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## Apportionment When the Legislature Fails to Act

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## APPORTIONMENT WHEN THE LEGISLATURE FAILS TO ACT

It is a fundamental right of citizens in a democracy to be equally represented in the legislative assembly. Most American state constitutions seek to secure this right by providing that the legislators shall be elected by the voters from single-member districts made up of "compact, contiguous territory as nearly equal in population as is possible," and by providing that the district lines conform with natural boundaries or the boundaries of previously established political subdivisions, such as counties.<sup>1</sup> However, in order to maintain equality of representation with the lapse of time, these districts cannot satisfactorily be established once and for all in the constitution itself; but provision must be made for their periodic re-alignment and re-apportionment to compensate for the uneven growth in population and for population shifts.<sup>2</sup> Usually the duty to re-apportion after each decennial national census, or after each state census if a national census is not taken, is imposed upon the very legislative body to be elected from the districts after they have been set up.<sup>3</sup> Some-

1. Ala. Const. (1901) art. IV, §50, §§199, 200; Ariz. Const. (1912) art. IV, c. 2, §§1, 11; Ark. Const. (1874) art. VIII, §§1-5; Cal. Const. (1879) art. IV, §§5, 6; Colo. Const. (1876) art. V, §§45-47; Conn. Amendments to Const. (1818) art. I (1828), art. XXXI (1901); Del. Const. (1897) art. II, §2; Fla. Const. (1887) art. VII, §§2, 3; Ga. Const. (1877) art. III, §2, par. 2, and §3, par. 1; Idaho Const. (1890) art. III, §§2, 4, 5; Ill. Const. (1870) art. IV, §6; Ind. Const. (1851) art. IV, §2, 5, 6; Iowa Const. (1857) art. III, §§6, 34-37; Kan. Const. (1861) art. II, §2, art. X, §1, 2; Ky. Const. (1891) §§31, 33; La. Const. (1921) art. III, §§2-5; Me. Const. (1820 and 1876) art. IV, pt. 1; Md. Const. (1867) art. III, §§4, 5; Mass. Const. (1870) Amendment LXXI; Mich. Const. (1909) art. V, §§2-4; Minn. Const. (1857) art. IV, §2; Miss. Const. (1890) art. XIII, §§254-256; Mo. Const. (1875) art. IV, §§2-9; Mont. Const. (1889) art. V, §4; Neb. Const. (1875) art. III, §§5, 6; Nev. Const. (1864) art. IV, §5, art. XVII, §6; N. H. Const. (1784) pt. 2, arts. 9, 25, 26; N. J. Const. (1844) art. IV, §2, pars. 1, 2, §3, §1; N. M. Const. (1912) art. IV, *Apportionment*; N. Y. Const. (1938) art. III, §§2-5; N. C. Const. (1876) art. II, §§3-5; N. Dak. Const. (1889) art. II, §§29, 32, 35; Ohio Const. (1851) art. XI, §§1-11; Okla. Const. (1907) Art. V, §§9 (a, b), 10; Ore. Const. (1859) art. IV, §§2, 6; Pa. Const. (1874) art. II, §§16-18; R. I. Const. (1843) art. V, §1, art. VI, §1; S. C. Const. (1895) art. III, §§3, 4, 6; S. Dak. Const. (1889) art. XIX, §2; Tenn. Const. (1870) art. II, §§4-6; Tex. Const. (1876) art. III, §§2, 25, 26; Utah Const. (1895) art. IX, §§2, 3; Vt. Const. (1793) c. II, §18; Va. Const. (1902) art. IV, §§41-43; Wash. Const. (1889) art. II, §§2, 3; W. Va. Const. (1872) art. VI, §§2, 4, 7, 11; Wis. Const. (1848) art. IV, §§2, 3; Wyo. Const. (1889) art. III-A, §§1-3; Model State Constitution (1941) §13.

2. Hilpert, *Making Representative Government Representative* (1939) 13 Ohio Law Rep. 481, 483.

3. Mo. Const. (1875) art. IV, §7 is typical; the only exceptions are Arizona, Arkansas, Delaware, and Ohio, which have special methods. See Ariz. Const. (1912) art. IV, c. 2, §11 (board of supervisors of each county redistricts); Ark. Const. (1874) art. VIII, §§1-5 (board of apportionment composed of governor, secretary of state, and attorney-general); Del. Const.

times, however, this duty has been devolved upon a committee of executive officers, acting *ex officio*,<sup>4</sup> an administrative agency,<sup>5</sup> or the regular judiciary,<sup>6</sup> in order to lessen the possibility that the re-apportionment or failure to re-apportion seasonably will be influenced by self-serving political considerations.

Experience under the single-member district system shows that all too often the agency, or agencies, charged with the duty to re-apportion have failed to act over periods of time long enough to cause gross inequalities of voting power, or have, in re-apportioning, "gerrymandered" the districts and thus violated the basic requirements of a fair election system.<sup>7</sup> These practices early raised the question of the power of the judiciary to compel reapportionment or otherwise control the exercise of the power. In the leading case of *Fergus v. Marks*<sup>8</sup> it was held that man-

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(1897) art. II, §2 (specific districts set out in constitution); Ohio Const. (1851) art. XI, §§1-11 (mathematical ratio for legislators, with districts laid out—governor publishes ratio of representation after each census).

4. Cal. Const. (1879) art. IV, §6 (reapportionment commission consisting of lieutenant-governor, attorney-general, surveyor-general, secretary of state, and state superintendent of public instruction); Ark. Const. (1874) art. VIII, §1 (board of apportionment consisting of governor, secretary of state, and the attorney-general); Ohio Const. (1851) art. XI, §11 (governor, secretary of state, and auditor).

5. Mo. Const. (1875) art. IV, §3, which reads, "When any county shall be entitled to more than one Representative, the County Court shall cause such county to be subdivided into districts of compact and contiguous territory, corresponding in number to the Representatives to which such county is entitled, and in population as nearly equal as may be, in each of which the qualified voters shall elect one Representative, who shall be a resident of such district: *Provided*, That when any county shall be entitled to more than ten Representatives, the circuit court shall cause such county to be subdivided into districts, so as to give each district not less than two nor more than four Representatives, who shall be residents of such district—the population of such districts to be proportioned to the number of Representatives to be elected therefrom"; and §6, which reads in part, " \* \* \* When any county shall be entitled to more than one Senator, the circuit court shall cause such county to be subdivided into districts of compact and contiguous territory, and of population as nearly equal as may be, corresponding in number with the Senators to which such county may be entitled; and in each of these one Senator, who shall be a resident of such district, shall be elected by the qualified voters thereof." In the case of *State ex rel. Major v. Patterson* (1910) 229 Mo. 373, 129 S. W. 883, the Supreme Court of Missouri decided that these two sections do not confer original power of apportionment upon the county court, but that an act of apportionment by the legislature is necessary to confer jurisdiction on the court to district the county. See also, in this connection, *Ariz. Const.* (1912) art. IV, c. 2, §11, conferring redistricting power on the board of supervisors of each county.

6. See the Missouri provision in note 5, above.

7. See Hilpert, *Making Representative Government Representative* (1939) 18 *Ohio Law Rep.* 481, 483, 484.

8. (1926) 321 Ill. 510, 152 N. E. 557, 46 A. L. R. 960.

damus would not lie to compel the legislature to re-apportion the state into senatorial districts because this power was specifically legislative and the doctrine of the separation of powers precluded the courts from compelling the performance of a legislative duty.<sup>9</sup> Therefore, if the duty to re-apportion is imposed upon the legislature and it fails to act, the only recourse is to the people through the polls, unless an intermediate recourse to some other agency is specifically provided in the state constitution. When the duty to re-apportion rests initially or secondarily on some other agency, such as an *ex officio* committee or the courts, as it does by some constitutions,<sup>10</sup> some courts have held that mandamus, or some other appropriate writ, will lie to compel such agency to proceed to the task of re-apportioning, although the courts will not control the mode of re-apportionment in detail.<sup>11</sup> Missouri, however, seems to extend the doctrine of *Fergus v. Marks, supra*, to any official body charged with the duty of re-apportionment, on the theory that such official is a "Miniature Legislature,"<sup>12</sup> against which, consequently, mandamus will not lie.<sup>13</sup>

Once there has been an apportionment, however, a degree of judicial control is possible, although the extent to which the courts will review the action of the apportioning agency depends upon the wording of the constitutional mandate.<sup>14</sup> Generally only in the case of a clear abuse of discretion will the court declare the act invalid.<sup>15</sup> Where there is a violation of the usual consti-

9. Blair, J., dissenting in *State ex rel. Lashly v. Becker* (1921) 290 Mo. 560, 600, 235 S. W. 1017, 1032, suggests in addition that the legislature is too numerous a body to be subject to the writ of mandamus.

10. Notes 3-5, *supra*.

11. *Donovan v. Suffolk County Apportionment Comm'rs* (1916) 225 Mass. 55, 113 N. E. 740, 2 A. L. R. 1334; *Merrill v. Mitchell* (1926) 257 Mass. 184, 153 N. E. 562; *Brooks v. State ex rel. Singer* (1904) 162 Ind. 568, 70 N. E. 980; see *State ex rel. Gallagher v. Campbell* (1891) 48 Ohio St. 435, 27 N. E. 884, 885. In these cases the writ, although spoken of as "mandamus," is in the nature of *procedendo*.

12. *State ex rel. Barrett v. Hitchcock* (1912) 241 Mo. 433, 146 S. W. 40.

13. For further discussions of mandamus against government officials see *Comments* (1940) 26 WASHINGTON U. LAW QUARTERLY 134 and (1941) 26 WASHINGTON U. LAW QUARTERLY 442.

14. Some courts call this a political matter, and refuse to look into it (*State ex rel. Cromelian v. Boyd* (1893) 36 Neb. 181, 54 N. W. 252, 19 L. R. A. 227), others say it presents a juridical question, rather than political, and the courts have jurisdiction (*Parker v. State ex rel. Powell* (1882) 133 Ind. 197, 32 N. E. 836, 18 L. R. A. 567, *reh. den.* 33 N. E. 119; *State ex rel. Morris v. Wrightson* (1883) 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; *State ex rel. Att'y Gen'l v. Cunningham* (1892) 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561).

15. As one court said in denying mandamus, "The deviation from equality of population must be so grave, palpable, and unreasonable that argument would not be necessary to convince a fair minded man that injustice has been done." *People ex rel. Baird v. Bd. of Sup'rs of Kings County* (1893) 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81.

tutional requirements of equality of population, and compactness and contiguity of territory, the redistricting may be set aside.<sup>16</sup> If the court invalidates the new plan, the old apportionment remains in effect.<sup>17</sup> But, as expressed by Ostrander, J., dissenting in *Williams v. Secretary of State*,<sup>18</sup> this result may leave the state with a less representative system than if the new apportionment were permitted to stand. Where the duty to re-apportion rests on some agency other than the legislature, the courts of some states will, in a proper case, invalidate a re-apportionment act, and by mandamus compel the official charged with the responsibility to proceed to draft a new act.<sup>19</sup> But this does not solve the problem where the legislature is vested with the power, since mandamus will not issue against it, nor where another agency is vested with the power, when, as in Missouri, the courts will not allow mandamus to lie against it.

The Missouri constitutional provisions for apportionment of legislative districts are to be found in article IV, sections 2-9, of the Constitution of 1875. Section 7, with which we are here most concerned, provides that the general assembly shall make the apportionment after each United States census, but, if it fails or refuses to district the state for any reason, the governor, attorney-general, and secretary of state shall perform such duty within thirty days after the adjournment of the legislature upon which that duty devolved. This would seem to provide an alternative procedure if the legislature does not act, but the Supreme Court of Missouri, in the case of *State ex rel. Lashly v. Becker*,<sup>20</sup>

16. The procedure followed in the various states differs, some allowing injunction (*Broom v. Wood* (D. C. S. D. Miss. 1932) 1 F. Supp. 134; *Bailey v. Abington* (Ark. 1941) 148 S. W. (2d) 176; *Denny v. State* (1896) 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; *Ragland v. Anderson* (1907) 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242; *Stiglitz v. Schardien* (1931) 239 Ky. 799, 40 S. W. (2d) 315; *Williams v. Woods* (Tex. Civ. App. 1914) 162 S. W. 1031; *State ex rel. Att'y Gen'l v. Cunningham* (1892) 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561), others granting mandamus to accomplish the result of injunction (*Bd. of Sup'rs of Houghton County v. Blacker* (1892) 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; *Williams v. Sec'y of State* (1906) 145 Mich. 447, 108 N. W. 749; *In re Sherrill* (1907) 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841, rev'g (1906) 114 App. Div. 890, 101 N. Y. S. 858; *State ex rel. Harte v. Moorhead* (1916) 99 Neb. 527, 156 N. W. 1067; see *People ex rel. Woodyatt v. Thompson* (1895) 155 Ill. 451, 40 N. E. 307; *State ex rel. Meighen v. Weatherill* (1914) 125 Minn. 386, 147 N. W. 105; *State ex rel. Warson v. Howell* (1916) 92 Wash. 540, 159 Pac. 777), and others granting special statutory review (*Armstrong v. Mitten* (1934) 95 Colo. 425, 37 P. (2d) 757; *In re Livingston* (1916) 96 Misc. 341, 160 N. Y. S. 462).

17. *Williams v. Secretary of State* (1906) 145 Mich. 447, 108 N. W. 749.

18. (1906) 145 Mich. 447, 108 N. W. 749, 751.

19. Note 11, supra.

20. (1921) 290 Mo. 560, 235 S. W. 1017.

held that the alternative procedure in this statute is ineffective because it does not allow the referendum. The reasoning of the court was that re-districting the state, being a legislative duty, may not be vested in the executive. Article IV, section 57<sup>21</sup> provides that the legislative authority shall be vested in a legislative assembly, but that the people reserve to themselves the power to initiate or reject laws, and it was the purpose of this section<sup>22</sup> to gather all legislative power or authority in one legislative forum, in order that it might be subject to the initiative and referendum. The decision in that case was not unanimous, and may be criticized, but it is the law of the state,<sup>23</sup> and was reaffirmed in *State ex rel. Gordon v. Becker*.<sup>24</sup> Thus the situation in Missouri is comparable to that in most other states, that is, full responsibility for re-districting the state rests upon the legislature, which is not subject to mandamus in the performance of its duties, and whose acts can only be invalidated if they clearly contravene the language of the constitution.

The single-member district system thus seems to present an insoluble dilemma. There seems to be no means, under established principles of American jurisprudence, for placing the duty to re-apportion on an agency against which mandamus will lie, where the vice complained of is inaction. Putting the duty to re-district, either initially or in the alternative, upon an agency other than the legislature seems at most only to permit judicial action compelling such agency to proceed with its work, without compelling its completion, at least not in any particular manner.

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21. Mo. Const. (1875) as amended November 3, 1908. Mo. Laws of 1909, 906.

22. Mo. Const. (1875) art. IV, §57.

23. It is not, however, the law of California, which has a provision similar to the Missouri provision, but carefully including the right of the people to the referendum. Cal. Const. (1879) art. IV, §6, as amended 1926, reads in part, " \* \* \* should the Legislature at the first regular session following any decennial Federal census fail to reapportion the Assembly and Senatorial districts, a Reapportionment Commission, which is hereby created, consisting of the Lieutenant-Governor, who shall be chairman, and the Attorney-General, Surveyor-General, Secretary of State and State Superintendent of Public Instruction, shall forthwith apportion such districts in accordance with the provisions of this section and such apportionment of said districts shall be immediately effective the same as if the act of said Reapportionment Commission were an act of the Legislature, subject, however, to the same provisions of referendum as apply to the acts of the Legislature." Note also that this provision would be a better one for Missouri than that in the present constitution because the governor is not on the commission. For problems connected with mandamus against the governor in Missouri, see Comment (1941) 26 WASHINGTON U. LAW QUARTERLY 442.

24. (1932) 329 Mo. 1053, 49 S. W. (2d) 146.

There is a modicum of judicial review possible to invalidate obvious abuses of power;<sup>25</sup> and yet the constitutional requirements of equality in population and compactness and contiguity of territory seem to leave a considerable area where a "gerrymander" is beyond effective judicial control. Moreover, the constitutional mandates seem in all cases to be couched in broad and general terms, and this is, no doubt, from the very nature of constitutions, necessarily so. Yet every effort should be made to draw the constitutional requirements as closely as possible to widen the area of judicial control when re-apportioning action is taken. If this is supplemented by devolving the duty to operate the constitutional mandate upon an agency that is expressly made subject to a writ in the nature of *procedendo*, the dilemma presented by the single-member district system is solved in part.<sup>26</sup>

Many students of government would avoid, rather than solve, the dilemma by substituting for the single-member district system multi-membered districts and any one of several methods of voting which insure either proportional or at least minority representation.<sup>27</sup> It is perhaps significant that a committee of emi-

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25. But, there are problems arising from the decisions of the courts themselves, when the legislature has acted and they are called upon to determine the validity of an apportionment act. As Higbee, J., dissenting in *State ex rel. Lashly v. Becker* (1921) 290 Mo. 560, 235 S. W. 1017, 1037 ff., clearly pointed out, frequently the issue reaches into the courts themselves, so that political decisions are, unconsciously perhaps, reached, with the courts divided along party lines. It will be interesting to see whether this has been avoided since the adoption of the non-partisan method of appointing judges, as opposed to the old elective system.

26. Consider the amendment proposed by the Constitutional Convention of Missouri, 1922-23, submitted for adoption in 1924: "Such apportionment shall be made by the Governor, Secretary of State, Attorney-General, State Auditor and State Treasurer, or a majority of them, within sixty days after the result of such census has been ascertained.

"Such officers shall file in the office of the Secretary of State a full statement signed by them or a majority of them containing the districts, their numbers, and the names of the counties in each. Upon the filing of such statement the new districting shall be in full force and effect.

"The acts of such officers shall be ministerial and mandatory and shall not be subject to the referendum and failure to perform shall be cause for impeachment, and neglect or refusal or failure to properly perform within the time herein prescribed shall not discharge such officers of such duty, but the same shall continue until fully performed."

It is to be wondered whether this provision would eliminate the difficulties of apportionment. Be that as it may, the proposed amendment was overwhelmingly defeated at the polls.

27. For discussions of these plans, see Hilpert, *Making Representative Government Representative* (1939) 13 Ohio Law Rep. 481; Hoag and Hallett, *Proportional Representation* (1937) passim; Luce, *Legislative Principles* (1930) 247-256; Graves, *American State Government* (1936) 143-150.

Where the membership of such multi-membered districts is arbitrarily assigned the problem herein discussed is, however, only alleviated and not

ment American political scientists has suggested the use of the Hare system of the single transferable vote (popularly known as "P. R.") in the election of state legislatures.<sup>28</sup> It would seem, in view of the difficulties encountered in operating the single-member district system, that other methods of electing the Missouri general assembly may be examined with profit by a constitutional convention.<sup>29</sup>

J. L. D.  
R. S. S.

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## STATE CONSTITUTIONAL PROHIBITIONS AGAINST OFFICE-HOLDING BY LEGISLATORS

### COMMISSION ON INTERSTATE COOPERATION

The Constitution of California prohibits a member of the legislature from holding any "office, trust, or employment" under the state.<sup>1</sup> A statute established the California Commission on Interstate Cooperation, consisting of five members of each house of the legislature, for the purpose of investigating legislative problems common to the several states. No compensation was provided, but members might receive reimbursement for necessary expenses. Plaintiffs, members of the Commission, sought a writ of mandate to compel defendant, Controller of the State of California, to issue warrants reimbursing them for sums expended in carrying out the duties of the Commission. In *Parker v. Riley*,<sup>2</sup> it was held that the writ would issue, since the legislature has the right to legislate on the problems handled by the Commission; and, when it has the right to act, it must be given the use of

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entirely solved. For a suggestion which would seem more nearly to avoid the dilemma, see Hilpert, *supra*, at 491: "If instead the total legislative membership only were determined and these were allocated to each district in each election upon the basis of the proportion the total vote of that district bore to the total vote of the state, not only would the objections stated in the preceding paragraph be met, but a further inducement to 'get out the vote,' would be provided. Or, the total legislative membership could be left variable and the quota necessary to elect a member be determined—each district's membership being dependent upon the number of times its total vote fills this quota. A similar arrangement is provided in the new New York City charter for determining the representation as among the several boroughs, although the councilmanic representation of each borough is elected by the Hare system of the single transferable vote."

28. National Municipal League, *Model State Constitution* (1941) §302.

29. This would seem to be more desirable since the proponents of these election systems claim for them advantages other than merely the avoidance of the perplexing problem discussed in this note.

1. Cal. Const. (1879) Art. IV, Sec. 19.  
2. (1941) 113 P. (2d) 873.