Case Western Reserve Law Review

Volume 20 | Issue 2 Article 7

1969

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COMMENT

Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan

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IN REYNOLDS V. SIMS[1] the Supreme Court held that the equal protection clause of the 14th amendment requires both houses of a state bicameral assembly to be apportioned on the basis of equal population districts. Although a myriad of books and articles have been written about the Court's role in the process of change, little analytic attention has been directed toward the subsequent but important events in the lower courts of the state and federal judicial systems which have sought to implement the mandate of the Supreme Court.[2] As a result of the order these courts have become recognized as the legitimate locus of decision-making for apportionment controversies. However, because the reapportionment cases require a kind of political decision on the part of the judiciary, questions of judicial partisanship have become significant.

Initially, the aura of illegitimacy which surrounds judicial participation in partisan decision-making needs to be dispelled in order to clear the way for an empirical examination of cases which partake of this characteristic. The representational nature of both state and federal judicial systems is recognized by the mode of selection of judges, yet the popular myth of judicial impartiality denies the propriety of a representational role for courts as institu-

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1 377 U.S. 533 (1964).

2 With reapportionment litigation still pending in a few states, a nationwide restructuring of the state legislative electoral base had occurred by 1967. In only three states — Kentucky, Maine, and South Dakota — had legislatures and electorates created population-based assemblies without judicial participation. State courts were drawn into the controversy in 24 states; lower federal courts participated in 40 states. Seventeen states, in which interaction between state and lower federal courts occurred, provided the overlap. *See* Council of State Governments, Legislative Reapportionment in the States (July 1967); 19 CASE W. RES. L. REV. 766 (1968).

tions. The process of appointment in the federal court system, except in the Supreme Court where broader political considerations may override partisan ones, is clearly party-oriented. District court appointments are made within the constraints of senatorial courtesy where appropriate; in states where the administration party is not represented in the United States Senate, the state party organization is, by custom, accorded a significant if not determinative voice. Federal Courts of Appeal are usually manned by district judges deemed worthy of promotion and found within the proper party.[3]

In a majority of state court systems, the electorate participates directly. Thirty-two states provide for elective judges; 18 of these use partisan, and 14, nonpartisan ballots. Partisan nominations in the latter group, either by convention or by primary, reduce the significance of the nonpartisan ballot.[4] Only six states select judges by gubernatorial appointment with consent of the state senate. Of the remaining 12 states, seven provide some combination of appointment and subsequent election, while five require the legislature to elect the judges.[5]

The reapportionment decision-making process is further complicated by the deeply political nature of the questions sought to be resolved. For example, while the historic urban-rural cleavage in American politics has been reduced in significance by demographic, economic, sociological, and technological developments, the apparent persistence of urban-rural conflict in state legislatures camouflages differences which are partisan in nature and which reflect far more complex interest groupings within both metropolitan and nonmetropolitan areas. In dramatic cases, suburban and rural legislators in reapportioned assemblies have joined in conservative coalitions to preserve the status quo. In New Jersey, for example, where northern suburban areas were most severely under represented in the old legislature, a 3-to-1 Republican majority was returned after reapportionment, and grave policy conflicts have developed between the Democratic, urban-oriented governor and the reapportioned legislature.[6] In Tennessee, Ohio, and Michigan, subdistricting accompanied reapportionment as a political price exacted by groups seeking structural ways to hold or gain power.

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[3] *See* text accompanying notes 23 & 26 *infra.*

[4] Nagel, *Political Party Affilation and Judges Decisions*, 55 AM. POL. SCI. REV. 843, 850 (1961).

[5] COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1966-67, at 116-17 (1966).

[6] N.Y. Times, Jan. 7, 1968, § 1, at 26, col. 1; *id.* May 12, 1968, § E, at 6, col. 1.

Although Chief Justice Warren, in *Reynolds v. Sims*, defined the goal of judicially enforced reapportionment to be "fair and effective representation,"[7] in reality the Supreme Court has failed to provide workable guidelines for resolution of these difficult political questions.[8] The judges in lower federal and state courts have been left "free" to decide them in accord with standards other than legal precedent. These judges may satisfy judicial norms by "representing" law or justice in reapportionment decisions by applying the requirement of equal population districts in both houses of state legislatures. At the same time and in the same decisions, judges may "represent" groups seeking to gain or hold power through legislative apportionment, by approving or withholding approval of alleged gerrymanders, and by validating or invalidating changes in the number of representatives per district.

Judicial response to pressures within the political system may occur in a variety of ways which are difficult to define and which may merge in the person of a single judge. Direct response to the bidding of a political party is probably rare, although this is difficult to verify empirically.[9] Indirect response to needs expressed by groups in the political system with which judges have been and may still be identified is more probable. The deepest and possibly unconscious level of response reflects consonance of the values of judges and parties with which they have been affiliated, values which predispose judges both to associate themselves with a given party and to make decisions which favor that party.

[7] 377 U.S. at 565-66.

[8] Equal population districts which, within the limits of census data and population mobility *can* be mathematically defined, do not provide in and of themselves "fair" representation. Within the bounds of equal population requirements, district lines may be drawn either to handicap or to enhance the power of racial or partisan groups in the potential electorate. Control of the boundary setting agency remains a crucial means of access to political power. Gerrymanders, once executed by over or under population of districts, still may be achieved by more sophisticated techniques. Districting by computer, for example — a fast and efficient method — involves programming the control agency's value judgments and political choices to guide the computer in its selection of populations as it builds districts of equal numbers of people. *See* Nagel, *Simplified Bipartisan Computer Redistricting*, 17 STAN. L. REV. 863-64 (1965).

[9] The exploration of judicial motivation is a task fraught with difficulties. The most promising method, psychoanalysis, is not available for obvious reasons. Interviewing judges, a method which Theodore Becker is exploring with optimistic expectations, is particularly inappropriate for investigation of partisan motivation, since party-oriented judicial behaviors conflicts so flagrantly with judicial canons that judges would be unlikely to be capable of admitting such behavior even to themselves, let alone to curious political scientists. If a decision coincided with the interest of a party with which the judge had some past or present affiliation, he would, of political and even psychological necessity, be likely to rationalize his decision by legal standards. Becker, *A Survey Study of Hawaiian Judges: The Effects on Decisions of Judicial Role Variations*, 60 AM.

The hypothesis that judges' decisions and political party affiliation are in some way related is supported by Nagel's findings, based on a study of 298 state and federal supreme court judges.[10] Excluding judges from courts which were solidly manned by members of one party, and excluding unanimous decisions, Nagel found statistically significant correlations between the political party variable and the favored litigant in nine types of cases in which the issues at stake were socio-economic in character. The most significant correlations showed Democratic judges tending to favor the administrative agency in business regulation cases, the claimant in unemployment compensation cases, and the employee in employee injury cases; Republican judges tended to favor the opposing party in these suits. Nagel does not suggest that he has proven a causal connection. His hypothesis is that personal standards of judges may account both for decisions and party affiliation. Indirectly, however, "party affiliation may be responsible for some decisional propensity by virtue of the fact that a judge's party affiliation may have a feedback reinforcement on his value system which in turn determines his decisional propensities."[11] Individual deviance, reflecting lack of consonance between value systems and party affiliation, may be explained by traditional family or sectional party allegiances; or, in the case of a specific issue, personal experience. A judge who previously served as a prosecuting attorney, for instance, may have liberal attitudes which do not extend to criminal cases.[12]

Nagel explored devices such as the nonpartisan ballot, judicial appointment, and long terms of office, which are used in various states to decrease the relationship between partisan influences and judicial decisions. His analysis shows that of these variables, only the appointive selection factor significantly interrupted the pattern of partisan tendencies of judges. The apparently more independ-

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POL. SCI. REV. 677 (1966). Gething attempted the interview technique in an investigation of reapportionment decisions in the Michigan Supreme Court. Only one of eight justices was willing to be interviewed, and his responses about determinants of his decisions were given in terms of rational-legal arguments. J. Gething, Interest Groups, the Courts, and Legislative Reapportionment in Michigan, 1967 (unpublished dissertation in Univ. of Michigan Library). In light of the fact that analysis of eight reapportionment decisions in the Michigan Supreme Court showed high consistency of voting within blocs defined by party affiliation, *id.*, the usefulness of interviewing to investigate this type of judicial problem appears minimal. Ulmer, *Communication*, 55 AM. POL. SCI. REV. 1098-1100 (1961).

[10] Nagel, *supra* note 4.

[11] *Id.* at 847.

[12] *Id.*

ent stance of appointed state judges may be due to appointments across party lines sometimes provided for by state tradition or law. If required to choose a candidate from the opposite party, a governor would tend to appoint a person whose values were closer to his own; for example, a liberal Republican or a conservative Democrat. Nomination by special bipartisan or nonpartisan commissions may also be associated with independent judicial behavior.[13] Nonpartisan elections, however, did not reduce the significance of the party variable, because nominations are usually partisan; nor did the length of term.[14]

The hypothesis that there is a relationship between reapportionment decisions and judicial partisanship can be more clearly seen through a comparison of the reapportionment cases. A useful example is that of the politics — judicial, legislative, and electoral — of reapportionment in Ohio and Michigan, where a significant association has been found between party affiliation and the party interest in judicial controversies in the decision-making behavior of both state and federal judges. The two states were chosen because both are middle-western, highly industrial, and urban. Both contain not only the traditionally Democratic urban areas and Republican countryside, but also Republican cities and isolated rural areas that consistently return Democratic majorities. Patterns of population mobility leading to mushrooming suburbs and declining core cities accompanied population growth in both states between 1950 and 1960. Nevertheless, there is one apparent difference — the partisan outcome of reapportionment.

Prior to reapportionment these cross cleavages of ecological and partisan characteristics provided the backdrop for legislatures that were constitutionally biased in favor of rural representation. Although both state assemblies struggled with various reapportionment plans in the wake of *Baker v. Carr*,[15] neither reached a successful legislative conclusion. In Ohio, a partisan supreme court endorsed the work of a partisan apportionment board, while in

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[13] Since neither custom nor law requires appointment across party lines in the federal judiciary, this source of independence of appointed judges would not be expected to be significant in the behavior of federal judges.

[14] Nagel, *supra* note 4, at 848.

[15] 369 U.S. 186 (1962). The new apportionments approximated the equal population standard in both houses; Michigan's is statistically the "most equal" in the nation, that is, with the smallest variance among district populations. Both new plans replaced some multi-member districts with an entirely single-member district structure. Both have been attacked as partisan gerrymanders — Ohio's as Republican, Michigan's as Democratic.

Michigan a partisan supreme court resolved the deadlock of an equally divided apportionment commission. In both states, the judiciary is elected on nonpartisan ballots, but party primaries in Ohio and party conventions in Michigan serve as vehicles of nomination for judicial candidates.

Quantatively the reapportionment decisions in these two states consists of 13 cases: two lower federal[16] and two state court decisions[17] in Ohio; one lower federal[18] and eight state court cases[19] in Michigan. A total of 27 judges participated in these decisions; of these, 22, or 82 percent, voted consistently with the apparent interest of the party whose label they bore. Five, or 18 percent, cast what will be called here an independent vote in at least one case.[20] Table 1 presents a summary of the judges' voting pattern according to party background and court.

In the federal apportionment cases supposedly nonpartisan judges appeared to have reached conclusions of a representational nature. Although federal judges, unlike members of the state elective judiciary, are appointed to their posts, in reality these federal benches are only an electoral step removed from the direct representative process. By virtue of the use of the three-judge court in the reapportionment cases, the chief judge of the circuit has the authority to determine the composition of the federal panels hearing the apportionment cases.[21] In all three federal cases, the panels, with a Republican majority, were selected by a Republican chief judge.

For example, in the first Ohio case, *Nolan v. Rhodes*,[22] Chief

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[16] Nolan v. Rhodes, 218 F. Supp. 953 (S.D. Ohio 1963), *rev'd per curiam*, 378 U.S. 556 (1964), *on remand*, 251 F. Supp. 584 (S.D. Ohio 1965), *aff'd per curiam*, 383 U.S. 104 (1966).

[17] State *ex rel.* King v. Rhodes, 11 Ohio St. 2d 95, 228 N.E. 2d 653 (1967). The lower court opinion was unreported.

[18] Marshall v. Hare, 227 F. Supp. 989 (E.D. Mich.), *rev'd per curiam*, 378 U.S. 561 (1964).

[19] *In re* Apportionment, 376 Mich. 410, 137 N.W.2d 495 (1965), *aff'd on rehearing*, 377 Mich. 396, 140 N.W.2d 436, *appeal dismissed sub nom.* Badgley v. Hare, 385 U.S. 114 (1966); *In re* Apportionment, 373 Mich. 250, 128 N.W.2d 722 (1964); *In re* Apportionment, 372 Mich. 418, 128 N.W.2d 350, *modified and vacated*, 373 Mich. 247, 128 N.W.2d 721 (1964); Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960), *vacated and remanded*, 369 U.S. 429, *on remand*, 367 Mich. 176, 116 N.W.2d 350 (1962), *cert. denied*, 377 U.S. 990 (1964).

[20] "Independent" is defined as a vote either in opposition to the interest of the judge's party, or in an ambiguous fashion that failed to further the interest of the judge's party, when it was possible to help it.

[21] 28 U.S.C. § 2284(1) (1964).

[22] 218 F. Supp. 953 (S.D. Ohio 1963), *rev'd per curiam*, 378 U.S. 556 (1964).

TABLE 1.— *Partisan Affiliation and Voting Behavior of Judges Participating in Reapportionment Decisions, Ohio and Michigan, 1960-1967*

	State Court of Appeals		State Supreme Court		Federal Court	
	Republican	*Democratic*	*Republican*	*Democratic*	*Republican*	*Democratic*
Ohio: Number of Judges Who Voted:						
According to Party-line	0	3	5	1	2	0
Independently	0	0	1	0	0	1
Total	0	3	6	1	2	1
Michigan: Number of Judges Who Voted:						
According to Party-line	--	--	3	5	2	1
Independently	--	--	1	2	0	0
Total	--	--	4	7	2	1

Circuit Judge Lester Cecil, a Republican from Dayton, convened two Republicans and a Democrat to form the panel: Circuit Judge Weick, former Republican treasurer of Summit County; District Judge Weinman, former Republican prosecutor of Steubenville; and District Judge Peck, former secretary to Democratic Senator Frank Lausche.[23]

By the time of the second Ohio federal reapportionment case,[24] and the only Michigan reapportionment case filed in federal court, *Marshall v. Hare*,[25] Judge Weick had succeeded Cecil as chief judge of the Sixth Circuit. In Ohio, Judge Weick appointed himself to sit with his two colleagues in the earlier Ohio apportionment case to hear the new plea. In Michigan, he appointed Circuit Judge O'Sullivan, former Republican National Chairman; District Judge Kaess, former chairman of the Wayne County Republican Committee and prominent Republican lawyer; and District Judge Roth, a former Democratic state attorney general.[26] In all three

[23] As a result of his conservative stance in state and national politics Senator Lausche had built a large Republican electoral following without sacrificing patronage privileges in the Democratic administrations. As his associate and nominee, Judge Peck could be expected to shun a partisan role on the bench.

[24] Nolan v. Rhodes, 251 F. Supp. 584 (S.D. Ohio 1965), *aff'd per curiam*, 383 U.S. 104 (1966).

[25] 227 F. Supp. 989 (E.D. Mich.), *rev'd per curiam*, 378 U.S. 561 (1964).

[26] Judge Roth was appointed to the federal bench by President Kennedy in 1962.

cases, the Republican majority favored the interest of the Republican party of the state in electing as many of its members to the legislature as possible.

Although these federal judges were not elected, their appointments reflected representative processes. Eisenhower, who appointed all of the Republican judges, had won the electoral votes of both states each time he ran for President. In Ohio, where the 1960 electoral vote went to Vice President Nixon, the Democratic judge was selected by independent-oriented Senator Frank Lausche and he voted with his Republican colleagues on reapportionment. In Michigan, where President Kennedy won the 1960 electoral vote, the Democratic judge dissented and upheld what was, in that situation, essentially a Democratic position in state politics. This is not to suggest that a causal relationship has been established between party affiliation and these judicial decisions, but that the appointment of judges with preexisting political philosophies, providing them with tools of analysis in a given situation, performs a representative function in society. It is a function no less important for an appointed than an elected judiciary, however indirect or inferential it may be for the former.

A brief summary of the issues in the three federal cases will serve to indicate the nature of the partisan interest. Nolan's suit in the first Ohio case challenged the Hanna Amendment to the state constitution, which had been approved in 1903 by 98 percent of the voters, including a majority in every county in the state. The rapidly growing urban population, as revealed by the 1900 Census, had led to a combined rural and conservative effort to write into the state's apportionment provisions a guarantee to every county, regardless of population, of one representative in the lower house.[27] By 1960, when the urban proportion of the state's population passed 70 percent, 48 of the 88 counties lacked populations equal to the one-half ratio of population required before 1903; 71 counties fell below the single ratio. In spite of areas of Democratic strength in the rural hills of southern Ohio, and strong Republican cities such as Cincinnati and Columbus, the Hanna Amendment inflated rural Republican strength enough to provide a reliable Republican majority in the state house of representatives. Since 1952, only the "Right to Work" issue, placed on the ballot in 1958, had brought out large enough numbers of Democratic voters to overcome the constitutional handicap to the Democratic

[27] OHIO CONST. art. XI, § 2 (1903).

party, and to enable it to win a majority in the house. Invalidation of the amendment and removal of the half-ratio provision from the state constitution would have left Ohio with a population-based assembly.

In opening judicial channels to groups seeking apportionment revision, however, the United States Supreme Court had left the lower courts free to devise their own criteria of fairness.[28] This the federal court did, upholding the Hanna Amendment on the grounds of (1) the federal analogy; (2) the open political process in Ohio which provides several means for amending the state constitution; (3) the rationality of a system of checks and balances; and (4) general custom among American state legislatures to elect one house on a population base, the other on a geographical base. "About one-half of the states in the Union have legislative bodies so apportioned. Can it be said that they are all irrational?"[29] Significantly, however, the Supreme Court could say so, and did in *Reynolds v. Sims*,[30] which the Court cited in its per curiam reversal of the federal court in Ohio.[31]

On remand, the district court used a potent defensive weapon, the right to delay. Judicial vacations, taken in sequence instead of simultaneously, in addition to full extension of legal delays to the defendants, enabled the state, under the control of a Republican administration, to hold the 1964 elections on the basis of the old apportionment. The delays also extended through the debate in the United States Senate on the Dirksen amendment to the United States Constitution, an attempt to prevent application of the population-base principle to both houses of state legislatures. The day after defeat of the Dirksen amendment in the Senate, the federal court in Ohio finally set a date for hearing the arguments in the *Nolan* case.[32]

In its second decision, the Ohio federal court declared the Hanna Amendment unconstitutional under the principles of *Reynolds v. Sims* and upheld the plan of the apportionment board, an administrative body whose three members were Republican state officials. The district boundaries of the board plan had been drawn by Republicans, opening the plan to the charge of Republican

[28] Baker v. Carr, 369 U.S. 186 (1962). *See* text accompanying note 8 *supra.*

[29] Nolan v. Rhodes, 218 F. Supp. 953, 958 (S.D. Ohio 1963), *rev'd per curiam*, 378 U.S. 556 (1964).

[30] 377 U.S. 533 (1964).

[31] 378 U.S. 556 (1964).

[32] Cleveland Plain Dealer, Oct. 3, 1964, at 25, col. 1.

gerrymander. The urban multi-member districts, which had enabled the Democrats to offset some of their losses from under-representation in the cities, were divided into small, single-member districts, promising the potential of legislative seats for suburban Republicans in the metropolitan delegations.

Subsequently, Democratic senate leader Frank King brought suit in the Franklin County Court of Appeals in Columbus, to void the action of the apportionment board as illegal, unconstitutional, and a usurpation of judicial power.[33] This challenge in a state tribunal provided the federal court with an appropriate means of delaying its decision on the constitutionality of the board plan, since interpretation of administrative powers under the state constitution was a proper function of the state courts. However, the partisan interest in delay was now reversed, and Republican leaders pressed for federal judicial action to validate the board plan.

Presiding Judge Weick acceded to the pressure for a decision. Noting that if the decision were delayed, there was a possibility of a breakdown in state election machinery for the 1966 election, the federal court ordered the board plan into effect on a temporary basis.[34] The board's action under the state constitution was accorded the presumption of validity "until or unless . . . dissipated by determination by the Ohio courts."[35] This decision was affirmed by the Supreme Court in February 1966,[36] although the question of the board's authority was still being litigated and would not be settled until June 1967.[37] In both Ohio federal court decisions the panel acted unanimously, confirming the expectation that Democratic Judge Peck would not necessarily represent the interests of the Democratic party.

In Michigan, August Scholle, President of the Michigan AFL-CIO, and his vice president Marshall, decided to transfer their apportionment controversy from the state supreme court to the federal judicial arena because of virulent attacks on the state court, including threats of impeachment from Republican legislative leaders following invalidation of the 1952 Senate apportionment. It has been widely assumed that federal court jurisdiction was invoked because Democratic Justice Adams was defeated by Republican

[33] *Id.*, Oct. 19, 1965, at 1, col. 1.

[34] Nolan v. Rhodes, 251 F. Supp. 584, 587-88 (S.D. Ohio 1965), *aff'd per curiam*, 383 U.S. 104 (1966).

[35] *Id.* at 587.

[36] 383 U.S. 104 (1966).

[37] State *ex rel.* King v. Rhodes, 11 Ohio St. 2d 95, 228 N.E.2d 653 (1967).

O'Hara in the 1962 judicial election, thereby creating an even partisan division on the state's high bench instead of a Democratic majority.[38] It seems unlikely, however, that Scholle would be so naive to believe that he could be assured of a favorable partisan majority on the federal court panel, which would be selected by Sixth Circuit Chief Judge Weick. The more rational explanation for the transfer from state to federal court lies in the strategy to remove, at least temporarily, the severe pressure on the Democratic justices of the state tribunal, a strategy which also had partisan overtones.

The issue at stake in *Marshall v. Hare*[39] was the validity of the apportionment plan in the 1963 state constitution, which provided a balance of population and area factors, well advertised as the "80-20" formula. Partisan perceptions of the plan were underscored by the fact that the new constitution, of which the apportionment plan was the most controversial feature, had been written and approved by the Republican majority in the 1962 constitutional convention, over the nearly solid opposition of the Democratic members of the convention. The partisan interest in Michigan apportionment was heated and bitter on both sides.

Republican Judges O'Sullivan and Kaess formed the majority upholding the constitutional apportionment provisions; Democratic Judge Roth dissented. In the court's opinion, Judge Kaess justified the over-representation of the people of the Upper Peninsula on the basis of their economic disadvantage, their remoteness from the seats of power, and the uniqueness of their problems. A model of judicial restraint, Judge Kaess declined to substitute "tyranny by the judiciary" for majority rule. The citizens of Michigan, he said, had just adopted their new constitution.[40]

Judge Roth's dissent was based on an accurate forecast of *Reynolds v. Sims*, a decision which would soon provide the ground for Supreme Court reversal of Roth's colleagues. Roth challenged the majority's view of the new state constitution as the "voice of the people," since it had been written by a convention whose electoral base was unrepresentative and adopted by a majority of less than 1 percent. Furthermore, he found the apportionment plan to be in conflict with the new state constitution's equal protection clause, guaranteeing, in Roth's view, the equality of the individual's

[38] S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 38 (1965).

[39] 227 F. Supp. 989 (E.D. Mich.) *rev'd per curiam*, 378 U.S. 561 (1964).

[40] *Id.* at 993-94.

vote. With reasoning which anticipated the Supreme Court in *Lucas v. Colorado General Assembly*,[41] Roth urged that "constitutional law is not a matter of majority vote. Indeed, the philosophy of the Fourteenth Amendment teaches us that it is personal rights which are to be protected against the will of the majority."[42] This view appeared vindicated when the Supreme Court reversed and remanded *Marshall*, citing both *Reynolds* and *Lucas*.[43]

In the limited sphere of the state reapportionment cases, judicial events in Ohio and Michigan suggest that the outcome of conflict in the state court systems can be more clearly related to the party affiliation of judges than to any other factor. State judicial involvement in apportionment in Ohio turned on the authority of the apportionment board to draw district boundaries and to create single-member districts in an entirely new plan. The constitutional mandate of the board was to increase or decrease the number of representatives for constitutionally established districts once each 10 years, following the decennial census. In *State ex rel. King v. Rhodes*,[44] Senator King charged that the board had abused its power by holding secret sessions and had usurped judicial authority by deciding which portions of the state constitution to treat as valid.[45] The choice of forum at the seat of state government was legally correct, but also favorable to the plaintiff in partisan character. Three Democratic judges heard the arguments.

Republican Attorney General Saxbe, who in 1964, when his party's interest lay in preserving the old apportionment, had argued that the apportionment board lacked authority to act until after the 1970 census, now defended the board's 1965 apportionment. Because the constitutional provisions were severable, he said, the board's right to act survived the invalidation of the Hanna Amendment and the half-ratio provision which had prevented population equality among districts.[46] Denying the allegation of secrecy, Saxbe argued that the meetings of the board were open "for anyone to

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[41] 377 U.S. 713 (1964).

[42] 227 F. Supp. at 1007.

[43] 378 U.S. 561 (1964).

[44] 11 Ohio St. 2d 95, 228 N.E.2d 653 (1967). The lower court opinion was unreported.

[45] Cleveland Plain Dealer, Oct. 19, 1965, at 1, col. 1.

[46] Brief for Defendant, State *ex rel.* King v. Rhodes, *cited in* 11 Ohio St. 2d 95, 126, 228 N.E.2d 653, 672 (1967).

attend," but admitted that the two sessions at which house and senate plans were approved had not been "announced in advance."[47]

The Democratic judges on the appeals bench upheld *King*, ruling that the board, having met and acted once following the 1960 census, had no authority to meet again until after the next decennial census. The court relied on historical tradition as well as on the language of the state constitution. "For more than one hundred years," one newspaper quoted the court as saying, "it has been the practice based upon the language used in the constitution for this board to meet once and only once each 10 years."[48]

The defendant, Republican Governor Rhodes, appealed to the Ohio Supreme Court, a body of seven judges elected statewide. In 1967 this bench was composed of a Republican chief justice, five other Republican judges and one Democratic judge. Republican Judge Matthias spoke for the majority in an opinion reversing the lower court, ruling that as a matter of state law, the constitutional provisions were severable, hence the board's authority to act survived the invalidity of the other portions of article XI of the Ohio Constitution.[49] Judge Matthias found in the state constitution an *implied power* for the board to determine new districts, and concluded by transforming this implied power into a "mandatory duty."[50] The Ohio Supreme Court also relied on the federal court validation of the board plan as additional support for its conclusion, although the federal panel had specifically and emphatically deferred to the state court on the question of the board's authority.[51]

Republican Judge O'Neill, joined by the lone Democrat on the bench, Judge Zimmerman, attacked the majority in a stinging dissent. Referring to the May 1967, referendum on the apportionment board plan, Judge O'Neill accused the majority of using judicial power "to amend the constitution to make effective the exact apportionment that the voters have just rejected."[52] The board's authority, the dissenters objected, was not severable from the invalid sections of article XI of the state constitution; the board had no general authority to apportion. Admitting that the federal court's opinion was res judicata with respect to the 1966 election,

[47] Cleveland Plain Dealer, Oct. 19, 1965, at 6, col. 5.

[48] *Id.*, July 20, 1966, at 2, col. 3.

[49] 11 Ohio St. 2d at 104, 228 N.E.2d at 672.

[50] *Id.* at 104, 228 N.E.2d at 659.

[51] *Id.* at 103, 228 N.E.2d at 658.

[52] *Id.* at 108, 228 N.E.2d at 662.

Judge O'Neill denied that the court's temporary order could be relied on to uphold the board's authority, a question which the federal court "specifically reserved . . . for the decision of the Ohio courts."[53] An implied power to establish new districts could not exist "unless there is some express power from which the implication of power arises," and no such power was granted in the state constitution.[54]

The intensely partisan nature of the judicial process in Michigan reflects a high degree of party conflict in the coordinate branches of state government. Among the reasons for the intensity of party conflict in Michigan, compared to the relatively muted competition of Ohio politics, is the contrasting distribution of the urban population, which accounts for about 73 percent of the total population in both states. Although Michigan has 10 standard metropolitan statistical areas (SMSA's), half of the state's population resides in one of them, metropolitan Detroit. Only 17 percent of Ohio's population lives in greater Cleveland, the largest of the 13 SMSA's in Ohio, while even the three largest (Cleveland, Columbus, and Cincinnati) account for less than a third of the state's population. Unimetropolitan dominance in Michigan has led to strong outstate fears in state politics, while Ohio's multimetropolitan population distribution has a moderating effect on intrastate conflict.

While Cleveland rivals Detroit in the preponderance of Democratic voting behavior, its strength is offset by Republican voting habits in Columbus and Cincinnati. Although some Michigan metropolitan areas tend to vote Republican, their relative strength in the state is far less, and their insistence on structural protection, such as area-based representation, correspondingly more intense.

Another factor which has led to more passionate partisan conflict in Michigan than in Ohio is found in the history of party competition in each state. Until the advent of the automobile assembly line, Michigan had a one-party system. Democratic successes were rare between the Civil War and the New Deal. Because of the break with tradition which Democratic majorities represent, the voting patterns of the past 3 decades have contained the element of threat to long-established sectors of the population. Because of Ohio's more gradual and diversified industrialization, so-

[53] *Id.* at 115, 228 N.E.2d at 666.

[54] *Id.* at 120, 228 N.E.2d at 669.

cial, economic, and political change has occurred less rapidly. Although Republicans were dominant in Ohio between the Civil War and the turn of the century, margins were slim and politics competitive. Since 1900, the parties have shared power both in state politics and in national allegiance.

By the 1960's, however, the parties were competitive enough in both states to prevent resolution of apportionment difficulties through the traditional representative institutions of the executive and legislature. Although Ohio's judiciary has been elective since 1851, Michigan constitution makers did not accede to popular demands for elective judges until 1908. Republican dominance in Michigan politics extended to the courts until the 1930's, when it was challenged by the growing power of a labor-Democratic coalition. What has been characterized as the "basest" kind of political competition for judgeships led to a constitutional amendment in 1939 instituting the nonpartisan ballot for judicial elections. The method for nominating judicial candidates was left to the legislature, which delegated the task to the political parties.[55]

In practice, the system has remained partisan. Newspaper coverage of elections includes partisan affiliation of judicial candidates; some aspiring judges emphasize their party in campaigning. For example, Chief Justice Kavanagh, Governor Williams' attorney general whose election to the bench in 1957 first created a Democratic majority on the Michigan Supreme Court, appealed during his campaign for the election of Democrats to the court in order for the people to secure "equal justice."[56]

The governor's power to appoint judges to unexpired terms is often used to increase party representation in the judiciary; appointed judges gain a major advantage in running as incumbents for a full term. Governor Williams' 14-year incumbency provided his party's margin on the state's high bench; three of five "Williams men" reached the supreme court by first being appointed to unexpired terms.[57] Partisan behavior on that court has been documented both by the judges themselves, in quotations collected by Ulmer on the difference between "Republican justice" and "Democratic justice," and by their record in the area of workman's compensation cases. Schubert and Ulmer found nearly perfect intra-

[55] Ulmer, *The Political Party Variable in the Michigan Supreme Court*, in JUDICIAL BEHAVIOR 280 (G. Schubert ed. 1964).

[56] *Id.* at 281.

[57] G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 130 (1959).

group consistency in judicial votes on this type of case from 1954 through 1960, with Republican judges favoring employers and Democratic judges supporting employees' claims.[58] With this background in view, the politically sensitive area of apportionment would be expected to generate partisan decisions.

From 1960 through 1966, the Michigan Supreme Court's eight major decisions affecting apportionment of the state legislature were made by a total of 11 judges who wrote 39 opinions, an average of almost five opinions per case. In spite of this multiplicity of views, two clearly partisan blocs emerged in the apportionment cases, with only three of the 11 judges involved voting independently of their party's position on one or more decisions. These blocs can be discerned through an analysis of the groups of Michigan cases where partisanship appeared to be a significant element in the decision-making process.[59]

In the first series of decisions, August Scholle, president of the state AFL-CIO, had failed to secure a population-based legislature in Michigan through political processes. The senate, whose area-based apportionment had been written into the state constitution in a 1952 amendment, provided an ever-present graveyard for legislation sought by labor interests in the state.[60] Scholle's decision to turn to judicial channels to seek reapportionment was made after the Democratic party won a majority on the state supreme court in 1957. In his suit, *Scholle v. Hare*,[61] Scholle charged that the 1952 amendment violated the due process and the equal protection clauses of the 14th amendment to the Constitution. He asked that the secretary of state be enjoined from issuing 1960 election notices until the senate reapportioned itself according to the 1908 constitution, or be required to declare all elections to the state senate at-large. Initially, respect for precedent overcame partisan leanings. The Democratic interest to invalidate the 1952 amendment was clear, but out of the ambiguity of five opinions emerged

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[58] Ulmer, *supra* note 55, at 285. *See also* text accompanying note 11 *supra.*

[59] The Michigan cases are so well documented that a case by case study need not be undertaken. *See* K. LAMB, W. PIERCE & J. WHITE, APPORTIONMENT AND REPRESENTATIVE INSTITUTIONS: THE MICHIGAN EXPERIENCE (1963); R. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 346-51 (1965); Cooper, *Civil Procedure*, 13 WAYNE L. REV. 44 (1966); Quint, *Constitutional Law*, 13 WAYNE L. REV. 89 (1966).

[60] An estimated 27 percent of the state's population could elect a majority of the senators; no provision was made for future redistricting.

[61] 360 Mich. 1, 104 N.W.2d 63 (1960), *vacated and remanded*, 369 U.S. 429 (1962).

a majority which believed that it should follow the nonjusticiable rule of *Colegrove v. Green*.[62] Scholle's appeal to the Supreme Court joined the group of cases under consideration with *Baker v. Carr* and won a reversal following that decision.[63]

On remand, the justices had new precedent to follow on the justiciability of apportionment controversies, but no guidelines as to fairness. The Michigan justices were in this case "free" to vote their personal predilections as to the value of a population-based apportionment. Predictably, the court split on party lines, ruled the 1952 amendment unconstitutional, and ordered the legislature to reapportion the senate within 33 days, or face at-large elections for that chamber.[64]

Neither at-large elections nor reapportionment occurred in 1962. That summer, while an acrimonious constitutional convention debated apportionment provisions in Lansing, a group of Republican state senators won a stay from vacationing Supreme Court Justice Potter Stewart. Although Justice Black simultaneously denied a similar request in an Alabama apportionment controversy, Justice Stewart called the Michigan decision "unprecedented," and ordered the temporary delay to give the full Court the opportunity to review the case during the fall term.[65]

The constitutional convention, in addition to approving the "80-20" formula for apportionment in the new constitution, provided for a bipartisan apportionment commission to carry out the charter's mandate. Two structural weaknesses suggested future difficulties for the commission: first, the representative base of the eight man body itself was weighted by area; and secondly, with four members from each party, partisan cohesion would lead to a stalemate. Jurisdiction was given to the Michigan Supreme Court in case the commission failed to agree.[66]

The predictable deadlock of the apportionment commission when it met to devise districts for the 1964 election led to the second round of apportionment cases in the Michigan Supreme Court.[67] Independent votes were cast by Republican Justice O'Hara,

[62] 328 U.S. 549 (1946).

[63] 369 U.S. 429 (1962).

[64] Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962), *cert denied*, 377 U.S. 990 (1964). The decision was 4-to-3 because Democratic Justice Adams, who had been attorney general at the time of the first decision, disqualified himself.

[65] *See* 18 CONG. Q. ALMANAC, 87TH CONG., 2D SESS. 1058 (1962).

[66] MICH. CONST. art. 4, § 6 (1963).

[67] *In re* Apportionment, 373 Mich. 250, 128 N.W.2d 722 (1964); *In re* Apportion-

who reluctantly recorded his respect for the higher authority of *Reynolds v. Sims*, and by Democratic Justices Black and Adams, who were more generous than their colleagues in allowing Republican members of the commission additional time to devise a population-based plan of apportionment.[68] The majority of the justices, however, voted in every case in accord with their stated personal and political preferences. The Democratic majority on the bench provided the votes to validate the Democratic commissioners' (Austin-Kleiner) plan of apportionment for the 1964 legislative election.

The Democratic presidential landslide of 1964 turned the Michigan Assembly over to the Democratic party with unprecedented majorities in both houses,[69] confirming the worst fears of opponents of the Austin-Kleiner plan. Although Democratic strength in the legislature was reduced to a minority again in 1966,[70] the court battles in the third round of apportionment cases were fought in an acrid atmosphere, and revolved around the single question of a Democratic gerrymander.[71]

Thirty-four Republican citizens, organized by Maxwell Badgley, sought invalidation of the Austin-Kleiner plan in the state supreme court on the ground that the federal standard of "fair and effective representation" had been violated by a partisan gerrymander. Cited as extrinsic evidence of a Democratic gerrymander were the dismemberment of political units (county, city, and township), in such a way as to silence "the effective political voice of the

ment, 372 Mich. 418, 128 N.W.2d 350, *modified and vacated*, 373 Mich. 247, 128 N.W.2d 721 (1964).

[68] Background factors may explain the deviance from the party's position in the cases of the Democratic independents. Justice Black had been a Republican attorney general in the 1940's, had switched parties because of personal differences with the then Republican governor, and had maintained a maverick position within his new party. Justice Adams, whose political career began in the rural, Democratic Upper Peninsula, represented a small sector of the state Democratic party traditionally opposed to reapportionment. Discounting background factors, Gething has classified the Democratic independents with Justice O'Hara as the "non-activists" on the bench. Each expressed his personal preference, at some point in the controversy, in accord with the position of his party; but each voted one or more times to implement the opposite system, basing his deviant vote on either judicial restraint or stare decisis. *See* J. Gething, *supra* note 9, at 194.

[69] The Democratic party won 60.5 percent of the senate seats and 66.4 percent of the house.

[70] Democratic seats comprised 47.4 percent of the total in the senate, and 50.0 percent in the house. Two Democratic deaths in the house permitted the Republicans to organize the legislature.

[71] *In re* Apportionment, 376 Mich. 410, 137 N.W.2d 495 (1965), *aff'd on rehearing*, 377 Mich. 396, 140 N.W.2d 436, *appeal dismissed sub nom.* Badgley v. Hare, 385 U.S. 114 (1966).

community";[72] and use by the Democratic commissioners of voting data, specifically, results from the 1962 state treasurer's contest, to guide the drawing of district lines in such a way as to maximize Democratic strength and minimize Republican votes.[73] The petitioners sought to initiate discovery procedures to ascertain the motivations of the commissioners.

The petitioners agrued that the evidence they sought was comparable to that relied on in New York, where it was held that a prima facie case of gerrymandering had been made when it was shown that: (1) reapportionment had been accomplished by a special, lame duck session of the legislature called and completed just prior to the 1964 election when change in party control was expected; (2) a letter by an important participant stated "our sole consideration in that respect was how best to serve the interests of those who were enrolled within our own party"; and (3) there were unexplained oddities in the shapes of selected districts.[74] The defendants argued that even if a showing of partisan motivation could be made, the apportionment would not be tainted if otherwise valid. The validity of an administrative or legislative act could not, as a matter of precedent in the state courts, be made to depend on the state of mind of those who passed it. By a partisan vote, discovery procedures were denied. The three Republican justices dissented, protesting that the process would facilitate obtaining evidence, while the Democratic majority ruled that discovery would encourage sensationalism and that "the motivations, cogitations and machinations of the commissioners, even if discoverable, would not be relevant."[75]

The Republican petitioners thus lost in the Democratic dominated judicial arena what the party had gained in the Republican dominated constitutional convention and what it had held for many years in the Republican dominated legislature. By appealing to the Supreme Court, they hoped to find a more favorable forum for their charge that the partisan gerrymander violated the equal protection clause of the 14th amendment. The Court reinforced its policy of refusing to consider this question by dismissing

[72] Reply brief for Petitioners at 29, *In re* Apportionment, 376 Mich. 410, 137 N.W.2d 495 (1965).

[73] *Id.* at 34-35.

[74] *In re* Orans, 45 Misc. 2d 616, 649, 257 N.Y.S.2d 839, 865, *aff'd on other grounds*, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825, *appeal dismissed*, 382 U.S. 10 (1965).

[75] 377 Mich. at 453, 140 N.W.2d at 459 (1966).

the appeal on November 21, 1966.[76] The Democratic and labor forces in Michigan had successfully limited the scope of the conflict to the state judicial arena in which they had majority representation.

The traditional myth of judicial impartiality requires that courts remain aloof from questions relating to the distribution of political power. The findings in the apportionment cases nonetheless suggest that partisan values assume a significant role in the resolution of reapportionment controversies, and that in both the lower federal and state courts, there is little if any difference between the behavior of elective or appointive judges. Hence, as the judiciary acquires a representative position it applies a decision-making process incorporating standards of judgment which enable particular interest groups to gain or conserve advantages in the political system.

The American Bar Association and the American Judicature Society, implicitly recognizing this representative aspect of judicial behavior, but rejecting its propriety, have called for the establishment of some means to ensure the appointment of equal numbers of Republicans and Democrats in the federal judiciary. Were such a goal possible to achieve, it would, by institutionalizing bipartisanship, prevent the operation of representative forces in an important sphere of judicial decision-making.[77]

The suggestion, however, offers no real solution to the problem, and would only perpetuate a system of partisanship in the courts. In the course of the Michigan apportionment controversy Republican Chief Justice Dethmers of the Michigan Supreme Court asked in the course of the Michigan apportionment controversy, "[c]an officials be expected to hand down impartial decisions when

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[76] Badgley v. Hare, 385 U.S. 114 (1966).

[77] *See* Nagel, *Unequal Party Representation on the State Supreme Court*, 45 J. AM. JUD. SOC'Y 62 (1961). Using 1955 data on the partisan affiliation of state supreme court judges, Nagel found that in the South, 92 percent of the highest state court judges were Democratic, while the region, as measured by the 1954 congressional vote, was only 76 percent Democratic. In the rest of the nation, 33 percent of the highest state court judges were Democratic, in contrast to 47 percent of the congressional vote. Nagel suggests several means to bring about a proportional representation of the parties in these courts. In elective states, Nagel advocates the reapportionment of judicial districts, on the assumption that the application of the "one man, one vote" principle would automatically create representative judiciaries. In appointive states, he suggests that appointments could be required, not of equal numbers of judges from each party as advocated by bar groups, but of proportional numbers. *Id.* at 65. Difficulties which would arise in implementing this proposal include means of accommodating long-term or life appointments to shifts in political sentiment, and choice of the measure by which the partisan division is to be determined.

those decisions may affect their reelection?"[78] Ideally, of course, they should, but the evidence here shows a deeper phenomenon at work, involving underlying value structures that will not easily be managed by adjustment of selection methods.

[78] Ulmer, *supra* note 55, at 281.

CASE WESTERN RESERVE LAW REVIEW

Volume 20 February 1969 Number 2

Member, National Conference of Law Reviews. Citations conform to *A Uniform System of Citations* (11th ed. 1967); style conforms generally to the *United States Government Printing Office Style Manual* (rev. ed. 1967).