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THE LEGISLATIVE ASSEMBLY IN A MODERN MONTANA CONSTITUTION

by Ellis Waldron* **

INTRODUCTION

American state legislatures entered the 19th century with a plenitude of authority, reflecting public confidence in representative assemblies as defenders of citizen interests against royal authority during the long colonial period. But public confidence ebbed during the middle decades of the 19th century, as the legislatures proved to be unequal to the political and administrative tasks of conquering a continental empire. From midcentury, state legislatures were hedged in by a growing variety of constitutional restrictions on their authority and functions.1 The Montana constitutions of 1884 and 1889 were drafted while this distrust was in full flood, and the heritage of that distrust still determines the structure and authority of the Montana Legislative Assembly nearly a century after its creation, in a society that has been radically transformed in basic ways—how we make our living, what we expect in life, and what we think government should do about such matters. Few would dispute these teachings of our political history.

But the lessons to be drawn from this history are far from axiomatic, and provide a substantial portion of the agenda for modern state constitutional debate. Can the state legislature remain, or become again, a productive and functionally effective branch of state government? What are appropriate functions for a modern state legislature? Should state constitutions restore the 18th century plenitude of legislative authority, or continue to speak the distrust of the 19th century, or seek some different modern balance between the two? Is there enough meaningful

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** Author's note: Opinions expressed in this article in no way reflect views or positions of the Montana Constitutional Convention Commission on which I served as a gubernatorial appointee. I accept full personal responsibility for the opinions expressed in the article, as for any errors of fact or judgment. The Constitutional Convention Commission was required by a convention enabling act "to undertake studies and research; [and] to compile, prepare and assemble essential information for the delegates, without any recommendation." This article was prepared prior to, and independently of, the author's involvement as a commission member with materials prepared by the commission relating to the legislative assembly.

1 J. HURST, THE GROWTH OF AMERICAN LAW (1950) is one of the best brief treatments, by a lawyer-historian. H. SECrist, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES, (Bulletin No. 637 of the University of Wisconsin 1914), details the development of the constitutional restrictions, in relation to economic developments. L. Hartz, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948), is particularly suggestive for implications of the shift from state to private enterprise after 1837.
governing still to be done by the states to make these questions significant?

Adequate answers to any of these questions is beyond the scope and purpose of this article, but the author should declare the points of view that inform what will be said about a modern constitutional framework for the Montana Legislative Assembly. As a student and professional observer of three state legislatures over a period of more than three decades, and more particularly of the Montana Legislative Assembly for nearly 20 years, I believe that a vital representative assembly is an indispensable element of modern state government, to perform at least three basic functions (not necessarily stated in order of importance):

1) To review and pass judgment on proposals of law that help to determine whatever public policies the state still may manage in an increasingly nationalized economic, social and political system.

2) To regulate the level and intensity of state governmental activity by controlling modes and levels of taxation and public expenditure.

3) To check the exercise of authority by the other branches of state government, most particularly by the executive and bureaucracy whose dominant role distinguishes government in our time.

I believe the Montana Legislative Assembly is seriously disabled from effective performance of any of these functions by its 19th century constitutional foundations. I believe the quality and capacities of most who seek and hold legislative office in Montana are distinctly superior to the equipment we ask them to operate, and that tragically, many of the ablest simply abandon or refuse to seek legislative service out of the frustrations this archaic apparatus engenders. A stronger, integrated executive authority is imperative if state governments do not default proper local responsibility and control to a lumbering national bureaucratic leviathan; and a stronger, freer legislature is necessary if for no other reason than to check this augmented executive authority. I believe, further, that substantial areas of sparse and declining population in Montana require the ministrations of an effective state government because local government will be simply too feeble to maintain what traditionally have been regarded as local functions. Police, administration of justice, health, education, welfare, land use and environmental controls are, in my judgment, obvious examples of public concerns for which more, rather than less, state government is indicated in Montana. For such concerns a revitalized representative assembly is indispensable.

As this material went to press, a Missouri Basin Interagency Committee study of population movements in the ten-state region reported that remaining rural population in some areas is too small to support many of the institutions necessary to fulfill their needs and suggested policies to reverse the movement of people to the cities. Yet that movement was expected to continue for the next 50 years, Missoulian, Sept. 22, 1971 (AP news story from Kansas City). Might it not be more realistic to adjust the political institutions to the projected population trends?
What should a new Montana constitution say about the legislative branch of state government? Even the casual student of state constitutions recognizes that emulation is the first rule of constitution-writing; most state constitutions reflect trends of thought and experience in other states at, or somewhat before, the time of drafting. This really means that many considerations of government and public policy are regional or national and that emulation simply expresses a common reaction to these matters. So I will attempt some systematic comparisons with what are rather arbitrarily called "the modern state constitutions"—some products of systematic general revision efforts since about 1960, whether they were ratified or not. 

By the time this article appears the Montana Constitutional Convention Commission will have published four significant general surveys of constitutional provisions relating to the legislature; for me to undertake a fifth such survey with limited personal resources of time and energy would be pointless.

This article addresses a limited number of matters that have central and distinctive importance for the Montana legislature, matters that predictably will be given substantial attention in the forthcoming constitutional convention. After an introductory discussion of the problem of granting legislative authority in a state constitution, several matters of legislative structure are considered: the size and number of houses,

*Particular reference is made to the following constitutions (date is year of ratification, or for rejected constitutions, year draft was completed): Alaska (1956); Arkansas (1970); Connecticut (1965); Florida (1968); Hawaii (1968); Illinois (1970); Michigan (1963); Virginia (1970); Idaho (1970 Const. Draft); Maryland (1968 Const. Draft); New Mexico (1969 Const. Draft); New York (1967 Const. Draft); Rhode Island (1968 Const. Draft); and NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th edition 1963) (hereinafter N.M.L.).

The Commission publications are:

a) A "Comparison of the Montana Constitution with the Constitutions of [Six] Selected Other States" prepared by the Montana Legislative Council staff in 1967 as working papers for a Council study of the constitution. This is reissued as MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, REPORT NUMBER 5.

b) A 1968 "Legislative Council Report on the Montana Constitution" reissued as MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, REPORT NUMBER 6. A small Council subcommittee made several section-by-section "trips" through the Montana Constitution during the winter 1967-1968, and concluded that "less than one-half of the document is considered adequate in its present form." LETTER OF TRANSMITTAL by Senator David F. James, Chairman of the Council (1968). The Council endorsed its subcommittee findings.

c) "Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees (December, 1968)" first published as MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, REPORT NUMBER 7. Generally I concur in the recommendations of the 1968 Legislative Council Report and of the 1969 Revision Commission subcommittees. They thought a number of current provisions for legislative organization and function were adequate or could easily be made adequate, but that numerous other current provisions should be deleted to leave the matters for statutory regulation.


STATE CONSTITUTIONAL PROVISIONS AFFECTING LEGISLATURES (May, 1967), is a Research Report of the Citizens Conference on State Legislatures that makes systematic analysis of then-current provisions of the 50 state constitutions.
and districting and apportionment. One set of problems of function is examined: the frequency and length of sessions and the related question of compensation.

THE CONSTITUTIONAL ARENA OF STATE LEGISLATIVE ACTIVITY

Events and political discourse of the late 18th century, attested by the Tenth Amendment to the United States Constitution, established the proposition that the people of a state could authorize their state government to do anything not prohibited by the national constitution. This large and unspecified reservoir of state power was further limited in practice, of course, by restrictions the people of each state had decided to impose on their state and local governments expressed in their state constitution. The tradition of written documents describing the grant and limitation of governmental powers emerged in full flower in the few momentous years between 1776 and 1787.

Thus, the authority of a state legislature, recently stated with uncommon precision by the 1968 Hawaii Constitution "shall extend to all rightful subjects of legislation not inconsistent with this (state) constitution or the Constitution of the United States." This is more illuminating than the common provision of state constitutions that simply vests "the legislative power of the state" in some sort of legislature. A state legislature may legislate on any subject not prohibited, in any manner not prohibited.

As the state constitution provides the framework for basic instrumentalities of government, it must also in a truly constitutional regime limit the otherwise plenary authority of a state legislature over some subjects of legislation not precluded from state competence by the national constitution. A century ago in the massive treatise that quickly became the "Blackstone" of American state constitutional law, Thomas M. Cooley expressed the matter this way: "The (state) legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion." Cooley endorsed a statement by Chief Justice Denio of the New York Court of Appeals:

"U.S. Const. amend. X: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Ratified 1791.
Hawaii Const. art. III, § 1. Legislative authority over a "wrongful" subject would seem anomalous; perhaps inclusion of the word "rightful" reassured lawyers that judicial review would still be available for clients disadvantaged by any novel or marginal exercise of legislative authority.
Mont. Const. art. V, § 1; Ida. (1870 Const. Draft) art. XVIII, § 9 suggests a possibly useful transitional statement: "Unrestricted nature of power of legislature. No inference restricting the power of the legislature shall be drawn from the deletions or omissions from this Constitution of any provisions of the Constitution of 1890 and its amendments. The power of the legislature shall be restricted only by this Constitution and the Constitution of the United States."
Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden."

Cooley's Constitutional Limitations summoned massive documentary support from state court practice for those who sought to show how state legislative authority was limited — not only by express constitutional terms, but by imaginative judicial application of the notion of due process, and by judicial implication of such restrictions as the notion that the only valid tax was one levied for a "public purpose."10

So almost everything expressed in a state constitution, along with some things implied from its wordage, limits or restricts the exercise of state legislative authority.11 From a legislative perspective, one of the prime purposes of a general constitutional review is to apply contemporary tests to the accumulated verbiage of the state charter, in order to retain only those restrictions of legislative authority that currently make sense, and perhaps to add a few new ones voicing current preoccupations with abuse of power. We might invert Chief Justice Denio's principle of constitutional draftsmanship: In inquiring, therefore, whether a given constitutional provision is required, it is for those who support its validity to show that its inclusion is necessary.

This perspective will inform our review of the legislative articles in the Montana Constitution and in more than a dozen modern state charters. Our problem would be simpler, and even the best of modern state constitutions would be briefer and tidier, if our principle was sufficient in practice. In fact, state constitutions also commonly direct governmental agencies and officers affirmatively to do certain things. Such affirmative performance requirements may be desirable; certainly they seem to be unavoidable, however clumsy are the modes to compel performance by reluctant officials. Occasionally such affirmative constitutional performance requirements are simply ignored. For example, the Montana Legislative Assembly never has conducted the state census midway between decennial federal censuses that was required by Article VI, section 2 of the 1889 Constitution. Such a census in 1895 and every tenth year thereafter was to furnish the basis for legislative apportionments midway between federal censuses, as well as after the decennial census.

9People v. Draper, 15 N.Y. 532, 543 (1857).
10B. Twiss, LAWYERS AND THE CONSTITUTION (1942 reissued 1962) explores Cooley's remarkable influence; he popularized the public purpose doctrine of taxation as an implied constitutional limitation and it became a part of the constitutional law of virtually every state although explicit constitutional statement of the proposition appeared in only sixteen state constitutions including MONT. CONST. art. XII, § 11; see Waldron, The Public Purpose Doctrine of Taxation, 14 SUMMARIES OF DOCTORAL DISSERTATIONS 242, (University of Wisconsin, 1954).
11Hurst, supra note 1 at 230: "The more constitutions went into detail, the more they limited the power of the legislatures and increased that of the judges."
SIZE OF CHAMBER

Five modern state constitutions specify the precise number of members to be elected to each legislative chamber, but three others prescribe a range of size within which statute or the reapportionment process will determine the precise number of seats.\(^1\) \(^2\)

 Constitutional statement of an acceptable range of size is probably preferable to a precise number because it gives the districting and apportioning process some flexibility to seek out an optimum fit of population ratios to existing populations of local units and to existing boundaries of election districts.

 Certainly a maximum size should be stated, particularly where multi-member districting is acceptable, because of the tendency of reapportioning agencies to resolve districting and apportionment problems by creating more seats.\(^3\)

 For single-member districting the imperatives may run the other way, since narrower percentages of variance can be more easily achieved with fewer and larger districts which disturb fewer established election district boundaries. Thus a constitutional lower limit of membership size would be desirable if there is any disposition to employ single-member districting.

 How large should Montana's legislative chambers be?

 Legislatures, both American and foreign, come in all sizes with no clear relationship of size to populations represented. The ideal size must be found in the eye of the viewer, not in any objective test. Most viewers would probably agree that the New Hampshire House of 400

\(^{1}\\text{Fixed size:}\) ALASKA CONST. art. II, § 1: 20 senate, 40 house; ARK. CONST. art. III, § 1, 34 senate, 102 house; HAWAI\(I\) CONST. art. III, § 2, 3: 25 senate, 51 house; ILL. CONST. art. IV, § 1: 59 senate, 177 house; MICH. CONST. art. IV, § 2, 3: 38 senate, 110 house; N.Y. (1967 Const. Draft) art. III, § 1(a): 60 senate, 150 house; R. I. (1968 Const. Draft) art. IV, § 3, 4: 40 senate, 100 house.

\(^{2}\\text{Range of size:}\) CONN. CONST. art. III, § 3. 4: 30-50 senate, 125-225 house; FLA. CONST. art. III, § 1, 16: 30-40 senate, 80-100 house; VA. CONST. art. IV, § 2, 3: 33-40 senate, 90-100 house; Ida. (1970 Const. Draft) art. III, § 3: statute, house not more than twice the size of senate; Md. (1968 Const. Draft) art. III, § 3.03: maximum: 40 senate, 120 house; N.M. (1969 Const. Draft) art III, § 2: maximum: 42 senate, 70 house; N.M.L. MODEL CONST. (1963) art. IV, § 4.02: constitution to fix range with senate not more than one-third the size of house.

\(^{3}\\text{Thus the U.S. House of Representatives grew to 435 members before it mustered determination to make this the maximum size. Montana's legislative chambers increased from an initial senate of 16 and house of 50, to a senate of 56 (because of 'county-busting'), and a house of 102, before the 1951 legislature cut the house size back to 90; it crept up to 94 after the 1950 and 1960 censuses, but the federal court increased the size to 104 in 1965, evidently because it was convenient to apportion representatives to districts initially designed for 55 senators. It may be questioned whether a federal court would assume responsibility, absent some state constitutional or statutory standard, to make any material reduction in the existing size of a legislative chamber; one-man, one-vote requirements can always be met more easily by increasing the size of multi-member districts and by assigning more representatives to such districts.}
Representatives, and the Massachusetts (240), Pennsylvania (203) and Georgia (195) lower houses, along with the U.S. House of Representatives (435) are too large for effective deliberative activity.

The average state house of representatives would have 115 members, and an average-sized senate would have 40 members. But such averages mean nothing when 40 senators represent 20 million Californians while Montana has 55 senators to represent less than 700,000 population and New Hampshire has 400 representatives for about the same number of people as Montana.

Each California senator represents about seven-tenths as many people as the entire population of Montana. Only Georgia (56), Illinois (58), Iowa (61), Minnesota (67) and New York (57) have larger senates than Montana. Twenty senators are enough in Alaska and Nevada, 28 in Utah, 30 in Arizona, Oregon and Wyoming, 31 in Texas, 35 in Colorado and South Dakota, and 49 for the entire Nebraska unicameral Legislature. Twenty-three states have larger houses of representatives than Montana’s 100 members.

The most meaningful comparison would be in terms of constituent population per legislator. Only in the senate and house of Alaska and Wyoming, and the New Hampshire house, do American state legislators represent fewer constituents than in Montana. It says something, of course; that these are states like Montana with relatively small populations.

If the Montana constitutional convention were to adopt the national average of constituents per legislator, Montana would have a senate of eight and a house of twenty members. Of course some of these would be elected from districts rather larger than a good many states, and there would be some problems in filling standing committees. But such a legislature would probably find the space allocated for legislative operation in the aging capitol to be sufficient.

What this fantasy illustrates, of course, is that an adequate legislative institution is achieved only by balancing many considerations. It does seem reasonable to suggest that the principles and goals of representative government would not be forfeit in a unicameral Montana legislature of 50 to 75 members.

The argument of persons in areas of declining population that they “lose” representation by reapportionment is understandable if not persuasive; their town or county that used to elect a senator and a

\[14\text{All figures are derived from 1970-1971 Book of the States, 65, 82-83, or computed from that source. There would be one senator per 86,260 constituents and one representative per 34,306 constituents as the national average; voters per seat for Vermont, Hawaii and Massachusetts were doubled to approximate total populations.}

\[15\text{The 1966 Montana-Idaho Assembly on State Legislatures thought the size of the Montana legislature was “approximately correct” but in 1968 the Montana Citizens Committee on the State Legislature proposed reduction in size of the chambers.} \]
representative may no longer do so, particularly if their county is associated with a more populous county in a several-county district that elects several legislators at large. But the argument that local interests are thereby sacrificed is not quite so obvious. There probably is greater diversity of occupation, way of life and political attitudes among any thousand dwellers in a few blocks of a major Montana city than among an equal number comprising the entire population of some smaller counties. In this sense the plea that increase in the size of legislative constituencies deprives local interests of representation seems no more valid for an essentially homogeneous sweep of prairie or river valley than for a portion of an urban center.

**Two Houses—or One?**

This is one of the fundamental decisions to be made by a constitutional convention, or by the people, regarding the legislature. The matter undoubtedly will be explored by the Montana constitutional convention, perhaps with unusual vigor after the deadlock of recent years over basic state tax policy. At the very least, I hope the delegates will submit the bicameral-unicameral option to the voters at ratification. I have come to favor a unicameral legislature for Montana.

Several of the first state legislatures were unicameral, but the pattern of a two-house legislature was universal among the states by 1837. Nearly a century later, Nebraska adopted a unicameral structure in 1934, but no other state followed that lead. Discussion of the issue waned until the one-man, one-vote decisions of 1964 eliminated the possibility that one chamber might represent territorial divisions without regard to their population. Montana’s traditional one-senator-per-county system, justified by the “little federal” analogy, was terminated by a federal court decision in 1965.

Although most of the world’s legislatures have two chambers, balanced or “true” bicameralism that gives substantial equality of powers to each chamber seems to be a distinctive feature of the American national and state legislatures. By contrast the less popularly constituted “upper” chambers of British and Commonwealth parliaments have functions distinctly subordinate to the first, or lower
chamber. In the parliamentary or "cabinet" form of government, the popularly elected lower chamber creates the executive from its own leadership, and that executive continues to function only so long as it maintains its "parliamentary majority." Does balanced bicameralism persist as a kind of luxury in American legislatures because our executive is independently constituted? An independent executive in at least nominal control of the bureaucracy can get on with governing in some fashion despite opposition in one or both chambers of the legislature, so long as public funds are appropriated.\(^\text{18}\)

One may also ask whether the steady growth of executive and bureaucratic authority during the past century, while universal and probably inevitable, may have been disproportionate in the United States where balanced bicameralism has sustained the opportunity for deadlock and delay in the legislature?

Still further, has this built-in capacity and tolerance for deadlock and delay contributed to the inadequate response of state governments to pressing problems of the American society in the past generation—contributing to the universally acknowledged shift of significant authority and function to the national government? My sense that the answer in each case should be a qualified affirmative contributes to the belief that the Montana constitutional convention should seriously consider adoption of a unicameral legislature. There are also some immediate, local and demonstrable reasons for such consideration.

A sterile quality has permeated modern American debate over cameralism. In the first place, it has pitted the real and the experienced against the hypothetical and unproven, because the solitary unicameral example has had limited "transfer value." It has always been possible to argue that the Nebraska experience is irrelevant because of nonpartisan election (Minnesota is the only other state to elect its legislators on nonpartisan ballot) in a state so dominated by one party that the example has no validity for states like Montana with a vigorous tradition of party competition. Moreover, much of the defense of bicameralism has been expressed in terms so irrelevant to the real basis for its continued support that some proponents seem either to lack understanding or candor, or both, about what goes on in a state legislature.

I will note some of the conventional arguments, with very brief comment, and get on to two or three points that seem to have real substance for the Montana legislature.\(^\text{19}\)

\(^{18}\)Wheare, supra note 16 at 137, indicates that balanced bicameralism also exists in Switzerland where the executive holds office for a fixed term.

\(^{19}\)The propositions are summarized from Zeller, supra note 16. See also W. Keeffe and M. Ogul, The American Legislative Process, 53, 55 (1964).
For two houses it is argued:

1. **The delays and duplication of process prevent hasty, ill-considered legislation.** Query: In a short session legislature like that of Montana, do not the delays of doing everything twice promote, rather than discourage, ill-considered legislation? If the argument is persuasive why do many of its proponents also urge retention of a 60-day session limit?

2. **There is a built-in check against popular passions and impulses.** Perhaps. Query: If legislators are representative, should they not respond to popular impulses? And do they not do so on occasion, in bicameral legislatures? Where there is a will and absence of opposition, legislation occasionally breezes through the Montana bicameral legislature in two or three days.

3. **A unicameral body might be too powerful vis-a-vis other branches of government, or the people.** Perhaps. But earlier unicameral legislatures were not monsters, apparently, nor has the Nebraska legislature proven to be one. Query: Is a bicameral legislature too feeble, when stalemated by partisan or other divisions, to maintain adequate check against other branches?

4. **Two houses are indigenous and traditional.** So were legislative election of United States senators, male suffrage, and the 21-year-old threshold to the “political country.” One of the essences of a constitutional convention is the unaccustomed burden of proof it thrusts upon the traditional, to revalidate continued observance.

5. **Two chambers give better protection against special interest or lobby domination of the legislature.** It will be argued below, and at length, that however true this may have been in the 19th century, bicameralism works precisely in the other direction today.

For one chamber it is argued:

1. **It gives legislative service more prestige, attracts better-qualified candidates, and encourages development of leadership.** Perhaps, but none of these points is susceptible to the kind of proof that would persuade the unconvinced.

2. **It operates more efficiently to give thorough consideration of legislation.** This apparently has occurred in Nebraska: to the extent that processes would be stretched out and given more time, the point seems reasonable. The same could occur, of course, in a bicameral legislature given more time to do its work.

3. **Rivalry and deadlock between chambers is eliminated.** Obviously.

4. **Responsibility is more clearly fixed.** Equally obvious, since

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neither house, or its leaders, can blame the rascals in the other chamber, or the bicameral system, for their difficulties.

5. **Collaboration with the executive is facilitated.** Of course. But how much value is to be placed on this collaboration?

6. **It is less costly in various ways.** It might be, if limited in membership to something like half the present total membership. This kind of dollar-of-direct-output argument, while persuasive to some, probably is less important than the question whether the impact on state government generally would be more or less desirable.

7. **The legislative process is more open, more deliberate, more capable of being understood by people outside, and therefore less subject to special interest dominance.** These are substantial considerations, discussed at greater length below.

**CAMERALISM AND PARTY COMPETITION IN MONTANA**

A constitutional convention is the appropriate forum to review the basic structural pattern of one or two legislative chambers, and consideration of the question in Montana should not be clouded by inappropriate comparisons to Nebraska experience. The unicameral Nebraska legislature of 49 members elected for four-year terms has apparently fulfilled, with at least moderate success, some of the claims of economy, efficiency, representativeness and adequate deliberation that were made for it. But the Nebraska legislature has always been elected on a nonpartisan ballot, in a state so republican that it has narrowly escaped classification as a one-party state.

By sharpest contrast Montana state politics has been stubbornly, persistently competitive over 80 years—perhaps more evenly balanced in bipartisanship than any other state. Montana’s first legislative assembly never met because there was no party majority to organize.

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D. Lockard, *The Politics of State and Local Government*, 185 (1963). In this classification, based on voting for president and governor 1944-1960, Nebraska was the least competitive among a group of seven states classified as “less competitive, Republican dominant.” Since 1941 a Democrat has been governor of Nebraska for only eight years; all of Nebraska’s U.S. senators have been Republican; and the last 14 congressional elections have sent 45 Republicans and only four Democrats to the U.S. House of Representatives from Nebraska.


M. Jewell and S. Patterson, *The Legislative Process in the United States*, 141-146 (1966) compare and classify 48 states according to party competition in their state legislatures but Nebraska and Minnesota are excluded for the obvious reason that their legislative elections are nonpartisan.

“‘As Main goes . . .’ is an outmoded adage, perhaps valid for an earlier time. Only Idaho, narrowly, has picked the winner in presidential elections more consistently than Montana in this century. Montana favored Bryan in his free silver campaign of 1900 (by only 1,773 more votes than for McKinley), but then favored the winner every time except 1960 when Nixon carried the state by 6,950 more votes than Kennedy in a notably close national election. See also, Jewell and Patterson, *supra* note 21 at 144.
it, and the deadlock extended into the second session until it was resolved by an ad hoc compromise. Counting these first two sessions, party control has been divided between, or within, the chambers in 19 of 42 sessions, including the seven most recent sessions.

**PARTY CONTROL, MONTANA LEGISLATIVE ASSEMBLY AND GOVERNOR, 1889-1971**

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</tr>
<tr>
<td>1913</td>
<td>D</td>
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<td>D</td>
<td>1955</td>
<td>R</td>
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<td>D</td>
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<td>1915</td>
<td>R3</td>
<td>+</td>
<td>D</td>
<td>1957</td>
<td>D</td>
<td>+</td>
<td>R</td>
</tr>
<tr>
<td>1917</td>
<td>R</td>
<td>+</td>
<td>D</td>
<td>1959</td>
<td>D</td>
<td>D</td>
<td>+</td>
</tr>
<tr>
<td>1919</td>
<td>R</td>
<td>R</td>
<td>+</td>
<td>1961</td>
<td>R</td>
<td>+</td>
<td>R</td>
</tr>
<tr>
<td>1921</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1963</td>
<td>D</td>
<td>+</td>
<td>R</td>
</tr>
<tr>
<td>1923</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1965</td>
<td>D</td>
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<td>R</td>
<td>+</td>
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<td>D</td>
<td>+</td>
<td>R</td>
</tr>
<tr>
<td>1927</td>
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<td>R</td>
<td>+</td>
<td>1969</td>
<td>D</td>
<td>+</td>
<td>R</td>
</tr>
<tr>
<td>1929</td>
<td>R</td>
<td>R</td>
<td>+</td>
<td>1971</td>
<td>D</td>
<td>+</td>
<td>D</td>
</tr>
</tbody>
</table>

= 1889: senate evenly divided, no house majority w/o contested seats, no session
+
party competition
3 majority by 3rd party support

Of even greater impact is the fact that during 10 of 23 sessions in which the same party controlled both chambers, the governor was of a different party from the legislative majorities. The Montana governor has faced an opposition majority in at least one legislative chamber during 12 of the last 16 sessions, and during 30 of the 42 sessions. In only 11 of 42 sessions—most recently in 1953—has nominal party harmony existed among the governor and leadership of both legislative chambers (sessions of 1895, 1899, 1901, 1913, 1921, 1923, 1937, 1943, 1945, 1947, 1953).

In Montana since 1889, party control has been divided as between the governor and at least one chamber of the legislature 71 percent of the time.

To summarize: the persistence and sweep and close balance of party rivalry in Montana state politics constitutes a factor justifying review of bicameralism in the state legislature. I think that party competition in the Montana pattern is healthy and desirable, but believe that its implications need to be recognized today as they could not have been anticipated in 1889. We possess mobility of movement, freedom to organize interests, and media to communicate them beyond

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https://scholarship.law.umt.edu/mlr/vol33/iss1/2
the wildest imaginings of the 19th century. My argument is that we have enough checks against abuse of power without bicameralism in the legislature, and too many checks with it. The delay and obstruction involved by bicameralism in Montana is excessive and constitutes a prime reason for consideration and adoption of a unicameral legislature.

**Bicameralism and Control of “Special Interests”**

“We're really here, you know, to prevent the passage of bad legislation,” a thoughtful senator once explained to me after an unproductive morning session. Since state legislators rarely originate bills they introduce, and pass less than half of the measures they consider, this was a pungent if unconventional description of the legislative process. “Bad” or “junk” bills are, of course, those introduced for the benefit of the other fellow. “Our little bill” is always vital and so obviously sensible that only an ignoramus would oppose it.

The argument comes down to us from the 19th century that the acknowledged delays of process and the not-so-obvious superiority of deliberation in a bicameral legislature make it more difficult for “special” interests to prevail. In the 19th century much legislation was in fact “special” or “private” in nature. Prior to the adoption of general incorporation statutes during the middle third of the century, private corporations came to supplant state and local governments in the development of most internal improvements; their essentially monopolistic character created special problems and great pressures for legislatures trying to regulate them. General incorporation statutes and specialized regulatory bodies gradually emerged to manage these central problems of the economy, but not before legislatures had acquired a reputation for corruption, and state constitutions had been laden with long lists of prohibitions against all kinds of special and private legislation.  

A distinguished lawyer-historian summarizes the problem:

In the nineteenth century many important interests were mainly concerned with getting positive action out of the legislature—special corporate charters, for example. By the twentieth, the emphasis had changed for many of these interests, from getting to retaining their gains unimpaired. They were thus now more interested in minimizing than in promoting legislative activity. Senator Norris drove through the change in Nebraska to the one-house legislature mainly with the argument that the two-chamber form gave too much chance for obstruction of measures that were in the general interest.

My observation of three state legislatures accords with this historical observation. In modern circumstances, bicameralism in the state legislature gives too much advantage to those interests that are sub-

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24Mont. Const. art. V, § 26 and scattered provisions relating to railroads and other common carriers, as in art. XIV, is quite typical. See Secrist, supra note 1, and any collection of state constitutions.

Hurst, supra note 1 at 55.
 substantially vested after a century of state government. The unprecedented changes that have occurred during the past half-century, including the accelerated rate of change we experience in our institutions, requires innovative public policies just to keep up with the conditions of our existence.\textsuperscript{26} Inflexible government and political arrangements resisting fundamental changes in the way people live creates a widening gap between expectations and performance that invariably presages revolutionary and uncontrolled change.

Stated another way, nearly all the advantages in the present state legislature now lie with those whose politics is essentially status quo, protective of what they have, calling mostly for defeat of any change. Bicameralism more than doubles the nooks and crannies of process in which to bushwhack anything that might jeopardize an entrenched position. David Truman has noted the advantage "defensive groups" found in bicameralism:

> The bicameral organization of our typical legislature and the constitutional separation of powers operate, as they were designed, to delay or obstruct action rather than to facilitate it. . . . The diffuseness of leadership, and the power and independence of committees and their chairmen, not only provide a multiplicity of points of access . . . but also furnish abundant opportunities for obstruction and delay, opportunities that buttress the position of defensive groups.\textsuperscript{27}

It is not argued here, nor by the authorities cited, that it should simply be easier to pass bills, or that more of them should be passed, or that the activities of interest groups are in themselves improper. They are indispensable to the legislative process in a system where political parties seldom assume responsibility for formulation of public policy.

It is suggested that a soundly elected modern state legislature, given adequate time, facilities and resources, and buttressed by the unprecedented modern capacities to know what is happening, and to mobilize to influence it, could be safely and more adequately responsive to contemporary needs if unicameral than bicameral.

No adverse moral and political judgment is implied in the observation that most incumbent legislators and practicing lobbyists I know seem to favor perpetuation of a bicameral legislature. They may be expected to approve arrangements with which they are familiar, particularly if the complexities of these arrangements maximize the need for their particular kind of "know how". This does not foreclose independent judgment by citizens and less-committed observers of the process, that it is unduly complicated. A significant proportion of former Montana legislators who voluntarily quit the service recently

\textsuperscript{26}A. Toffler, \textit{Future Shock} (1970), discusses the phenomenon in terms of "accelerative thrust" and increasing "transience" as characteristics of contemporary life in a technological society.

\textsuperscript{27}D. Truman, \textit{The Governmental Process}, 354 (1951). His chapters 11 and 12 on The Dynamics of Access and Techniques of Interest Groups in the legislative process are crisp, scholarly discussions by a leading student of interest group politics.
voiced frustration with the complexities they experienced and 20 percent of them volunteered the idea that the legislature should be unicameral.28

DISTRICTING AND APPORTIONMENT29

Provisions regulating districting and apportionment for legislative elections have prominent place in state constitutions, either as part of the legislative article or in a special article or schedule. The constitution of a new state commonly contains statutory detail to get the first legislature elected,30 but such provisions usually become obsolete after the first succeeding decennial census. Modern practice might place such detail in a transitional ordinance or schedule, but provisions for recurrent districting and apportionment process are vital elements to be considered in a contemporary state constitutional revision.

The reapportionment revolution of the 1960's occurred when federal courts abandoned their traditional reticence31 to intervene in state districting and apportionment for congressional and legislative elections and subjected the process to equal protection requirements of the Fourteenth Amendment.32

The consequence for state constitutions was sudden obsolescence of historic provisions found to conflict with one-man, one-vote standards enunciated by federal courts.33 Efforts to devise new machinery for

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Unpublished research of Mrs. Jean Ellison, spring 1971, for a legislative process seminar, University of Montana. A systematic effort was made to contact every Montana legislator serving one or more sessions since 1950, who had voluntarily abandoned legislative service (did not seek reelection). Each was asked: "What do you consider to be the greatest weakness of the legislative process as it exists in Montana?" and "Have you any suggestions that you believe would make the legislature more efficient, more effective, and more responsive?"

Reapportionment, as a term, commonly describes a process that has two distinguishable steps: districting establishes the number and boundaries of election districts within which legislators are elected; apportionment establishes the number of legislators to be elected from each district; more accurately, the total number of legislators is apportioned among the districts. For single-member districts the two stages become one: districts are created and one legislative seat is apportioned to each district. Multi-member districts call for a distinction between the two steps: creation of a number of districts, and then apportionment of one or more seats to each district.

The actual census population of each single-member district must be approximately the same. For multi-member districts the fiction is honored that equal representation exists when the district population divided by the district's apportionment of seats equals the state population divided by the total number of seats to be apportioned:

<table>
<thead>
<tr>
<th>District Population</th>
<th>State Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of District Seats</td>
<td>Total number of seats</td>
</tr>
</tbody>
</table>

**Mont. Const.** art. VI, §§ 5, 6 (repealed 1965 Laws, c. 273, ratified Nov. 8, 1966).

**Colgrove v. Green,** 328 U.S. 549 (1946).


No state constitutional provision can take priority over a justiciable right derived from the United States Constitution or laws, U.S. Const. art. VI, § 2. Thus Mont. Const. art. V, § 4, was held unconstitutional, **Herweg v. 39th Legislative Assembly,** 246 F. Supp. 454 (D. Mont. 1965); 1965 Laws, c. 273, ratified Nov. 8, 1966, repealed art. XI, §§ 4 and 45 due to incompatibility with new reapportionment requirements.
districting and apportionment that will meet Fourteenth Amendment standards of equal protection are prominent features of state constitutions revised during the past decade. Of 14 recent constitutional drafts here under examination, 12 introduce some agency other than the legislature either to initiate reapportionment plans, or to accomplish them following legislative deadlock. This article will explore these innovations and make a recommendation for Montana. First, however, it will be helpful to summarize some constitutional benchmarks established during the past decade, and seek to identify related matters that warrant treatment in a modern state constitution.

National constitutional requirements now establish certain things that must follow each census:

1) Reapportionment for congressional seats and state legislative chambers must occur decennially after the census.

2) The standard to be observed in creating districts for election of U.S. representatives is "a good faith effort to achieve precise mathematical equality" among their populations.

3) Each chamber of the state legislature must be elected by a districting and apportionment system that achieves district populations or apportionment ratios "as nearly equal as practicable."

4) The standard of equality must be a good-faith attempt to achieve population equality rather than some predetermined maximum percentage of variance.

5) But the United States Supreme Court has declined to specify allowable percentage limits of population variance because much depends upon size of the districts and on other considerations that vary from state to state.

6) More precise standards of allowable variance may emerge from the litigation of reapportionments in the 1970's, but a current "educated guess" is that variances for state legislatures are suspect

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"Kirkpatrick v. Preisler, 394 U.S. 526, 531-532 (1968); justification must be given for "limited population variances which are unavoidable despite a good-faith effort.""

"Reynolds v. Sims, supra note 17 at 577.

"Kirkpatrick v. Preisler, supra note 34 at 531.

"The wide variation in size of state legislative chambers, as between California's senate of 40 and New Hampshire's house of 400 was noted, supra note 14 and accompanying text. A variation of 1,000 population between two California senate districts would be 1/20 of one percent plus or minus; between two Montana house districts, about 14.5 percent plus or minus; and between two New Hampshire house districts, about 56 percent plus or minus. For example: shifting one precinct or census enumeration district of 350 population in Montana would involve a shift of 1/10 of one percent, plus or minus, for each district; but a shift of the same population between two legislative districts of 7,000 population would involve a percentage shift of five percent plus or minus for each such district."
if greater than five to ten percent. With such variances the apportioning agency must be able to show "good faith effort" to achieve equality in order to justify variances of that magnitude. Rejection of an apportionment with narrower margins of variance to adopt one with wider variances casts a shadow on the good faith of the apportioning agency.

7) Primary responsibility for equitable districting and apportionment lies with state legislatures and/or state apportioning agencies.

8) But federal and state courts will accept and, upon satisfactory proof, sustain citizen actions to enjoin inequitable apportionments. Usually the court finding inequitable apportionment will refer the problem back to the constituted state agency, often with guidelines or instructions, "retaining jurisdiction" until the matter is resolved to satisfaction of plaintiff and court. Sometimes the court itself will "fashion relief"—that is, impose its own plan of reapportionment as in Montana in 1965.

As with racial segregation and the rights of the criminal defendant, judicial application of Fourteenth Amendment standards to legislative representation complicated but did not supplant state responsibilities. The state still has very substantial discretion as to some of the standards to govern legislative selection:

1) Should the state constitution attempt to declare such standards? In what form?

2) From what kinds of districts should state legislators be elected? The state still may choose between single-member or multi-member districts or certain combinations of the two kinds of districts.

3) The state still may determine the most appropriate reapportionment agency. Should this be the legislature, or an apportionment commission, or some combination of the two? How should a special apportionment agency be constituted?

4) Should the constitution specifically recognize and regulate the exercise of judicial review in apportionment matters?

CONSTITUTIONAL ACKNOWLEDGEMENT OF THE APPLICABLE FEDERAL STANDARD

As indicated above, federal courts will apply the prevailing conception of equal protection of the laws to state reapportionments, whether

**BOYD, REAPPORTIONMENT IN THE 1970s: THE PROBLEMS OF COMPLIANCE, 5 (an address prepared for the National Legislative Conference and circulated by the Council of State Governments January 1971): "If you play around with figures much bigger than 5 percent, then inevitably you are in trouble."

**This is my reading of Kirkpatrick v. Preisler, supra note 34 at 529 in which a central fact was a district court finding below "that the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them" than the one adopted and at issue in the case.

the state constitution acknowledges such jurisdiction or not. But one of the functions of a state constitution is to enunciate fundamental legal principles for the guidance of both governors and governed. Several modern constitutions expressly acknowledge the federal standard, and the language of the Florida provision is particularly concise and comprehensive; it directs the legislature to reapportion after each decennial census "in accordance with the constitution of the state and of the United States." The Connecticut Constitution directs that "the establishment of districts in the general assembly shall be consistent with federal constitutional standards."41

**Single-Member or Multi-Member Districts?**

The choice between single-member and multi-member elections to the legislature is a fundamental legislative issue to be resolved by the constitutional convention. The choice is commonly made in the constitution, although it need not be exclusively for one or the other. As in Montana through most of its century-long political history, a combination of the two kinds of districts is not uncommon. But the relative balance between them materially affects the nature of legislative representation.

Should the voter choose among two or three candidates for a single seat and be represented by one winner? Or should the voter choose among ten, or twenty, or forty candidates and be represented by the fraction of them—five, or ten, or twenty—who get the most votes? Should there be a one-to-one relationship between constituent and legislator, or group representation of sizeable populous districts?

Single-member representation of relatively small territorial districts has long prevailed in both American and British legislative elections. It probably still prevails in American state legislative elections despite pressures to use multi-member districts as the easier way to achieve equal protection of the franchise.

For a century, a preponderant majority of Montana territorial and state legislators were elected from single-member districts, although a few members were elected from multi-member districts of moderate size in the larger cities. The situation was sharply reversed by the federal district court that reapportioned the Montana Legislative Assembly to

"**Conn. Const. art. III, § 5.** The N.Y. (1967 Const. Draft) art. III, § 2 (c) said "'the standards set forth in this section shall govern redistricting of congressional districts to the extent that such standards are not inconsistent with standards established by the United States.' But state legislative districting is also subject to federal standards. The R.I. (1968 Const. Draft) art. IV, §§ 2 and 3 provided for apportionment of the senate and house 'on the basis of population, consistent with federal standards.' This like the Connecticut provision omits reference to the fact that congressional districting is subject to federal constitutional and statutory standards."
one-man, one-vote standards in 1965. By 1971 the Montana Legislative Assembly was in full flight from the historic single-member district system and enacted a reapportionment that would elect 40 of 50 senators, and all 100 representatives from multi-member districts. They were not all large districts, but the two largest cities would elect six senators and 12 representatives each from November ballots that would confront the voters in those cities with lists of a dozen senate candidates and two dozen representative candidates—or more. As this was written, a federal district court had ruled that the new arrangement for house elections would suffice to elect delegates to the constitutional convention in November, 1971, but still held under advisement whether to permit 1972 legislative elections under the system.

Nominations and elections to the constitutional convention appeared likely to demonstrate some of the implications of large multi-member districting with unusual clarity, since no incumbency or carry-over factors would be involved in the delegate nominations and elections.

In the September 14, 1971 primary elections, candidates from dominant counties in multiple-county districts generally won more than their share of places on the November ballot; conversely, candidates from counties of small population in such multiple-county districts fared relatively poorly. The real test will come in November, of course, when

<table>
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<th>Dist.</th>
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<th>Name</th>
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<th>Filings</th>
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<td>75</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
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<tr>
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<td>48.2</td>
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</tr>
<tr>
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<td>75</td>
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<tr>
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<td>100</td>
</tr>
<tr>
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</tr>
<tr>
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<td>6</td>
<td>Lewis &amp; Clark</td>
<td>81.1</td>
<td>85</td>
<td>83.5</td>
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<tr>
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<td>4</td>
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<td>43</td>
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<tr>
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<td>4</td>
<td>Lincoln</td>
<td>64.2</td>
<td>57</td>
<td>50</td>
</tr>
</tbody>
</table>

Candidates from Carter, Fallon, Garfield, Prairie, Golden Valley and Broadwater Counties were eliminated, and there were no candidates from Wibaux, Stillwater, Petroleum and Granite Counties.
the field of candidates will be cut by half or more than half in general bipartisan elections.

Ironically, "one-man, one-vote" standards have been implemented in Montana and some other states by increasing the "one-voter, many-legislators" relationship involved in multi-member districts. This has resulted from an intersection of several factors:

1) Reapportionment gave substantially greater shares of representation to larger cities. Characteristically, the four largest Montana cities, already represented in multi-member districts of moderate size, together picked up 17 more senators and nine more representatives in 1965.

2) It is easier to assign additional seats to populous centers than to divide those centers into smaller districts. It is easier to combine counties of small population than to divide some of them up, attaching portions to other counties. Arithmetic reinforces politics: it is easier to create a smaller number of large multi-member districts than to achieve a small population variance among each of many smaller single-member districts. It is also easier politically among incumbent legislators who have "made it" in sizeable multi-member districts—particularly when they recognize a partisan advantage in perpetuating the basis for their own pluralities or majorities. The existence of such county-wide pluralities for Republicans in Yellowstone County and for Democrats in Silver Bow County are two fundamental facts of legislative politics and apportionment in Montana. In the 1971 Legislative Assembly, the chairman of the House reapportionment committee, a Billings Republican, and the vice-chairman of the senate reapportionment committee, a Butte Democrat, were among the most determined champions of multi-member districting.

3) Some state constitutions prohibited division of counties in legislative districting; reapportionments that divided counties bore the burden of proof that such division was necessary to meet equal protection standards. The Montana Constitution contained such a prohibition against dividing counties and in 1965 the federal court, having found a way by use of multi-member districts to meet then-prevailing lenient apportionment standards, refused to divide counties. The provision was repealed in 1966.

There is some evidence that, like Montana, other states have turned to use more large multi-member districts, particularly for the urban

*Mont. Const. art VI, § 3; See Waldron, Montana's 1966 Legislative Apportionment Amendment, 4 Mont. Bus. Q. 2 (1966).*
centers, but the evidence is too conflicting to speak of a trend. In 1962, on the eve of the reapportionment revolution, 84 percent of all state senators and 54 percent of all state representatives were elected from single-member districts. I lack comparable data for recent elections, but in 1970, 87.9 percent of all senate election districts were single-member, and 76.4 percent of all house districts were single-member. Several states, including Ohio, Colorado, Oklahoma and Tennessee, have moved away from multi-member districting completely, and Texas and Georgia have broken up some of the very large multi-member districts that resulted from gains in representation by major urban centers.

The Montana Citizens Committee on the State Legislature, like the national Citizens Conference on the State Legislatures, has favored single-member districting across the board, because, in the language of its recent summary report, single-member districting facilitates "clear identification between legislators and their constituents, a direct tie between each individual legislator and each individual district," and greater diversity of membership through representation of minorities that tend to get submerged by a dominant majority in a large multi-member district.

Efforts to demonstrate that the legal "fiction" sustaining multi-member districting violates equal protection guarantees of the Fourteenth Amendment have not thus far succeeded. From Lucas v. Colorado General Assembly in 1964 to Connor v. Johnson in 1971, the Supreme Court has expressed doubts about the representativeness of large multi-member districts, and regards the question as justiciable; but thus far no peti-

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\*M. Jewell, *The State Legislature*, 21 (1969), citing David and Eisenberg, *State Legislative Districting*, 20 (1962) for the 1962 figures. For 1970, see 1970-71 Book of the States 82-83; 26 of 50 senators and 17 of 49 houses were elected exclusively from single-member districts; in 24 senators and 32 houses elected partially from multi-member districts, a majority of districts were single-member. Burns, *The Sometime Governments*, 82 (1971), grossly misstates the balance, apparently from failure to recognize the substantial number of single-member districts in states that also use the multi-member district; the error is curious since the Citizen Conference on State Legislatures that sponsored the publication favors single-member districts.

Jewell, *supra* note 49 at 23.

Burns, *supra* note 49 at 52-53, 135. The lowly rating (41st among the 50) given the Montana Legislative Assembly in this national study apparently resulted in considerable degree from a standing of 49th for "representativeness" and 46th for "independence". The Montana legislature received average ratings on three other scores—26th for functional effectiveness, 28th for accountability, and 31st for capacity to inform itself about legislative needs. I have strong personal reservations about any rating system that puts short-session biennial legislatures on the same scale with virtual full-time operations in some populous states; if such comparisons make good propaganda for legislative reform nationally, they can be singularly unhelpful in addressing the problems of a particular legislature.

Discussed *supra* note 29.
tioner has been able to demonstrate their essential incompatibility with equal protection of the laws. 53

On June 3, 1971 a six-member per curiam majority of the U.S. Supreme Court ordered a Mississippi federal district court to devise single-member districts for Hinds County, where petitioners had objected to electing five senators and 12 representatives at large and had demonstrated that single-member districting was feasible. The majority said: "[W]hen district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." 54

What does it matter, whether a citizen is represented by one legislator or by a panel of legislators? When the real-world alternative is between one and twelve (Cascade and Yellowstone Counties, 1971) in the state house of representatives, the difference is apt to be real, although there may be little agreement about its nature or significance.

Debate about the relative values of the two systems is inconclusive because the divergent values desired from representation remain unarticulated, while the real-world distributions of interests vary almost infinitely with the territorial size and population of particular districts and with matters of prime concern—whether they are economic, recreational, ethnic, religious. . . . Hopefully, the constitutional convention will look somewhat dispassionately at the alternatives, and critically examine the system by which the delegates themselves were elected.

53 In Lucas v. Colorado General Assembly, 377 U.S. 713, 731 (1964), Chief Justice Warren for the majority remarked that a Denver voter for eight senators and 17 representatives found "[b]allots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them." But "[w]e do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from . . . any political subdivision, are constitutionally defective."

In Whitcomb v. Chavis, ...... U.S. ......, 29 L. Ed.2d 363, 375 (1971) voters in a Negro ghetto in Indianapolis failed to establish the fact that their submergence in at-large elections from the metropolitan county denied equal protection. "But we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population" citing earlier cases. "Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-membered for both houses . . . or if it lacks provision for at-large candidates running from particular geographical districts . . . ." Other cases discussing the multi-number districting problem were cited at 375.

54 Conner v. Jackson, ...... U.S. ......, 29 L. Ed. 268, 271 (1971). The brevity of the opinions and lack of a report of the case below prevent determining the context for this statement. Mississippi had apparently employed multi-member districts freely as a matter of state policy as recently as 1970, see 1970-1971 Book of the States 82, 83 (1970-1971). The Conner case was decided four days before Whitcomb, cited above, but in view of its emergency nature the opinions probably were written after those in Whitcomb.
Proponents of single-member districts are apt to make these claims:

1) The district is relatively small in area and population; this fosters personal identification between constituent and legislator, from campaign through legislative service.

2) Lower campaign costs in the smaller district open candidacy to people who would be precluded by the costs and rigors of running in a larger constituency.

3) By the intimacy of constituent-legislator relations, the legislator is kept more responsible; people know to whom they should address their desires, and watch voting performance.

4) Localized minorities within a larger community gain representation that would be denied them by dominant majorities of the larger constituency.

Critics of the single-member district might make these rejoinders:

1) Localized interests in the smaller district give undue advantage to narrower interests in the legislature and discourage recognition of larger values of the entire political community.

2) The base for recruitment of effective legislators is too narrow, diminishing the stature of representatives and the quality of legislation.

3) The decennial problem of redefining the more numerous boundaries of single-member districts is unduly costly and disruptive of district continuity — except to the extent that increased opportunities for gerrymandering perpetuate representation of locally dominant groups (incompatible arguments: pick one).

Proponents of multi-member districts may also make these claims:

1) Group representation of the community fosters team action and increases community “clout” in the legislature.

2) Party responsibility for recruitment and discipline of its members is fostered by group representation, improving quality even while achieving economies of group candidacy.

3) The larger view of things is fostered because intensity of local pressures on individual legislators is cushioned in group representation.

Proponents of single-member districting might retort that these points simply prove their claims for better representativeness in the smaller district. They would ask how a voter can make rational choices from a list of a dozen or two dozen candidates. They would point out in some

*A simple solution to Montana’s reapportionment problems was proposed by Repres. L. Lockrem, first term Republican from Billings, late in the second special session; his H. B. 32 [Ex. Sess 2] would have assigned fifteen senators and twenty-five representatives to each of the state’s two congressional districts with a total population variance of less than 3.3 percent. Nothing in such a plan would violate either federal or state constitutional standards, and by extreme example, the notion illustrated some of the tendencies of the large multi-member districts that were created by the 1971 legislative apportionment.
situations that at-large election from the larger district is a massive political gerrymander by the community-wide majority.56

This catalog of arguments, neither exhaustive nor sophisticated, is more apt to fuel debate than to resolve the issue.57 My own preference for Montana, stated early in the reapportionment debate, has been modified by growing disillusionment with the obfuscations that accompany bicameralism and by my experience with practical efforts to achieve reapportionment within the rigorous equal protection standards that appear to govern the problem in the 1970s.

If the legislature is to remain bicameral the senate ideally should be elected from a mixture of single-member multiple-county districts for sparsely populated regions (to keep the districts “reasonable” in size) and small multi-member districts for the populous centers; no district should elect more than three senators; the house could be elected entirely from single-member districts. Such representation would be close to the century-old tradition in Montana — a valid tradition in my judgment, unfortunately abandoned in 1965 — and it would maximize the divergent bases of representation in the two chambers that is the only persuasive modern argument for bicameralism.58 One-man, one-vote population standards do not prevent achieving this value of bicameralism, but I have learned that they make it difficult, at least in Montana. It is difficult, if not impossible, to create 90 or more single-member districts of sensible contour and content within a total population variance of less than five or six percent; some such districts will depart from conventional notions about what sensible districts should be.

I have also learned, by drafting such a plan, that a senate of 40 to 45 members can be elected from sensibly compact single-member

57Discussion of the relative values of single-member versus multi-member representation is neither extensive nor notably useful. But see: M. Jewell, supra note 49 at 20-24; M. Jewell and S. Patterson, supra note 21 at ch. 3; W. Keefe and M. Ogul, supra note 20 at ch. 3; D. Leithold, The Effect of Multi-Member Districts on State Legislatures (processed, and distributed in the Montana Legislative Assembly, 1965); 10 Nomos, Representation (1968), esp. Dixon, Representation Values and Reapportionment Practice: The Eschatology of ‘One-Man, One-Vote’, 167-195; A. DeGrasia, Apportionment and Representative Government (1962); R. Dixon, Democratic Representation (1968); R. Silva, Compared Values of the Single- and the Multi-Member Legislative District, 17 W. Pol. Q. 504 (1964). In Whitcomb v. Chavis, supra note 53, n. 33 at 382, n. 38 at 384, Mr. Justice White, speaking for the majority cites discussions of the alternative kinds of districts and concludes that “the comparative merits [1] of the two approaches to metropolitan representation has been much mooted and is still in contention.”
districts with quite minimal population variances — perhaps as little as three percent between the largest and smallest districts. Many such senate districts can then be split into two sensible single-member house districts of nearly equal population, but some cannot be so subdivided; these latter could be left as two-member house districts and the plan would pass legal muster if the rationale was systematically applied in all parts of the state. The plan would not achieve maximum differentiation between senate and house constituencies, but it can meet very narrow equal protection standards.

Thus for various reasons I now would prefer a single chamber of not more than about 75 members, all elected from single-member districts. I think a legislature of 50, or even of 40, members might represent the state adequately, but some districts would be territorially quite large, and some might have to combine rural populations with major populations centers in undesirable ways. There would be a strong sense of loss of representation in a unicameral legislature of only 40 or 50 members, and no legislature can rise far above the public expectation for it.

**WHAT AGENCY SHOULD REAPPORTION?**

Not the legislature. The modern state constitutions — those redrafted during the reapportionment revolution of the past decade — furnish startling support for the proposition that the constitutional tradition giving legislatures the responsibility was probably a mistake, if the standard of equal representation for equal populations is to be taken seriously.\(^5\)\(^9\)

If we add the selective Pennsylvania constitutional revision of 1968 to our group of "modern" state constitutions, half of the drafts (seven states) placed responsibility for districting and apportionment in a commission outside the legislature, while five others acknowledged the probability of legislative failure by arranging for a back-up commission or the state supreme court to finish the job. Only two\(^6\)\(^0\) left the traditional arrangement undisturbed.

There are two rather simple and interrelated reasons why some agency other than the legislature should initiate and accomplish reapportionment.

1) Reapportionment poses a fundamental dilemma of representation for the elected representative when it must be done to the standard of equal representation of equal populations. Since people move around, the process of reapportionment periodically redistributes representation, taking increments of "voting power" from some constituencies and giv-

\(^5\)Two principal historical surveys, **McKAY, REAPPORTIONMENT** (1965) and **DIXON, DEMOCRATIC REPRESENTATION**, *supra* note 57 differ in their judgment of the extent to which this was the prevailing standard from the time of the Northwest Ordinance of 1787; *see* their early chapters.

ing increments to others. The representative of the losing constituency is asked to approve something that seems directly contrary to the interest of the constituency he is elected to protect; it is difficult to justify such an act either to himself or to his constituents. Justice Frankfurter and others who would have left this problem to the voters in the "political thicket" were asking some constituents, or their representatives, voluntarily to surrender voting power to others — an equally unpromising process.

2) Why should legislators, any more than judges or governors or the president or aldermen determine the political base and ground rules by which they enter and hold elective office? The tradition of checks and balances in our constitutional system usually hedges fundamental exercise of political power by a check from some other branch of government, but no such checks were designed for the legislature in its decennial task of reallocating representative power. British practice has put the matter in the hands of an independent boundary commission, and Ohio turned it over to an ex officio council of elected state officers (not necessarily an ideal solution, but at least an external check) 120 years ago, in 1851. More than a third of the states now have followed suit, at least to the extent of designating a back-up agency to finish the job when the legislature fails.

The judiciary has fashioned one kind of check by accepting jurisdiction of the reapportionment question as a problem of equal protection under the Fourteenth Amendment. But it does not follow that the judiciary should assume primary responsibility for accomplishing the task.

Here are summaries of constitutional provisions for apportioning agencies in a dozen modern constitutional drafts:

1) Placing responsibility outside the legislature:

**Alaska** Const. art. VI sections 8-11: A five-member "reapportionment board" appointed by the governor "in an advisory capacity to him" (one member from each of four designated regions) and "without regards to political affiliations" drafts "a plan for reapportionment and districting."

**Arkansas** Const. art III, section 4: A five-member "board of apportionment" comprising the governor as chairman, the attorney-general and secretary of state (both elected state officials) and two others, non-legislators, one named by each legislative house, "shall divide the state into house and senate [single-member] districts" to become effective

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*\(^{a}\)Baker v. Carr, 369 U.S. 186, 270 (1962) (Mr. Justice Frankfurter dissenting): ‘Appeal must be to an informed, civicly militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.' Or did the esteemed justice expect the consciences of representatives of the over-represented constituencies to be seared by some one else's constituents in the under-represented districts?* 

*\(^{b}\)Ohio Const. art. XI, § 11 (1851).*
unless the state supreme court revises "any arbitrary action or abuse of discretion by the board."

**Hawaii Const. art. III, section 4:** A nine-member "legislative reapportionment commission" by six-vote majority submits a plan to the state elections officer, effective on publication. The majority leaders of each legislative chamber each designate two commissioners, and the minority leaders of each chamber each designate one member; these two in turn designate two more; these eight elect a ninth person to serve as chairman. On each island an advisory council advises the commission "for matters affecting its island unit."

**Michigan Const. art. IV, section 6:** A nine-member "commission on legislative apportionment" is "to district and apportion the senate and house of representatives" effective after publication and hearings. Each major party "state organization" designates four commissioners (one each from four designated regions) who elect a ninth member to serve as chairman. If no majority is mustered for a plan, all commissioners may submit plans to the state supreme court which then orders adoption of the plan which "complies most accurately with the constitutional requirements."

**Pennsylvania Const. art. II, section 17:** A five-member "legislative apportionment commission" files a "preliminary" reapportionment plan with the state elections officer; this becomes law in 30 days if no exceptions are filed; the state supreme court may remand the preliminary plan to the commission, with instructions. If a majority of the commission fails to agree with a plan the state supreme court proceeds "on its own motion to reapportion the commonwealth." The majority and minority leaders of each legislative chamber, "or deputies appointed by each of them" as commissioners select a fifth to serve as commission chairman; if they fail to agree on a chairman, the fifth member is designated by a majority of the supreme court justices.

**Maryland (1968 Const. Draft) art. III, sections 3.05, 3.06:** A nine-member "commission on legislative redistricting" prepares a plan which the governor submits to the legislature when it convenes; "If any other plan has not been prescribed by law within 70 days . . . then the commission plan shall become law." The state court of appeals has original jurisdiction to review any legislative plan; if it is found to be invalid, the commission plan becomes effective, unless it in turn is found to be invalid; in that eventuality the court of appeals must "grant appropriate relief" for impending elections. The majority and minority leaders of each legislative chamber each designate two commissioners and the governor appoints a ninth commissioner as chairman. The commission operates by majority vote.

**New York (1967 Draft) art. III, section 2:** A five-member "redistricting commission" drafts reapportionment plans for legislative and congressional seats that "have the force and effect of law" except as the state
THE LEGISLATIVE ASSEMBLY

The court of appeals might review them for conformity to constitutional standards. The temporary senate president, assembly speaker, and minority party leaders in each house each designate a commissioner and the chairman is designated by the state court of appeals.

In addition to the states here noted, four others — Arizona, Missouri, New Jersey and Ohio — place responsibility for reapportionment in a commission or with designated state elective officers.63

2) “Back-up” Agency if Legislature Fails:

CONNECTICUT CONSTITUTION art. III, section 6 (a) If legislature (by two-thirds vote of each house [!]), fails to district and apportion, an eight-member “commission” (senate and house majority and minority leaders each designate two members) prepares a plan. If six of the eight fail to agree upon a plan, the house speaker and house minority leader each designate a superior court judge to serve on a three-member board; the two judges select “an elector” as third board member; the board, by a majority of two, develops a plan which becomes law.

FLORIDA CONST. art. III, section 16 (a): If legislature fails to reapportion by adjournment, the governor reconvenes them in special session limited to reapportionment business “and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.” But if this fails, the state attorney general petitions the supreme court to get the job done.

ILLINOIS CONST. art. IV, section 3: If legislature fails to reapportion by June 30, an 8-member “legislative redistricting commission” is to submit a plan by August 10. The house speaker and minority leader and senate president and minority leader each designate a legislator and another member to the commission, which acts by majority of five. If this commission fails the secretary of state draws one of two persons designated by the state supreme court, to function as a ninth commission member and they try again to develop a plan by October 5.

NEW MEXICO (1969 Const. Draft) art. III, section 5: If the legislature fails, the governor would appoint a five-member “reapportionment commission” to submit a plan to the state supreme court within 90 days “for approval as to legal sufficiency and compliance with this article.” The court-approved plan would become law.

In addition to the “back-up” agencies noted for these four states, California, North Dakota and Texas constitutions specify a commission or state elective and/or judicial officers to assume the responsibility.64
Several general observations are warranted:

1) The constitutions of at least 19 states now recognize that some agency other than the legislature is required either to initiate or to complete the reapportionment process.

2) Nearly all of these arrangements acknowledge the bipartisan political nature of the problem and attempt to achieve a reasonable balance of partisan representation in the apportioning agency which then proceeds by a designated majority vote. Connecticut, requiring exceptional majorities at successive stages, evidently expects trouble and has a back-up agency for the back-up agency.

3) Most arrangements indicate a desire to have the job done by a special bipartisan commission or board rather than by a court.

4) Because ultimate resort to the courts must be anticipated in any arrangement, involvement of supreme court justices in the reapportionment process prior to this review is undesirable. For supreme court judges to participate in selection of members of the apportioning agency might also be questioned, but such arrangements at least do not involve the justices in the substance of plans before they reach the court for review.

5) Some states preclude office-holders or elected officials from service on apportionment commissions, but others involve elective state officials as ex officio members of the commissions. There are also some provisions that prevent members of the apportionment commissions from holding or seeking legislative office for a designated period after their task is completed.

Among the various plans, the Maryland and Pennsylvania provisions for constituting the apportionment commission particularly appeal to me as appropriate for Montana. And the provision of the Maryland 1968 Draft Constitution for submission of the commission plan to the legislature with the commission plan to become effective unless the legislature adopts an alternative or agrees upon amendments to the commission plan, retains a role for the legislators, gives them a model to work from, and gets the job done if they fail to exercise their option.

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*Dixon, Democratic Representation, supra note 57, ch. 13, 14, reviews state experience with apportionment commissions of various kinds and concludes, at 380: "To be avoided at all costs is the bemused idea that 'nonpartisan' apportionments are possible.... Even if the actual apportioners be conceived as nonpartisan (a concept akin to the idea of the 'Second Coming' itself), every line drawn wittingly or unwittingly will have an apportionment political effect different from another line which is equally 'equal' and equally available. Balanced, bipartisan apportioners are the best guarantors of balanced and fair apportionments." (Emphasis in original).

*Alaska Const. art. VI, § 8; Mich. Const. art. IV, § 6; and Md. (1968 Const. Draft) art. III, § 3.05 preclude service by elected officials. Ark. Const. art. II, § 4 involves three elected state officials and two non-legislators; Ill. Const. art. IV, § 3 involves four legislators, four non-legislators.

*Hawaii Const. art. III, § 4 precludes legislative candidacy of commission members in the first two elections under their plan; Mich. Const. art. IV, § 6 precludes legislative service until two years after adoption of the reapportionment.
This was the arrangement contemplated in HJR 48 of the 1971 Montana Legislative Assembly. I drafted the resolution and was pleased that it got to second reading after a favorable vote in the house reapportionment committee. I commend the plan to the constitutional convention, happy to leave details of commission composition and operation to its collective judgment.

One final word: The Maryland arrangement for a commission plan to become law unless changed by the legislature raises the question of "delegated legislation" if left to statute; but a constitution clearly can authorize and direct such an arrangement.

JUDICIAL REVIEW OF REAPPORTIONMENT

Most of the modern state constitutions expressly provide for judicial involvement in reapportionment, and several kinds of concerns are evident. We have noted instances in which the highest state court is made an integral part of the process, at least as a back-up agency. A number of the other constitutions recognize that judicial review of reapportionment is a probability and expressly grant original jurisdiction in the highest state court. Several constitutions set particular time limits with either of two purposes: to expedite the process where judicial involvement is an indispensable element in getting the job done, or to limit the time within which a voter may challenge a reapportionment, in order to "quiet the title" in the matter.

Several state constitutions give "exclusive" jurisdiction to state courts in reapportionment matters. Such a provision probably does not preempt jurisdiction of a federal court disposed to review a state apportionment for equal protection standards.

The past decade has made judicial involvement in reapportionment a common expectation even when the state constitution is silent about that matter. To expedite judicial review there may be utility in an express

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ALASKA CONST. art. VI, § 11 gives 30 days for voter action to compel performance by apportionment commission or governor; FLA. CONST. art. III, § 16 (c, e, f) give 15 to 60 days to compel certain performances; MICH. CONST. art IV, § 6 gives 60 days to compel certain performances.

This seems to be involved in ALASKA CONST. art. VI, § 11, 30 days for trial court of general jurisdiction to review apportionment plan; HAWAII CONST. art. III, § 5E, 45 days to review apportionment; MICH. CONST. art. IV, § 6, 60 days to review apportionment commission plan.

HII. CONST. art. IV, § 3; N. M. (1969 Const. Draft) art. III, § 5E; N.M.L. MODEL CONST. (1963) art. IV § 4.04 (c), which may have been drafted before the U.S. Supreme Court resolved questions of justiciability in Baker v. Carr, supra note 61.

See supra note 31 and accompanying text. One of the strangest provisions was that of the Ida. (1970 Const. Draft), art. III, § 4: "Whenever the [apportionment] statute materially fails to meet the requirements for the districts the Supreme Court shall have original jurisdiction to enforce compliance with this section [defining standards of compactness, contiguity and equal populations]." Who but the court determines that the statute "fails to meet the requirements"?
grant of original jurisdiction to the state’s highest court, but it may be doubted whether an attempt to make this jurisdiction “exclusive” can preempt federal court jurisdiction. A constitutional time limit for initiation of judicial challenge in the state courts may tend to stabilize expectations under a particular apportionment, but no attempt is made here to resolve the question whether such a limitation would foreclose federal court involvement after the time limit had expired for action in a state court.

SOME FUNCTIONAL CONSIDERATIONS

FREQUENCY OF SESSION

The first state legislatures commonly met annually, and the 1780 Massachusetts Constitution said “the legislature ought frequently to assemble for redress of grievances, for correcting, strengthening and confirming the laws, and for making new laws, as the common good may require.” But by 1900 constitutional provisions in 43 states allowed the legislature to meet in regular session no more frequently than every other year. Moreover, many of the states imposed limits on the length of sessions. In 1950, half of the states still limited the length of session either by specification of the maximum number of days, or by limitation of the number of days for which service would be compensated. Among eleven western mountain and Pacific states, a biennial legislative session of not more than 60 days was very nearly universal. In 1950, the legislature met in regular annual session in only six states — California and five eastern seaboard states whose legislatures dated from the 18th century (Massachusetts, New Jersey, New York, Rhode Island and South Carolina).

These Constitutional limitations on the frequency and length of sessions were the most obvious and effective expressions of distrust of state legislatures that developed in the latter half of the 19th century.

Such limitations, often quite reasonable when they were adopted, limit severely not only the legislature’s opportunities for deliberation but the effectiveness of its committees and the ability of less senior members to develop experience and to become acquainted with legislative norms. No single factor has a greater effect on the legislative environment than the constitutional restriction on the length of sessions.

John Burns, for the Citizens Conference on the State Legislatures, writes: “The amount of work to be done at any given time — and

B. Zeller, supra note 16 at 89.

Only California had annual sessions without time limit, but the subject-matter of alternate sessions was limited; Colorado had biennial sessions without time limit; 60-day biennial sessions were the rule in Arizona, New Mexico, Nevada, Utah, Washington, Idaho and Montana; Oregon had a 50-day biennial session, and Wyoming a 40-day biennial session. North and South Dakota also had 60-day biennial sessions.


Jewell and Patterson, supra note 57 at 138.
not any fixed and arbitrary rule — should determine how long a legislative session lasts.”

In 1966 the Montana-Idaho Assembly on State Legislatures stated its first and most important recommendation: “There was substantial agreement that constitutional restrictions on the length of legislative sessions should be removed and that legislators should be free to determine the frequency and length of legislative sessions.”

The Montana Legislative Assembly evidently agreed in some measure; by two-thirds vote in 1967 it proposed a constitutional amendment to extend the length of biennial session to 80 days. But no one assumed responsibility for presenting the issue to the voters, while a small group of lobbyists mounted a campaign of shabby scare-advertisements opposing the amendment in the days just before the 1968 election. The 80-day amendment was defeated. This rebuff undoubtedly heightened legislative awareness that systematic approaches to improvement of its working conditions were needed, and fed the movement for general constitutional revision. Decisions of the 1972 constitutional convention regarding frequency and length of legislative sessions will be among the most important it will make.

There has been notable movement in the constitutional patterns governing legislative sessions during the past decade; release of state legislatures from limitations on sessions may be one of the principal concomitants of the reapportionment revolution. By 1970 a majority (26) of the states had provided for annual legislative sessions, and 21 states imposed no limitation on the length of session. Three others had session limits of no less than 140 days. The following table compares the situation in 1950 and 1970, for fifteen western states:

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<thead>
<tr>
<th>State</th>
<th>1950</th>
<th>1970</th>
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<tr>
<td>Alaska</td>
<td>biennial</td>
<td>annual</td>
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<tr>
<td>Arizona</td>
<td>biennial</td>
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<tr>
<td>California</td>
<td>annual</td>
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<tr>
<td>Colorado</td>
<td>biennial</td>
<td>annual 180</td>
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<tr>
<td>Hawaii</td>
<td>biennial</td>
<td>annual 60 legis.</td>
</tr>
<tr>
<td>Idaho</td>
<td>biennial</td>
<td>annual 60</td>
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<tr>
<td>Montana</td>
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<td>New Mexico</td>
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<tr>
<td>North Dakota</td>
<td>biennial</td>
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<tr>
<td>Nevada</td>
<td>biennial</td>
<td>biennial 60</td>
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<tr>
<td>Oregon</td>
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<td>South Dakota</td>
<td>biennial</td>
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<tr>
<td>Utah</td>
<td>biennial</td>
<td>annual 60</td>
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<tr>
<td>Washington</td>
<td>biennial</td>
<td>biennial 60</td>
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<tr>
<td>Wyoming</td>
<td>biennial</td>
<td>biennial 40</td>
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"Burns, supra note 49 at 58.
"Book of the States, supra note 75 at 66-67.
Every one of our group of "modern" state constitutions provides for an annual legislative session; among the states whose draft constitutions were rejected the annual session either existed previously or has been adopted by special amendment.81 Half of the constitutions in this group provide no limit on the duration of sessions (Alaska, Illinois, Michigan, Idaho Draft, New York, Rhode Island Draft, National Municipal League 1963 Model) and most of those that set some limit on duration would extend earlier limitations to allow longer sessions.82 Of particular interest in this group are provisions that allow the legislature itself to extend the session rather than "cover the clock". The modern constitutions also contain provisions for the legislature to convene itself in special session: in Connecticut and the Idaho and Rhode Island draft constitutions, by a majority of members of each house; in Arkansas, Florida and the Maryland draft constitution, by three-fifths of the members; in Alaska, Hawaii, Virginia and the New Mexico draft constitution, by two thirds of the members. In Illinois and the Maryland draft constitution, legislative officers may convene a special session. The conventional power of the governor to convene special sessions is essentially undisturbed, and in Alaska, Arkansas, Florida, Illinois and Michigan as now in Montana, the governor may limit the subject matter to be considered in the special session.83

CONSTITUTIONAL LIMIT ON LENGTH OF SESSION

My comparison of the Montana legislature with two others I have observed operating without time limits convinces me that no single factor has more insidious effect on the quality of legislative process than a rigorous constitutional restriction on length of session. If the notion that a biennial 60-day session could accomplish state business made any sense in Montana three generations ago, modern pressures have simply overwhelmed the rationale of the limitation. Any recent session of the Montana legislative assembly has tried to cope with as many measures as the first three sessions of this century.


82 ARK. CONST. art. III, § 9 (60 days but three-fifths vote may extend); CONN. CONST. art. III, § 2 (alternate five-month and four-month sessions); FLA. CONST. art. III, § 3(d) (60 days but three-fifths vote may extend); HAWAII CONST. art. III, § 11 (60 legis. days plus 15 by two-thirds vote); VA. CONST. art. IV, § 13 (60 days plus 30 by majority vote plus 30 by three-fifths vote); Md. (1968 Const. Draft) art. III, § 3.15 (90 days plus 30 by majority vote plus 30 by three-fifths vote); N. M. (1969 Const. Draft) art. III, § 6 (115 days of per diem payment in biennium, not including special sessions).

The legislators have been trying to tell the people about the problem, and I think increasing numbers of people have been listening. But the campaign of national legislative reformers on behalf of annual sessions — aimed largely at the needs of populous, industrious and seaboard states whose biennial sessions are either long or unlimited in length — can obscure the fact that frequency of session and length of session are related but separable problems.

Happily, the constitutional convention need not choose between allowing annual sessions and removing the 60-day limit on session length. But if it were to choose, the worse choice in my judgment would be for annual sessions of 60 days, rather than biennial sessions without time limit. My concern about the alternatives is not groundless when Idaho, New Mexico and Utah have made the other choice for annual 60-day sessions in recent years. This is apt to be the "compromise" position of groups that really have no desire to open up the legislative process at all, but sense they must give ground somewhere. It is conceivable to me that annual repetition of the frustrations of a 60-day limited session would only deepen disillusionment with the ability to achieve good legislative operation.

On this point I stand with the Montana legislature which proposed to lengthen biennial sessions, rather than with reform groups like the Citizens Conference on the State Legislature that has simplistically beat the drum for annual session, across the land, while virtually ignoring problems of the short session. Unwittingly, "cultural overhang" from national reform groups has reinforced the position of powerfully-placed special interests who find the frantic pace of a 60-day session tailor-made for their "defensive style" politics. We are talking about the other leg of the 19th century inheritance that supports bicameralism for its utility in bushwhacking innovation.\textsuperscript{84}

The haste and confusion and proneness to error inherent in a 60-calendar-day session seem too obvious to describe here. The point I make is that this constitutional limitation, overlaid upon basic facts of Montana geography and mechanics of the media prevent effective communication between legislator and constituent once a 60-day session...

\textsuperscript{84}As a member of the Montana Citizens Conference on the State Legislature in its earlier years, I shared the agonies of that group when its simplistic reflection of the national focus collided with the legislative proposal for an 80-day biennial session; some lobbyist-members of the group almost got the Montana Citizens Conference to oppose the legislature’s proposal, and the best it finally managed was an embarrassed, lukewarm endorsement of the proposed amendment. The reader who questions my characterization of reform group emphasis is invited to review the literature of the National Citizens Conference, the Council of State Governments, and the National Municipal League during the past five years. See Burns, supra note 49 which almost ignores the short-session problem except at 103-104, (where he misses its essence) and at 127-130 talks about improving "the level of competence" as a protection against undue lobbyist influence but ignores the problem of time impaction in a short session. Note its curious prescription for Montana, at 249: constitutional amendment "to permit annual general sessions, limited to no fewer than 90 legislative days." Would the legislature have to stay around that long whether it needed to or not?
begins. Montana legislators commonly complain that constituents tell them nothing during a session but plenty afterwards. How can a citizen know what is going on in that frantic 60-day pressure cooker a hundred or more miles away, when even experienced members of the body itself have to scramble to keep track of their own proposed bills, their frequent and often conflicting committee obligations and the long, trying hours in formal sessions that roll on unremittingly, seven days a week, through most of the short session?

The legislator rarely gets home to talk with constituents after the early weeks of the session because “home” is at least a day’s trip away; for many it is a day’s trip each way. The distance is the same for his constituents. Those who muster energy and organize affairs for a visit to the capitol spend a whole day, often two, and incur substantial travel and accommodation bills, only to find that they may be given five minutes before a committee meeting in an attic room filled with stale air and a scrambling sense of urgency. Such a visit assumes in the first place that the constituent knows when to come. The legislator has time for client service to only a few of the most insistent constituents, so the citizen who lacks contact with the process through a hired legislative agent will simply not know what is going on until it is all over. Then, if the media regard it to be a matter of widespread concern, he may read about it or hear about it but the odds are not good even for such communication in the 60-day “time-frame.”

The essential fact is that information about bills and committee meetings and calendars posted on the morning of the day is so scattered, so transient, so sudden, so quickly past that only a full-time legislative agent operating on the scene can keep up with it. The essential fact about a 60-day session is that it unduly inflates the dependence of everyone, citizen and legislator alike, upon a fairly small cadre of skilled, virtually full-time legislative agents-for-hire.

The citizen who can afford to hire a lobbyist gets represented; few can afford this, so the tendency of all public affairs to respond only to organized group pressures is accentuated; and that puts everybody inordinately in the hands of the professional lobbyist.

I am not criticizing the lobbyists; most of their operations, most of the time, are legitimate and, in the circumstances, indispensable. I am criticizing an aspect of the Montana legislative system that makes everyone, citizen and legislator alike, so utterly dependent upon the presence and services of those who can stand in lobbies and committee rooms for substantial portions of a session.

I do not expect many of the perennial lobbyists skilled in manipulating this time-impacted system, to sell short their stock-in-trade by supporting sessions of unlimited duration. They will point to the possibility that an unlimited session would just go on and on at great cost to the taxpayer. This threat can be controlled by an annual salary and modest
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per diem which minimizes the legislator's interest in just staying on in Helena.

Sadly, I do not even expect many legislators to be sharply critical of the existing system because few of them have seen a legislature that works on a more open, leisurely, deliberative schedule; others, unwittingly, have fallen into comfortable dependence upon the friendly lobbyist whose information is better organized and more discreetly presented than the importunacies of constituents from home. The legislator comes to be comfortable with the skilled lobbyist — I imply nothing improper in that relationship — and somewhat impatient with the amateur or less skilled occasional visitor from home who knows what he wants but counts on the legislator to tell him how to get it. The full-time professional lobbyist, by contrast, can tell the legislator how to get what the lobbyist and his particular “public” wants.

These contexts are not peculiar to the short-session legislature, but they acquire unusual poignancy in that context. The committee process is the constituted place for resolving such problems. But the Montana legislature maintains a rule that all measures should pass through committee within seven days. Some legislatures with more work time give that much advance notice for committee hearings.

During the 1971 session I was invited four times by committee chairmen to testify before their committees: each time I would be a friendly witness with something presumably useful to say. Each visit involved a motor trip of 250 miles with two wintry crossings of the Continental Divide. Each time I received a telephone call that gave me less than 24 hours to arrange my affairs and make the trip. I mention my experience only because I think it was more typical than exceptional. The chairmen involved, courteous and friendly men, saw nothing exceptional in the timing of their invitations.

This is a miserable way to bring interested citizens into contact with their legislators, and a desperate way to try to get useful information into the legislative “mix”. The fault lies with a constitutional provision that requires the legislature to proceed hammer-and-tongs for sixty unremitting days in a style that virtually precludes sensible legislator-constituent relations; and makes open flow of a wide variety of useful information virtually impossible, once the pressure gets up in the legislative cooker.

I am simply trying to say that if session limits were relaxed: so that the legislator had more time, meeting perhaps only four days most weeks so that he could frequently or routinely return home and talk with constituents on weekends; so that committee processes including

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83 The fact that this rule is frequently waived by unanimous consent demonstrates that it is essentially a poor rule; but it is retained because it “makes sense” in relation to the 60-day session limit.

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public hearings could be scheduled in advance; so that citizens would have time to arrange affairs and find the long costly journey to Helena rewarding; so that calendars could be prepared one or two days in advance; so that media could communicate the imminence of events rather than only their consummation—more people and more information then could get into the process on more meaningful terms than is now possible.

Compensation

Frequency and duration of session must be considered in relationship to provisions for compensation for legislators. The modern tendency to convene legislatures annually and to remove limits on the duration of sessions is reflected in the prevailing pattern of modern constitutions to provide an annual salary with the amount fixed by statute. Most also provide for per diem expenses or allowances in amount fixed by statute. Several also make express provision for payment of transportation expenses in amounts to be fixed by statute.

I think that Montana legislators should receive an annual salary, "moderate" or "reasonable" in amount, with the level determined by statute from time to time. The level should be sufficient to make legislative service possible, if not attractive, to broader groups of citizens than are presently recruited to such service. Adequate compensation is imperative if younger professional and business people are to be attracted to legislative service. Some control over the length of legislative sessions might be exercised by a limit on the number of days for which per diem expense allowances would be made. The New Mexico Draft Constitution of 1969 would have limited per diem allowances to 115 days during a biennium, plus days engaged in interim legislative activities. This limitation is unduly restrictive, and it would be better to leave such a limit to statute rather than constitutional provision. The present Montana

\[\text{References} \]


\[\text{CONN. CONST. art. III, § 17; ALASKA CONST. art. II § 7; N. M. (1969 Const. Draft) art. III, § 6 (one round trip); ARK. CONST. Schedule I provided eight cents per mile for a weekly round trip.}\]

practice to reimburse per diem expenses and actual travel at a level fixed by statute seems satisfactory.90

The state constitution commonly contains some provision limiting the capacity of legislators to increase their compensation during a current session.91 The current Montana provision that "no legislative assembly shall fix its own compensation" is probably adequate.92

SUMMARY AND CONCLUSION

I would like a chance to ratify a constitution that contained this kind of legislative article:

1) A unicameral legislature with about 75 members elected from single member districts that would be revamped each decade by a bipartisan apportionment commission, preserving the legislative opportunity to try to revise its proposals,

2) meeting regularly in January of odd-numbered years and other times at its own call or the call of its leaders, for sessions unrestricted in length except by

3) annual salary and modest per diem expense reimbursements and ample travel reimbursements to encourage frequent visits home during session; and

4) minimal language authorizing conventional legislative immunities and broadly granting authority of the legislature by statute and rule to accommodate its processes for maximum use of all the technology that can serve it.

Given these elements I am prepared to trust the kind of people Montanans will elect to legislative service, to create a legislative institution notably more flexible and responsive than the one imposed upon us by the archaic fears and improvisations of the late 19th Century. In thinking about a new constitution these items are central in importance for a modern legislature.

90Currently, Montana legislators receive $20 per day plus $25 per day for expenses incurred in attending the session, payable weekly during the session, and nine cents per mile for travel between home and place of session by nearest traveled route. R.C.M. 1947, § 43-310.


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