Wisconsin Briefs from the LEGISLATIVE REFERENCE BUREAU

Brief 69-2 May 1969

LEGISLATIVE APPORTIONMENT: MISCELLANEOUS BACKGROUND INFORMATION ON THE PROPOSAL TO AMEND THE U.S. CONSTITUTION BY CONSTITUTIONAL CONVENTION

Compiled by the Wisconsin Legislative Reference Bureau, June 1969

INTRODUCTION

The United States Constitution, Art. V, states:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;..."

Proposing amendments by a constitutional convention called on petition of two-thirds of the states has never been used. An attempt is being made, however, at the present time to make use of this method.

As a result of decisions of the U.S. Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, 377 U.S. 533 (1964), and related cases, which, in essence, require both houses of a state legislature to be apportioned according to population – the so-called "one man, one vote" doctrine – numerous bills were introduced in Congresss relating to the subject. Some would have curtailed jurisdiction of the federal courts in the area of apportionment; others proposed to modify the decision by constitutional amendment. U.S. Senator Everett Dirksen twice has tried to obtain passage of a constitutional amendment to permit apportionment of one house by factors other than population. Although his measures were able to obtain a majority vote in Congress, they could not muster the two-thirds necessary for a constitutional amendment. He has worked, therefore, to encourage proposing the amendment by petition to Congress of two-thirds of the states to call a constitutional convention. To date, 33 states have petitioned Congress to call such a convention to consider the apportionment question.

Two similar petitions, Assembly Joint Resolution 55 and Senate Joint Resolution 69, are currently before the Wisconsin Legislature. Wisconsin's action on these petitions is of very considerable significance since passage would bring the total number of states up to the required two-thirds necessary to call the unprecedented constitutional convention.

It should be noted that both houses of the Wisconsin Legislature have been apportioned according to population since the beginning of statehood. The Wisconsin Constitution provides (Art. IV, Sec. 3): "At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding soldiers, and officers of the United States army and navy." The Baker and Reynolds decisions, therefore, have not presented quite the problem to Wisconsin that they have to those states which apportioned one house on population and the other on geography. Nevertheless, the Baker case has had a significant effect on legislative districting in this state. In 1962 the Wisconsin Legislature passed 3 reapportionment bills, all of which were vetoed by the Governor and were not passed over his veto. Subsequently the Attorney General brought suit to enjoin the 1962 legislative elections on the grounds that in the light of Baker v. Carr, the then existing apportionment was a denial of equal protection of the law under the 14th Amendment to the United States Constitution. Although the state's action was ultimately dismissed because of the imminence of the 1962 elections, when 1963 legislation was vetoed and not overridden, the Governor again petitioned the court to enjoin the 1964 legislative elections. The Legislature subsequently attempted to apportion itself by joint resolution. In Reynolds v. Zimmerman, 23 (2d) Wis. 606 (1964), the Wis. Supreme Court invalidated both the resolution and Ch. 4, 1961 Stats. (legislative districts) and, when a reapportionment plan had not been adopted by the date set, proceeded to reapportion the Legislature. In its statement of principles regarding legislative districting, the court said that the Wisconsin Constitution requires both Senate and Assembly districts to be of "substantial population equality." This decision preceded the federal decision in Reynolds v. Sims.

This report comprises a very brief compilation of data pertinent to consideration of this question.

STATES WHICH HAVE ENACTED RESOLUTIONS TO DATE

Thirty-three states have enacted resolutions memorializing Congress to call a convention to consider the apportionment question. They are: Alabama, Arizona,

Arkansas, Colorado, Florida, Georgia, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

Different states framed the proposed amendment in different ways, some calling for one house to be apportioned on a basis other than population, others leaving the question up to the individual states. The status of 4 – New Hampshire, Colorado, Utah and Georgia - apparently are in some doubt, because they were not filed with the Senate and House Judiciary Committees, but were entered in the Congressional Record. (Source: CONGRESSIONAL QUARTERLY WEEKLY REPORT, 5/2/69)

U.S. SUPREME COURT DECISIONS ON LEGISLATIVE APPORTIONMENT

Baker v. Carr, 369 U.S. 186 (1962), was a landmark decision in which the Supreme Court held that federal courts have jurisdiction to hear cases relating to apportionment in the state legislatures, and can grant relief if they find that there has been a violation of the 14th Amendment providing for "equal protection of the law". Although federal jurisdiction was established, there was no clear-cut formula or precedent. This fact was borne out in February 1964 in Herne v. Smylie, when a federal district court in Idaho denied ordering reapportionment of the state legislature, basing its decision on dissenting comments of Justice Frankfurter in Baker v. Carr. The court refused to invalidate an apportionment plan, citing lack of federal precedent to guide them in establishing an apportionment formula. However, in a contrasting decision, Moss v. Burkhart, a federal district court in Oklahoma refused to delay application of an order reapportioning the legislature. The court held that unless the U.S. Supreme Court acts on the case, the court-ordered plan – based strictly on population – would go into effect for the 1964 elections.

Wesberry v. Sanders: In 1964, the Supreme Court laid down the "one man, one vote principle in Wesberry v. Sanders, 376 U.S. 1 (1964). It did not, however, specifically refer to state legislatures. The case assured "equal representation for equal numbers of people" for the U.S. House of Representatives. In the majority opinion, Justice Black said: "We hold that, construed in its historical context, the command of Article I, Section 2 that Representatives be chosen 'by the people of the several states' means that as nearly as is practicable one man's vote in a Congressional

election is to be worth as much as another's." Justice Harlan, dissenting, said that the question of house districting within states is a political one entrusted to Congress as the sole federal supervisor and that the Court should not make a decision which would invalidate the districting basis on which 398 of 435 members were elected.

Reynolds v. Sims: Extending the "one man, one vote" doctrine to state legislatures was Reynolds v. Sims, 377 U.S. 533 (1964), which held that states must make an honest and good-faith effort to construct districts for both houses as nearly of equal population as is practicable. The reasoning behind this decision was that rural minorities have held absolute control over many of the state legislatures, some of whose houses had not been redistricted in over 100 years. The Court held that this is a violation of the 14th Amendment, under which "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the U.S;... nor deny to any person within its jurisdiction the equal protection of the laws." Justice Warren, speaking for the majority, said that "legislators represent people, not trees or acres...Legislators are elected by voters, not farms or cities or economic interests." He also refuted the analogy to the federal system that the U.S. Senate granted equal representation to each state regardless of population. He said the equal weight voting /given small states was their compensation for giving up their sovereignty upon joining the union, but counties and cities were never sovereign. However, Warren did assert that: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents or citizens or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." He clarified this statement, in part, by intimating that indiscriminate districting which did not pay heed to natural and historical boundaries could lead to partisan gerrymandering." The Supreme Court directed the lower courts in the various cases brought before the Court to decide whether the legislative districts must be revised before the fall elections. Harlan, again dissenting, said that the question of legislative apportionment was beyond judicial competence and federal jurisdiction, and disliked the 'supervisory power of state political systems.' The nucleus of his arguments were based on historical grounds. He could find no "original understanding" that the 14th Amendment was to apply to voting or apportionment, for there was no evidence that those who proposed it or ratified it believed the "Equal Protection Clause" to limit powers of states to apportion.

Following this historic decision, all but a handful of the states have been reapportioned to comply with it.

Kirkpatrick v. Preisler and Wells v. Rockefeller, 394 U.S. 526, 542 (1969): The Supreme Court in April 1969 reiterated the one man, one vote doctrine in rejecting Missouri and New York Congressional redistricting plans. The Court tried to clarify the phrase used in its 1964 decision – "as nearly as is practicable one man's vote in a congressional election is to be worth as much as anothers." Brennan, speaking for the majority said: "The principle permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." He rejected as feasible justifications "partisan politics," the contention that a plan represented "reasonable legislative compromise," and the desire not to fragment areas with "distinct economic and social interests." Dissenters Harlan, Stewart and White felt boundaries would be broken which would encourage gerrymandering. Harlan said: "Rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort... A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." The court, however, did not specify any allowable mathematical variation for congressional districts.

PROS AND CONS

For Amending the Constitution

"Arguments favoring the Dirksen proposal before the Subcommittee on Constitutional Amendments and on the floor of the Senate stressed a number of common themes. Baker and Reynolds, as so well demonstrated by Justices Frankfurter and Harlan, had shattered constitutional precedents, federal-state relations and judicial respect for matters left to legislative determination; in these cases the majority misapplied the Fourteenth Amendment, misunderstood the intentions of the Founding Fathers and misread American constitutional history. A rigid application of the one man, one vote principle in both legislative houses would break down the traditions of moderation, check and balance and a republican form of government and would inevitably lead to a domination of rural America by the cities and their political bosses who neither understood nor showed concern for the needs of the farmer, his roads, schools or local government; Chicago would rule downstate Illinois and the four metropolitan counties of California the rest of that state. Nothing gave the Supreme Court the right to impose a theory of representation requiring both houses to be based on population when the people of a number of states (such as California, Colorado, Illinois, Missouri and Ohio) explicitly ratified a federal plan under which one house at least allowed districts and representation voting distributions in which political subdivisions and area factors were given consideration. The Dirksen Amendment would return to the people the power which was properly theirs by enabling them to adopt free from judicial interference patterns of representation indigenous to the peculiar conditions of each state." (Source: DECADE OF DECISION, by G. Theodore Mitau, Charles Scribner's Sons, 1967.)

Against Amending the Constitution

"Opponents of the Dirksen Amendment rested their arguments on contentions such as these: The Supreme Court through its reapportionment decisions at last brought equitable representation to America's cities and metropolitan areas. Long ignored and denied their fair share of political power by conservative rural legislatures, urban voters (especially Negroes), organized labor and the poor were forced to turn away from their own state legislatures and seek assistance in Washington to help finance their enormously expanding needs in education, housing, transportation, welfare and other service areas. "Rotten borough" state legislatures greatly enhanced and accelerated the trend towards federal centralization and a progressively weakened state government.

"Fundamental to a democratic government, to political justice and equity, suggested the critics, is the principle that the weight of every person's vote must be equal, regardless of his race, sex, religion, residence, wealth or occupation. This is what the Supreme Court reaffirmed and this is what the Amendment is designed precisely to negate. It gives to a majority the right to adopt a system of apportionment which may legitimately discriminate by distributing the vote in favor of the residents of one region of the state over those living in another. Under our Constitution one's right to freedom of speech and religion and to all the other civil liberties cannot be abridged even by a majority voting on such rights at a referendum; the Amendment would not only make it possible to abridge a man's vote - a most precious civil right - simply because he may happen to live in a metropolitan area of a state, but would also keep the federal courts from exercising their powers of judicial review over these newly encouraged experimentations in anti-majoritarian electoral engineering.

"Widely heralded as a countermeasure to meet the threat of an urban mass electorate bent on destroying rural America, the Amendment perpetuates and reinforces a well-known political myth. There is nothing homogeneous or unified about the politics of metropolitania. It is and will likely continue to be a complex fabric of political accommodations and compromises between conflicting interests of core city and suburb, rich and poor, whites and blacks,

employers and employees, Democrats and Republicans. Equalizing the vote throughout the state and terminating the political discriminations based on geography and residence of the type actually invited by the Amendment would bring a new vitality to the operations of state and local government and to the effectiveness with which these units could function within the framework of a contemporary federalism." (Source: DECADE OF DECISION, by G. Theodore Mitau, Charles Scribner's Sons, 1967.)

Political Composition of State Legislatures Before and After Reynolds v. Sims (1964)*

Compiled by Wisconsin Legislative Reference Bureau, June 1969

State	Senate: Apportionment by	Senate: Year of apportionment[1]	Senate: Number of seats	House: Apportionment by	House: Year of apportionment[1]	House: Number of seats	Party Affiliation - Senate: Before Apportionment D.	Party Affiliation - Senate: Before Apportionment R.	Party Affiliation - Senate: After Apportionment D.	Party Affiliation - Senate: After Apportionment R.	Party Affiliation - House: Before Apportionment D.	Party Affiliation - House: Before Apportionment R.	Party Affiliation - House: After Apportionment D.	Party Affiliation - House: After Apportionment R.
Alabama	L	1965	35	C	1965	106	35	0	34	1	102	4	106	0
Alaska	G	1966	20	G	1961	40	17	3	6	14	30	10	15	25
Arizona	C	1966	30	C	1966	60	26	2	14	16	45	35	28	32
Arkansas	B	1965	35	B	1965	100	35	0	35	0	99	1	97	3
California	L	1965	40	L	1965	80	27	13	21	19	49	31	42	38
Colorado	L	1964	35	L	1964	65	15	20	15	20	42	23	27	38
Connecticut	L	1965	36	L	1965	177	23	13	25	11	111	183	117	60
Delaware	L	1964	18	L	1964	35	10	7	13	5	24	11	30	5
Florida	L	1965	48	L	1965	119	28	20	32	16	80	39	77	42
Georgia	L	1962	54	L	1965	205	--	--	--	--	198	6	182	23
Hawaii	L	1965	25	L	1959	51	16	9	15	10	--	--	--	--
Idaho	L	1966	35	L	1966	70	19	25	13	22	37	42	32	38
Illinois	B	1965	58	B	1965	177	25	33	20	38	117	59	78	99
Indiana	L	1965	50	L	1965	100	35	15	29	21	78	22	34	66
Iowa	L	1965	61	L	1964	124	34	25	32	29	101	23	35	89
Kansas	L	1964	40	L	1966	125	8	32	13	27	36	89	44	81
Kentucky	L	1963	38	L	1963	100	--	--	--	--	--	--	--	--
Louisiana	L	1966	39	L	1966	105	39	0	39	0	103	2	101	3
Maine	C	1967	32	L	1964	151	24	10	14	18	110	41	81	69
Maryland	L	1965	43	L	1965	142	21	7	35	8	116	25	118	24
Massachusetts	C	1960	40	L	1963	240	--	--	--	--	--	--	--	--
Michigan	C	1964	38	C	1964	110	23	11	23	15	58	52	72	38
Minnesota	L	1966	67	L	1966	135	Nonpartisan (same no. of seats before and after)							
Mississippi	C	1967	52	C	1967	122	51	1	52	0	120	1	120	0
Missouri	B	1966	34	B	1966	163	23	11	23	11	124	39	107	56
Montana	C	1965	55	C	1965	104	32	24	30	25	56	38	40	64
Nebraska	L	1965	49				49 (Nonpartisan)		49					
Nevada	L	1965	20	L	1965	40	8	8	11	9	25	12	21	19

State	Senate: Apportionment by	Senate: Year of apportionment	Senate: Number of seats	House: Apportionment by	House: Year of apportionment	House: Number of seats	Party Affiliation - Senate: Before Apportionment D.	Party Affiliation - Senate: Before Apportionment R.	Party Affiliation - Senate: After Apportionment D.	Party Affiliation - Senate: After Apportionment R.	Party Affiliation - House: Before Apportionment D.	Party Affiliation - House: Before Apportionment R.	Party Affiliation - House: After Apportionment D.	Party Affiliation - House: After Apportionment R.
New Hampshire	L	1965	24	L	1965	400	8	15	10	14	176½	218½	155	245
New Jersey	L	1965	40	Con	1966	80	6	14	19	10	41	19	22	58
New Mexico	C	1966	42	L	1965	70	28	4	25	17	59	18	45	25
New York	C	1966	57	B	1966	150	33	25	25	31	88	62	80	70
North Carolina	L	1966	50	L	1966	120	49	1	43	7	106	14	94	26
North Dakota	C	1965	49	C	1965	98	19	29	5	44	65	44	15	83
Ohio	B	1966	33	B	1966	99	16	15	13	20	62	75	37	62
Oklahoma	C	1964	48	C	1964	99	38	6	41	7	95	25	78	21
Oregon	L	1961	30	L	1964	60	--	--	--	--	--	--	--	--
Pennsylvania	C	1966	50	C	1966	203	22	27	22	27	116	93	97	106
Rhode Island	L	1966	50	L	1966	100	30	15	35	15	76	24	67	33
South Carolina	L	1966	50	L	1961	124	46	0	44	6	--	--	--	--
South Dakota	L	1965	35	L	1965	75	16	18	6	29	30	45	12	63
Tennessee	Con	1966	33	Con	1966	99	25	8	25	8	75	24	58	41
Texas	L	1965	31	L	1965	150	31	0	30	1	149	1	147	3
Utah	L	1965	28	L	1965	69	15	11	5	23	39	30	10	59
Vermont	L	1965	30	L	1965	150	12	17	8	22	117	49 R.D. 75[2]	51	93
Virginia	L	1964	40	L	1964	100	36	3	36	4	89	11	88	11
Washington	L	1965	49	L	1965	99	32	17	29	20	60	39	44	55
West Virginia	L	1964	34	L	1964	100	23	9	34	7	76	24	91	9
Wisconsin	C	1964	33	C	1964	100	11	22	13	20	46	54	51	48
Wyoming	C	1965	30	L	1963	61	12	13	12	18	--	--	--	--

Source: Council of State Governments, Year Book of the States, 1968-69 edition, pp. 66-67; and "State Elective Officials and the Legislatures", Supplement I to Book of the States, 1963, 1965, 1967, 1969.

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

Notes: Party composition of the legislatures does not include independents, other parties, or vacancies.

Abbreviations: B-Board or Commission; C-Court; Con-Constitution; L-Legislature.

Election dates for state officers are held in even-numbered years in November, with the following exceptions: Kentucky, New Jersey, Virginia, Mississippi hold state elections in November of odd-numbered years; Louisiana in spring of even-numbered years.

[1] Year of apportionment following Reynolds v. Sims or most recent apportionment.

Supplemental Information on Apportionment in the Several States

Colorado - The Legislature apportioned both houses during a 1964 special session following Reynolds v. Sims (June 1964). The plan was in effect for 1964 elections, but was amended in 1965, at which time court action was dismissed.

Florida - The Legislature, in June 1965, apportioned both houses, but in December, the federal court declared the plan unconstitutional and to be used only as an interim measure. In 1967 the federal court reapportioned the Legislature.

Georgia - In 1962 the Legislature reapportioned the Senate, and in 1965 it adopted a new House plan. The federal court said the House plan could only be used as an interim measure and further required both houses to be reapportioned no later than the end of 1968 regular session or May 1, 1968, whichever came first.

Illinois - The State Supreme Court ruled that at-large elections should be held in 1964 for the House. This ruling came before the Reynolds decision. A reapportioning board established new plans for the Senate and House in August and November 1965, respectively, to be used for the 1966 election.

Indiana - The federal district court ordered the Legislature to reapportion itself, which it did in May 1964. Then, in October 1965, the Legislature enacted a set of 4 apportionment alternatives for both the House and the Senate. The federal court later in the year accepted one of the 4 in each situation.

Iowa - A temporary plan was enacted by the Legislature for both houses in early 1964. The 1965 session saw fit to make several changes in the plan. This "temporary" plan was upheld by the state district court in November 1965.

Massachusetts - Reapportionment was to be required after the 1966 state census, but apparently no action has been taken.

Michigan - In March 1964, a federal panel upheld provisions in the state Constitution designating the composition of the Senate to be based 80% on population and 20% on land area. In late June a federal court revised the plan to conform to Reynolds v. Sims. In November 1965, the court invalidated the 1964 plan and said a new plan was to be devised before January 1966.

New Jersey - The Legislature apportioned the Senate in April 1965 as an interim plan to be used for the November 1965 election. Apportionment was achieved for both houses in 1966

by revision of the Constitution.

North Dakota - The March 1965 reapportionment plan adopted by the Legislature was declared unconstitutional by the federal court in August 1965. It devised its own plan for the 1966 elections.

Vermont - The Legislature reapportioned both houses in June 1965, and the court ordered a special election to be held in November of that year.

Party Affiliation for House Members

	Jan. 1965		Aug. 1965		Jan. 1967	
Georgia -	D.	R.	D.	R.	D.	R.
	198	6	182	23	184	21

Special election held June 1965.