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Robert G. Dixon Jr.

Gordon W. Hatheway Jr.

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THE SEMINAL ISSUE IN STATE CONSTITUTIONAL REVISION: REAPPORTIONMENT METHOD AND STANDARDS

ROBERT G. DIXON, JR.*
AND
GORDON W. HATHEWAY, JR.**

INTRODUCTION

The making of a constitution is a great effort which cannot be oft-repeated with any assurance of sustained public interest, or disposition to seek the purified "general will" of Rousseau rather than the common will of current desire. And yet, the constitution-making process is normally viewed as the ultimate affirmation of the principle of government by the consent of the governed. No other central premise is consistent with the basic tenets of democratic theory. To be sure, particular policy responses to shifting public needs are not made by the constitution-forming process, but the institutional basis for making these responses is grounded on the formal constitution.

Once past the stage of constitution-making, we look to the legislature—a deliberative body serving both as guardian and as articulator of the "public interest"—for continuance of the consent basis for government. How well the legislature discharges this dual role is conditioned by a plurality of factors. Beyond the reach of constitution-makers is the degree of that public spirit which the Greeks, for lack of a better term, called "virtue." Within the reach of constitution-makers are formal matters of legislative structure and reapportionment methods and standards—matters which, if properly handled, can transform the popular consent principle into a continuing process of fair and effective representation, and which, if improperly handled, can enshrine parochial interests and the status quo of yesterday.

In short, one moves in a direct line from constitution-making to provision for an effective legislative organ, and to effectuation of the popu-

*Professor of Law, George Washington University National Law Center. Reapportionment consultant to New York, Pennsylvania, and Maryland constitutional conventions.

**B.S., 1965, Bucknell University; J.D., 1968, George Washington University National Law Center. Member of the Bar of the District of Columbia.

lar will through that organ.¹ An effective legislative institution provides the highest assurance that other state governmental matters will be disposed of well. For this reason Chief Justice Earl Warren has said that the initial reapportionment decision in *Baker v. Carr*,² rather than the desegregation ruling in *Brown v. Board of Education*,³ was the most important decision of the Warren Court. He said in a 1968 interview that many of the problems that now confront the nation could have been disposed of earlier if the legislatures had been properly apportioned before the Supreme Court required it.⁴

When we move to the specifics of "properly apportioned" state legislatures we find that, contrary to popular impression, the Supreme Court to date has done little more than require an unspecified degree of population equality. The justiciability of political gerrymandering, the constitutional range of districting options and at-large voting procedures, possible tests of fair and effective representation (including minority representation)—all these and more are open questions leaving much room for maneuver at the state level. Two cases concerning congressional districting in New York and Missouri scheduled for oral argument in the Supreme Court early in 1969 may throw some light on the "equality" and "gerrymandering" issues, but are unlikely to resolve them.⁵

This article discusses continuing reapportionment problems under the two headings of apportionment method, with particular focus on bipartisanship, and state constitutional apportionment standards. Arithmetic equality alone provides no certain direction to apportionment now that the basic "suburban"—"rural" redistribution of seats has been achieved, more or less, in most states. (Most big cities change little under reapportionment.) Indeed, a tight arithmetic equality standard can be a boon to the gerrymanderer, because it gives him carte blanche to ignore traditional boundaries and draw fresh lines with an eye to political profile data. At the same time, effective restraint on gerrymandering is difficult not only because of continuing doubts concern-

1. STATE LEGISLATURES IN AMERICAN POLITICS, American Assembly Essays, (A. Heard ed. 1966); Reviewed, Dixon, 40 S. CAL. L. REV. 604 (1967); COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING STATE GOVERNMENT (Policy Statement 1967).

2. 369 U.S. 186 (1962).

3. 347 U.S. 483 (1954).

4. N.Y. Times, July 6, 1968, at 1, col. 8, at 42, col. 1.

5. Wells v. Rockefeller, 281 F. Supp. 821 (S.D.N.Y. 1968), *prob. juris noted* 89 S. Ct. 115 (1968); Kirkpatrick v. Preisler, 279 F. Supp. 952 (W.D.Mo. 1967), *prob. juris noted* 390 U.S. 939 (1968).

ing the justiciability of the issue, but also because proof would be most difficult even if the justiciability hurdle were surmounted.

Hence, the best assurance of achieving a goal of fair and effective representation is to focus on apportionment method, in the hope that effective operation here will obviate the need for placing reliance on the uncertainties of subsequent review. For many states the answer is to build political candor, cross-checking, and fairness into their apportionment method by use of bipartisan commissions or related devices. In the past three years a trend has arisen as several states, recognizing that nonpartisanship is more a myth than a reality, have turned to the bipartisan commission idea in their constitutional revision deliberations.

The bipartisan commission concept also obviates, or materially eases, the need to continue a search for ever-elusive apportionment standards to channel and supposedly "purify" the discretion of the reapportioners. Nevertheless, the idea of apportionment standards has a continuing appeal, and there are a number of apportionment and districting options which need to be considered by revisers of state constitutions. After delineating recent bipartisan apportionment methodology, which is deemed to be of crucial importance, this study concludes with a discussion of apportionment standards and options.

RECENT ATTEMPTS AT BIPARTISANSHIP IN APPORTIONMENT

Since 1966, five states, New Jersey, New York, Pennsylvania, Maryland, and Hawaii, have proposed new constitutions containing highly formalized bipartisan reapportionment provisions. Three, New Jersey, Pennsylvania, and Hawaii, achieved popular ratification. Special considerations explain the defeat of the draft constitutions in New York and Maryland. There is no indication that defeat was caused by opposition to the provisions for bipartisan reapportionment. A sixth state, Florida, has successfully proposed a new constitution including apportionment provisions, but with bipartisan provisions substantially lacking. As a foundation for comparative analysis of these provisions, a brief description of the respective state proposals and their implementation will be presented at this point.

*New Jersey*⁶

In the spring of 1966, a constitutional convention was convened, composed of an equal member of delegates from each party. The conven-

6. One of the authors of this article has recently published a comprehensive treatise

tion's permanent apportionment plan proposed a forty-member Senate which was to be apportioned among the counties by the method used to apportion the United States Congress.⁷ A requirement that Senate districts be composed of one or more whole and contiguous counties necessitated creation of a predominantly multimember Senate plan, in view of the additional restraint imposed by the limit on the size of the body and the applicable equal population requirements.⁸ Of fifteen Senate districts, three were single-members, and the remaining twelve contained from two to six Senators.

An eighty-member lower house was to be elected from forty two-man districts. These were created by subdistricting the multi-member Senate districts, and by adopting the single-member Senate districts. Assembly districts were to be contiguous⁹ and "as nearly compact and equal in the number of their inhabitants as possible."¹⁰ A twenty percent maximum deviation,¹¹ apparently within each Senate district, was ordained for the two-man Assembly districts.

Finally, the reapportionment function was transferred from the legislature to a bipartisan Apportionment Commission. The state chairmen of the two parties receiving the largest vote in the preceding gubernatorial election were each to appoint five members to the ten-member Commission. In the appointment of commissioners, "due regard" was to be given to geographical dispersion.

ment of reapportionment issues, including a detailed study of the history of reapportionment developments and litigation in the states considered herein, and an analysis of the reapportionment issues considered below in the discussion of reapportionment standards and options. See R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* (1968) [hereinafter cited as *DEMOCRATIC REPRESENTATION*]. Because of limitations of space, a complete treatment of each state's reapportionment history cannot be presented. Accordingly, citations are given to the relevant parts of *DEMOCRATIC REPRESENTATION* wherein may be found a more detailed study and references to other authorities in the field. For New Jersey, see *DEMOCRATIC REPRESENTATION* 333-40, 381-83, 613-14.

7. U.S. CONST. art I, § 3.

8. See *Jackman v. Bodine*, 49 N.J. 406, 231 A.2d 193 (1967).

9. A contiguous district is one in which no part of the district is wholly physically separate from any other part. This "touching" requirement may be waived in instances where parts of states are separated by water, e.g., the Michigan peninsula and the islands of Nantuckett and Martha's Vineyard in Massachusetts.

10. A rule of compactness requires that the perimeter of a district be as small and "regular" in shape as practicable.

11. The maximum percentage deviation is the largest tolerated disparity between the population of the average or ideal district and the smallest and largest districts, respectively. Thus, given an average district of 10,000 population, a 20 percent maximum deviation would require that all districts fall within a range of 8,000-12,000.

The Commission would adopt a plan by majority vote. Failing a Commission majority, an eleventh member, or "tie breaker," was to be appointed by the Chief Justice of the state supreme court, in which case the Commission has an additional month to achieve consensus. All further modification of Senate districts and subdivision into two-member house districts was to be accomplished by the Commission. The governor is without official power to influence the appointment of the Commission or to participate in or overrule its work.

Of the six states discussed herein, only New Jersey has implemented a reapportionment plan pursuant to a new constitution. Vindication of the convention's decision to provide for a tie breaker was not long coming. The Commission deadlocked, Professor Marver H. Bernstein, Dean of the Woodrow Wilson School of Public and International Affairs of Princeton University, was appointed by the New Jersey Chief Justice, and a plan was soon announced.

Professor Bernstein's plan, adopted by an eight to three vote, effected a compromise between the interests of the parties in two of the large counties. Maximum deviations in the Senate and Assembly were + 13.5% to 13.8% and + 13.6% to 17.2% respectively. Seven of 15 Senate districts electing 17 of 40 Senators and 14 of 40 assembly districts electing 38 of 80 Assemblymen exceeded a 10 percent deviation from the average or "ideal" district. The electoral percentages¹² and population variance ratios¹³ for the Senate and Assembly were 49.1 percent and 1.3 to 1, and 47.3 percent and 1.37 to 1, respectively.

Although the leadership of neither party felt its interests to have been substantially prejudiced, several suits challenged the plan. The suits sought elimination of lower house subdistricting, broader use of at-large voting, and a higher degree of compactness. If the real motivations were political, which seems likely in the light of some local comment, they were not overtly disclosed.

The state supreme court required a minor rearrangement of three

12. The electoral percentage is a fiction representing the minimum population theoretically necessary to elect a majority of a legislative house. It is calculated by first ordering all districts by population, smallest to largest. Second, the populations of the smallest districts are summed until the legislators representing such districts constitute a majority of the house. The percentage of the total electorate represented by the population of those districts yields the electoral percentage. An ideal electoral percentage would be fifty percent (or that which represents one more person than fifty percent of the electorate).

13. The population variance ratio represents the ratio by which the largest district exceeds the smallest.

Senate districts which in return required a revision of the Assembly districts contained therein. The court effected some of the alterations itself and extracted the remainder on remand to the Commission.¹⁴ To justify its otherwise unexplainable minor "tinkering," the court relied on the argument that if a more equalized plan in terms of population variance could be effected without completely undoing the Commission's work, such revision is required.¹⁵

The court's decision rejected the *raison d'être* of the bipartisan commission. It noted that "so-called community interests, partisan history, and residence of incumbents . . . are wholly irrelevant to the subject and cannot support deviations of any kind."¹⁶ The court concluded that "[o]ur attention is not called to any other consideration that could conceivably support the discrepancies here involved."¹⁷

On review of the remand to the Commission, the court noted that "the parties acknowledge that the plans were prepared without any awareness of the political complexion of the proposed districts."¹⁸ Without such knowledge the political fairness of the proposed plans remains a matter of chance, and a primary *raison d'être* for using bipartisanship collapses.¹⁹

*Maryland*²⁰

In the fall and early winter of 1967-1968, a constitutional convention convened and proposed a sweeping revision of Maryland's reapportionment procedures. Although there was some controversy over the abolition of multimember districting, other issues were the primary causes of defeat of the proposed constitution when it was submitted as a unit to a referendum in the spring of 1968.

The proposed reapportionment plan would have limited the size of the House of Delegates to 120 members with the Senate to be one-third

14. *Jackman v. Bodine*, 50 N.J. 127, 232 A.2d 419 (1967).

15. The revision reduced the population of the three Senate districts from +13.6%, +9.2%, and -13.8% to +6.1%, +2.5%, and -3.5%, respectively. The overall electoral percentage was increased to 50.2%.

16. *Jackman v. Bodine*, 49 N.J. at —, 231 A.2d at 200.

17. *Id.* at —, 231 A.2d at 198.

18. *Jackman v. Bodine*, 50 N.J. at —, 232 A.2d at 420.

19. The consideration of precisely such information was permitted and encouraged by Chief Judge William J. Campbell (N.D. Ill.) in obtaining a substantial settlement through the case of the bipartisan pre-trial conference device. See DEMOCRATIC REPRESENTATION, *supra* note 6, at 310-13.

20. See generally DEMOCRATIC REPRESENTATION, *supra* note 6, at 217-26, 382-83, 607.

the size of the House. Each Senate district would be divided into three Assembly districts with all legislators being elected from single-member districts of "substantially equal" population. Traditional contiguity and compactness provisions were included, as were admonitions to give "due regard" for "natural boundaries" and "boundaries of political subdivisions."

A bipartisan commission was delegated the reapportionment function. Its members were appointed by the majority and minority leaders of each house (two each) with the ninth member being appointed by the governor. No commissioner could hold a popularly elected state office at the time of his appointment.

The commission was to meet six months prior to the convening of the General Assembly and, by majority vote, to adopt a plan which would be sent first to the governor and then to the Assembly on the day it convened. The Assembly was to have seventy days in which to overrule the commission's plan by substituting its own. Significantly, a legislative substitution would be subject to a gubernatorial veto.

The proposal authorized review of both commission and legislative plans by the Maryland court of appeals, the state's highest court. Invalidation of a legislative substitute plan would automatically reinstitute the commission plan, if valid. Invalidation of a commission plan would require the court to provide "appropriate relief for the conduct of the impending election."

The plan eventually adopted by the convention constituted a marked departure from that proposed by a pre-convention Constitutional Convention Commission draft.²¹ The rejected pre-convention draft placed the reapportionment function in both the legislature and the governor, but primarily in the latter. The draft provided that reapportionment was to begin by the submission of a gubernatorial plan to the legislature. Although such a plan was subject to legislative substitution, such a choice was required to be made before a date four months prior to the coming general election. A legislative failure to agree on a substitute would cause the governor's pertinent plan to become law. In addition, any legislative plan would have been subject to a gubernatorial veto. Thus, it would require an extraordinary legislative majority to enact any plan opposed by the governor.

Another significant difference between the draft submitted to the convention and the plan presented for the referendum was in the na-

21. REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 127-29 (Mo. 1967).

ture of the districts. The pre-convention draft permitted multimember districting in both houses but limited senate and house districts to two and six members respectively. The plan finally adopted required single-member districting for both houses.

A final difference between the two plans concerned the degree of population equality required. The pre-convention draft would have required district population to be "as nearly equal as practicable," although the drafters had rejected a requirement of maximum deviations of not more than five percent. The final plan substituted the arguably more flexible requirement of "substantially equal" districts. The latter expression was thought to be less susceptible of equation with "as nearly equal as possible," a concept which would invite perpetual litigation.

*Pennsylvania*²²

In the spring of 1968, several amendments to the Pennsylvania constitution proposed by a constitutional convention were approved by a popular referendum, including an amendment providing for a revision of the constitution's reapportionment article. A constitutional convention had proposed a senate of fifty members and a lower house of 203 representatives. Single-member districts were required in both houses which were to be of "compact and contiguous territory as nearly equal in population as practicable." "Unless absolutely necessary," local political subdivisions were not to be divided.

The bipartisan commission created for Pennsylvania was to consist of five members—the majority and minority leaders of each house or their deputies, plus a fifth member to be selected within forty-five days by the other four members. Failure thus to select a fifth member creates the necessity of his selection by a majority of the state supreme court. The fifth member may not be a salaried holder of public office at the time of his appointment.

Failure of the commission to come forth with a valid plan necessitates judicial reapportionment by a majority of the state supreme court. In addition, any plan proposed by the commission is subject to several notice requirements, including publication of relevant mathematical data and maps of all districts prior to validation.

22. See generally DEMOCRATIC REPRESENTATION, *supra* note 6, at 382, 620; PREPARATORY COMMITTEE REFERENCE MANUAL NO. 6, LEGISLATIVE APPORTIONMENT 41-59 (Pa. 1967).

The bipartisan character of the newly adopted reapportionment procedures was not a feature of plans of several groups submitting their views to the convention. Plans submitted by the AFL-CIO, the Pennsylvania ADA chapter, and the Pennsylvania Bar Association and testimony offered by the League of Women Voters all advocated placing the reapportionment functions in the legislature.

In addition, a twenty percent maximum deviation requirement was suggested, but not adopted. Finally, legislative failure to reapportion would have required judicial reapportionment by the state supreme court in all plans but that submitted by the ADA. The ADA plan provided for an intermediate stage prior to recourse to the supreme court, whereby the issue would be submitted to a reapportionment commission consisting of the governor and the majority and minority leaders of each house. Arguably, such a commission would provide for no more than gubernatorial reapportionment.

*New York*²³

Because of rather violent opposition to proposed constitutional provisions designed to weaken the principle of separation of church and state and permit more direct aid to parochial schools, a proposed new constitution was rejected by New York voters in November, 1967. Because of insistence by the convention leadership (particularly Assembly Speaker Anthony J. Travia) that the proposed constitution be voted on as a whole, a new reapportionment article was defeated along with the more controversial provisions.

The proposed reapportionment plan would have created a Senate of sixty members and an Assembly of 150 to be elected from single-member districts of contiguous and compact territory and with populations "as equal as practicable." Due regard was to have been given to natural geographical and political boundaries; gerrymandering and city block division were prohibited.

The reapportionment function would have been vested in a redistricting commission of five members appointed, one each, by the majority and minority leaders of each house and by the chairman (chief

23. See generally DEMOCRATIC REPRESENTATION, *supra* note 4, at 201-08, 349-62, 615-17; COMMITTEE ON CONSTITUTIONAL ISSUES, BRIEFING PAPER No. 2 ON "STRUCTURE OF GOVERNMENT," (Feb. 20, 1967) (R. Peter Strauss and Robert B. McKay, co-chairmen); COMMITTEE ON THE LEGISLATURE, MINORITY REPORT TO CONVENTION ON "APPORTIONING AND DISTRICTING AGENCY," (August 1, 1967) (Leonard B. Sand, chairman, Sub-Committee on Apportionment) [hereinafter cited as MINORITY REPORT].

judge) of the court of appeals, the state's highest court. No member of the legislature would have been eligible to serve on the commission. A plan certified by a majority of the commission would have had the force of law, subject to challenge in the court of appeals.

By adopting the above plan, the convention rejected appeals by the *New York Times* and the minority members of the Committee on the Legislature to create a plan providing for a nonpartisan commission,²⁴ and also rejected a request by Governor Rockefeller to allow the governor to appoint some commissioners. In addition, the convention rejected the majority report of the committee, which proposed to vest the reapportionment function in the legislature not subject to gubernatorial veto.

The nominally nonpartisan plan would have provided that four commission members be appointed, one each, by the four above-mentioned legislative leaders from a list of thirty-six candidates nominated, six each, by the presidents of six universities in the state. The four appointees would elect a fifth by majority vote. No person holding a party or public office could be appointed.

The Governor's suggestion would have increased the commission membership to nine, and would have permitted the governor and court of appeals to appoint five members between them.

*Hawaii*²⁵

The most recent creation of a bipartisan reapportionment process occurred in Hawaii with popular approval of a constitutional convention proposal on November 5, 1968. The new plan creates a Senate of twenty-five members and a lower house of fifty-one members, apportioned on a registered voter basis. Legislators are to be apportioned among the basic island units, generally in multimember districts of compact and contiguous territory. Representative districts are to be

24. Under one version, although the purpose was announced as "nonpartisan," there was a dash of bipartisan flavor. State university presidents would nominate a panel of thirty-six, none of whom could hold public office or office in any political party. From this panel the four partisan leaders in the legislature (presiding officers and minority leaders of each house) would each select one name, and the four so selected would select the tie breaker who would also serve as chairman. See MINORITY REPORT, *supra* note 3.

25. See generally DEMOCRATIC REPRESENTATION, *supra* note 6, at 114-15, 478-80, 599-600 for background. For recent development see 1968 amendments to HAWAII CONST., art. III, §§ 2-4, and explanatory comment in CONVENTION COMMITTEE ON LEGISLATIVE APPORTIONMENT, REPORT No. 58 (Hawaii Sept. 10, 1968).

formed wholly from senatorial districts, and no district may contain more than four members.

As a further assurance of minority representation, the plan provides that "where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided." A seemingly contradictory criterion provides, however, that "no district shall be so drawn as to unduly favor a person or political faction." The latter provision focuses attention in the wrong direction, on districts taken separately, rather than on the representation plan as a whole. It would seem to bar the creation of a homogeneous district for a minority which otherwise would have no voice.

The contradiction in the two quoted provisions stems from the fact that these two criteria take opposite approaches to the same practice. The former encourages the commission to take into account the disparate "socio-economic interests" (a euphemism for "political interests") present within a given area. The latter criterion, however, appears to prohibit any action based upon a recognition of those very interests. It may be argued that the contradiction is more apparent than real by distinguishing the use of "socio-economic" in the former and "political" in the latter. The distinction appears specious. A further rationalization would be to argue that the term "unduly favor" was used advisedly to mean that a requirement of reasonableness would serve to limit unduly partisan districting while the same requirement would still permit the commission to take into consideration the effect its decisions would have on any political minority. The real explanation for the contradiction, unfortunately, may be that it simply escaped the notice of its author and all those at the convention which proposed it.

Because districts must be "as nearly equal in population as practicable," and because of the adherence to basic island groups as representation units, adequate representation of the lesser-populated island units was achieved by providing that in no case should an island group receive fewer than two Senators and three Representatives. Because of the limit on the size of the legislative bodies, however, it was necessary concurrently to devise a fractional voting system.²⁶ Thus, the senators or representative delegations of any island unit so augmented beyond their population entitlement shall exercise a fractional vote; the numerator being the number initially allocated and the denominator being

26. For a review of weight and fractional voting devices see DEMOCRATIC REPRESENTATION, *supra* note 6, at 516-20

the minimum specified. In this way the underpopulated island units have an augmented "voice" in legislative affairs, including committee membership, but their "vote" in the legislature is limited to their population weight.

A bipartisan commission was delegated the reapportionment function. The president of the Senate and the speaker of the House are each to appoint two members. A member of the minority party of each house is selected by his party to appoint two each. The eight thus chosen are to select a ninth by a three-fourths majority vote. Failure to so select the final member in this manner shall result in his selection by a majority of the state supreme court. The ninth member shall also serve as chairman.

In addition to appointing the commission members, each of the four appointing authorities shall also appoint from each island unit a person to serve on an advisory council from that island unit. These advisory councils would be without voting power, but would serve in an advisory capacity to the commission during its existence. Finally, no commission member may seek legislative office during the first two elections under the commission's plan.

Florida: Continuance of the Traditional Mold²⁷

The reapportionment article of the constitutional revision approved by Florida voters in November, 1968, is more traditional in character in that it vests the reapportionment function in the legislature. It has no bipartisan features, but there is no indication that some variety of bipartisan device was ever seriously considered. A senate of 30 to 40 members and a house of 80 to 120 members were created, all of which members were to be elected from single-member districts "of either contiguous, overlapping or identical territory."

In the event of legislative failure to reapportion, a special thirty-day apportionment session is to be convened by the governor. Legislative failure in the special session will result in reapportionment by the state supreme court. There are no meaningful standards to guide the discretion of either the legislature or the court.

Specific procedures are provided whereby any legislative plan would be promptly reviewed by the court at the instance of the attor-

27. FLA. CONST. art. III, §§ 1, 16 (1968); M. DAUER, C. DONOVAN AND G. KAMMERER, *SHOULD FLORIDA ADOPT THE PROPOSED 1968 CONSTITUTION?* UNIVERSITY OF FLORIDA PUBLIC ADMINISTRATION PAMPHLET No. 31 (1968). For background see *DEMOCRATIC REPRESENTATION*, *supra* note 6, at 444-46, 596-97.

ney general seeking a declaratory judgment of validity. Invalidation would necessitate the prompt convening of a special session to last fifteen days. Should the legislature again propose an invalid plan or fail to act, the reapportionment would be made by the supreme court.

The only notable aspects of the new Florida plan are the manner in which definite deadlines are set and enforced, and the requirement of single-member districting.²⁸ It has been said that the legislature "flunked its finals" in preparing the new constitution, but it is unclear whether the comment was meant to include the reapportionment provision.²⁹

STATE CONSTITUTIONAL REAPPORTIONMENT STANDARDS AND OPTIONS: AN ANALYSIS

Although recent constitutional revisions have accorded a substantial measure of discretion to bipartisan commissions (or to legislatures), such authority has not been delegated without certain standards or guidelines. The first is the *base* upon which reapportionment will be effected. Other standards relate to population equality, the pattern, size and nature of legislative districts, and certain provisions protecting against gerrymandering and insuring minority representation.

Apportionment Base

The apportionment base may range from the traditional and broadest base of total population to the most restricted permissible base of registered voters.³⁰ In between are the citizen population and qualified voter bases. Although all of these bases have been validated by federal courts for at least one state,³¹ total population has been the most commonly used standard. The only base to be declared invalid has been one predicated upon voter turnout in a particular election.³²

As noted above, census or total population is the broadest base, and includes all located within the district without regard to citizenship or

28. The effectuation of a valid plan without undue delay was an especially acute problem in Florida. See *Swann v. Adams*, 383 U.S. 210 (1966).

29. Public Administration Pamphlet No. 31, *supra* note 27, at 41 (conclusion of Kammerer).

30. DEMOCRATIC REPRESENTATION, *supra* note 6, at 501-03.

31. *Burns v. Richardson*, 384 U.S. 73 (1966) (Hawaii registered voters); *WMCA Inc. v. Lomenzo*, 377 U.S. 633 (1964) (N.Y.—citizen population); *Baker v. Carr*, 247 F. Supp. 629 (M.D. Tenn. 1965) (qualified voters); *Buckley v. Hoff*, 243 F. Supp. 873 (D. Vt. 1965) (registered voters).

32. *WMCA v. Lomenzo*, 238 F. Supp. 916, 924 (S.D.N.Y. 1965). See also *Klahr v. Goddard*, 250 F. Supp. 537, 547 (D. Ariz. 1966).

status as a voter. To the extent a legislator is viewed as one charged with representing the views of all those in his district affected by a legislative decision, the broadest possible base would be most appropriate. In addition, such a base does not suffer from the defect that transient elements of the population may go unrepresented or uncounted.

The adoption of more restricted bases indicate a concern that certain elements physically located within a district not be counted so as to distort the representative weight given a certain district. For example, since such elements of the population as military personnel, college students, and institutional inmates may be ineligible to vote in a given district, it is argued that they should not be counted for the purpose of reapportioning legislators since the same considerations that apply to voting qualification arguably apply to legislative representation in these special instances.

The choice among the various bases is not one of the more important issues because in most instances the various possible apportionment bases have only a slight differential impact on districting results. Any choice is reasonable, *i.e.*, not unconstitutional, with the possible exception of the use of either the registered voter or qualified voter base in those states having a history of denying the franchise to a resident minority.

Population Equality

The degree of inter-district population equality required has been the one reapportionment standard substantially circumscribed by court decisions. Yet the Supreme Court's first requirement of substantial equality³³ has remained unchanged, although it has apparently been subject to re-evaluation.³⁴

Since absolute population equality has not yet been made a constitutional mandate,³⁵ it would seem best not to write such a requirement into state statutes. To do so would substantially lessen the flexibility of other provisions necessary to implement full and fair representation. To do so also would invite perpetual litigation because *every* plan now in force could arguably be made more "equal."³⁶

Provisions requiring apportionment "as nearly equal as may be," or

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

34. *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Swann v. Adams*, 385 U.S. 440 (1967)

35. *But see* cases cited *supra* note 5.

36. *Compare*, *Jackman v. Bodine*, 49 N.J. 406, 231 A.2d 193 (1967) *with* *Jackman v. Bodine*, 50 N.J. 127, 232 A.2d 419 (1967).

"as nearly equal as practicable," should be avoided as being too susceptible to interpretations of "as nearly equal as *possible*." A requirement of "substantial equality" would be more in keeping with both the Supreme Court standard and the goal of fair and effective representation for all groups in the light of the realities of residence distribution. Such a standard would permit deviation of five percent, ten percent, or possibly even fifteen percent where required to effectively represent the total spectrum of the electorate. The great majority of plans now in force contain at least some districts exceeding a ten percent limit; many exceed a twenty percent deviation from average limit.³⁷ Accordingly, rigidly small maximum deviation requirements should be avoided. Only Maryland, however, sought to incorporate the more flexible "substantial equality" standard.

District Patterns

All recent plans have incorporated the traditional restrictions on the shape or boundaries of legislative districts. These include requirements of continuity, compactness, and adherence, where practicable, to natural geographical and political subdivision boundaries.³⁸

The contiguity requirement—that no part of one district be completely separated from any other part of the same district—has been universally accepted and poses no enforcement problem or serious challenge to reapportioning flexibility.

The requirement of compactness—that districts be as symmetrical as practicable—is equally innocuous on its face, and may present a certain restraint on gerrymandering.³⁹ However, a rigid adherence to this requirement should be avoided, because a district pattern of symmetrical squares, although conceivable, could well operate to submerge a significant element of the electorate. As a practical matter, absolute compactness (districts forming perfect circles) is an impossibility. Furthermore, a benign gerrymander, in the sense of some asymmetrical districts, may well be required in order to assure representation of submerged elements within a larger area.

37. The relevant mathematical calculations for the plans, past and present, of all states are set forth in *DEMOCRATIC REPRESENTATION*, *supra* note 6, at 589-628.

38. *See generally*, *supra* 6, at 456-99.

39. An interesting mathematical test for calculating compactness is presented in Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of "Compactness,"* 50 MINN. L. REV. 443 (1966). The thesis presented therein is subject to several criticisms. *See DEMOCRATIC REPRESENTATION*, *supra* note 6, at 460-61.

For example, assume that an area is subdistricted into four single-member districts that there is a fifty percent white Republican population evenly spread over the area and that a twenty-five percent white and Negro Democratic population is fairly well concentrated, although subject to separation. In such a hypothetical case, four symmetrical districts may so divide the minority votes that four Republican legislators would be elected. An informed and deft, yet legitimate, creation of less symmetrical districts would then be required to produce a 2-1-2 split. It would seem that the choice between the alternatives of district symmetry and effective representation would not be a difficult one. The above considerations would also seem to apply to the requirement of adherence to certain natural or political boundaries or the requirement that city blocks not be divided. Where it is impossible to follow both a political boundary and a natural boundary, it is assumed that the political line would be followed.

In conclusion, requirements affecting the physical appearance of a district's shape may have some relevance but should not be controlling. Such requirements focus on form rather than the substance of effective political representation. The prospect of the tail wagging the dog may be avoided by inclusion of the modifier "where practicable" in each of these requirements.

Single-member vs. Multimember Districts

Of the six states involved in this study, two states retained a past practice of single-member districting (Pennsylvania and New York), two retained multimember districting (Hawaii and New Jersey), and two rejected their tradition of multimember districting and required complete single-member districting (Maryland and Florida). This significant preference for single-member districting, also exemplified in other states since 1964,⁴⁰ demonstrates a realization of certain deficiencies and inequities inherent in the multimember system notwithstanding the arguments traditionally made in its behalf.⁴¹

Advocates of the multimember system argue that its adoption would minimize gerrymandering, provide a means of preserving county-wide physical integrity, or other area interests, and minimize the "localism" and lobbying that may have been brought to bear on a legislator repre-

40. *E.g.*, Michigan, Ohio, Oklahoma, and Tennessee.

41. See generally DEMOCRATIC REPRESENTATION, *supra* note 6, at 504-07 and authorities cited therein.

senting a smaller constituency. Such benefits are substantially offset, however, by factors militating against their salutary effect. First, gerrymandering is probably enhanced rather than restricted by a multi-member system. For example, the winner-take-all effect of at-large multimember districting may serve to elect four Democrats in an area having a forty percent Republican minority. Subdistricting could provide at least one, and perhaps two, Republican legislators if subdistricted into four single-member districts.⁴²

Second, a mixed multimember and single-member plan operates in favor of the multimember district resident since he will be influencing the vote of more legislators who will be in a position to cast the deciding ballot on any given legislative vote. Mathematical analysis leads to the conclusion that such representation more than overcomes the apparent deficiency that the legislator elected from a multimember district must be responsible to more constituents. A multimember system of exclusively two-man districts would, of course, eliminate the discrepancies inherent in the mixed system or one in which multimember districts varied in size.⁴³

On balance, the multimember system seems best suited only for situations such as that presented in Hawaii, where it serves to preserve the integrity of units of common interest or other situations in which single-member districting could not easily be accomplished. The choice of single-member districting, therefore, would protect against the "clean-sweep" tendency in multimember systems, and would preserve the relative equality of voter influence of legislative outcomes.

*The Reapportionment Agencies*⁴⁴

Perhaps the single most important contribution of recent state constitutional revision in the field of reapportionment has been the stated preference for bipartisan commission reapportionment. Of the six attempted revisions since 1966 reviewed here, only Florida chose to vest the reapportionment function in the legislature, while none gave the governor a controlling role. Legislative and gubernatorial functions

42. Compare, *Kilgarlin v. Hill*, 386 U.S. 120 (1967) with *Burns v. Richardson*, 384 U.S. 73 (1966) and *Fortsom v. Dorsey*, 379 U.S. 433 (1965).

43. The advantages given the residents of larger multimember districts over residents of single member or smaller multimember districts has been the subject of extensive and sophisticated mathematical analysis. Banzhaf, *Multimember Electoral Districts—Do they Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

44. See generally DEMOCRATIC REPRESENTATION, *supra* note 6, at 300-62, 380-84, 450-51.

have been limited, in general, to appointive powers, although a commission's plan may be overruled by the Maryland General Assembly within a certain period, and legislator service on the Pennsylvania commission is not prohibited.

The choice of bipartisan commissions has substantial justification, given the inherent deficiencies of legislative and gubernatorial dominance, and the virtual nonexistence of the animal called the "nonpartisan."⁴⁵ A bipartisan agency would seem to best assure the necessary combination of fair and effective representation without undue political favoritism and the political realism necessary to perform what is a most political function.

Legislative dominance of the reapportionment function is too often tantamount to a defendant's self-determination of his guilt or innocence. At best, it is unrealistic to expect a body to legislate against its own interests. There can be little other explanation for the past legislative refusal to reapportion.⁴⁶

Moreover, mere insistence upon certain deadlines for legislative reapportionment will insure little more than that a plan will be forthcoming. Absent a fortuitous division in party control of the two legislative houses, or of the legislature and state house, there is little assurance that any plan will do more than protect the interests of the majority party.

Provision for gubernatorial dominance of the reapportionment function is hardly a better solution, for in the first instance, the governor is the most successful partisan in the state,⁴⁷ and in the second, there may be a partisan investiture much less broad than that represented by the legislature.

Although there may be some appeal to giving the governor a role to play in the reapportionment process because he might be thought to be expressing a "state-wide view," such a provision would be difficult to work out in practice. Granting the state's chief executive substantial powers could not be done without undermining the principle of bipartisan balance, unless he were to share appointive or membership powers with the legislative partisans of his own party. Such a proposal might

45. *Supra* note 6, at 532-35 and authorities cited therein.

46. Legislative nonaction respecting reapportionment of up to sixty years was not rare. *Reynolds v. Sims*, 377 U.S. 533 (1964) (Alabama); *Baker v. Carr*, 247 F. Supp. 629 (M.D. Tenn. 1965) (Tennessee).

47. For a comparison of the "strong-governor" systems, see the discussion of Alaska, Arkansas, Ohio, and Missouri in *DEMOCRATIC REPRESENTATION*, *supra* note 6, at 369-70, 368-70, 364-68, 331-33, respectively

invite intra-party conflict. However, the governor could and probably should be given the power to veto any legislative substitute for a commission plan. Such a provision would protect the commission's plan from casual rejection by a bare legislative majority, and would have the salutary effect of ensuring that the bipartisan basis and nature of the new reapportionment would be preserved.

Use of a "nonpartisan" commission applying "nonpartisan" principles provides little more assurance of fair and effective political representation than do plans with legislative or gubernatorial dominance. Apparently, such a commission would be concerned solely with census tracts, natural and political subdivision boundaries, and district symmetry. The product of its labors might be a reapportionment fully representing all interests. Such a result, however, would be purely fortuitous. Consideration of the same "nonpolitical" factors, and a refusal to consider political data, could as well result in an unintended submersion of the interests of one party or faction. It may be surmised that a ninth grade civics class equipped with a map and a desk calculator could do as well; indeed, one experienced reapportioner has said as much.⁴⁸

The foregoing discussion assumes, however, that the "nonpartisans" will be just that. This is to assume that knowledgeable men are either without political leanings, or are able to suppress them to the possible detriment of their political faith. Such assumptions are unrealistic at best. Indeed, political disputation seldom wages hotter than in academia—the very place to which proponents of "nonpartisanship" tend to look for candidates for commission positions. The better alternative would be to candidly admit that reapportioners deal with the heart of the political process, and will best serve their function by insuring that the political impact of any reapportionment will be to fully and fairly represent all concerned.⁴⁹

Acceptance and adoption of the bipartisan commission principle alone will not provide a panacea for all reapportionment problems, however, since the composition, selection and procedures of the commission are equally important.

The recent experience has been to appoint a commission of from five to eleven members, all but one of whom are concededly partisans.

48. Address by A. Robert Kleiner, Democratic member, Michigan Bipartisan Apportionment Commission, to the National Municipal League, Boston, 1966.

49. DEMOCRATIC REPRESENTATION, *supra* note 6, at 310-13.

Appointment of the partisan members has been by political party leaders, who are unrestricted in their choice, except that (1) in Pennsylvania the legislative leaders of each party are themselves the commission; (2) in Maryland no holder of a popularly elected office may be appointed; and (3) in Hawaii no member of the commission may run for legislative office in the first two elections after reapportionment. Hence, only in Maryland is there a flat prohibition on legislators' serving on the commission and only in Hawaii is there a provision exacting the price of temporary noncandidacy for legislative office as a condition of service on the commission.

Appointment of the last member of the commission is made by the governor in one instance (Maryland's defeated plan), by those already appointed in two instances, with further provision for appointment by the state supreme court when the members are unable to agree on a tie-breaker (Pennsylvania and Hawaii), by the full bench of the state's highest court (New York's defeated plan), or by the state's chief justice, but only after the commission deadlocks over competing plans (New Jersey). In all instances the partisan members are equally divided among the two major parties;⁵⁰ in all instances the commissions act by majority vote in determining the apportionment plan.

There is much merit in a plan providing for a commission of nine or eleven members, all but one of whom would be appointed by legislative or other state political leaders. By virtue of each party being represented, the unavoidably political process of apportionment and districting would be brought into the open and "fairness"—certainly an improvement over partisan unfairness—would be a product of party negotiation in the context of full disclosure of political realities. The last member, or tiebreaker, would be elected by a majority of the state's highest court. Selection of the tiebreaker in this manner would minimize partisan considerations and suspicions present when the tiebreaker is appointed by the governor alone, or by the state's chief justice alone. Selection by the full bench of the state's highest court can serve to

50. Quære whether the following language in Hawaii's plan would operate to produce an exception to this statement:

The president of the Senate and the Speaker of the house . . . shall each select two members. Members of each house belonging to the party *or parties* different from that of the president or the speaker shall designate one of their members for *each house* and the *two* so designated shall each select two members of the commission. The *eight members* so selected shall . . . select . . . the *ninth* member who shall serve as chairman of the commission.

instill a popular faith in the selection process and induce a more ready acceptance of the final product.

The several benefits of the bipartisan commission-tie breaker mode of apportionment—including the added possibility that a plan so devised might be entitled to an extra presumption of validity on appeal—outweigh the danger that the legislative leaders who appoint the partisan commissioners will be individually parochial and self-serving. Certainly, such a danger is nothing compared to the traditional alternative of straight partisan apportionment by the majority party in the legislature. Furthermore, any supposed risk can be minimized if desired (a) by shifting the power to appoint the partisan members of the bipartisan commission to the state central committee of each major party, as in New Jersey's plan; or (b) by providing that none of the members of the commission can be legislators, as in Maryland's defeated plan; or (c) by allowing legislators to serve, but barring their reelection for a specified period, as in Hawaii's plan.

Provisions permitting appointment of members by partisans, but restricting the choice to nonlegislators, ensures an informed body, thus safeguarding against blatant or unintended gerrymanders, and yet ensures one whose members are without prospect of immediate personal political benefit. To reduce the influence of the legislative leaders, *per se*, appointive power could be vested in the party legislative caucus, as an alternative to shifting the appointive power from the legislature to the state party committees.

Although all recent provisions permit action on an apportionment plan by majority vote, consideration could be given to requiring extraordinary majorities of six (of a nine-member commission) or seven (of an eleven-member commission) for adoption of a final plan. Although the possibility of commission failure may appear to be increased with this variation of the simple bipartisan commission-tiebreaker idea, the prospect of a certain and perhaps uninformed judicial reapportionment could be sufficient to induce a reasonable compromise. The benefit of this variation would be to broaden the consensus basis for the plan finally approved, and minimize the possibility of simple partisan deadlock broken only by the tiebreaker's exasperation.

Arguably also, equal representation of the political parties on the bipartisan commission should be required even in those states in which one party has achieved a position of relative dominance. Such a provision would tend to insure that a one and one-half party state does not

become a one-party state. In the normal course of events the tiebreaker always would be from the dominant party anyway, and thus, given the standards already discussed, the legitimate interests of the dominant party would not be jeopardized. If its voters remained loyal, it would still rule the state. As an alternative, and certainly better than partisan apportionment by the legislature, one-party states could adapt the commission device by utilizing a formula designed always to vest commission control in the majority party, but giving a voice to the minority party. For example, the majority party in the legislature (or state party committee) could appoint more commissioners than the minority party. Vesting power to appoint additional commissioners in the governor might not ensure dominant party control of the commission because of recent tendencies to elect Republican governors in some Southern states which are still, for most purposes, one-party or one-and-one-half party Democratic states. Even such a modified commission device—the modification perhaps being the realistic price of political acceptance—would at least have the virtue of bringing the apportionment process into the open.

An additional alternative, designed to take account of the third party or faction situation, is to provide that any party polling a specified percentage of the vote in the last legislative election may appoint a number of commissioners equal to those appointed by the major parties. In November, 1968, Montgomery County, Maryland, ratified a county charter containing such a provision for county council apportionment—with the added provision that the additional member (intended as tie-breaker presumably) would be appointed by the council itself.⁵¹ The charter amendment authorizes appointment of three apportionment commissioners by any party polling at least fifteen per cent of the total vote cast for all candidates for the council in the last regular election. If there were no minor parties, such a provision would operate as a bipartisan commission device, with the tiebreaker being appointed by

51. Charter of Montgomery County, Maryland, art. I, § 104 (Nov. 1968) which reads in part as follows:

. . . Whenever district boundaries are to be reestablished the council shall appoint . . . a commission on redistricting composed of three members from each political party chosen from a list of five names submitted by the Central Committee [a local body] of each political party which polled at least fifteen percent of the total vote cast for all candidates for the Council in the last preceding regular election. The Council shall appoint one additional member of the Commission. . . . No person shall be eligible for appointment to the Commission if he holds any elected office.

the party controlling the sitting council. However, if there were a minor party, the spectre arises of commission control being vested in the six members (three each) appointed by the second party and the splinter party, rather than the four members appointed by the dominant party (three appointed by the party itself, plus the one seat gained by virtue of controlling the council and appointing the "tiebreaker").

Obviously, additional thought is needed before departing from the conventional bipartisan commission mode and venturing in the direction just discussed, giving equal voice to each "fifteen percent faction." Consideration also should be given to the question whether the Supreme Court's ordering Ohio to place George C. Wallace and his American Independent Party on that state's 1968 presidential ballot in any way gives rise to a principle that minor parties have a right to representation on apportionment commissions.⁵²

The short answer would be to say that the Wallace case involved access to the ballot to stand for election to public office, whereas an apportionment commission is a non-elective device to discharge a special pre-election function. However, the contours of the "one man-one vote" principle, still in the developmental stage, are too uncertain to permit a definitive answer.

CONCLUSION

Paradoxically, the model of the kind of legislature most persons—and most plaintiffs in reapportionment cases—would deem to be ideal, is the proportional representation model. All parties and groups would be represented in the state legislature roughly in proportion to their statewide voting strength. Chief Justice Earl Warren may have had something of the sort in mind when he wrote in *Reynolds v. Sims* that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."⁵³

Yet, this ideal of giving each major group in the state a proportional voice in the state legislature can be achieved with assurance only by abolishing both districting and at-large voting and using a formal proportional representation system, such as the party list system common in Europe. There are many reasons, beyond the realm of the present discussion, for not going all the way to the "PR" form of legislative elections. But so long as this ideal persists there will always be tension be-

52. *Williams v. Rhodes*, 89 S. Ct. 5 (1968).

53. 377 U.S. 533 (1964).

tween the inexactness of the share of seats awarded to a given party under an apportionment-districting system of legislative election, and the share a party feels is its just due when it compares the votes it won with the number of seats it gained.

Endless fussing with apportionment standards can do little to reduce this inexactness and tension. Informed use of the bipartisan commission device, combining both political realism and cross-checking for fairness, can reduce the inexactness and ameliorate the tension. Indeed, to reject formal proportional representation devices in favor of our traditional apportionment-districting systems of legislative election, without opting also for a bipartisan reapportionment device, is to evidence again that curious mixture of political innocence and political cynicism which has always served to mystify foreign observers of the American scene from De Toqueville to De Gaulle.