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Reapportionment: Success Story of the Warren Court

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REAPPORTIONMENT: SUCCESS STORY OF THE WARREN COURT

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EARL Warren became Chief Justice of the United States in October 1953. Shortly after the end of his fifteenth term in office, Chief Justice Warren indicated his wish to retire upon Senate confirmation of a successor. When President Johnson's nomination of Associate Justice Abe Fortas to be Chief Justice was passed over without action in the closing days of the ninetieth Congress, Warren resumed the center seat for the October 1968 term rather than let the position remain vacant. But in so doing the Chief Justice let it be known that he had not given up hope of retiring in the near future to permit work outside the Court for the more efficient administration of justice.

Whether Earl Warren continues as Chief Justice for a short time only or for several years, 1968 will almost certainly be regarded as a proper vantage point for reviewing the work of the Warren Court. As the Kennedy-Johnson period comes to a close, President Nixon will undoubtedly have several nominations to make to the Court; these nominations will probably bear a different stamp from those of the recent past, as indeed the problems of the next period will themselves be different from those that faced the Warren Court.

From the perspective of history, a decade and a half is not long. But in the history of the Supreme Court of the United States, the period from 1953 to 1968 was uniquely important. Even the first fifteen years of John Marshall's long tenure as Chief Justice did not produce decisions more noteworthy than those of the Warren Court. Of the opinions delivered between 1801 and 1816, the only ones that were inescapably marked with lasting significance for the constitutional process in the United States were *Marbury v. Madison*[1] and *Martin v. Hunter's Lessee*.[2] Although the vital principles of judicial review and federal supremacy in the judicial system were developed during the early years of the Marshall Court, these doctrines scarcely touched the social fabric of the day. Cases before the Warren Court, on the other hand, have more often than not involved social issues critically important to every level of American

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1. 5 U.S. (1 Cranch) 49 (1803).

2. 14 U.S. (1 Wheat.) 304 (1816).

society. Indeed, the fundamental concept of federalism itself has been re-examined in the context of problems that stirred the conscience and aroused the passions of contemporary society. To understand fully the impact of the Warren Court, one need only reflect upon four principal areas in which the Court has helped to reshape the nation's destiny.

First. The revolution in race relations might have come without Supreme Court participation; but there is no denying that it dates from *Brown v. Board of Education*,[3] an opinion written by Chief Justice Warren during his first term. It is true that the problems of school segregation and racial discrimination have not been resolved in the intervening fourteen years, but no one should have expected that any number of judicial statements could work that kind of magic even though the Warren Court's desegregation decisions so clearly spoke the conscience of the majority and so properly expressed the constitutional ideals of the nation. The Court has said and done most of what it can say and do. The balance is up to Congress and to the people, and there the matter now rests uneasily.

Second. The early years of the Warren Court coincided with the high tide of McCarthyism in the United States—a period of suspicion, incipient isolationism, and limitation of first amendment freedoms. The Warren Court reasserted the values of the open society for which the Constitution stands and rode out the storm of congressional and public criticism during the late 1950's. The first amendment decisions during that period and in the early 1960's provided significant encouragement to those who resisted the then-prevailing preference for conformity of opinion, expression, and conduct.

Third. Standards of fairness in the criminal justice system deserve the closest judicial scrutiny; any such examination presents problems that are difficult of rational solution at any time, but particularly so when the public's natural concern for "law and order" has been sloganized into a criticism of Supreme Court efforts to assure fairness in criminal procedure. The Warren Court has nonetheless staked out major guidelines for virtually every significant aspect of criminal justice. Unless the Warren Court's successor unexpectedly revises the principles that now control the right to counsel, search and seizure, self-incrimination, and the rest, we may anticipate that the natural process of adjustment will involve matters of detail rather than major overhaul.

Fourth. The only complete newcomer on the federal judicial

3. 347 U.S. 483 (1954).

scene during the decade and a half of the Warren Court is legislative apportionment and congressional districting, the subject of the present comments. The fascinating thing about this major engagement of the Warren Court is that the principal decisions came to the Court late—1962 and after. Although these decisions precipitated a revolution in the concept and practice of legislative representation at every level of government, they were implemented quickly and with surprisingly little dislocation. The following remarks are intended to report the fact of that adjustment and to explain, to the extent the phenomenon is now understandable, why the change was so easily accomplished. When compared with the delay in public acceptance of decisions in the other areas mentioned above, the success of the reapportionment cases seems even more remarkable. Others in this Symposium have commented on the other major areas of Supreme Court action during the last fifteen years, building in each case on what had gone before. My story is limited to the six years between 1962 and 1968.

I. Malapportionment and Equal Protection of the Laws[4]

Until 1962, there was no recognized remedy in federal courts for even the most extreme inequality of population among otherwise comparable legislative representation districts. It made no difference whether the disparity was among the congressional districts in a state, election districts for a state legislature, or local government districts of various types. Between 1872 and 1929 Congress had required that members of the House of Representatives be elected from districts "containing as nearly as practicable an equal number of inhabitants."[5] However, this provision was never enforced, and it was eliminated altogether in 1929.[6] Population differentials soared; by 1964 the most populous district in each of six states had more than three times the number of persons in the least populous, and nearly all congressional districts were seriously out of balance.[7] In addition, almost none of the state courts sought to correct the even more severe malapportionment that existed in state legislatures[8] and

4. For further discussion of the matters commented on in the statement that follows, *see* R. Dixon, Democratic Representation: Reapportionment in Law and Politics (1968); R. McKay, Reapportionment: The Law and Politics of Equal Representation (1964).

5. 17 Stat. 28 (1872).

6. 46 Stat. 21.

7. Wesberry v. Sanders, 376 U.S. 1, 49-50 (1964) (appendix to opinion of Justice Harlan).

8. Ratios between the most populous and least populous district in a state were not uncommonly more than 100 to 1.

local governmental bodies, despite the fact that some specific state constitutional provisions required substantial equality of population.

By 1960 malapportionment in the United States had attained such proportions that the integrity of representative government was in many instances endangered. Yet the extent of the disparity continued to grow, fortified as it was by four assumptions from the past that had become unreliable guides to the future in the 1960's.

First, until 1962 it was widely believed that federal courts would not review individual voter complaints about malapportionment, either because they lacked jurisdiction over such matters, or because the claims were not justiciable, or for both reasons. There was considerable basis for this belief, supported as it apparently was by *Colegrove v. Green*,[9] in which Justice Frankfurter had cautioned that "[c]ourts ought not to enter this political thicket."[10] Although a few commentators had warned that *Colegrove*—decided in 1946—should not be read as a denial of jurisdiction and/or justiciability, the issue was not squarely faced in the Supreme Court again until 1962, when the Court held in *Baker v. Carr*[11] that claims of population inequality among election districts are indeed within the jurisdiction of the federal courts; that the issues are justiciable; and that individual voters have standing to raise the issues. Thus fell the first assumption—the procedural gambit—leaving as the next line of defense assumption number two: the substantive claim that no provision of the Constitution requires substantial equality of population among election districts.

During the period when it was generally believed that the Court would not review claims of legislative malapportionment, there was no great need for defenders of the status quo to develop elaborate constitutional arguments in behalf of an issue they thought could not arise. With the decision in *Baker v. Carr*, however, all that was changed. Justices Frankfurter and Harlan, in basing their dissents to *Baker* mainly on the justiciability issue, previewed the more refined arguments Justice Harlan was later to make (sometimes joined by Justices Clark and Stewart) in *Reynolds v. Sims*[12] and the companion cases decided in 1964.[13] But assumption number two was laid to rest

9. 328 U.S. 549 (1946).

10. 328 U.S. at 556. *See also* MacDougall v. Green, 335 U.S. 281 (1948) and cases discussed, and distinguished, in Baker v. Carr, 369 U.S. 186, 208-37 (1962).

11. 369 U.S. 186 (1962).

12. 377 U.S. 533 (1964).

13. Justice Harlan's dissent for all the cases appears in Reynolds v. Sims, 377 U.S. 533, 589 (1964). The principal dissenting statement of Justice Stewart, joined by Justice Clark, appears in Lucas v. Colorado General Assembly, 377 U.S. 713, 744 (1964), applicable also to WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

Justice Harlan, who alone finds the fourteenth amendment totally inapplicable, has restated and refined his argument in subsequent apportionment cases,

in *Reynolds*,[14] which held with exquisite simplicity that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both Houses of its legislature, as nearly of equal population as is practicable."[15]

A third assumption was that even if the fourteenth amendment could be interpreted to require population equality in state legislative election districts, there was nothing in that amendment or elsewhere in the Constitution that would impose a similar limitation on the drawing of congressional district lines by state legislatures. However, when this question was presented to the Court in *Wesberry v. Sanders*[16] (before the decision in *Reynolds*), only Justice Clark thought the equal protection clause determinative;[17] and Justices Harlan and Stewart thought that no constitutional provision limited congressional districting. But six members of the Court found a command of substantial population equality in article I, section 2, of the Constitution, which provides that representatives be chosen "by the People of the Several States." In an extensive review of historical sources, Justice Black concluded for the majority that this clause "means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[18]

A fourth and final assumption, to which the Court put the lie in 1968 in *Avery v. Midland County*,[19] was the lingering belief, even after *Reynolds*, that the representative function in local governmental units was somehow different than in state legislative bodies. For a time there seemed to be some basis for this view, at least where the local governmental units had no obvious legislative functions.[20] But in *Avery* the Court held, as should have been expected from the beginning, that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.[21]

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including Avery v. Midland County, 390 U.S. 474, 486 (1968).

Justices Harlan and Stewart have also objected to application of the equal protection clause of the fourteenth amendment in other political rights cases, including Katzenbach v. Morgan, 384 U.S. 641, 659 (1966), a dissent applicable also to Cardona v. Power, 384 U.S. 672 (1966).

14. 377 U.S. 533 (1964).

15. 377 U.S. at 568, 577.

16. 376 U.S. 1 (1964).

17. The majority did not find it necessary to consider the fourteenth amendment in view of its conclusion that art. I, § 2 requires equality among congressional districts, 376 U.S. at 8 n.10.

18. 376 U.S. at 7-8.

19. 390 U.S. 474 (1968).

20. *See* Sailors v. Board of Educ., 387 U.S. 105 (1967); Dusch v. Davis, 387 U.S. 112 (1967).

21. Avery v. Midland County, 390 U.S. 474, 485 (1968). For further discussion, *see*

II. The Impact of Reapportionment

A. *The Initial Response*

The Supreme Court decisions that applied the equal-population principle to all levels of government were thought by some to have saved representative government from self-destruction. Others, like Senator Barry Goldwater in his unsuccessful presidential campaign of 1964, viewed the decisions as an abuse of judicial power not justified by any provision of the Constitution. Friends and critics alike agreed on one proposition: Representative government in the United States would be significantly affected by implementation of the new requirement.

In 1968, just four years after *Reynolds*, and in the same year as *Avery*, the public outcry has faded to a whisper. Criticism of the Supreme Court, a noisy issue in the 1968 presidential campaign, did not emphasize the reapportionment decisions. The mood, even among politicians, is that the decisions are acceptable; the accommodations have largely been made.

In retrospect, this development is not hard to understand. The initial objections to the decisions came from two groups whose uneasy alliance should never have been expected to come to much. First, there were the intellectual critics who express alarm at each new judicial intervention in matters that they had not previously admitted to the charmed circle of federal judicial authority. These critics were more concerned with *Baker v. Carr*, which they regarded as a breach of their first canon, judicial restraint, than with the substance of the rules in *Wesberry*, *Reynolds*, and *Avery*. The second group of critics were the "practical" politicians, particularly those who saw in reapportionment a threat not only to their legislative power, but also sometimes to their very seats.

Perhaps sensing that this alliance of principle and self-interest could not long survive, opponents of reapportionment swiftly mounted an attack on the decisions—and on the Court itself—in Congress. At first, efforts were made to limit the jurisdiction of the federal courts so that most reapportionment cases could not be heard; but this was too frontal an attack even for many critics of the decisions and the Court. Next, amendment of the Constitution was sought in order to provide that the equal-population principle would apply to only one house of a bicameral state legislature. The final attack, and the most nearly successful, was the campaign for a constitutional convention under a never-used provision of article V

Symposium: One Man—One Vote and Local Government, 36 Geo. Wash. L. Rev. 689 (1968).

of the Constitution. Ultimately, all of these efforts were unsuccessful.[22]

Direct frontal attack on the decisions—by constitutional amendment or otherwise—was probably never destined to make much progress for the simple reason that the public did not oppose the decisions. This should not have been surprising since malapportionment had worked to the disadvantage of a majority of all the voters, including the politically sophisticated and highly vocal group in the cities and suburbs.

B. *Reapportionment Effected—The Success Story*

When *Wesberry* and *Reynolds* were decided in 1964, students of the political process believed that accommodation to the equal-population standard would be accomplished, if at all, only after extensive litigation that would take many years, perhaps decades. For once, the prophets of gloom were wrong; it is not easy to think of any other major Supreme Court decisions to which significant adjustment was so swiftly accomplished. While there was some foot-dragging, and judicial proceedings were often necessary, the astonishing fact is that by the spring of 1968, four years after the key decisions, the task of revision was essentially complete.

Within this period congressional district lines were redrawn in thirty-seven states. Of the remaining thirteen, five have a single representative each; two elect representatives at large; and several did not require redistricting. Although several states may need further change for reasons discussed in the final section of this Article, the fact remains that by April 1968 only nine states had any district with a population deviation in excess of ten per cent from the state average, while twenty-four states had no deviation as large as five per cent from the state norm.[23]

State legislatures responded with similar speed and integrity to the even more painful task of redrawing their own district lines; this often entailed the necessary consequence of making impossible the re-election of some of their own members. By the spring of 1968 every state had made some adjustment, and it seemed probable that more than thirty of the state legislatures satisfied any reasonable interpretation of the equal-population principle.

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22. For a review of these campaigns, *see* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968); McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964).

23. Bulletin of ILGWU [International Ladies' Garment Workers Union] Political Department (April 22, 1968).

C. *Substantive Impact—The Character of the Reapportioned Bodies*

Reapportionment and redistricting are still too new to permit definitive evaluation of their impact. Even before careful study is completed, however, some conclusions can be drawn. It was no surprise to those familiar with the pattern of malapportionment, for example, that the principal beneficiaries of reapportionment and redistricting were less the cities than the suburbs. In the decade between the 1950 and 1960 censuses eight of the largest cities in the United States lost population, while the suburbs gained population from urban and rural areas alike. One result of this population shift was that in some Southern states, particularly Florida and Tennessee, a genuine two-party system emerged as suburban voters began to pursue aggressively specific political goals. This was not, however, an exclusively Southern phenomenon according to Republican Party analysts, who concluded from study of the 1966 congressional races that Republicans might gain from ten to twenty-five seats in the House of Representatives in twenty-two states.[24]

Another predictable consequence of fair apportionment was the unseating of a number of legislators. Where prior malapportionment had been severe, the turnover was correspondingly large. For example, the first legislature after reapportionment in Maryland contained eighty per cent freshman legislators; in Connecticut more than half were new; and in California nearly half of the members of the legislature were there for the first time.

With the influx of so many inexperienced legislators there was sometimes a certain amount of confusion about goals and techniques. But the novice legislators frequently seized the reins of authority with surprising decisiveness, often with results that were applauded; seldom were they criticized for being less effective than their predecessors in the exercise of power. Moreover, the size of the legislature was dramatically reduced in several instances, a change approved by most students of government. The Connecticut house was reduced from 294 representatives to 177; the Vermont house from 246 to 150; and the Ohio legislature from 137 to 99.

Evaluation of legislative performance is in the eye of the beholder; thus, it is difficult to generalize about the success of legislative programs after reapportionment. However, there were observable trends in the form of increased aid for schools, greater home rule, increased consumer protection, stronger civil rights legislation,

24. *See* McKay, Reapportionment Reappraised 18-19 (Twentieth Century Fund pamphlet 1968).

urbs on air and water pollution, and reform of criminal justice. A reapportioned Missouri legislature was hailed by the *St. Louis Post Dispatch* as probably "the most creative session in the mid-term of a governor in the State's history."[25] And a study of the 1966 and 1968 biennial session of the Virginia general assembly concluded that "[b]oth sessions enacted outstanding legislative programs in response to strong gubernatorial leadership and growing public demands for more and better governmental services."[26]

The fears that reapportionment would lead to urban dominance did not materialize in such primarily rural states as Idaho, Kansas, Montana, and North Dakota. In New Mexico the Farm and Livestock Bureau, the state's largest agricultural organization, pronounced the reapportioned legislature "one of the finest"; and the reapportioned Vermont house drew "lavish praise from all quarters" for its 1966 session.[27]

The impact of reapportionment on local government is necessarily more speculative because of the almost infinite variety of local government structures—counties, cities, school boards, and other special purpose districts, to name only the most common.[28] But there is reason for cautious optimism that fairly based election districts will be as salutary for local government as for state legislatures.

III. Some Open Questions

As a matter of wise institutional policy, the Supreme Court of the United States ordinarily does not try to answer at first encounter every question that might arise in connection with a novel problem. The reapportionment decisions are almost unique in the comprehensiveness of the early rulings. There are of course some unanswered questions in the wake of these decisions, but the number is surprisingly small. The original decisions were sweeping, direct, and relatively clear. Qualifications were few, except for the fairly obvious reminder that in state legislative districting (or in drawing lines for congressional districts and local government units), "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."[29]

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25. *Id.* at 17.
26. Wells, *A Pattern Emerges*, 57 Natl. Civ. Rev. 453 (1968).
27. McKay, *supra* note 24, at 17-18.
28. *See Symposium, supra* note 21.
29. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

From this qualification more or less directly arise three important questions for which final answers have not been given—and perhaps should not yet be expected—because key elements in these decisions depend upon relatively indefinite factors of judgment. Nevertheless, guidance is available, both in the Court's original decisions and in its subsequent reaffirmations of the principles involved. The questions, to which brief answers are suggested below, are (1) What population deviations are consistent with the standard of substantial population equality? (2) To what extent, if any, is the gerrymander forbidden by the Constitution? (3) What agency should be given authority to draw election district lines?

A. *Substantial Population Equality*

The standard fixed by the Court for congressional districting, state legislative apportionment, and local government line-drawing was similar, if not precisely identical, in the three principal decisions. The operative language in *Avery* is typical of the Court's formulations in the other reapportionment cases: "We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."[30]

Although the Court emphasized in *Reynolds, Wesberry,* and *Avery* that mathematical exactness is not required,[31] it has insisted that population is the only proper basis of apportionment. In *Reynolds* the Court stated that "neither history alone, nor economics or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation."[32] And in *Avery* the Court restated *Reynolds* as a holding that "bases other than population [are] not acceptable grounds for distinguish-

30. Avery v. Midland County, 390 U.S. 474, 484-85 (1968). In Wesberry v. Sanders, 376 U.S. 1, 7-8, the Court said: "The command of Art. I, § 2, that Representatives be chosen 'by the People of the several states' means that as nearly as practicable, one man's vote in a congressional election is to be worth as much as another's." And in Reynolds v. Sims, 377 U.S. 533, 568 (1964) the standard was thus defined: "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis."

31. Wesberry v. Sanders, 376 U.S. 1, 18 (1964); Reynolds v. Sims, 377 U.S. 533, 577, 579 (1964); Avery v. Midland County, 390 U.S. 474, 484-85 (1968). In *Reynolds* the Court observed that "[s]omewhat more flexibility may be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578. This is because of the greater number of districts in state legislatures so that local political subdivision lines may be used more extensively in state legislative districting than in congressional districting.

32. 377 U.S. at 579-80.

ing among citizens when determining the size of districts used to elect members of state legislatures."[33]

From this proposition—that population is the only permissible standard for districting even though mathematical exactness is not required—another proposition logically follows: population deviations among districts must be justified by the state. This principle emerged clearly in *Swann v. Adams*,[34] where the variations were thirty per cent among senate districts and forty per cent among house districts. The Court said, "*De minimis* deviations are unavoidable, but . . . none of our cases suggest that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."[35] Deviations from equality require justification, and the burden is on the state to supply rational explanation for instances of inequality. Apparently, the only acceptable justification for population variances is the use of political subdivision lines or other logical division lines in order to structure coherent districts. Use of such pre-established boundary lines may prevent an otherwise destructive gerrymander, but where this factor is claimed as the reason for population inequality, it must be demonstrated. The New Jersey Supreme Court made the point specifically in *Jones v. Falcey*: "Where the deviation obviously exceeds that needed to permit the use of political subdivisions, the deviation spells out unconstitutionality, and a court must so hold unless the record affirmatively reveals a tenable basis for legislative action."[36]

Some have sought a judicial statement of percentage points of maximum permissible deviation, but such a holding is not likely. The standard remains population equality—quite strict in congressional districting cases and somewhat more flexible for state and local legislative bodies.

B. *The Forbidden Gerrymander*

The gerrymander is a practice-tested and time-dishonored device of American politics that has been used most often for partisan advantage, but sometimes has also served to break up (or to combine) racial, ethnic, or socioeconomic groups thought to have common interests. Malapportionment is itself a particular kind of gerrymander in which advantage or disadvantage is based upon population concentration or dispersion. In the United States the population gerrymander usually, but not always, has been used to prefer rural over urban and suburban groups. The reapportionment decisions

33. 390 U.S. at 484.
34. 385 U.S. 440 (1967).
35. 385 U.S. at 444.
36. 48 N.J. 25, 40, 222 A.2d 101, 109 (1966).

have ruled that the population gerrymander is constitutionally forbidden, but initially at least there was little direct guidance on racial and partisan gerrymandering.

Gomillion v. Lightfoot[37] is the only case before 1968 in which the Court reached the merits of a claimed racial gerrymander; the Court held that the redrawing of municipal lines to exclude Negro voters was a violation of the fifteenth amendment.[38] Other cases that sought to raise the racial gerrymander issue have not been successfully pressed to a decision on the merits. In *Wright v. Rockefeller*,[39] a majority of the Court accepted "the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."[40] There was, however, nothing in the majority opinion to suggest approval of racial gerrymandering. Both dissenting opinions, by Justices Douglas and Goldberg, specifically stated that racially motivated districting is unconstitutional,[41] a proposition to which the majority took no exception, and with which disagreement is scarcely possible.

Although gerrymandering for partisan advantage has also not been squarely presented to the Court for decision, there is reason to believe that this, too, would be struck down upon a sufficient showing of political motivation in apportionment formulas or districting practices. In *Fortson v. Dorsey*,[42] the Court, commenting on a multimember constituency apportionment scheme, worried about the possibility that this method might in some circumstances "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[43]

Three cases scheduled for argument before the Supreme Court in December 1968 raise the question of partisan gerrymandering,

37. 364 U.S. 339 (1960).

38. Only Justice Whittaker thought that the case presented a violation of fourteenth amendment equal protection rights. 364 U.S. at 349. Justice Frankfurter, writing for the majority, apparently felt that judicial review on fourteenth amendment grounds was barred by Colegrove v. Green, 328 U.S. 549 (1946), which he said "involved a claim only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years." But *Gomillion*, he said, involved "affirmative legislative action [that] deprives them of their votes and the consequent advantages that the ballot affords." 364 U.S. at 346. He may also have been seeking to preserve the *Colegrove* principle of nonjusticiability against the attack mounted in *Baker v. Carr*, in which probable jurisdiction was noted one week after the decision in *Gomillion*. 364 U.S. 898 (1960).

39. 376 U.S. 52 (1964). *See also* Connor v. Johnson, 386 U.S. 483 (1967); Honeywood v. Rockefeller, 376 U.S. 222 (1964).

40. 376 U.S. at 56.

41. *See also* Sims v. Baggett, 247 F. Supp. 96 (S.D. Ala. 1965); Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88 (1966).

42. 379 U.S. 433 (1965).

43. 379 U.S. at 439.

and possibly of racial gerrymandering as well. Two of the cases, *Preisler v. Kirkpatrick*[44] and *Preisler v. Heinkel*,[45] arise out of a holding by a three-judge district court that the 1967 congressional redistricting in Missouri did not satisfy the constitutional standard of population equality as nearly as practicable. The third case, *Wells v. Rockefeller*,[46] is an appeal from the decision of a three-judge federal district court upholding the 1968 congressional redistricting in New York against a challenge of partisan gerrymandering and excessive population variances. Decision of these cases should provide guidance on the remaining questions about the propriety of gerrymandering.

C. *Redistricting: Who Will Bell the Cat?*

The habit of legislative redistricting for partisan advantage is so deeply ingrained in the American legislative and political structure that it will be rooted out only with difficulty. The effort must be made, for the stakes are high: the effective functioning of representative democracy. Unfortunately, the answers are not easy. Implementation of the equal-population principle is an essential ingredient of ultimate success, but it is by no means a self-contained solution. Within the framework of absolute equality it is entirely possible to pervert the electoral process; the contortions of the gerrymander remain within easy grasp. Even judicial willingness to forbid racial, partisan, and other gerrymandering can protect against only the most blatant abuses.

There is accordingly an imperative need in every state for some politically acceptable device to remove the district line-drawing function from the partisan process. By 1967 seventeen states had committed a portion of the apportionment or districting function to nonlegislative agencies.[47] These plans range from executive initiative after legislative inaction for a specified period of time to a constitutionally established board of apportionment consisting of the governor, secretary of state, and attorney general. But none of the present plans is sufficiently removed from the ongoing political process to prevent partisan influence from taking its due. The question that urgently requires thoughtful debate is whether American democracy is now sufficiently mature to agree upon a nonpolitical

44. 279 F. Supp. 952 (E.D. Mo. 1967), *prob. juris. noted*, 390 U.S. 939 (1968).
45. 279 F. Supp. 952 (E.D. Mo. 1967), *prob. juris. noted*, 390 U.S. 939 (1968).
46. 281 F. Supp. 821 (S.D.N.Y.), *prob. juris. noted*, 37 U.S.L.W. 3133 (Oct. 15, 1968).
47. *See* NATIONAL MUNICIPAL LEAGUE, LEGISLATIVE DISTRICTING BY NONLEGISLATIVE AGENCIES, appendix (1967).

means of resolving this vital question of representative government —finding the best method for structuring election districts.[48]

48. The following statement of principles deserves study as approved by the Citizens Union Committee on Constitutional Issues, Position Paper No. 1, April 1967 (quoted from pages 55-56 of Legislative Districting by Non-Legislative Agencies, *supra* note 47). The proposed plan relates to New York State.

Reapportionment Outside the Legislature

Recommendations:

The following recommendations are not stated in formal constitutional language, but easily could be converted into a concise provision on legislative apportionment.

Legislative Districts

For the purpose of electing members of the Legislature (each house if there are to be two houses) the state should be divided into as many districts as there are members to be elected. Each district should consist of compact and contiguous territory.

All state legislative districts should be so nearly equal in population that no district has over 10 per cent more or less population than the statewide average for all districts.

Among state legislative districts wholly contained within a single county, no district should be allowed to have over 5 per cent more or less population than the average district population in that county.

Among state legislative districts wholly or partly within a city or town (or, in New York City, within a borough) no district should be allowed to have over one per cent more or less population than the average population of districts in that city, town or borough.

As nearly as is possible under the requirements of population equality, no county, city, town or village boundary should be crossed in the formation of districts.

At no time should a block enclosed by streets or public ways be divided.

Apportionment and Districting Commission

Within thirty days after receipt of the final figures of the decennial United States census, the Governor, after inviting nominations from the presidents of the state's institutions of higher learning, civic, educational, professional, and other organizations, should be required to name a ten-member commission to reapportion and redistrict the state legislative districts.

No member or employee of the Legislature should be allowed to be a member of the commission.

No more than five members of the commission should be allowed to be enrolled in the same political party.

The Governor should list at least one source for the nomination of each member of the commission.

If by reason of resignation, death or disability, any member of the commission should be unable to perform his duties, a successor shall be appointed by the Governor in the same manner as an original member of the commission is appointed.

The Legislature should be required to provide sufficient funds for the operation of the commission.

All decisions of the commission should be required to have the approval of six or more members.

Within ninety days of its appointment, the commission should submit its redistricting plan to the Governor, who, within thirty days after receipt of the plan, should be allowed to recommend amendment to the commission.

Thirty days thereafter the commission should promulgate its plan, with or without amendments.

The commission's plan should be published in the manner provided for acts of the Legislature and should have the force of law upon such publication.

Upon the application of any qualified voter, the Court of Appeals, in the exercise of original, exclusive and final jurisdiction, should review the commission's redistricting plan and should have jurisdiction to make orders to amend the plan to comply with the requirements of this constitution or, if the commission has failed to promulgate a redistricting plan within the time provided, to make one or more orders establishing such a plan.