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James E. Pate
College of William and Mary

REDISTRICTING FOR THE PURPOSE OF REPRESENTATION

JAMES E. PATE*

The conclusions reached in the Federal Convention's discussion[1] of representation were crystalized in Article I of the Constitution as follows: "The House of Representatives shall be composed of members chosen every second year by the people of the several States." . . . . . Par. (3) of the same section reads: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers. . . . . The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every 30,000, but each State shall have at least one representative."[2] In Article I, sec. 4, par. (1) we find that: "The

* Prof. of Political Science, College of William and Mary. B. A., Louisiana College; M. A., Virginia; Ph. D. Johns Hopkins; contributor to various periodicals.

[1] Farrand's *Records of Federal Convention.*
For references to discussions of representation see: Vol. I, pp. 36, 48, 49, 52, 57, 134, 151, 154, 559, 587;
Ibid. Vol. II, pp. 122, 123, 203, 217, 235, 268;
Ibid. Vol. III, pp. 311, 319, 260.

[2] There was some fear, at first, that the House of Representatives would be too small or that the number of its members would not be increased with the progress of population. In a striking passage (Federalist No. 58) Madison comments on this point as follows:

> "One observation, however, I must be permitted to add on this subject as claiming, in my judgment, a very serious attention. It is, that in all legislative assemblies the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more numerous an assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now, it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered,

times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The second Congress, October 1791, took up the question of apportioning representatives among the several States. A bill recognizing fractions in the apportionment of representatives to the States passed finally both Houses of Congress. "The result," comments John Marshall, "was a more equitable apportionment of representatives to population, but the rule was novel and overturned opinions which had been generally assumed, and were supposed to be settled."[3]

Divergence of opinion as to constitutionality of the apportionment act developed in the President's Cabinet. Mr. Hamilton, the Secretary of the Treasury, believed the act constitutionally correct. Mr. Jefferson, the Secretary of State, believed the act invalid because the Constitution had not provided for use of fractions left from "the operation". He advised the President that it was a good time to use the executive veto. "The non-use of his negative," Jefferson says, "begins already to excite belief that no President will ever venture to use it; and it can never be used more pleasingly to the public than in the protection of the Constitution."[4] On this occasion President Washington accepted his Secretary of State's advice, even to the extent of using the veto message which Jefferson in his

the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society*, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed." For further Federalist discussion of House of Representatives, see Federalist Nos. 52 to 60 inclusive.

[3] See Marshall's *Life of Washington*, V, 318–24, Philadelphia 1807.

[4] *The Writings of Jefferson* (Ford's Edition) V, p. 500, N. Y. 1895.

methodical way had drafted.[5] "Thus," observes Marshall, "was this interesting part of the American Constitution finally settled."

Until 1842 fractions were, therefore, rejected in apportioning representatives after each decennial census. Webster's criticism of the act of 1832, and his strong support for a plan to represent large fractions[6] led to our first experiment in the representation of fractions in the apportionment act of 1842. In this act an additional representative was allowed a State when the remainder left from dividing its population by the electoral quotient was over one-half of the quotient. From 1850 through 1900 Congress distributed seats in the House of Representatives according to the Vinton Plan, whereby any undistributed seats went to those States with the largest fraction.

This discussion about fractions in our reapportionment acts was bound to attract the attention of mathematicians and statisticians. This happened about 1910, and since that time we have the following methods of apportionment:

Method of Major Fractions, devised by Prof. Willcox of Cornell.
Method of Equal Proportions, discovered by Prof. Huntington, of Harvard.
Method of Smallest Divisors.
Method of Greatest Divisors.
Method of Harmonic Mean.[7]

Decided differences of opinion have developed as to these plans. In his presidential address before the American Economic Association, Professor Willcox states that: "The method of major fractions is the correct and constitutional method of apportionment."[8] On the other hand Professor Huntington has an able defender in Professor Chafee who believes that the method of equal proportions is the best plan from both the mathematical and political standpoint.

Professor Willcox's plan of major fractions was used in

[5] Compare Marshall op. cit. V, 324 and Jefferson op. cit. V, 501.

[6] *Writings and Speeches of Daniel Webster* (National Ed.) XIV, p. 144, Boston, 1903. Webster's dictum is seen in recent cases in defense of inequality of congressional districts.

[7] For an able discussion of these various plans of apportionment, see *Congressional Reapportionment*, by Zechariah Chafee, Harvard Law Review, 42—1015 (1929). Professor Huntington comments on the mathematical phase of the problem in American Political Science Review, November 1931, p. 961.

[8] American Economic Review, VI, March, 1916.

1911; but in 1920 Congress skipped, making no reapportionment at all in that year, the first time that such a thing was done in the history of the Republic. In 1929 an act was passed to prevent anything like this recurring again. Future reapportionment after the decennial census is now guaranteed. If Congress fails to act, an apportionment worked out in the Census Bureau on the basis of the formula used in the last preceding apportionment goes into effect. An opportunity to use the new law was presented in 1930 when Congress loath apparently to increase the size of the House beyond four hundred thirty-five members or to apportion at this number with consequent loss of representatives to some states, adjourned without taking any action on the matter.

A further historical retrospect is needed to appreciate the recent cases that have been before the courts. From 1791 to 1842 Congress was concerned largely in fixing the number of representatives for each State. In 1842 there appears, for the first time, in an Act of Congress the statement that representatives shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which each State is entitled. In the act following the census of 1850, the reference to districts was omitted. In 1862 districts were again mentioned; and in 1872 we find the further provision that such districts should contain as nearly as practicable an equal number of inhabitants. This provision was found in each decennial apportionment act from 1872 to 1911. In 1929 this injunction of compactness, of contiguity, and of equality in population of districts was left out of the law.

The apportionment act which went into force automatically in 1930 resulted in a gain of twenty-seven seats distributed among eleven States and a loss of representatives to twenty-one States. The thirty-two States affected by this act, proceeded to draw new districts for representation in the House of Representatives. In doing this there was full evidence of the practice of an old art.[9]

[9] For interesting account of origin and early use of gerrymander, see "The Political Depravity of the Fathers" by McMaster (Atlantic Monthly, May 1845) "It is to Massachusetts," writes McMaster, "that we owe the introduction of the most infamous piece of party machinery this country has produced. . . . In 1812 the Jeffersonian Republicans overcame Federalist strongholds by joining them to Re-

Several interesting questions have been raised by these recent State redistricting acts:

1. Does the act of Congress enjoin equality of districts?
2. Does the Constitution contemplate districts of equal population?
3. Has Congress the power to redistrict?
4. Is redistricting for representation in the House of Representatives an exercise of the legislative power in which the governor participates by his veto?
5. Are redistricting acts subject to referendum when provided in State constitutions for ordinary legislative acts?

The first question propounded above has been answered by the state courts, by the United States District Courts and finally by the United States Supreme Court.

By the redistricting act of 1931, the Illinois legislature divided the State into twenty-seven districts with populations that varied from 158,738 to 541,785 in the district in which Cook County is located. An attempt was made by means of a taxpayer's bill to enjoin the spending of public money to carry out provisions of the act on the ground that it violated the Act of Congress (1911) which required that representatives to the lower House of Congress shall be elected by districts composed of contiguous, compact territory, and containing as nearly as practicable an equal number of inhabitants. On the other hand the defendant secretary of state maintained that the Act of 1929 repealed that of 1911; and, therefore, in absence of congressional legislation, the States are empowered to elect their representatives in any manner they choose, even without regard to compactness, contiguity, or equal population in the districts.

In answering this question, the Illinois Supreme Court held the State redistricting act invalid because it violated the requirement of the Act of Congress (1911) which was not superseded by the Act of 1929. Furthermore, the court declared, if there were no congressional enactment on the subject, the legislative act is invalid because the Illinois Constitution provides that all elections shall be *free* and *equal*: And an election is free "when the voter is exposed to no intimidation or improper influence and is allowed to cast his ballot as his own con-

publican strongholds. They cut Worcester County in two, joined Bristol and Norfolk, attached some of the towns of Suffolk to those of Essex and in the next General Court had twenty-nine Senators out of forty." For recent cases of inequalities of representation see Mott, *Materials on American Government*, p. 219.

science dictates; and an election is equal when the vote of each voter is equal in its influence upon the result to the vote of every other voter".[10]

A similar situation developed in Virginia when the General Assembly[11] in endeavoring to accommodate her congressional districts to the loss of one representative so shifted the lines of three districts that a single district was made to contain approximately one-fourth of the entire area and one-seventh of the population of the whole State. Dr. W. M. Brown filed a petition for mandamus praying that the Secretary of State be compelled to receive notice of candidates at large for Congress on the ground that there were no congressional districts in Virginia because the redistricting act was contrary both to the Act of Congress (1911) and to the Virginia Constitution.

For over one hundred years the principle of practical equality of representative districts has been in the Virginia Constitution. Basing its decision on this provision of the State Constitution, the Virginia Supreme Court of Appeals declared the redistricting act invalid because no bona fide effort was made to divide the State into districts containing as nearly as practicable an equal number of inhabitants.[12] And for the first time in one hundred forty-four years, Virginia's entire membership in the House of Representatives had to run at large.

Under the apportionment act, Kentucky's representation in the lower House of Congress was reduced from eleven to nine. The State's redistricting law was brought into question by one who sought relief both as a taxpayer and as a legally qualified

[10] *Moran* v. *Bowley*, 179 N. E. 526 (1932).

[11] Acts of Assembly, Virginia .1932 c. 23.

[12] *Brown* v. *Saunders*, 166 S. E. 105 (1932).

Some variation in size of districts as pointed out by the Court, is inevitable due to the Virginia custom of not breaking county lines in creating congressional districts. "From the early history of Virginia," the Court said, "the community of interests in the counties has been recognized and in no division of State for any governmental purpose has any county line been broken."

The Attorney General emphasized the dictum in the early Virginia case of *Wise* v. *Bigger* (79 Va. 269) where the Supreme Court of Appeals had said: "The laying off and the defining of congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people whose representatives they are." The principal point in this case, however, was not constitutionality of the act creating the ten congressional districts in substance, but whether the bill had been passed according to proper procedure.

congressional elector. In establishing its jurisdiction, the Federal District Court held this was a proper case brought by a legal voter and "it is well settled," the court said, "that the right to vote is a valuable right capable of being measured in money". The Court held that the Kentucky redistricting act violated the law of Congress (1911) both as to uniformity, as to compactness and as to equality of population. "Instead of complying with the law," the court said, "the legislature without any reason whatever other than exigencies of practical politics, worked out a gross inequality of population between the districts, and not only did the legislature disregard requirement of substantial equality of population but the fifth district outrageously violates the requirement of compactness of territory . . . . . its shape resembling a French style telephone."[13]

Following the passage of Mississippi's redistricting act (1932), an attempt was made to get a writ of mandamus to compel the Secretary of State to disregard in making up ballots any designations of candidates for Congress by districts and to prepare ballots only for candidates at large, on the ground that the Mississippi act violated the provision of the Act of Congress (1911) requiring equality. The Supreme Court of Mississippi passed only on the merits of the mandamus and refused to issue the writ because the public interest would be adversely affected. Since primary ballots were involved, the court felt obliged to declare: "Courts have no jurisdiction to direct how party authorities shall act in administration of party machinery under primary election statutes; moreover, federal statutes have nothing to do with party primaries and party nominations within a State."

The Court went out of its way in showing clearly how it stood on the question of elections by districts versus elections at large. Representation by districts, the Court says, is a century old practice and there have been inequalities in districts from the beginning. An election at large is undesirable (1) because "it is important that the representation in the lower House of Congress in this day and time . . . . . shall be by districts where each section has a representative familiar with habits, desires, aspirations and problems of his people;

[13] *Hume* v. *Mahan*, 1 F. (2d) 142 (Sep. 1932).

(2) a state-wide struggle in present condition of economic distress would introduce strife, turmoil and bitterness, and the people of Mississippi have been wearily hoping to be permitted to remain a while in political peace."[14]

The Mississippi redistricting act was declared invalid by the United States District Court because of conflict with the equality provision of the Act of Congress (1911).[15]

An appeal from the United States District Court carried to the United States Supreme Court finally the question whether Congress requires States in redistricting for the House of Representatives to observe the requirements of compactness, contiguity and equality of population. The Supreme Court answered this question in the negative. The omission in the Act of 1929 of the above requirements, the Court says, was deliberate. Chief Justice Hughes, speaking for the Court, says further: "There is no ground for conclusion that the Act of 1929 re-enacted or made applicable to new districts the requirements of Act of 1911 as to compactness, contiguity, and equality in population of districts. They did not outlast the apportionment to which they related."[16]

This decision of the Supreme Court has been as disquieting to those who fear some irreparable injury to democratic principles, as the decisions of the Supreme Court in *Nixon* v. *Herndon* and *Nixon* v. *Condon*.[17] have been disquieting to those who live under the spectre of negro domination of democratic primaries in the south. Both fears are unfounded.

But it has raised the question: Does not the Constitution contemplate districts of an equal number of inhabitants for the purpose of representation in the House of Representatives? And does not Congress have the power to redistrict, if necessary, to attain this end?

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[14] *Wood* v. *State*, 142 So. 747 (July 1932).

[15] *Broom* v. *Wood* 1 F. (2d) 134 (Sept. 1932). Inequalities in Mississippi Congressional districts ranged from 184,000 to 414,000; 40% of the population was in one district.

[16] *Wood* v. *Broom*, 53 Sup. Ct. R. 1 (Oct. 1932). The Attorney General of Virginia appeared in this case as amici curiae. The Kentucky case, mentioned above, reached the United States Supreme Court December 1932, in *Mahan* v. *Hume*, 53 Sup. Ct. R. 223. The decree of the United States District Court was reversed. See Mississippi case for Court's opinion.

[17] *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Nixon* v. *Condon*, 52 S. Ct. 484.

As these questions have not been adjudicated, it becomes a mere matter of opinion. By a great stretch of the legal imagination, the provision of the Fourteenth Amendment which reads "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" has been taken to enjoin congressional districts of an equal number of inhabitants. Professor Bowman, writing in the Michigan Law Review,[18] believes that it would not be at all fanciful or "unreasonable to spell out of the Fourteenth Amendment a duty of State authorities to apportion so as to confer equality of representation". If this, however, is part of a national plan to give fluidity to the Constitution who would gainsay it in times like these?

But suppose the States obstinately persist to redistrict in equal proportions? In a case like this, can Congress step in and redistrict the State?

There is no doubt as to the source of Congress' power to control congressional elections. We find it stated in Art. I, Sec. 4 of the Constitution as follows: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators". There are divergent views as to how far this power goes. In favor of a broad extension of congressional authority over the subject we have such an expression from the Court (*Smiley* v. *Holmes, supra*) that: "In exercising this power, the Congress may supplement these State regulations or may substitute its own. It may impose additional penalties for the violation of the State laws or provide independent sanctions. It has a general supervisory power over the whole subject."

In 1870 Congress, for the first time, exercised in a broad manner its control over congressional elections.[19] In upholding these acts of Congress, the Supreme Court in ex parte Siebold speaks in part as follows: "There is no declaration that

[18] Bowman, N. M., *Congressional Redistricting and the Constitution.* Mich. Law Review, December 1932, p. 167.

[19] Sixteen Stat. at Large 256. Seventeen Stat. at Large 347. See Willoughby, *Constitution of the United States*, II, 639.

the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary cooperation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power 'to make or alter.' "[20]

On the other hand Justice Field's dissenting opinion in this case is certainly more consistent with the view of the Fathers as expressed in the Federalist.[21] In commenting on that part of the Constitution coming after the semicolon, quoted above, Justice Field says: "The act was designed simply to give the General Government the means of its preservation against a possible dissolution from the hostility of the States to the election of representatives, or from their neglect to provide suitable means for holding such elections." "I am greatly mistaken," writes Hamilton in the Federalist, "if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition; that every government ought to contain in itself the means of its own preservation."

As an authority on this question, the Virginia case (*Brown* v. *Saunders*, supra) cites the congressional election committee's report in the contested election case of *Davidson* v. *Gilbert*, which in part reads: "So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion

[20] Ex parte Siebold—100 U. S. 371 (1879); cf. Willoughby (*supra*), p. 641.

[21] See Federalist, No. LIX.

in favor of its power to require that the States shall be divided into districts composed of contiguous territory, and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the State into congressional districts or to supervise or change any districting which the State may provide." In other words, as one writer has put it, it is better to have state gerrymanders than a congressional gerrymander.

The second question, mentioned above: Is congressional redistricting by the State legislature an exercise of the ordinary law making power in which the governor participates?

This question came up in Minnesota when as a result of a recent congressional apportionment act, Minnesota's representatives, as Virginia's, were reduced from ten to nine. In the State redistricting act, Minnesota's strong third party, the Farmer Laborite, was discriminated against in what the Minnesota Journal describes as "the rankest gerrymander ever conceived by a Minnesota legislature". Governor Olsen, a Farmer Laborite, vetoed the bill. An appeal from a lower court carried three questions to the State Supreme Court, namely: (1) Does the congressional apportionment act of 1929 repeal the act of 1911? (2) Is the State redistricting act contrary to the privilege and immunity clause of the Fourteenth Amendment, inasmuch as two voters in one district have the same voting power as three in another? and (3) What is the law making power in regard to congressional redistricting? The Court answered the first question in the affirmative. As to the second question, the Court held that the Fourteenth Amendment was not violated because (by *Minor* v. *Heppersett*, 21 Wall. 171) the right to vote for representatives is not a necessary incident of federal citizenship.

In its answer to the third question, the Court reasoned as follows: The Federal Constitution provides that the time, place and manner of holding elections in each State shall be prescribed by the legislature. The Minnesota Constitution defines the legislature as consisting of the Senate and House of Representatives, i. e., it is the representative body which makes

the State laws and does not consist of the governmental machinery which constitutes the State's law-making power. Redistricting, therefore, is a legislative function in which the governor does not participate by his veto. In making a congressional apportionment, the Court says, the State legislature acts exclusively as an agency responding to a federal mandate, and not in discharge of legislative duties of a law making body.[22]

A similar question was brought before the State courts in Missouri and New York. In the latter State, redistricting was by a joint resolution which was not submitted for the governor's approval. The New York court held the joint resolution redistricting the State ineffective because this must be done by the law making power which includes the governor.[23] A similar view was taken by the Missouri court where an attempt to disregard the governor's veto was thwarted when the court held that congressional redistricting was a legislative act in which the governor may participate by interposing a veto.[24]

These cases[25] were carried to the United States Supreme Court on writ of certiorari. The Court's opinion in each case was written by Chief Justice Hughes. The principal opinion is found in *Smiley* v. *Holm.*

The primary question before the Court, "Whether the function contemplated by Art. I, Sec. 4 is that of making law", was answered in the affirmative. We find, the Court says, no suggestion in Art. I, Sec. 4 of the Federal Constitution of an attempt to endow the legislature of the State with power to enact laws in any matter other than that in which a constitution of the State had provided that laws shall be enacted. Whether the governor shall participate by his veto in redistricting the State for congressional elections just as in the making of other State laws is a matter of State policy. In defining legislative functions, the Chief Justice says: "The legislature may act as an electoral body. It may act as a ratifying body, as in the case of a proposed amendment to the Constitution;" and further, it means today what it meant when the Constitution was adopted: "A

[22] *State* v. *Holm*, 238 N. W. 494 (October 1931).
[23] *Koenig* v. *Flynn*, 179 N. E. 705 (February 1932).
[24] *State ex rel. Carroll* v. *Becker*, 45 S. W. (2d) 533.
[25] *Smiley* v. *Holm*, 52 S. Ct. 397 (March 16, 1932); *Carroll* v. *Becker*, 52 S. Ct. 402 (March 24, 1932); *Koenig* v. *Flynn*, 52 S. Ct. 403 (March 24, 1932).

legislature was then the representative body which made the laws for the people."

One of the results of the Supreme Court's decision was that New York's two additional representatives were elected at large, but in the case of Missouri and Minnesota where there was a reduction of representation the entire lot of congressional candidates were forced to seek election from the State at large. Neither political party in Missouri viewed this situation with complacency because of the increased cost of the election campaign with the possibility of the election of all representatives from the largest cities, and because of the disruption of party machinery. The result in Minnesota was an unprecedented scramble for nomination, eighty-eight candidates entering the lists. When the battle cleared, the people of Minnesota were chagrined to find that one of the successful candidates had served a term in a federal prison.[26]

A further analysis of the State's law making power was made by the courts in connection with the question: Is the referendum a part of the State's legislative power in the sense that it can be applied to congressional redistricting acts?

The Supreme Court of California has held that a redistricting act is subject to referendum..[27] In an early case[28] on this subject, the Supreme Court of South Dakota declared that the word "legislature" as used in Art. I, Sec. 4 of the United States Constitution does not mean simply the members who compose the legislature but refers to the law making power of the State, as established by the State Constitution, which in South Dakota under the referendum includes the people and therefore a congressional redistricting act is subject to popular referendum.

In 1915 an Ohio redistricting act was, according to a referendum provision of the State Constitution, submitted to the people and rejected. The State Supreme Court held that the action of the people had nullified the act since the provision for

[26] For interesting account of these elections see:
R. V. Shumate, *Minnesota's Congressional Elections at Large*, American Political Science Review, February, 1933.
L. M. Short, *Congressional Redistricting in Missouri*, American Political Science Review, August, 1931.
[27] *Boggs* v. *Jordan*, 267 Pac. 696 (1928).
[28] *State ex rel. Shrader* v. *Polly*, 12 N. W. 848 (1910).

referendum was part of the legislative power.[29] This decision was affirmed by the United States Supreme Court. Chief Justice White, speaking for the court, says: Congress by providing in the Reapportionment Act of 1911 that the redistricting of congressional districts should be made by each State "in the manner provided by the laws thereof" plainly intended that if by the State Constitution the referendum is treated as part of the legislative power it is applicable for the purpose of creating congressional districts. The contention that the congressional act is unconstitutional because it impliedly recognizes the referendum, the Chief Justice says, rests upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and therefore violates the constitutional provision requiring a republican form of government. This, the Chief Justice says, on the basis of *Pacific States Telegraph and Telephone Company* v. *Oregon* (223 U. S. 118), offers no justiciable question.[30]

When we turn our attention to a brief review of reapportionment for representation in State legislatures, problems similar to those discussed above are seen. There exists in some of these legislative districts the grossest inequalities, which, as Governor Pollard recently told the Virginia General Assembly, "can be easily corrected if political expediency and personal political fortunes be disregarded." "And loyalty to the principle of representative government," the Governor goes on to say, "requires an honest effort to reduce to a minimum the inequalities growing out of differences in population between districts."

In Virginia inequalities exist between rural districts as well as between urban and rural districts. Isle of Wight County, for instance, with a population of 13,409 and, as for

[29] *State ex rel. Davis* v. *Hildebrant*, 94 Ohio 154 (April, 1916).

[30] *Davis* v. *Hildebrant*, 241 U. S. 565 (1916). For comments on this case see 18 *Michigan Law Review* 51 (1919). *Davis* v. *Hildebrant* is, of course, to be distinguished from *Hawke* v. *Smith*, 253, U. S. 221 (1920) where the Supreme Court held that the referendum could not be applied to the ratification of an amendment to the Federal Constitution. "It is true," the Court says, "that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution."

that matter, a half dozen other counties with a similar population are each represented by one delegate, while Accomac County with twice this population has only one delegate, and Norfolk and Wise Counties with over three times the population of Isle of Wight have only two representatives each in the House of Delegates. A delegate from the City of Norfolk represents three times as many people as the delegates from several rural counties, and he represents approximately twice as many people as the delegates from the majority of the rural counties of the State.

In the Virginia Senate there is Halifax County with a population of 41,283 represented by a single senator, while Norfolk County, a larger county, is grouped with the cities of South Norfolk and Portsmouth to make a single senatorial district of 83,643. A Norfolk city senator represents 87,000 people. Each of the Richmond senators represents approximately 63,000 people. In sharp contrast to this is Amherst and Nelson Counties which are combined to form a single senatorial district of 37,900 people.[31]

Compared with legislative districts in several other States, the Virginia districts are models of equality. In Connecticut, which is an extreme case, New Haven with a population of 162,537 has two representatives in the lower house of the legislature, while Union Village has two representatives for 257 people.[32]

The reason for this great inequality in Connecticut and Virginia is because each town or city is given equal representation regardless of population. Other reasons for this situation in other States are the respect for county lines, party conflict, and urban-rural jealousy.

State constitutions usually require for representation in State legislatures, as for representation in Congress, that districts shall be compact, contiguous, and as nearly as practicable, equal in number of inhabitants. Some State constitutions as the Virginia Constitution require only a reapportionment every ten years. But the mere requirement for decennial reapportionments strongly implies that the maintenance of equality is the motive.

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[31] See the writer's *State Government in Virginia*, (Richmond 1932) Ch. 4.

[32] See Mott. op. cit. p. 225.

The State legislature, therefore, is the apportioning authority. The question arises as to the extent of legislative discretion in the performance of this important duty. Some courts have favored the exercise of wide discretion, while others have narrowly restricted legislative discretion. In an early New York case,[33] it was held that the constitutional expression 'as nearly as may be' allows the exercise of legislative discretion and courts should not interfere unless it appears that it has been plainly and grossly abused. In other words, equality as between legislative districts is a matter of legislative integrity.

In an early Illinois case[34] holding valid the apportionment act (1843) of that State, the court says: "In imposing this duty on so numerous a body as the General Assembly, the people must be presumed to have contemplated that the two houses composed of men from all parts of the State, representing different and often conflicting interests and views, would have much difficulty in securing fair results; and that only an approximation towards absolute equality in representation could be secured."

On the other hand, we see a different point of view expressed in a Michigan case[35] where the court denied the right of a scrupulous legislature to dismember a county in forming representative districts "as near as may be" equal in population. In attaining this desirable end the court believed that the State Constitution did not contemplate a division of counties. "If one county can be dismembered," the Court says, "all of them can; and we might have, under the exercise of legislative discretion, a representation ignoring counties altogether, and based solely upon the idea of equality of population." A still stronger stand against the exercise of legislative discretion is seen in two Wisconsin cases.[36] In the former case the court says, "Constitutional restrictions on legislative power of making apportionment are mandatory and imperative and are not subject to legislative discretion. In the latter case the Wisconsin Supreme Court declares that a constitutional requirement for apportionment according to number of inhabitants is plain and hence not to be regarded as abrogated by legislative violations.

[33] *People ex rel Carter* v. *Rice*, 135 N. Y. 473 (1892).
[34] *People* v. *Thompson*, 40 N. E. 307 (1895).
[35] *Board of Supervisors* v. *Blacker*, 52 N. W. 951 (1892).
[36] *State* v. *Cunningham*, 51 N. W. 724 (1892); *State ex rel. Lamb* v. *Cunningham*, 53 N. W. 35 (1892).

But if the legislature abuses its legislative discretion or if it refuses altogether to reapportion representatives, the question immediately arises: Can pressure be brought to compel legislative compliance with the constitution?

This question has been answered recently in several interesting cases in Illinois where no apportionment has been made since 1911 and the controversy between Chicago and rural Illinois for the control of the State legislature has been particularly acute. In *Fergus* v. *Marks*[37] the petitioner for a writ of mandamus to compel the legislature to meet and to apportion the State contended that the duty imposed by the Illinois Constitution is clear and mandatory, and that the right set up by the petition is the "right of representation which by the Declaration of Independence is said to be a right estimable to the people and formidable only to tyrants". The court denied the writ, saying in part: "The duty to reapportion State is a specific legislative duty imposed by the Constitution solely upon the legislative department of the State, and it alone is responsible to people for failure to perform that duty."

Two years later an Illinois taxpayer sought by injunction to stop payment of salaries to legislators on the ground that the legislature was not a legal body since no new apportionment had been made for over ten years thus violating the State Constitution and the guarantee of the republican form of government clause of the Federal Constitution. The Court denied the petition holding that it could not be denial of salaries do indirectly what it could not do directly. "Apart from a constitutional amendment", the Court says, "the people have no remedy save to elect a General Assembly which will perform that duty."[38]

Two years later the Illinois Supreme Court refused a quo warranto to be used to test the validity of a member's right to serve from one of the existing legislative districts on the ground that the General Assembly had no de jure existence because of failure to apportion. The Court reiterated its former opinion that the legislature could not directly or indirectly be compelled by court action to reapportion.[39]

[37] 152 N. E. 557 (1926).
[38] *Fergus* v. *Kinney*, 164 N. E. 665 (1928).
[39] *Fergus* v. *Blackwell*, 173 N. E. 750 (1930).

The attack upon the legislature took another angle in *People* v. *Claridy*[40] where the plaintiff, a citizen of Chicago, was sentenced to prison for six months for carrying concealed weapons. He contended that the Illinois statute under which he had been convicted was unconstitutional because failure to reapportion since 1911 made the General Assembly an illegal body. This contention was rejected by the Illinois Supreme Court, the Court asserting that it had no authority to declare the General Assembly not a de jure body.

An interesting line of attack is seen in *Keogh* v. *Neeley*[41] where the plaintiff in a bill for an injunction against the United States Collector of Internal Revenue contended that the United States Government had ceased to have authority to levy and collect federal income taxes from the citizens of Illinois because the Federal Government had not compelled the Illinois legislature to redistrict the State and thereby secure for the State equal representation and therefore the republican form of government guaranteed by the United States Constitution. The Illinois Supreme Court held this contention entirely without merit. The court went on to say: "Even were the Federal Government empowered to force a State to obey its State Constitution as to reapportionment and failed to do so, this failure would not relieve citizens of the State from duties and burdens imposed by the Federal Constitution. If this were not so, the citizen while still remaining in the country, might with impunity set at naught the Federal Constitution and laws and virtually secede from the government. This cannot be sanctioned especially since the stirring events of 1861-65."

The solution of this problem, therefore, seems to lie in establishing a non-legislative body to reapportion the State along equitable lines. Some Commonwealths have had experience in doing this. In Ohio, for instance, the governor, auditor and secretary of state make apportionments regularly after each decennial census. The result of this plan has been to avoid the glaring discriminations seen in some States where the legislature has been derelict in its duty.[42] In Maryland it is the duty

[40] 165 N. E. 638 (1929).
[41] 50 F. (2d) 685 (1931).
[42] See *Procedures in State Legislative Apportionment* by V. O. Key, American Political Science Review, Dec. 1932.

of the governor to arrange according to constitutional rules representation in the House of Delegates after each federal census. A constitutional amendment in Florida provides that in case the legislature fails to apportion at the time specified, the governor shall after adjournment of the session call a special session to consider the question of reapportionment; and such session is required to reapportion the representation as required and such extra session shall not be limited to expire at the end of twenty days or at all until reapportionment is effected and shall consider no business other than such reapportionment. In Missouri, provision is made for the governor, secretary of state, and attorney-general to divide the State into senatorial districts, "as nearly equal in population as may be," if the General Assembly fails to do this at the first session following the census. Passing on this provision in 1912, the Missouri Supreme Court stated that the governor and his associates in carrying out this apportionment duty were a minature legislature, and consequently . . . could no more be compelled by mandamus to redistrict the State than the legislature proper could be."[43]

If equitable apportionment for representation is to be guaranteed we should (1) exclude the governor from the non-legislative body and (2) have a specific constitutional amendment definitely make the apportioning authority amenable to mandamus. As a final guarantee, the popular initiative could be used. In Washington State, for example, the voters by using the initiative were able (1930) to adopt a statute reapportioning both houses of the legislature for the first time since 1901, and remedied a situation in which great inequalities of representation prevailed.[44]

A brief summary of the problem of redistricting for the purpose of representation in Congress shows that: (1) There is no act of Congress today which enjoins congressional districts of equal population; (2) The Federal Constitution does not

[43] *State ex rel. Barrett* v. *Hitchcock*, 146 S. W. 40 (1912). In *State* v. *Becker*, 235 S. W. 1017 (1921) it was held that the initiative and referendum, adopted in 1908, had nullified the constitutional provision giving the legislative power of making apportionments to the governor and his associates.

[44] V. O. Key op. cit. p. 1058. An effort was made to block the initiative but the State Supreme Court held this device proper for attaining the objective of reapportionment. *Miller* v. *Hinkle*, 286 Pac. 839 (1930).

require congressional districts of an equal number of inhabitants, and only by a wide stretch of the imagination can such a requirement be read into the Constitution; (3) A liberal construction of Congress' power in Art. I, Sec. 4, might possibly include a right to redistrict, still it would be unwise for the Congress to brush aside a State and on its own account redistrict the State into congressional districts; (4) Redistricting is an exercise of the ordinary law-making power in which the governor may participate by his veto; (5) Redistricting acts are subject to the referendum when this is provided in a State constitution for ordinary legislative acts.

As to reapportionment for the purpose of representation in State legislatures we find that: (1) The legislature may ignore a State constitutional provision requiring them to reapportion the State into districts that are contiguous and, as nearly practicable, equal in population; (2) A State legislature cannot be compelled either directly or indirectly to comply with the constitution's requirements; (3) As a result of the foregoing, some States in order to secure compliance with the constitution have provided for reapportionment by a non-legislative body, or by popular initiative; and (4) in order to make sure of (3) supra it will be necessary to provide in the State constitution for the writ of mandamus to be used against the apportioning authority in case of failure to carry out its duty.

Representatives thus elected by popular vote from districts that are contiguous, compact and, as nearly as practicable, equal in inhabitants will probably be amenable to the popular will and the spirit of representative government, at least in the American sense, will be observed.[45]

[45] See J. S. Mill *Representative Government*, particularly Chs. 5 and 12, and Edmund Burke for a classic dissent to the above view. Burke once remarked: "The representative should be a pillar of State, not a weathercock on the top of the edifice exalted for his levity and versatility and of no use but to indicate the shiftings of every fashionable gale."