarcity of land and its stabilizing effect on NMI society and culture. *Id*. Additionally, because Section 805's land alienation restriction was as essential provision making the Covenant possible, denying congress the authority to exempt Section 805 from contrary constitutional dictates would curtail congress's flexibility to enter such agreements, form alliances, and secure military outposts. *Id*. at 1462.

¶ 72 Applying *Atalig's* fundamental rights approach, the *Wabol* court reached the same conclusion. "Where land is so scare, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes towards property and our commitment to the ideal of equal opportunity in its acquisition." *Id*. Consequently, the court determined equal right to land ownership is not "fundamental in the international sense. It therefore does not apply *ex proprio vigore* to the Commonwealth" and congress did not transgress its authority by exempting it from the Equal Protection Clause. *Id.* Moreover, since congress was constitutionally permitted to exempt NMI land alienation from the Equal Protection Clause, the resulting land alienation restrictions need not be narrowly tailored to achieve the NMI's legitimate interests, at least not in the conventional equal protection sense. *Id*. at 1461-62.

¶ 73 The most recent federal decision considering a fundamental rights challenge to the Covenant, and the one most relevant to the current case, is *Rayphand v. Sablan*, 95 F.Supp.2d 1133, 1140 (D.N.M.I. 1999), *aff'd, Torres v. Sablan*, 528 U.S. 1110 (2000). Plaintiffs in *Rayphand* claimed the malapportioned NMI Senate violated the Equal Protection Clause's one

person, one vote standard as articulated in *Reynolds*. The NMI argued, among other things, that because the malapportioned senate was a necessary compromise for Rota and Tinian to support the Covenant, the NMI's bicameral system is analogous to the federal legislature and should similarly survive equal protection attack. *Id*. at 1136-37. The court declined to consider whether the "federal analogy" was applicable, however, it noted the issue might be misleading and that addressing it was unnecessary because the Insular Cases provided the analytical framework to determine whether constitutional rights apply of their own force in the Commonwealth. *Id*. at 1137. Recounting *Atalig* and *Wabol*, the court again framed the operative question as whether congress, in authorizing the malapportioned senate, encroached upon "one of those fundamental limitations in favor of personal rights which are the basis of all free government;" a right "fundamental in the international sense." *Id*. at 1138 (internal quotations and citations omitted). But the court limited its inquiry to this "central test of *Atalig*, *Wabol*, and the *Insular Cases*," registering its doubt regarding the validity of *Wabol's* "impractical or anomalous" standard. *Id*. at 1138 n.11.

¶ 74 The court pointed to the United States Congress as evidence that one person, one vote is not a basis of all free government. *Id*. at 1140. Finding the NMI's malapportioned senate constitutional, the court presented a simple syllogism: only fundamental rights apply of their own force in the NMI because it is not an incorporated territory; one person, one vote is not a fundamental right because numerous free governments, including the United States, have a bicameral legislature in which one house is not apportioned based on population; therefore, one person, one vote does not apply of its own force in the NMI and congress acted within its authority in authorizing the NMI Senate's departure from the one person, one vote standard. *Id*. at 1139-40.

IV

¶ 75 Returning to the present case, we now consider whether the one person, one vote principle applies to NMI legislative apportionment. An alleged constitutional right applies in the NMI if the Covenant expressly makes it applicable or if the right is fundamental for purposes of the Insular Cases. We first consider whether the Covenant specifically requires, or specifically precludes, the alleged right's applicability to the case at hand. The answer to this question is found at Covenant §§ 501(a) and 501(b). If the right does not expressly apply, or is expressly precluded, we must consider whether congress acted within its authority in infringing that right. Answering this question requires a fundamental rights analysis.

¶ 76 Whether the constitutional provision giving rise to the claimed right applies in the NMI will generally be answered by reference to Covenant §§ 501(a) and 501(b). Section 501(a)

enumerates certain constitutional provisions and makes them applicable "as if the Northern Mariana Islands were one of the several States." But even if Section 501(a) makes the operative constitutional provision applicable generally, the provision may not be applicable for all purposes. We must also consider whether Section 501(b) limits the provision's application in certain contexts. Section 501(b) states:

> The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Section 501(b) prevents otherwise applicable constitutional provisions from prejudicing fundamental Covenant requirements. Thus, a constitutional provision may be applicable generally, but inapplicable in a specific context.

¶ 77 If the constitutional provision is inapplicable generally, or inapplicable in the specific context for which it is proffered, we next determine whether the claimed constitutional right is fundamental for purposes of the Insular Cases. We consider whether the alleged right is fundamental in the international sense, such that it is the basis of all free government.

Reynolds's one person, one vote standard is inapplicable to NMI legislative apportionment

¶ 78 The one person, one vote standard has at least two distinct constitutional sources. It applies to congressional elections by virtue of U.S. Const. art. I, § 2, requiring representatives to be chosen "by the People of the several States." *Wesberry*, 376 U.S. at 7-8. It applies to state legislative apportionment through the Equal Protection Clause. *Reynolds*, 377 U.S. at 568. Clearly, NMI legislative apportionment is not controlled by constitutional language describing elections for members of the United States House of Representatives. Thus, if a constitutional provision applies the one person, one vote standard to the NMI House of Representatives, it must be through the Equal Protection Clause.

¶ 79 Covenant § 501(a) makes the Equal Protection Clause applicable in the NMI. Based on Section 501(a) alone, *Reynolds's* one person, one vote principle would control NMI legislative apportionment. But Section 501(a) does not stand alone; it must be understood in conjunction with Section 501(b)'s requirement that no constitutional provision prejudice Covenant § 203. Section 203(c) provides for the NMI legislature. Thus, although the Equal Protection Clause applies generally, *Reynolds's* one person, one vote standard controls NMI legislative apportionment only if that standard does not prejudice Covenant § 203(c).

Covenant § 203(c) states:

> The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation.

> The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

Covenant § 203(c). This language makes clear that seats in one house of the bicameral NMI legislature must be apportioned by municipality. Equally clear is that apportioning by municipality is incompatible with *Reynolds*, which requires population-based apportionment. This incompatibility means applying *Reynolds* to the NMI Senate[20] would prejudice Section 203(c). Consequently, *Reynolds* is inapplicable to senate apportionment.

¶ 80 *Reynolds's* application to the NMI House of Representatives is less clear. Whereas Section 203(c) specifically provides for the NMI Senate's apportionment, it does not address apportionment in the NMI House. At first glance, the requirement that the legislature be popularly elected appears to bear on the question of apportionment. This language is similar to Article I, Section 2 of the United States Constitution – requiring the United States House of Representatives be chosen "by the People of the several States" – that led the Court in *Wesberry* to require congressional election districts comply with one person, one vote. 376 U.S. at 7-8. However, analogizing Covenant § 203(c)'s call for a popularly elected legislature to the constitution's requirement that United States Representatives be chosen "by the people" is untenable. Unlike U.S. Const. Art. I, § 2, Covenant § 203(c)'s language applies equally to both houses of the NMI legislature. Thus, Section 203(c) requires both the NMI House and Senate be popularly elected. However, Section 203(c) mandates senators be apportioned by municipality, not population. Reading Section 203(c) as a whole and giving meaning to each of its provisions, as we must, *see Pac. Saipan Technical Contractors v. Rahman*, 2000 MP 14 ¶ 16, we are unable to equate the requirement of a popularly elected legislature with a requirement of population-based apportionment in the NMI House, much less one person, one vote.[21]

¶ 81 Only if *Reynolds* and Section 203(c) are incompatible regarding NMI House apportionment does *Reynolds* prejudice Section 203(c) in that regard. In assessing their

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[20] Section 203(c) does not refer to the NMI Senate or House of Representatives by name, but only a bicameral legislature. However, its requirement of one house with "equal representation for each of the chartered municipalities" clearly refers to the chamber later termed the senate. Covenant § 203(c). Therefore, its language in reference to the other chamber, later titled the house of representatives, is equally clear.

[21] The requirement that each house be popularly elected might be intended to preclude one house being appointed or elected by the members of the other house. Office of Transition Studies and Planning, *Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention, Briefing Paper No. 3: The Legislative Branch of Government* [hereinafter *NMI Constitutional Briefing Paper*] 4 (1976).

compatibility, we must first determine what, if any, requirements Section 203(c) contemplates regarding NMI House apportionment. Of course it could be argued that because Section 203(c) is silent regarding NMI House apportionment, it is impossible for *Reynolds* to prejudice it. That argument would equate prejudice with an express contradiction between a United States Constitutional provision and Covenant language. We refuse to adopt such a narrow approach. Instead, we conclude the Covenant is prejudiced whenever a constitutional provision is incompatible with Covenant intent, express or implied. Accordingly, even where the Covenant is silent, if its clear intent is contradicted, it is prejudiced.

¶ 82 Covenant intent regarding NMI House apportionment is revealed through the Covenant analyses' explanation of Section 203(c). The analyses evidence an intent that NMI House apportionment be based primarily on population. This intent is not directly stated; it flows from analogizing the NMI legislature to the United States Congress:

> The second sentence of Subsection (c) provides that the Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature. . . . This sentence will require the Northern Marianas to have a two-house legislature analogous to the Congress of the United States.

Marcuse at 19 (excerpt from MPSC Memorandum).

The Senate Committee Report is also clear on this point:

> The subsection also requires that the Constitution of the Northern Mariana Islands shall provide for a bicameral legislature and that in one House thereof each of the presently charted municipalities shall be equally represented. This provision was inserted at the insistence of the chartered municipalities of Rota and Tinian with the unanimous support of the Marianas Political Status Commission. This departure from the One Man-One Vote rule thus is justified under Reynolds v. Sims, 377 U.S. 533, 574 (1964). Moreover, the municipalities of Saipan, Tinian, and Rota are not governmental subdivisions created by the legislature, but are separate island communities with divergent histories, traditions and problems. Id. at 575.

Marcuse at 18 (excerpt from Senate Committee Report). *Reynolds* expressly rejected the argument that state legislatures could rely on the federal analogy to justify malapportionment. 377 U.S. at 573. But the Senate Committee Report distinguished the NMI legislature from *Reynolds*, arguing the different historical setting giving rise to the NMI legislature justified its otherwise impermissible structure. The Administration Memorandum is almost identical to the Senate Committee Report on this point. Marcuse at 20. Consequently, the majority of Covenant

analyses agree, and the remaining do not contest,[22] that Covenant drafters modeled the NMI legislature on the federal legislative scheme rather than that of the states.

¶ 83 There is undoubtedly an attractive logic to analogizing the NMI legislature to congress and adopting federal legislative apportionment standards where local guidance is not forthcoming. Despite the past reluctance of federal courts to rely on the federal analogy when addressing NMI Senate apportionment,[23] *Rayphand*, 95 F.Supp.2d at 1137, we believe the analogy is useful in the present context, if only as a starting point from which to draw distinctions. We do not, however, adopt it wholesale, as we do not believe the Covenant's language or history warrants such an approach. Rather, our utilizing the federal analogy results from our assumption, well-founded we believe, that in conceptualizing the NMI legislative structure, Covenant drafters were informed by the legislative models available at that time and the case law applying constitutional standards to them.

¶ 84 Because the Covenant analyses clearly envision a bicameral NMI legislature analogous to congress, and because the drafters clearly intended membership in one chamber be apportioned equally among political entities as in the United States Senate, it also seems clear the drafters must have intended membership in the remaining chamber be apportioned on a population basis similar to the United States House of Representatives. This conclusion finds support in the Drafting Committee Report's explanation of the malapportioned senate:

> It is . . . the intention of the parties, as reflected in the unanimous view of the members of the Marianas Political Status Commission, that the Northern Mariana Islands Constitution provides for a distribution of the membership *of one house of the legislature on the basis of appropriate considerations in addition to population* . . . .

Marcuse at 18 (excerpt from Drafting Committee Report) (emphasis added). If the drafters intended one house be apportioned based on "considerations in addition to population," it stands to reason the other house should not be apportioned based on "considerations in addition to population." In other words, one house should be apportioned based on population alone.

¶ 85 However, although highly persuasive, the weight accorded the Covenant analyses' language must be tempered by the fact that their main objective was distinct from the issue for

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[22] The Drafting Committee Report speaks generally of the senate being apportioned by municipality, but does not mention the federal analogy. Marcuse at 18 (excerpt from Drafting Committee Report). The House Committee Report does not discuss the legislative structure. *Id*. at 19 (excerpt from House Committee Report).

[23] In *Rayphand*, the court determined it was unnecessary to consider whether the NMI could rely on the federal analogy to justify its malapportioned senate because it could address the issue on other grounds and "because resort to the federal analogy may be misleading when discussing the Commonwealth, which exists 'under the sovereignty of the United States of America . . . .'" 95 F.Supp.2d at 1137 (citation omitted).

which we seek their guidance. Their references to the federal analogy and population-based apportionment were intended to justify the malapportioned senate; their interest in house apportionment is secondary at best. The Senate Committee Report and the Administration Memorandum clearly exemplify this point. They make no mention of the NMI House, but specifically cite *Reynolds* in concluding the NMI Senate's "departure from the One Man-One Vote rule . . . is justified." Marcuse at 18, 20 (excerpts from Senate Committee Report, Administration Memorandum). What is less clear is why the analyses remain concerned with justifying the NMI Senate, despite Section 501(b)'s preemption of the Equal Protection Clause to the extent it prejudices NMI legislative apportionment. The NMI Senate would clearly be prejudiced if *Reynolds* applied, so Section 501(b) clearly excludes it. Moreover, given their preoccupation with apportionment, the analyses could easily have dispelled Section 203(c)'s ambiguity regarding NMI House apportionment, but they do not. The analyses imply population-based apportionment, but they do not state it outright. The reason the analyses do not clarify NMI House apportionment is likely as political as it is legal.

¶ 86 The analyses' language reflects the political realities of the day. Prior to its current version, when the Covenant was still in draft form, Section 203(c) called for an NMI Constitution that "may provide for a distribution of the legislature's membership on the basis of appropriate considerations in addition to population."[24] This language was pleasantly ambiguous. It was neither a clear affront to *Reynolds*, nor did it tie the NMI legislature to *Reynolds's* one person, one vote standard. Yet its purpose was largely the same as that which became the final version; to leave open the possibility of a malapportioned senate. *Honorable Accord* at 175-76. Even at that time, NMI negotiators advocated excluding the NMI legislature from the Equal Protection Clause. *Id*.

¶ 87 Early in Covenant negotiations, the NMI made known its desire to secure the option to provide Saipan, Rota, and Tinian equal representation in one house of a bicameral legislature. *Id*. at 176. United States negotiators, while generally sympathetic to the principle of protecting each island's voice, were concerned that including such language clearly contrary to the Equal Protection Clause might give pause to certain members of congress and jeopardize the Covenant's passage. *Id*. at 176-77. Understating its politically sensitive nature, NMI negotiators admitted careful drafting was in order to make the exception from *Reynolds's* one person, one

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[24] Honorable Accord at 220-21 (citing Draft, *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, December 19, 1974, *collected in Negotiations Between the Northern Mariana Islands and the United States 1972-1975* at Volume X, Round V, Tab 20 (1974)).

vote standard more palatable. *Id*. at 177. Both sides agreed flexible language granting the NMI discretion over the makeup of its legislature was the most appropriate path to pursue. *Id*. However, toward the end of negotiations the Rota Municipal Council passed a resolution calling to modify the draft Covenant. Citing a history of discrimination and neglect, the Rota Municipal Council stated Rota's support for the new Commonwealth was contingent upon, among other things, equal representation in the senate:

> The central government legislature must be bicameral, with a Senate composed of equal representation from each of the present municipalities and a House of Representatives based on population figures and traditional voting patterns. This plan will help protect the interests of Tinian and Rota while ensuring Saipan a healthy majority in the House of Representatives. A bicameral Legislature is indispensable to the fair and equal treatment of Tinian and Rota. In addition it would be in keeping with the proposed covenant which specifically permits "distribution of the Legislature's membership on the basis of appropriate considerations in addition to population."

Resolution 11MC-27-1975, 11th Rota Municipal Council, 1st Reg. Sess. [hereinafter *RMC Resolution*], *reprinted in* Honorable Accord at 221. United States negotiators agreed to the change after the NMI impressed upon them the necessity of amending the Covenant to secure Rota and Tinian support. *Honorable Accord* at 223. Notably, the United States' initial opposition was not based on constitutional grounds; it viewed composition of the NMI legislature as a local NMI matter. *Id*. Rather, opposition flowed from its belief the Covenant should be limited to broader United States-NMI relations and its worry that such a blatant departure from conventional constitutional standards might create negative political ramifications in congress. *Id*.

¶ 88 Against this backdrop, the Covenant analyses may be understood in their proper contexts, as responding to the specific concerns of their constituent groups. By justifying the malapportioned senate in light of *Reynolds*, the Senate Committee Report and the Administration Memorandum address a potential concern of federal officials. And the MPSC Memorandum justified the malapportioned senate to Saipan voters in light of Rota and Tinian's concern that in the absence of such a provision, equal representation for their islands would likely have been precluded by the one person, one vote standard:[25]

> The establishment of the commonwealth involves compromise and concessions which reflect the different historical and geographic interests of the major islands in the Northern Marianas group, as well as population. This sentence [of Section 203(c)] will require the Northern Marianas to have a two-house legislature

[25] Fear that equal representation in the senate was incompatible with the Supreme Court's one person, one vote cases likely precipitated the Rota and Tinian effort to secure it by express Covenant provision. *Honorable Accord* at 221.

> analogous to the Congress of the United States. If this sentence were not included, Tinian and Rota would be limited to representation in the new commonwealth which is based entirely on population. The Commission concluded that, in light of the past experience of the people of Rota and Tinian and the need for their support of the Covenant, the protection afforded them by Section 203(c) was entirely appropriate and desirable.

Marcuse at 19 (excerpt from MPSC Memorandum).

¶ 89 Understanding the Covenant analyses in their historical-political context serves to sharpen their interpretive value, not diminish it. Indeed, because they are contemporaneous explanations of Covenant provisions designed to inform NMI and federal decision-makers, the analyses provide unrivaled insight into Covenant language. And as legislative history, they are highly persuasive. Our reference to them in the present case reveals a preoccupation with legislative apportionment as it pertains to the senate. Factors controlling house apportionment are left largely to inference. However, given the frequent comparisons with congress, we believe population-based apportionment provides the point of departure. The NMI believed it would likely be constrained by *Reynolds's* one person, one vote standard if it did not confront the matter head-on during Covenant negotiations. After securing its main goal, membership in one house apportioned by municipality, other deviations from population-based apportionment might have seemed less pressing. Or perhaps the NMI negotiators believed they would only further jeopardize congressional support. The exact nature of these other deviations from population-based apportionment is unclear, as is the degree of support they garnered among the parties. Deviations were, however, envisioned. NMI apportionment discretion was initially broad. But even when the Rota Municipal Council demanded equal representation in the senate, they did not view their proposal as completely negating NMI flexibility regarding house apportionment. Instead, they called for "a House of Representatives based on population figures *and traditional voting patterns*." *RMC Resolution, reprinted in Honorable Accord* at 221 (emphasis added). And despite the MPSC Memorandum's language that one person, one vote would likely control legislative apportionment, its analysis of Covenant § 203(a) reveals the general tenor pervading the NMI position; "[w]hile the Northern Marianas Government will have to have three separate branches, the people of the Northern Marianas will be free to determine how the persons who will hold offices will be selected . . . ."

¶ 90 The MPSC Memorandum echoes the struggle NMI negotiators probably felt between the desire to maintain wide discretion while likely being constrained by Supreme Court precedent. Clearly, many within the NMI delegation believed, or feared, population would be the primary criteria for apportioning the house. Whether they arrived at this belief by analogizing the NMI House to the United States House of Representatives or because they believed the one person, one

vote standard controlled to the extent not expressly rejected, there appears to have been a general presumption that population-based apportionment was the starting point. However, there also exist clear indications the NMI desired to maintain the largest allowable degree of flexibility to decide their own apportionment criteria. This is hardly surprising given the NMI's consistent desire throughout Covenant negotiations to maximize self-rule. United States negotiators appear to have supported, at least in principle, the NMI's desire to maintain discretion regarding legislative apportionment. In viewing the issue as one of internal politics, United States negotiators either believed it outside constitutional purview, or as a potential pitfall unnecessarily endangering the larger issue of United States-NMI relations. Their desire to avoid the issue was largely supported by the Covenant analyses prepared for federal decision-makers. The House Committee Report does not mention legislative apportionment. The Senate Committee Report and the Administrative Memorandum justify senate apportionment by distinguishing *Reynolds*, but make no attempt to clarify whether house apportionment remained bound to population.

¶ 91 We conclude the Covenant requires the NMI House of Representatives to be apportioned in large part based on population. Although the analyses do not provide clear guidance, read together they support our conclusion. Population-based apportionment, at least to some degree, was assumed by the MPSC Memorandum; may be inferred from the Joint Drafting Committee Report; and is not expressly contradicted by the remaining analyses. Yet the question remains whether *Reynolds* controls house apportionment. Our conclusion that house apportionment be based in large part on population does not necessarily mean house apportionment is compatible with *Reynolds's* one person, one vote standard. To the contrary, Covenant drafters apparently desired that wide apportionment discretion be reserved for the NMI government. Of course it is not the intent of the Covenant's drafters that controls, but that of the Covenant's principals – NMI voters and United States law makers. The drafter's intent might reasonably be imputed to the principals in the absence of contradictory evidence, but we need not consider Covenant intent to answer the question whether *Reynolds's* application of the one person, one vote principle to state legislatures would prejudice Covenant § 203(c). *Reynolds's* own language makes clear it conflicts.

¶ 92 *Reynolds* considered and rejected the argument that state legislatures may rely on the federal analogy to justify departures from population-based apportionment in either house of a bicameral legislature. In reaching its conclusion, the Court cited historical and political distinctions between federal and state governments:

> Attempted reliance on the federal analogy appears often to be little more that an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States

> provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. . . .
>
> The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the 13 original States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.' But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. . . .
>
> Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . [T]hese governmental units are created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them, and the number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state. The relationship of the States to the Federal Government could hardly be less analogous.

Reynolds, 377 U.S. at 573-75 (quotations, citation, and footnotes omitted).

¶ 93 Clearly, the NMI legislature does not comport with *Reynolds's* description of state legislatures. At the time of the Covenant's drafting, Saipan, Rota, and Tinian were not "subordinate governmental instrumentalities" created as administrative conveniences and charged with exercising limited and revocable powers. *Id*. at 575. Although they were answerable in many respects to the Trust Territory Administration, they were not artificial extensions of it. Their identity cannot be reduced to mere administrative districts whose existence, purpose, and authority flowed from the Trust Territory Administration and continued at its pleasure. The United States recognized as much when it agreed to the malapportioned NMI legislature. As both the Senate Committee Report and the Administration Memorandum note, "the municipalities of Saipan, Tinian, and Rota are not governmental subdivisions created by the legislature, but are

separate island communities with divergent histories, traditions, and problems."[26] Marcuse at 18, 20 (excerpt from Senate Committee Report, Administration Memorandum).

¶ 94 The NMI legislature is clearly modeled after the United States Congress, not state legislatures. Our adoption of the federal analogy is supported by overwhelming evidence; it is not "an after-the-fact rationalization offered in defense of [a] maladjusted . . . apportionment arrangement[]." *Reynolds*, 377 U.S. at 573. Covenant negotiating history is clear that Rota and Tinian took measures to ensure they would not become subordinate to Saipan. And Saipan, in recognizing the legitimate concerns of Rota and Tinian, and, in return for their support the Covenant, agreed to equal representation in one house of a bicameral legislature. Consequently, no inferential leap is required to analogize the compromise ensuring the Covenant's passage to the "compromise between larger and smaller States . . . [that] averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id*. at 574.

¶ 95 Because *Reynolds* precludes a bicameral legislature based on the federal analogy, it would clearly prejudice the NMI legislature if applicable. The NMI Senate could not exist in its current form if *Reynolds* applied. Therefore, the NMI legislative structure, both the senate and the house, would fail. On that basis alone, *Reynolds* is inapplicable. Of course it could still be argued that, although the NMI Senate is prejudiced, *Reynolds* does not necessarily prejudice NMI House apportionment, and, because it does not prejudice house apportionment, it must apply. Again, we reject this argument based on *Reynolds's* own reasoning. By requiring population-based apportionment in both houses of a bicameral state legislature, *Reynolds* was concerned with legislative apportionment as a whole:

> Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighed equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house.

Id. at 575-76. If any doubt remained that legislative apportionment as a whole was the target of *Reynolds's* one person, one vote standard, later cases removed it:

> [I]n reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the

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[26] *See also* Willens & Siemer at 1401-02.

> proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature.

Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964); *see also Burns*, 384 U.S. at 83.

¶ 96 We understand *Reynolds's* one person, one vote standard as an all-or-nothing proposition; it either applies or it does not. If it applies, then it applies to legislative apportionment as a whole, and thus to both houses. However, if it does not apply to one house of a bicameral legislature, then, by definition, it does not apply to legislative apportionment as a whole, and thus does not apply to either house.[27] Were we to conclude *Reynolds* applies to NMI House apportionment despite the malapportioned NMI Senate, we would reach that result not by *Reynolds's* own terms, but by extending its reasoning to a situation that it clearly did not envision. We do not believe such an extension wise, much less required. However, even if the Equal Protection Clause were to apply the one person, one vote principle to NMI House apportionment, we do not believe the controlling standard would be that applied to state legislatures. There is simply no reason to believe the legal standards developed in apportionment cases expressly rejecting the federal analogy would be adopted wholesale and applied to one house of a legislature that is based on the federal analogy. Just as the one person, one vote principle applies differently to congressional and state elections, so too does its application to NMI elections differ. This is because the one person, one vote principle does not contain within itself a legal standard. Rather, a legal standard evolves as courts consider apportionment plans deviating from perfect population-based apportionment. In considering such apportionment plans, the Supreme Court has relied on the context of the constitutional provision applying the one person, one vote principle to the situation in question. Similarly, in crafting the legal standard for apportioning the NMI House of Representatives, we consider the historical-political context of Covenant and NMI Constitutional language. The resulting standard might resemble *Reynolds*, and will certainly look to its reasoning. But we are not bound by *Reynolds.* In light of the different context in which the *Reynolds* standard evolved, to find it applicable to NMI House apportionment would be an ideological conclusion, not a legal one.

Covenant § 203(c) does not encumber any fundamental right

¶ 97 We conclude the Covenant requires population to be a principal factor in apportioning the NMI House of Representatives. Yet the degree to which house apportionment is tied to population remains unclear. The *Reynolds* line of cases is not the source of population-based

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[27] *But see* Willens & Siemer at 1413.

apportionment in the NMI House. Consequently, the reasoning of those cases and the deviation standards they found permissible are not controlling. The limitations on NMI legislative apportionment derive solely from Covenant § 203(c) and the NMI Constitutional provisions giving it effect, and so too must apportionment concerns justifying departure from population.

¶ 98 Of course the question remains whether congress exceeded its Territorial Clause power in approving a bicameral NMI legislature in which one house is apportioned equally among municipalities and the remaining house is apportioned in large part, but not exclusively, based on population. We believe it did not. The Supreme Court has made clear congress acted within its authority in approving the NMI Senate. *Torres*, 528 U.S. 1110. This in turn makes clear that one person, one vote, as applied to the states in *Reynolds*, is not a right upon which all free government is based. *Rayphand*, 95 F.Supp.2d at 1140. At least there is no fundamental right violated by one house of a bicameral legislature being malapportioned. *Id.* Even where the Supreme Court applies the one person, one vote standard, it never required numeric equivalence across voting districts. The question always reduces to one of degree. Such is the case here. Because we read Section 203(c) to require a high correlation between population and house apportionment, any fundamental rights analysis would focus on the degree to which an apportionment plan deviates from perfect equality. We are not aware of any case having considered this issue and we see no need to speculate what, if any, population deviation in one house of an otherwise malapportioned bicameral legislature might infringe a fundamental right. In any event, no fundamental rights violation is evident from the 1991 Apportionment Plan, 1 CMC §§ 1501-1504, the stated purpose of which was compliance with the one person, one vote principle, or the house's current apportionment, resulting from our previous opinion apportioning the house based almost exclusively on population.

V

¶ 99 We next consider petitioners' claims in light of NMI Constitutional requirements. First, we address whether non-citizens should be counted for apportionment purposes. Second, we consider the role of population when apportioning seats in the NMI House of Representatives. Before doing so, however, we briefly distinguish *Sablan v. NMI Board of Elections*, the only other Commonwealth case considering NMI House apportionment. 1 CR 741 (Dis. Ct. App. Div. 1983).

¶ 100 At issue in *NMI Board of Elections* was whether PL 3-78, which reapportioned and redistricted the house of representatives, violated the Equal Protection Clause of the NMI

Constitution.[28] *Id*. at 754. The Appellate Division of the District Court for the Northern Mariana Islands determined the NMI Equal Protection Clause should be interpreted analogously to its federal counterpart, and on that basis found *Reynolds* applicable.[29] *Id*. at 754-55. We agree the NMI Equal Protection Clause is analogous to the federal Equal Protection Clause and will generally be given the same interpretation. *See Analysis of the Constitution of the Northern Mariana Islands* 21 (Marianas Printing Ed 1982) [hereinafter *NMI Constitutional Analysis*].[30] However, the NMI Equal Protection Clause, like all provisions of the NMI Constitution, is subservient to the Covenant. It must be interpreted in accordance with Covenant requirements; it may not contravene them. Where, as here, Covenant language renders federal authority inapplicable, no NMI Constitutional provision may resurrect it. Thus, although the NMI Equal Protection Clause is analogous to its federal counterpart, we will not use that analogy to circumvent Covenant terms. The Covenant rejected *Reynolds's* one person, one vote standard. We will not read the NMI Equal Protection Clause as a backdoor through which it may enter. To the extent *NMI Board of Election*s holds otherwise, it is overruled.

A

In the absence of contrary legislative action, noncitizens should be counted for apportionment

¶ 101 Petitioners argue the NMI House of Representatives should be apportioned based on the distribution of United States citizens throughout the Commonwealth. They claim the NMI Constitution supports their approach because it distinguishes "residents" from "population" for apportionment purposes, and therefore excludes nonresident workers. *See* NMI Const. art. II, § 4(a). Moreover, petitioners argue, the high percentage and unequal distribution of noncitizens in the Commonwealth skews vote distribution, thereby diluting Rota and Tinian votes in relation to Saipan. In our previous opinion we rejected these arguments. *Pangelinan*, 2007 MP 14 ¶¶ 10-13. We refused to adopt petitioners' resident-nonresident worker dichotomy because "nonresident worker" is an immigration status unrelated to legislative apportionment. *Id*. ¶ 11. And we noted the large number of noncitizens does not, by itself, warrant a departure from previous apportionment plans relying on total population. *Id*. ¶ 13.

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[28] The NMI Equal Protection Clause states, "[n]o person shall be denied the equal protection of the laws. No person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex." NMI Const. art. I, § 6.

[29] The court specifically declined to consider the federal Equal Protection Clause. *NMI Bd. of Elections*, 1 CR at 754 n.12.

[30] The NMI Constitutional Convention adopted the *NMI Constitutional Analysis* on December 6, 1976 "to summarize the intent of the . . . convention in approving each section" of the Constitution. *NMI Constitutional Analysis* at 1.

¶ 102 Amicus house of representatives argued that petitioners' position was precluded by *Garza*, which requires apportionment based on total population. 919 F.2d at 775. As controlling Ninth Circuit precedent, amicus argued *Garza* provides the appropriate authority for implementing *Reynolds's* one person, one vote rule in the NMI. Based on our reasoning above, we disagree. NMI legislative apportionment is not bound by *Reynolds*, and therefore neither is it bound by later cases considering the appropriate "population" against which compliance with *Reynolds's* one person, one vote standard must be measured. Consequently, *Garza* is inapposite.

¶ 103 The NMI Constitution requires regular reapportionment or redistricting to ensure "representation by each member of the house of representatives of approximately the same number of residents . . . ." NMI Const. art. II, § 4(a). The Constitution does not define "residents," but the *NMI Constitutional Analysis* provides guidance. It states, "'residents' *may* mean persons who are counted in a census or other enumeration made by the government." *NMI Constitutional Analysis* at 37 (emphasis added). This language clearly permits an apportionment plan to be based on total population, but it does not specifically require it. If "residents" may mean all persons counted in a census, it might also mean fewer than all persons. Accordingly, we read Article II, Section 4(a) to permit the legislature discretion over who should be counted. But legislative discretion is not unlimited. For instance, counting only voters might be prohibited.[31] *See id.* at 39.

¶ 104 We need not decide at this time whether any class of persons present in the Commonwealth may be excluded from apportionment numbers. Apportionment is by nature a legislative act and, in both instances where it addressed the issue, the NMI legislature relied on total population. *Pangelinan*, 2007 MP 14 ¶ 11. We see no reason to substitute our judgment for that of our legislators. As we noted in our previous decision, "[i]f any category of persons is to

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[31] The *NMI Constitutional Analysis* states:

> If redistricting or reapportionment is used, the result must be a representation system in which each member of the house of representatives represents approximately the same number of residents to the extent permitted by the separate islands of the Commonwealth and the distribution of population among islands. This requirement prohibits the legislature from enacting a system of representation based on the number of voters represented by each member of the house of representatives. Compliance with the one man-one vote requirement must be through representation of approximately the same number of residents, regardless of whether those residents are qualified voters.

NMI Constitutional Analysis at 39. To the extent the prohibition against apportionment based on voters is based on the assumption that *Reynolds's* one person, one vote standard controls, its validity is diminished. However, we need not consider that question here because we hold that, at least on the current facts, all residents should be counted for apportionment.

be excluded for purposes of legislative apportionment, the Court is not the proper body to pioneer it." *Id.* ¶ 12.

B

Population is the starting point when reapportioning or redistricting the house of representatives

¶ 105 NMI Constitution Article II, Section 4(a)[32] requires the house of representatives be regularly reapportioned or redistricted to account for population changes in the Commonwealth. Mandatory reapportionment or redistricting ensures voting power remains distributed among Commonwealth residents on a sufficiently proportional basis. And distributing voting power according to population implicates the one person, one vote principle. But, as mentioned above, the one person, one vote principle does not necessitate a particular legal standard. Rather, the context in which the principle is applied determines the degree of permissible deviation from perfect equality, and the legislative interests justifying those deviations.

¶ 106 The NMI Constitutional requirement of population-based apportionment in the house of representatives is flexible. Each house member must represent "approximately the same number of residents to the extent permitted by the separate islands and the distribution of population in the Commonwealth." NMI Const. art. II, § 4(a). The drafters recognized a flexible application of the one person, one vote principle was necessary given the NMI's unique challenges:

> The clause "to the extent permitted by the separate islands and the distribution of population in the Commonwealth" is intended to recognize that there are inherent limitations in redistricting when some of the districts are required constitutionally to be comprised of no more than one island. There are similar limitations in reapportionment when a very small total number of seats is available for redistribution among districts. Within those constraints, any system of representation must be designed to achieve the lowest deviation from representation by each member of the same number of residents that is consistent with the requirement for compact and contiguous districts.

NMI Constitutional Analysis at 39.

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[32] Article II, Section 4(a) states:

> At least every ten years and within one hundred twenty days following publication of the results of a decennial census, the legislature shall reapportion the seats in the house of representatives or revise the districts for electing representatives as required by changes in Commonwealth population or by law. A reapportionment or redistricting plan shall provide for contiguous and compact districts and for representation by each member of the house of representatives of approximately the same number of residents to the extent permitted by the separate islands and the distribution of population in the Commonwealth.

NMI Const. art. II, § 4(a).

¶ 107 It is unclear whether the drafters believed *Reynolds's* one person, one vote standard applied to NMI House apportionment, either through the Covenant or as a necessary corollary of population-based apportionment.[33] The *NMI Constitutional Analysis* does not specifically make house apportionment dependent on *Reynolds* or the Equal Protection Clause, but its language indicates some dependence on federal precedent. Thus, reapportionment or redistricting may be necessary for reasons other than population changes "if the United States Constitution is interpreted so as to require" it. *NMI Constitutional Analysis* at 38. The NMI Constitutional requirement that election districts be "compact and contiguous" appears to be based on *Reynolds*.[34] However, despite requiring the legislature to reapportion or redistrict pursuant to population changes, the legislature is not required to increase house membership in order to achieve greater equality across election districts. *Id*. at 39.

¶ 108 If the drafters believed *Reynolds* applied, requiring apportionment based on population "to the extent permitted by the separate islands and the distribution of population in the Commonwealth" appears a preemptive justification of otherwise dubious population discrepancies. *Reynolds*, after all, permitted discrepancies "based on legitimate considerations incident to the effectuation of a rational state policy." 377 U.S. at 579. And "insuring some voice to political subdivisions, as political subdivisions" was noted to be a particularly compelling justification. *Id*. at 580. But, even assuming the drafters believed *Reynolds* applied, because we find it does not, we need not consider whether *Reynolds* would permit a given reapportionment or redistricting plan. We look to *Reynolds* only in so far as it provides insight into the meaning of relevant NMI Constitutional provisions. And doing so leads us to believe the drafters desired wide apportionment latitude. Whether because they assumed *Reynolds* controlled, or because they believed any scheme of population-based apportionment would be judged by *Reynolds's* requirements or requirements analogous to them, the drafters clearly recognized and allowed for the inherent difficulties in implementing the one person, one vote principle in light of the Commonwealth's small population and its distribution across separate islands. Nevertheless, "[w]ithin those constraints, any system of representation must be designed to achieve the lowest deviation from representation by each member of the same number of residents that is consistent with the requirement for compact and contiguous districts." *NMI Constitutional Analysis* at 39.

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[33] At the very least, certain consultants to the Northern Marianas Constitutional Convention believed *Reynolds* applied. *NMI Constitutional Briefing Paper* at 47.

[34] *See id*. at 49.

¶ 109 We conclude the NMI Constitution requires population be the starting point when apportioning the house of representatives or revising its election districts. However, we also appreciate the inherent difficulties in implementing the one person, one vote principle in the NMI. And we recognize competing legislative interests might warrant departure from population equality. Historical and cultural differences are often put forth as reasons to maintain Rota and Tinian as separate election districts. Indeed, the divergence of interests between islands is often viewed as greater than the divergence of interests between residents of any one island. And if intra-island interests are believed superior, then population discrepancies between islands might be justifiable provided the inter-island balance of power is maintained. So long as Saipan maintains its supermajority in the house of representatives, the legislature might conclude Saipan voters will not be unreasonably prejudiced if they are apportioned fewer representatives than they would be if population was the sole factor. Based on the NMI legislature's federal structure, and the constitutional cap on representatives at Article II, Section 3(a), perhaps increased deference is due to legislative decisions apportioning representatives among islands than to legislative decisions drawing election districts within a particular island. *See United States Dept. of Commerce v. Mont.*, 503 U.S. 442, 461-64 (1992). Conversely, the legislature might decide Saipan deserves more representatives to offset the senate's malapportionment.

¶ 110 We do not intend our opinion to be understood as approving or disapproving any particular departure from population-based apportionment. The potential justifications mentioned above are included only as examples of what the legislative process might conclude. For our present purpose it is sufficient to note that neither the 1991 Apportionment Act, nor the apportionment plan created by our previous decision, violates the NMI Constitution by deviating too far from strict population equality across election districts. Moreover, we note our previous opinion reapportioning the NMI legislature and redistricting Saipan was intended to achieve the highest possible degree of representational equality while ensuring compact and contiguous voting districts and with an eye toward maintaining traditional communities. *NMI Bd. of Elections*, 1 CR at 770. Any departure from pure population-based apportionment, other than those specified in the NMI Constitution or previous legislation, should originate though the political process, not through judicial proceedings.

VI

¶ 111 We conclude the NMI House of Representatives must be apportioned based on population. However, population is not the sole criterion that must be considered. Election districts must be "contiguous and compact." NMI Const. art. II, § 4(a). And any apportionment plan will face unique challenges presented by the physical, if not historical and cultural,

separation of the Commonwealth's population. Consequently, apportionment plans must ensure "representation by each member of the house of representatives of approximately the same number of residents to the extent permitted by the separate islands and the distribution of population in the Commonwealth." NMI Const. art. II, § 4(a).

¶ 112 We recognize apportionment is quintessentially a legislative function. And being within the province of the political process, numerous and varied policy preferences will vie for attention as apportionment compromises are made. However, because population distribution remains the benchmark against which reapportionment or redistricting plans are measured, legislative decisions creating substantial population deviations across election districts must be justified. And if apportionment is based on a population figure excluding certain classes of residents, the decision to exclude those individuals must likewise be based on legitimate legislative concerns.

¶ 113 In contrast to legislative reapportionment, when we exercise our NMI Const. art. II, § 4(b) reapportionment authority, we seek to divide the NMI population into substantially equal election districts. We consider only those other factors required by our constitution or long-recognized policy goals such as maintaining historically distinct subdivisions. Our previous opinion reapportioning and redistricting the house of representatives was based on these considerations. *See Pangelinan*, 2007 MP 14 ¶¶ 13-14. And our decision to reapportion the house by total population rather than United States citizens was similarly rooted in NMI Constitutional language and legislative policy.[35] *Id*. ¶¶ 11-12.

Concurring:
Castro, Manglona, JJ.

Demapan, C.J., concurring in part and dissenting in part:

¶ 114 I join with the majority in the decision on the use of total population to conform to the one person, one vote principle. I respectfully dissent from Section V(B) of the majority's opinion with respect to house membership number and the redistricting plan.

¶ 115 Specifically, I believe the existing makeup of the house of representatives, derived from the Commonwealth Constitution and augmented by the Reapportionment Act of 1991, with sixteen representatives, should remain. Despite the increased population reported by the 2000

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[35] The NMI legislature may be dissatisfied with the reapportionment and redistricting plan we set in *Pangelinan*. If it is, it may reapportion or redistrict the house of representatives based on its own policy considerations. However, any reapportionment or redistricting plan must accord with our interpretation of the language, history, and policy of the Covenant and the NMI Constitution. Substantial population deviations across election districts, or the exclusion of any class of persons from the apportionment population, must be justified by legitimate legislative policy.

Census, judicial redistricting as a matter of course should not be practiced. The United States Supreme Court has long held that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). The Commonwealth Constitution mandates that we review, amend, or establish a plan, as the majority does in this opinion. While I respect the legal reasoning and sound research of the majority, I maintain that our "original and exclusive jurisdiction" over the plan allows us to consider other alternatives to the majority's reapportionment and redistricting plan. NMI Const. art. II, § 4(b).

¶ 116 The issue of redistricting is by its nature a political undertaking that should be accorded legislative or executive attention. The political bodies most equipped to establish such a plan neglected to do so, which forced the Court to undertake an extrajudicial act. A court that executes the roles of the legislative and executive branches of our government must be hypersensitive to the economic and political ramifications of its decision. While legal issues are easily distinguished, political ones are not, and frequently indicate ulterior motives. For that reason, political questions are best left to be resolved by the political branches of our government. However, when a court is called upon to perform such delicate political task, it must do so in a more neutral and unbiased fashion. For this reason, I propose that an at large representative election with one district for the island of Saipan is the most apolitical course of redistricting. Such a plan would minimize the political decisions inherent in drawing election district lines and ensure voting equality for the residents of Saipan.

¶ 117 Furthermore, the inapplicability of *Reynolds* allows the Commonwealth to maintain the status quo of sixteen members for the Saipan election district. To quote the opinion, "[w]e look to *Reynolds* only insofar as it provides insight into the meaning of relevant NMI Constitutional provisions. And doing so leads us to believe the drafters desired wide apportionment latitude." Majority Opinion ¶ 108. The "one person-one vote" principle as applied to the Commonwealth currently exists within tolerable limits of natural population deviation between the islands' electoral districts. A more pressing concern is the disparity within Saipan's electoral districts. While we are sensitive to inter-island interests, the reorganization of Saipan into five electoral districts is not to be taken lightly. Any benefit to the Commonwealth that inures from balancing Tinian and Rota's voting power must be weighed against the interests of Saipan as the most populous island. While pure population-based reapportionment with precautions to maintain voting communities is an admirable goal, I do not concur with the majority's addition of a new

election district. I still believe that a status quo of 16 members for the Saipan election district is permissible under the relaxed deviation standard.

¶ 118 Finally, courts must not sit in isolation when confronted with political questions that have economic impact. The increase in the size of the legislature is a concern which we must seriously consider in any reapportionment case. As a rule, this Court should redistrict and reapportion in the most apolitical fashion possible, and leave any future tasks to the legislature. I would therefore dissent from section V(B) of the majority's decision, retain the current house membership of 16 legislators, and allow for one apolitical at-large election district for Saipan.