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[Constitution Paper No.1]

REAPPORTIONMENT

A Study Guide, prepared by the League of Women Voters of Maine.

> "We, Sir, profess to be republicans; and begin our Constitution by declaring all men to be born equally free and to have equal inalienable rights and privileges. And in our apportionment of Representatives are furnishing a practical commentary upon this text. By way of illustration of what we mean by equal rights we say to the inhabitants of a large town, you have but one third as much right as the inhabitants of a small town. Three men in a large town are but equal to one in a small one."
>
> Ezekiel Whitman, Portland delegate
> Maine Constitutional Convention, 1819

THE STICKIEST WICKET

The Constitutional Convention was considering the fairest method of apportioning the new legislature. Sentiment ran high for the "town plan", the traditional New England allotment of one representative per town. Mr. Whitman proposed what his opponents abused as "the old serpent:" a district plan of representation, based on equal-population. Of all the issues involved in hammering out the Maine Constitution, legislative apportionment was the "stickiest wicket."

The interesting thing about Mr. Whitman's remark quoted above is its similarity to a statement made by a Supreme Court Justice when he handed down a decision on state legislative apportionments 145 years later, in June, 1964. The debate which is still going on is timelessly recorded in the Convention debates of 1819.

Even then, the delegates clearly saw that a limit on the size of the legislature would lead to apportionment difficulties and inequities. At the same time, an unfixed legislature, growing with Maine's population, would become increasingly unwieldy. Rural delegates, fearing the dominance of Portland, proposed to limit large towns to 7 representatives. They considered the basis of representation we now call "the sliding scale system." They weighed "corporate interests" (towns) against "popular interests." They arrived at an impasse described by John Holmes, delegate from Alfred:

> It is impossible to preserve corporate representation to its extent; restrict the number within any reasonable limits, and at the same time preserve to the people an equal representation. How is it to be done? How are these three favourite plans, at cross purposes with each other, to be accomplished to the satisfaction of the people of Maine?

What emerged out of the Debates was an apportionment which Mr. Whitman termed "a mongrel system" --- i.e., a compromise. A House of between 100 and 200 members would apportion seats every 5-10 years to reflect population increase in the counties. Towns with 1500 "inhabitants" (excepting aliens and Indians not taxed) would receive 1 representative; towns with 3750, 2 representatives; towns with 6750, 3 etc. --- a sliding scale. Towns having a population of 26,250 or more would have a fixed representation of 7 seats. Towns under 1500 population were to be classed in districts with other small whole towns to make up the population required for one representative.

The Senate would number 20-31 members, elected from equal-population districts conforming as nearly as possible to county lines.

MAINE APPORTIONMENT - 1961

By 1961, constitutional amendments had changed Maine apportionment. The former Senate system had been adopted by the House.

House

The number of seats had been fixed at 151 in 1841. Seats were allotted on the basis of a mathematical formula called the Unit Base Number (UBN), which was obtained by dividing the "adjusted" state population by the number of House seats.

$$\frac{944,511}{151} \quad \text{equals } 6255, \text{ UBN}$$

The UBN is the ideal constituency, upon which the real districts were based.

The number of seats allotted to each county was determined by dividing its population by 6255. Because of fractional remainders in some counties, 8 seats remained unassigned. These were allotted to the smallest counties ("fractional excesses over whole numbers to be computed in favor of the smaller counties," Art. IV, Part First, Sec. 3, Maine Constitution.)

Seats were then allotted within the county. Any towns with at least the UBN received seats so that towns of twice 6255 received 2 seats, etc. to the maximum of 7 seats. Distribution to the smaller towns in the county was made by using a new UBN, obtained by dividing the remainder of the county population by the remainder of the seats. Each town containing a population equalling the new UBN received one seat, or more, while towns containing less than the new UBN were grouped into compact class districts approximating the new UBN in size, and assigned one seat. County delegations of legislators did the districting.

Senate

Senate apportionment had the merit of simplicity. An unfixed Senate (consisting of 34 members) had seats assigned to the counties on the following sliding scale basis:

County Population (Federal Census)	Senators
up to 30,000	1
30,000 to 60,000	2
60,000 to 120,000	3
120,000 to 240,000	4
240,000 and over	5 (maximum)

WHAT IS EQUALITY?

In a representative democracy, apportionment of legislatures is a practical commentary on equality. But, the question remains, equality measured by which standard? There are honest, earnest differences of opinion.

Population Standard

"One man, one vote" is the slogan of those who think that equal representation means equal-population districts. If all men have equal right to equal protection of the laws, then they are also entitled to equal participation in making the laws. Critics of this standard point out that it is a practical impossibility. Population shifts render equal-population districts obsolete in a single day, no matter whether they are determined by federal census figures, "adjusted population" counts, number of qualified voters or number of votes cast in gubernatorial elections.

To counteract the effects of population mobility, students of the situation have developed standards of permissible variation in district sizes:

1. The Dauer-Kelsay measure of representativeness calculates what percentage of a state population can elect a majority (51%) of its legislature. Experts agree that although election of a legislative majority by 51% of the people is virtually impossible, election by 45% is not only possible, but a good average criterion of representativeness.

2. One district may exceed or fall below a state-wide average district size by 10-15% (percent of variation.)

3. No district with a single representative should have a population more than twice the size of another.

Limited Population

Others would go along with the population standard, but with reservations. They stress the practical difficulties of districting as well as the exigencies of party politics. Maine's sliding scale system, in which the ratio of representatives to population varies inversely with population growth, is a good example. Other methods are using area factors (see below), "freezing" districts permanently into the constitution, or fixing the size of the legislature.

Area Standard

Quite opposed to equal-population representation is area-representation. This view preserves the integrity of a governmental unit, either the town, as in New England, or more frequently, the county. The obvious example is the U. S. Senate on the federal level, and similarly the county-based constitutional provisions in Maine. Area factors in the Maine Constitution provide for limitations on the maximum number of seats from one district and guarantees of one seat to each unit.

Little Federal Plans

State legislatures which imitate our national houses, reflecting area in one house and population in the other, are said to be on a "little federal plan." This system recommends itself because of the balance it achieves between urban

interests in the population-based house and rural interests in the area-based house, Proponents of little federalism say that the system protects minorities and provides the check and balance advantageous to deliberative legislation.

The several states have traditionally adapted varieties of population and area plans for their individual legislatures. In 1960, Prof. Gordon E. Baker compiled a chart showing the range of apportionment bases in the 50 states. (Unicameral Nebraska is shown only in the total figures.)

Basis	Senates	Houses	Total
Population (including one unicameral)	19	12	32
Population, but with weighted ratios (sliding scales)	1	7	8
Combination of population and area	17	28	45
Equal apportionment for each unit (area)	7	1	8
Fixed constitutional apportionment	4	1	5
Apportionment by taxation (N. H.)	1	0	1
Total	49	49	99

MALAPPORTIONMENT IN MAINE

By 1961, some serious discriminations in legislative apportionment existed in the Maine Constitution. Dr. Eugene A. Mawhinney of the University of Maine pinpointed them in the April, 1963 Maine Managers' Newsletter.

House

1. In ascertaining "the number of inhabitants", the House customarily "adjusted" census figures by deducting military personnel plus dependents and students not having a fixed residence in Maine.[1] In the 1961 reapportionment, for example, Penobscot County sustained a 10,379 deduction from its total population of 126,346 (1960 federal census), a deduction representing students at University of Maine at Orono, and military personnel at Dow Air Force Base. Dr. Mawhinney raised these questions: how do we make the distinction between military personnel having a "fixed residence" and those residing "temporarily"? how is the total subtracted figure for any given county broken down by towns within the county? (The latter information is not available readily to the public.) On the basis of these questions, Dr. Mawhinney challenged Orono's representation.

Moreover, he raised the point that whether people are "fixed" residents or not, they contribute to governmental problems and therefore ought to be represented in government.

2. The seven-man limit on representation from any single town or city obviously discriminated against Portland, which, even on an adjusted population basis, was entitled to 11 seats in the House.

3. Designation of "fractional excesses" discriminated against counties with the larger fractional excesses---Kennebec, Aroostook, Lincoln and Cumberland Counties in the 1961 reapportionment.

4. The use of two UBNs in computing intra-county seats put constituencies on unequal basis and favored smaller towns and rural areas.

MALAPPORTIONMENT IN OTHER STATES

In fact, malapportionment was the rule rather than the exception in state legislatures all over the country. The four most populous counties in Texas, containing 29% of the state's population elected only 13% of the Senate. Florida's nine most populous counties, containing 60% of the state's population elected 24% of its Senate. (Both states had constitutional prohibitions against more than one senator to a county.) In Michigan's "frozen" upper house, Wayne County, with 38% of the state's population, was limited to 21% of its seats. Such inequities continued into 1962 despite some reapportionments in the states upon receipt of the 1960 census figures.

In 1962, only 6 states had both houses apportioned so that 40% or more of the populations could elect a majority of legislators. Only 20 states had one house apportioned on the above basis. In 13 states, one-third or less of the population elected majorities in both houses. California's Senate constituencies ranged from 14,294 to 6,038,771, Nevada's Senate districts from 568 to 12,016, and Vermont's House, the least representative, from 38 to 33,155.

Professors David and Eisenberg, in an exhaustive statistical analysis of the relative values of votes in each county of the 50 states (the ideal value being 100%) concluded:

> "The most general statement that can be made on the basis of this research is thus to the effect that as of 1960, the average value of the vote in the big city was less than half the average value of the vote in the open country, so far as electing members of the state legislature is concerned."

While they admitted that county figures did not always reflect the fact, big cities had been losing population to big suburbs. Substantial evidence pointed to the fact that while city underrepresentation actually had decreased, suburban underrepresentation had increased markedly. They continued:

> "The progressive disenfranchisement of the urban voter has been going on in the country at large for at least 50 years on a scale that suggests that only some decisive change in the system could bring a general reversal."

Meantime, trends in new or revised state constitutions maintained status quo. Alaska's 1956 constitution provided for a Senate based on area with population factors, and a House on civilian population. Hawaii's 1950 constitution fixed Senate districts and provided a House based on population, with a minimum of one legislator per county. Michigan's newly revised constitution has a Senate formula giving 80% weighing to population, 20% weighing to area, and a House based on strict population. In Nebraska's unicameral legislature, a constitutional amendment was proposed, adding area factors to a House based on population since its inception in the 1930's.

SUPREME COURT IN THE POLITICAL THICKET

Professors David and Eisenberg had not long to wait for their "general reversal."

The Supreme Court had traditionally preferred to keep out of what it called the "political thicket" of reapportionment cases. "The Constitution has left the performance of many duties of our governmental scheme to depend... on the vigilance of the people in exercising their political rights," summed up Justice Felix Frankfurter for the majority in Colegrove v. Green (1946); thus the Court refused jurisdiction over a Congressional reapportionment case. A year later it refused to enter into state legislative reapportionment in Colegrove v. Barrett.

But in 1962, the Court charged straight into the political thicket in Baker v. Carr,[2] a Tennessee apportionment case. Baker et al. sought judicial relief for underrepresented voters in urban and suburban Tennessee. The rural-dominated legislature had ignored for 60 years a constitutional mandate for reapportionment every 10 years. The Baker case was dismissed from a Tennessee district court, but on appeal found its way to the Supreme Court, which found Tennessee's apportionment "a crazy quilt without rational basis." The Court concluded that "the Tennessee apportionment statute offends the Equal Protection Clause" (Fourteenth Amendment of the Federal Constitution: "no State... shall deny to any person within its jurisdiction the equal protection of the laws.")

Justices Harlan and Frankfurter adamantly disagreed with the majority's acceptance of jurisdiction of apportionment cases.

The effect of Baker v. Carr was to submit the apportionment of state legislatures to the scrutiny of the federal courts, where relief would be granted in cases of discrimination. Within 6 months, suits were filed in at least 31 states.

Though the Tennessee decision had offered no guidelines upon which to draw districts, a court definition of "equality" began to emerge. In Gray v. Saunders,[3] 1963, Justice Douglas, speaking for an 8-man majority, defined political equality as "one man, one vote." In February, 1964, the Court applied this standard to Congressional districting.

ONE MAN, ONE VOTE

In June, 1964, the Supreme Court[4] handed down another historic decision on a group of reapportionment cases involving the legislatures of Alabama, New York, Colorado, Maryland, Virginia and Delaware. Chief Justice Earl Warren spoke for the majority (Black, Douglas, Brennan, White and Goldberg): "Legislators represent people, not trees or acres, legislators are elected by voters, not farms or cities or economic interests..... To the extent that a citizen's right to vote is debased, he is that much less a citizen. The weight of a citizen's vote cannot be made to depend on where he lives." Not demanding "mathematical exactness," which he recognized as a practical impossibility, Warren nonetheless warned 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 practical."

More "flexibility" would be allowed in state than in Congressional districting. For example, states could give emphasis to "political subdivisions" by maintaining county lines and basing representation to some extent on the subdivision. But, specifically, EVERY COUNTY COULD NOT BE GUARANTEED A SEAT.

It would be "an unusual case", he warned, in which a lower court would be justified in not taking steps to make sure that no further elections are held under invalid apportionments. On the other hand, courts might be justified in withholding immediate relief "under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress." He then directed the courts to decide in the six cases whether the legislatures involved should reapportion before the 1964 fall elections.

Justices Clark and Stewart filed a minority opinion disagreeing with the majority reasoning, but agreeing on the unconstitutionality of some of the cases.

Justice Harlan, dissenter[5], maintained: "The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The equal protection clause was never intended to inhibit the States choosing any democratic method they pleased for the apportionment of their legislatures."

Reaction

What would the June decision mean to the states? All but two states (Oregon and Kentucky) will have to redraw their legislative districts, Newsweek claimed! New York City and suburbs, containing only 4.6% of the state's area, would now control 64% of the legislature, said U. S. News. Similarly, the Baltimore and Annapolis areas (11% of the state's area) would control 53% of the legislature. Cook County in Illinois (1.7% of state's area) would control 51% of the legislature. Time worried about the effects of big-city "strangle-holds" on state legislatures. Alexander Bickel of The New Republic soberly re-examined majoritarian principles:

> "The legislature does not exist merely to register the majority will expressed at the last election, or we should elect it at large or by proportional representation."

Reapportionment, an issue long buried by public apathy, was making the front pages! Alarmed Congressmen quickly introduced legislative challenges to the June decision. Senator Dirksen attached a rider to the 1964 foreign aid bill, staying court action for a year or two. Then he, Rep. McCulloch and Maine's own Rep. McIntire separately introduced similar constitutional amendments which would permit area factors in one house if approved in a state referendum. The most drastic legislative move was a bill introduced by Rep. Tuck, revoking jurisdiction of all Federal courts over apportionment cases (leaving jurisdiction solely to state supreme courts.)

ISSUES OF REAPPORTIONMENT

I. Role of the Supreme Court

The June decision raised a grave question: has the Court the right to

interfere in state legislative apportionments?

Backing up the Court are those who maintain that it is merely fulfilling its traditional role in American government. They trace the persistent but changing ideal of "equality" in such documents as the Declaration of Independence, Lincoln's Gettysburg Address, and the 14th, 15th and 19th amendments to the U. S. Constitution. The Court traditionally has been concerned with here-and-now as well as the past and precedent, and has often reversed itself; "one man, one vote" is an interpretation in light of current problems, but not unconnected with past decisions.

Hard-core resistance to the June decision comes from the states' righters. Legislative apportionment is nobody's business but the separate states', they say. In response to Baker v. Carr in 1963, the Council of State Governments proposed an amendment to the Constitution barring constitutional restriction or limitation of apportionments of state legislatures and barring from the federal courts jurisdiction over apportionment cases.

Another bone of contention in some states is the practice by some Federal District Courts of declaring invalid area-type apportionment plans which have already passed the test of referendum. In Washington, after the people had soundly defeated a population plan in referendum, a district court threw out the area plan. Said the court:

> "The inalienable constitutional right of equal protection cannot be made to depend on the will of the majority."

The United States is constitutionally charged with guaranteeing to each state a "republican form of government." Critics of the Supreme Court claim that, far from guaranteeing, the Court is defining republicanism with the "one man, one vote" decision. The idea of representative government, they say, is a philosophical concept which has developed politically and should continue to do so.

Finally, some lawyers criticize the Court's line of reasoning in developing its case. Adapting reasoning used in racial civil rights cases, the Court assumed jurisdiction of apportionment cases under the "equal protection" clause of the Fourteenth Amendment. In Baker v. Carr, the key terms were "invidious discrimination" and "irrationality" of plan. Actually, what the Court invalidated was a very rational plan to dilute the urban and suburban votes in Tennessee. Robert G. Dixon has written:

> "Indeed, an 'irrational plan', i.e. illogical, unprincipled, possessed of internal inconsistencies, may have a reasonable effect, and that is all the Constitution requires at the level of judicial review of public choice."

Failure to make the distinction between "rational" and "reasonable" has led some lower courts, in considering mathematical "proof" of malapportionment, to make what Dixon calls "quickie judgments" on the unconstitutionality of area plans.

Summing up his position, Dixon says:

> "Representation systems which perpetually deny large majorities any effective influence in both houses of a legislature are unreasonable under the fourteenth amendment. But they are unconstitutionally unreasonable not because they deviate from a simple one-man, one-vote principle, but because minority process is not due process."

He would like to see apportionment cases reargued on the basis of the "due process" clause of the Fourteenth Amendment.

Rep. Tuck's bill revoking jurisdiction of all federal courts over apportionment cases is grounded upon Art. 3 of the U. S. Constitution, which allows Congress to regulate appellate jurisdiction of the Supreme Court (Sec. 2) and to "ordain and establish" inferior courts (Sec. 1.) Once before, in 1868, Congressional statute restricted the Supreme Court to hear habeas corpus appeals, and the Court held the restriction constitutional (in "Ex parte McCardle".) Would the Court follow precedent here? Would the Court uphold Congressional fixing of lower court jurisdiction?

In a recent N. Y. Times article, Anthony Lewis put his finger on the meaning of the apportionment dilemma:

> "What is about to be tested is whether the recent line of Supreme Court decisions protecting individual liberty has offended public opinion so much that the political forces arrayed against the apportionment decision will be able to limit or overcome it. On the answer depends not only a good measure of the states' future political makeup, but the great role of the Supreme Court in the American system of government."

II. Area vs. Population Base

Thus, what appeared in June to be a clear-cut guideline for apportionment hung in the balance by September. The area v. population debate is not over if Congress chooses to act.

The soundness of area-plans, at least in one house, is both reiterated and rebuffed:

1.) A house based on area protects minority interests. Opponents ask, which minorities? A state consists of many minorities, only one or two of which can be protected this way.

2.) The area house slows down "hasty" or "popular" legislation. Opponents point to the ease with which segregationist bills, no matter how "hasty" or "popular", have been rammed through legislatures.

3.) What's constitutional for our national legislature is constitutional for the state legislatures. Opponents toss out the analogy to the federal government, noting that the U. S. Senate was a compromise among sovereign states, necessary to establishing a union at all. Counties, on the other hand, are not sovereign, but creatures of the state.

4.) Federal check-and-balance system should be preserved in the states. But this system was designed to check the three branches of government, not the legislative houses within one branch. Further, "balance" in state legislature frequently operates so that power drifts to another level of government and results in weak, ineffective state government.

5.) If both houses are based on population, why even retain bicameralism? Why not switch to unicameralism?[6] Opponents answer that if population is represented in different ways in the two houses, there is every reason to preserve two houses.

Andrew Hacker has shown ways to vary representation by population in two houses. The more numerous "local" districts in the larger house can be combined into larger districts in the smaller house to reflect broader interest groups. Members of one house could have two-year terms, while members of the other, six-year terms. Or, each house could be elected in alternate elections to provide a continuum of popular will.

III. Problems in Districting

"One man, one vote", is simple enough in concept; but implementation is a complicated nightmare. Not only is a district outmoded as soon as it is drawn because of population shift, but people never settle in neat little equal populations around which lines may be drawn. Add to this the political fact of life that you can't draw a line through a town or county without disrupting the party organization based on these units.

Once the lines are drawn, a glance at the districting plan will reveal physically large districts in apposition to small compact ones. Does the rural legislator have the easy accessibility to his constituency as does his urban counterpart?

The most pressing problem, however, is how to prevent gerrymandering. Gerrymandering is a political kind of discrimination, dedicating each party to the principle that the opposing party's votes be wasted by lack of plurality in a district, or being concentrated in one or two districts only. If the vote count is nearly equal in count, the winning votes must be on our side; and if the districts contain population differences, the advantages must accrue to our side rather than to the opponent's. Each party wants district lines drawn to its advantage.

The best way to prevent gerrymandering is to guarantee compact, contiguous and equal-population districts in specific language in the constitution. Other preventatives are following county lines (though this cuts down on population-equality), and taking the districting task out of "political" hands altogether.

Single-member districts are open sesame to the gerrymander---unfortunately, since the simple relationship between one legislator and his constituency is an ideal of representative government.

Multi-member or at-large districts practically defy gerrymandering, but they lengthen ballots, some to as many as 18 candidates. David and Eisenberg have recommended that when a district grows to 4-6 representatives, it be split into two smaller at-large districts, thus combatting the longer ballot. Another disadvantage of the multi-member district is that the majority party tends to dominate all the seats. Illinois protects minorities by using "cumulative voting" (or proportional representation), wherein the voter distributes his legislative votes as he pleases--- giving them all to one candidate, or one to each, or splitting his votes in various other combinations. Professor Robert H. Engle has carried cumulative voting further, proposing to weigh each legislator's vote in the legislature according to the number of votes he received in the election. This method would prevent gerrymandering, as well as guarantee automatic biennial equalization of legislators and maximize rapport between legislators and their constituencies.

Once drawn, should districts be "frozen" permanently into a Constitution? Permanent districts are considered by experts to be contrary to representativeness. Only a legislator from an over-represented district wishes to perpetuate it in the constitution.

A final question to be answered in district-making is: who shall be counted? Among the various bases used are these:

1.) Decennial Federal Census figures. Easily attainable, but least reflective of population changes.

2.) Adjusted population, based on Federal Census. Inexact, and discriminates against mental in-patients, the military, students and American Indians.

3.) Qualified voters. Affords more frequent reapportionment, but inaccurate because of variations in town procedures in keeping voter lists.

4.) Votes cast in gubernatorial elections. Available at least every five years, but discriminates against non-voters.

IV. Fixed v. Flexible Legislature

Fixing legislative size constitutionally aims at preventing unwieldiness, but makes for further complication in reapportionment. Other alternatives are constitutional approximation, leaving wide berth for change, or fixing size by legislation, which is easier to change than a constitutional provision.

V. Apportionment Agency

In January, 1964, the states showed a wide range of apportionment agencies:

1.) Legislature. Some political scientists feel that to place reapportionment in the hands of those who stand to gain or lose the most from it is to invite avoidance of duty. The facts have born out this criticism. On the

other hand, legislators say since they are the most involved, they should be allowed to reapportion. Most states allow them the privilege.

2.) Governor: both houses in Hawaii, lower house in Maryland. Proponents say a single agent fixes responsibility and encourages impartiality. On the other hand, a governor is not above politics.

3.) State Officers: in Ohio, Governor, Secretary of State and Auditor, or any two of them; in Arkansas, Governor, Secretary of State and Attorney General.

4.) Other Commissions: in Alaska, an unspecified "apportionment board"; in Michigan, four members by political party and four members by area; Missouri Senate, commission appointed by the governor; in Delaware, the Governor, Senate Majority Leader, Senate Minority Leader, President of the University of Delaware and President of the Farmers' Bank of the State of Delaware; Arizona House, by County Boards of Supervisors.

The National Municipal League's 1963 Model Constitution gives the responsibility of reapportioning a bicameral legislature to a board of qualified voters appointed by the governor, to make recommendations within 90 days.

VI. Automatism and Enforcement

The only way to insure periodic reapportionment is specify it in the constitution, though even constitutional provision for it has been ignored by several states.

Of prime consideration is the method by which the constitution may be amended. Constitutional inclusion of the initiative-referendum process, whereby the terms of the process are spelled out, is absolutely essential. Pertinent here is the fact that Maine's constitution, though it provides for initiative of legislation, allows the origin of constitutional amendments only by 2/3 vote of the legislature, followed by majority acceptance by the voters in referendum. Provision for constitutional amendment by initiative is conspicuous by its absence.

Next, if a Constitution specifies periodic reapportionment--- i.e. after each decennial federal census, state census, or election--- avoidance of the duty can lead to a court case.

Finally, reapportionment can be enforced in a constitution by time limits on the original apportioning agency, and provision for a second agency if the original one fails to perform. Other methods are providing for at-large elections if the legislature fails to reapportion, or calling a special session, with or without pay. Judicial review is also a good guarantee, the final threat being invalidation of an unconstitutionally apportioned legislature.

1964 REAPPORTIONMENT IN MAINE

What has been the effect of the Supreme Court cases in Maine? In March, 1963, the Maine Constitutional Commission published a proposal for reapportionment in its Fourth Report to the legislature. Though Professors David and Eisenberg had ranked Maine eleventh among the states in fairness of voting-

strength distribution, the Commission pointed out that Maine's constitutional apportionment provisions were clearly intended to discriminate against city voters. Under threat of court intervention after Baker v. Carr, Maine ought to reapportion. The Commission suggested the following changes for the Maine House.

1.) Permissible variation of districts: the largest district not to exceed the smallest by more than 20%. Using the 1961 unit base number of 6255 inhabitants, districts could then vary between 5630 and 6756 persons (10% deviation either side of 6255.

2.) Single-member districts.

3.) 150 representative districts (instead of 151), compact and following city, town and ward lines, insofar as possible.

4.) Preferred count of inhabitants: the average number of votes cast in each district in the last 3 gubernatorial elections. Second choice was adjusted population, excluding inmates of mental and penal institutions, and nonresident military personnel and students.

5.) Reapportionment by legislature in 90 days from the adoption of a constitutional amendment containing these provisions, and every 10 years thereafter. If the legislature should fail to act, the governor and an optional reapportionment board would redistrict within 60 days. If the governor failed, the state supreme court, upon petition of five electors, would reapportion.

6.) Some specific changes in the Constitution removing discriminations against the larger cities, and the counties with the larger "excess fractions." (See below.)

The Constitutional Commission made the following recommendations for reapportionment of the Senate.

1.) A Senate of 31 members, instead of 34.

2.) 16 Senators, elected 1 each from the counties.

3.) 15 Senators, elected 1 each from a senatorial district composed of 10 contiguous House districts.

4.) Reapportionment by the legislature within 90 days of adoption of these provisions and every 10 years thereafter.

5.) Enforcement provisions parallel to those suggested for House.

In November, 1963, Maine voters approved a referendum constitutional amendment containing a few of the Commission's recommendations for the House (the reapportionment resolve passed by the 101st Legislature). Specifically, it removed the former constitutional provisions for the 7-man limit on representation of larger cities, the granting of excess county fractions to smaller counties, and the accruing of excess fractions within the counties to the benefit of

smaller towns.[7] Small towns would be classed in districts "as equitably as possible, with consideration for population and for geographical contiguity." The door was left open for single-member districts, if approved by 2/3 vote of both houses. Reapportionment would be carried out by the State Supreme Judicial Court if the legislature failed.

Early in 1964, the House reapportioned itself, and on the whole, did a creditable job. 44.5% of the population can now elect a majority of legislators--- close to the 45% standard. Extremes in population variation, however, still exist. Dr. Mawhinney pointed out an appalling range of from 3823 population in the Green-Wales-Leeds-Webster district in Androscoggin County to 10,515 population in Saco. This is a variation of 38.6% under and 68.8% above the UBN figure of 6255, and a total variation of 107.4%. One constituency is 2.8 times the size of the other.

The Senate remains unreapportioned. The Fourth Report showed that Cumberland County, with 10 times the voting strength of Piscataquis County, has only 4 Senators to the other's one. In 1960, based on the recent census figures, "the average value of the vote for senator in Maine's five smallest counties as a percentage of the state wide average was 145, while the value of the vote in three largest counties... was 71," said the Fourth Report. A Cumberland County senator represents 45,000 people, a Hancock County senator, 16,146; here again, one constituency is 2.8 times the other. Though 46.9% of the people can elect a majority in the Senate, such extreme variations in apportionment cause concern as to the "equality" of the Senate. After the June and September 1964 decisions, unless Congress acts in the future sessions to limit the Court, the sliding scale system in the Maine Senate will have to go. The September Supreme Court decision - that both houses of state legislatures should be based on population - means reapportionment for the Maine Senate! On Wednesday, September 23, 1964, the Senate passed a compromise substitute for Senator Dirksen's rider to the Foreign Aid Bill. Instead of making it mandatory, it suggested that the Court move slowly in ordering reapportionment of state legislatures.

Note 1: P. 4

Deduction of military personnel, their dependents, and students not having a fixed residence in Maine.

In Davis v. Mann, 84 S. Ct. 1453 (1954) the Supreme Court rejected the argument of the State of Virginia that it had the right to require under representation of certain counties because those counties contained large numbers of military and military-related personnel. The Supreme Court said (84 S. Ct. at 1460) " ... Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible ..." This may have some implications for the Maine system of exclusion.

Note 2: P. 6

The holding of Baker v. Carr

The Supreme Court did not find the Tennessee apportionment a "crazy Quilt ..." nor did it conclude that the Tennessee apportionment offended the Equal Protection Clause. The court held that the claim arose under the Fourteenth Amendment and that the appellants had stated a claim upon which relief could be granted. The Supreme Court was holding that the courts had power to hear such

cases and that there were standards of judgment under the Equal Protection Clause which could be applied in such cases. It did not decide the merits of the controversy. The "crazy quilt" language is from the concurring opinion of Mr. Justice Clark.

Note 3: P. 6
Gray v. Saunders

This case held the Georgia County Unit system of voting unconstitutional.

Decision of February, 1964

This is the decision in Wesberry v. Sanders, S. Ct. 526 holding that the Georgia Congressional Redistricting Statute violated section 2 of Article 1 of the Constitution of the United States which provides that the House of Representatives shall be "composed of members chosen every second year by the people of the several states." The Court held that the purpose of that article was to give to each qualified voter, as nearly as practicable, a right to have his vote given as much weight as any other person's.

Note 4: P. 6
1964 State Reapportionment Cases

The names of the cases are: Reynolds v. Sims; (Alabama); WMCA Inc. v. Lomenzo, (New York); Maryland Committee for Fair Representation v. Tawes (Maryland); Davis v. Mann (Virginia); Roman v. Sincock (Delaware); Lucas v. Forty-fourth General Assembly of State of Colorado (Colorado).

Note 5: P. 7
Justices Stewart and Clark dissented in the New York litigation (WMCA v. Lomenzo) and the Colorado case (Lucas v. Forty-fourth General Assembly). Justice Stewart's written dissent is important. He stated (84 S. Ct. 1434-35): " . . . I think that the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that in the light of the state's own characteristics and needs, the plan must be a rational one. Secondly it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the state . . . beyond this I think there is nothing in the Federal Constitution to prevent a state from choosing any electoral legislative structure it thinks best suited to interests, temper, and customs of its people. . . .

Note 6: P. 10
Unicameralism

The question is raised as to whether we should adopt a unicameral legislature. In Reynolds v. Sims, 84 S. Ct. at 1389 the Chief Justice Warren said: "We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same--population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to

be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multi-member districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of the districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

Note 7: P. 14

The amendment provides for fractional excesses to be computed in favor of the counties having the larger fractional excesses. With respect to intra-county districts it is worth noting that the districts can contain no fewer members than the largest fraction remaining to any city or town within such county after allocation of one or more representatives.

WHAT STATE LEAGUES HAVE BEEN DOING

The National League of Women Voters has compiled an inventory of reapportionment activity accomplished by state Leagues up to January, 1963.

At that time, 29 Leagues were engaged in programs ranging from throwing a second Boston Tea Party (Fla.) to holding a mock constitutional convention (Conn.); from sending red carnations to legislators as reminders of the "live" issues of reapportionment (Okla.) to providing social studies teachers with reapportionment kits (Tenn.). Behind the razzle-dazzle, League members worked smoothly and knowledgeably. They testified at hearings, quizzed candidates on their reapportionment views, filed amicus curiae briefs in court, circulated initiative petitions for League-sponsored or League-designed apportionment plans, appeared before party platform committees, organized citizen committees, and even drew up redistricting plans themselves. Unquestionably, in some states, state Leagues have been the primary moving force behind reapportionment.

Most Leagues have acted for automatic reapportionment machinery. Most worked either for qualified-population bases in both houses, or for modified little federal plans. It is remarkable, however, that even in 1962 and 1963, 8 Leagues were proposing equal-population apportionments for both houses.

MAINE LWV IN REAPPORTIONMENT

In the 1950's, Maine Leagues made an extensive over-all study of our Constitution. The one consensus that emerged regarding reapportionment was the need for automatic machinery. Thus, in 1955, the League sponsored a bill containing a constitutional provision that would have vested the power of reapportionment in a ten-man commission if the Legislature failed to discharge its responsibility in the year following the decennial census. The bill failed to pass, but it served to focus public attention on the need for reapportionment machinery.

Leagues again took up the question of constitutional revision in 1963. Because of the "over-all" emphasis, we were unable to support or reject the reapportionment referendum question in the same year.. 1964, "Reapportionment Year", finds us confronted with many action possibilities. Hopefully, this time we shall be able to act. This paper has been prepared to give some background on reapportionment, both in Maine and elsewhere, to probe the essential issues of reapportionment, and to provoke thoughtful answers to the discussion questions below.

UNIT DISCUSSION QUESTIONS

1. Do you support the Supreme Court's right to decide state reapportionment cases? If not, do you support Senator Dirksen's or Rep. Tuck's position? (Similar proposals may be introduced in the next Congress.)

2. Is area a factor that ought to be preserved? In toto or in part?

3. Is it worth preserving 2 population-based houses? Or should we consider unicameralism more seriously?

4. Should the number of legislators be fixed or flexible?

5. Who should be counted as "population"?

6. Should reapportionment be carried out by the Legislature or some other agency?

7. How can gerrymandering be discouraged?

8. What is the best way to make reapportionment automatic?

9. How often should reapportionment occur?

10. How can reapportionment be enforced?

11. Should we consider a substantial reduction in the size of the House? (NML Model suggests a House approximately 3 times the size of the Senate.)

12. Should district lines disregard county lines entirely? (A county with 20,000 people is not entitled to even 1 senator if the senate is to be based on population alone.)

13. If the Legislature is to continue to be bicameral, should we consider changing the length of terms for Senators? and elect them one-third at a time (e.g. U. S. Senate)?

14. Should we work for the power of constitutional amendment by initiative?

BIBLIOGRAPHY

Debates and Journal of the Constitutional Convention of the State of Maine - 1819, '20.

The Constitution of the United States

The Constitution of the State of Maine, 1820, and codification of 1955, with supplementary amendments.

Maine's Legislative Apportionment --- Present and Future: Dr. Eugene A. Mawhinney, Prof. of Government, U. of Maine (Appearing in Maine Managers' Newsletter, Vol. XI, No. 3, April, 1963.)

State Constitutions: Reapportionment (National Municipal League, State Constitution Studies Project, #2): Prof. Gordon E. Baker, U. of California, 1960.

Compendium on Legislative Apportionment: National Municipal League, 1961 and 1962 Supplement.

Devaluation of the Urban and Suburban Vote, Vols. 1 and 2: Profs. Paul T. David and Ralph Eisenberg, U. of Virginia, Bureau of Public Administration, 1961 and 1962.

Legislative Reapportionment in the States: The Council of State Governments, June, 1964.

Apportionment and Representative Government: Alfred de Grazia, Praeger, N. Y., 1963.

Congressional Districting, the Issue of Equal Representation: Andrew Hacker, Brookings Institute, 1963.

The Federal Analogy and State Apportionment Standards: Prof. Robert B. McKay, N. Y. U., Notre Dame Lawyer, August, 1963.

Apportionment Standards and Judicial Power: Prof. Robert G. Dixon, Jr., George Washington U. Law School, Notre Dame Lawyer, June, 1963.

Non-Population Factors Relevant to an Acceptable Standard of Apportionment: Prof. Jerold Isreal, U. of Michigan Law School, Notre Dame Lawyer, August, 1963.

Fourth Report, Maine Constitutional Commission, March 1963.

What's the Story on Legislative Apportionment in Maine? LWV of Maine, Oct. 1954.

Inventory of Work on Reapportionment by State LWVs: prepared by the LWV of the United States, January, 1963.

Our Unknown Constitution: by Prof. Edward F. Dow, U. of Maine, 1962.

LWV National Voter: September 1963, Union Now
April 1964, The Other Shoe

Periodical Articles: Time, June 26, 1964
Newsweek, June 29, 1964
U. S. News, July 6, 1964
New Republic, June 20, 1964, Reapportionment and the Courts: Alexander M. Bickel

New York Times, June 16, 1964 (excerpts from Supreme Court apportionment decision.)
August 16, 1964, Congress vs. the Court--Issue Joined on Redistricting: Anthony Lewis.

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THE EXECUTIVE COUNCIL OF MAINE

Constitution Paper No. 2
League of Women Voters of Maine
January 15th, 1965

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THE EXECUTIVE COUNCIL OF MAINE

Though forty-seven state constitutions make no provision for Executive or Governor's Councils, the constitutions of Maine, New Hampshire, and Massachusetts still provide for Executive Councils. Maine has the one often referred to by writers on state government as the most unique. In Massachusetts and New Hampshire the Councils are elected by the people, but in Maine the Executive Council is elected by the majority party in a joint session of the two houses of the Legislature. All three Councils were inherited from colonial days and were established as aids to and checks on the Governor.

History

The Executive Council was a controversial issue even at the first constitutional convention of Maine in 1819. In the debates of that convention on the Council article "Dr. (Daniel) Rose of Boothbay moved to strike out the whole article; he thought a Council unnecessary, and that dispensing with one would be a great saving of expense... The executive of most of the other states act without a Council, and no complaint is made of the want of one. New York has one, which they would be glad to be rid of... If we give (the Governor) a Council (we) divide the responsibility, and open the door for intrigue. The Senators will come from all parts of the state, and will give him all the information he could obtain from a Council..." Mr. John Holmes of Alfred said he thought it was his duty to defend the report. He had considered a Council a useless appendage to the government. "But I received such information from those gentlemen... who have been members of Council, that such business was done by them which otherwise must be done at much greater expense by men with established salaries, that I was convinced it was best to retain it." Similar pro and con arguments have persisted through the years.

In 1875 Governor Nelson Dingley appointed a ten-man commission to study the state constitution and report on what after fifty-five years had become, he thought, a "piece of legal patchwork." Under the leadership of Edward Kent, the commission of 1875 recommended some changes still being suggested, including one to abolish the Executive Council. (Edward T. Dow: Our Unknown Constitution)

Constitutional Provisions

The Constitution of Maine states that "the supreme executive power of this state shall be vested in a Governor (Art. V, Part First Sec. 1). But in Sections 8 and 11 the supreme executive power is to be shared with the Executive Council: "He shall nominate, and, with the advice and consent of the Council, appoint all judicial officers (except judges of probate), coroners and notaries public..." and Section 11 reads: "He shall have power, with the advice and consent of the Council to remit, after conviction, all forfeitures and penalties, and to grant reprieves, commutations and pardons..."

Section 12 states: "He shall take care that the laws be faithfully executed."

Article V Part Second Section 1 says: "There shall be a Council to consist of seven persons... to advise the Governor in the executive part of government, whom the Governor shall have full power, at his discretion, to assemble; and he with the counsellors, or a majority of them, may from time to time hold and keep a Council for ordering and directing the affairs of state according to law."

Selection

The method of electing members of the Executive Council has drawn much criticism. The state is divided into seven councillor districts as follows: District 1 includes York and Oxford counties; District 2, Cumberland; District 3, Sagadahoc, Androscoggin, and Franklin; District 4, Somerset and Kennebec; District 5, Lincoln, Waldo, Hancock, and Knox; District 6, Piscataquis and Penobscot; and District 7, Washington and Aroostook. In all districts except Cumberland County the counties rotate having a Councillor. The schedule of rotation is determined by the Legislature on the basis of population after each decennial census. The legislative delegation from the county to have a councillor nominates him and he is endorsed by the pre-legislative caucus of the Legislature's majority party. He is then elected for a two-year term by the joint convention of the two houses of the Legislature. Thus, a county like Waldo with a total legislative delegation of five (four representatives and one senator) could have one person - if he was of the majority party of the whole Legislature and the other four were of the minority party - naming the candidate for councilor from Waldo County! The pre-legislative majority party caucus would undoubtedly support the nomination and the Legislature would approve unanimously because it has been customary for the party members to vote for the county's party nominee.

In the light of the method of selecting Councillors, the representativeness of the Council has been questioned. Though they may meet only once or twice a month between legislative sessions, they have been called "our representatives when the Legislature is not in session." On the other hand, it is also true that many people do not even know who their Councillor is. Because of the rotation of Councillors among the counties, many can serve only one term, so the turn-over is very high. The counties with ExecutiveCouncillors for 1965-66 are York, Cumberland (every term, because of population), Androscoggin, Somerset, Waldo, Penobscot and Washington.

Powers

1 Confirmation. Practically all appointments of the Governor are made with the advice and consent of the Council. Such advice and consent are construed to mean that the Council may withhold its approval of an appointment of the Governor if there is available for appointment a person whom it prefers to the one named by the Governor. Under present circumstances it is possible for the Council to designate persons of its own selection by refusing to consent to the appointment of the Governor's nominees. ((The P.A.S. survey of 1956 pointed out that over 80 statutory boards, commissions and committees

participate in the affairs of the executive branch... The total membership of these is approximately 500, of whom half are persons named by the Governor with the consent of the Council. It was also noted that all of the 62 persons directing the work of 29 major operating agencies of the state have tenure of office exceeding that of the Governor except the four constitutional offices of Secretary of State, Attorney General, Treasurer and Adjutant General.)) Confirmation in other states is used to insure that non-qualified persons are not named as governmental officials.

2. Pardons

As indicated above, the Governor with the advice and consent of the Executive Council grants pardons, reprieves, and commutations. The State Parole Board makes investigations of cases and a staff member of the Board is present when decisions are made. He makes recommendations when requested to do so. The P.A.S. report stated that the pardon authority is exercised cautiously and few reprieves, commutations or pardons are granted. The indications are, according to Dr. Vose, that the Councillors do not enjoy acting as a Parole Board. In 1955 the Maine Judicial Council recommended that a five-man Pardon Hearing Board be established to consist of a justice of the state supreme court, a physician, a psychiatrist, and two others. (Clement Vose: The Executive Council in Decline)

3. Insurance

As described by the P.A.S. report, the Executive Council administers state insurance with the assistance of private insurance agents and with the technical advice and assistance of the Department of Insurance. The insurance coverage is split between 21 three-year policies with seven expiring each year. Each of the seven members of the Executive Council is made responsible for an equal share of the annual insurance coverage to be obtained; he names a key insurance agent from his district and works with the key agent in the distribution of the business among the agents in his area. The Governor and Council designate a master key agent to coordinate the work of the key agents and to be responsible for the over-all administrative work involved in the placement of the insurance." In 1957 the cost was approximately $200,000 on $80,000,000 worth of state property.

At this writing a committee created by the Governor is considering the possibility of changing this system. Putting the insurance out to competitive bidding has been suggested.

4. Administrative Functions

These are said to range from approving wallpaper for the Blaine House to salary authorizations for personnel not employed under the personnel law. It must approve out-of-state travel, allotment of appropriated funds, purchase of real estate, opening of contract bids and a great many duties involving the day-to-day operation of many phases and agencies of state government. The Governor and Council have control over the State Contingent Fund and must together approve any transfer of funds from it. Dr. Vose has said the Council's

"functions have such variety that no single phrase can quite describe them. The Council still approves countless individual expenditures but members are guided by a rubber stamp with the magic words: Approved by the Bureau of Accounts and Contracts." Though the duties of the Council have increased in number, they have become less important. The Council no longer serves as the employment agency (before the 1937 enactment of the Personnel law) nor does it control highway construction as it did before the creation of the State Highway Commission. It no longer visits institutions, but today the Governor and Council rely on the various administrative agencies, the Legislative Research Committee and others for information. (Vose)

Some Proposals for Change

Proposals for change concerning Maine's Executive Council began in the first constitutional convention of 1819. They have persisted through the years and have come from legislators of both political parties, from Democratic and Republican Governors, from Councillors themselves, from scholars in the field of government, from professional survey studies by objective firms, from citizens committees and from editorial writers. The proposed changes have ranged from altering the method of nomination so as to give possible representation to the minority party to complete abolition of the Council and reassignment of their functions. The issue of the Executive Council furnishes subject matter for controversy almost continually, but especially during state election campaigns. However, bills to effect these changes are killed in session after session. In 1957 the Republican State Committee urged popular election of the Council but this and the Democratic proposal to abolish the Council were both defeated.

Gardiner Survey. In 1930 a survey of state government was conducted for Governor William Tudor Gardiner by the National Institute of Public Administration. In Chapter II of this report (State Administrative Consolidation in Maine) it was pointed out that though the constitution "vested supreme executive power in a governor, subsequent sections set serious limitations upon the exercise of this power. The Governor must consult with the Council in directing the affairs of state, he must have the Council's advice and consent in all appointments to office, he cannot authorize expenditures even of moneys which have been authorized by the Legislature without the Council's approval." The study found that so many agencies were created by the Legislature that the Governor could not conduct the administration in an economical and effective manner. The major recommendations of the survey were: 1. consolidation of administrative departments; 2. elimination from the constitution of provisions for the offices of Secretary of State, Treasurer, and Attorney General; and 3. curtailment of powers of the Executive Council and "perhaps future elimination of this body unless it can be made purely advisory to the Governor."

P.A.S. Report. In 1956 the Public Administration Service instigated by Governor Edmund S. Muskie made a survey report on the "Organization and Administration of the Government of the State of Maine." The study recognized the constitutional provisions for a Council and the legislative appointment of state officers as "deliberate restrictions based on governmental concepts of colonial times arising, in large part, from recent memories of experiences with appointive British governors." State government "is characterized by strong legislative powers, restricted latitude for executive control..." It is significant that the report said "many persons trained in public administration regard the Executive Council to be an unnecessary and outdated appendage to the state government. This report does not contest that viewpoint. In deference to the traditional acceptance of the Council by the people of Maine suggestions made here are aimed at making the Council a useful adjunct of the executive branch. The responsibilities of the Council should be limited to: 1. Confirmation of certain appointments of the Governor to insure that nonqualified persons are not named as government officials... The Council action... is in lieu of legislative confirmation required in most states. 2. Advising the Governor on requests for pardons, reprieves and commutations submitted by the Parole Board with its recommendations. 3. Approval of schedules submitted by the Governor to cover salaries of employes... not under the personnel law. 4. Approval with the Governor of working capital advances, transfers from the state contingency fund, and appropriation adjustments...permissible under law...after recommendation by the Commissioner of Finance. 5. Consideration of important state matters which the Governor may refer to the Council...

In January 1957 the bipartisan Citizens Committee on the P.A.S. Report recommended that the "Executive Council be popularly elected in the present districts, and on the same inter-county and intra-county basis existing in the current system of apportionment, that it serve primarily as an advisory body, that it have power to confirm only judicial and major departmental appointments, that it advise on pardons and related matters subject to specific recommendations from the parole board, and that with some exceptions, such as working capital advances, transfers from the contingent fund, and statutory appropriation adjustments, its financial powers be advisory only."

A year later the enlarged bipartisan Citizens Committee on the Survey of State Government urged abolition of the Executive Council. Clement Vose stated that "this Committee comprehends thoroughly the functions of the Council and has proposed bills transferring them to other parts of state government. Nothing like this has ever been done before." The State Library has this "Resolve proposing an Amendment to the Constitution to Abolish the Council and Make Changes in the Matter of Gubernatorial Appointments and their Confirmation." It provided for Senate confirmation of appointments. It did not, however, remove the provisions for election of the Secretary of State and other state officers by the Legislature.

Parts of the report of the Subcommittees on the Executive Council are quoted below:

1. The committees recommend that the Executive Council be abolished. This action was concurred in by nine of the eleven members of the two subcommittees.

3. The following points are presented to indicate the thinking and conclusions that led to this decision.

a) It is to be recognized that the Council was organized at a time when all feasible steps were taken to check the power of the Executive. However, the present tendency has been to give the elected executive adequate power to cope with his responsibilities while not departing from any of the necessary balancing elements provided by the other branches of a democratic government.

b) It is apparent that though the functions of the Council have become more numerous, they have also become less and less significant.

c) Such functions as could legitimately be left with the Council are ones that can be performed equally well by some other branch of the government.

d) At present the citizens throughout Maine rarely know who their Councillor is. Popular election would probably bring the Councillor into greater contact with those he represents. However, there is much to be said for enabling the voter to concentrate on fewer, rather than more candidates.

e) Though improvements could be made in the selection as well as in the functions of the Council, it would still leave a withered vestige of government which no amount of alteration could make into a lasting or really effective branch of government.

f) The fact that the Council was established in part to avoid employing full time personnel to aid the Governor is hardly a valid argument for today. This points up one of the most glaring and significant inadequacies of our present government, namely, the lack of staff at the disposal of the Governor. His inability to maintain effective contact with the many State Departments, his inability to keep track of legislation during the session, and his difficulty in adequately disposing of legislation placed on his desk (given only five days to either sign or veto legislation) are but a few examples of the difficulties that could be solved by the provision for a staff. Under no circumstances could these staff functions be fulfilled by a part time non-professional Council.

4. The following brief points cover some of the more significant functions of the Council:

a) Pardons. The final approval in the granting of any pardons and reprieves must be given by the Governor. At best, the Council can only advise him. The limitations of time and procedure used by the Council seriously reduce the effectiveness of this function. While it may be agreed that the Council can, together with the Governor, collectively arrive at a better "lay" decision than that of one individual, it must be recognized that the real work and decision should rest with the Probation and Parole Board.

b) Appointments. Many of these appointments presently handled by the Council should be relegated either to the Personnel Department other State Agencies or to the Governor. There remain, however, a number of appointments of the Governor which should be confirmed by some additional body. These are chiefly those of Justices and the Commissioners of the various departments.

c) Salaries. It does not recommend that the Council share with the Governor the power to approve salary schedules since this task inevitably covers political implications... Control is still exercised sufficiently through the legislature's power over appropriations.

d) Financial powers. The duties of a financial nature now exercised by the Council are an unnecessary review of matters which are properly the business of the Financial Department, the particular state agency and the Governor.

e) Insurance Allocation. This is one of the few plums presently allowed the Council. It has been a function operating without the benefit of any legislative procedures.

Prof. James Storer, Chairman of the Subcommittee on the Functions of the Executive Council, in his report to the subcommittee said: "The efficient approach would probably be to let the states' property be insured on the basis of bids submitted. Self-insurance is also a possibility..."

((Note: At this writing, January, 1965, such a proposal is being considered by a special committee created by Governor Reed.))

Modern State Constitutions

In the newer constitutions, Alaska, Hawaii, Missouri, New Jersey and New York provide a stronger administrative role for governor by longer terms, eligibility for re-election and broader appointment and removal powers, as does the Model State Constitution (p. 49, State Constitutions: The Structure of Administration by Ferrel Heady, N.M.L., 1961). Particularly interesting is the provision in the new 1963 Michigan Constitution, Article V, Executive Branch Section 6, Advice and consent to appointments, which reads: "Appointment by and with the consent of the senate when used in this

constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed."

Most states today provide for Senate confirmation of the Governor's appointments. Some call for the legislature's confirmation and some require no confirmation for the Governor's appointments. The Model State Constitution (N.M.L. 1963) provides that the Governor appoint and remove the heads of all administrative departments. "Because the Governor is the only popularly elected statewide executive officer and appoints subordinates who have no similar popular mandate, he can be responsible for the faithful execution of the laws." The Model provides that the Governor appoint judges of supreme, appelate and general courts subject to the advice and consent of the legislature.

A number of states that have no constitutional provision for any type of Executive or Governor's Council do permit the Governor by statute to appoint an advisory group to serve at his pleasure.

Considering the amount of material available concerning the Executive Council in Maine, it is remarkable that so little has been accomplished in the way of change. Even the recent Maine Constitutional Commission established by the 100th Legislature made no significant recommendation for curtailing the Council's powers. Though the Council has been called a "fossil of colonial government," "an elephant graveyard," a dead-end street for a politician; though a number of past governors have been frustrated by it; though it makes the headlines for breaking the fishing laws; or, most frequently, for blocking appointments for partisan reasons - it is still retained.

The real issue is whether or not the Executive Council in Maine serves its citizens as an important or necessary part of good state government. These questions must be answered: Does the "plural executive" serve us best? Is this division of executive authority contrary to modern thinking that "authority must be commensurate with responsibility"? Is this representative government? Would Governors be more apt to appoint the best qualified persons to office if they were subject to Senate, rather than Executive Council confirmation?

Sources consulted:

Constitution of Maine, Alaska, New Jersey, Michigan
Model State Constitution, National Municipal League, 1963
The Executive Council of Maine in Decline, by Clement E. Vose, Bureau of Research in Municipal Government, Bowdoin College, 1959
Organization and Administration of the Government of the State of Maine, a Survey Report, Public Administration Service, 1956
Our Unknown Constitution, articles in the Portland Sunday Telegram, by Edward F. Dow
Pamphlet entitled: From the Debates of the Constitutional Convention of Maine, October 1819
Resolve, proposing an amendment to the Constitution to Abolish the Council and Make Changes in the Matter of Gubernatorial Appointments and Their Confirmation, January 1959
An Act Conferring upon Others the Powers Now Vested in the Council
Report of the Maine Citizens Committee on the Survey of State Government
Report of the Subcommittees on the Executive Council, 1959
State Administrative Consolidation in Maine, National Institute of Public Administration, 1930
Newspaper file on the Executive Council, State Library
American State Government, by W. Brooke Graves, Boston, Heath, 1953
State Constitutional Revision, by W. Brooke Graves, ed. P.A.S. 1960
Salient Issues of Constitutional Revision, N.M.L., 1961
State Constitutions: The Structure of Administration, by Ferrel Heady, N.M.L., 1961
State Constitutions: The Shape of the Document, by Robert B. Dishman, N.M.L., 1960
Report on the Functions of the Executive Council (for the Citizens Committee on State Government) 1958. by James Storer, Chairman of the Subcommittee on the Functions of the Executive Council
State Constitutions: The Governor, by Bennett M. Rich, N.M.L., 1960

Since much of the support of and opposition to the Executive Council is a matter of opinion, we are presenting here the views which some Maine leaders have made public within the last ten years.

In an article by Louis L. Arnold in the Bangor News of November 4, 1960, former governors were quoted giving their opinions of the value of this Executive Council.

Former Governor Lewis O. Barrows of Newport said he "would never recommend any tampering with or change in the constitution in this respect... In the all important matter of appointments, with no Council to take confirmation action on them, the door would be wide open for abuse and dictatorial power." According to the article, he rejected as 'not in the best interests of Maine' suggestions that, with abolition of the Council, appointments would be approved late by the Senate or a senatorial committee, or maybe a combination of department heads. He contended that Senate approval of appointments 'would add nothing but confusion and delay.' "As for any group of department heads assuming this added responsibility, I would not favor it because: 1. It could deprive the governor of geographical representation and viewpoints which he would welcome... 2. It would unquestionably tend to create friction between departments... 3. What guarantee would it offer that any greater degree of efficiency would result?"

Frederick G. Payne, another former Republican Governor, is reported to have said "the people should have a chance to vote on this issue after full and factual information is provided." He noted that since only two other states had councils similar to Maine's, "this, of course, proves that there are other systems that work and work well."

Percival P. Baxter of Portland is quoted as saying: "Based upon my experience as Governor, the Council performs a most valuable service to our state. I believe it would be a great mistake to abolish it or change the method of its election. During my years in the State House the Councillors worked faithfully and unselfishly for the best interest of our people. Moreover, I do not recall that what is termed "politics" ever influenced any decision which the Councillors were called upon to make."

Owen Brewster was quoted as saying, "The Council represents the voice of the people, as determined by the Legislature in their selection, during the time when the Legislature is not in session. As government becomes more complex... it becomes even more important to check any trend to an all-powerful executive... It would be very desirable and entirely in accord with our existing constitution if the Legislature in making its selections for the Council would adopt the recommendation of the majority group from the county supplying the Councilor at the biennial election. This would often result in giving recognition to the minority in the Council and would, in my judgment, be altogether beneficial."

The only former Democratic Governor, Edmund S. Muskie, stated that "by statute and by inclination, the Council has assumed greater and greater control of the executive power and authority which was entrusted by the constitution to the Governor." He pointed out that "the Governor is the office in the executive branch elected by the people. Thus, if the executive authority falls increasingly to others than the Governor, it is removed from the people... I believe in the basic principle that the Governor, having been charged with the executive authority of the state, ought to be in a position to select his own advisers, his own assistants. What has happened is that the appointment system between the Governor and Council has developed into a horse-trading process." Virtually every appointment is the result of time-consuming bargaining between the Governor and Council to achieve political compromises." If the confirming body were to be the Senate, "the procedure would involve the posting of nominations by the Governor at arm's length without any preliminary haggling or trading. Then the Governor's responsibility to appoint qualified people would be made clear cut... I found the time that I could spend with the heads of operating state departments was reduced (by time spent with the Council)). The Governor needs the advice of the people best equipped to give it - and these are the heads of departments in state government."

Former Governor Horace Hildreth expressed his views also in a letter to the Editor of the Portland Press Herald of October 28, 1960. He said: "My fundamental reason for supporting the existence of the Governor's Council is that I believe no one with power of a Governor should have an unlimited power of appointment. To allow such a situation would enable an unscrupulous Governor to build up an almost indestructible personal political machine." Regarding the suggestion that the Senate confirm appointments he said, "Such a requirement would demand annual sessions of the Legislature which I believe are unnecessary and unwise. Even more important to me is the fact that if I, as Governor, had to get appointments passed upon by some group, I would much prefer to have the appointments cleared by a group of seven people than by a majority or two-thirds of .. the Senate... My experience makes me certain I would have to spread the appointments sufficiently to meet the wishes of a large group of Senators or any legislative program I was trying to get through the Legislature would be wrecked upon the rocks of senatorial anger that I had not appointed the people they wished to have the Governor appoint to responsible offices."

As candidate for Governor in 1960, Frank M. Coffin called the Executive Council a "hidden executive." In a speech prepared for the Kiwanis-Lions Club meeting in South Portland, he is reported (by Bert Clinkston, Portland Press Herald of May 27, 1960) to have stated that the Council has administrative powers over managing state property - "everything from buying, condemning, selling and leasing state lands, including timber, mining rights and facilities at state airports. It supervises election machinery, has equal control with the Governor over the contingency fund, equal say with the Governor on setting salaries of department heads and many subordinates." He raised these questions: 1. Is it fair to citizens to elect a Governor on the basis of a program when another "seven-man Governor" not elected by them does not approve the Governor's program? 2. Can the seven-man part-time group have the time, interest and expertness to give valid judgments to a vast range of decisions which require their

approval? 3. Is it fair to department heads, in a time when there is enough difficulty attracting able administrators, to force them to consult the Council at every turn? 4. Can we not re-allocate all the duties now performed by the Council to the Senate and department heads so that adequate checks and balances can be preserved while increasing the efficiency of our government? He asked, too, whether a successful business or civic enterprise did not have to reorganized itself periodically to remain competitive, efficient and successful.

At the Woodfords Club on October 24, 1959, the Portland Press Herald reports on a speech by Governor Clinton Clauson in which he said the authority of the Maine Governor "is dissipated by the helter-skelter manner in which the lines of authority and responsibility meander in the executive branch"..."Many of the various department heads, boards and commissions think of the Governor as a temporary figurehead rather than as their chief executive." To the Maine State Grange (October 29) he answered the argument that continuity of departmental operation is destroyed by gubernatorial appointment of key officials. He said; "This objection does not take into consideration the fact that within our departments we have responsible deputies and division chiefs in the classified service who can and do provide the necessary continuity." He regretted that the recommendations of the professional survey of Maine government to appoint all department heads except that of state auditor was not implemented.

A particularly revealing editorial appeared in the Portland Evening Express on November 1, 1960. Entitled "The Council Issue," it read as follows: "Governor John H. Reed has taken a new position on the manner in which members of the Executive Council should be chosen. He previously had favored selection of Councillors by county legislative delegations. Last weekend he endorsed popular election of the Council saying, "This is a recommendation I feel I would want to make" if elected November 8. Councillors presently are chosen by the majority party of the Legislature.

The editorial continues: "It is difficult to take seriously the argument that absence of a Council invites gubernatorial dictatorship. There is still the Legislative branch to pass laws or not pass them, with or without the Executive's sponsorship. There is still the Judiciary to rule on the works of either or both. There are still department heads through which orderly administration may be performed. And finally there is the electorate which elevates a man in the expectation that he will have the opportunity to apply his ideas and leadership and can throw him out on the next pass through the polling places. This system obtains in the federal government and in most states, and what is more, it works.

"We agree with Representative Coffin that the Council is an unnecessary fourth division of state government, a stumbling block to efficient administration, a small group of men exercising too much influence in places they have no business to be. But if the Council must be retained, as Governor Reed wishes, it would be better on its present elective basis. To separate it entirely from the Legislature, which would be the effect of the Reed proposal, would be to make its status as a fourth branch of government all the more secure. It would be a move in the wrong direction which also ignored the basic difficulty.

In January 1963 Frank E. Hancock, the state's new attorney general, addressed a women's Republican Club. He said that the Executive Council has outlived its usefulness. He hoped the Constitutional Commission would recommend abolishing the Council, "but I doubt if they will," he said.

As a candidate for the Executive Council in September, 1956, Robert L. Travis of Westbrook drew editorial praise from his pledge concerning appointments that "if well qualified, confirmation will not be refused by me because of partisan party politics" (Portland Press Herald, September 19, 1956).

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INFORMATION SHEETS ON SUFFRAGE FOR PAUPERS AND PERSONS UNDER GUARDIANSHIP

The extension of suffrage has been one of the major developments in the growth of democracy. Though universal suffrage was predicted by Alexis de Tocqueville over a hundred years ago it has not yet been achieved. Through the years restrictions in this country have pertained to religious beliefs, property ownership, race, sex, payment of taxes, financial status, literacy, criminal acts and mental competency. At the present time only a few of these remain in state constitutions.

The provision in Article II, Section 1 of the Maine Constitution reads: "Every citizen of the United States of the age of 21 years and upwards, excepting paupers and persons under guardianship, having his or her residence in this state for the term of six months next preceding any election, shall be an elector for Governor, Senators and Representatives..." Until 1954 "Indians, not taxed" were also excepted.

Tax-paying and property ownership as qualifications for voting were inherited from colonial times. According to W. Brooke Graves[1] the theory was "that property was the foundation of society and that it needed protection by excluding from the vote those floaters, paupers and apprentices who had no stake in the community." It is evident that there was the fear that paupers could influence, and be influenced by, those in office who provided them relief.

Today only a handful of states still disenfranchise "paupers." The suffrage provision in the Model State Constitution[2] is so worded that it prevents requirements other than residence, literacy, and maturity for qualifications, and mental incompetency and conviction of a felony for disqualifications. Paul Piccard in "Salient Issues of Constitutional Revision[3] says, "Qualifications ((for suffrage)) based on financial independence or the payment of taxes are hard to justify today." W. Brooke Graves also said in American State Government: "There is little or no connection between the extent of a person's wealth and his or her ability to discharge conscientiously the duties of a citizen."

In Maine, a pauper, as defined in Section 1, Chapter 3-A of the Revised Statutes, is "a person who has been directly or indirectly furnished supplies by a municipality within 3 months of any election at which he seeks to vote. The fact that money for the payment of wages of a person employed by a municipality is derived from relief funds does not give that person the status of a pauper." It should be noted that persons receiving aid through other state and federal programs are not considered "paupers."

In "Our Unknown Constitution," a series of articles which appeared in the Portland Sunday Telegram in 1962 Dr. Edward F. Dow says: "The definition of paupers under Maine law has a long, involved history and varying interpretations from community to community. While the Constitution excludes paupers from voting it does not define the term nor set up a procedure to prevent paupers from registering. Some paupers vote, others do not even attempt to register. It would seem wise to delete the pauper clause from Article 2 of the Constitution."

The Republican Party Platform of 1964 does not refer specifically to the disenfranchisement of paupers, but the Democratic Party Platform includes "Repeal of the law disenfranchising paupers.'

The most significant recommendation is that of the bi-partisan Maine Constitutional Commission in its First Report of January, 1963 "The changes in laws in this State covering paupers are such that the Constitution should no longer deny the right to vote to "paupers"... The old idea of pauperizing the underprivileged no longer exists in this country and this limitation should be removed from our Constitution."

A bill has just been introduced in the 102nd Legislature (L.D.9) which would remove the phrase "excepting paupers and persons under guardianship" from the first sentence of Article II, Section one of the Constitution.

"Persons under guardianship" are not defined in the Constitution. Chapter 158 of the Revised Statutes states that guardians may be appointed for (1) persons who are <u>mentally</u> incompetent to manage their own affairs, (2) persons who have become incapable of managing their own affairs through drinking, gambling, idleness or debauchery of any kind or who so waste their estate as to expose themselves or families to want or suffering or their towns to expense, and (3) convicts committed to the state prison for a term less than for life.

If suffrage is denied to paupers and persons under guardianship at the present time, it must be assumed that registrars of voters are kept informed of current pauper lists and lists of persons put under, or released from guardianship. Is this a fair or even practical restriction?

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(1) W. Brooke Graves, author of "American State Government," 1953
(2) "Model State Constitution," National Municipal League, 1963
(3) "Salient Issues of Constitutional Revision," National Municipal League, 1961

Other Sources: Constitutions of Maine, Alaska, Hawaii; Compilation of the Laws pertaining to Elections; Revised Statutes, 1954, Chapter 158; Maine Constitution and its Need for Revision (L.W.V.of Maine, 1953); Report of Oregon State Bar Committee on Constitutional Revision, 1963.