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COMMENT**APPORTIONMENT: PAST TO FUTURE**

by John Dudis

INTRODUCTION

“Apportionment,” in American political practice, may be defined as the “determination by law of the number of representatives which a state, county, or other political subdivision may send to a legislative body.”¹ “Reapportionment” is “a new apportionment of legislative seats among states or other political units.”² These definitions would appear to be the principal pillars upon which our democracy is built; however, apportionment and reapportionment have caused some of the greatest political and judicial controversies of the last three decades. The causes and reasons for malapportionment may be reduced to three main rationales.³

The first is the shift that has taken place in the population of the United States. Our country is no longer rural but urban in nature. Because of malapportionment, the rural areas generally control the power in the state legislative assemblies.⁴ State legislatures have expressed, at best, reluctance and, at worst, outright hostility to the suggestion that they surrender their power to the expanding urban communities.

Second, political factors often come into operation. In most states, rural areas are dominated by one political party, and the opposition party controls the expanding urban centers. This factor alone is sufficient to create a dispute over reapportionment. Another fear, sometimes more illusory than real, is that the urban communities, if given the power, would neglect the interests of the rural population. A common fear of many rural dwellers is that the urban faction would “over tax” and “under spend” to the detriment of the rural population.

The third and final factor for failure to reapportion is essentially legal in nature. Most state constitutions were written before the “rural to urban” shift in population had taken place; consequently these constitutions usually require that each county, or other similar political subdivision, be guaranteed at least one seat in one of the chambers of the state legislature. As a state grows in population, more political subdivisions are created out of the rural areas to offset the growing power of the urban communities; therefore, malapportionment in favor

¹SMITH, CONRAD AND ZURCHER, *JOHNS, DICTIONARY OF AMERICAN POLITICS*, 22 (1955).

²*Id.* at 318.

³For an extensive study of the causes and reasons for malapportionment *see*, MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION*, 49-54 (1965); JEWELL, *THE POLITICS OF REAPPORTIONMENT*, 5-17 (1962).

⁴BONE, *AMERICAN POLITICS AND THE PARTY SYSTEM*, 62 (1965).

of the rural areas rapidly increases.⁵ Some state constitutions also set a maximum number of seats that can exist in one chamber at one time. A state that possesses such a constitutional provision will quickly reach a point at which malapportionment will be guaranteed because the state constitution will not permit any new legislative seats to be created. Since boundaries for political subdivisions within a state are drawn by the state legislatures, one is able to understand the method by which rural domination is perpetuated.⁶

From what authority does the power to reapportion flow? The Constitution of the United States provides for a decennial census on the basis of which Congress apportions representatives to the states according to population, although each state must have a minimum of one representative.⁷ State constitutions and laws regulate the apportionment of the various state legislatures.⁸ States have not solely considered population as the basis for their legislative apportionments. States have also taken into consideration such elements as geography, economy, history, and demography.⁹ Most states have followed the example of the U.S. Constitution; consequently, one chamber was at least partially apportioned according to population, and the other chamber was apportioned on the basis of a geographical district. e.g.: a county, borough, township, etc.

By the fall election of 1970, the voters of Montana authorized the calling of a constitutional convention to draft a new constitution

⁵Montana is an excellent example of this proposition. In 1889 Montana had a total of 16 counties. This number has been increased, and today Montana has a total of 56. ⁶See, Bone, *supra* note 4: Three major techniques are employed by rural-dominated state legislatures to gerrymander the congressional districts to favor rural voters. one is to give urban areas significantly less representation than a rural representative. A second is the simple refusal to redistrict, so that as people move to the cities, their vote counts less because the cities do not gain seats and the rural areas do not lose seats according to the proportional changes in their populations. A third is to create new districts but to make them all unequal in size and in shape in order to favor certain kinds of voters. A party majority may use this technique to concentrate opponent's strength in a few districts and to spread its own strength over several districts.

"Gerrymandering" is the name given to excessive manipulation of the shape of legislative or congressional districts. The gerrymander was named after Elbridge Gerry, Governor of Massachusetts in 1812, when the legislature created a peculiar salamander-shaped district to benefit the party to which Gerry belonged. The basic intent of practically every gerrymander is political to create a maximum number of districts which would elect the party candidates or types of candidates favored by the controlling group in the legislature that does the redistricting. *Congress and the Nation, 1945-1964*, CONGRESSIONAL QUARTERLY SE. VICE 1528 (1965).

⁷U.S. CONST. art. I, § 2, cl. 3.

⁸The Montana Constitution of 1889 provided that the Montana Senate would be composed of a single senator from each county. MONT. CONST. art. V, § 4, art. VI, § 4. The Montana House of Representatives was to represent each county in proportion to its population. MONT. CONST. art. VI, §§ 2, 3, 6. A census and reapportionment of the House was to take place every five years. MONT. CONST. art. V, § 4, art. VI, §§ 2-6. For an interesting and informative article in this area of Montana constitutional law see, Waldron, *100 Years of Reapportionment in Montana*, 28 MONT. L. REV. 1-24 (1966).

⁹*Controversy Over Supreme Court Decision on Apportionment of State Legislation*, CONGRESSIONAL DIGEST XVIV, 3 (1965).

for the state. Toward that convention, this comment is being written for two main purposes: first, to provide a brief history of the reapportionment issue; second, to suggest a reapportionment plan.

A SHORT HISTORY OF THE JUDICIARY' REFUSAL TO CONSIDER REAPPORTIONMENT

Prior to 1960, the courts had played only a negative-to-passive role in reapportionment conflicts. Conflicts which were brought before the courts were based almost exclusively upon violations of the apportionment provision of the various state constitutions. The courts restricted themselves to the examination of whether or not reapportionment actions of this type came within the range of permissible legislative discretion.¹⁰ Because of the policy of the courts, any action on the part of a citizen to force a state legislature to reapportion itself was doomed to failure.¹¹

The Supreme Court of the United States also refused to consider reapportionment questions on the grounds that such suits involved

¹⁰For an excellent summary of this particular reapportionment history, see, LAMB, PIERCE, AND WHITE, *APPORTIONMENT AND REPRESENTATIVE INSTITUTIONS THE MICHIGAN EXPERIENCE*, 14-18 (1963). The authors of this work state at 17: "In enunciating these standards for determining the range of permissible legislative discretion, the courts have carefully examined the provisions of the state constitution and have repeatedly emphasized that in some respects the mandatory provisions conflict with the requirement of equal population. Furthermore, they have almost universally agreed that the motives of the legislature in enacting the particular apportionment will not be examined in applying the standard. Finally, although expressing awareness of the delicacy of the questions involved and of the respect due a coordinate branch of government, state courts generally have not refused to decide the constitutional issues. Various cases that illustrate this standard are: *Baird v. Kings County*, 138 N.Y. 95, 112, 22 N.E. 827 (1893); *Giddings v. Secretary of State*, 93 Mich. 1, 52 N.W. 944 (1892); *People v. Thompson*, 155 Ill. 451, 482, 40 N.E. 307 (1895); *State ex rel. Meighan v. Weitherill*, 125 Minn. 336, 342, 147 N.W. 105 (1914); *State v. Cunningham*, 81 Wis. 440, 51 N.W. 725 (1892); *Pagland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 869 (1907); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315, 321 (1931); *Parker v. State*, 133 Ind. 178, 32 N.E. 836 (1892); *Attorney General v. Suffolk County Apportionment Commissioners*, 224 Mass. 598, 113 N.E. 581 (1916); *Merrill v. Mitchell*, 257 Mass. 184, 153 N.E. 562 (1926); and *Rogers v. Morgan*, 127 Neb. 456, 256 N.W. 1 (1934).

LARSON, *REAPPORTIONMENT AND THE COURTS*, 15 (1962) states: "It is to be noted, however, that the courts . . . were not intervening directly to strike down the evil of unequal representation but were admonishing the legislatures that reapportionment acts must be drawn within the bounds of constitutional limitations. While this unyielding judicial attitude toward reapportionment chicanery served effectively to keep the legislatures from outrageous abuses in the exercise of their powers, it did not provide a workable solution where the legislature had become a society of connivance for the continuation of usurped political power through willful disregard of constitutional directives to reapportion. Against the 'silent gerrymander' of legislative inaction the courts could find no firm ground. . . ."

¹¹In the leading case on this point, *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 960 (1926), the Supreme Court of Illinois rejected the petitioner's request that a writ of mandamus be issued to order the state legislature to reapportion itself.

"political questions."¹² The first reapportionment case to reach the Supreme Court was the famous case of *Colegrove v. Green*.¹³ Three persons, who were qualified to vote in congressional districts of Illinois having much larger populations than other congressional districts of the state, brought a suit to restrain officers of the state from arranging an election in which members of Congress were to be chosen. The complaint alleged that the congressional districts created by Illinois law lacked compactness of territory and approximate equality of population. The Supreme Court affirmed the dismissal by the lower court on several grounds. First, the Court stated that the Federal Reapportionment Act of June 18, 1929¹⁴ stated no requirements "as to compactness, contiguity and equality in population districts."¹⁵ This fact alone was sufficient to justify a dismissal of the case. Second, the Court stated:

The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.¹⁶

An interesting note is that a majority of the judges who took part in this decision believed that the federal courts had the power to determine whether an apportionment was constitutional.¹⁷ The cases

¹²In the case of *Marbury v. Madison*, 1 Cranch 137, 164-166, (1803) Chief Justice Marshall stated in the majority opinion that the courts will not enter in political questions even though such questions involve actual controversies. The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint. The relationship between the judiciary and the other branches of the federal government gives rise to political questions, and whether a matter has been committed by the Constitution to another branch of the government is decided by the Court. For an excellent discussion of this area see, C. A. WRIGHT, *Law of Federal Courts*, 45-48 (1970).

¹³328 U.S. 549 (1946).

¹⁴46 Stat. 21 as amended, 2 U.S.C. § 2 (a).

¹⁵*Colegrove v. Green*, *supra* note 13 at 551.

¹⁶*Colegrove v. Green*, *supra* note 13 at 554. At 552 the court stated: "We are of opinion that the appellants ask of this court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meant for judicial determination."

¹⁷The 4-3 ruling of the case that no relief could be granted obscured an alignment which stated that under certain circumstances matters such as this would be justiciable. Justice Rutledge concurred with Justice Frankfurter, Justice Reed and Justice Burton in the dismissal of the action; but the concurring opinion of Justice Rutledge agrees with the dissenting opinions of Justices Black, Douglas, and Murphy that political questions should not exclude reapportionment questions from judicial interpretation.

that followed the Colegrove decision were equally unsuccessful in obtaining a change in state apportionment laws, with the Supreme Court utilizing a variety of grounds to reach such results.¹⁸

Two reapportionment cases that were litigated after *Colegrove v. Green* deserve mention. The first is *Dyer v. Kazuhisa Abe*.¹⁹

Under the congressional act that established the Hawaiian Territory, the territorial legislature was to reapportion itself as was necessary to maintain its representative character. For a period of fifty-five years the legislature did not reapportion itself; consequently, a suit was brought.²⁰ The district court retained jurisdiction and was highly critical of the injustice that was being accomplished by the failure to reapportion the legislature of the Territory of Hawaii. The court distinguished the Colegrove decision on the grounds that Hawaii was a territory and as such did not come under the state-national government relationship. As a territory Hawaii was merely a nonstate political subdivision of the United States. The court stated:

We are not saying each citizen must always have the same vote. Political institutions may invoke geographic representation. However, where the fundamental law provides for equal rights of suffrage each citizen should have the right of judicial redress if the law is violated. Otherwise his rights under the law can be disregarded with impunity, as indeed they now are in Hawaii and many states.²¹

Before any further action could be taken, the United States Congress amended the act that established the Territory of Hawaii, established new legislative districts, and placed the responsibility of reapportionment on the Governor. The importance of this decision is obvious. Federal courts would retain jurisdiction of reapportionment suits and would act if necessary to insure that each citizen was granted an equal vote in selecting members of the legislative assemblies.²²

The second case to consider is the Minnesota case of *Magraw v. Donovan*.²³ In this case citizens and voters of Minnesota brought an action to have the 1913 Minnesota Legislative Redistricting Act declared invalid and to have state officers enjoined from operating the election machinery at future elections. By 1957 Minnesota had been without a reapportionment since 1913, and during that time the popula-

¹⁸See Wright, *supra* note 12 at 47, n. 17, e.g., *Cox v. Peters*, 342 U.S. 936 (1952) (per curiam) (want of a substantial federal question); *South v. Peters*, 339 U.S. 276 (1950) (want of equity); *Colegrove v. Barret*, 330 U.S. 804 (1947) (per curiam) (want of equity). Only in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) was relief granted. In *Gomillion* the plaintiffs complained of affirmative legislation action that deprived them of their vote. The decision was based on discriminatory treatment of a racial minority which violated the Fifteenth Amendment.

¹⁹138 F. Supp. 220 (D. Haw. 1956).

²⁰*Id.*

²¹*Id.* at 236.

²²The precedent set forth in the Dyer case was refuted by the State of Alabama in *Perry v. Folsom*, 144 F. Supp. 874 (N.D. Ala. 1956).

²³163 F. Supp. 184 (D. Minn. 1958).

tion had increased within the state by 43.7 per cent. The difference in voting power between the smallest and largest legislative district was inequitably distributed.²⁴ The court stated:

Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. . . . Early in January of 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. . . . It is not to be presumed that the legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of the Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to re-district."²⁵

The Minnesota case, like the one in Hawaii, became moot because the new Minnesota Legislature reapportioned itself without the court having to take any further action.

Both of these cases illustrate that the opinion of the courts in the 1950's and the early 1960's was that they had the power to force reapportionment. That opinion was affirmed in the landmark decision of *Baker v. Carr*.

LEGISLATIVE APPORTIONMENT OF THE STATES AND THE FOURTEENTH AMENDMENT: BAKER V. CARR

Noting the extension of the United States Constitution during the 1950's and the 1960's to greater protection of individual rights, it is the more remarkable that the issue of reapportionment did not come to the front sooner:

By 1960, every legislative body in every single state had at least a 2-1 popularity disparity between the most and least heavily populated districts. Studies of the effective vote of large and small counties in state legislatures between 1910 and 1960 showed that the effective vote of the large counties had slipped while their percentage of the national population had more than doubled. The most lightly populated counties advanced from a position of slight over-representation to one of extreme over-representation, holding almost twice as many seats as population alone would entitle them to. Predictably, the rural-dominated state legislatures resisted every move toward reapportioning districts to reflect new population centers.²⁶

These factors were present in the State of Tennessee, and for over half a century, the legislature of the state had utterly refrained from reapportioning itself. The Tennessee Constitution guaranteed each qualified voter an equal vote and provided for a system of representation in both houses of the state legislature proportional to voting population

²⁴*Id.* at 186.

²⁵*Id.* at 187. According to *Reapportionment and the Courts*, *supra* note 10 at 27, "Voter equality was guaranteed by the Minnesota Constitution; relief had been denied in the state courts; the remedy sought did not project the court into the legislative arena; nor would a declaration of unconstitutionality of the existing apportionment statutes paralyze the state government." These were perhaps the reasons for the court decision.

²⁶CONGRESS AND THE NATION, 1945-1964, CONGRESSIONAL QUARTERLY SERVICE, 1525-1526 (1965).

of the counties and the districts of the state. This equality of voters was to be maintained by a decennial census, and the legislature was to reapportion itself according to this census. The last reapportionment of the legislature had taken place under a 1901 reapportionment, and since 1901 the population of Tennessee had shifted to such an extent that about one-third of the total voters had the power to elect and control two-thirds of the members of the state legislature.²⁷ All efforts to secure a new apportionment that would be in line with the population shift had met with failure.²⁸ The Tennessee legislature completely refused to reapportion itself, and no referendum or initiative laws existed in the state to compel reapportionment.²⁹

The urban interests of Tennessee brought a suit in the state courts to force reapportionment; this suit was rejected, however, on the grounds that state courts should stay out of legislative matters. The urban complainants then appealed to the federal courts asking for relief. They charged that there was a "debasement of their votes by virtue of the incorrect, obsolete and unconstitutional apportionment."³⁰ A three-judge federal court in Tennessee dismissed the case on February 4, 1960, citing the *Colegrove v. Green* decision as controlling precedent.³¹ In March of 1961 the U.S. Justice Department intervened in the case by filing as an "amicus curiae." The Justice Department pointed out to the court that many states had not reapportioned themselves for over 50 years; consequently, the only realistic remedy to rectify the situation would be federal judicial action.³²

On March 26, 1962, the Supreme Court by a 6-2 decision ruled in favor of the urban population of Tennessee. Mr. Justice William J. Brennan, writing for the majority, emphasized that the federal judiciary had the power to review the apportionment of state legislatures under the 14th Amendment equal protection clause. Justice Brennan specifically stated: "The mere fact that the suit seeks protection of a political right does not mean it presents a political question."³³ The Court distinguished the case of *Colegrove v. Green*:

²⁷For a discussion of the population shifts that had taken place in Tennessee from 1901 to 1962 see, McKay, *supra* note 3 at 71 and Larson, *supra* note 10 at 29.

²⁸*Id.* All past efforts in the legislature to secure new apportionment legislation had failed. Moreover, resort to constitutional amendment as a method of reform was found to be impossible by virtue of the stringent procedures for amending the Tennessee Constitution, procedures which for years had safeguarded that document as the oldest (1870) unamended constitution in the nation. Similarly, reform through a constitutional convention seemed unworkable. Only one constitutional convention had been called, and that in 1952. This convention was a so-called limited convention in that only a limited number of constitutional provisions were to be taken up for consideration by the convention. Legislative representation was not among the subjects included on the convention's agenda.

²⁹Congress and the Nation, 1945-1964, *supra* note 26.

³⁰*Baker v. Carr*, 369 U.S. 186, 186 (1962). The Fourteenth Amendment to the Constitution of the United States reads, in part: "No state . . . shall deny to any person within its jurisdiction the equal protection of the laws."

³¹179 F. Supp. 824 (N.D. Tenn. 1959).

³²*Baker v. Carr*, *supra* note 30 at 187.

³³*Id.* at 209.

The appellees refer to *Colegrove v. Green*, 328 U.S. 549, as authority that the District Court lacked jurisdiction on the subject matter. Appellees misconceive the holding of that case. The holding was precisely contrary to their reading of it. Seven members of the Court participated in the decision. Unlike many other cases in this field which have assumed without discussion that there was jurisdiction, all three opinions filed in *Colegrove* discussed the question. Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter.³⁴

In a strong dissent, Mr. Justice Felix Frankfurter stated that the majority had misinterpreted the facts of the case, and he contended that relief for malapportionment should be obtained from the electorate of the State of Tennessee and not in the courts.³⁵

According to one analyst, the decision of *Baker v. Carr* posed five major questions:

- (1) Is the suit within the jurisdiction of the federal courts?
 - (2) Is the issue "justiciable," that is, is it a controversy which is of a type which can be properly settled by judicial action?
 - (3) Do the facts establish a denial of equal protection? (4) What standards of apportionment are dictated by the equal protection principle? (5) What remedies may courts grant?
- The Court chose to decide only the first two issues, and then remanded the case to the trial court. Hence the case left standing more issues than it settled.³⁶

The major unresolved questions that *Baker v. Carr* did not answer posed serious problems for the lower courts. How seriously malapportioned must a legislature be to violate the 14th Amendment? Would a "little federal system," with one house apportioned by population and the other by factors such as geography be constitutionally acceptable? Would state constitutions be overridden to enforce the 14th Amendment's guarantees of equal protection? Would the presence of initiative and referendum laws, or the fact that an apportionment plan had been so approved, affect constitutionality? How would a court order be enforced? Despite the confusion, countless suits were filed and numerous lower courts undertook to interpret *Baker v. Carr*. Rarely in U.S. history had a single decision had such an immediate and far-reaching impact. Litigation immediately took place in almost every state in the union.³⁷

³⁴*Id.* at 202.

³⁵*Id.* at 267-270. Justice Frankfurter stated: "A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many states. In such a setting to promulgate jurisdiction in the abstract is meaningless."

³⁶HAMILTON, LEGISLATIVE APPORTIONMENT: KEY TO POWER, 32-33 (1964).

³⁷Congress and the Nation, 1945-1964, *supra* note 26. According to the NEW YORK TIMES, October 21, 1962, p. 71, Col. 1: "70 cases were in the process of litigation in 33 states of the union. 39 of these were in state courts, and 31 cases were in federal courts."

The major questions raised by *Baker v. Carr* were answered on June 15, 1964, when the U.S. Supreme Court rendered a decision in six reapportionate cases.³⁸ The leading case of *Reynolds v. Sims* was litigation concerning the malapportionment of the Alabama Legislature. From this series of cases seven basic principles for reapportionment of state legislatures can be gleaned: First, the Equal Protection Clause of the 14th Amendment to the Constitution requires "with respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live."³⁹ The second principle of reapportionment that these cases held is that:

. . . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. 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.⁴⁰

The third principle is that a "little federal system" with one house apportioned by population and the other by facts such as geography is not constitutionally acceptable.⁴¹ The fourth principle brought out by this series of cases is that "mathematical exactness of precision"⁴² in carrying out legislative districts might be impossible, but that apportionment must be "based substantially on population."⁴³ The fifth principle set forth in these cases was that reapportionment of a state legislature is constitutionally required with each 10-year national cen-

³⁸*Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. 44th General Assembly*, 377 U.S. 713 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). The Supreme Court on June 22, 1964, using the above-mentioned cases as precedent, invalidated reapportionment plans of nine other states. *Swann v. Adams*, 378 U.S. 533 (1964); *Meyers v. Thigpen*, 378 U.S. 554 (1964); *Nolan v. Rhodes*, 378 U.S. 556 (1964); *Williams v. Moss*, 378 U.S. 558 (1964); *Germano v. Kerner*, 378 U.S. 560 (1964); *Marshall v. Hare*, 378 U.S. 561 (1964); *Hearne v. Smylie*, 378 U.S. 563 (1964); *Pinney v. Butterworth*, 378 U.S. 364 (1964); *Hill v. Davis*, 378 U.S. 565 (1964).

³⁹*Reynolds v. Sims*, *supra* note 38 at 565. At 562 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 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 could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature."

⁴⁰*Id.* at 568.

⁴¹*Id.* at 573: ". . . the federal analogy [is] inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislature when the system of representation in the Federal Congress was adopted."

⁴²*Id.* at 577.

⁴³*Id.* at 572. The Court indicated that a good faith effort on the part of a state would be considered to be constitutionally acceptable.

sus.⁴⁴ The sixth principle brought out by the Court was that an election should be prevented from taking place under an unconstitutional apportionment plan; however:

In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.⁴⁶

The seventh and final principle the Court enunciated was that if the citizens of a state, through referendum or initiative laws, had approved an apportionment plan based on any other principle than population, it would be unconstitutional because a "citizen's constitutional rights can hardly be infringed upon because a majority of the people choose to do so."⁴⁷ These principles are basic considerations which any state must account for in developing any type of reapportionment plan, and any reapportionment plan that does not comply with these basic guidelines will be declared unconstitutional.

Several states, especially those located in the South, used what was known as the "County Unit Voting System." In essence this system divided the counties of a state into miniature electorates, and as a candidate ran for a state office he was given the "electoral" votes of each county in which he won the popular vote. This system allowed a candidate to win the popular vote in a given election but still lose the election because the candidate failed to obtain a sufficient number of "county unit votes." On March 18, 1963, in the case of *Gray v. Sanders*⁴⁸ the Supreme Court of the United States found that the "unit voting system" of Georgia was unconstitutional as a violation of the Equal Protection Clause to the 14th Amendment.⁴⁹ Although *Gray v. Sanders* was not a reapportionment case *per se*, the Court did indicate that the Fourteenth Amendment's Equal Protection Clause was going to be interpreted in the future as meaning "one man, one vote."

Apportionment problems also came into existence in regard to U.S. Congressional Districts. On February 17, 1964, in the case of *Wesberry v. Sanders*,⁵⁰ the U.S. Supreme Court ruled that congressional districts

⁴⁴*Id.* at 583-584, the Court stated: "In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual, or biennial reapportionment so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

⁴⁵*Id.* at 585.

⁴⁶*Id.*

⁴⁷*Lucas v. 44th General Assembly*, *supra* note 38 at 736-737.

⁴⁸372 U.S. 368 (1963).

⁴⁹*Id.* at 381, the Court stated: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Sixteenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

⁵⁰376 U.S. 1 (1964).

would have to be as equal in population as possible.⁵¹ That case relied upon *Baker v. Carr* to support the contention that this type of districting question is justiciable and upon *Gray v. Sanders* to establish the principle that one man, one vote is applicable to national congressional elections as well as state legislative elections.

THE STATES FIGHT BACK: THE DIRKSEN AMENDMENT⁵²

By late summer of 1964, the reapportionment decisions of the Supreme Court were subjected to a great deal of criticism. The Republican National Convention in San Francisco adopted a platform plank urging an amendment to the Constitution in order to allow the individual states to base at least one house of their state legislature on a basis of an element other than population. Senator Everett Dirksen (R.-Ill.) introduced a bill that would have placed a two-year moratorium on reapportionment legislation in most states, and this was attached as a "rider" to the foreign aid bill that was presently before the U.S. Congress. This "rider" was later struck by a Conference Report; however, the threat of this type of congressional action forced the reapportionment forces in Congress to unite. Support for a constitutional amendment was growing, and by the end of 1964, the United States Congress began to feel the impact of this growing popular demand.⁵³ The attack of these anti-reapportionment forces was based on the concept that the states had the right to select through the initiative and referendum the type of state legislatures that were to exist in the individual states. These forces also demanded that Congress call a Constitutional Convention under Article V of the U.S. Constitution. Petitions by two-thirds of the states would require Congress to call this national convention for the purpose of considering proposed amendments. The strategy of the anti-reapportionment forces was built on the theory that Congress would be forced to amend the Constitution on its own initiative, by a two-thirds vote of each house, or else be faced with the uncertain prospect of calling a Constitutional Convention. As the anti-reapportionment forces gained support, the pro-reapportionment forces

⁵¹*Id.* at 8-9, the Court stated: "To say that a vote is worth more in one district than another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the people,' a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adopting of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives."

Id. at 18, the Court stated: "While 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."

⁵²For a concise and short summary of the attempts to limit the reapportionment decisions of the Supreme Court see, Hanson *The Politics and Semantics of Constitutionalism* POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 82-102 (1966).

⁵³Such organizations as the American Farm Bureau Federation and the Chamber of Commerce of the United States favored a Constitutional Amendment to limit the decisions that were rendered in the reapportionment cases.

shifted their plan of attack into high gear.⁵⁴ The basic strategy of the pro-reapportionment forces was to delay because as time passed more and more state legislatures would be forced to reapportion by court action. As the make-up of legislatures changed, the pro-reapportionment forces would gain support.

In January of 1965, Senator Dirksen proposed an amendment that provided for "the right and power to determine the composition of the legislature of a state and the apportionment of the membership thereof shall remain in the people of that state." Secondly, this proposed amendment provided for the use of "factors other than population" in determining the composition of a state legislature. Finally, Dirksen's proposal provided for the use of a state referendum for determining what factors were to be used to select the composition of a state legislature.⁵⁵ This proposed amendment was referred to the Senate Judiciary Committee for consideration. Because of other business the committee was unable to consider it until March of 1965. The hearings of this committee allowed "pro" and "anti" reapportionment elements to dispute the issue. The proposal finally reached the Senate floor where Senator Tydings (D.-Maryland) gave an eloquent speech against the Dirksen amendment.⁵⁶ By June of 1965, the tide of popular support in the country had turned against the amendment. After political maneuvering on both sides of the aisle, the Dirksen Amendment went down in defeat by a vote of 57-39.⁵⁷

⁵⁴Such organizations as the American Civil Liberties Union, Americans for Democratic Action, Conference of Mayors, Maryland Reapportionment Movement, and Senator Paul Douglas (D.-Ill.) favored the strict and speedy enforcement of the Reapportionment Decisions of the U.S. Supreme Court.

⁵⁵S. J. Res. 44, 89th Cong., 1st Sess. (1964). Senator Frank Church (D-Idaho) also introduced two versions of the same amendment, S.J. Res. 37 and S.J. Res. 38.

⁵⁶U.S. CONGRESSIONAL RECORD 11848-61. Senator Tydings' objections to the amendment were as follows:

1. The first sentence eliminated judicial review by the courts. (i.e. the right and power to determine the composition of the legislature of a state and the apportionment of the membership thereof shall remain in the people of that State.
2. The vagueness of "other factors" would allow discrimination against Negroes and other minorities.
3. The right of representation should not be submitted to a referendum.
4. Even if it should be submitted, the Dirksen Amendment made no provision for subsequent review by the people thus freezing a malapportionment for all times.
5. Such an amendment should not be referred to the legislatures with a vested interest in continuing malapportionment, but to convention.
6. There was no historical basis for the Dirksen assumption that one house of a legislature should be based on factors other than population.

⁵⁷U.S. CONGRESSIONAL RECORD 18660.

*WHAT SOLUTIONS ARE AVAILABLE TO ENABLE A STATE
TO COMPLY WITH THE CONSTITUTIONAL REQUIREMENT
TO REAPPORTION?*⁵⁸

The first solution to the reapportionment problem is for the individual state legislatures to reapportion themselves.⁵⁹ Most states, however, are reapportioned under a combination of judicial-legislative action. Either the legislature fails to reapportion and a suit is brought to compel reapportionment; or a legislature reapportions, and a suit is brought to test the constitutionality of the reapportionment.

Legislative action has been one of the most satisfactory methods of reapportionment because a legislature is able to consider, to a limited extent at least, historical, economic, geographic, and demographic trends existing within a state. The legislature, however, must reapportion itself within the numerous constitutional guidelines the U.S. Supreme Court has set forth in the various reapportionment cases. Legislative reapportionment, however, does have several significant drawbacks. Partisan politics and various interest groups often have conflicting ideals as to what the new apportionment should be. Legislators, who are also politicians, do not want to dilute the strength of their party, and legislators do not wish to combine their personal district with the district of another. After reapportionment some incumbent legislators are forced to run against other incumbent legislators of the same party because the reapportionment has combined their two districts. At any rate, over half of the states in the nation have attempted to comply with the reapportionment mandate of the Supreme Court by reapportioning through legislative action.⁶⁰

A second "method" by which a state can be reapportioned is for the state legislature to do nothing or at best be unable to agree on what form of reapportionment the state should follow. In cases such as this, the federal courts or the supreme court of the individual state will draw

⁵⁸For an excellent study of the apportionment plans of the various states, see, *Apportionment in the Nineteen Sixties: State legislatures and Congressional Districts* by the National Municipal League (August 1967, revised November 1970).

⁵⁹*Id.* California, CAL. CONST. art. 4, § 6; Idaho, IDAHO REV. STAT. 67-204; Indiana, IND. CONST. art. 4, § 5; Kansas, KAN. CONST. art. 2, § 2; Maine, ME. CONST. art. IV, pt. 1, § 1; Maryland, MD. CONST. art. III, § 2 *et seq.*; Minnesota, MINN. CONST. art. IV, § 2; Mississippi, MISS. CONST. Ch. 15, Title 2, § 3326; Nebraska, NEB. CONST. art. III, § 5; Nevada, NEV. CONST. art. IV, § 5; North Carolina, N.C. CONST. art. II, § 3 *et seq.*; South Dakota, S.D. CONST. art. III, § 5; Tennessee, TENN. CONST. art. II, § 5-6; Texas, TEX. CONST. art. III, § 25 *et seq.*; Virginia VA. CONST. art. IV, § 43; Washington, WASH. CONST. art. II, §2-3; West Virginia, W.VA. CONST. art. VI, § 7; Connecticut, CONN. CONST. art. III, § 6; Delaware, DEL. CONST. art. II § 2-2a; Utah, UTAH CONST. art. IX, § 1-4; Vermont, VT. CONST. Ch. 2, § 18; Georgia, GA. CONST. art. III, § 3, Ch. 2-15.

⁶⁰*Id.*

up the necessary reapportionment plan.⁶¹ This method's disadvantage is that the courts do not usually consider any other factors except population in drawing up a reapportionment plan; consequently, districts, counties, townships, boroughs, and other political subdivisions are often indiscriminately combined in order to achieve a fair reapportionment. One must also consider the various advantages this method possesses. First, a scrupulously fair reapportionment is obtained. Second, political fighting and bipartisan politics are completely removed from the reapportionment environment of the judiciary. Judicial reapportionment is usually frowned on by state legislatures because legislators consider reapportionment to be an issue that is to be reserved solely for their judgments. Legislatures do not "interfere" with the matters of the judiciary; therefore, the judiciary should not "interfere" with legislative reapportionment matters. Often the mere threat of judicial intervention is a sufficient stimulus to force a legislature to reapportion itself.⁶²

A third method that is used to comply with the reapportionment requirements of the U.S. Constitution is to call a state constitutional convention or at least to propose a state constitutional amendment.⁶³ States have many problems with this type of procedure. How does a state select delegates for this convention? How does the state insure these delegates represent all of the various interest groups within a state? What is the scope of the convention to be? Is the convention merely to draw up amendments to the present constitution? All constitutional conventions are faced with the following problems: political fighting, bipartisan politics, drafting proposals, excessive lobbying, restrictive compromises, etc. A malapportioned constitutional convention's acts will also have the problem of questionable constitutionality, in light of the various U.S. Supreme Court decisions in regard to reapportionment. One must not rule out the possibility that where constitutional amendments and new constitutions are submitted to the voters of a state for ratification, the citizens of the state may reject the proposals. For these reasons, constitutional conventions and constitutional amendments are not the most popular methods of satisfying the reapportionment requirements of

⁶¹*Id.* For example: Arizona: *Klahr v. Goddard*, 250 F. Supp. 537 (D.C. Cir. 1966); Arkansas: *Pickens v. Board of Apportionment*, 246 S.W.2d 556, 220 Ark. 145 (1952); Florida: *In re Advisory Opinion to the Governor*, 150 So.2d 721 (1963); Hawaii: *Burns, Governor of Hawaii v. Richardson et al.*, 386 U.S. 73 (1966); New York: *Orans v. Rockefeller*, 265 N.Y.S.2d 49 (1965); Louisiana: *Le Dourx v. Parish Democratic Executive Committee of St. Landry Parish*, 156 So.2d 48, 244 La. 901 (1963); Wisconsin: *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 22 Wis.2d 544 (1964).

⁶²*Id.* The discussion of California provides an excellent illustration of the point.

⁶³*Id.* Iowa, IOWA CONST. art. III, § 33-35; Hawaii, HAWAII CONST. art. III, § 4; New Jersey, N.J. CONST. art. IV, § 3, par. 1; Rhode Island, R.I. CONST. amend. 19; Pennsylvania, PENN. CONST. art. 2, § 17; Colorado, COLO. CONST. art. V, § 48; Massachusetts, MASS. CONST. art. XXI, § 123; New Hampshire, N.H. CONST. art. IX, pt. 2; Missouri, Mo. CONST. art. III, § 2. This list is not exclusive because states often use constitutional amendment and constitutional conventions in conjunction with legislative and judicial action.

the U.S. Constitution. On the other hand, the advantages of this method are obvious. The state is able to forget any malapportionment problems that existed in the past, and the convention is able to write a new constitution without having to worry about previous state constitutional mandates. No one really knows how to deal with the problems that are inherent in a constitutional convention, but recognizing that these problems do exist enables one to avoid the pitfalls.

A fourth method of complying with the Supreme Court requirements of apportionment is to organize a Reapportionment Commission.⁶⁴ Under this mode, the Commission draws up the reapportionment plan for the state. The plan may either be mandatory for a state to accept, or the plan may be merely advisory in that the legislature, courts, or voters of the state will have to enact the proposed plan into law. This method has met with some success in that a fair reapportionment plan is usually obtained, and a small group of men seem to be able to reach compromises and obtain equitable results much quicker than a legislative assembly. The reapportionment commission is also able to meet during the legislative assembly term, and the state is not faced with the unhappy prospect of a paralyzed state government while the legislative assembly attempts to reapportion itself. A state is still faced with the problem of selecting members for the reapportionment commission, and often partisan politics will come into play just as quickly on a reapportionment commission as it will in the legislative assembly.

Upon failure of any of these plans, the judiciary may prohibit a state legislature from enacting any laws until an equitable reapportionment solution is found.⁶⁵ The judiciary may also require that the next legislative election be held "at large."⁶⁶ Although this usually provides for an equitably apportioned legislature, the problems with an "at large" election are enormous. Instead of running in a county or other political subdivision, a state legislator must run on a state-wide ballot. This not only increases the time and money involved in a political campaign, but the voter is usually thoroughly confused by the mass of names from which he is required to select his legislative representatives.

⁶⁴*Id.* OHIO CONST. art. XI, § 1 *et seq.*; N.J. CONST. art. IV, § 3, par. 1. This list is not exclusive because states often use reapportionment commissions in conjunction with constitutional, legislative and judicial action.

⁶⁵*Id.* WASH. CONST. art. II, § 2-3; VT. CONST. Ch. 2, § 18; CONN. CONST. art. III, § 6.

⁶⁶*Id.* This occurred in Illinois in 1964.

REAPPORTIONMENT IN MONTANA⁶⁷

In 1965, on the basis of the U.S. Supreme Court decisions in regard to reapportionment,⁶⁸ Mrs. Phoebe Herweg, a citizen of Butte, brought a suit in federal district court to compel reapportionment.⁶⁹ The federal district court retained jurisdiction, but refrained from granting relief pending action by the 39th Legislative Assembly to reapportion itself. Although several bills were introduced, the Montana Legislature failed to reapportion itself, and in August of 1965, the federal district court under its continuing jurisdiction reapportioned the Montana Legislature. This has been the reapportioned form of the Montana Legislature; it is the present form of the Montana legislature.⁷⁰ The federal district court also reapportioned Montana's two congressional districts as required by the Supreme Court of the United States.⁷¹

When the 42nd Montana Legislature convened on January 4, 1971, the state was faced with a financial crisis; consequently, although the legislators knew that reapportionment was mandatory, financial affairs of the state took precedence over reapportionment. Three House Bills were introduced in the Montana House of Representatives. The first bill, House Bill No. 502, was introduced by Representatives Towe and T. L. Murphy.⁷² This bill provided for 80 single-member legislative districts and 40 single-member senate districts, and the electors of a senate district were provided with the option of selecting two House members-at-large instead of voting for each House member in a single-district

⁶⁷For an excellent article dealing with reapportionment in Montana see, Waldron, *supra* note 7. Professor Waldron also discussed Montana Reapportionment in *Apportionment in the Nineteen Sixties*, Id.

⁶⁸*Id.* Waldron states: "In 1889 Montana became the first state expressly to establish a legislature on the federal analogy; the constitution decreed that its senate would have one senator per county. Sixteen counties became 56 by 1925; yet population growth slackened abruptly and people moved to the cities after World War I. Meanwhile, the assembly had given each county one representative as well, so that by 1961 only 38 of 94 representatives were allocated by a population formula. Decennial reapportionment by legislative action deepened malrepresentation."

⁶⁹*Herweg v. 39th Legislative Assembly*, 246 F. Supp. 454 (D. Mont. 1965). *Apportionment in the Nineteen Sixties*, *supra* note 58. "Until November 1966, the state constitution prohibited subdivision of counties in legislative districting. (art. VI, § 3 of the Montana Constitution states: Representative districts may be altered from time to time as public convenience may require. When a representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be. No county shall be divided in the formation of representative districts.) Observing this requirement, the court shifted the legislature mostly single-member to predominantly multi-member districts . . . The 1965 assembly proposed a constitutional amendment which was approved by the people in November 1966. While deleting constitutional provisions incompatible with the reapportionment cases, this amendment also permits the legislature to subdivide counties and to return to single-member districts. The amendment contains a wistful anticipation that the Dirksen amendment might permit return of the senate to one senator per county. The federal court refused a petition to enjoin vote on its ratification, declaring that the effect of this provision was speculative."

⁷⁰REVISED CODES OF MONTANA, §§ 43-106.1 and 43-106.2 (1947). [Hereinafter cited as R.C.M. 1947].

⁷¹*Roberts v. Babcock*, 246 F. Supp. 396 (D. Mont. 1965).

⁷²Thomas E. Towe (Dem.-Yellowstone County) and Terry L. Murphy (Dem.-Jefferson County).

manner.⁷³ This bill was killed in the Legislative Reapportionment Committee on February 10, 1971.⁷⁴

The second bill, which was House Bill No. 601, was introduced by Representatives Gunderson, Towe, Swanberg, Line, and T. L. Murphy.⁷⁵ This bill would have established a bipartisan apportionment commission to be created after each federal census for the purpose of studying the feasibility of dividing the Montana Legislature into single-member districts. This commission was to report its findings to the next state legislative assembly for the lawmakers consideration. The commission was to be composed of the leaders of the majority and minority parties in each chamber of the legislature, and these members of the commission were to select a non-office-holding citizen of Montana for a neutral chairman. This bill was killed on the second reading on March 1, 1971.

The third bill to be introduced in the House was Bill No. 552 and was the report of the Legislative Reapportionment Committee. The original bill provided for a Senate of 42 members and a House of 85 members; however, this division was not acceptable, and on February 7, 1971, the Reapportionment Committee submitted a revised version of Bill No. 552. The new revision provided for a Senate of 45 members and a House of Representatives composed of 88 members. This revision also contained a provision that enabled the legislative districts to divide multi-member districts into single-member districts.⁷⁶ This new revision was not acceptable; consequently, on February 12, 1971, the Reappor-

⁷³The difference between "single-member" and "multi-member" districts is that a single-member district is one in which one legislator is elected from the entire district. Multi-member districts provided for several legislators to be elected by the voters from that district. According to Waldron, *supra* note 8 at 21-22: "Single-member districts are commonly said to permit better representation of local minorities, more knowledgeable voting because of the short ballot, and more responsible relations between the legislator and his constituents. Multi-member districts are supposed to place less emphasis on parochial interests of the locality, to strengthen the party responsibility required to achieve the large objectives of a political system, and reduce opportunities for gerrymanderer partisan advantage."

⁷⁴The members of the House Reapportionment Committee of the 42nd Montana Legislative Assembly are: Chairman Harrison G. Fagg (Rep.-Yellowstone County), Vice-Chairman William R. "Lefty" Campbell (Rep.-Missoula County), L. M. Larry Aber (Rep.-Stillwater County), Robert A. Ellerd (Rep.-Gallatin County), Jack Gunderson (Dem.-Cascade County), Albert E. Kosena (Dem.-Deer Lodge County), Conrad F. Lundgren (Rep.-Flathead County), Hershel M. Robbins (Dem.-Musselshell County), and A. A. Zody (Dem.-Dawson County).

⁷⁵Jack Gunderson (Dem.-Cascade County), Thomas E. Towe (Dem.-Yellowstone County), Terry L. Murphy (Dem.-Jefferson County), Gorham E. Swanberg (Dem.-Cascade County), and Orphey "Bounty" Lien (Dem.-Roosevelt County).

⁷⁶See *supra* note 73, and § 3 of H.R. Bill No. 552 which states: "Multi-member districts may be divided into single-member districts under the following conditions: (a) A petition representing eight percent (8%) of the registered voters of a multi-member district has been submitted to the county clerk and recorder of each county, or portion of a county in the district; (b) The county commissioners of each county which, in part or whole, consists of a portion of a multi-member district shall establish a time of election; (c) A majority of the registered voters of the district so orders; (d) The plan of single-member districts shall be effective upon the approval of the majority of the county commissioners of each county which, in part or whole, consists of a portion of the multi-member district; (e) Single-member districts shall be as compact as possible, comprise contiguous territory and shall be as nearly equal as practicable in population."

tionment Committee submitted a second revision. This revision provided for a Senate of 45 members and a House of 89 members, and retained with some slight modification the provisions for a division of multi-member districts into single-member districts. This revision was not acceptable. On February 13, 1971, the Reapportionment Committee submitted a third revised version of Bill No. 552. The Senate was to be composed of 45 members and the House was to be composed of 89 members. The multi-member districts to single-member districts provisions were retained; however, the new revision separated Deer Lodge County from Jefferson, Powell and Granite Counties. This would have enabled Deer Lodge County to have a completely separate Senate seat. This revision was amended on February 27, 1971, by the Senate Committee of Reapportionment. The amendment increased the membership of the Senate from 45 to 56. When the 42nd Legislative Assembly adjourned its regular session on March 4, 1971, House Bill No. 552 died in a conference committee.

During the regular session of the legislature three joint house and senate resolutions were introduced to the legislature. The first of these resolutions was Joint Resolution No. 47 and was introduced by legislators Selstad, Keller and T. L. Murphy.⁷⁷ The resolution provided for single and dual-member districts instead of the present multi-member districts that exist in the larger counties of the state. This resolution was killed in the Reapportionment Committee on February 10, 1971. The second Joint Resolution, No. 48, was introduced by the Reapportionment Committee. This resolution stated that a bipartisan reapportionment commission should be established to present plans to the legislative assembly on solutions to Montana's reapportionment problems and methods to reapportion the legislative districts. This resolution was killed during the second reading which took place on February 12, 1971. The third and final joint senate and house resolution was introduced by the Reapportionment Committee. This resolution, which was Joint Resolution No. 24, provided for certain guidelines to be followed in

⁷⁷Tom Selstad (Rep.-Cascade County), Terry L. Murphy (Dem.-Jefferson County), and M. F. Keller (Rep.-Cascade County).

reapportioning the Montana Legislature.⁷⁸ This resolution was killed on March 1, 1971.

On March 4, 1971, the regular session of the 42nd Legislative Assembly adjourned without having reapportioned itself, and on March 8, 1971, the 42nd Legislative Assembly began the first of two extraordinary sessions. Reapportionment had by now reached the forefront of the problems that faced the Assembly. Finally, on March 10, 1971, the Reapportionment Committee approved Extraordinary Senate Bill No. 1. This bill provided for a senate of 56 members and a house of representatives that was to be composed of 104 members. This bill was passed by the Montana legislature and was signed into law on April 6, 1971, by Governor Forrest Anderson. A suit was immediately filed to test the constitutional validity of this reapportionment.⁷⁹

On June 11, 1971, a three-judge court sitting in Billings, Montana, ruled the reapportionment plan of the 42nd Legislative Assembly to be unconstitutional. The court did not believe that a deviation of 37.06 percent between the smallest and largest house districts and a deviation of 23 percent between the smallest and largest senate districts was constitutionally acceptable. The court stated:

It is clear from the record that in drafting Chapter Ex-3 (Extraordinary Senate Bill No. 1 which was enacted into law) the Montana legislature took the maximum deviation reflected in the Herweg decision as the acceptable standard and devised a plan within those limits which resulted in the least possible change from the

⁷⁸The 42nd Legislature was unable to agree on these general guidelines: That the senate shall consist of not less than forty (40) members; not more than fifty (50) members, and that the senate districts may be single-member or multi-member districts, and that the house of representatives shall consist of not less than eighty (80) members nor more than one hundred (100) members, and that the members of the House of Representatives shall be elected from single-member districts or multi-member districts, and that to the extent practicable, districts for election house members should be created from portions of senate districts, and that districts shall be compact, comprise contiguous territory, and that county boundaries should be observed to the extent practicable, and that multi-member districts shall be divided into single-member districts under the following conditions: (a) A petition representing eight (8) percent of the registered voters of a multi-member district has been submitted to the county clerk and recorder of each county, or portion of a county, in the district; (b) The county commissioners of each county which, in part or whole, consists of a portion of a multi-member district shall establish a time of election; (c) A majority of the registered voters of the districts so orders; (d) The plan of single-member districts shall be effective upon the approval of the majority of the county commissioners of each county which, in part or whole, consists of a portion of the multi-member district; (e) Single-member districts shall be compact, comprise contiguous territory and shall be as nearly equal as practicable in population.

⁷⁹*Wold v. Anderson*, Governor of the State of Mont. 28 Mont. St. Rep. 585, 586, 327 F. Supp. 1342 (D. Mont. 1971). The Court stated: "By decree entered August 10, 1965, in the case of *Herweg v. the Thirty-ninth Legislative Assembly of the State of Montana*, 246 F. Supp. 454, this Court ordered into effect a plan for the apportionment of members of the Senate and House of Representatives of the Montana Legislative Assembly for the 1966 election, retaining jurisdiction for the purpose of passing upon any plan of reapportionment enacted by the Fortieth Legislative Assembly." No appeal was taken from the plan contained in *Herweg* (Ch. 194, L. 1967, R.C.M. 43-106.1 and 106.2) and members of the Montana Legislative Assembly were elected pursuant to this plan in 1968 and 1970.

status quo. But the equal protection clause of the Constitution, not Herweg provides the standard to which the Legislature must aspire.⁸⁰

The court also stated that since the 42nd Montana Legislative Assembly was still in the second extraordinary session that: "We reserve jurisdiction to make such order as may be appropriate following such session."⁸¹

The result of this court's decision was to return the reapportionment issue to the 42nd Montana Legislature, which had entered into the second of two extraordinary sessions. A compromise bill,⁸² which was a variation of the previously unacceptable reapportionment plans that had been drafted by the Senate and House reapportionment committees,⁸³ was presented. This new plan was subdivided into four subsections. The first two subsections⁸⁴ reduced the legislature from 55 senators and 104 representatives to 50 senators and 100 representatives. The county boundaries of Carter, Sweet Grass, Valley, Yellowstone and Missoula were changed to form 23 legislative districts. The second part of this plan provided for multi-member districts to subdivide themselves into single-member districts.⁸⁵ Eight percent of the registered voters would file a petition demanding that a general election be held to determine whether the legislative district should be subdivided into single-member districts. If the majority of the voters at such an election agree to subdivide the legislative district, then the county commissioners of the affected counties shall divide the multi-member district into single-member districts. The third portion of this bill provided for the adjustment of senatorial terms.⁸⁶ The result of this was that hold-over senators from districts which remain essentially unchanged would not have to seek re-election in 1972. The amendment would save 14 senators elected last year from having to run before their terms expire. This bill passed the House of Representatives on June 23rd by a vote of 51-34, and the bill passed the Senate on June 24th by a 42-3 vote. The 42nd Session of the Montana Legislature adjourned at the end of June, and questions immediately arose as to whether or not this compromise reapportioned plan fulfilled the U.S. Constitutional requirements that were set forth in the various Supreme Court decisions. The whole issue of whether the new law complied with the constitutional requirements hinged on the fact that the new reapportionment plan had a deviation of 10 or 11 percent. Is this deviation constitutionally acceptable?

⁸⁰*Id.*

⁸¹*Id.*

⁸²Extraordinary Session II, H.R. Bill No. 40.

⁸³*See, supra* notes 68-80, for previously unacceptable reapportionment plans that had been submitted to the previous sessions of the Montana Legislature.

⁸⁴R.C.M. 1947, §§ 43-106.6, n. 43-106.7.

⁸⁵R.C.M. 1947, § 43-106.8.

⁸⁶R.C.M. 1947, § 43-106.9.

On July 3, 1971, Russell K. Fillner, a Billings attorney, asked a three-judge U.S. District Court panel to review the new reapportionment which the 42nd Legislative Assembly had enacted. This court, which had ruled the first reapportionment plan unconstitutional,⁸⁷ stated on June 11, 1971:

We take judicial notice of the fact that the Montana legislative assembly is now in extraordinary session. We reserve jurisdiction [over the reapportionment issue] to make such orders as may be appropriate following such session.⁸⁸

Both Senate Majority Leader Dick Dzivi of Great Falls and Senator Neil J. Lynch, D-Butte, consider the present reapportionment plan to be a constitutionally acceptable attempt to reapportion the Montana Legislature, and both filed supporting affidavits. The State of Montana maintains that the law is constitutional, and briefs were filed to this effect by Charles H. Dickman and Charles C. Lovell for the Montana Attorney General's Office.

Fillner, in his brief, argues that the legislature aimed not for districts that are as equal as possible but merely districts which deviate from each other in population by no more than 10 percent. Fillner also argues that the present law is unconstitutional because the districts created are not as equal in population as those proposed in other bills. Fillner contends that the present plan was subjected to political gerrymandering in several counties to save the seats of incumbent legislators.

The final decision will have been made by the three-judge court by the time this comment has been published.

A REAPPORTIONMENT PROPOSAL TO THE MONTANA CONSTITUTIONAL CONVENTION

Reapportionment will always be one of the main problems of which Montana legislatures, as well as the legislative assemblies of other states, must be cognizant. One of the simplest and quickest ways to solve any reapportionment problem is to do nothing and then let the courts, federal and state, reapportion the legislative assemblies. Legislators are understandably hostile to this solution, and to some extent justifiably so. Courts do not consider, nor should they be expected to, the various geographical, social, historical, and other such interest groups that make up the character of the citizenry of a state. Legislators, who represent in varying degrees these political groups, are aware of this competing interest of citizens. Legislators should be the men who reapportion the legislature, and courts should only step into the picture when the legislature either fails to reapportion or malapportions the assembly giving more weight to one set of citizens' interests than that group justifiably deserves. Montana does have a method by which the legislature can reapportion itself; it should be written into the new Constitution. Pro-

⁸⁷Wold v. Anderson, *supra* note 79.

⁸⁸Wold v. Anderson, *supra* note 79 at 588.

posals⁸⁹ were introduced during the 42nd Legislative Assembly that with some slight modification can be written into the new constitution to provide a solution to Montana's reapportionment woes. The following is the author's reapportionment proposal for the new constitution.

**ARTICLE: LEGISLATIVE DEPARTMENT
APPORTIONMENT**

Sec. 1 Senatorial. The Montana Legislative Assembly shall redistrict the state after each federal census for the purpose of electing state senators. All senatorial districts shall be formed of contiguous and compact territory. In their formation, area shall be the prime consideration. All districts shall be as equal as practicable in population.

Sec. 2 Representative. The Montana Legislative Assembly shall redistrict the state after each federal census for the purpose of electing state representatives. Representative districts shall be formed of contiguous and compact territory. All districts shall be as equal as practicable in population.

Sec. 3 Population. Population shall be determined by each federal census.

These are standard phrases used by most state constitutions,⁹⁰ and no specific mention is made of whether or not Montana should be composed of single, dual, or multi-member districts. We have already noted the arguments "pro" and "con" for each system.⁹¹ The author's personal opinion would be that "single" member districts are much easier to deal with and provide easier bases from which to reapportion. Montana legislators, and Montana citizens, appear to have a strong affection for the 56 individual counties, and single-member districts would cut across and through many individual counties. On the other hand, multi-member districts would preserve, to some extent at least, the individual county lines. At present, Montana has a combination of both. The larger counties such as Cascade, Yellowstone, and Silver Bow are represented by several legislators. The smaller counties or groups of counties are only represented by one legislator. If the new constitution does not incorporate a mandate for a particular mode of redistricting, the future Montana legislative assemblies will be free to choose the type of system that would best represent Montana.

In regard to the definition of "population" the author can see no sound policy for excluding foreign aliens,⁹² Indians non-taxable,⁹³ or servicemen on active duty.⁹⁴ This is a policy judgment based on two basic principles. All persons domiciled in a district are entitled to representation. These people purchase gasoline, alcoholic beverages, tobacco products, and other such taxable items; therefore, they should be

⁸⁹H.R. Bill No. 601 and H.R.J. Res. 48, *supra* note 77.

⁹⁰The constitution that Montana presently follows for these provisions is that of Illinois. ILL. CONST. art. IV, §§ 6-7.

⁹¹Waldron, *supra* note 73.

⁹²ME. CONST. art. IV, p. 1, 2 and Pt. III; NEB. CONST. art. III, § 5; N.Y. CONST. art. 3, § 4-5; CAL. CONST. art. IV, § 6; and N.C. CONST. art. II, §§ 4-6.

⁹³MINN. CONST. art. IV, §§ 2, 23; N.C. CONST. art. II, §§ 4-6; WASH. CONST. art. II, § 3; and WIS. CONST. art. IV, § 3.

⁹⁴WASH. CONST. art. II, § 3 and WIS. CONST. art. IV, § 3.

given representation as to how their tax dollar is to be spent by the government. This argument is strengthened in states with a sales tax. The second principle, which is of lesser importance because computers often do most of the work, is that economic savings will result: The census bureau will not have to waste the necessary time and money auditing federal census returns to discover who is an "exception" to the population figures.

Sec. 4 Reapportionment. At each legislative assembly, after the taking of each federal census, the Montana Legislature shall re-district and reapportion itself in a single legislative enactment. If however, after the thirtieth (30) business day from the start of the legislative session, the legislators fail to redistrict and reapportion itself then the redistricting shall be accomplished by a commission.⁶

This section would give to the legislature the chance to draft a new reapportionment plan. The thirty-day time limit should provide adequate time for such a plan to be drafted, revised and adopted. If the legislature either cannot or will not reach a reapportionment agreement, then the burden of redistricting should fall upon a commission. The important feature of this plan is that the legislature is forced to act immediately.

Sec. 5 Reapportionment Commission. Within 15 days, after the thirtieth (30) business day of the legislative assembly, the state central committee of each of the two political parties casting the highest votes for governor at the last preceding gubernatorial election, shall submit to the governor of the state a list of ten persons. Within thirty days thereafter, the governor shall appoint the commission of ten members, five from each list. If either of the state central committees fails to submit the list within the specified time, the governor, within the specified time, shall appoint five members of his own choice from the party of such committee. This commission shall redistrict the state into senatorial districts and into representative districts in the manner specified. This commission shall file with the secretary of state a full statement of the numbers of the senatorial and representative districts and their boundaries. No such statement shall be valid unless approved by seven members of such commission.⁷

This section provides for the two major parties in the state to be represented on the reapportionment commission, and the parties are able to select their best partisan negotiators for this task. The governor has the final choice in selection of this commission. The governor has been selected by a majority vote, or perhaps a plurality, of the voters of the state. Because of these factors, the governor should be the one to have the final choice. One must always be cognizant of the possibility that the Montana Supreme Court will have to make a decision on the constitutional validity of any reapportionment plan, making it necessary to refrain from involving any member of the Supreme Court in the formation of a plan. This section requires a seven-vote majority on any reapportionment decision, so that any new reapportionment plan must obtain more than a mere majority vote of the members of the com-

⁶This provision is also found in the constitution of Illinois and Missouri. ILL. CONST. art. IV, § 8 and Mo. CONST. art. III, § 7.

⁷*Id.*

mission, insuring that the redistricting will be acceptable to both major parties. A financial reimbursement provision for commission members should be enacted through enabling legislation.

Sec. 6 Failure of Reapportionment Commission. If a majority of the commission cannot agree on a plan each member of the commission individually or jointly with other members must submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in these sections.

Upon the application of any elector or commission member filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of the Montana or United States Constitution.

This section would guarantee to Montana a reapportionment plan even if the commission were unable to agree on how to redistrict the state. The commission, even if not in agreement, would be forced to submit considered plans to the Montana Supreme Court, which would be the final judge or arbitrator of the plans. These justices, who are citizens of Montana, would be able to appreciate and to understand the state's particular reapportionment difficulties. Since the supreme court is nonpartisan in nature, the justices should be able to reach an equitable and nonpartisan solution.⁹⁷

The second paragraph of this section gives any Montana elector or commission member the requisite standing to contest the validity of the adopted reapportionment plan. The Montana Supreme Court is given original jurisdiction to hear the suit.⁹⁸ The Supreme Court is also given the power to compel the commission to act, or the court may remand the reapportionment plan to the commission in order to obtain a new or revised plan if the court believes that the present plan is unconstitutional. The 60-day provision merely guarantees that any suit will be brought in a timely and efficient manner. Needless to say, any elector, at any time, has the requisite standing to challenge any reapportionment plan by taking his suit before the federal courts.⁹⁹

The rationale of this proposed plan is speed and efficiency. The time span from the start of the legislative session to a final judicial decision of the reapportionment plan would be approximately six months. Because the states that have adopted this type of provision have not had a chance to apply the new plans to the 1970 census, its actual operation is yet untested.

⁹⁷MICH. CONST. art. IV, § 6.

⁹⁸Original jurisdiction allows the Montana Supreme Court to be the sole and exclusive authority to hear and to decide the case. This means that a suit, which falls within this category, will come directly in front of the Supreme Court without the necessity of climbing the ladder of appeals. This also means that the Montana Supreme Court must hear and pass judgment on the case in question and is the only court which has the authority to do so.

⁹⁹*Colegrove v. Green*, *supra* note 13, and *Baker v. Carr*, *supra* note 30.

CONCLUSION

The reapportionment issue has evolved from a moot question into one of the most controversial and important problems facing almost every state. Reapportionment has cut across the whole spectrum of our judicial, social, political and historical environment. Montana has been no exception, and this state has been forced to reapportion itself, often through the process of trial and error, by the judicial system. Adoption of the proposal offered in this comment will resolve many of the reapportionment problems that have and may well continue to plague Montana.