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The Role of the Judiciary in Legislative Reapportionment

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NOTES

THE ROLE OF THE JUDICIARY IN LEGISLATIVE REAPPORTIONMENT

I. INTRODUCTION

Scarcely any right more nearly relates to the liberty of the citizen and the independence and the equality of the freeman in a republic than the method and conditions of his voting and the efficacy of his ballot, when cast, for representatives in the legislative department of government.¹

Problems of reapportionment² are faced by most of the forty-eight states. Although all state constitutions contain some provision for reapportionment of the legislature,³ these provisions have operated with varying degrees of effectiveness. At one extreme are those provisions which, as a practical matter, insure reapportionment every ten years.⁴ At the other extreme are those provisions which have, in effect, served as a deterrent to reapportionment.⁵ In many states the failure to reapportion in order to reflect changes in population patterns has resulted in the partial disenfranchisement of a large portion of the electorate. The purpose of this Note is to determine what, if any, part the courts should play in resolving this problem. The discussion will center primarily around the State of Minnesota, which, having failed to reapportion for forty-five years, is representative of those states in which the reapportionment problem has reached major proportions.

II. CURRENT APPORTIONMENT IN MINNESOTA

The Constitution of the State of Minnesota specifies that "the representation in both houses shall be apportioned equally throughout the different sections of the State, in proportion to the population thereof . . . ."⁶ At the first session after each state and federal census "the legislature shall have the power to . . . apportion anew

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2. Reapportionment is the act of allotting representation to geographical areas which have been created by the process of redistricting. "Reapportionment" is commonly used to mean both processes and will be used in this Note in that broader sense unless otherwise indicated.
4. For example, the Constitution of Missouri provides that the seats in the senate be reapportioned after each decennial census by a ten member commission selected by the governor from the two major political parties of the state. See Mo. Const. art. 3, § 7.
5. See notes 6-18 infra and related text.
the senators and representatives among the several districts. . . ."7 With the tremendous influx of immigrants into the state between 1858 and 1913 the legislature was reapportioned quite frequently.8 This was accomplished by merely adding legislators to those districts with increased population. In 1913 a statute was passed which completely revised the existing apportionment.9 It was enacted amidst a strong feeling against an increase in representation for the three urban counties of Hennepin, Ramsey, and St. Louis.10 The bill was not without its inequalities when enacted since the urban counties received only half of the additional legislators to which they were entitled. Inequalities also existed when districts under-represented in one house were compensated by over-representation in the other.

Apportionment of the Minnesota Legislature is still controlled by the 1913 act, which was based upon the 1910 census of 2,175,708. By 1950, the population of the state had increased by almost one-half that amount, to 2,982,483. Today it is estimated that the state's population is somewhat in excess of three million. Of course, this increase does not in itself reflect inequitable representation,11 but inequality has resulted from the fact that some areas have decreased in population while others have increased much more than the average. During that period the state has changed from a predominately rural to a predominately urban population.12 The greatest increase in population has been in the suburbs surrounding the metropolitan areas of Minneapolis, St. Paul, and Duluth. This population distribution has accentuated the discrimination of the 1913 act to the point where, for example, district thirty-six of suburban Hennepin County is now the most under-represented district in the state. In the House, the representative for district forty,

7. Minn. Const. art. 4, § 23.
8. See Bond, Legislative Reapportionment in Minnesota 165-223 (unpublished thesis in University of Minnesota Library 1956). Much of the background material in this Note is taken from this excellent, exhaustive, and comprehensive thesis which is undoubtedly the best work to date on the problem of legislative reapportionment in Minnesota.
10. A constitutional amendment limiting the number of senators to seven from any one county was narrowly defeated both in 1913 and 1914 and unsuccessful attempts were made in each house to amend the 1913 reapportionment bill by eliminating all the increases in representation it afforded the three urban counties. See Bond, op. cit. supra note 8, at 206-09, 220-23.
11. If all districts increased in population at the same rate the proportional representation would remain the same.
12. See Bond, op. cit. supra note 8, at 238-39. In 1910 Minnesota's population was 59% rural and 41% urban. In 1950 it was 46% rural and 54% urban. "Urban" is defined as a municipality of 2,500 or more population.
a "rotten borough" of downtown St. Paul, represents 7,290 persons whereas the representative for district thirty-six south represents 107,246. Similarly, the senator from the third district, comprising Wabasha County, represents 16,878 persons whereas the senator from district thirty-six, suburban Hennepin County, represents 153,455. The net result of this inequality is that one-third of the state's electorate may now elect a majority to both houses of the legislature.

The fact that the voters representing one million people can control the legislature of a state of over three million is shocking in itself, but even that does not reveal the extent of the resulting inequality. In pressing the inquiry further it is seen that the districts comprising this one-third control could be those whose population has decreased since 1910 or not increased in proportion to the average district. Thus, the voters of districts of rapidly increasing population which need legislative assistance with such difficult problems as schools, public transportation, playgrounds, and public utilities are the ones that are greatly disenfranchised. This turns their appeal for a solution to such problems from the state legislature to Congress where due to more recent reapportionment these areas are more equitably represented.

Viewing the problem superficially it appears strange that a state legislature would consider a constitutional mandate so lightly as not to comply with it for forty-five years. Upon closer examination it is seen that the desirability of following the letter of the constitution is challenged by many legislators and interest groups. Most rural

13. Boroughs, which at the time of the Reform Act of 1832 contained but few voters, yet retained the privilege of sending a member to Parliament. Hence, by extension any political unit in a republican form of government that has much less than its due proportion of inhabitants. Webster, New International Dictionary of the English Language 2171 (2d ed. 1947).

14. This represents a ratio of inequality of 14:1 in the House and 9:1 in the Senate. These figures were based upon the 1950 census, and it is estimated that by 1960 the population of district thirty-six will exceed 225,000. See Bond, op. cit. supra note 8, at 256.

Perfect exactness in apportionment is neither required nor possible. The ideal district is determined by dividing the number of districts into the population of the state. The American Political Science Association recommends that districts vary no more than 15% plus or minus from the ideal population. By employing this standard it has been demonstrated that only four of the eighty-seven counties in the state are equitably represented in both houses. See Bond, op. cit. supra note 8, at 247. In the Senate, fifteen districts are under-represented, twenty-nine over-represented, and twenty-three equitably represented. In the House, thirty-one representatives are elected from districts which are under-represented, seventy-five from districts over-represented, and twenty-five from districts equitably represented. Id. at 241.

15. See Bond, op. cit. supra note 8, at 247, 253.
legislators desire representation by area, at least to some extent, and most urban legislators want representation according to population as required by the constitution. Various reasons are given by the rural legislators to demonstrate why area representation is preferable to population. It appears, however, that behind these reasons is the earthy fact that rural legislators presently control the legislature and are unwilling to concede to urban legislators lest the cities someday dominate the legislature. Rural legislators feel, understandably perhaps, that if they now agree to a reapportionment strictly by population the urban legislators will be increased to such an extent that a change to area reapportionment in the future will be made virtually impossible. There is little doubt that the rural-urban controversy is the chief obstacle to reapportionment.

Other factors have contributed to this failure to reapportion. First, in such a vote a legislator will be determining his own fate. In a major reapportionment some legislators would have to campaign in a new or partially new area and possibly against a very popular incumbent. Such personal considerations may influence the legislator's vote on a particular reapportionment bill. Further complicating the problem is the fact that constituents apparently do not press their representatives for reapportionment. Rural voters may feel that the legislature is functioning adequately so "why change

16. Past reapportionment acts have based representation upon area to some extent as evidenced by the practice of not cutting across county lines when forming a district and allotting at least one representative to each county regardless of population.

17. For example, it is argued that the compactness of the population in a city and the daily newspaper make it easy for the city legislator to communicate with his constituents and that city legislators are closer to the capitol which enables them to represent more people than the rural legislators.

It is also argued that since Minnesota's 150,000 population of 1857 was only about 7% urban, the framers of the constitution could not have conceived of the large cities of today when requiring that apportionment be based solely upon population.

18. There is some fear that the rural areas will be dominated by a labor-union controlled legislature if population as a strict basis were used. It is also believed by some that it is better for the rural legislators to pass laws for the city than vice-versa:

Today the greatest threat to democratic institutions, to the republican form of government, and ultimately to freedom itself, lies in our big cities. They are populated for the most part with the mass-man, devoid of intelligence, and devoid of civic responsibility. He talks only about rights and has no conception of responsibilities. He will vote for anyone who offers him something for nothing. Whether it be subway at half-price or public housing at one-third price... Our one hope of survival as a free country is that rural and semi-rural areas still dominate most of the state legislatures through their representatives and still dominate the House of Representatives at Washington. Our best hope for the future is to keep it that way.

"it?" However, it is not only voters in rural areas who impede reapportionment. Experience in other states has indicated that many urban voters are either too apathetic or uninformed to press for a change. Finally, pressure from some special-interest groups has contributed to the failure to reapportion. These groups have sought to retain the rurally dominated legislature which, being traditionally conservative, has been more sympathetic to their interests.

Since 1945, reapportionment has been a live issue in Minnesota resulting in a quantity of proposed legislation. However, very little progress has been made. Bills have been introduced which would reapportion according to population with some compromise to area in the Twin Cities area; amendments to the constitution have been proposed to reapportion by area; and bills have been introduced to merely add legislators to the most under-represented areas. None of these attempts have succeeded, apparently because the proponents of reapportionment by population and the

19. For example, in 1948 four California counties contained sixty percent of the population of the state but only elected ten percent of the senators. Yet the vote on a proposed reapportionment by initiative failed to carry a single county. See Harvey, Reapportionment of State Legislatures—Legal Requirements, 17 Law & Contemp. Prob. 364, 374 (1952).

20. See Bond, op. cit. supra note 8 at 399.

21. Since 1951 these bills seem to have had the greatest degree of success. The same bill was introduced, with slight modifications, in each session from 1951 through 1957. Population, as required in the constitution, was the basis of the bill and it even departed from the tradition of allowing each county a representative regardless of population. The population requirement was not strictly adhered to in the Twin City area which was not allowed quite as much representation as its population required. Realizing that politics is entwined in any reapportionment effort the author drew his bill as carefully as possible with an eye not to disturb any more existing legislative seats than necessary. This was done in an effort to make the bill appeal to more rural legislators. In 1951 it was defeated by a vote on the floor of the House. In 1953 it was virtually massacred by amendments in the House which restored the inequities which the bill was designed to eliminate. In 1955 the House passed the bill but the Senate Elections Committee failed 6-5 to vote it out of committee. See Bond, op. cit. supra note 8, at 285-303. The bill was passed by the House in 1957 and sent to the Senate where it was changed by amendment to contain representation by population in the House and representation by area in the Senate. Upon its return to the House the amended bill was tabled.

22. A considerable bloc of legislators take the position that they will not vote for complete reapportionment until some provision is made for representation by area. See Bond, op. cit. supra note 8, 323-24. As a result some constitutional amendments have been drafted but have not enjoyed any degree of success in the legislature. Id. at 332-47. This bloc advocates placing representatives in one house on an area basis and the other on a population basis like the organization of Congress.

23. It is contended that after a period of time the additions will have changed the complexion of the legislature to the point where a complete and thorough bill of reapportionment could be enacted. The defeat of such bills for "piecemeal" additions may be attributed to the opinion of some legislators that the size of the legislature should not be enlarged and that the reapportionment problem is general throughout the state rather than local. See Bond, op. cit. supra note 8, at 314-17.
proponents of reapportionment by area are divided evenly enough so that neither can effectuate a change according to its plan. It appears that any successful reapportionment attempt must concede to some area representation.

Reapportionment might be easier to achieve if the legislators were elected with party designation. Perhaps the party would make it a part of the platform and the legislators would then be forced to show action if elected. However, the effectiveness of such a proposal seems questionable, since rural and urban legislators tend to vote with their respective groups on this issue cutting across party lines.

III. Possible Reapportionment by the Electorate

Noting the practical difficulties involved and the unlikelihood of the legislature reapportioning itself, one is turned to a consideration of what action the citizens may take to accomplish reapportionment without the aid of the legislature.

It has been suggested that the constitution be changed in order to relieve the legislature of the responsibility of reapportionment, vesting this duty in a disinterested group. This might be accomplished by one of two methods. The constitution could be completely revised by constitutional convention, or merely amended to change the existing reapportionment provisions. Although both of these methods have been successful in other states, in Minnesota neither would avoid the necessity of legislative action since at least a majority of both houses is required before the issue of amendment or revision may be voted upon by the people. Since the legislature will not pass a reapportionment act, it is highly unlikely to approve a constitutional amendment or take steps to call a constitutional convention which would place the reapportionment responsibility in other hands.

24. The candidates for governor of the two major parties have included reapportionment in their platform in the past. However, without party designation the legislators have not been obligated by them.

25. For example, Missouri changed its apportionment method in its constitution of 1945. After failure of the Hawaiian Legislature to reapportion for fifty-five years Congress removed the power from the legislature and vested it in the Governor, subject to mandamus if he failed to act.

New Mexico has frequently reapportioned by constitutional amendment.

26. Minn. Const. art, 14, §§ 1, 2.

27. Although it is generally agreed that the Minnesota Constitution is in need of a complete revision, the possibility that a constitutional convention would change the present means of reapportionment is, at least in part, responsible for the failure of the legislature to submit the issue of calling such a convention to the people. See Short, supra, note 18 at 379.

Another method, which has recently enjoyed success in Washington\textsuperscript{29} and Colorado,\textsuperscript{30} is the “initiative.” The direct initiative allows the circulation of a petition to propose a measure to be placed upon the ballot directly without legislative action.\textsuperscript{31} By the indirect initiative the proposal of the people is submitted to the legislature, but if they do not act it is placed on the ballot for popular vote.\textsuperscript{32} The initiative affords a method by which the electorate could solve reapportionment problems without legislative action. Unfortunately, the Constitution of Minnesota makes no provision for such a procedure. In their search for relief the people of Minnesota as a last resort have turned to the courts.

IV. STATE COURT ACTION

The state courts have almost uniformly refused to compel legislative reapportionment.\textsuperscript{33} However, once a legislature has reapportioned, the courts have not hesitated to review the action to see that it was done in accordance with the provision of the constitution.\textsuperscript{34} Since most of the constitutional framers were careful to include provisions to prevent gerrymandering, most of the cases invalidating a reapportionment act have done so on the grounds that it has not provided for “equality,”\textsuperscript{35} “compactness,”\textsuperscript{36} or “contiguity”\textsuperscript{37} of districts. Before the courts will invalidate the action of the legislature “its action must partake of an arbitrary disregard of the requirements of the constitution, or be so gross and inconsistent as to imply arbitrary action.”\textsuperscript{38} Granting a willingness to review at the time of enactment, the courts have refused to invalidate acts which due to passage of time have become inequitable in application.

The various means by which judicial help has been sought and the general attitude of the courts in this matter is exemplified by the challenges in the Illinois state courts to that state’s local and federal apportionment systems. The Illinois Constitution provides that “the

\begin{thebibliography}{99}
\bibitem{32} Id. at 25-26.
\bibitem{33} See 32 N.Y.U. L. Rev. 383, 384 (1957).
\bibitem{34} See cases collected at 18 Am. Jur., Elections § 29 (1938).
\bibitem{35} See, \textit{e.g.}, Stevens v. Martindale, 181 Mich. 199, 148 N.W. 97 (1914).
\bibitem{36} See, \textit{e.g.}, State \textit{ex rel.} Barrett v. Hitchcock, 241 Mo. 453, 146 S.W. 40 (1911).
\bibitem{37} See, \textit{e.g.}, State \textit{ex rel.} Baird v. The Board of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893).
\bibitem{38} State \textit{ex rel.} Warson v. Howell, 92 Wash. 540, 544, 159 Pac. 777,
\end{thebibliography}
General Assembly shall reapportion" after every federal census. After failure of the General Assembly to perform this duty following the 1910 and 1920 censuses an attempt was made in 1926 to secure a writ of mandamus forcing the individual members to reapportion.

In denying the writ the court adopted the traditional argument that: (1) the constitution divided the powers of the state between the legislative, executive, and judicial departments, each being equal and acting independently of the others; (2) no department can arrogate to itself any control over either of the other departments in matters which have been solely confided by the constitution to such other department; and (3) the duty to reapportion the state is specifically imposed by the constitution solely upon the legislative department, and it, alone, is responsible to the people for a failure to perform that duty.

After this unsuccessful attempt to seek direct judicial compulsion, a series of actions was brought in an attempt to achieve the same result indirectly. Suit was brought to enjoin the state treasurer from paying the salaries and expenses of the legislators on the ground that failure to reapportion prevented the legislature from being a legally constituted body. The action was summarily dismissed, as was an action of quo warranto against the members of the legislature. A convicted criminal failed in an attempt to have the statute under which he was convicted declared void on the ground that it was passed by a legislature allegedly elected under an invalid apportionment act. A suit to restrain the expenditures of public funds to carry out an election under an allegedly invalid apportionment statute also failed. Despite these and other attempts to force the Illinois General Assembly to reapportion there was no reapportionment for fifty-four years—from 1901 to 1955. Generally speaking, the attempts to seek judicial assistance in other states has approximated this pattern.

The Minnesota Supreme Court has dealt with the problem of reapportionment of the state legislature on two occasions. In *State ex rel. Meighen v. Weatherill*, brought soon after enactment of the 1913 reapportionment act, a citizen filed for state senator under the prior apportionment act contending that the new act was uncon-
stitutional since apportionment was not made throughout the state in proportion to population. The court held that the constitution imposed a duty of reapportionment which continued until performed. Furthermore, "the whole object [of reapportionment] is to vest in the people rights that inherently belong to them, namely, participation upon an equal footing in the affairs of the state." Yet, the court dismissed the plaintiff's contention that the act did not provide for equal representation on the ground that the alleged inequality of the act did not justify judicial intervention. The court stated:

Perfect exactness in an apportionment . . . is neither required nor possible. But there should be as close an approximation to exactness as possible and this is the utmost limit for the exercise of legislative discretion . . . . The only objection to the act is that there is not an entire uniformity in the population of the different districts. This standing alone is insufficient to justify the court in declaring the act unconstitutional.

In the 1945 case of Smith v. Holm the plaintiff sought a declaratory judgment to the effect that the reapportionment act of 1913 was invalid due to unequal representation caused by population shifts since that time. Questioning the validity of the existing legislative districts, he sought determination of his rights as a citizen to equal representation in the legislature, as a voter to an equal voice in the selection of public officials, and as a taxpayer to an equal voice in the enactment of laws taxing and otherwise affecting citizens and taxpayers. The defendant, secretary of state, demurred on the ground that the complaint failed to state a cause of action. In overruling the demurrer the trial court found that a declaratory judgment would terminate the controversy since all

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47. He also contended that the act was unconstitutional because the legislature had no power to reapportion in 1913 since it was not the year following a census, and because two election precincts in St. Paul were not included in any senatorial district. These contentions were found to be without merit.
48. 125 Minn. at 341, 147 N.W. at 107.
49. Ibid.
50. Id. at 342-43, 147 N.W. at 107 (emphasis supplied).
51. 220 Minn. 486, 19 N.W.2d 914 (1945); 30 Minn. L. Rev. 37 (1945).
52. Plaintiff also sought determination of his rights as a taxpayer to prevent where possible the use of public funds for the purpose of conducting an illegal election, and as a candidate for office to have removed any uncertainty or doubt as to the district and other qualifications necessary for the office of legislator from the district in which he resides.
53. Other grounds of the demurrer were that the court lacked jurisdiction of the subject; that the plaintiff lacked legal capacity to sue, and that there was a defect in the parties defendant in that the members of the legislature, the governor and the county auditor should have been made parties.
the plaintiff asked was that the apportionment act be held unconstitutional. It rejected the defendant's argument that declaring the present law unconstitutional would be "disastrous to the people of the state," declaring that it is the duty of the courts "to point out the invasion of the constitution and to forbid it." The court held that this duty cannot be abandoned even though before a new apportionment law could be enacted the governor would have to call an extra session of the legislature.

On appeal, the Minnesota Supreme Court reversed the trial court's order overruling defendant's demurrer. Although the court failed to discuss the propriety of the declaratory judgment and the practical consequences of holding this act unconstitutional, it is likely that both considerations were important factors in deciding the case. The opinion is grounded on the traditional judicial reluctance to enter the "political arena," and avoids critical analysis of the issues by quoting language from cases dealing with separation of powers. The court relies upon the Meighen case as authority for the proposition that "only when as of the time of enactment there appears a clear and palpable violation of the fundamental law [do] the courts . . . have the power to upset the law." Such an interpretation is not persuasive. Meighen seems to hold only that in that particular case the inequality of representation reflected in the statute was not such that would justify judicial interference. In Smith, the court failed to recognize that it is the application of a statute at the time it is challenged that determines its constitutionality. Thus, the court summarily rejected the plaintiff's argument that this case was analogous to situations where laws activating the police power have been held unconstitutional as discriminatory or confiscatory when sought to be applied to circumstances radically changed since their enactment.

The court reasoned further that, as the plaintiff conceded, it had no power to compel the legislature to enact a constitutional reapportionment statute. Thus, the court held that an apportionment

55. Id. at 41-42. If the legislature was not in session at the time the 1913 act was held unconstitutional, a special session would be necessary since all previous reapportionment acts were expressly repealed by the 1913 act.
56. A considerable part of the trial court's memorandum and the appellate briefs dealt with these issues.
57. The court concluded from the separation of powers doctrine that the judicial branch, directly or indirectly, may not interfere with the legislative power other than passing upon the constitutionality of the law as of the time of its enactment.
58. 220 Minn. at 490, 19 N.W.2d at 915.
act, constitutional when enacted, must remain in force until superseded by a valid act. The opinion failed to recognize, however, that the court need not direct mandamus against the legislature forcing reapportionment; it could, as suggested in the briefs, merely declare the act unconstitutional and order an election at large, subsequently testing the validity of any statute passed.

Returning to the "political nature" argument, the court continued:

The remedy lies in the political conscience of the legislature, where lies the burden of the constitutional mandate. It is not within the province of this court to prompt the action of that conscience. It is usually sensitive enough to promptings from the electorate.59

The court failed to point out, however, how the conscience of a legislature, dulled by self interest and a conviction that what the constitution demands is unwarranted and unwise, may be moved by the electorate of a minority of the districts.60 The legislative conscience may usually be sensitive to promptings of the electorate but in the area of reapportionment it is seen that this is not true. Further, inaction on the part of the legislature when inequality reaches the point that it has today,61 certainly "evinces an intention on the part of the legislature to boldly disregard the rule of the constitution . . . "62 Surely this inaction constitutes an abuse of the legislative discretion.

The net result of this case was to place another obstacle in the path to solution of the reapportionment problem in Minnesota. Thus, the state court has taken the easy way out of a problem which deals with the efficacy of the state government and has chosen to leave the people of the state at the mercy of the legislators. The people had but one place left to turn for help in solving the reapportionment problem—to the federal courts.

V. FEDERAL COURT ACTION

There have been few reported federal cases dealing with reapportionment. Of those, the earlier ones dealt with reapportionment of congressional districts whereas the more recent dealt with reapportionment of state legislatures.

59. Id. at 492, 19 N.W.2d at 916.
61. See note 14 supra and related text.
A. Congressional Redistricting

In 1931 the Minnesota Legislature passed a bill reapportioning its congressional districts pursuant to the federal constitutional provision that: "The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature. . . ." After the governor returned the bill without his approval, the legislature sent it to the secretary of state contending that the governor's signature was not necessary since reapportionment was the duty of the legislature alone. In interpreting the words of the Constitution to mean that the governor's signature was necessary, the Supreme Court in Smiley v. Holm, had no difficulty with the obvious "political" nature of the issue. To the contrary, the Court stated that the constitutional provisions governing the exercise of political rights are subject to constant and careful judicial scrutiny. Since the existing apportionment was not in conformity with the federal requirements, the Court held that all representatives must be elected by the state at large.

Later that same year in Wood v. Broom the validity of a Mississippi congressional reapportionment act was challenged on the ground that it allegedly did not provide for districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. The Court dismissed the complaint because the words providing that such conditions exist were omitted from the revised statute. The Court displayed its reluctance to review the equality of representation in the congressional redistricting by expressly reserving any opinion on the right of the complainant to relief in equity upon the allegations of the complaint or on the justiciability of the controversy.

By far the most important federal case in the area of reapportionment is Colegrove v. Green decided by the Supreme Court in 1946. The voters of a congressional district in Illinois, which contained a much greater population than other districts in the state, brought suit against the Governor, Secretary of State, and State Auditor as members of the Illinois Primary Certifying Board to restrain them from conducting the 1946 election according to the provisions of the then existing 1901 apportionment law. They contended that due to subsequent changes in population the existing act violated various provisions of the Constitution and of the 1911

64. 285 U.S. 355 (1932).
65. Id. at 369.
66. 287 U.S. 1 (1932).
Reapportionment Act in that the congressional districts lacked compactness of territory and approximate equality of population. The Court affirmed the district court's decree dismissing the complaint, one Justice concurring, three dissenting, and two not participating. Mr. Justice Frankfurter, announcing the Court's judgment, stated that the case could be dismissed merely upon the authority of *Wood v. Broom* but argued that it should be dismissed for want of equity. He stated that the issue was of a political nature "and therefore not meet for judicial determination."68 He continued:

> From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of law.69

He considered the suit an appeal to the federal courts to reconstruct the electoral process of Illinois because of the legislature's failure to do so and concluded that Congress is given the power by the Constitution to secure fair representation in the House and that it is up to that body to determine whether the states have fulfilled their responsibility. He stated that at best the Court could declare the existing electoral system invalid.

Mr. Justice Black, writing for the three dissenters, argued that the action stated a justiciable case or controversy; that the Court had equity jurisdiction; and that such jurisdiction should be exercised. He further contended that failure to reapportion for forty years despite the great change in population had denied the voters equal protection of the laws and abridged their privilege to vote for Congressmen as provided by Article I of the Constitution. He felt that an election at large would be the answer to the problem of enforcing the decree and even though such election might be administratively inconvenient it would be preferable to the more convenient method since "it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional."70

Mr. Justice Rutledge, in a separate concurring opinion, argued that the case was justiciable and that the Court had jurisdiction but the circumstances were such that equity jurisdiction should not be exercised. He stated that because of the short time until election

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68. *Id.* at 552.

69. *Id.* at 553-54.

70. *Id.* at 574.
and the difficulties of an election at large that the "cure sought may be worse than the disease."\textsuperscript{71}

Thus a majority of the Court rejected the argument that this was a "political question" over which the Court had no jurisdiction. Mr. Justice Rutledge's belief that such equity jurisdiction should not be exercised in this case was the difference between relief and dismissal. It would seem that this should decrease considerably the value of this case as precedent.

B. State Legislative Reapportionment

Lower federal court cases

The first federal case attempting to use the courts to compel a state legislature to reapportion itself was \textit{Reminey v. Smith}\textsuperscript{72} brought in the district court in Pennsylvania. When suit was brought in 1951 the General Assembly had not reapportioned for 30 years, since 1921, notwithstanding the fact that the state constitution provides that "the General Assembly . . . immediately after each United States decennial census, shall apportion the State into senatorial and representative districts. . . ."\textsuperscript{73} The plaintiffs sought, \textit{inter alia}, to have the 1921 act declared unconstitutional as a violation of certain sections of the state constitution and of the fourteenth amendment of the Federal Constitution. An injunction was sought compelling the members of the General Assembly to reapportion in order to reflect the changes in population. An injunction was also sought against the Secretary of the Commonwealth prohibiting him from performing his duties in connection with holding elections for members of the General Assembly until a valid reapportionment bill had been passed. Deeming the suit prematurely brought, it was dismissed for want of equity. Citing \textit{Colegrove}, the court stated that this was a political question "not meet for judicial determination."\textsuperscript{74} It reasoned that if the federal courts would not compel a state legislature to reapportion its congressional districts they should not do so in respect to a system whereby representatives to a state legislature are to be chosen. The court argued that the suit was premature because relief had not been sought in the state courts, and what was deemed a most cogent reason—the 1951 General Assembly was still in session and had an opportunity to remedy the inequality by a reapportionment act. The court did not find it necessary to discuss

\textsuperscript{71} Id. at 566.
\textsuperscript{73} Pa. Const. art. 2, § 18.
\textsuperscript{74} 102 F. Supp. at 710.
the jurisdictional issue although it recognized its presence. The tenor of the majority opinion is such that it leads one to believe that under certain circumstances perhaps relief may be granted. The court discussed at length how notoriously true the plaintiffs’ allegations were and that the practical disfranchisement of qualified voters is common knowledge. It stated that a suit based on the Civil Rights Act and the fourteenth amendment would present novel questions, as yet undecided.

The hope for judicial assistance in the fight for reapportionment of the various state legislatures was brightened considerably in 1956 by a case brought in the Hawaiian District Court. In *Dyer v. Kazuhisa Abe* it was shown that the legislature for the Territory of Hawaii had not reapportioned for fifty-five years despite the fact that a statute provided that “the legislature, from time to time, shall reapportion . . . on the basis of population . . .” During that period there had been a considerable geographical shift in population. Suit was brought against the members of the Territorial Legislature, the Governor, the Secretary of the Territory, and the disbursing agent of the Treasury Department to force the legislature to reapportion. The court, in reviewing the general problem of “rotten boroughs,” recognized the almost uniform refusal by the courts to interfere and concluded that the courts have taken the easy way out of a difficult problem. It stated:

> We are not asked to open the floodgates of the courts to the political problems of the legislature. We are requested to enforce the clear command of the fundamental law which the legislators have sworn to obey.

The jurisdictional problem which was so vexatious in *Colegrove* was eliminated since both the cause of action and the court’s jurisdiction were based upon federal statute. The court held that “biased inaction has had the same result as biased action;” it has denied the plaintiff equal protection of the laws and due process of law. *Colegrove* was distinguished by stating that in the present case there was no delicate state-federal relationship since the Territory of Hawaii is a political subdivision of the United States. While the

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78. 138 F. Supp. at 224.
79. See note 75 supra.
decision was apparently grounded on this special relationship, the
court went further and based its decision also upon the analogy of
federal interference with the states in matters of racial discrimina-
tion in schools and elections. Citing Terry v. Adams and Brown v.
Board of Education, the court concluded:

The people of Hawaii need no court intervention to insure a
democratic school system. They do need judicial aid in achiev-
ing a democratic legislature. Any distinction between racial and
geographic discrimination is artificial and unrealistic. Both
should be abolished.

The champions of reapportionment in the state legislatures were
quick to seize the Dyer case to support actions in the federal courts.
In Perry v. Folsom the plaintiff brought an action against the
Governor, Lt. Governor, Secretary of State, and the members of
the Legislature of the State of Alabama seeking an order directing
them to comply with the state constitutional provision that the legis-
slature shall be reapportioned following each decennial census. The
plaintiff stressed the extreme inequality in representation resulting
from the failure to reapportion since 1901. The court dismissed the
action, distinguishing Dyer on the basis of the federal-territorial
relationship. Relying upon the "political nature" language in Cole-
grove and stressing the age-old language of separate sovereignties,
the court stated:

Ours is a dual system of government. The United States is
sovereign in its sphere and the States are likewise sovereign in
their spheres. . . . If the federal courts attempt to exercise the
sovereignty vested in the States, as plaintiff here seeks, state
sovereignty will suffer serious if not fatal impairment.

The most recent case is Radford v. Gary in which the plaintiff
sought a writ of mandamus against the Governor of Oklahoma to
call the legislature into a special session, and a judicial order forcing

82. 345 U.S. 461 (1953). In that case Negro voters were being ex-
cluded from voting in elections held by an association of white voters to
select candidates to run for nomination in the Democratic primary. The
association's elections did not utilize state election machinery or funds. The
Supreme Court found the necessary state action to hold the discrimination
violative of the fifteenth amendment.

83. 347 U.S. 483 (1954). In that case segregation of white and Negro
children in the schools of a state solely on the basis of race was held to be
a denial of the equal protection of the laws guaranteed by the fourteenth
amendment.

84. 138 F. Supp. at 236.
86. Id. at 877.
87. 145 F. Supp. 541 (W.D. Okla. 1956), aff'd per curiam, 352 U.S. 991
(1957).
the legislature to reapportion itself as required by the state constitution and the equal protection clause of the United States Constitution. Further, if the legislature failed to reapportion itself, the plaintiff requested mandamus against the Oklahoma Supreme Court to reapportion the state. It was also requested that the members of the State Elections Board be enjoined from holding any election for state legislators by the present districts; that until reapportionment the members be elected at large; and in the event of an election from the present districts the State Auditor and State Treasurer be enjoined from paying the per diem, salaries and expenses of the so-called de facto legislature. The court reviewed the state decisions which had denied relief on the basis of the separation of powers doctrine. It stated that the doctrine has support in the federal cases when a violation of the Federal Constitution has been the basis for a suit to compel reapportionment and then discussed Colegrove, MacDougal v. Green, and Remmey. Once again the Dyer case was distinguished by noting the federal-territorial relationship. In discussing the strength of Colegrove in light of Brown v. Board of Education,90 and Bolling v. Sharpe,91 where the federal government has protected the constitutional rights of individuals from racial discrimination by state action, the court said that there was no indication of reversal or modification of the rule of the former cases and that “it is not the function of this Court to psychoanalyze the Justices of the Supreme Court in order to divine the trend of decisions.”

Critique

Since the Remmey case was deemed to be prematurely brought, the Perry and Radford cases were the first and only federal cases in which the courts squarely met the problem of compelling a state legislature to reapportion itself. Reliance of those courts upon Colegrove appears unjustified. Granted similarity in the state legislature's duty to reapportion itself and its duty to draft congressional districts, in considering the use of the courts as a means to compel action it is necessary to probe beyond this superficial similarity. In doing so it is seen that the case for federal judicial intervention in reapportionment of the state legislature is much stronger than the

88. See, e.g., Romang v. Cordell, 206 Okla. 369, 243 P.2d 677 (1952); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943).
89. 335 U.S. 281 (1948).
91. 347 U.S. 497 (1954). In that case it was held that segregation in the public schools of Washington, D. C., was a denial of due process of law as guaranteed by the fifth amendment.
92. 145 F. Supp. at 544.
case for such intervention in the determination of congressional districts.

The most important difference in the two situations is in the magnitude of the problem. The House of Representatives is automatically reapportioned every ten years. The executive department after each census calculates mathematically the number of representatives each state is entitled to on the basis of its population and relates this information to Congress. Within fifteen days of receipt of such information the Clerk of the House must send to the executive of each state a certificate of the number of representatives to which such state is entitled. Thus, as to forty-eight subdivisions there is equality of representation in the House. It then becomes a matter of each subdivision providing for equality in districts within itself. It is true that in some state districts, such as in Illinois at the time of *Colegrove*, gross inequality may exist. Whereas the problem of such gross inequality of one district is important to the people of that district, its effect on the over-all representation in the House is minimal. Even as to districts there is some incentive to insure equal representation. The population of the nation increases more rapidly in some states than in others so there is a constant shifting of representatives—a loss by one state, a gain by another. When this occurs, the state legislature usually finds it advantageous to redistrict to conform to the loss or gain. In addition to such self operating factors, Congress has the power to force the state legislature to redistrict. This is what Mr. Justice Frankfurter had in mind in *Colegrove*. It is not unlikely that this power would be exercised, because even though the representatives from one state may be interested in preserving existing inequalities for personal or selfish reasons, the other four hundred or so members would not be interested parties and could easily correct the situation.

This is not to say that inequalities in the congressional districts should not be corrected, but rather to show the relative unimportance of the problem as compared with that of state legislatures which have neither an automatic reapportionment into large units

94. If after the federal census the number of representatives from a state is changed, the elections (until the state is redistricted by the legislature) are held in the following manner:
   (1) If there is an increase of representatives over existing districts, such additional representatives shall be elected at large and the other representatives from existing districts.
   (2) If there is a decrease and the number of existing districts exceeds the number of representatives allowed, all representatives shall be elected at large.
nor an external body which could compel reapportionment. In the state legislature the problem is not with a comparatively few districts of the representative body but the inequality affects almost all districts either favorably or adversely. It is not a case of an overwhelming majority deciding the fate of a few representatives, but rather each is deciding his own fate along with that of the other legislators. The inequality is not a matter of small subdivisions of forty-eight larger equitably represented units but pervades the entire legislature without any outside body to compel action.

Dismissal of reapportionment actions has not been based exclusively on the Colegrove case; the courts have also relied on cases which have refused intervention in other related “political” areas. Principally cited are MacDougal v. Green96 and South v. Peters.97 In MacDougal, an injunction was sought against enforcement of an Illinois statute requiring that a petition to form a new political party be signed by at least 25,000 qualified voters, including at least 200 from each of at least 50 counties. It was alleged that since Cook County alone contained 52% of the state’s registered voters and only 13% resided in the 53 least populated counties, the statute was so discriminatory in its application as to amount to a violation of the due process and equal protection clauses of the fourteenth amendment. The Supreme Court rejected the argument and held that a state has the power to assure a proper diffusion of political initiative as between its thinly and heavily populated counties. In South, the validity of a Georgia statute which provided that the outcome of primary elections should be determined by the “county unit” rule was challenged as violative of the fourteenth and seventeenth amendments. By the county unit rule each county is allotted a number of unit votes, ranging from two to eight, according to population. The candidate who receives the greatest number of votes in each county is awarded the appropriate number of unit votes. The successful candidate in the state is the one receiving the greatest number of unit votes. In dismissing the action the Court merely stated that federal courts refuse to exercise their equity powers in cases posing political issues dealing with a state’s distribution of electoral strength among its political subdivisions.

Since MacDougal had no relation to legislative representation it is distinguishable upon its facts. It is argued98 that in the South
case the plaintiff challenged the manner in which a state chose to distribute its electoral strength—admittedly a right retained by the states. In the reapportionment problem, the manner in which the state chooses to distribute its electoral strength is not being challenged. That choice has been made and incorporated into the state constitution in the form of a requirement for apportionment based on population. Discrimination has resulted from the legislature ignoring that provision. As was argued in *Dyer*, the legislators “should be made as responsive to the [constitutional requirement] as are the citizens who elect the legislators.”

Notwithstanding the fact that *South* and *MacDougal* are thus distinguishable, they do exhibit the reluctance of the Court to intervene in some areas of state politics.

Obviously reapportionment of a state legislature is “political” in that it involves the election process. But it does not follow that the judiciary may not interfere. Dismissing an action by simply calling the issue “political” is a mere play upon words, since some political matters are interfered with while others are not. The courts have not hesitated to interfere in political matters such as elections, as shown by the protection of minority groups in voting. Nor are they especially reluctant to interfere with state political party autonomy.

VI. SUMMARY AND CONCLUSION

As the reapportionment problem in Minnesota now stands, three propositions are clear: (1) The specific provisions of a reapportionment act must come from the legislature; (2) The primary difficulty in the legislature is the rural-urban controversy on the method to be used as a basis for reapportionment; and (3) The legislators are split in such numbers on this issue that even after much activity on both sides during the past thirteen years, no early solution seems likely.

The problem then becomes one of finding a way to exert pressure on the legislature to meet this issue immediately and come to a workable conclusion, probably through compromise. It appears that such pressure might be achieved as the result of judicial action.

Such legal action, whether brought in a state or federal court, should emphasize the fact that the Minnesota Constitution imposes a

100. See, e.g., Terry v. Adams, 345 U.S. 461 (1953); Nixon v. Nern-don, 273 U.S. 536 (1927) (a state statute barring Negroes from voting in the Democratic party primary elections was held to violate the fourteenth amendment).
duty upon the legislature to reapportion, and provides that representation "shall be apportioned equally throughout the different sections of the State, in proportion to the population thereof. . . ." The action should proceed along the lines of the Radford case, seeking a decree that the present apportionment act is unconstitutional as a violation of the equal protection and due process clauses of the fourteenth amendment of the Federal Constitution. As argued in Dyer, the prolonged inaction of the legislature has resulted in illegal discrimination against some citizens the same as if such discrimination were caused by direct action. If the legislature were to pass a reapportionment act today which was as discriminatory as the existing act it seems very likely that the court would invalidate it. It would likewise seem proper for the court to invalidate the act when the discrimination is caused by inaction of the legislature.

Although Radford was affirmed by the Supreme Court, its usefulness as precedent is not clear, since the affirmance was per curiam, citing Colegrove, with no written opinion to indicate the basis for the decision. However, as has been demonstrated, the Colegrove case, which considered congressional reapportionment, can be distinguished on the ground that it dealt with a situation far different than reapportionment of a state legislature. The only argument of Colegrove which remained valid in Radford was that the complainant appealed to the court to reconstruct the entire electoral process of the state. Such a comprehensive remedy would hardly be granted by any court since it would entail judicial supervision of the politics of an entire state. To avoid this argument, the relief sought in such an action should be a decree that future elections be held on an at-large basis until the legislature enacts a new apportionment statute which conforms to the constitutional mandate. After that point the legislators would be left with the choice of resolving their differences or running for election on a statewide basis where their chances of re-election would be highly speculative. As a practical matter, there is no question but that they

102. People ex rel. Meighen v. Weatherill, 125 Minn. 336, 147 N.W. 105 (1914).
103. Minn. Const. art. 4, § 2 (emphasis supplied).
105. The per curiam decision also cited Kidd v. McCanless, 292 S.W.2d 40 (Tenn.), aff'd per curiam, 352 U.S. 920 (1957). In that case the Supreme Court of Tennessee upheld the validity of the state legislative apportionment statute since the existence of a prior valid apportionment was not alleged.
106. Whereas a legislator may be popular and well-known in his own district, that would be of little significance in a state-wide election. The incumbent's relatively poor chance in an election at large is evidenced by the results of Minnesota's at-large congressional election in 1932 where many incumbents lost only to be re-elected in 1936 when elections were again by districts.
would reapportion. In granting this relief the court would not be
going beyond established judicial precedent. The United States
Supreme Court in *Smiley v. Holm* had no difficulty in holding that
the 1932 Minnesota congressional election be on an at-large basis.
Similarly in *Dyer*, where the discrimination due to the inaction of
the legislature was held to violate the fourteenth amendment, the
election at large was the remedy given to restore equality. The
Supreme Court of Virginia ordered an election at large despite an
explicit provision in the constitution to the contrary.\(^{107}\)

It may be preferable to bring such an action in the state courts
since practical obstacles not going to the merits of the case might
arise in a federal court. Since the inequality in the Minnesota
Legislature is so pronounced and since the machinery of the state
provides no means for the citizens to remedy that inequality, a
strong case for federal judicial intervention is made. However, the
Supreme Court may be reluctant to affirm a granting of relief for
two reasons: (1) Extremely difficult reapportionment problems,
such as that in Minnesota, are only found in a few states;\(^{108}\) and (2)
Because of the political considerations in interfering with “state’s
rights.”

If, however, the suit were brought in a Minnesota state court,
it would be faced with the decision in the *Smith* case. It cannot be
denied that the court in that case indicated its intent to leave the
reapportionment problems solely to the legislature. However, con-
fined to its particular facts, the case merely *held* that changes in
equality due to population shifts since the enactment of the present
apportionment act have not yet operated “to vitiate the constitu-
tionality of the act and leave the state without a valid law creating
legislative districts.”\(^{109}\) Further, the proposed action would not
rely on inequality as such to invalidate the act but rather to show
that the citizens’ rights of equal protection and due process of law
have been denied by this inequality. It goes without saying that a
proven denial of these rights should constitute a sufficient basis
to invalidate the act.

Further, the complexion of the problem has changed consider-
ably since the *Smith* case was decided due to economic and social

\(^{107}\) Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932). For argu-
ments that an election at large is an inappropriate remedy, see Shumate,
*Minnesota’s Congressional Election at Large*, 27 Am. Pol. Sci. Rev. 58
(1933).

\(^{108}\) Although many states have reapportionment problems, in only a few
states such as Alabama, Minnesota, and Oklahoma have the problems reached
major proportions.

\(^{109}\) Smith v. Holm, 220 Minn. 487, 19 N.W.2d 914 (1945); 30 Minn.
L. Rev. 37 (1945).
advances. One need only consider the enormous growth of the sub-
urbs and certain urban areas in the last thirteen years to realize the
change. Despite vigorous action in the legislature during this period,
it is apparent that it is either incapable of, or unwilling to, reappor-
tion.

As has been demonstrated, there are a number of means whereby
Smith might be distinguished. However, it must be frankly recog-
nized that there the court was presented with these same arguments,
yet it refused to grant relief. Since the Smith case left the problem
to the legislature and it has been unable to solve it, the Minnesota
Supreme Court today should either distinguish this case or acknowl-
dge the changes in the problem since the case was decided and
overrule it.

The proposed action is not a complete solution to Minnesota's
reapportionment problem. That can only be accomplished by the
legislature. The urban-rural controversy and others would still
exist. However, it would bring the problem to the immediate atten-
tion of the legislature and prompt action could be expected. Without
judicial assistance the problem of reapportionment is left once
again solely with the legislature to deal with as it sees fit.