100 Years of Reapportionment in Montana

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In the remarkably short time since the United States Supreme Court decided the Reapportionment Cases in 1964, a reapportionment revolution has swept away entrenched modes of legislative representation in nearly all of the fifty states, including Montana. A new legislative era begins with the reconstituted 40th Montana Legislative Assembly. Patterns of political representation have fundamental relevance to the conduct of public affairs, and significant changes in legislative representation will inevitably produce changes in public policy and in the mode and spirit of political life. Agrarian dominance of Montana’s legislative norms will be reduced, and in increasing measure public policies of the Treasure State will reflect its progressive urbanization.

Yet, no sharp break with established traditions and policies seems likely in the 1967 session. The effects of reapportionment in Montana promise to be selective and cumulative rather than sweeping or sudden. As the state stands on this threshold between old and new, it is useful to recall how it came to this juncture. The earliest American colonial assemblies were commonly unicameral, but they became bicameral during the 18th century. The Montana Territorial Legislative Assembly was bicameral, and representation in both chambers was supposed to reflect population of the counties which served as legislative districts.

The Montana Constitution of 1889 founded the state senate on the principle that each county would be represented by just one senator. This pattern of representation in the senate was imposed on the three heavily-populated counties—Silver Bow, Deer Lodge, and Lewis and Clark—by the remaining thirteen counties with relative sparse populations, with the express argument that it would be analogous to the United States Senate. But the house of representatives was designed to represent each county in proportion to its population. The population principle seemed so important that there was to be a census and reapportionment of the house every five years. The populous counties argued against the senate plan, saying that the state-county relationship was quite different from the nation-state relationship, and that the analogy...
was faulty.\textsuperscript{6} Organization of the Montana legislature on this so-called "federal analogy" or "little federal plan" broke sharply with the state's territorial pattern of representation, and with the pattern of representation which had prevailed among the several states in the century following the Northwest Ordinance of 1787.\textsuperscript{7} The Montana senate was more nearly unique than typical. A few other states employed the pattern, but in 1964 no more than ten states represented subordinate political units in a way even roughly analogous to the position of the states in the United States Senate.\textsuperscript{8}

The common policy among the states gave a first representative to each local subdivision (usually a county) without regard to population, and then apportioned the remainder of the members to the more populous units according to some pre-set population ratio.\textsuperscript{9}

In an agricultural society this pattern created no great disparities of representation, but when people began migrating to the cities the arrangement ultimately created gross departures from equitable representation of population.\textsuperscript{10}

The 1889 Montana constitution and the first apportionment statute assigned some representatives to joint districts of two or more counties in order to equalize representation among them.\textsuperscript{11} In 1895, the Legislative Assembly abandoned use of joint representatives and assigned a first representative to each county, apportioning additional representatives to the more populous counties.\textsuperscript{12} There was no reapportionment in 1901. In 1911, the legislature passed an apportionment act which assigned representatives to each county by the following ratio:

\begin{equation}
\text{One representative . . . from each county for each forty-eight hundred persons in such county or fractional part thereof in excess of twenty-four hundred persons . . . .}\textsuperscript{13}
\end{equation}

The population distribution of the state in 1911 was such that each county had at least 2,401 persons residing therein, and was entitled to a first representative on the basis of population.\textsuperscript{14}

By 1921, the ratio was increased to 6,000 population or major fraction thereof; four counties lacked the major fraction to "earn" a first

\textsuperscript{6}PREPROCEEDINGS AND DEBATES OF THE MONTANA CONSTITUTIONAL CONVENTION OF 1889, 27 (1921).

\textsuperscript{7}Northwest Ordinance, art. II, 32 JOURNAL OF THE CONTINENTAL CONGRESS 340 (1936).

\textsuperscript{8}McKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 199 (1965).

\textsuperscript{9}McKAY, op. cit. supra at chs. 1-2. This is the best concise review of these developments; see also HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 4-28 (1966); U. S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT ON APPORTIONMENT OF STATE LEGISLATURES 8-14 passim (1962).

\textsuperscript{10}McKAY, op. cit. supra note 8, at ch. 1.

\textsuperscript{11}MONT. CONST. art. VI, § 6; Mont. Laws 1893, 43.

\textsuperscript{12}Montana Political Code, 1895, §§ 112, 113.

\textsuperscript{13}Laws of Montana 1911, ch. 38, § 1.

\textsuperscript{14}Laws of Montana 1911, ch. 38, § 2.

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representative. Thus the statutory proviso that "each county now created shall be entitled to at least one member" acquired independent force as a departure from the ratio principle. By 1930 eight counties lacked the statutory major fraction of the ratio. There was no reapportionment in this decade. The state continued to grow, while some of its counties declined in population. In 1941 the apportionment ratio was raised to 7,000 population or major fraction thereof. Fourteen counties lacked the major fraction for a first representative. In 1951 sixteen counties lacked the major fraction. In 1961 the ratio was increased to 8,500 population or major fraction; nineteen counties lacked that major fraction to "earn" their first representative. Nevertheless, in each apportionment act since 1921, they were awarded as statutory exceptions to the ratio. A curious feature of this pattern was that the greatest relative disadvantage was experienced by counties of medium population not sufficiently populous to entitle them to a second or third representative.

Thus, in Montana malapportionment of the senate was the product of constitutional provisions for equal representation of counties whose populations became less equal with the passage of every decade. Malapportionment of the house of representatives had its roots in statutory abandonment of joint districting, and in the assignment of a first representative to each county. Representation in proportion to population (in both houses) was acutely distorted by the 1960s.

THE FOURTEENTH AMENDMENT ENCOMPASSES LEGISLATIVE APPORTIONMENT

It seems likely that no decision of the United States Supreme Court regarding basic norms for conduct of political affairs ever gained such
universal accommodation in so short a time as the *Reapportionment Cases* of 1964.\(^{22}\) Until almost the eve of these decisions, it was generally felt that courts either lacked jurisdiction or workable remedies for legislative malapportionment. Doubts about the existence of judicial remedy for malapportionment rested in part on careless interpretation of *Colegrove v. Green*\(^{23}\) which had affirmed a federal district court's refusal to intervene in Illinois congressional districting. A four-to-three holding that there was no basis for equitable relief in the particular case obscured a four-to-three alignment agreeing that such matters would be justiciable in proper circumstances.\(^{24}\) Justice Frankfurter sounded the warning that "Courts ought not to enter this political thicket"\(^{25}\) and declared that "of course no court can affirmatively remake the Illinois district .... At best we could only declare the existing electoral system invalid."\(^{26}\)

Once again Frankfurter had enriched the language of law and politics, and for more than a decade his was the accepted teaching of *Colegrove*. The Supreme Court failed to clarify the matter in nearly a dozen cases which refused equitable relief in other apportionment actions, and this contributed substance to the misconception.\(^{27}\)

Meanwhile, the provision of the Fourteenth Amendment that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws" became the focus of massive litigation and reinterpretation in the desegregation cases. Racial problems intersected problems of legislative representation in *Gomillion v. Lightfoot*.\(^{28}\) There, a unanimous court gave standing to Negro citizens and voters to challenge a legislative redistricting of a city's boundaries amounting to a racial gerrymander.\(^{29}\)

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\(^{22}\) *Infra* note 36.
\(^{23}\) 328 U.S. 549 (1946).
\(^{24}\) Id. at 553.
\(^{25}\) Id. at 556.
\(^{26}\) Id. at 553. Justice Rutledge concurred with Justice Frankfurter and two others in dismissal of the petition for an injunction; but his concurring opinion apparently agrees with Justices Black, Douglas and Murphy that questions of congressional districting by state legislatures were not excluded from judicial intervention by virtue of raising a political question.
\(^{27}\) See HANSON, *op. cit.* supra note 9, at 46 n.17, 47-52, for citation of these cases and for a brief account of "The Weakening of Colegrove" by scholarly criticism and litigation between 1946 and 1961. Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958) may have been the most influential single attack on the whole notion of non-justiciability of apportionment cases.
\(^{28}\) 364 U.S. 339 (1960).
\(^{29}\) *Ibid.* Frankfurter based the majority opinion on the Fifteenth Amendment, accepting the proposition that unequal weight of voting distribution was lifted out of the so-called "political" arena and into the conventional sphere of constitutional litigation if it involved differentiation on racial lines. Douglas and Whittaker concurred
Further clarification of standing and jurisdiction in apportionment cases came in 1962. The Supreme Court decided that refusal of the Tennessee General Assembly to reapportion itself for more than 60 years raised the justiciable question of whether the state had denied equal protection of the laws to some of its voters.\(^{30}\) A six-member majority remanded the case to a three-judge court to fashion appropriate relief.\(^{31}\) This was the celebrated case of *Baker v. Carr*, and it removed most doubts about standing of voters and justiciability of their petitions for equitable relief against legislative malapportionment.

Voters now had an "individual and personal right" to an equitably apportioned vote for state legislators. They could ask United States courts to grant judicial relief against legislative apportionments which disregarded equitable representation of population. Cases were initiated in many states to challenge both state legislative districting for congressional seats, and state districting and apportionment for state legislatures where voters were not equitably represented.

In 1963, the Supreme Court invalidated the "county unit" plan of weighted voting employed in Georgia primary elections.\(^{32}\) While this was not in a strict sense an apportionment case, Justice Douglas declared for the majority in *Gray v. Sanders* that

\[
\text{once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded} \ldots \text{The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.}\]

In 1964, the Court sustained a plea of voters in a Georgia congressional district of more than 800,000 population that their voting rights were diluted when other congressional districts in the state averaged less than 400,000 in population.\(^{34}\) The petitioners appealed to the equal protection and apportionment clauses of the Fourteenth Amendment, and to the provisions of Article I, § 2 of the United States Constitution, providing that "The House of Representatives shall be composed of members chosen every second year by the people of the several states \ldots." Justice Black rested the majority opinion on a construction of the word "people" in this provision.\(^{35}\)

\[^{30}\text{Baker v. Carr, 369 U.S. 186 (1962).}\]
\[^{31}\text{Supra note 30, at 237. Justice Frankfurter's impassioned dissent was his last important opinion; he reiterated the warning of Colegrove against judicial involvement in political entanglements, and in the granting of illusory relief for a hypothetical claim resting on abstract assumptions.}\]
\[^{32}\text{Gray v. Sanders, 372 U.S. 368 (1963).}\]
\[^{33}\text{Supra note 32, at 381. Douglas asked "How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" Id., at 379.}\]
\[^{34}\text{Wesberry v. Sanders, 376 U.S. 1 (1964).}\]
\[^{35}\text{Supra note 34, at 13-14.}\]
The court still had to determine the relevance of the Fourteenth Amendment to state legislative apportionment and districting in cases which challenged the structures of state legislative assemblies. These determinations were made in 1964, in a sweeping series of 15 cases from as many states, involving claims of malapportionment in one or both houses of state legislatures.6 The principal opinion in the series was that in Reynolds v. Sims,37 which involved apportionment of the Alabama legislature. The central ruling of these cases was “that as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis.”38

In Lucas v. Colorado General Assembly,39 it had been argued and accepted in the lower court that state legislative apportionment might diverge from population-based representation to recognize “such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries [and] conformity to historical divisions such as county lines and prior representation districts.”40 Not so, the majority declared, if such allowances involved “substantial disparities” from equality of population. Dictum in the majority opinion also suggested that a long ballot for a multi-member district in Denver was a debatable feature, but made no holding on the point.

The Alabama,41 Delaware,42 and Maryland43 cases were of particular interest for Montana because the Supreme Court refused to analogize their state senates to the United States Senate. The Court said such a plan could not involve significant departure from population-based representation. It held that representation of states in the United States Senate had been the product of “unique historical circumstances”44 and that the “federal analogy [is] inapposite and irrelevant to state legislative districting schemes.”45 The analogy was said to be “little more than an after-the-fact rationalization . . . of maladjusted state apportionment.


7Reynolds v. Sims, supra note 1.

8Id., at 568.


10Id., at 719.

11Reynolds v. Sims, supra note 1.

12Roman v. Sincock, supra note 36.

13Md. Comm’n v. Tawes, supra note 36.

14Reynolds v. Sims, supra note 1, at 574.
arrangements. It followed that both, or indeed all, houses of a state legislature must be apportioned on a population basis.

Numerous other points were covered in the series of six principal decisions. Each state involved a particular complex of problems for which local remedies would be best, so fashioning of appropriate remedies was left to the trial courts or other apportionment authorities within each state. Temporary inequities in representation might be permitted rather than to upset imminent elections of legislatures, but indefinite postponements or sophisticated evasions would not be tolerated. Nor would judicial remedies be precluded by the existence of such "political" remedies as popular initiative of constitutional amendments or of apportionment statutes. Decennial reapportionment after each federal census would be sufficiently frequent; less frequent reapportionment would be constitutionally suspect. Nor would exact mathematical equality of voters in districts be required; the Court seemed rather to emphasize the importance of good faith efforts, seasonably made, to achieve equality of representation within reasonable limits. Such considerations were more important than precise mathematical equality; and the court demonstrated some impatience with lower-court efforts to fix any precise mathematical factor of allowable variation. It seemed likely that the outer limits of allowable departure from strict mathematical equality between representative districts would always depend in some measure on local circumstances, and would emerge in any event only by generalization from a considerable series of decisions affirming or rejecting particular apportionments.

REAPPORTIONMENT IN MONTANA

A flurry of litigation swept the states in the months after the decisions in the Reapportionment Cases. When the 39th Legislative Assembly convened in Helena on January 4, 1965, Montana was but one of seven states in which no legal action had been initiated to compel reapportionment. Governor Babcock, in evident disagreement with the view of the Supreme Court in the Lucas case, advised the Legislative Assembly that "the theory of 'one person-one vote' simply does not fit Montana, with its unusual geographical barriers, its diverse interests, its varied economy and its pioneer heritage any more than it fits the two
Houses of the National Congress." Yet, "some action . . . showing our good faith" was required, so the governor proposed prompt reapportionment of the state house of representatives to equal population standards, and submission of a constitutional amendment to the voters to provide for senatorial districts irrespective of county lines. Meanwhile, there was hope that the national Constitution might somehow be amended to reverse the effect of the Supreme Court decisions. The governor urged the legislature to advise Congress of its desire for such an amendment. The governor also suggested that the state's two congressional districts should be adjusted, or provision made for election of both congressmen at large. The governor presented his program of accommodation in his "State of the State" message to the Legislative Assembly on January 5, 1965. The next day, Mrs. Phoebe Herweg, citizen-taxpayer and registered voter of Silver Bow County, and of Butte, the state's third largest city, asked the federal district court in Montana to declare that both houses of the Montana Legislative Assembly were malapportioned in a manner which deprived her and others of her class of constitutional rights guaranteed by the Fourteenth Amendment; to declare that it was the constitutional duty of the Legislative Assembly to properly reapportion itself before the 1966 general elections; and to enjoin future elections under existing law which would cause her vote for legislators to be "diluted and debased."

The complaint asserted that because of state constitutional provisions for election of senators upon a purely geographic basis, without regard to population, senators representing 14 per cent of the state's population could muster a 27 vote majority of the 56 member senate; the population variance ratio between counties of largest and smallest population (each with one senator) was approximately 88 to 1. The complaint maintained that the Montana House of Representatives was also malapportioned since representatives of 40 per cent of the state's population could muster a majority of 48 of its 94 members; the population variance ratio was approximately 13 to 1; and that this malapportion-

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56 HOUSE JOURNAL, 39th Mont. Legis. Assembly 32-33 (1965). "All legal authority with which I have consulted agrees that . . . we cannot apportion our State Senate without first having [the state] constitution amended by the people." For another view see Waldron, supra note 54, at 97-98; and Waldron, Getting the Job Done, Winter 1965 MONT. BUS. Q. 124, 126-128.

57 Complaint of Phebe R. Herweg v. Thirty-Ninth Legislative Assembly, Tim M. Babcock, Governor, and Frank Murray, Secretary of State; dated Jan. 6, 1965, attorney A. L. Libra for plaintiffs; summons for answer to complaint was dated Jan. 7, 1965. The summons and complaint were read at length into the journals of the legislature on Jan. 8, 1965: HOUSE JOURNAL, 39th Mont. Legis. Assembly 48-52 (1965); SENATE JOURNAL, 39th Mont. Legis. Assembly 34-37 (1965). (Hereinafter called "Complaint.")

58 Complaint, supra note 57, at 3. MONT. CONST. art. V, § 4 (no more than one senator from each county); art. VI, § 4 (each new county to have one senator, but no senatorial district . . . to consist of more than one county); and art. VI, § 5 (each county a senatorial district, and original apportionment of 1889) were cited with their statutory reflections in R.C.M. 1947, §§ 43-101, 43-102 in the complaint. The majority of 56 senators would of course be 29; and the minimum-proportion-to-control would be 14 per cent. See Waldron, supra note 20, at 63-67.
ment was the consequence of both constitutional and statutory provisions.69

It was further alleged that to await legislative proposal and popular ratification of an amendment to the state constitution would postpone reapportionment beyond the 1966 general election with consequent denial of fair representation in the 1967 legislature; moreover, some of the named defendants had indicated an intention to seek to evade or postpone the requirement of fair and full apportionment. So, the court was asked to declare the enumerated provisions of the Montana constitution and statutes to be invalid and null and void because they conflicted with the complainant’s rights under the Fourteenth Amendment. It asked that the governor, secretary of state, and legislature be enjoined from conduct of any special or general election until such time as a plan of reapportionment be approved by the court. It was requested that the 39th Legislative Assembly be advised of its duty to reapportion both houses substantially on a population basis, without deviation from this basis in an attempt to balance urban and rural power in the legislature. The court was asked to exercise continuing jurisdiction, supervision and control over the reapportionment of the Montana Legislative Assembly, as may be necessary and appropriate to secure a just and fair apportionment consistent with the principles the court might declare, and to afford other just and equitable relief which might seem appropriate.60

Federal Circuit Court Judge Pope joined Federal District Court Judges Murray and Jameson to comprise the required three-judge district court.61 The court accepted jurisdiction and defendants moved to dismiss. Taking judicial notice of “invidious discrimination” in the election of members to both houses of the Montana Legislative Assembly “in advance of any hearing,” the court ruled that it would take no further steps “until such time as the state legislature shall have had an opportunity to take appropriate action designed to put into effect a state legislative reapportionment scheme which will measure up to the requirements of the equal protection clause of the Fourteenth Amendment.”62

The court hoped to avoid the more or less drastic judicial remedies employed in some states where legislatures had failed to reapportion, when given time to do so, by federal courts which had taken jurisdiction of reapportionment actions.63 The possibility that the court might order

69Complaint, supra note 57, at 3. MONT. CONST. art. VI, § 3 (no county shall be divided in the formation of representative districts); R.C.M. 1947, § 43-103 (a first representative to each county and apportionment of the balance by ratio of one member for each 5,500 or major fraction thereof); R.C.M. 1947, § 43-104 (specific assignments of representatives to counties); and R.C.M. 1947, § 43-105 (each new county to have one representative until reapportioned) were cited. See Waldron, Statistical Measures of Apportionment, Winter 1965 MONT. BUS. Q. 65-73, for slightly different indices of house malapportionment.

60Complaint, supra note 57, at 4-6.


63Noted were court restrictions of legislatures to reapportionment matters until satis-
the legislature to remain in session beyond its constitutional limits until such time as it could enact appropriate provisions for valid reapportionment was mentioned. Legislative evasion of court orders like that experienced in Washington and Oklahoma would not be tolerated. Nor should the Legislative Assembly entertain doubts about its current authority to proceed with reapportionment because of strictures in Article VI, §§ 4 and 5 of the Montana Constitution. The court said the Supreme Court decisions in the Reapportionment Cases "have clearly demonstrated that portion of the Constitution is void and of no effect." It said that temporarily, until a more permanent apportionment might be made, the "Legislature has the inherent power, unrestricted by any valid constitutional limitation, to provide for its own reapportionment.

While not considering it proper to suggest to the legislative assembly what particular method of apportionment should be adopted, the court felt it would be reasonable for the legislature to reapportion both houses for the 1966 election, with a plan to be followed until such time as a more permanent system could be provided by constitutional amendment. Concurrently the legislature could submit a constitutional amendment for ratification by the voters in November, 1966.

The court assumed that the Legislative Assembly would exercise the function which properly belonged to it and would consider setting up a system of apportionment by judicial order only as a last resort. Parties were invited to submit progress reports; and if it appeared from these reports or from reasonable probability apparent to the court that the legislature would fail to reapportion, it would "thereupon set for hearing either the application for temporary relief or the main case." If the legislature failed to enact a valid reapportionment scheme, the court foresaw three alternative modes of judicial action:

1. to order a special session for performing the essential task of reapportionment, as in Georgia and Delaware;
2. temporary reapportionment by the court itself to be continued until the Legislature should enact a valid reapportionment plan; or
3. election of legislators at-large, as had been done in Illinois.

On the same day, the federal court, in Roberts v. Babcock redis...
stricted Montana for the election of its two members of the United States House of Representatives. The petitioner in this action had claimed that a disparity of 126,000 in the 1960 population of the two districts deprived him of rights guaranteed by Article II, § 2, and the Fourteenth Amendment of the United States Constitution. The petition had been heard July 7, 1965, the day after hearing the Herweg petition.

The court conceded that neither Wesberry v. Sanders nor the Reapportionment Cases represented clear authority for realignment of congressional districts by judicial decree, saying “While we find no decision of the Supreme Court of the United States expressly authorizing a three-judge court to enter an order directing congressional reapportionment, we conclude that the language of the Court in Reynolds v. Sims . . . relating to legislative reapportionment is sufficiently broad to justify the exercise of this power with respect to congressional reapportionment under the conditions here found. . .”

The Wesberry case had rested squarely upon construction of the word “people” in Article I, § 2 of the United States Constitution, and the Reapportionment Cases were based upon construction of the equal protection clause of the Fourteenth Amendment. The Montana district court drew support even-handedly from both provisions.

Seven counties with a 1960 population of 52,825 were transferred from the Second (eastern) District to the First (western) District. State officials were enjoined from conducting any further elections in the old congressional districts and directed to conduct the 1966 congressional elections from the court-decreed districts. These districts would continue to exist “until such time as the Montana Legislative Assembly shall have provided a different valid reapportionment.”

The Legislative Assembly promptly acknowledged its obligation by asking Congress for a constitutional amendment which would relieve it of the obligation to reapportion the state senate. To make the point doubly clear, the legislature also proposed that Congress call a constitutional

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approach. The Supreme Court had sustained such action by a district court in Alabama. Order, supra note 62, at 10 n.5.


"Id., at 399.

"Ibid. Lying generally on the east slope of the Rocky Mountains, the counties were Glacier, Pondera, Teton, Toole, Liberty, Meagher, and Park. Four of these counties had voted moderately Democratic for congressmen during the previous decade, one moderately Republican, and two strongly Republican so that the political effect of the shift may have been minimal as between districts.

"The Republican incumbent from the eastern district and the Democratic incumbent from the western district were both re-elected in the 1966 elections.

"Roberts v. Babcock, supra note 71, at 399.

Senate Joint Resolution No. 4, Laws of Montana 1965, at 998, noting the requirement of the Reapportionment Cases that states having a bicameral legislature may not apportion membership in either house thereof other than on a population basis, asked Congress to propose a constitutional amendment close in form (but not identical) to the proposed Dirksen amendment of Jan. 2, 1965; (S. Res. 2, 89th Cong., 1st Sess. 1965). Fifty senators joined as sponsors of the Montana measure, which passed
convention for the same purpose. Only five votes were cast in the senate against these measures, but a substantial number of representatives from the state's larger cities opposed them. Some smaller county representatives joined those from the larger cities in opposing the request for a constitutional convention. On January 13, five days after receiving the summons in the *Herweg* suit, both houses of the 39th Legislative Assembly established standing committees to deal with apportionment problems.

A number of reapportionment bills were introduced from January 13 to January 23, the last day for introduction of bills, but none were chosen. Two house proposals were rejected by the senate; five other house bills representing several approaches to reapportionment were finally repudiated by the house on the final day of the session. In the senate, S.B. 30, introduced on January 13 attracted most support, but was defeated in a 26-28 roll call vote on February 27. Three other senate bills were indefinitely postponed the same day.

On March 1, house and senate leaders gathered in the governor's office for a conference telephone conversation with Judge Murray of the federal district court. The judge advised them that the court would reapportion the legislature if it failed to reapportion itself. Legislative

the Senate 48-5 on January 19; it gained House approval 56-23 on January 30; and was finally approved Feb. 8, 1965. The Montana resolution proposed that Congress submit the proposed amendment to state legislatures for ratification. Perhaps the reaction to the Reapportionment Cases was pretty much a "politician's rebellion", as was suggested by Anthony Lewis in the New York Times, Aug. 16, 1964, § 4, p. 3, cols. 1-2. Otherwise, why not entrust a matter of such fundamental concern to voters to ratification by convention?

"Senate Joint Resolution No. 5, Laws of Montana 1965, at 999, calling for an amendment "So as to Provide That A State Having a Bicameral Legislature May Apportion Membership in One House of Its Legislature On Other Than a Population Basis."

Language of the proposed amendment was identical to that in Senate Joint Resolution No. 4, supra note 76. Again, 50 senators sponsored this resolution and it passed the senate 48-5 on Jan. 19; the House approved it 49-38 on Feb. 1 and it gained final approval on Feb. 8, 1965.


"The senate had moved on the first day of the session to establish a select committee on reapportionment. There were soon reports of struggle for the chairmanship between two senators of impressive seniority. (Missoulian, Jan. 10, 1965). They represented counties of 2,624 and 1,345 population respectively and became chairman and vice-chairman of the standing committee when it was constituted. Neither of the state's two metropolitan communities was represented on the senate committee, and six of its 11 members came from counties whose total population was 19,562, *Senate Journal*, 39th Mont. Legis. Assembly 19, 43-44 (1965). The chairman of the nine-member House Reapportionment Committee was a representative from the state's largest city, and the second and fourth-largest cities also were represented on its membership; but five members of this nine-member committee came from counties whose total population was 23,025. *House Journal*, 39th Mont. Legis. Assembly 66 (1965)."


H.B. 115, 515, 516, 518, and 521.

"S.B. 75-201 and 228.

"Telephone conversation with Judge Murray, November 28, 1966."

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leaders seem to have concluded that a special session for enactment of apportionment legislation would not be called. The Assembly adjourned sine die on March 10 without acting on reapportionment measures, and transmitted records of its consideration of the matter to the court. Its only accomplishment had been to propose the apportionment amendment which voters ratified in November, 1966.

In May, 1965 the three-judge federal court noted failure of the 1965 Assembly to enact a valid plan or reapportionment and the original complaint was amended to request that the court make a temporary reapportionment and vacate all legislative offices. The court conducted a hearing on July 7, and on August 6 announced its reapportionment of the state for election of legislators in 1966. The court’s plan provided that with a senate of 55 members, each senator would represent 12,268 persons; with a house of 104 members, each representative would represent 6,489 persons. The ratios were derived from dividing the number of seats in each instance into the 1960 state population of 674,720.4

With few exceptions, house districts either coincided with senate districts or were portions of senate districts. The court’s plan required election of 35 of the 55 senators and 93 of the 104 representatives from multi-member districts.

4Herweg v. 39th Montana Legislative Assembly, 246 F.Supp. 454 (D. Mont. 1965). The court found "invidious and unconstitutional discrimination against the majority of the voters of the state and against those subdivisions of the state containing the greater portion of the population of the state . . . [B]oth in respect to the senate and in respect to the house of representatives." Id. at 457. This was the result of constitutional provisions for election of the senate upon a purely geographical basis, without regard to population, and of statutory provision for election of representatives upon a combined geographical and population basis. The clause in Mont. Const. art. V, § 4 providing that there shall be no more than one senator from each county, and Mont. Const. art. VI, §§ 4, 5 were held to be void and unconstitutional and in violation of the Equal Protection Clause of the Fourteenth Amendment; along with R.C.M. 1947, §§ 43-101, 43-102, 43-103, 43-104, and 43-105, relating to legislative elections. Id. at 462. The governor and secretary of state were enjoined from calling or conducting legislative elections under these sections. Terms of all members of the 1965 legislative assembly, except the lieutenant governor, were terminated as of December 31, 1966.
Table I. The districts and apportionments for the senate were as follows:

**Montana Senatorial Districts**

<table>
<thead>
<tr>
<th>Dist. No.</th>
<th>County or Counties</th>
<th>No. of Senators</th>
<th>Pop. Per Senator</th>
<th>Dist. No.</th>
<th>County or Counties</th>
<th>No. of Senators</th>
<th>Pop. Per Senator</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Carter, Fallon, Wibaux, Prairie</td>
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<td>10,506</td>
<td>17</td>
<td>Chouteau, Judith Basin</td>
<td>1</td>
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<td>1</td>
<td>12,314</td>
<td>18</td>
<td>Cascade</td>
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<td>12,236</td>
</tr>
<tr>
<td>3</td>
<td>Richland, McCona</td>
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<td>19</td>
<td>Hill, Liberty</td>
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<td>10,639</td>
</tr>
<tr>
<td>4</td>
<td>Roosevelt</td>
<td>1</td>
<td>11,731</td>
<td>20</td>
<td>Toole, Pondera, Teton</td>
<td>2</td>
<td>11,426</td>
</tr>
<tr>
<td>5</td>
<td>Valley, Daniels, Sheridan, Petroleum</td>
<td>2</td>
<td>13,649</td>
<td>21</td>
<td>Lewis and Clark</td>
<td>2</td>
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<td>6</td>
<td>Rosebud, Treasure, Garfield, Petroleum</td>
<td>1</td>
<td>10,407</td>
<td>22</td>
<td>Deer Lodge, Powell, Granite</td>
<td>2</td>
<td>12,821</td>
</tr>
<tr>
<td>7</td>
<td>Custer</td>
<td>1</td>
<td>13,227</td>
<td>23</td>
<td>Silver Bow</td>
<td>4</td>
<td>11,613</td>
</tr>
<tr>
<td>8</td>
<td>Big Horn, Powder River</td>
<td>1</td>
<td>12,492</td>
<td>24</td>
<td>Beaverhead, Madison</td>
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</tr>
<tr>
<td>9</td>
<td>Yellowstone</td>
<td>6</td>
<td>13,169</td>
<td>25</td>
<td>Ravalli</td>
<td>1</td>
<td>12,341</td>
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<tr>
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<td>Phillips, Blaine</td>
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<td>14,118</td>
<td>26</td>
<td>Missoula</td>
<td>4</td>
<td>11,166</td>
</tr>
<tr>
<td>11</td>
<td>Fergus</td>
<td>1</td>
<td>14,018</td>
<td>27</td>
<td>Sanders, Mineral</td>
<td>1</td>
<td>9,917</td>
</tr>
<tr>
<td>12</td>
<td>Musselshell, Golden Valley, Wheatland, Sweet Grass</td>
<td>1</td>
<td>12,407</td>
<td>28</td>
<td>Lake</td>
<td>1</td>
<td>13,104</td>
</tr>
<tr>
<td>13</td>
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<td>Glacier</td>
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</tr>
<tr>
<td>14</td>
<td>Park</td>
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<td>Flathead</td>
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<tr>
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<td>13,022</td>
<td>31</td>
<td>Lincoln</td>
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<td>12,537</td>
</tr>
<tr>
<td>16</td>
<td>Jefferson, Broadwater, Meagher</td>
<td>1</td>
<td>9,717</td>
<td>Total State Senators</td>
<td>55</td>
<td></td>
<td></td>
</tr>
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Table II. The districts and apportionments for the house of representatives were as follows:

<table>
<thead>
<tr>
<th>Dist. No.</th>
<th>County or Counties</th>
<th>No. of Representatives</th>
<th>Pop. Per Representative</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Carter, Fallon, Wibaux, Prairie</td>
<td>2</td>
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<td>2</td>
<td>Dawson</td>
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<td>6,157</td>
</tr>
<tr>
<td>3</td>
<td>Richland, McCone</td>
<td>2</td>
<td>6,913</td>
</tr>
<tr>
<td>4</td>
<td>Roosevelt</td>
<td>2</td>
<td>5,865</td>
</tr>
<tr>
<td>5A</td>
<td>Sheridan</td>
<td>1</td>
<td>6,458</td>
</tr>
<tr>
<td>5B</td>
<td>Valley, Daniels</td>
<td>3</td>
<td>6,945</td>
</tr>
<tr>
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<td>Rosebud, Treasure, Garfield, Petroleum</td>
<td>2</td>
<td>5,204</td>
</tr>
<tr>
<td>7</td>
<td>Custer</td>
<td>2</td>
<td>6,614</td>
</tr>
<tr>
<td>8</td>
<td>Big Horn, Powder River</td>
<td>2</td>
<td>6,246</td>
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<td>9</td>
<td>Yellowstone</td>
<td>12</td>
<td>6,584</td>
</tr>
<tr>
<td>10A</td>
<td>Phillips</td>
<td>1</td>
<td>6,027</td>
</tr>
<tr>
<td>10B</td>
<td>Blaine</td>
<td>1</td>
<td>8,091</td>
</tr>
<tr>
<td>11</td>
<td>Fergus</td>
<td>2</td>
<td>7,009</td>
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<tr>
<td>12A</td>
<td>Musselshell, Golden Valley</td>
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<td>6,091</td>
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<tr>
<td>12B</td>
<td>Wheatland, Sweet Grass</td>
<td>1</td>
<td>6,316</td>
</tr>
<tr>
<td>13</td>
<td>Carbon, Stillwater</td>
<td>2</td>
<td>6,922</td>
</tr>
<tr>
<td>14</td>
<td>Park</td>
<td>2</td>
<td>6,584</td>
</tr>
<tr>
<td>15</td>
<td>Gallatin</td>
<td>4</td>
<td>6,511</td>
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<tr>
<td>16</td>
<td>Jefferson, Broadwater, Meagher</td>
<td>2</td>
<td>4,858</td>
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<tr>
<td>17</td>
<td>Chouteau, Judith Basin</td>
<td>2</td>
<td>5,217</td>
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</table>

<table>
<thead>
<tr>
<th>Dist. No.</th>
<th>County or Counties</th>
<th>No. of Representatives</th>
<th>Pop. Per Representative</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>Cascade</td>
<td>11</td>
<td>6,674</td>
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<tr>
<td>19</td>
<td>Hill, Liberty</td>
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<td>Toole</td>
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</tr>
<tr>
<td>20B</td>
<td>Pondera</td>
<td>1</td>
<td>7,653</td>
</tr>
<tr>
<td>20C</td>
<td>Teton</td>
<td>1</td>
<td>7,295</td>
</tr>
<tr>
<td>21</td>
<td>Lewis and Clark</td>
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<tr>
<td>22A</td>
<td>Powell</td>
<td>1</td>
<td>7,002</td>
</tr>
<tr>
<td>22B</td>
<td>Deer Lodge, Granite</td>
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<td>7,218</td>
</tr>
<tr>
<td>23</td>
<td>Silver Bow</td>
<td>7</td>
<td>6,635</td>
</tr>
<tr>
<td>24A</td>
<td>Beaverhead</td>
<td>1</td>
<td>7,194</td>
</tr>
<tr>
<td>24B</td>
<td>Madison</td>
<td>1</td>
<td>5,211</td>
</tr>
<tr>
<td>25</td>
<td>Ravalli</td>
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<td>6,170</td>
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<tr>
<td>26</td>
<td>Missoula</td>
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<td>6,380</td>
</tr>
<tr>
<td>27</td>
<td>Sanders, Mineral</td>
<td>2</td>
<td>4,953</td>
</tr>
<tr>
<td>28</td>
<td>Lake</td>
<td>2</td>
<td>6,552</td>
</tr>
<tr>
<td>29</td>
<td>Glacier</td>
<td>2</td>
<td>5,783</td>
</tr>
<tr>
<td>30</td>
<td>Flathead</td>
<td>5</td>
<td>6,593</td>
</tr>
<tr>
<td>31</td>
<td>Lincoln</td>
<td>2</td>
<td>6,268</td>
</tr>
</tbody>
</table>

Total State Representatives: 104

Ibid., 460.
In part this was a consequence of the court’s ruling that Article VI, § 3, providing that no county shall be divided in the formation of representative districts remained “valid and unaffected by any requirements of the . . . Fourteenth Amendment and . . . has been respected by this court in its plan for reapportionment.”

The judicial reapportionment would continue in effect until a legislature, properly elected under the plan, should provide valid reapportionment. If the 1967 Legislative Assembly should fail to reapportion, the court would then decide whether protection of the public interest required any further retention of jurisdiction. But in any event, jurisdiction would be retained until the 1967 Assembly concluded its first biennial session “for the purpose of adjudging and passing upon the validity of any plan of reapportionment enacted by [that] Assembly and to compel compliance with the Equal Protection Clause.”

The court further provided for determination by lot which senators elected in 1966 would serve for four-year terms and which for two-year terms. Since several multiple-county districts were established, the court ordered filing of all nomination petitions and primary and general election returns with the secretary of state. Certification of the results of these elections would be made by the state canvassing board as provided by statute for election of state officers.

Although the 1965 Legislative Assembly failed to reapportion itself, it did propose a constitutional amendment intended to clear the way for the expected reapportionment. The bill proposing the constitutional amendment was introduced in the senate on the 18th day of the session, and was finally approved on the 58th day after a rather stormy journey through the chamber. The bill was approved in the house on the 60th day by a vote of 67-4. This amendment clearly foresaw that reapportionment of the state to equal population standards would require grouping some of the less populous counties into legislative districts comprising two or more counties. It was also clear that large multi-member slates of representatives would be necessary in the most populous counties, unless the constitution could be changed to permit subdivision of these counties in

See supra note 84.

Herweg v. 39th Legis., supra, note 84, at 463.

Id. at 462; R.C.M. 1947, §§ 23-910, 23-922, 23-1812, 23-1814, 23-1816. On November 16, 1966 the Secretary of State announced detailed regulations governing the division of state senators into two-year and four-year classes. In districts with more than one senator, lots were to be drawn in a public meeting of the most populous county in the district at 10:00 a.m., December 14, 1966. The Secretary of State would draw lots in his Capitol office at 9:00 a.m., December 15 to determine which senators from single-senator districts would serve four year terms. Flathead County, with three senators, was a special problem; a preliminary drawing at 9:00 a.m., December 14 would determine which of the three senators from that county would be drawn along with those from single-senator districts; the other two would then draw at 10:00 a.m. for determination of their terms. The Secretary of State reported that there would be 28 senators with four-year terms, and 27 with three-year terms as a result of the process.
the establishment of representative districts. The amendment was ratified by a narrow margin in the 1966 general election.99

Despite the rather formidable structure of the amendment, its only really significant effect is to permit establishment of single-member districts by subdivision of counties. The sentence in Article VI, § 3 declaring "No county shall be divided in the formation of representative districts" was simply left out of the new text of that section.90

Ratification of the amendment gives the 1967 legislature or some subsequent session the significant choice between large multi-member slates elected from whole populous counties, and single representatives elected from parts of these counties. Perhaps some intermediate arrangement might be devised in which voters would elect no more than three or four representatives of a part of a county. Such districting might be desirable for one or both chambers; more probably for the house of representatives. The most obvious attraction of single-member districts would be a short legislative ballot in place of the "bedsheet" ballot which confronted voters in the more populous counties in November, 1966.91 It is arguable that single-member subdistricts within populous counties would facilitate more direct representation of local party minorities and/or rural minorities or secondary towns in counties dominated by a large population center. This accounted for some support of this amendment in some of the less-populous counties.

But the considerations involved in choices between modes of districting are complex and not completely obvious. This article cannot explore these intricacies, but it is suggested that the shift from predominantly single-member representation to predominantly multi-member representation represents an important change in the nature of legislative representation, quite apart from reapportionment.92

The authors of Senate Bill 122 recognized that some small-population counties would inevitably be combined in any reapportionment.93

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99 For: 96-246; Against: 85,248. OFFICIAL CANVASS OF MONTANA GENERAL ELECTION RETURNS FOR NOVEMBER 8, 1966.
90 Article VI, § 3 will read "Senatorial and representative districts may be altered from time to time as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be."
91 Voters in Yellowstone County chose among 24 house candidates and 12 senate candidates; in Cascade County there were 22 house candidates and 12 senate candidates.
92 See the writer’s examination of some of these problems: Waldron, Montana’s 1966 Legislative Apportionment Amendment, Spring 1966 MONT. BUS. Q. 11, 14-25; and Waldron, What Kind of Legislature?, Winter 1965 MONT. BUS. Q. 106, 111-123.
93 The federal district court noted that an apportionment of Montana which gave the least populous county one representative would create a legislative chamber of "approximately 754 members, a manifest absurdity."
Herweg v. 39th Legis., supra note 84, at 461. The only practicable alternative to multiple-county districts would be some scheme of weighted voting; such bills were introduced in the 1965 session but gained little support; and it may be supposed that once the older pattern of county representation has been broken, such proposals will have even less appeal. Serious problems of the weighting or allocation of votes in committee, and indeed in the composition of committees, made weighted-voting schemes unattractive to many legislators, however much they resisted apportionment.
But the constitutional provision for filling legislative vacancies caused by death would not work in multiple-county districts. The legislature proposed repeal of this section and the voters ratified this proposal in November, 1966. The applicability of remaining law to fill legislative vacancies involves intricate questions of statutory and constitutional interpretation in a complicated variety of circumstances in which vacancies might occur. To explore these problems would require extended comment. It is submitted that new legislation is urgently called for and should be an early concern of the 1967 Legislative Assembly. The history of the problem suggests that a new constitutional provision should do no more than grant express authority to the legislature to provide for filling legislative vacancies. It might be argued that the legislature may govern the matter simply by statute without constitutional authorization.

The apporionment amendment deletes several apportionment provisions which had become archaic or which had been nullified by the Supreme Court decisions in the Reapportionment Cases. It also anticipates that something like the Dirksen Amendment to the national constitution might permit return of the Montana Senate to equal representation of counties. A battered version of the Dirksen proposal was defeated in the United States Senate for a second time on April 26, 1966, making further efforts to pass such a proposal quite remote. Ratification if proposed seems even more remote.

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94 Article V, § 45.
95 Article V, § 45, as amended in 1932, provided that vacancies caused by death would be filled by appointment of the board of county commissioners from the county where the vacancy occurred; vacancies from any other cause would be filled by special elections called by the governor. Repeal of this entire section in 1966 raises the question of the extent to which an 1895 statute (R.C.M. 1947, § 59-604) now governs the filling of vacancies. §59-604 provides that whenever a vacancy, or failure to elect because of a tie vote occurs in either house, the governor is to call an election to fill the vacancy. State ex rel. Cutts v. Hart, 56 Mont. 571, 185 Pac. 769 (1919), is the leading case interpreting § 59-604. But the case rests squarely on the express and mandatory effect of the original language of Article V, § 45 of the Constitution; the force of the case presumably collapsed with repeal of the constitutional provision it interpreted.

96 Article V, §§ 4 and 45, and article VI, §§ 4 and 6 were repealed. Article VI, §§ 2 and 3 were substantially rewritten to accommodate apportionment of both houses to population. Article VI, § 2(3) now provides: “At such time as the constitution of the United States is amended or interpreted to permit apportionment of one house of a state legislative assembly on factors other than population, the senate of the legislative assembly shall be apportioned on the basis of one senator for each county.” In July 1966 Mrs. Herweg asked the court to prevent submission of the proposed amendment to the voters for ratification, claiming that the anticipation of the Dirksen Amendment in the language of the amendment was a legislative effort to circumvent the relief granted in the judicial reapportionment of the previous year. She claimed the amendment would deprive Montana voters of the right to designate the basis and number of senators by subjecting senate apportionment to unknown, and uncertain factors. And, that it would deprive future legislative assemblies of the right to effectively reapportion the Senate. (Affidavit in Support of Motion for Temporary Injunction, p. 2 [July 18, 1966]). The petition was probably correct in anticipating the effect of the amendment, in the unlikely event the Dirksen amendment should pass. But the court thought the issue too speculative to warrant present judicial interference, and denied the petition without conducting a hearing. The court observed that “any possible legislative action pursuant to the amendment is based upon contingencies which may never occur. There is no suggestion of any present violation or threatened violation of the federal constitution.” (Order, Aug. 1, 1966)

97 The Dirksen Amendment had been altered to require that both houses of a state legis-
Reapportionment has made significant changes in legislative representation, but in Montana the strength of the two major political parties is so distributed among both urban and rural areas that reapportionment will not deliver either house of the legislature to one party beyond hope of recapture by the other in some subsequent election. A preliminary examination of the legislative results in the 1966 elections sustains this view. The Republicans gained 26 legislative seats in the house, and control of that chamber, but they reduced the Democratic senate majority by only two votes. These results are explicable as the product of a Republican trend running in the house where nearly half the representatives were elected to their first term of legislative service. However, seniority and incumbency of senate candidates prevailed against a Republican trend, except for a few seats in pivotal counties like Flathead and Missoula. Both parties shared gains and losses attributable to reapportionment in both houses. Results in senate and house districts unaffected by reapportionment closely reflected total results in each chamber.98

In the 1965 Legislative Assembly incumbency and the sum of individual inclinations to resist change prevailed against a constitutional obligation to reapportion. Success in the November 1966 election may have persuasive logic for the new incumbents; having succeeded they may see little reason to supplant the court-decreed apportionment with another of their own contriving. Ratification of the 1966 apportionment amendment opens up a wide variety of subdistricting possibilities for the 1967 legislature. Exploration of these options may well occupy the thoughts of the 1967 legislature, excluding review of the larger apportionment pattern.

A rich mixture of political values is involved in a choice between single-member and multi-member districts, and discussion is further complicated by numerous options within each of these principal forms.99

Single-member districts are commonly said to permit better representation of local minorities, more knowledgeable voting because of the short ballot, and more responsible relations between the legislator and his constituents. Multi-member districts are supposed to place less emphasis

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97JEWELL AND PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES ch. 3 (1966); and Silva, Compared Values of the Single- and Multi-Member Legislative District, 17 WEST. POL. Q. 504-516 (1964) are useful recent discussions. See also HAMILTON, REAPPORTIONING LEGISLATURES ch. 8 (1966), for an exploration of the experience with several modes of districting in Ohio.
on parochial interests of the locality, to strengthen the party responsibility required to achieve the larger objectives of a political system, and reduce opportunities for gerrymandered partisan advantage. However, the legislature should at least explore the values of single-member districting for the House of Representatives while retaining multi-member districting in the senate. Such an arrangement would maximize the alleged value of differing bases for representation in the two houses of a bicameral legislature.\textsuperscript{100}

It might be said that reapportionment is a meaningful act only when it reduces representation of a constituent who is over-represented, and increases representation of another constituent who is under represented. It is not difficult for a representative to vote for "reapportionment" which increases the "voting power" of his own constituents; past legislative reapportionments in Montana have had this effect. The traditional expectation that a legislative assembly will transfer representation in a meaningful way may be unrealistic. The representative of constituent A who is called upon to surrender voting power to a future representative of constituent B naturally regards such a surrender as an \textit{un}-representative act. He is asked to advance the interests of B to the clear disadvantage of A. This may be the basic reason a third of the legislatures elected in 1966 were supplanted as apportioning agencies by courts and commissions.\textsuperscript{101} Moreover, judicial intervention lurked behind many legislative reapportionments accomplished in other states.

\textbf{CONCLUSION}

In retrospect, it seems a bit strange that 18th century notions of checks and balances which surrounded other aspects of legislative activity were not extended to this fundamental area of representative politics. Judicial intervention to compel reapportionment may be seen as the historical development of such a check against legislative inaction (or purely symbolic action) in the face of constitutional or statutory directives to transfer representative power from time to time.

As early as 1851, the Ohio constitution stripped the state legislature of reapportionment responsibility and gave that function to a commission of elected state officers.\textsuperscript{102} One hundred ten years later, on the eve of the reapportionment revolution, at least a dozen other states had developed alternatives to legislative reapportionment. Arkansas, like Ohio, turned to a board of elective state officers. The two newest states, Alaska and Hawaii, gave the job to the governor while Arizona entrusted it to the secretary of state. Missouri and Michigan used apportionment commissions.\textsuperscript{103}

\textsuperscript{100}\textit{Waldron, supra} note 92, Winter 1965 at 106-123.


\textsuperscript{102}\textit{OHIO CONST. art. IX.}

\textsuperscript{103}\textit{ARK. CONST. art. VIII, § 5; ALASKA CONST. art. VI, § 3; HAWAI'I CONST. art. III.}
In at least six states primary responsibility for reapportionment remained with the legislature, but specific recourse to non-legislative agencies was provided if the legislature failed to act within a specified time.\textsuperscript{104}

A point of diminishing returns may be quickly reached in Montana if the legislative assembly attempts reapportionment every decade. The temptation to manipulate district boundaries and the number of representatives for local partisan advantage is always considerable. This is especially true within the increasingly populous urban centers because of the prospect that greater advantages may be gained after every census. However, these opportunities are limited by judicial checks against substantial numerical disproportions. Further, the wide distribution of local centers of partisan dominance among both parties may cancel locally gained advantage rather than allowing them to become cumulative.\textsuperscript{105}

Montana legislative history suggests another limitation on the possibility of partisan advantage through legislative reapportionment. Seven Montana legislatures in this century had the constitutional obligation to reapportion. But in only two instances were both houses controlled by the governor's party. In one of those years, there was no reapportionment although the political signs would have been favorable for some sort of coup. Was this accidental? Of 40 legislatures, only 13 had both houses controlled by the governor's political partisans—one in three. There seems little reason to suppose that reapportionment will alter this pattern in the foreseeable future.\textsuperscript{106}

Some non-legislative apportionment agency may be the most desirable and practicable way to accomplish reapportionment; especially since the Reapportionment Cases have made judicial intervention a certainty when the legislature fails to act according to judicial standards. Like many complex tasks, reapportionment can be made large nonpolitical by treating it that way; thus leaving political struggles to be conducted on more promising terrain. If the 1967 Legislative Assembly finds the judicial reapportionment of 1965 to be more acceptable than any substitute it can devise, the logic of non-legislative reapportionment may seem even more persuasive.


\textsuperscript{105}As a specific example: retention of multi-member districts in order to return "solid" Republican delegations from Yellowstone County gives comparable advantage to Democrats in districts including Silver Bow and Deer Lodge counties; while pivotal counties like Missoula and Flathead can be swept by the opposition in a "bad" year.

\textsuperscript{106}See Waldron, Reapportionment and Political Partisanship, supra note 98.
Ultimate legislative control could be retained by a statutory provision that an apportionment initiated by a board or commission would go into effect on adjournment of a legislative session which failed to agree upon an alternative apportionment. In any event, court action would be available to guard against abuse of the function.\footnote{Query: will all future reapportionments be tested in the courts, as taxpayer suits now customarily test referenda for Montana state bond issues?}

The Montana Legislative Assembly has four years in which to work out reapportionment standards and devices.\footnote{A legislative apportionment in 1967 probably would not depart substantially from the court-decreed arrangement of 1965, unless radical changes were made in the size of one or both houses, and this seems unlikely. It seems even more unlikely that a court would repudiate the judicial handiwork of the Herweg action before 1971.} The easiest course would be simple inaction. But the most useful contribution of the 1967 Assembly might be to establish an apportionment study commission to explore alternatives during the next legislative interim. The 1969 Legislative Assembly could then choose among the alternatives, selecting one to be used after the 1970 census—perhaps even in time for the 1970 legislative elections.