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CHESTER T. WINSLOW, Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-THREE

Communication Re: Fourth Report of Maine Constitutional Commission

March 19, 1963

To the Honorable House and Senate of the 101st Legislature
State House
Augusta, Maine
Members:

I have the honor to transmit to you herewith the Fourth Report of the Maine Constitutional Commission.

Very truly yours,

FRED C. SCRIBNER, Jr.
President, Maine Constitutional Commission

TO THE LEGISLATURE OF THE STATE OF MAINE:

FOURTH REPORT OF THE MAINE CONSTITUTIONAL COMMISSION

The 1961 apportionment of Maine's House of Representatives and State Senate favors voters who reside and vote in the rural and sparsely settled areas of the state. The small counties are given an advantage over the larger counties. The votes cast by residents of Maine's larger communities for representatives and senators have less value than the votes cast for these officials by residents of many of Maine's small towns.

Over the years, Maine's legislature, within the arbitrary limits imposed upon it by the provisions of our constitution, has done a creditable job of apportioning seats in the house of representatives and senate. A recent study of long-term trends in state legislative apportionment by Professors David and Eisen-

berg of the University of Virginia published in 1961, rated Maine eleventh among all of the states in the fairness of the states' distribution of voting strength.

However, in spite of the conscientious work of legislative committees and of the legislature in carrying out reapportionment promptly within the framework of our constitution, significant inequities of voting strength do now exist. These discriminations exist because Maine's Constitution, as now drawn, was intended to give added voting strength to the rural areas of the state and to limit the voting strength of city voters. Voting rights should not be denied, modified, or watered down, because an elector resides in a large city or populous county. A rural vote should not be worth three, four or five times the vote of an elector residing in a large county or city.

A number of state courts had acted to nullify or revise legislative reapportionments prior to the March, 1962 decision of the Supreme Court of the United States in the case of **Baker v. Carr** 369 U. S. 186. It was this decision, however, that broke and swept away the barriers which allowed voting inequities to exist unchallenged in many of the states of this nation.

The Supreme Court in the **Carr** case held that with respect to apportionment of state legislatures the Fourteenth Amendment to the Federal Constitution guaranteed certain rights to individual citizens of the several states. The Court took a major step in holding that Federal as well as state courts had the power and authority to protect these rights. Perhaps the major contribution to the controversial field of redistricting made by the Supreme Court in **Baker v. Carr** was the Court's conclusion that in reviewing or measuring apportionment action, courts may apply standards of equality which would satisfy the equal protection requirements of the Federal Constitution.

The Baker case did not establish an apportionment formula. The Court did state that the equal protection clause prohibits "invidious discrimination" in apportioning seats in a state legislature. The opinion also stated that a particular apportionment must represent a "rational policy." In March of 1963 there is no agreement as to how Fourteenth Amendment standards are to be applied in testing the constitutionality of the apportionment of any particular state legislature. Only one thing is certain. If there is "invidious" discrimination in an apportionment, a Federal or state court will strike it down.

Basis for Apportioning Maine's House of Representatives

Article IV, Part First, Section 2 of the constitution dealing with the apportionment of the 151 members of the house of representatives provides that,

> "The legislature shall, within every period of at most ten years and at least five, cause the number of inhabitants of the state to be ascertained, exclusive of foreigners not naturalized. The number of representatives shall, at the several periods of making such enumeration, be fixed and apportioned among the several counties as near as may be, according to the number of inhabitants, having regard to the relative increase of population."

This provision of Maine's constitution does not require the legislature to accept census figures in making apportionments of Maine's house of representa-

tives. The legislature could, if it so desired, make its own enumeration of the inhabitants of the state. In practice, the legislature has used census figures as the starting point for reapportionment, correcting the same when errors were brought to its attention and omitting from "the number of inhabitants of the State" students not having a fixed residence in the State, military personnel and their dependents, not having a fixed residence in the State, and foreigners not naturalized.

Thus, the number of inhabitants used as a basis in 1961 in reapportioning Maine's house of representatives is less than the number of inhabitants reported for Maine by the Federal Census Bureau.

The following table taken from the report of the Joint Select Committee on Constitutional Reapportionment of the 100th legislature shows the changes made by that committee and adopted by the legislature.

County	Census Figure	Minus Military Personnel and Students	Reapp. Figure
Androscoggin	86,312	812	85,500
Cumberland	182,751	3,328	179,423
Kennebec	89,150	1,735	87,415
Penobscot	126,346	10,379	115,967
Aroostook	106,064	5,962	100,102
York	99,402	1,592	97,810
Oxford	44,552		44,552
Somerset	39,749		39,749
Licoln	18,497		18,497
Piscataquis	17,379		17,379
Washington	32,908	256	32,652
Hancock	32,293	385	31,908
Knox	28,575		28,575
Waldo	22,632		22,632
Sagadahoc	22,793	309	22,484
Franklin	20,069	203	19,866
Total	969,472	24,961	944,511

In 1961 the legislature determined, for apportionment purposes, that the number of inhabitants of the State was 944,511. Based on this determination, if exact equality was to be achieved in apportioning the 151 seats in Maine's house, each 6,255 inhabitants would be entitled to one representative. Exact equality is, of course, impossible to achieve, if attention is to be paid to county, city and town lines. Even if accomplished at a given point of time, exact equality would soon disappear as people moved in and out of voting districts. Courts passing on equality of voting rights have recognized that some variation from exact equality must be permitted. For the purposes of this discussion, however, the unit base number of 6,255 inhabitants should be kept in mind. If exact equality of representation was possible in the lower house, one seat in the house of representatives would be available for each 6,255 inhabitants.

Existing inequities in Maine's apportionments, in the house, stem from three constitutional provisions which were intended to discriminate against our larger areas of population. Inequities also exist because of a long-existing practice under which apportionment of legislative seats within counties is determined, in large measure, by county delegations. These delegations have, over the years, been reluctant to revise downward existing apportionments and to reduce drastically rural representation.

No City to Have More Than 7 Representatives

The first constitutional barrier to equality of representation is Section 3 of Article IV, Part First, of the constitution which provides that, "no city or town shall ever be entitled to more than seven representatives." This arbitrary limitation was written into the constitution in 1819 to limit the influence of the City of Portland. This city, the constitutional draftsmen anticipated, would grow rapidly in population and if left unrestricted would dominate the state.

The 1960 Federal census reported the population of Portland at 72,566, down more than 5,000 from the city's population in 1950 and somewhat less than Portland's population in 1940. Thus, although Portland still suffers discrimination, there is now less discrimination against Portland than was the case in the twenty-year period from 1940 to 1960.

The Commission does not have available to it the exact number of inhabitants assigned to Portland by the legislature when it made adjustments in population in arriving at 1961 reapportionment totals. We do know that the census figures for the County of Cumberland were reduced by 3,328 inhabitants. If we assume that this reduction was taken in its entirety from Portland's population as reported by the census at 72,566, Portland would still have 69,238 inhabitants for the purposes of the 1961 apportionment of seats in the Maine House. Using the number of 6,255 as the number of inhabitants which would entitle a city to a single representative based on exact apportionment, Portland should have been given eleven (11) seats in the Maine house instead of the seven (7) to which it was limited by the constitution. This arbitrary limitation took four seats from Portland in 1961 and gave these seats to rural Cumberland County.

It should be pointed out that while there is discrimination within Cumberland County, the limitation in the number of representatives which may be given to the City of Portland did not result in any discrimination between Cumberland County and the other counties within the state.

Fractional Excesses Used to Favor Small Counties

The second constitutional limitation which we now discuss has, however, resulted in an unjustifiable discrimination between counties. This second limiting provision appears in the first sentence of Section 3 of Article IV, Part First of the constitution. This first sentence reads as follows:

> "Section 3. Each county shall be entitled to that number of representatives which is in the same proportion to the total number as the number of inhabitants of the county bears to the number of inhabitants of the state, **fractional excesses over whole numbers to be computed in favor of the smaller counties.**" (Emphasis added)

In the 1961 reapportionment, the effect of this provision was to give at least four (4) of Maine's smaller counties seats in the house of representatives to which they would not have been otherwise entitled. In each instance, a larger county was denied a seat to which, based on the number of inhabitants, it would have been entitled.

Based on the unit base number of 6,255 inhabitants, used by the legislature in making the 1961 reapportionment and using the adjusted population figures given in the foregoing table set out on page 4, the population of Kennebec County was sufficient to give that county 13 legislative seats with 6,100 inhabitants to spare. Penobscot County was entitled to 18 legislative seats with 3,377 inhabitants to spare. York was entitled to 15 seats with 3,985 extra inhabitants. Androscoggin was entitled to 13 seats with 4,165 inhabitants more than the number required to give that county the 13 seats to which it was assigned.

In spite of these very substantial fractions remaining after dividing the population in each of the named counties by the unit base number of 6,255, extra seats, or a share in extra seats, were not forthcoming for these counties. Instead, acting under the constitutional provision quoted above, Hancock County was given an additional legislative seat although it had only 633 inhabitants in excess of the number entitling it to 5 legislative seats. An extra seat was given to Franklin County which had 1,101 inhabitants in excess of the even number which qualified it for 3 legislative seats. Washington County was given an extra seat for its 1,377 inhabitants beyond the exact number required for 5 representatives. A fourth small county, Knox, was given an extra seat for the 3,555 inhabitants it had to spare above the number of inhabitants entitling it to 4 seats.

Intra-County Fractional Computations Favor Rural Areas

The third constitutional provision which gives rise to unfair apportionment of representatives in the lower house is also part of Section 3, Part First of Article IV of the constitution. The constitution there provides that in allocating representatives within a county, each city or town having a number of inhabitants greater than the unit base number obtained by dividing the inhabitants in the county by the number of representatives to which the county is entitled, shall be entitled to as many representatives as the number of times the number of its inhabitants fully contains the unit base number of representation. Any inhabitants of such city or town in excess of the number fully contained in said unit base number are not available to qualify the city or town for additional voting strength but rather are used to determine the number of representatives to be given to the remaining area of the county. Clearly, this limits the representation of the more thickly populated areas of the state.

This is not only a difficult formula to state but there are few people within the State of Maine who understand the manner in which the formula operates.

Part of the confusion in applying this section of the constitution stems from the fact that the unit base number used to determine the number of representatives to be given to each county, is not used in allocating house seats within counties. Instead, after seats are divided among the counties, a new and different unit base number is determined for each county.

The formula can best be illustrated by a step-by-step application to a single county. Attached to this report and marked Exhibit A is an excerpt from the report of the Joint Select Committee on Constitutional State Reapportionment of the 100th Legislature. This excerpt sets forth an example of intra-county reapportionment, set up as a guide by that Committee.

It is to be noted that in applying the formula to the number of inhabitants which the committee of the 100th Legislature assumed to be resident in Androscoggin County and in the various cities and towns thereof, the difference between the number of inhabitants necessary to give Auburn three legislative seats, viz. 19,917, and the actual number of Auburn inhabitants shown by the 1960 census, viz. 24,449, was disregarded in making any further distribution of seats in the Maine house within Androscoggin County. Some 1,000 inhabitants were also disregarded in the City of Lewiston.

In summary, as a result of the application of this particular constitutional provision in the 1961 reapportionment, each representative from Auburn speaks for 8,150 inhabitants, while the representative from Class No. 6 in Androscoggin County speaks for 3,823 inhabitants. Thus, the vote of an Auburn resident voting for a member of the House of Representatives has less than one-half of the value of a vote for the same office cast in Class No. 6.

The three constitutional provisions summarized above have given to the state's rural areas a voting strength in the legislature greater than the strength that such areas would be entitled to receive based on the number of inhabitants resident therein. Our constitution was drawn to discriminate against voters living in metropolitan areas, and it has so discriminated.

Legislative Application of Apportionment Formulas
Illustrations of Inequality

As actually applied, Maine's apportionment formulas have created further discriminations. In recent apportionments, the method of making the allocation of representatives within county areas has been to depend upon the county delegations recommendations in distributing the seats within the county, always within the limits of the three constitutional limitations discussed above. In practice this reliance on county delegations has resulted in further discriminations in favor of the less populated areas. This is particularly true when one area of a county is losing population while another section of the county is growing at a rate faster than the remainder of the county as a whole. Thus, we find markedly different standards within the various counties and major discrepancies in the number of inhabitants resident within various class districts in a single county.

Attached to this report is a chart, marked Chart No. 1, showing the distribution of seats in the 1963 house of representatives according to the number of persons who were inhabitants in each district at the time of the 1961 apportionment.

There are in Maine a number of major departures from the previously described unit base number of 6,255. We now have in the state three districts with less than 3,000 inhabitants. At the other extreme, we have eight districts

with more than 8,000 inhabitants and four cities, each with more than one representative, in which each representative speaks for more than 8,000 constituents. In fact, each member of the House from the City of Portland speaks for more than 10,000 inhabitants.

There are improper variations within counties. In Knox County, Rockland has a single representative for 8,769 inhabitants while representative Class No. 62 in that County has only 3,413 inhabitants.

Rumford in Oxford County has a population of 10,005 inhabitants but has only a single representative in the legislature. On the other hand, Class No. 68 in Oxford County is composed of six towns with a total number of inhabitants of only 4,210.

Professor Edward F. Dow of the University of Maine in a most informative series of articles published in the Spring of 1962 has pointed out other examples of inequality resulting from the 1961 reapportionment. Professor Dow in Article 7 of his series entitled "Our Unknown Constitution" said:

> "Caribou was 794 persons short of the 13,258 needed to qualify for two representatives, while Biddeford was lacking 626 persons of the number needed to retain its three representatives. Presque Isle, lacking 372 persons nevertheless got two seats in the 1961 redistribution. Limestone, adjoining Caribou, had a federal census population of 13,102 in 1961, which is only 156 short of the population needed for two seats, and got one, while Brunswick with 15,741 had 56 more persons than needed to qualify for three seats, but was given only two. Apparently, the Legislature assumed that military personnel in both communities should not be counted as 'actual' population, or should be counted only in part."

Professors David and Eisenberg of the University of Virginia in their study to which we have previously referred have shown in chart form the variances in the value of a right to vote for a member of the house of representatives. Attached hereto and marked Charts No. 2 and 3 are copies of the material which appears in the David-Eisenberg report. The charts are preceded by a brief statement of the manner in which they have been compiled. Chart No. 2 indicates that in 1960 the right to vote for a representative had a value in Maine's five smaller counties of 120% of the state-wide average vote value; in the eight counties having a population between 25,000 and 100,000 the vote had a value of 103% while in the three largest counties that vote had a value of only 91%.

Chart No. 3 statistically evaluates the right to vote in this state on a county-by-county basis and demonstrates how substantial is the difference between the value of the vote in our smallest county and in our largest county. This chart also demonstrates that over the years, the disparity in the right to vote is becoming greater and greater. For example, in 1930 the legislative vote had an index value of 134 in Sagadahoc County and only 83 in Cumberland County. Thus, the 1930 disparity was 51% between the most over-represented county and the most under-represented county.

Based on the 1960 census, a right to vote for the legislature had its greatest value, namely 158% in Piscataquis and its smallest value, 78%, in Penobscot

county or a difference of 80%. It is also interesting to note that in 1930 in only four counties, namely, Androscoggin, Aroostook, Cumberland and Penobscot, was the index value of the right to vote less than 100%. Based on the 1960 census there were six Maine counties in which the index value of the right to vote had a value of less than 100%, namely, Penobscot, Cumberland, Aroostook, Androscoggin, Kennebec and York.

Charts Nos. 2 and 3 were prepared before the 1961 Maine reapportionment changes were available to Professors David and Eisenberg. However, except to award an additional senator to Penobscot County, only minor changes were made in the 1961 apportionment and these changes do not, in the opinion of the Commission, materially change the computations set forth in Charts Nos. 2 and 3.

Permissible Variation

As has been previously stated in this report, no one expects a state to achieve the ideal situation of equality in all voting districts. The question is, how much variation between districts will be recognized as fair? Many state constitutions provide that among legislative districts there shall be "equality as nearly as may be."

In December of last year, the Advisory Commission on Governmental Relations, a Federal advisory body created under public law 86-830, rendered a detailed report entitled "Apportionment of State Legislatures." This report, which was carefully prepared and well-documented, came to the conclusion that where a legislative body is to be apportioned according to population only, the permissible percent deviation in the number of inhabitants should not exceed 10% from the number obtained by dividing the total population of the State by the number of representatives in the legislative body. Senator Muskie is a member of this advisory committee and participated in the deliberations. Maine's junior senator did not fully agree with the conclusions of the Commission, holding that under some circumstances, factors other than population might be considered in apportioning one house of a bicameral legislature.

As stated, the commission recommended that the variation in size of constituencies be limited to 10% of the state ratio. If this standard should be adopted by courts as a requirement in order to meet the tests laid down under the Fourteenth Amendment, Maine's legislative districts should include not less than 5,630 people and not more than 6,880 people. Under such a test, approximately two-thirds of the present Maine districts would be either too large or too small.

The Commission files herewith a report entitled "Judicial Review of State Apportionment Plans Under the Equal Protection Clause of the Fourteenth Amendment" prepared at the request of the Commission by Cornelius F. Murphy, Jr., Associate Professor at the Law School of the University of Maine. At pages 6 and 7 of his report, Professor Murphy discusses the amount of variation which appears to be permissible under the standards created by the Fourteenth Amendment. He points out that while there is no universal agreement on a fixed mathematical formula, at least two courts have struck down reap-

portionment plans which permitted variations of greater than two-to-one between the largest and the smallest districts.

In 1957 Richard S. Childs, Chairman of the Executive Committee of the National Municipal League, drafted a tentative proposal providing for single member constituencies, the districts to be of substantially equal population with a permissible variance from a norm of 10 or 20 per cent.

There have been several proposals for a Federal Constitutional amendment intended to guarantee "equal representation" in state legislatures. Such a proposal drafted in 1960 by Professor Paul T. David then with the Brookings Institute specified that state legislative districts should be compact, contiguous and based on population with the highest ratio of population to representatives of the same house not to exceed the lowest ratio by more than 30 per cent thereof.

In view of court action striking down reapportionment plans which have permitted variations of greater than two-to-one, it is interesting to note that the new constitution drafted by the Oregon Commission for Constitutional Revision permits a variation of 100% providing the largest population per senator or representative, respectively, may not be more than twice the smallest population per senator or representative.

If we should recognize a 100% variation in the size as permissible, no Maine districts should have less than 3,910 inhabitants or more than 7,819 inhabitants. Yet as apportioned in 1961, 35 of the districts created for the election of house members fall outside of this category. Put another way, if a 100% variation is accepted as a test for invidiousness, and we do not accept such a test, nearly one-fourth of Maine's representative districts as now established are either too large or too small. We are unanimously of the opinion that a variation of 100% in the size of districts is too great.

While the Commission quickly reached agreement that a permissible variation between districts should not be too small and a permissible variation of 100% is too large, the exact amount of variation to be granted in a new formula has not been easy to determine. Obviously, the greater the permissible variation, the more variation will exist between districts and the further actual apportionment will be from the ultimate goal of true equality in voting strength among all legislative districts.

The Commission recognizes that insofar as possible legislative districts should not split or divide voting precincts. Some variation is necessary in order to avoid to the maximum extent the division of voting precincts. Some members of the Commission were of the opinion that the permissible variation between precincts should not exceed 15%. Other members were of the opinion that perhaps a variation as great as 50% would be proper. The Commission concluded that a permissible variation between districts which would allow the largest district to exceed the smallest by 20% should be recommended to provide reasonable flexibility in recognizing divisions between voting precincts. Based on the ideal unit base number arrived at for the 1961 apportionment of 6,255 inhabitants and assuming for purposes of illustration that apportionment is based on inhabitants, no legislative district should have more than 6,756 in-

habitants or less than 5,630 inhabitants. Thus there would be a permissible spread of 1,126 inhabitants between the largest and the smallest district.

The Constitutional Commission is unanimously of the opinion that Maine should now eliminate from its constitution the restrictions therein which discriminate against electors residing in our larger communities. Our constitution should protect the voting rights to all of our citizens regardless of the communities in which they live. This means the removal from the constitution of the proviso that no city or town shall be entitled to more than seven representatives. There should also be removed the existing provision requiring the legislature in apportioning representatives among the counties to use "fractional excesses of whole numbers in favor of the smaller counties." Finally, the constitutional formula should be changed so that a different standard is not used in awarding representative seats to cities and towns entitled to one or more representatives than is applied to class towns entitled to a single representative for a class composed of several towns.

Commission Recommends Single Representative Districts

There is another inequality in our present method of electing the house of representatives which should be corrected. Under existing constitutional provisions, when a city or town is entitled to more than one representative, all of the voters in the city or town vote for all of the representatives elected from the municipality. As a result of this provision, a voter in the City of Portland votes for seven representatives to Maine's house, a Lewiston elector may cast votes for six representatives, a voter in Bangor votes for five representatives and voters in many communities vote for three representatives.

In all of the representative classes which are entitled to only a single representative, a voter may only vote for one member of the lower house. If equality is to be achieved in the area of voting for members of the house of representatives, it is the opinion of the Commission that each voter should vote for one and only one representative to the legislature.

This change becomes of major importance at this time because if a constitutional change is made permitting the City of Portland an increased number of representatives, each Portland voter would vote for eleven or more representatives. This will inevitably mean that many, if not most, voters will be voting for several individuals unknown to them. Under present practice, all eleven representatives could come from a small and compact section of Portland. Other areas of the city and large segments of the population would have no representative living in their area of the city to speak for them in Augusta.

A constitutional change should be made so that each voter in the state will have an equal voting right, namely, to vote for one member of the house of representatives.

Commission Recommendation for House of Representatives

Your Commission recommends that in order to eliminate discriminations in the right to vote which now exist in this state and to place the voters in all communities on an equal basis insofar as the election of representatives is con-

cerned, that the state be divided into 150 representative districts, each district as equal as may be to the other, but in any event, the discrepancy between the smallest district and the largest district not to exceed twenty per cent.

Basis of Apportionment

The Commission has been concerned as to the standard of measurement to be used in apportioning representatives in the lower house among the various districts. The present constitutional provision is that the apportionment shall be based on the number of inhabitants of the State "exclusive of foreigners not naturalized." This is a different standard than the constitution now provides shall be used in apportioning the senate. There, the provision is that the basis of representation shall be "according to the Federal census." There should be uniformity of standards between the basis of representation appearing in Article IV, Part First, of the constitution which has to do with the house of representatives and Article IV, Part Second, which has to do with the senate. The Commission has noted a number of complaints against the use of census figures as even a starting point in apportioning house seats. The Commission has noted complaints from some areas of the state that census figures have been inaccurate. The records of the 100th legislature contain an example of this. The census report gives the population of Stoneham in Oxford County at 18. Documents filed with the 100th legislature certified that, in fact, the population was 225. This increased number was accepted and used by the 100th legislature in making its apportionment.

The chart at Page 4 shows deductions from census figures recognized by the legislature in making the 1961 apportionment. These deductions had to be made on the basis of an "educated guess" by the legislature as to the number of non-resident students or military personnel in a district.

There is doubt as to the authority of the legislature to eliminate such individuals from the population base. It is true that the Maine Constitution uses the word "inhabitants" as the basis of apportionment and that the word usually connotes permanent residents. However, it is not clear that military personnel or students in residence were intended to be omitted from reapportionment computations, although they were to be denied the status of **Electors** during their stay in the state.

The constitution does provide in Article II, Section 1 that only citizens of the United States may be **Electors** and that persons

> ". . . in the military . . . shall not be considered as having obtained residence by being stationed in any garrison, barrack or military place in any city, town, or plantation", nor shall ". . . the residence of any student at any seminary of learning entitle him to the right of suffrage in the city, town, or plantation where such seminary is established . . ."

However, the provisions dealing with apportionment specifically exclude from those to be considered in the enumeration of inhabitants only foreigners not naturalized, and no other group. Thus:

Article IV, Part First

Section 2 ". . . The legislature shall . . . cause the number of the inhabitants of the state to be ascertained, exclusively of foreigners not naturalized . . . having regard to the relative increase in population."

It is thus arguable that the constitution intended to exclude military personnel and students from being considered as **Electors** but did intend that they be considered as inhabitants for apportionment purposes. In this regard, it should be noted that the Maine Supreme Court has held that the Federal Census may be used by the legislature in determining the number of inhabitants for house apportionment purposes under Article IV, Part First, Section 2, **Opinion of the Justices** 148 Maine 404, 408 (1953). The Federal census must be used in determining senatorial representation under Article IV, Part Second, Section 1. The refusal of the legislature to consider the military personnel or students for apportionment purposes may deprive the **electors** of the communities in which such personnel and students reside of their electors right to cast an effective vote which is guaranteed by the Fourteenth Amendment. Professor Dow's article from which we have already quoted illustrates how communities such as Limestone and Brunswick were deprived of representatives to which they would be entitled if the military personnel in those communities was considered.

Since for purposes of apportioning the senate census results must be used in determining number of inhabitants in relation to the senate, members of the armed forces stationed in a particular area, students who are attending school in the state but have no place of residence in Maine and no intention of becoming residents are counted as inhabitants of the state. Penobscot County was given an extra senator in 1961 because census figures for Penobscot included students at the University of Maine and military personnel and their families at Bangor.

Census figures leave much to be desired as a basis for distributing voting strength among Maine communities.

The suggestion is made that since towns and cities are now required to report the number of registered voters to the secretary of state, at least once in each two-year period, the number of registered voters should be used in determining the apportionment of members of the house of representatives. Here again, however, it is quite clear that different standards are used in different areas of the state in maintaining voters' lists. Some registrars are meticulous in removing names from voting lists. They act promptly, sometimes too promptly. Other officials, for one reason or another, allow names to remain on voting lists although the voters have long since ceased to be in the community.

We do not at the present time have in this state sufficient uniformity of standards for the maintenance of voting lists to make the number of registered voters reported for a community a sound standard for apportioning representatives to the Legislature.

A third standard which has been urged on your Commission and which appears to have real merit is the use of the number of votes cast for the office of governor as the apportionment standard. The number of votes cast must be reported

after each gubernatorial election to the secretary of state. The numbers here reported are more accurate than the numbers flowing from census reports or from reports giving the number of registered voters.

The Advisory Commission on Governmental Relations in its report discussed earlier in this document at Page 12 makes the following comments concerning the use of actual votes as a major item in the development of an apportionment formula.

"Another possible criterion for population in an apportionment formula is actual voters. This measurement has several definite advantages. The figures are readily available, and, if thought desirable, could provide information that would permit apportionment more often than once every 10 years. Actual voters also give the most accurate picture of participation in the governing process. No one can deny that all qualified voters should be given an opportunity to vote, and to have their votes counted equally with other voters. But should one individual's vote receive greater weight because others in his legislative district have stayed away from the polls? This argument is countered by the advocates of straight population on the grounds that the legislator is the representative of all members of his district, and therefore the district should be determined by actual population. Another argument against use of actual voters is that there is no stability in this figure. On a national basis voter participation is greatest in presidential elections; therefore, if actual voters are used, should presidential, non-presidential, or an average of the two elections be used as the basis for apportionment? Perhaps the most significant argument raised against use of actual voters is the possibility of giving undue weight to a particular area where a highly controversial local issue will be decided at the polls. One writer says of these alternatives to actual population: "Employment of these modifications of the term 'population' tends to distort equalities of representation. Metropolitan areas which have highly mobile populations may well be penalized under a system that uses registered or qualified voters as the base." (Commission Report, 1962, Page 31.)

Maine is physically a large state and one area might be visited by exceedingly bad weather conditions on election day while another area might have favorable weather conditions and, therefore, produce a larger percentage of its inhabitants at its polls. This objection to the use of actual votes for apportionment purposes can be met, however, by using as a standard for each community the average number of votes cast in that community for governor in the preceding three gubernatorial elections. Not only would such a standard by averaging among three elections guarantee greater fairness, but it would add to the importance of each election and provide an incentive for Maine citizens to perform their extremely important obligation of voting in all elections.

The Commission believes that an advantage does exist in the use of the average number of votes cast for governor as the standard to be used in determining representation in the state legislature.

However, the Commission believes that a standard using the number of inhabitants, while not as accurate, is also acceptable, and believes that the choice between those two standards should be determined by the legislature.

If the standard is to be the number of inhabitants in a community, then we believe that the legislature should be authorized to exclude from its count the number of inhabitants in any district inmates of mental and penal institutions, members of the armed forces temporarily stationed in the district and having no settled residence there, families of armed forces personnel having no such settled residence, college students in the district for purposes of attending an educational institution, and other classes of people physically present in the district but without, in fact, being residents or inhabitants of the State.

Responsibility to Apportion

The Commission also recommends that changes be made in the constitution covering the authority of the legislature to make the apportionment. The population of Maine will increase over the years and further major population shifts will occur. It is always difficult and sometimes impossible for elected officials to amend the statutes in such a way that some of those making the changes shall no longer be in office. It is the opinion of the Commission that reapportionment in this state should be done by the legislature when the legislature desires to perform this function. It is also the Commission's opinion that if the legislature does not act within a reasonable time that reapportionment should be carried through by the governor with an ultimate direction that if both the legislature and the governor fail to act, then reapportionment shall be the responsibility of the Supreme Judicial Court.

Form of Resolve

Attached hereto and marked "Exhibit A" is a form of resolve which we recommend for adoption by the legislature and submission to the people as a new Article IV, Part First of the constitution.

Also submitted herewith is an alternative provision for Section 2 of Article IV, Part First, which provides for reapportionment to be based on the number of inhabitants in the State (with certain exclusions) rather than on the number of votes for governor.

Apportionment of the Maine Senate

Apportionment of the Maine state senate is based on population of the various counties according to the Federal census. The legislature has no discretion in determining population for the purposes of apportioning senators. Each Maine county is entitled to at least one senator. In addition, if a county has more than 30,000 inhabitants and less than 60,000 inhabitants, it shall have one additional senator. If a county has more than 60,000 inhabitants but less than 120,000 inhabitants, the county is entitled to a total of three senators. Counties having more than 120,000 inhabitants but less than 240,000 inhabitants are entitled to four senators.

Piscataquis County had a population of 17,379 in 1960, Lincoln County had 18,497 inhabitants in that year and Franklin County had only 20,069 inhabitants. On the other hand, Cumberland County had 182,751 inhabitants which would have entitled it to ten senators if the apportionment of senate seats were based on the number of inhabitants represented. Put another way, since Cumberland

County has ten times the population of Piscataquis County or of Lincoln County, it should, based solely on population, be entitled to ten times the voting strength of these counties in the senate. Measured solely by population, there is inequity in the present apportionment of the Maine senate.

The Maine senate now has 34 members. As reapportioned in 1961, 17 senators are elected by the eleven counties having the smallest number of inhabitants. The total population of these smallest counties is 365,759. In contrast, the remaining one-half of the state senate, seventeen senators, is elected by the state's five largest counties which together have a population of 603,713 inhabitants. Thus, in round figures, slightly more than one-third of the inhabitants of the state select one-half of the senators.

The inequality of representation within the Maine senate has increased markedly over the years. In 1930 the average value of the vote for a senator in Maine's five smallest counties was 133 compared to an average value of the vote in Cumberland County of 72. In 1960 based on the census of that year but without regard to the reapportionment which took place in 1961, the average value of the vote for senator in Maine's five smallest counties was 145, while the value of the vote in the three largest counties as a percentage of the state-wide average was 71. (See Chart No. 3)

There is no agreement at present whether the equal protection clause of the Federal Constitution requires both houses of a bicameral state legislature to be apportioned on the basis of population. Some courts have held that both houses must be so apportioned. Still other decisions can be found which indicate that other considerations, in addition to population, may be taken into account in making an apportionment of both houses of a bicameral legislature. As of now, there is no certainty as to the manner in which the law in this area will be resolved. It does appear certain, however, that any formula for apportionment of a house of a bicameral legislature must be established on a ational basis and must be calculated to give the same weight in both rural and urban areas to the various items included in the formula.

Solicitor General Cox writing in the August, 1962, issue of the American Bar Association Journal made the following comments concerning the extent of departure from per capita equality which might pass the requirements of the Fourteenth Amendment. The Solicitor said:

> "In **Baker v. Carr** we also argued that the starting point in determining the constitutionality of any apportionment should be per capita equality of representation and that any serious departure from this standard is invalid unless shown to have a rational justification. Both points were largely based upon history, for history is a powerful influence in constitutional law. State constitutions reflect the extent to which the idea of equality of voting power is imbedded in our political heritage, as I indicated above. They also suggest some of the justifications for diverging from exact numerical equality—the claims of historically separate units such as towns and counties to have equal recognition, the desirability of distributing political power geographically, the need to prevent a single large city or two from dominating an entire state; in New Hampshire, seats in the Senate are allocated in the

ratio of direct taxes paid. I do not mean to suggest how the question should be decided, but it would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions **provided that the departure from equal representation in proportion to the population is not too extreme.** (Am. Bar Asso. J. V. 48 P 712)

Many states do recognize that items other than population or voting strength may be included in a formula for the purpose of apportioning at least one house of a state legislature. Apportionment formulas include, in addition to population, acreage and governmental subdivisions including towns and counties. New Hampshire recognizes taxes paid. There may be other elements of measurement which could be included in a formula. All of the decisions in the field however, emphasize that there must be a logical basis for the adoption of any particular formula.

Your Commission believes that a new formula should be adopted for apportioning the Maine Senate. Representations have been made to the Commission that county lines should be entirely disregarded in the creation of a new formula for the senate. It has been suggested that the new districts should be as equal as possible in number of inhabitants or in number of voters if the latter is to be used for apportionment purposes. Strong arguments were made that the ideal formula for Maine would be to provide for a senate of 30 members, each senator to be elected from a senatorial district composed of five contiguous representative districts, the senatorial districts so created to be as compact as possible. The Commission recognizes the sound basis of this position. However, after extensive discussion on this point, the Commission concluded that a formula for the apportioning of the Maine senate should give some recognition to Maine's counties and county boundaries, to the different territorial and geographical interests of people living in the different sections of this large state and to the facts of history. The Commission is of the opinion that a formula giving recognition to these points as well as to the number of individuals to be represented by each senator will meet the tests of fairness which are now developing in the apportionment field and which will in the next few years be worked out by innumerable court decisions.

The Commission, therefore, recommends that the constitution be rewritten to provide that the senate of the State of Maine be composed of 31 members, that sixteen of these members be elected as senators from the 16 counties, each county being treated as a senatorial district and being entitled to elect from the county at large a single senator. The fifteen additional senators would be elected from senatorial districts, each district to be composed of ten districts from which members of the house of representatives are elected. The ten representative districts forming a senatorial district would be contiguous and insofar as possible would follow county, city and town lines. Attached hereto, marked Resolve C is a proposed amendment to the constitution which would make effective the recommended changes in the composition and method of electing the Maine senate.

This formula if approved would keep the senate at about its present size. It would guarantee that the inhabitants of each county would have at least one senator. In addition, the inhabitants of each senatorial district would vote for a senator from that district so that each Maine voter would vote for two, but only two senators. Now, many Maine voters are entitled to vote for only a single senator, while others vote for as many as four senators.

Electing fifteen senators from senatorial districts instead of the county as a whole would further insure fairness of representation. In Cumberland County and in other counties containing large cities, the senators would not all come from the large population areas but would be scattered through the entire area of the county.

Legislature Should Act

The providing of new apportionment standards for Maine's two legislative houses is a difficult and demanding task. Since becoming a state in 1820, Maine has been blessed with good state government. It cannot be demonstrated that existing apportionment formulas have resulted in legislation which discriminates against any of our citizens. It is, perhaps, unfortunate that the present provisions for apportioning seats in the legislature must be changed.

None, however, can be so lacking in appreciation of present-day developments as to claim that a change is not now required. We believe that the necessity for change must be recognized by the legislature. Necessary Constitutional changes should be voted by the 101st Legislature and submitted to the people.

As the Solicitor General of the United States pointed out in the article from which we have previously quoted, fair apportionment will strengthen responsible government at the state and local level. Mr. Cox stated:

> "Despite the clear mandate in their own constitutions many states have failed for many years to reapportion seats in the legislature. The failure of state governments to meet modern problems and majority needs, especially the burgeoning problems of urban and metropolitan regions, is partly the result of the fact that the majority of the people, even large majorities, do not control the legislature. The failure leads to public cynicism, disillusionment and loss of confidence. Reapportionment would be one of the best methods of encouraging vigorous and responsible state and local government and thus reversing the tendency of the cities to look to the national government for progressive solutions. But for a time, all the local and political avenues were closed." (American Bar Association Journal, volume 48, page 711)

There are two other approaches which could be taken in attempting to solve Maine's apportionment problem. The legislature could take no action, leaving the drawing of a new apportionment formula to a Federal or state court or the legislature could call a constitutional convention and refer the problem to such a convention.

We believe, however, that it is the legislature itself which is best equipped to apply recent decisions and developments in the apportionment field to the facts of

population, geography and history which exist in this state. We have every confidence in the capacity, the ability and the desire of the 101st Legislature to meet our existing apportionment problems. We are certain that a solution worked out by this legislature will be good for Maine and all of its citizens.

March 18, 1963

Emery O. Beane, Jr.
John P. Carey
Carleton E. Edwards
Robert A. Marden
Edwin R. Smith
Stanley G. Snow
George D. Varney
John F. Ward
Robert M. York
Fred C. Scribner, Jr.,
President

Exhibit A.

Excerpt from report of the Joint Select Committee on Constitutional State Reapportionment of the 100th Legislature

County Reapportionment

The intra county reapportionment is relatively simple only with respect to the mathematics. However, it seems pointless to summarize that phase of the reapportionment task until there is reasonable agreement on where the 151 representatives shall be assigned.

As an indication of how this phase of reapportionment may be worked out, Androscoggin is used as an example and the example assumes that Androscoggin will continue to have 13 members of the House of Representatives.

County Calculations

Total population, 86,312, divided by 13, the number of representatives to which Androscoggin Cornty is entitled, is 6,639.

Auburn, having more than 3 x 6,638 (19,917) but less than 4 x 6,639 (26,566) would continue with 3 representatives.

Lewiston, having more than 6 x 6,639 (39,843) but less than 7 x 6,639 (46,473) would be entitled to 6 representatives.

There being no other city or town with a population of 6,639, the remaining number of representatives, 13 less the 3 for Auburn and the 6 for Lewiston, leaves 4 for the remaining communities in Androscoggin County.

These remaining towns, now made up of four districts, appear to be entitled to four representatives. The total population of the remaining towns, 12 in num-

ber is 21,159. If these four districts are to be continued each district should contain as near as may be to 21,159 divided by 4 or 5990. The Androscoggin delegation will, no doubt, undertake the county task, or the Committee might wish to meet with interested persons in trying to work out the problem. All of the data in this example assumes that the Androscoggin County total will remain at 13.

ANDROSCOGGIN COUNTY

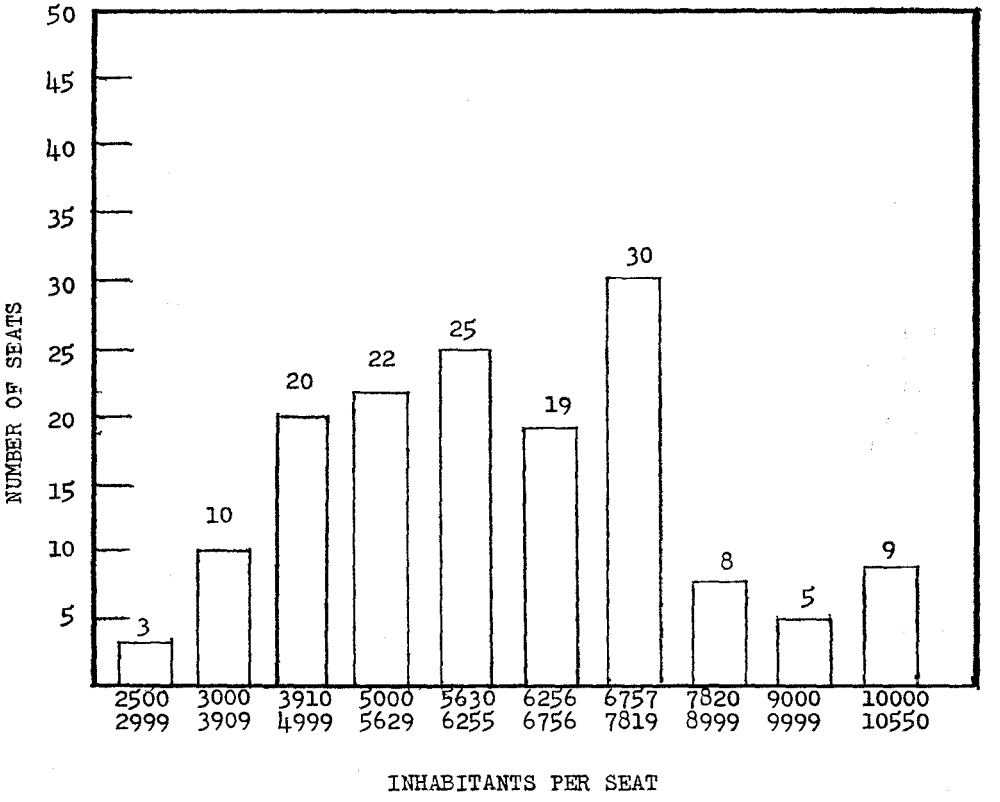
1960 Population—86,312
1950 Population—83,594
Gain 2,718 3.3%

Present Class	Population Data 1960	1950	Population per Rep., 100th Legis. 1960	1950
(3)				
Auburn	24,449	23,134	8,150	7,711
(5)				
Lewiston	40,804	40,974	6,801	8,195
(1)				
Lisbon	5,042	4,318	6,128	5,368
Durham	1,086	1,050		
	6,128	5,368		
(1)				
Livermore	1,363	1,313	6,596	6,384
Livermore Fls.	3,343	3,359		
Turner	1,890	1,712		
	6,596	6,384		
(1)				
Mechanic Fls.	2,195	2,061	4,512	4,314
Minot	780	750		
Poland	1,537	1,503		
	4,512	4,314		
(1)				
Greene	1,226	974	3,823	3,420
Wales	488	437		
Leeds	807	797		
Webster	1,302	1,212		
	3,823	3,420		

Chart No. 1

Distribution of Seats in Maine House of Representatives
According to the Number of Persons Represented in Each.

1960 Census as adjusted for use in 1961 Apportionment.



Ideal Number of Persons Per Seat 6255

Comments re Charts No. 2 and 3:

The attached charts giving the relative value of the right to vote in the various counties in the State of Maine measure the amount of deviation in the population size of legislative districts from the ideal norm for legislative districts in each house of the Maine legislature.

As has been pointed out in our report, based on the 1960 census as adjusted for use in the 1961 apportionment, each member of the Maine House should represent 6,255 inhabitants. Such representation constitutes the ideal norm for the Maine House at this time.

If all of Maine's districts were of this size, the value of the vote possessed by each inhabitant would be the same and each vote would have a value of one. When a district contains fewer than the ideal Maine state-wide average of 6,255 inhabitants, the district is over represented. Districts with more than 6,255 inhabitants are under represented.

In the attached charts, counties shown as having an "Index Value of the Right to Vote" above one hundred have more than their fair share of the voting strength. On the other hand, counties having an "Index Value of the Right to Vote" of less than one hundred, have less than their fair share of the State's voting strength.

* Chart No. 2 appears at page 37 of volume one of the work entitled "Devaluation of the Urban and Suburban Vote" written by Paul T. David and Ralph Eisenberg published in the fall of 1961. Chart No. 3 appears at page 71 of volume two of the "Devaluation of the Urban and Suburban Vote" also compiled by Professors David and Eisenberg. Volume two was printed and distributed in 1962.

CHART NO. 2

MAINE

Census Year	Counties by Categories of Population Size			Proportionate Share of Voting Strength of Legislature: Number of Members		Average Values of the Vote for Representation As Percentages of the State-Wide Average		
	Category	Number	Total Population in Census Year	Lower House	Upper House	Lower House	Upper House	Legislature
1960	Under 25,000	5	101,370	19.00	5.00	120	145	133
	25,000-99,999	8	452,734	73.00	18.00	103	117	110
	100,000-499,999	3	415,161	59.00	10.00	91	71	81
	500,000 and over	0	0	0	0	-	-	-
	Totals and Averages	16	969,265	151.00	33.00	100	100	100
1950	Under 25,000	5	99,901	19.00	5.00	115	139	127
	25,000-99,999	9	536,474	88.00	21.00	99	108	104
	100,000-499,999	2	277,399	44.00	7.00	96	70	83
	500,000 and over	0	0	0	0	-	-	-
	Totals and Averages	16	913,774	151.00	33.00	100	100	100
1930	Under 25,000	5	90,883	19.00	5.00	110	133	122
	25,000-99,999	10	571,895	108.00	24.00	100	101	101
	100,000-499,999	1	134,645	24.00	4.00	94	72	83
	500,000 and over	0	0	0	0	-	-	-
	Totals and Averages	16	797,423	151.00	33.00	100	100	100
1910	Under 25,000	5	99,179	21.00	5.00	104	121	113
	25,000-99,999	10	531,178	107.00	22.00	99	99	99
	100,000-499,999	1	112,014	23.00	4.00	101	86	94
	500,000 and over	0	0	0	0	-	-	-
	Totals and Averages	16	742,371	151.00	31.00	100	100	100

Sources on apportionment: Resolves 1911, chs. 133, 226; Resolves 1931, chs. 114, 127; Resolves 1951, ch. 132; Resolves 1955, ch. 24.

CHART NO. 3

Index Values of the Right to Vote for Members of the Legislature by Counties, 1910, 1930, 1950, 1960 as Percentages of the State-Wide Average

State Maine

County		1910			1930			1950			1960		
Name	1960 Pop. (Thousands)	Lower House	Upper House	Legis-lature	Lower House	Upper House	Legis-lature	Lower House	Upper House	Legis-lature	Lower House	Upper House	Legis-lature
Androscoggin	86	99	80	89	96	102	99	94	99	97	97	102	99
Aroostook	106	99	96	97	96	83	89	95	86	91	91	83	87
Cumberland	183	101	86	93	94	72	83	97	65	81	95	64	80
Franklin	20	103	125	114	106	121	114	117	134	125	128	146	137
Hancock	32	97	135	116	103	157	130	113	173	143	119	182	151
Kennebec	89	102	114	108	97	103	100	94	99	96	94	99	96
Knox	29	102	83	92	114	87	101	108	98	103	112	103	108
Lincoln	18	108	131	120	102	156	129	101	154	127	104	159	131
Oxford	44	95	66	80	102	117	109	109	125	117	116	132	124
Penobscot	126	98	84	91	97	78	88	95	77	86	86	70	78
Piscataquis	17	99	120	110	116	133	124	130	149	139	148	169	158
Sagadahoc	23	106	129	117	125	143	134	116	132	124	113	129	121
Somerset	40	95	132	113	95	124	109	106	139	123	113	148	130
Waldo	23	105	102	104	104	119	112	112	128	120	113	130	122
Washington	33	103	112	107	112	128	120	103	157	130	117	179	148
York	99	100	105	103	101	99	100	97	89	93	97	89	93

RESOLVE A

RESOLVE, Proposing an Amendment to the Constitution Relating to the Apportionment, Election and Powers of the House of Representatives.

Constitutional amendment. Resolved: Two-thirds of each branch of the Legislature concurring, that the following amendments to the Constitution of this State be proposed:

Constitution, Article IV, Part First, Sections 2 to 8, repealed and replaced. Sections 2 to 8 of Part First of Article IV of the Constitution are repealed and the following enacted in place thereof:

'Section 2. The house of representatives shall consist of one hundred and fifty representatives, to be elected by the qualified electors, for a term of two years from the first Tuesday of January in the year next following their election. For the purpose of electing representatives, the state shall be divided into one hundred and fifty representative districts of compact territory following, insofar as possible, city, town and ward lines. Districts shall be determined according to the average number of votes cast for governor by the electors resident in each district in the three gubernatorial elections held immediately preceding the year in which the state shall be divided into such districts. Each district, so far as practicable, shall have the same average number of votes as each other district, provided that the district having the largest average number of votes shall not exceed the district with the smallest average number of votes by more than twenty percent.

Section 3. The legislature, within ninety days from the adoption of this amendment, and in the year of our Lord one thousand nine hundred and seventy-one and in every tenth year thereafter, shall make the division required under this article. In the event that the legislature shall fail to make a division, the governor shall, within sixty days following the end of the period or year in which the legislature is required to act, but fails to do so, divide the state into such districts. The governor may appoint qualified electors, in such number as may be fixed by law, to assist him in making the division, and the division once made by him, shall have the force and effect of law.

The supreme judicial court upon the petition of any five qualified electors, and in the exercise of exclusive jurisdiction, shall review the division thus made, either by the legislature or the governor, and shall make such changes in the same as shall be necessary to make it comply with this constitution. If the legislature and the governor shall both fail to divide the state into districts within the times provided for each to act, then the supreme judicial court shall, upon the petition of any five qualified electors, make the required division.

Section 4. No person shall be a member of the house of representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty-one years, have been a resident in this state one year; and for the three months next preceding the time of his nomination shall have been, and, during the period for which he is elected, shall continue to be a resident of the district which he represents.

Section 5. The meetings within this state for the choice of representatives shall be warned in due course of law by qualified officials of the several towns and cities seven days at least before the election, and the election officials of the various towns and cities shall preside impartially at such meetings, receive the votes of all the qualified electors, sort, count and declare them in open meeting; and a list of the persons voted for shall be formed, with the number of votes for each person against his name. Cities and towns belonging to any class herein provided shall hold their meetings at the same time in the respective cities and towns; and such meetings shall be notified, held and regulated, the votes received, sorted, counted and declared in the same manner. Fair copies of the lists of votes shall be attested by the city and town clerks, and the city and town clerks respectively shall cause the same to be delivered into the secretary of state's office not less than fifteen days after the day on which election is held. The governor and council shall examine the returned copies of such lists and twenty days before the first Wednesday of January biennially, shall issue a summons to such persons as shall appear to have been elected by a plurality of all votes returned, to attend and take their seats. All such lists shall be laid before the house of representatives on the first Wednesday of January biennially, and they shall finally determine who are elected. The electors resident in any city may at any meetings duly notified for the choice of any representative, vote for such representative in ward and precinct meetings as the case may be.

Section 6. Whenever the seat of a member shall be vacated by death, resignation or otherwise, the vacancy may be filled by a new election.

Section 7. The house of representatives shall choose their speaker, clerk and other officers.

Section 8. The house of representatives shall have the sole power of impeachment, provided that the trial of all persons impeached shall be conducted by the senate.'

RESOLVE B

RESOLVE, Proposing an Amendment to the Constitution Affecting the Election, Powers and Apportionment of the House of Representatives.

Constitutional amendment. Resolved: Two-thirds of each branch of the Legislature concurring, that the following amendments to the Constitution of this State be proposed:

Constitution, Article IV, Part First, Section 2, repealed and replaced. Section 2 of Part First of Article IV of the Constitution is repealed and the following enacted in place thereof:

'Section 2. The House of Representatives shall consist of one hundred and fifty Representatives, to be elected by the qualified electors, for a term of two years from the first Tuesday of January in the year next following their election. For the purpose of electing representatives, the State shall be divided into one hundred fifty districts of compact territory following, insofar as possible, city, town and ward lines. Districts shall be determined according to population so

that each district so far as practicable is of equal population with each other district, provided that the district having the largest population shall not exceed the district with the smallest population by more than tweny percent.

Military personnel, their families and students, not having a legal residence in a district, foreigners not naturalized and persons in mental hospitals and correctional institutions shall be excluded in determining the population of a district.'

(Remainder same as Resolve A)

RESOLVE C

RESOLVE, Proposing an Amendment to the Constitution Relating to the Apportionment, Election and Powers of the Senate.

Constitutional amendment. Resolved: Two thirds of each branch of the Legislature concurring, that the following amendment to the Constitution of this State be proposed:

Constitution, Article IV, Part Second, Sections 1 to 5, repealed and replaced. Sections 1 to 5 of Part Second of Article IV of the Constitution are repealed and the following enacted in place thereof:

'Section 1. The senate shall consist of thirty-one senators to be elected at the same time and for the same term as the representatives by the qualified electors of the districts which they shall respectively represent. For the purpose of electing senators, there shall be thirty-one senatorial districts; each county shall constitute one senatorial district and the remaining fifteen districts shall be composed of ten contiguous representative districts combined in such a manner as to form a compact senatorial district.

Section 2. The legislature, within ninety days from the adoption of this amendment and in the year of our Lord one thousand nine hundred seventy-one and in every tenth year thereafter, shall make the division of the state into senatorial districts required under this article. In the event that the legislature shall fail to make a division, the governor shall, within sixty days following the end of the period or year in which the legislature is required to act but fails to do so divide the state into such districts. The governor may appoint qualified electors, in such number as may be fixed by law to assist him in making the division, and the division once made by him shall have the force and effect of law.

The supreme judicial court, upon the petition of any five qualified electors, and in the exercise of exclusive jurisdiction, shall review the division thus made, either by the legislature or the governor, and shall make such changes in the same as shall be necessary to make it comply with this constitution. If the legislature and the governor shall both fail to divide the state into districts within the times provided for each to act, then the supreme judicial court shall upon the petition of any five qualified electors, make the required division.

Section 3. The meetings within this state for the election of senators shall be notified, held and regulated and the votes received, sorted, counted, declared

and recorded, in the same manner as those for representatives. Fair copies of the lists of votes shall be attested by the clerks of the cities and towns or other duly authorized officials and sealed up in open meetings and such officials shall cause said lists to be delivered into the secretary of state's office within fifteen days after the date on which the election is held.

Section 4. The governor and council shall, as soon as may be, examine the copies of such lists returned into the secretary of state's office, and twenty days before the said first Wednesday of January, issue a summons to such persons, as shall appear to be elected by a plurality of the votes in each senatorial district, to attend that day and take their seats.

Section 5. The senate shall, on said first Wednesday of January, biennially, determine who is elected by a plurality of votes to be senator in each district. All vacancies in the senate arising from death, resignation, removal from the state or like causes, and also vacancies, if any, which may occur because of the failure of any district to elect by a plurality of votes the senator to which said district shall be entitled shall be filled by an immediate election in the unrepresented district. The governor shall issue a proclamation therefor and therein fix the time of such election.'

JUDICIAL REVIEW OF STATE APPORTIONMENT PLANS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

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School of Law

TABLE OF CONTENTS

INTRODUCTION

Prior to the decision of the United States Supreme Court in the case of **Baker v. Carr**, there was considerable doubt as to the jurisdiction of federal courts to hear suits challenging state legislative apportionment. The principal reason advanced for denying jurisdiction was that the issues in such cases were "political"; that is, they involved matters which were traditionally left to legislative policy making or partisan politics. It was also felt that the judiciary could not devise standards for judging the part that numerical equality among voters should play as a criterion for the allocation of representative strength in a legislature. In **Baker v. Carr** the Supreme Court decided that federal courts did have the power to hear such cases and that there were workable standards of judgment on which to base a decision concerning the compatibility of any state plan with the demands of the Equal Protection Clause of the Federal Constitution. The decision has resulted in the acceptance by numerous federal district courts and, to some extent, state courts, of jurisdiction in these cases and the bringing of them to trial and judgment.

This memorandum will examine, in the light of **Baker v. Carr** and decisions following it, the reasons for jurisdictions, the quantum of injury, factual proof of harm and the justifications advanced by the States, and the coercive remedies used by the courts. Some attempt will be made to relate this experience to the apportionment situation in Maine. Any conclusions must be, of necessity, provisional since many of the important cases in this area are being reviewed by the United States Supreme Court. There are, however, several significant factors which can be gathered from the decisions and which can reasonably be assumed to be a permanent part of the developing law in this area.

1. Standing of a citizen to challenge state legislative apportionment in federal courts as a violation of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution.

In **Baker v. Carr**, 82 S. Ct. 691 (1962), several qualified voters, residents of four Tennessee counties, instituted an action in the United States District Court for the Middle District of Tennessee against the Tennessee Secretary of State and other state officials, alleging that by means of a 1901 state statute apportioning the members of the General Assembly among the state's 95 counties, the plaintiffs and others similarly situated, were denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States. The injury alleged was the debasement of their vote because of the gross disproportion of representation to voting population which placed plaintiffs in a position of inequality **vis a vis** voters in irrationally favored counties.

The trial court held that it did not have jursidiction to consider the subject matter of the complaint, that is, that the court was not empowered to hear a complaint of this nature. It also held that the matter was not suited to judicial adjustment and dismissed the complaint. The plaintiffs appealed to the Supreme Court of the United States. The Supreme Court held that the dismissal was error and remanded the case to the district court for trial. Justices Frankfurter and Harland dissented.

The court held that the claim arose under the Federal Constitution and, therefore, was a matter to which the judicial power extended. Moreover, the matter fell within the coverage of the Civil Rights Acts which gave to the federal district courts jurisdiction to hear civil actions ". . . to redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States"

(28 U. S. C. § 1343 (3)). The court said:

> We hold that the appellants do have standing to maintain this suit . . . Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment . . . A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . They are entitled to a hearing and to the District Court's decision on their claims. '**The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury** . . .' Marbury v. Madison 5 U. S. (1 Cranch) 137, 163. (emphasis added)

II **Legal norms and other relevant factors involved in a judgment by a federal court of whether or not a particular state legislative apportionment violates the equal protection clause of the Fourteenth Amendment.**

(A) Legal Norms

In **Baker v. Carr** the Supreme Court spoke of the citizen's injury being a dilution of his vote to a substantial extent — "invidious discrimination." Upon the establishment of such an injury the particular court hearing the claim must decide whether or not the justifications asserted by the States for gross disparities in voting strength reflects "**no** policy, but simply arbitrary and capricious action." In the decisions following **Baker v. Carr** there have been several amplifications of these ideas.

The first concerns the burden of proof: assuming a serious inequality of voting strength is established, what burden of justification does the state have in showing that there are rational grounds for the discrimination? Generally, in equal protection cases, a state statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it. However, the more basic is the right claimed to have been injured, the more carefully will the court scrutinize the possible reasons for the state discrimination. The majority of the Supreme Court did not indicate which of the two approaches should be followed in these cases: Mr. Justice Harlan, dissenting, assumed it would be the former. However, the vast majority of cases subsequent to **Baker v. Carr** have taken the latter view — assumed that the injury was serious and carefully scrutinized state justifications for the discrimination. This is important because in nearly every case in which the decision has gone against the state it has been because the state **has failed to prove** why any discriminations were necessary. This suggests that, on the level of legislative judgment, any reapportionment plan which results in some inequalities of representation should carefully consider and make explicit the reasons for such discrepancies.

A related point which has emerged from many of the post **Baker v. Carr** cases is that relevant factors which may be advanced to justify a dilution of voting strength cannot, either separately or collectively, overcome the basic principle that every qualified voter has the civil right to cast an effective ballot (See, e.g. **Thigpen v. Meyers** 31 L.W. 2305 — 12/12/62 — D.C.D. Washington 1962). These developments give a clue to the general legal norm which has evolved from these decisions.

While there is some language that at least one house must be based "fully on numbers of qualified voters without regard to any factor" (e.g. **Baker v. Carr**, 206 F (S) 341, 349 D.C. Tenn. 1962 — on remand from the Supreme Court) the general consensus is not quite as strict. The approach is rather that

In each house of a state legislature there should be substantial equality of population representation, that some disparities are permissible in either house (with more leeway in the Senate than the House) and that any deviations from the norm of equality of population representation must be justified by clear and explicit proof; such justifications being subject to the superior right of every citizen to cast an effective ballot.

(see: **W.M.C.A. v. Simon** 208 F (S) 368 (1962); **Moss v. Burkhart** 207 F (S) 885, 898 (1962); **Sims v. Frink** 208 F (S) 431, 439 (1962); **Mann v. Davis** 31 L.W. 2263 (1962)

This is in accord with the brief indication of norms of judgment expressed by the Supreme Court in **Baker v. Carr**, such as whether a discrimination in representation, on any particular facts "reflects no policy, but simply arbitrary and capricious action" or whether a state has made an "invidious discrimination." "Universal equality is not the test; there is room for weighing" (Justice Douglas, concurring) unless ". . . the total picture reveals incommensurables of both magnitude and frequency . . ." (Justice Clark, concurring).

B. Factual Considerations

Several factual considerations have entered into the process of making a determination of whether the plaintiffs have established a case of invidious discrimination. It should be remembered that the courts consider these factual matters in the light of the legal norms explained above and with a view to preventing a disparity which is so substantial that a citizen cannot cast an effective vote.

The factual considerations fall into three categories which somewhat overlap but which are distinguishable for purposes of analysis. They are: (1) comparative inequality of representation; (2) practical control of the legislature; (3) population increases and shifts. Each will be briefly illustrated and the several factors will be applied to the present situation in Maine.

1. **Comparative Inequality of Representation**

The courts have compared the relative voting strength of groups within a single chamber of the legislature by noting the number of people represented by each representative. There has been no fixed mathematical formula for deciding what is a gross disparity, but there is some indication that, in the State

Senate a disparity of more than 2 to 1 would be unconstitutional while a lesser gap in the House would not meet the demands of the equal protection clause. Most of the decisions have been concerned with greater variations, such as 4 or 5 to 1 or even as high as 20 to 1. With respect to the lower limits, in **Baker v. Carr** 206 F (S) 341 (D. C. Tenn. 1962) on remand from the Supreme Court, the trial court found constitutionally objectionable a plan which gave one county having 11,000 voters a single vote and another county of 14,000 voters a vote only when joined in a floterial district with a county of 32,000. In **Scholle v. Hare** 116 N.W. 350, 355 (1962) the Michigan Supreme Court, in finding a Senate Districting Plan unconstitutional, held that any plan which permitted a discrepancy of more than 2 to 1 would be necessarily unconstitutional; as to less than that amount it would withhold judgment. But see Maryland Committee for **Fair Rep. v. Tawes** 184A^2 715, where the Court of Appeals of Maryland permitted substantial senatorial disparities. It is my opinion that this decision will be reversed by the Supreme Court. (See also: **Sobel v. Adams** 208 F (S) 316 (D. C. Florida 1962).) In **Mann v. Davis** 31 L.W. 2263 (D. C. Virginia 1962) the court struck down Senate provisions which gave a 2 to 1 advantage to rural areas, even though a University of Virginia Study had placed that State eighth in the nation in population representation.

A question may arise as to whether the court will endlessly compare and re-compare voting districts to find inequalities. The answer may be found by considering the problem from the viewpoint of **legislative control.**

2. Practical Control of the Legislature

The **legislative control** factor refers to the inquiry that courts make to see what control an underpopulated voting bloc actually can exert in the legislature. In **Tombs v. Fortson** 205 F (S) 248 (D.C.N.D. Georgia 1962) the federal court found invidious discrimination in a Georgia representation plan which placed control (constitutional majority) of the House of Representatives in 103 of the least populous counties; control of the Senate in counties representing 21.4% of the state's population. The court also noted that the 69 least populous counties had sufficient control to prevent constitutional amendments. In **Sims v. Frink** 208 F (S) 431 (D. C. Alabama 1962) the federal district court rejected a proposed constitutional amendment which, if adopted, would permit senators elected by 20% of the population to block effectively any proposed legislation and senators elected by 14% of the population to prevent the submission of future amendments of the State Constitution to the people. In **Thigpen v. Meyers** 31 L. W. 2305 — 12/12/62 — (D. C. D. Washington 1962) the court found an unexplained disparity of sufficient magnitude to rebut a presumption of constitutionality where, in the Washington House, voting districts representing 38% of the population had 51 of the total 99 seats and, in the Senate, 25 districts with 35.6% of the population held the majority. In its opinion the court indicated that whatever justifications could be advanced for the inequalities could not overcome the right of an individual to cast an effective ballot.

3. Population Increases and Shifts

The extent to which the population increases and shifts is an important factor because it accentuates the demand for reapportionment, calls into question state

constitutional limitations on legislative membership, and directs the court's attention to the plans a state has made for future adjustment of its apportionment to reflect the population changes. In **Moss v. Burkhart** 207 F (S) 885, 898 (D.C.D. Oklahoma on appeal, sub. nom. **Price v. Moss** 31 L.W. 3244 (Doc. Num. 688)) the court held that a seven-member ceiling in House representation for populous counties established by the State Constitution violated the Fourteenth Amendment. In Rhode Island, the State constitution placed an upper limit of one hundred members in the house and required that each city and town have at least one representative. Because of the shifts in population, many of the smaller cities and towns did not have, under 1960 census figures, enough population to meet the population factor minimum amount. The state court in **Sweeney v. Notte** 183A^2 296 (R. I. 1962) held that the state constitutional provisions on representation constituted a denial of the equal protection of the laws under the Fourteenth Amendment and that the legislature had an obligation to reapportion whenever census reports indicated that because of population shifts the prevailing apportionment no longer reflects reasonably equitable representation. In **Scholle v. Hare** 116 N.W.^{2}350 (Michigan 1962) the court found a Senate apportionment plan unconstitutional when the disparities of comparative inequality had grown in ten years from 7 to 1 to 12 to 1 because of population increases and where no provision had been made in state law for subsequent rearrangement.

APPLICATION TO MAINE

1. The House of Representatives

The state constitutional theme of population representation is offset, to some extent, by the upper limit of seven representatives placed upon cities and towns. This results in some inequalities in large cities and towns which probably would not meet equal protection standards. (See: **Moss v. Burkhart, supra**, where a federal court held a constitutional limitation of seven house representatives for populous counties to be unconstitutional).

Looking first at the larger towns and cities: in Cumberland County, the City of Portland has one representative for every 11,000 people with a constitutional limit of 7 representatives. Of the remaining 20 representatives in the county, 18 represent constituents on a population ratio which dilutes the voting strength of each Portland voter by one-half. This inequality runs from Brunswick with one representative for every 5,400 voters to the Harrison-Naples-Otisfield group of one representative for 2,372 people. The Portland voter is in a similarly unequal position with a large number of voting groups in the other counties.

The same disparities can be seen on the town-plantation level. For example, in Franklin County the Wilton-Jay group has one representative for 6,500 population, while the Rangeley-etc. group has more than a 2 to 1 advantage with one representative for 3,200 people.

Senate

Art. IV, Part II, of the State Constitution with its sliding scale of population limitations per seat is probably unconstitutional because it compels variations of Senatorial strength which are substantially unequal and does not account for

population increases. The resolve of the last legislature creating senatorial districts merely continues this inequality.

The discrepancies in the Senate are manifest. Cumberland County has 1 senator per 45,000 population, while Lincoln has one senator for 18,500, Piscataquis has one for 17,000, Hancock and Washington one for 15,000. Aroostook County has only one senator per 35,000 population which puts it at a fairly similar disadvantage when compared with the Lincoln-Hancock-Washington group. As most of these are discrepancies of better than 2 to 1, they would probably be unconstitutional under the rule in **Scholle v. Hare, supra.**

III. Remedial action taken by federal district courts to compel state legislative bodies to provide representation compatible with the equal protection clause of the Fourteenth Amendment

Once a federal district court has decided that a state apportionment plan deprives voters of the equal protection of the laws, various means are used to compel the legislature to meet the demands of the Federal Constitution.

One method has been to withhold a declaration of unconstitutionality in order that the incumbent legislature may have an opportunity to meet in special session and adopt an apportionment plan which meets the guide lines set out by the court. Under this approach the court will retain jurisdiction of the case and provide for reopening of the litigation if necessary, subsequent to the legislative session (see: **Baker v. Carr** 206 F (S) 341). If state elections are pending, the court may withhold further action until the new legislature has an opportunity to convene and reapportion (see: **Lisco v. McNichols** 208 F (S) 471) or enter a decree making the existing apportionment prospectively void so that the newly elected legislature must reapportion according to court directives (see: **Scholle v. Hare** 116 N.W.^{2} 350 — Supreme Court, Michigan).

If a legislature meets every two years, as in Maine, the court may enjoin further elections under the existing apportionment plan, which will require the present legislature to meet in special session to enact appropriate reapportionment legislation (see: **Mann v. Davis** 31 L. W. 2263 — D. C. Virginia, 1962).

If the legislature fails to act in any of these situations, it is clear that the court will then take some appropriate action either by undertaking to apportion the legislature itself (see: **Moss v. Burkhart, supra,**) or ordering state-wide elections (**Scholle v. Hare, supra**).

IV. Conclusion

With the decision in **Baker v. Carr** it is clear that the federal courts will consider the claim of any qualified voter that a state legislative apportionment plan prevents him from casting an effective vote and therefore denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution. In order to prevent a serious dilution of voting strength the courts will require that representation in both houses of a legislature be substantially apportioned on the basis of numerical equality in order that a citizen can cast an effective vote when choosing his Representatives and Senators. Using a factual guide of a less than 2 to 1 dilution of voting strength in the House of

Representatives and a limit of that ratio for the Senate, it is clear that there are inequalities in both houses of the Maine legislature of sufficient magnitude to constitute a violation of the Fourteenth Amendment. If such findings were to be made by a federal court, the legislature would probably be required to meet in special session to correct the inequalities in order to avoid the alternatives of elections-at-large or court-conducted apportionment.

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