EQUAL REPRESENTATION AND STATE LEGISLATIVE APPORTIONMENT:
A STUDY OF THE POLITICAL IMPACT OF THE
LEGISLATIVE REAPPORTIONMENT DECISIONS

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EQUAL REPRESENTATION AND STATE LEGISLATIVE APPORTIONMENT: A STUDY OF THE POLITICAL IMPACT OF THE LEGISLATIVE REAPPORTIONMENT DECISIONS

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PREFACE

Few recent decisions of the United States Supreme Court have had as great a political impact as those concerning state legislative apportionment. By declaring that legislative districts had to be as nearly equal in population as practicable, the Court seemed to strike at the heart of the existing bases of political power within most of the states. For this reason, the political implications of those decisions were considered to be so important that they were often compared to such landmark cases as Marbury v. Madison and McCulloch v. Maryland.

These decisions, however, marked neither the beginning nor the end of the controversy over legislative apportionment. Rather, they raised new questions concerning legislative apportionment and districting practices in the states, and they embroiled the Supreme Court in what had previously been an area reserved to the political branches of the government.

This study is concerned with the political impact of those decisions in three basic areas. First, an attempt is made to describe the political environment in which they were made, with special reference to the existing bases of representation in the states and the political reaction to

the decisions. Secondly, the study traces the major issues relating to judicial enforcement of the apportionment standards enunciated by the Supreme Court and the modification and development of those standards that followed the initial decisions. Finally, the extent to which reapportionment has been successfully enforced by the courts may suggest some tentative conclusions about the viability and utility of the equal population doctrine as a constitutional standard, as well as some of the possible political consequences of enforcement of that standard.

For the study, the basic sources include the decisions of the Supreme Court and those of the lower federal and state courts. The debates in Congress serve to indicate the principal arguments which developed over the issue of court-directed apportionment. In addition, the monthly section on representation in the National Civic Review, as well as articles in the New York Times, present an excellent review of the reapportionment problems in the states. The number of books and periodical articles on the subject has made some selection necessary, and an attempt has been made to select those which are representative of the major arguments developed during the period studied.

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CHAPTER I

"EQUAL REPRESENTATION" IN THE STATES: THE POLITICAL SETTING

The degree to which American state legislatures have been truly representative of the public has long been a matter of interest and concern. Particularly in matters of districting and apportionment has the "unrepresentative" character of state legislatures been apparent. As early as 1776, a convention of delegates from the towns of Essex County, Massachusetts, objecting to the "inequalities of representation" in the state, addressed a memorial to the legislature which predicted that unless different methods of representation were adopted "our Constitution will not continue to the late period of time which the glowing heart of every American now anticipates. . . ."[1] Despite this dim outlook, more than one hundred and fifty years later the government still endured. Nevertheless, the assertion could still be made at the time that any distinction between the former "rotten boroughs" of England and twentieth century American state legislatures was only a "matter of defining the degree of 'rottenness.'"[2]

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[1]Quoted in Robert Luce, Legislative Principles (Boston, 1930), p. 334.

[2]Harold F. Gosnell, Democracy: The Threshold of Freedom (New York, 1948), p. 176.

Criticism of apportionment and districting has become especially vocal and persistent during the last two decades; possibly no aspect of the legislative process has received as much public attention as that of legislative apportionment. The pattern for such criticism was set when, in 1954, the Committee on American Legislatures of the American Political Science Association concluded that with respect to legislative representation "anomalous situations exist, and inequities are common."[3] One year later a committee appointed by President Dwight D. Eisenhower to study intergovernmental relations supported that conclusion, adding that "the more the role of the states in our system is emphasized, the more important it is that the state legislatures be reasonably representative of all the people."[4]

These and similar evaluations of the state legislatures, which became more common as the years passed, made certain assumptions about representative government and the nature of the representative process. Central to any discussion of legislative apportionment, however, is the fact that democratic theory is itself "full of compromises -- compromises

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[3]Belle Zeller, editor, American State Legislatures (New York, 1954), p. 45.

[4]Message from the President Transmitting the Final Report of the Commission on Intergovernmental Relations, House Document No. 198, 84th Congress, 1st Session (Washington, 1955), p. 40.

of clashing and antagonistic principles."[5] As a result, one difficulty encountered in judging any method of apportionment derives in part from the existence of several traditional approaches that may reach quite different answers to the fundamental questions of who is to be represented and how the system will translate the preferred values, wants, or material interests into government policy.[6]

Some method of apportionment is essential to representative government, but its form may vary according to the ends sought by the representative system. Moreover, because it both affects and is affected by the system within which it operates, no apportionment is neutral, either in its origins or its consequences. Whether based on population, political units, proportional representation, or functional groupings — or on some pragmatic compromise involving a combination of these — any apportionment will have the effect of giving some values or interests more weight than others.[7]

Apportionment, then, presents some of the difficulties which inhere in the broader concept of representation. Since

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[5]Robert A. Dahl, A Preface to Democratic Theory (Chicago, 1956), p. 4.

[6]Charles E. Gilbert, "Operative Doctrines of Representation," The American Political Science Review, LVII (September, 1963), 616. Gilbert distinguishes six views of representation, although some are "rather academic than political." Ibid., p. 605.

[7]Alfred de Grazia, Apportionment and Representative Government (New York, 1962), p. 20.

it is through the representative process that "the represented accept legislative decisions as authoritative."[8] an apportionment supports the decision-making role of the government and legitimates the decisions made only so long as it reflects the values of those who are represented.

The major point of controversy that gave rise to the debate over the "representativeness" of state legislatures concerned the use of population as the primary, if not the only, criterion for any valid apportionment scheme. The sharpest critics of the legislatures shared a belief that the right to vote — and consequently to proper representation in the legislature — was seriously impaired if some election districts were substantially more populous than others. The right to have a vote "counted equally" with other votes meant nothing less than that election districts should be as nearly equal in population as possible. This view was concisely summarized in 1962 at a conference of political scientists, research scholars, and others interested in legislative apportionment. "In the light of democratic principles, of history and of contemporary political theory," their statement read, "the only legitimate basis for representation in a state legislature is people. One man's vote must be worth the same as another's."[9]

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[8]John C. Wahlke and others, The Legislative System: Explorations in Legislative Behavior (New York, 1962), p. 267.

[9]The Twentieth Century Fund, One Man, One Vote (New York, 1962), p. 3.

This conception of democratic theory encountered several obstacles. First, there was the problem that, as Justice Felix Frankfurter pointed out, the idea that "representation proportioned to the geographic spread of population" could be considered "the basic principle of representative government" had "never been generally practiced, today or in the past."[10] Again, even assuming the correctness of the equal population premise, those who sought to provide for apportionment on the basis of population had to overcome not only the inertia of the present system but the active resistance of the interests that especially benefited from the status quo. Until the controversy was transferred from the political arena to the courts, these seemed almost insuperable impediments to reform.

Historical Development

Ideas and usages of the past are often invoked to justify those of the present or to provide a basis for reform. The debate concerning legislative apportionment proved no exception. But if there is any single conclusion which might be drawn from the available evidence, it seems that no method served exclusively as a model in the matter of apportionment. Reflecting the circumstances of colonial development and the diversity of the federal system, methods of apportionment have varied considerably.

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[10] Baker v. Carr, 369 U.S. 186, 301 (1962).

In the American colonies, following the English practice, primary emphasis was given to representation of political units, usually counties or towns, and this practice carried over into the first states. Dissatisfaction with such an arrangement, however, developed during the colonial period, even to the threat of armed violence,[11] as population contested against town and county for representation. The result was often something of a compromise. Population was recognized in some of the colonies to the extent that the larger towns were given greater representation, but before the Revolution, representation in none of the colonies had any uniform relation to numbers of voters or inhabitants.[12]

The first state constitutions recognized population in varying degrees. Pennsylvania and Massachusetts, for example, gave primary consideration to population,[13] although in Massachusetts the small towns successfully fought off an effort to deprive them of the right to have at least one representative.[14] In Rhode Island, each town or county was

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[11]Gordon E. Baker, Reapportionment Revolution: Representation, Political Power, and the Supreme Court (New York, 1966), p. 17.

[12]Luce, op. cit., p. 342.

[13]Constitution of Pennsylvania (1776), Section 17, in Francis Newton Thorpe, editor, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America, 7 vols. (Washington, 1901), V, 3086; Constitution of Massachusetts, Chapter I, Sections 2, 3, Ibid., III, 1895.

[14]Luce, op. cit., p. 351.

guaranteed a minimum of one representative, but the constitution further stipulated that no single town or city could have more than one-sixth of the total.[15] Virginia's constitution distributed representatives among the counties in a manner that gave only indirect consideration to population differences,[16] while in South Carolina the legislative districts were fixed in the constitution.[17] Thus, while it could be maintained that the guarantee of representation to counties or towns did not originally create great inequalities among legislative districts,[18] both population and area served as the original bases of representation, and in several of the states area predominated as a basis.

Despite this mixed use of population and area, circumstances following the Revolution generally favored a more equal distribution of representation, especially in those states where the inequalities were greatest. The polemics of the Revolution stressed the importance of direct representation, and in the states a representative legislature often came to be regarded, along with the doctrines of

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[15] Constitution of Rhode Island (1842), Article V, Section 1, and Article VI, Section 2, in Thorpe, op. cit., VI, 3228.

[16] Constitution of Virginia (1776), Ibid., VII, 3815-3816.

[17] Constitution of South Carolina (1790), Article I, Section 7, Ibid., VI, 3258-3259.

[18] Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation (New York, 1965), p. 17.

separation of powers and checks and balances, as essential to free government.[19] Thus, John Adams recommended that the legislative assembly

> should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this assembly to do strict justice at all times, it should be an equal representation, or in other words, equal interests among the people should have equal interests in it.[20]

Developing political theory, as well as the demands of under-represented sections of the new states, increasingly equated the representation of "equal interests" with the population principle.

As early as 1782, Thomas Jefferson complained of the Virginia constitution that "among those who share the representation, the shares are very unequal."[21] Moreover, the apportionment practices in some of the states even drew criticism in the Constitutional Convention and in the state ratifying conventions. Although a number of states later adopted the "federal plan" of representation, using factors other than population in one house of the legislature, James Madison was willing to accept representation based on states rather than individuals in the United States Senate only as

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[19] Clinton Rossiter, Seedtime of the Republic (New York, 1953), p. 425.

[20] Charles Francis Adams, editor, The Works of John Adams, 10 vols. (Boston, 1851), IV, 195.

[21] Andrew A. Lipscomb and Albert Ellery Bergh, editors, The Writings of Thomas Jefferson, 20 vols. (Washington, 1904), II, 160.

an expedient necessary for the adoption of the Constitution.[22] In Number 62 of The Federalist the arrangement was justified as being the result "not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.'"[23]

In fact, Madison was concerned in 1787 with preventing "the inequality of the representation in the legislatures of particular states" from producing "a like inequality in their representation in the national legislature," since he felt that "it was presumable that the counties having the power in the former case would secure it to themselves in the latter."[24] Congress was consequently given ultimate authority in Article I, Section 4, of the Constitution to regulate the time, place and manner of holding congressional elections partly to preclude that possibility.[25]

This early interest in greater equality of representation became widespread with the "democratic awakening" of the nineteenth century. In the older states the struggle for

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[22]Dahl, op. cit., p. 112.

[23]Benjamin Fletcher Wright, editor, The Federalist (Cambridge, 1961), p. 408. In the same place it is further stated that "among a people thoroughly incorporated into one nation, every district ought to have a proportional share in the government. . . ."

[24]Max Farrand, editor, The Records of the Federal Convention of 1787, 4 vols. (New Haven, 1911), II, 241.

[25]Anthony Lewis, "Legislative Apportionment and the Federal Courts," Harvard Law Review, LXXI (April, 1958), 1069.

political equality involved representation as well as suffrage restrictions. As new states were formed, their constitutions generally used the standard of representation by population. Again, some of the new states made territory as well as population a basis for representation. In other instances, however, especially in the states of the West, the use of territory may have been impelled by frontier conditions of isolation and poor communication rather than by any rationale for representation of political units as such.[26] A few states, such as Oklahoma, placed restrictions on the number of senators or representatives a single county might have.[27]

The evidence regarding these early constitutions leaves much to be desired in any attempt to discover the precise relationship between population and other factors as bases of representation. The fact that "complexities and ambiguities in the constitutional texts make full agreement on classification impossible"[28] lessens considerably the validity of any strong reliance on historical precedent. The United States Advisory Commission on Intergovernmental Relations,

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[26]Baker, op. cit., p. 20.

[27]Royce Hanson, The Political Thicket: Reapportionment and Constitutional Government (Englewood Cliffs, New Jersey, 1966), p. 12.

[28]Robert G. Dixon, Jr., "Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation," Michigan Law Review, LXIII (December, 1964), 239.

for example, estimates that the first constitutions of thirty-six states gave total or predominant recognition to population in both houses.[29] A more critical survey narrows the number to twenty-one.[30] Such differences result from the uncertainty of what constitutes "predominant" consideration of population and how much the population factor was limited by other constitutional provisions relating to representation. It seems clear, however, that the distortions which resulted from such provisions, such as assuring each county at least one representative or limiting the number of representatives a single county might have, were much less in nineteenth century America than they were later to become.

Malapportionment in the American States

A survey in 1907 found only nine states which could be regarded as giving a "disproportionate" number of representatives to towns or counties with small populations.[31] Less than half a century later a majority of the states fell into this category.[32] The major cause of this dramatic change in legislative representation could be attributed to the steadily

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[29]Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures (Washington, 1962), p. 7.

[30]Dixon, op. cit., p. 239.

[31]James Dealey, "General Tendencies in State Constitutions," The American Political Science Review, I (February, 1907), 209-210.

[32]Gordon E. Baker, Rural Versus Urban Political Power: The Nature and Consequences of Unbalanced Representation (Garden City, New York, 1955), p. 11.

increasing urbanization of the United States. Although the urban sector did not account for over one-half of the population until 1920, by 1960 it included seventy per cent, with more than one-third of the people living in cities of over 100,000.[33] Added to this burgeoning urban development was the increasing mobility of the population; one-fifth of the people moved each year.[34] Despite the political implications of such changes -- or because of them -- representation in the state legislatures failed to adjust to the new demographic patterns.

Various ways have been used to describe the extent to which the states failed to adjust to this shifting population. Probably the most easily understood was the comparison of population differentials between the largest and smallest districts in a state.[35] Drafters of plans for model constitutions, for example, have frequently suggested that the largest district should not exceed the smallest by more than thirty per cent (or a ratio of 1.3), although fifty per cent

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[33] U.S. Bureau of the Census, Statistical Abstract of the United States: 1966 (Washington, 1966), pp. 15, 22.

[34] E. E. Schattschneider, "Urbanization and Reapportionment," Yale Law Journal, LXXII (November, 1962), 8.

[35] Thus, in 1960, California's senate districts ranged in size from 14,294 to 6,038,771; Nevada's senate districts from 568 to 127,016; and Vermont's House districts from 38 to 33,155. Paul T. David and Ralph Eisenberg, Devaluation of the Urban and Suburban Vote (Charlottesville, Virginia, 1961), p. 2.

(a ratio of 1.5) could be considered "politically more feasible."[36] In 1960, no state met this standard. The lowest ratio was 2.2, while the highest was 1081.3.[37]

Because a comparison of the extreme differences in a state might emphasize unusual circumstances without reflecting the general districting pattern, another useful method was that devised by Manning J. Dauer and Robert G. Kelsay in 1955, which calculated the minimum percentage of the population that could theoretically elect a majority of the members of each house of the legislature. This figure was derived by placing the legislative districts in rank order of population and then counting down the list, beginning with the smallest district, to accumulate the portion of the population that would be sufficient to elect a majority of the house in question. In 1955, according to this analysis, South Carolina's lower house ranked first, with almost forty-seven per cent of the population necessary to elect a majority. In only eleven states, however, did the minimum figure rise above forty per cent, and in thirteen states the minimum fell below thirty per cent. In Connecticut, as few as 9.59 per

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[36] Ibid., p. 1.

[37] The lower houses of Hawaii and New Hampshire respectively. Ibid., pp. 1-3.

cent could theoretically elect a majority; in Vermont 12.58 per cent; and in Florida 17.19 per cent.[38]

The upper houses fared little better. It took at least forty-eight per cent of the population to elect a majority of Massachusetts' senate, but in only fourteen states did the existing apportionment require more than forty per cent of the population for a majority. In nineteen states, less than thirty per cent was necessary.[39]

Although the Dauer-Kelsay percentages served to indicate the relative representativeness of the legislature in terms of total population, they did not indicate how the apportionment system affected particular areas or groups of voters. In 1961, Paul T. David and Ralph Eisenberg attempted to supply such information by determining the relative value of the vote in any county in a state in comparison to the average value of the vote on a state-wide basis. Counties were categorized according to their population and the representation accorded to each population group of counties was totaled. The population per representative for all counties in that category was determined by dividing the total population of each category by the number of representatives which that

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[38]Manning J. Dauer and Robert G. Kelsay, "Unrepresentative States," National Municipal Review, XLIV (December, 1955), 574. These figures, of course, are not intended to suggest that the smallest districts will vote as a bloc, but only to illustrate the extent to which minority representation is possible.

[39]Ibid., p. 572.

category had in the legislative chamber. Then the average value of the vote for that category was obtained by dividing the population per representative for that category into the state-wide average population per representative for the legislative chamber.

Their research confirmed the previous studies. By 1960, the average value of the vote in the large city was less than half that of the vote in the country.[40]

If the concepts of political equality and rule by majorities have any close relationship with that of representation, most of the states were unrepresentative in the 1950's, some to a substantial degree. The long-range trends, furthermore, gave little comfort to those who hoped for major changes in the apportionment schemes. Between 1937 and 1955, using the Dauer-Kelsay percentages, thirty-eight of the upper houses and thirty-five of the lower houses had become actually less representative.[41] As Table I indicates, the study by David and Eisenberg disclosed that the spread between the average values of the vote between the largest and smallest categories of counties on a nation-wide basis had widened progressively from 1910 through 1960.[42]

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[40]David and Eisenberg, op. cit., p. 10.

[41]Dauer and Kelsay, op. cit., p. 572.

[42]David and Eisenberg, op. cit., p. 10.

TABLE I

RELATIVE VALUES OF THE RIGHT TO VOTE FOR REPRESENTATIVES IN STATE LEGISLATURES, NATIONAL AVERAGES

Categories of Counties by Population Size	1910	1930	1950	1960
Under 25,000	113	131	141	171
25,000 to 99,999	103	109	114	123
100,000 to 499,999	91	84	83	81
500,000 and over	81	74	78	76

Source: Paul T. David and Ralph Eisenberg, Devaluation of the Urban and Suburban Vote (Charlottesville, Virginia, 1961), p. 9.

A similar comparison of the relative value of the vote in the largest and smallest categories of counties for each state produced corresponding results. Only Rhode Island and New York had shown a consistent improvement in the value of the vote in their largest categories of counties since 1910.[43]

The implications of these statistics seemed obvious. Unless some dramatic changes were made in the whole structure of legislative apportionment, increased urbanization would mean an even greater deterioration of population as a basis for representation. At the same time, the factors that contributed to the existence of the problem in the first place made it improbable that any sudden changes could be expected.

[43] Ibid., p. 14.

Institutional Causes of Malapportionment

As population movement to the cities became more pronounced, states began to change their constitutions to prevent a corresponding shift in legislative representation. In 1889 Montana, retaining population as the basis for representation in the lower house, gave one senator to each of the sixteen counties in the upper house. After the 1890 census, New York and Delaware followed the example, with Delaware establishing permanent districts for both houses.[44] This trend continued until, in 1960, only nine state constitutions placed no important limitations on population as the basis for both houses. Nebraska made population the basis for its unicameral senate, and thirteen other states used it exclusively in only one house.[45]

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[44] McKay, op. cit., pp. 26-28.

[45] Population as a basis for both houses: Constitution of Colorado, Article V, Section 45; Constitution of Indiana, Article IV, Section 5; Constitution of Massachusetts, Amendment LXXI; Constitution of Minnesota, Article IV, Section 2; Constitution of North Dakota, Article II, Sections 29, 35; Constitution of South Dakota, Article III, Section 5; Constitution of Virginia, Article IV, Sections 41, 43; Constitution of Washington, Article II, Section 3.

Population as a basis for one house only: (A) House only: Constitution of California, Article IV, Section 6; Constitution of Illinois, Article IV, Section 7; Constitution of Montana, Article V, Section 4. (B) Senate only: Constitution of Kansas, Article X, Sections 1,3; Constitution of Kentucky, Section 33; Constitution of Louisiana, Article III, Sections 2, 4; Constitution of Mississippi, Article VIII, Section 256; Constitution of Missouri, Article III, Section 5; Constitution of North Carolina, Article II, Section 4; Constitution of Ohio, Article XI, Sections 6, 11; Constitution of Oklahoma, Article V, Section 9; Constitution of Tennessee, Article II, Sections 5,6; Constitution of Utah, Article IX, Section 2; Constitution of Nebraska, Article III, Section 5.

The constitutional provisions varied considerably in the rest of the states in the degree to which population served as an apportionment base. Broadly, as shown in Table II, the different methods of apportionment found in the constitutions could be classified as (1) weighted ratios, (2) population and area combined, (3) equal representation for each unit, (4) fixed constitutional apportionment, and (5) apportionment by taxation.[46] Any classification of apportionment provisions must be prefaced with the caution that no general grouping can suggest the wide variety of approaches taken by the state constitutions. A summary of those provisions, however, may at least suggest the scope and complexity of the issue.

TABLE II

STATE LEGISLATIVE APPORTIONMENT BASES

Bases	Senates	Houses	Total
Population	20	12	32*
Population with weighted ratios	1	7	8
Combination of population and area	17	28	45
Equal apportionment for each unit	7	1	8
Fixed constitutional apportionment	4	1	5
Apportionment by taxation	1	0	1

Source: Gordon E. Baker, State Constitutions: Reapportionment (New York, 1960), p. 5.

[46] Gordon E. Baker, State Constitutions: Reapportionment (New York, 1960), pp. 5-6.

In seven states, less populous units were given an advantage in at least one house by provisions that allotted them a representative if they had a stipulated ratio or quota, usually derived by dividing the population by the number of seats. Tennessee required two-thirds of a ratio for a seat in its House of Representatives. The others -- Michigan, New Hampshire, Oklahoma, Hawaii, Alaska, and Oregon -- required only half a ratio; Oregon extending the system to both houses.[47]

The Vermont constitution gave equal representation to each inhabited town in the house of representatives, and in seven other states -- Idaho, Montana, Nevada, New Jersey, New Mexico, South Carolina, and Arizona -- counties received equal representation in the senate.[48] In four other states the election districts were fixed by the constitution. Districts for both houses were established by the Delaware constitution and for the senate by the Hawaii constitution. Districts for the upper houses of Michigan and Arkansas were

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[47] Constitution of Tennessee, Article II, Section 5; Constitution of Michigan, Article V, Section 3; Constitution of New Hampshire, Part II, Article 9; Constitution of Oklahoma, Article V, Section 10; Constitution of Hawaii, Article III, Section 4; Constitution of Alaska, Article VI, Sections 4,5; Constitution of Oregon, Article IV, Section 6.

[48] Constitution of Vermont, Chapter II, Section 13; Constitution of Idaho, Article III, Section 4; Constitution of Montana, Article V, Section 4, Article VI, Section 5; Constitution of Nevada, Article IV, Section 5; Constitution of New Jersey, Article IV, Section 2, Paragraph 1; Constitution of New Mexico, Article IV, Section 3b; Constitution of South Carolina, Article III, Section 6; Constitution of Arizona, Article IV, Part 2, Section 1 (1).

"frozen" into the constitutions by amendments in 1952 and 1956 respectively.[49] The New Hampshire senate was the only legislative house based on "public taxes paid" by each district.[50]

The largest category of states comprised those which established some combination of area -- usually political units -- with population. In most instances, the constitutions specified population as the basis for representation. At the same time, they then limited the application of those provisions by additional qualifications that generally (1) gave special consideration to smaller units (such as guaranteeing each county or town at least one representative), (2) restricted the representation of the larger units, (3) or by the use of both methods. The variations were almost as numerous as the states using them, but the practical effects may be demonstrated by a few illustrations.

In Georgia, seats in the lower house were apportioned on the basis of counties, the eight largest receiving three members each, the thirty next most populous two each, and the remainder one each.[51] The districts ranged in population

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[49] Constitution of Delaware, Article II, Section 2; Constitution of Hawaii, Article III, Section 2; Constitution of Michigan, Article V, Section 2; Constitution of Arkansas, Amendment XLV, Section 3.

[50] Constitution of New Hampshire, Article II, Section 26.

[51] Constitution of Georgia, Article III, Section 3, Paragraph 1.

from 185,442 to 1,876, and less than twenty-two per cent of the population could theoretically elect a majority of representatives.[52] Rhode Island placed both maximum and minimum limits on representation from each city or town in both houses,[53] so that, despite the constitutional provision for representation by population, senate districts varied from 47,080 to 486, house districts from 18,977 to 486. The city of Providence was limited by the constitution to twenty-five of the one hundred seats in the lower house, although its 1950 population was thirty-one per cent of the state's total.[54] In Texas, an amendment adopted in 1936 provided that no county could have more than seven representatives in the House of Representatives until its population exceeded to an additional representative for each additional 100,000 persons.[55] As a result of this amendment, the constitution made it impossible for a county to receive equal representation after it reached 447,055, which was seven times the average district size.[56]

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[52]William J. D. Boyd, editor, Compendium on Legislative Apportionment, 2nd ed., (New York, 1962), section on Georgia.

[53]Constitution of Rhode Island, Article XIII, Section 1, Article XIX, Section 1.

[54]Boyd, op. cit., section on Rhode Island.

[55]Constitution of Texas, Article III, Section 26a. This was commonly known as the "Moffett Amendment".

[56]Clarice McDonald Davis, Legislative Malapportionment and Roll Call Voting in Texas, 1961-1963 (Austin, 1965), p. 14.

Altogether, at least thirty state constitutions contained similar restrictions. In some states such provisions had only a negligible effect on the population factor, but in other states the resulting distortion was severe. In the California senate, for example, no county could have more than one member and no more than three counties could be combined into a senate district.[57] In 1960, sixty per cent of the population living in almost fifty per cent of the area of the state had less than thirty per cent representation in that house.[58]

In actuality, regardless of the ostensible basis of representation, the majority of state constitutions limited the ability of the legislatures — even ones which were willing — to create districts of equal population.

> Those states which have written into their constitutions such restrictive provisions make the constitutional convention the real apportioning authority. . . . The dead hand of the past stands as a legal block to reapportionment.[59]

But the whole blame for unequal representation could hardly be laid to the "dead hand of the past." State legislators proved extremely reluctant to provide for even the

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[57] Constitution of California, Article IV, Section 6.

[58] Boyd, op. cit., section on California.

[59] Lashley G. Harvey, "Reapportionment of State Legislatures — Legal Requirements," Law and Contemporary Problems, XVII (Spring, 1952), 368.

limited apportionment called for in the constitution, and the "silent gerrymander" became a political institution.

The constitution of almost every state contained some provision for periodic reapportionment in at least one house. Nevertheless, between 1930 and 1950 only eleven states complied fully or even partially with those requirements.[60] During the next ten years, thirty-one states managed some form of reapportionment. Among the states where the election districts were not fixed by the constitution, the legislatures of Alabama and Tennessee had the distinction of being least responsive to the constitutional mandate to reapportion, having last changed their districts in 1901.[61] It was estimated that by 1961, at least one house of seventeen state legislatures had not met the constitutional requirement for periodic reapportionment.[62] Even when reapportionment had taken place, the complexity of many of the state constitutions and the large measure of discretion allowed most of the legislatures, made it difficult to determine whether the resulting districts fairly reflected the constitutional standards.[63]

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[60] Hugh A. Bone, "States Attempting to Comply with Reapportionment Requirements," Law and Contemporary Problems, XVII (Spring, 1952), 368.

[61] Frank Smothers, editor, The Book of the States, 1960-1961 (Chicago, 1960), pp. 34, 54-58. The Tennessee legislature "reapportioned in 1945, changing a flotorial district to eliminate one county." Ibid., p. 58.

[62] McKay, op. cit., p. 51.

[63] Bone, op. cit., pp. 391-392.

The Political Causes of Malapportionment

While the constitutional provisions, abetted by obsolete or intentionally discriminatory reapportionment statutes, served as a convenient explanation for the unequal treatment accorded different groups of voters within a state, they were themselves the legal manifestations of a more fundamental set of causes that militated against the population principle. At the foundation of these institutional arrangements could be discovered the personal, political, sectional, and economic interests that were involved in any change in the apportionment system.

Those most immediately concerned with any apportionment were, of course, the members of the legislature, and in a majority of states the legislatures were designated as the apportioning authority. It is undoubtedly a rare situation in which the legislators "see themselves as human computers, bound only to translate the census returns into districts of near-perfect equality."[64] Possibly the best apportionment plan in the opinion of most legislators is one which threatens as few incumbents as possible. Moreover, the individual legislator may be concerned with more than self-preservation. In Illinois, for example, a redistricting measure was limited

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[64]Malcolm E. Jewell, "Political Patterns in Apportionment," The Politics of Reapportionment, edited by Malcolm E. Jewell, (New York, 1962), p. 27.

not only by the constitution but by informal legislative rules which included: the willingness of members to cooperate with each other in protecting incumbents against potential challengers; the desire of each party to "maximize" its strength in the legislature; and the desire of members of voting blocs (often bipartisan) to retain their strength.[65] Legislators who took the reapportionment issue seriously enough to attempt reform might find their efforts had jeopardized their standing in the legislature. When twenty-nine members of the Florida House of Representatives issued a statement supporting an extensive reapportionment, clashing directly with members of the Senate

> reprisals took the form of direct attack, loss of support on measures on which advocates of reapportionment might otherwise have received additional votes, a decline in prestige in the house brought about by niggling opposition to them on every occasion, opposition in elections, and private expressions of dislike, distrust, and disdain.[66]

Even representatives from expanding areas sometimes resisted a new allocation of seats because of the possibility

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[65] Gilbert Y. Steiner and Samuel K. Gove, Legislative Politics in Illinois (Urbana, 1960), pp. 86-87.

This attitude may extend even beyond the main issue. Thus an observer of the 1965 session of the Texas legislature, which was faced with the task of reapportionment, noted: "Their all being in the same boat may help explain the somewhat unaccustomed friendly and cooperative atmosphere. . . . Differences are not pursued so stridently and aggressively." Luther G. Hagard, Jr., Samuel B. Hamlett, and August O. Spain, Legislative Redistricting in Texas (Dallas, 1965), p. 9.

[66] William C. Havard and Loren P. Beth, The Politics of Mis-Representation: Urban-Rural Conflict in the Florida Legislature (Baton Rouge, Louisiana, 1962), pp. 56-57.

that their own prestige and power within the legislature could be threatened by other members from the same area.[67] Strong leaders were especially well situated to protect their own interests.[68]

Apart from the self-interest of the legislators, the most discussed explanation for the inequalities in districting was the putative conflict between urban and rural areas. The statistics demonstrated clearly enough that the areas that suffered most from malapportionment were the large cities and their suburbs.[69] Many of the restrictions on the use of population that had been added to the state constitutions during the twentieth century had often been aimed directly at limiting the political influence of the big cities. In this respect the United States was not unique; other countries, such as France and Norway, had experienced the same conflict.[70] The fear of big-city domination in the legislatures, the distrust of urban politics, and the myth of rural superiority combined to deprive the urban voters of equal representation.

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[67]Baker, State Constitutions, p. 18.

[68]See, for example, William T. Irwin, "Colorado: A Matter of Balance," The Politics of Reapportionment, p. 71.

[69]David and Eisenberg, op. cit., pp. 10-16; Baker, Rural Versus Urban Political Power, pp. 15-19.

[70]Alfred de Grazia, "General Theory of Apportionment," Law and Contemporary Problems, XVII (Spring, 1952), 261-262.

> American political thought contains a heavy bias against the city. The most influential treatise on national development, Frederick Jackson Turner's The Frontier in American History, is not a history of urban growth. . . . It was Davy Crockett and Wild Bill Hickock rather than Big Bill Thompson or Boss Tweed who became folk heroes, although their respective derring-do and moral fibre seemed roughly comparable.[71]

Yet the failure to reapportion could not be attributed exclusively to rural legislators "as reluctant to redistribute districts as feudal landholders had been to redistribute land."[72] The evidence suggests that the views of the rural legislators were shared by many residents of the urban areas. Opposition to changes that would have given added representation to the city often originated within the city itself. Thus, while differences in attitudes and interests of rural and urban voters remained a central issue in the question of equal representation, recognition must also be given to the fact that social, cultural, and economic interests not directly associated with any urban-rural cleavage had important effects on the apportionment of a state. Ideological and economic views were not necessarily tied to any particular geographic area.[73] As a Georgia legislator explained the attitude toward the urban vote in his state, "It's the difference between radical government

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[71]Hanson, op. cit., p. 20.

[72]Alan P. Grimes, Equality in America (New York, 1964), p. 91.

[73]Robert L. Friedman, "The Urban-Rural Conflict Revisited," The Western Political Quarterly, XIV (June, 1961), 485.

and conservative government."[74] This distinction would be important to urban-based interests that feared the results if the legislatures were to be "controlled by the urban population with its strong, politically active segment of organized labor."[75]

Sectional and party rivalries, sometimes associated with the urban-rural issue and possibly grounded upon economic or racial interests, also interfered with any strict apportionment by population. Sections of a state with declining, static, or slowly-growing populations often opposed giving proportionate representation to the more rapidly growing sections. This appeared to be especially true in those states where one city would have dominated the legislature had the population standard been strictly applied.[76] Moreover, the "silent gerrymander" could work to the advantage of the political parties as well as to urban or rural interests. In several states the districting pattern practically assured one party of control of at least one house even when the other party received a large majority in the gubernatorial election.[77]

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[74]Quoted in Gus Tyler, "Court Versus Legislature," Law and Contemporary Problems, XXVII (Summer, 1962), 397.

[75]"What Reapportionment Means to You," Nation's Business, L (July, 1962), 29.

[76]Lloyd M. Short, "States That Have Not Met Their Constitutional Requirements," Law and Contemporary Problems, XVII (Spring, 1952), 328.

[77]V.O. Key, Jr., American State Politics: An Introduction (New York, 1956), pp. 64-67.

Finally, the economic, sectional, and political implications of population trends were further complicated by the fact that in most metropolitan areas the central cities were growing at a slower rate than the surrounding suburbs. During the 1950's, the relative position of the central cities had actually been improving, while the suburbs were becoming increasingly underrepresented.[78] To legislators from the central cities, overrepresentation of rural areas remained a problem, but now reapportionment threatened their own positions as well as that of their rural colleagues.

The causes underlying the unequal treatment of voters were thus complicated and manifold, and there existed no single, comprehensive solution by which those who felt the system incompatible with democratic theory could mold that system more to their interest in "one man, one vote." In their search for such a solution, they had little success in operating through the political institutions of the states. Finding the political avenues blocked, they turned to the courts. The following chapter will detail the attempts to use the courts in reapportionment matters.

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[78]David and Eisenberg, op. cit., pp. 11-14.

CHAPTER II

THE SUPREME COURT AND LEGISLATIVE APPORTIONMENT: 1946-1964

While the concept of equal representation in election districts traditionally has received little support from the political institutions in most of the states, it originally fared no better in the national courts. Challenges to unequal districting based upon the due process and equal protection clauses of the Fourteenth Amendment were turned away by the courts as presenting issues which were beyond the purview of the national judiciary.

The United States Supreme Court at first showed no reluctance to hear and decide cases involving congressional districting. As early as 1932, for example, the Court heard challenges to the validity of congressional district.[1] In the same year it answered in the negative the question as to whether federal statutes required "reasonably equal population" among congressional districts.[2] In none of these cases, however, did the Court squarely face the question on

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[1] Smiley v. Holm, 285 U.S. 355 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Koenig v. Flynn, 285 U.S. 375 (1932).

[2] Wood v. Broom, 287 U.S. 1 (1932).

the basis of protection afforded by the United States Constitution. That question the Court carefully avoided as being "political" in nature.

In 1946, Colegrove v. Green[3] presented a challenge to the congressional districts of Illinois, which had been established by a districting act passed in 1901, and in which population disparities by 1940 ranged from 914,000 to 112,116. The appellants, residents of the largest districts, argued that the inequalities violated Article I, section 2 of the United States Constitution and deprived them of the Fourteenth Amendment guarantees of due process of law and equal protection of the laws. Although the questions raised in the case related directly only to congressional districts, the Court's decision proved broad enough to cover apportionment of state legislatures as well.

Written by Justice Felix Frankfurter, this opinion prevailed in legislative apportionment cases for the next sixteen years. Justice Frankfurter resolved the constitutional issues by discovering that the question was of such a "peculiarly political nature" that it was "not meet for judicial determination."[4] In view of the fact that "the most glaring disparities" among districts had prevailed in the past, he felt that it would be "hostile" to a democratic system to

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[3]328 U.S. 549 (1946).

[4]Ibid., p. 552.

involve the Court in "the politics of the people."[5] "To sustain this action," he wrote, "would cut very deep into the very being of Congress." Then he delivered his often-quoted admonition: "Courts ought not to enter this political thicket."[6] In short, he suggested that appropriate remedies for inequities in both congressional and legislative districting lay with the ballot box rather than the judiciary.

Although this warning effectively removed the federal courts from an obviously political area of judgment, it did not establish a clear precedent. Three different opinions were written in this case, and of the other six Justices who recorded an opinion, only Justices Stanley Reed and Harold Burton joined Justice Frankfurter in his appraisal of the question as "political." Justices Hugo L. Black, William O. Douglas and Frank Murphy dissented, arguing that the question could properly be decided by the courts. Going beyond the issue of justiciability, in fact, Justice Black wrote that

> the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their forms, should be designed to give approximately equal weight to each vote cast.[7]

Justice Wiley Rutledge cast the deciding vote, joining Justice Frankfurter in dismissing the case, but for reasons

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[5] Ibid., pp. 554-555.

[6] Ibid., p. 556.

[7] Ibid., p. 570.

quite different from those stated in the latter's opinion. He agreed with Justice Black that the Court had power to grant relief, but he also felt that the Court should avoid deciding issues that might "bring our function into clash with the political departments of the government, if any tenable alternative. . .is presented." He found such an alternative in the fact that a decision would disrupt the electoral machinery of Illinois, which was already in progress, and so voted to dismiss the action "for want of equity."[8]

The "political question" doctrine has been described as a rule of expediency, a recognition by the Court of the practical difficulties involved in reaching or enforcing a particular decision, by which the Court may disengage itself from an issue because of the "felt necessity to realize anticipated consequences."[9] The precise nature of such questions, however, apparently cannot be readily defined,[10] a fact demonstrated by the disparate views expressed by the Justices in the Colegrove decision. It has been observed, for example, that the political question doctrine cannot be

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[8] Ibid., pp. 565-566.

[9] Charles G. Post, The Supreme Court and Political Questions, (Baltimore, 1936), p. 130.

[10] See, for example, "Comment: Challenges to Congressional Districting: After Baker v. Carr Does Colegrove v. Green Endure?", Columbia Law Review, LXIII (January, 1963), 98-116.

described any more precisely than a recognition that "political questions are those which judges choose not to decide, and a question becomes political by a judge's refusal to decide it."[11] If this is true, Colegrove v. Green represented something less than a perfect disposition of the issue, since four of the seven Justices held that it was justiciable.

This division continued briefly. In the same year, the Court dismissed an appeal from a district court which had refused to invalidate the Georgia county-unit system by which a minority could control the nominating procedures of the state.[12] This time, Justice Rutledge voted to hear the case on the merits, explaining that in Colegrove "a majority. . .participating refused to find that there was a want of jurisdiction. . . ."[13] Two years later (1948), the Court granted a hearing to a Fourteenth Amendment challenge of an Illinois nominating procedure which allowed a minority to block the nomination of third-party candidates.[14]

Despite these few exceptions, the Court's attitude toward the specific issues of congressional districting and

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[11]Jack W. Peltason, Federal Courts in the Political Process (New York, 1955), p. 10.

[12]Cook v. Fortson, 329 U.S. 675 (1946).

[13]Ibid., pp. 565-566.

[14]MacDougall v. Green, 335 U.S. 281 (1948). In a per curiam decision the Court refused to "deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses. . . ."

legislative apportionment continued to support Justice Frankfurter's position of the issue. Challenges to inequalities in state legislative districts received only brief notice from the Court in a series of per curiam decisions; and when Justices Murphy and Rutledge left the Court, the dissenting minority was reduced to two by the late 1940's. Meanwhile, the Supreme Court had dismissed an appeal from a suit in federal district court to invalidate the Illinois apportionment statutes as not presenting "a substantial federal question."[15] It also dismissed similar Fourteenth Amendment challenges to legislative districting in Pennsylvania,[16] California,[17] Tennessee,[18] and Oklahoma.[19] In each of these states constitutional provisions limiting the population factor or outdated apportionment statutes had resulted in underrepresentation for the growing urban areas. The attitude of the Court, then, considering the obviously unequal districts involved, made it evident that any reforms would have to operate within the framework of the state institutions, and that the political branches would necessarily have to make any corrections needed.

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[15] Colegrove v. Barrett, 330 U.S. 804 (1946).

[16] Remmey v. Smith, 342 U.S. 916 (1952).

[17] Anderson v. Jordan, 343 U.S. 912 (1952).

[18] Kidd v. McCanless, 352 U.S. 920 (1956).

[19] Radford v. Gary, 352 U.S. 991 (1957).

Reapportionment Problems: 1946-1962

Few major changes in Supreme Court decisions are entirely unheralded, but in the matter of legislative apportionment, there were few indications that the Court would reverse the practice of consigning redistricting cases to the area of political questions. Nevertheless, in retrospect, certain factors may be isolated which made such change likely, if not inevitable. Of these, possibly the most important was the lack of effective remedies in the states, and an increasing public awareness of the issue. Even if the population standard did not require precise equality of election districts, the existing apportionments violated both the standards set by the state constitutions and the principle of majority rule that is a dominant -- if not the predominant -- feature of American political theory. In Colegrove v. Green, Justice Frankfurter had advised those seeking judicial intervention in congressional districting that "the remedy for unfairness in districting is to secure a legislature that will apportion properly, or to invoke the ample powers of Congress."[20] Since, in the majority of states, the initiative for both constitutional amendment and periodic reapportionment rested with the legislature, this advice obviously posed something of a conundrum for those who could not even look to Congress for assistance. The

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[20] Colegrove v. Green, 328 U.S. 549 (1946).

only way to secure a legislature that would apportion properly was to get a proper apportionment, which was the problem in the first place.

Where the inequalities were embedded in state constitutions, the problem was even greater. The legislatures proved as unwilling to submit proposals for constitutional change in the area of apportionment as they were to reapportion under the existing standards. Even when constitutional conventions were used, elections were often based on legislative districts or county lines, so that the malapportionment that obtained in the legislature was merely transferred to the convention.[21] Moreover, use of the amending process to establish more equitable districting was complicated by the fact that it had been used on several occasions for the opposite reason. In California, Michigan, New Mexico, Illinois, Nevada and Arizona the legislatures and the people had changed the constitutional provisions to allow each county more weight in the state senate. Often the result of compromise, such changes could understandably engender some bitterness in those who objected to the use of factors other than population. The viewpoint of those pressing for the predominant use of population as a basis for representation was summarized by a description of the situation in Illinois in 1954:

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[21]See, for example, Royce Hanson, "Fight For Fair Play," National Civic Review, L (February, 1961), 73.

> The legislature relinquished its assumed power to ignore, and its practice of ignoring, the constitutional mandate; and in turn the Chicago area gave up its former constitutional (but unenforced) claim to equal representation in the Senate.[22]

Some attempts had been made to adopt methods that would guarantee that the legislature obeyed the constitutional requirements. In Alaska, Arkansas, Arizona, Hawaii, Missouri, and Ohio, reapportionment was removed from the legislature entirely and the power given to the governor, boards or commissions composed of executive officials of the state, local districting boards, or special commissions appointed by the governor.[23] Six other states -- California, Illinois, Michigan, Oregon, South Dakota, and Texas -- provided for ex officio boards or commissions to reapportion the state in the event the legislature failed to act.[24]

Varying from state to state, still other provisions were found. Some form of judicial review of the reapportionment

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[22]Gordon E. Baker, State Constitutions: Reapportionment (New York, 1960), p. 38.

[23]Constitution of Alaska, Article VI, Sections 8-10; Constitution of Arkansas, Article VIII, Section 4; Constitution of Arizona, Article IV, Part 2, Section 1 (1); Constitution of Hawaii, Article III, Section 4; Constitution of Missouri, Article III, Section 7; Constitution of Ohio, Article XI, Section 11.

[24]Constitution of California, Article IV, Section 6; Constitution of Illinois, Article IV, Section 8; Constitution of Michigan, Article V, Section 4; Constitution of Oregon, Article III, Section 6; Constitution of South Dakota, Article III, Section 5; Constitution of Texas, Article III, Section 28.

plan was expressly mentioned in the constitutions of six states.[25] In California, the proposed changes were subject to referendum.[26] The Illinois constitution threatened the drastic remedy of at-large elections if the legislature and commission both failed to reapportion the House,[27] while in Missouri the same held true for the Senate.[28] Florida's constitution provided that, if the legislature did not reapportion decennially, the governor was to call a special session to consider no other business and to adjourn only when reapportioned.[29]

As methods for making the reapportionment of the state more in line with the requirements of the constitutions, such provisions were helpful; but their value in regard to equal population districts was less than might at first appear. Again, the constitutional provisions determined the extent to which population would be given consideration, and the existence of such provisions often resulted from a compromise whereby one house would be automatically reapportioned while

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[25] Constitution of Alaska, Article VI, Section 11; Constitution of Arkansas, Article VIII, Sections 1,4; Constitution of Hawaii, Article III, Section 4; Constitution of New York, Article III, Sections 4,5; Constitution of Oklahoma, Article V, Section 10 (i); Constitution of Oregon, Article IV, Section 6.

[26] Constitution of California, Article IV, Section 6.

[27] Constitution of Illinois, Article IV, Section 8.

[28] Constitution of Missouri, Article III, Section 7.

[29] Constitution of Florida, Article VII, Section 3.

the other was based on considerations other than population.[30] Moreover, the legislature could usually avoid action by a board or commission by making only minor adjustments in the apportionment scheme. Thus, requirements for periodic apportionment could be less important than the limitations under which the apportionment was made. In 1961, for example, eight states which had redistricted after the census of 1960 had greater differences in the size of their largest and smallest districts than five which had not reapportioned since 1947.[31]

Of all the potential methods for securing changes in the apportionment system, the use of the initiative should have been especially important. Use of the initiative was available in twenty states. In seven of these states, however, it could not be used to amend the constitution. Because of constitutional limitations on apportionment in the states with the statutory initiative only, it could have been used for changing the apportionment in only five chambers -- the Utah Senate, and both houses in South Dakota and Washington. In twelve of the remaining states, it could have been used

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[30]Lashley G. Harvey, "Reapportionment of State Legislatures -- Legal Requirements," Law and Contemporary Problems, XVII (Spring, 1952), 364.

[31]Andrew Hacker, Congressional Districting: The Issue of Equal Representation (Washington, D.C., 1963), pp. 22-23.

for both houses. The method, however, did not prove to be "an effective method for securing substantial reform," having been tried in only seven states.[32]

All things considered, then, the disadvantages of the political remedies far outweighed in actual practice the advantages insofar as any move toward equal representation was concerned. The efforts at revision of existing districts were frustrated at almost every attempt. Equal representation may have been excellent in theory, but its basic premise obviously did not comport with the facts of political life.

One final alternative was to be found in litigation in state courts. Generally, the state courts did not share the attitude of the United States Supreme Court about the political nature of the issue. The courts of at least twenty-two states, according to one estimate, had either exercised the power, or had stated that they had the power, to review legislative apportionment acts.[33] Only a few state courts had expressly refused to decide such cases. As early as 1939, the supreme court of

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[32]Edward M. Goldberg, "The People Legislate," National Civic Review, LV (February, 1966), 82-83. Action by the legislature always remained a threat. In Washington, the legislature successfully amended an initiated reapportionment measure passed in 1956 to restore most of the former apportionment, and the modification was upheld by the state supreme court. State ex rel O'Connell v. Meyers, 319 P. 2d. 828 (Wash., 1957). A similar attempt by the legislature in Colorado in 1932 failed. Armstrong v. Mitten, 37 P. 2d 757 (Colo., 1934).

[33]Asbury Park Press v. Wooley, 161 A. 2d 705 (N.J., 1960).

North Carolina answered the charge that failure to reapportion made acts passed by the general assembly invalid by asserting that the courts did not "cruise in non-justiciable waters."[34] This position was later adopted after Colegrove v. Green by the highest courts in Alabama,[35] Pennsylvania,[36] and Mississippi.[37] On the other hand, the Arkansas supreme court drew up a districting plan of its own in 1952;[38] the supreme court of Connecticut struck down a 1953 apportionment by the legislature,[39] and in Missouri, a 1955 districting of St. Louis was voided because of the lack of compactness and wide variance in population of the districts.[40]

Even when the courts decided such cases, however, the issues almost always concerned the state constitutional provisions. Furthermore, two problems affected the manner in which the courts intervened. In matters of apportionment the courts tended to allow as much discretion to the

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[34] Leonard v. Maxwell, 3 S.E. 2d. 316 (N.C., 1939).

[35] Waid v. Pool, 51 So. 2d. 869 (Ala., 1951).

[36] Butcher v. Rice, 153 A. 2d. 869 (Pa., 1959).

[37] Barnes v. Barnett, 129 So. 2d. 638 (Miss., 1961).

[38] Pickens v. Board of Apportionment, 246 S.W. 2d. 556 (Ark., 1952).

[39] Cahill v. Leopold, 103 A. 2d. 818 (Conn., 1954).

[40] Preisler v. Doherty, 284 S.W. 2d. 427 (Mo., 1955).

legislature as possible; and when reapportionment acts were held in violation of the state constitution, there remained the question of appropriate relief.

While holding that the Massachusetts constitution required "equality of representation" among all the voters of the Commonwealth, the supreme court of that state laid down the rule:

> When fairminded men from an examination of the apportionment and division can entertain no reasonable doubt that there is a grave, unnecessary, and unreasonable inequality between different districts, the Constitution has been violated. . . .[41]

In West Virginia, the legislature gave a representative to each county in the lower house, although the constitution required that to be represented a county must have at least three-fifths of a ratio. The state court, however, ruled that the validity of this practice was a "finding of fact" which the court would not question. It said that the practice had a long history and had not been challenged for fifty years.[42]

Perhaps an even greater problem was that of fashioning relief. State courts were often faced with the inability to force reapportionment even when the legislative acts were

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[41] Attorney General v. Suffolk County Apportionment Commissioners, 113 N.E. 581, 585 (Mass.,1916). See also Baird v. Kings County, 33 N.E. 827 (N.Y.,1893).

[42] State v. Thornberg, 70 S.E. 2d 73 (W. Va.,1952).

clearly invalid.[43] One method of enforcement lay open to the courts where the legislature had the responsibility for reapportioning -- reviving older apportionment statutes after declaring the latest invalid. This, however, raised two other difficulties: the earlier apportionment might well be more inequitable than the one in question, and in some instances there existed no apportionment statutes to fall back upon. After declaring four reapportionment acts unconstitutional, the supreme court of Indiana was forced to allow the one remaining act to stand. Declaring the act invalid, the court reasoned, would have the effect of declaring the entire legislature invalidly comprised, and lead the people of the state "into the troubled sea of anarchy. . . . As well ask this court to overthrow. . .every provision of the whole constitution."[44]

Where the only recourse of the court would be to place the state under an earlier apportionment statute, the inequalities that would possibly result might prevent such action. The supreme court of Oklahoma found the existing

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[43]See, for example, Donovan v. Holtzman, 132 N.E. 2d 501, 503-504 (Ill., 1956), the Illinois supreme court holding that, although the legislature's failure to redistrict could be "attributed almost entirely to the fact that the General Assembly was opposed to giving control of both houses of the legislature to population-heavy Cook County," it was "without power to compel the legislature to act affirmatively to perform its constitutional duty."

[44]Fesler v. Brayton, 44 N.E. 37, 38-39 (Ind., 1896). See also Kidd v. McCanless, 292 S.W. 2d 40, 44 (Tenn., 1956).

apportionment "grossly disproportionate." Yet it failed to declare the law in question invalid. To revive the old statute, it reasoned, would "merely increase the wrongs sought to be prevented" by diminishing "the representation of an already underrepresented group. . .under the guise of affording relief."[45]

The inability to change the pattern of unequal districting within the states received increasing attention as population shifts continued and disparities in representation became greater. However, in the fact of inaction on the part of the legislatures, Congress, and the courts, reliance on the "sheer weight of logic and morality. . .an aroused public, a vigorous press, and the force of the democratic tradition"[46] proved generally unavailing. A survey of states which had reapportioned following the 1960 United States census showed little improvement. Of the twenty-five states which had drawn up new districts by March, 1962, only five increased the voting power of the most underrepresented urban areas.[47]

While in the long run the Supreme Court may follow the election returns, the existence of a problem and public awareness of it do not necessarily provide sufficient reason

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[45] Jones v. Freeman, 146 P. 2d 564, 574 (Okla., 1943).

[46] John F. Kennedy, "The Shame of the States," New York Times Magazine, May 18, 1958, p. 38.

[47] Ralph Eisenberg, "Power of the Rural Vote," National Civic Review, LI (October, 1962), 489-491.

for judicial intervention. Inequalities in legislative districts had increased since 1946, but they had been recognized by the court then. The question of apportionment was obviously no less "political" in consequence of passage of time. Nevertheless, circumstances surrounding the question made a change more likely, if not inevitable.

The Changing Attitude of the Supreme Court Toward Reapportionment

It has been suggested that three prerequisites to major changes in decisions by the Supreme Court are (1) that the Court be "packed" with a majority of Justices favorable to the proposed policy change; (2) that public opinion generally favor the change; and (3) "that the general political context be such that the Court's making the policy would not seriously jeopardize the Court's capacity to assure the realization of other major policies to which it remains committed."[48] With regard to the issue of reapportionment, a fourth might be added: the absence of potential change in the political arena. If such is the case, then, three of these prerequisites had been met by 1960. There still remained questions about how favorable the "general political context" was with regard to change in this area.

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[48]Glendon Schubert, Judicial Policymaking: The Political Role of the Courts (Glenview, Illinois, 1965), pp. 152-153.

Although changes in the Court shortly after Colegrove v. Green may actually have strengthened Frankfurter's position,[49] by 1960 the personnel of the Court had changed considerably. Of the three remaining Justices that had participated in the Colegrove decision, two -- Justices Black and Douglas -- had dissented. Furthermore, along with the changes in the Court had come a corresponding movement toward expansion of the equal protection clause and a willingness to invoke the powers of the Constitution even in areas fundamentally "political." According to one observer of the Court, this trend worked more changes in the political and legal structure of the United States "than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a tabula rasa."[50]

One area where there was the most uncertainty concerned the political reaction to any attempt by the Court to enter the "political thicket." The administration of President John F. Kennedy appeared to be favorable to such an adventure; but there had been no attempt by Congress to exercise its "ample powers" in the creation of equal congressional districts, and the general attitude of the state legislatures

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[49]Jo Desha Lucas, "Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr," Michigan Law Review, LXI (February, 1963), 723.

[50]Philip B. Kurland, "Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," Harvard Law Review, LXXVIII (November, 1964), 143-144.

toward any judicial involvement in their political bases could be predicted with a fair degree of accuracy. If the political question doctrine is primarily a response to potential consequences, it also remained central to the issue of legislative apportionment.

Despite the changing political climate, the Court did not give any real indication that a change in its original position was pending. As late as 1957, it rejected an appeal from a district court in Oklahoma which had dismissed a challenge to an outdated apportionment statute.[51] In fact, in 1960, the Court heard a case involving racial gerrymandering in which the majority opinion carefully distinguished between Fourteenth and Fifteenth Amendment protection of voting rights.[52] In 1958 the Alabama legislature, fearing the power of the growing Negro vote within the city of Tuskegee, had redrawn the city boundaries so that almost all Negroes were excluded from the corporate limits. Although the issue involved districting, Justice Frankfurter, delivering the opinion of the Court, pointed out that while the Colegrove case had concerned a mere "dilution" of the vote through population shifts and legislative inaction, the Alabama case represented an instance in which "a readily isolated segment of a racial

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[51] Radford v. Gary, 352 U.S. 991 (1957).

[52] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

minority" had been deliberately discriminated against, an action proscribed by the Fifteenth Amendment.[53] At the same time, he rejected the contention that the matter was "political" with a quotation that, as it turned out, could readily apply to legislative apportionment: "The objection that the subject matter of the suit is political is little more than a play upon words."[54]

Even as Justice Frankfurter made this distinction between voting rights as they applied to racial minorities and underrepresented urban majorities, a case was making its way to the Court that would abolish that distinction. In May, 1959, a suit was initiated in a federal district court in Tennessee alleging that as a result of failure of the legislature to reapportion since 1901, both houses of the Tennessee general assembly were controlled by a minority of voters, and that, as a result, the voters in the largest districts were denied equal protection of the laws.[55] Although the district court found the existing apportionment violated the Tennessee constitution, which required reapportionment every ten years based on the number of qualified voters in each county or district,[56] it refused

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[53] Ibid., p. 347.

[54] Ibid., citing Nixon v. Herndon, 273 U.S. 536, 554 (1927).

[55] Baker v. Carr, 179 F. Supp. 824 (Tenn., 1959).

[56] Constitution of Tennessee, Article II, Sections 4, 5.

to grant relief. Reviewing the previous decisions of the United States Supreme Court in this area, the Court reasoned that the case involved a "question of the distribution of political strength for legislative purposes" and that "whether from lack of jurisdiction or from the inappropriateness of the subject matter" the federal rules precluded the Court from interfering with legislative apportionment.[57]

Upon appeal, however, the United States Supreme Court accepted jurisdiction. In light of the earlier view of the Court that the question was political, some importance may attach to the fact that the United States Solicitor General intervened on behalf of the appellants as amicus curiae. This action threw the influence of the Kennedy administration on the side of equal districting -- a position which furthered the interest the President had manifested on the question while still a senator. It is possible that, because of the close relationship between legislative apportionment and congressional districting, the President's concern for his legislative program was another motivation for his interest.[58]

Baker v. Carr, 1962

The most significant development in the area of apportionment occurred when the landmark case of Baker v. Carr[59]

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[57] Baker v. Carr, 179 F. Supp. 824, 826 (Tenn., 1959).

[58] "Your Vote: Supreme Court May Put a New Value on It," U.S. News and World Report, LI (November 6, 1961), 101.

[59] 369 U.S. 186 (1962).

was decided on March 26, 1962. The facts showed that large disparities existed in the election districts as a result of the Tennessee legislature's failure to reapportion. As an example, it was pointed out that Moore County, with 2,340 voters elected one representative, while Shelby County, with a population of 312,345, elected only seven. Such disparities permitted voters in districts having only forty per cent of the voting population to elect sixty-three of the ninety-nine representatives; and voters in districts having only thirty-seven per cent of the voting population could control thirty of the thirty-three senators.

If a majority of the Court had been predisposed to overturn the precedent set by Colegrove v. Green, the Tennessee case might have had special appeal, in that it represented one of the more extreme instances of legislative inaction. Nevertheless, the Court did not reach a decision on the constitutionality of Tennessee's apportionment. Quite possibly feeling that it would be enough to take one problem at a time, the Court confined itself to the overriding issue of whether the national courts could decide such cases at all.

Justice William J. Brennan spoke for the Court[60] and he disposed of the three questions that stood in the way

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[60]There were actually six opinions. Justices Warren and Black joined in Justice Brennan's opinion. Justices Clark, Douglas, and Stewart wrote concurring opinions, and Justices Frankfurter and Harlan dissented. Justice Whittaker did not participate.

of a decision on the merits of the case. Dispelling the doubts that had been created by the districting case of 1946, Justice Brennan announced that national courts possessed jurisdiction; that, because they asserted "a plain, direct and adequate interest in maintaining the effectiveness of their votes," appellants were entitled to a hearing; and that "a justiciable cause of action" was stated "upon which appellants would be entitled to appropriate relief. . ."[61] The first two points were not seriously contested, but Justice Brennan naturally felt obligated to spend some time clarifying the point of justiciability.

He argued that in the political question cases, it was "the relationship between the judiciary and the coordinate branches of the federal government, and not the federal judiciary's relationship to the states, which gives rise to the 'political question.'" The cases in this area most closely related to that of legislative apportionment -- claims involving the guarantee to the states of a republican form of government --[62] were nevertheless such that their nonjusticiable character had nothing to do with the fact that they concerned state governmental organization.[63] Nor could the possibility of difficulties arising from enforcement be an

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[61] Ibid., pp. 197-198.

[62] Constitution of the United States, Article IV, Section 4.

[63] Baker v. Carr, 369 U.S. 186, 210-218 (1962).

impediment, since "judicial standards under the Equal Protection Clause are well-developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine. . .that a discrimination reflects no policy, but simply arbitrary and capricious action."[64]

One other matter had to be laid to rest. If the question of legislative apportionment was not "political," why had the Court dismissed so many previous cases? Alluding to the three different opinions in the case of Colegrove, Justice Brennan explained that the refusal to award relief in the 1946 case "resulted only from the controlling view of a want of equity. Nor is anything contrary to be found in those per curiams that came after Colegrove. . . ."[65]

Although Justice Stewart felt constrained to repeat Justice Brennan's announcement of the narrowness of the holdings in Baker v. Carr,[66] several Justices went beyond the immediate holding to discuss the relationship of representation and voting to the Fourteenth Amendment. Justice Clark, in fact, in a concurring opinion, would have decided the whole question. By going no further than giving bare mention to the fact that under the Fourteenth Amendment "judicial standards. . .are well-developed," he pointed out,

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[64] Ibid., p. 226.

[65] Ibid., pp. 232-233.

[66] Ibid., pp. 265-266.

the majority opinion failed to give the district court any guidance in exactly what standards should be applied in this new area of judicial action.[67] Although he would not have considered intervention by the courts if any other remedies for relief were available, he found the districting in Tennessee -- where some rural districts were as under-represented as some urban districts -- a "topsy-turvical of gigantic proportions. . .a crazy quilt without rational basis," which could find correction only in the federal courts.[68] He would, therefore, have granted the sought-for relief.

Justice Harlan, on the other hand, dissented vigorously. He could find nothing in the Constitution to support the view that "state legislatures must be so structured as to reflect with approximate equality the voice of every voter." There was nothing to prohibit a state from choosing any system it thought best suited "to the interests, temper, and customs of its people."[69]

The principal dissent was left to Justice Frankfurter rather than Harlan. He berated the "massive repudiation of the experience of a whole past" that he saw in the rejection of the doctrine he sought to establish in Colegrove v. Green.

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[67] Ibid., p. 251.

[68] Ibid., pp. 254-259.

[69] Ibid., pp. 333-334.

He also accused the Court of offering more than it had a right, by asserting the existence of a right without giving the lower courts specific standards to follow -- standards which, he felt, were beyond the power of the judiciary to formulate in any case.[70]

Perhaps the most fundamental issue which separated the majority and Justice Frankfurter was one which went to the heart of the problem, and the difference in viewpoints on this issue could make the difference between action and inaction on the part of the Court. Justice Frankfurter, echoing his opinion in Colegrove v. Green, expressed the fear that disregard of the "inherent limits" of its power would leave the Court not only helpless to effect a remedy, but open to an attack that could "impair the Court's position as the ultimate organ of the 'Supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which the Court must pronounce."[71] He said that relief must come "from an aroused popular conscience that sears the conscience of the people's representatives."[72]

Justice Clark took another view of the same issue. The Court must hesitate to act where possible, he felt; but when no other remedies are available -- where, as in Tennessee,

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[70] Ibid., pp. 267-268.

[71] Ibid., pp. 266-267.

[72] Ibid., p. 296.

the legislative policy had "riveted the present seats in the assembly to their respective constituents" -- the Court had no choice but to act.[73]

> It is well for this court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuge.[74]

One issue, then, was settled: the issue of legislative apportionment came under the protection and prohibitions of the equal protection clause of the Fourteenth Amendment. There were more fundamental questions yet to be answered, and the divergent opinions of the Justices in Baker v. Carr presaged the broader controversies that would result from the Court's determination to involve itself in the protection of "helpless majorities."

Political Reaction and Legal Response: 1962-1964

Initially, the political reaction to the decision seemed to support Justice Clark's appraisal of the issue. It was not greeted with anything approaching the political result that Justice Frankfurter had envisioned.

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[73] Ibid., p. 259.

[74] Ibid., p. 261.

Favorable comments were quick in coming, as well as speculation about the possible effects of the decision. It was greeted favorably by Attorney General Robert Kennedy, and Senator Kenneth D. Keating of New York said that the decision would "meet with the approval of everyone who believes in giving full significance to the equal protection clause." The decision was also approved by such groups as the American Municipal Association, the United States Conference of Mayors, and organized labor.[75] Ultimately, in a statement he may have later regretted, even Senator Barry Goldwater supported the decision, remarking that there were proportionately as many conservatives in the cities as there were liberals.[76]

The reaction, of course, was not altogether complimentary, and there were the first hints of stronger attacks on the Court. Especially in the South did the decision meet with disapproval. Senator Richard B. Russell of Georgia described it as "another major assault on our constitutional system," and called for a constitutional amendment to protect the system of checks and balances.[77] His attitude was generally echoed at the Southern Governor's Conference a few months later.[78] In December 1962, the Sixteenth General Assembly of the States, meeting in Chicago, approved three

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[75] New York Times, March 28, 1962, pp. 1, 22.

[76] Ibid., March 29, 1962, p. 17.

[77] Ibid., March 28, 1962, p. 1.

[78] Ibid., October 5, 1962, p. 21.

proposed constitutional amendments to be adopted by the state legislatures in an effort to get Congress to call a national constitutional convention. In addition to proposals for making it possible for the states to by-pass Congress in the amending process and establishing a "Court of the Union", one resolution contained provisions intended to remove cases concerning legislative apportionment from the judicial power of the United States.[79] A few such proposals were introduced in Congress, but they attracted little congressional notice.[80] Generally, however, these efforts were of short duration and soon dwindled "to an occasional pro forma statement for the record."[81]

Despite the relative public and political calm, such reaction was not mirrored in the courts. The opening of the gates of the judiciary in reapportionment matters led to a veritable run on both state and federal courts. By the middle of May 1962, there were suits challenging the makeup of the legislature in twenty-two states.[82] By August of the same year, in Alabama, Arkansas, Maryland and Oregon,

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[79]"Amending the Constitution to Strengthen the States in the Federal System," State Government, XXXVI (Winter, 1963), 13.

[80]See Congressional Record, 87th Congress, Second Session, CVIII, pp. 5365 (H. J. Res. 678), 5835 (H. J. Res. 683), 6202 (H. J. Res. 686).

[81]Paul T. David and Ralph Eisenberg, State Legislative Redistricting: Major Issues in the Wake of Judicial Decision. (Chicago, 1962), p. 1.

[82]New York Times, May 14, 1962, p. 1.

reapportionment of one or both houses had either been ordered by the courts or approved by the legislatures. In twenty-five others, decisions were pending or legislative action was in process.[83] Only one year after Baker v. Carr, thirty-eight states were involved.

The obstinate resistance that met the attempts to enforce the desegregation decisions was not apparent in the apportionment cases. As one editorial commented favorably, perhaps the most interesting aspect of the situation were "those actions that have not taken place."

> No state legislature has obstinately defied the courts. No governor has refused to call a special session of the legislature. . . . The courts have not eagerly jumped at the chance to become state apportionment and districting commissions. There have been changes but no really dire consequences as predicted a year ago.[84]

Meanwhile, the lower courts were bothered especially by the lack of standards; and as the cases multiplied, so did the difficulty of discovering any judicial pattern of enforcement. The uncertainty of what Baker meant was reflected, for example, in Michigan. A bare majority of five judges of the state supreme court held the apportionment of the state senate to be "invidiously discriminatory" and threatened at-large elections if the senate was not reapportioned by August. One dissenting judge went so far, however, as to

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[83] Ibid., August 5, 1962, sec. 4, p. 5.

[84] "One Year Later", National Civic Review, LII (April 1963), 184.

deny that the equal protection clause was even involved.[85] In New York, the apportionment was held not to violate the United States Constitution despite limitations on the population factor in both houses of the legislature. The court declared that the apportionment provisions were "rational", with a firm basis in New York history.[86] In approving an apportionment statute passed by a special session of the Florida legislature, a federal district court offered the opinion that while the plan gave more weight to population than previous statutes, "if it be required that both branches of the legislature, or either branch, must be apportioned on a strict population basis," the approved plan "would not pass the test."[87]

Apart from the fundamental question of how far legislative districts might deviate from the population standard, two very political questions were raised. It has already been noted that in several states the legislature was based upon the so-called "little federal plan," whereby one house was based on population while other factors predominated in the other house. In a few states the courts rejected the federal analogy, holding that both houses must be based substantially on population.[88] Nevertheless, in most states

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[85] Scholle v. Hare, 116 N.W. 2d 350 (Mich., 1962).

[86] WMCA, Inc. v. Simon, 208 F. Supp. 368 (N.Y., 1962).

[87] Sobel v. Adams, 214 F. Supp. 811, 812 (Fla., 1963).

[88] For example, Scholle v. Hare, 116 N.W. 2d 350 (Mich., 1962); Sims v. Frink, 208 F. Supp. 431 (Ala., 1962).

where the question arose the federal plan was sustained,[89] providing there were "rational" reasons — historical, geographical, or political — for the departure.

Another question related to the role of the courts where the majority of voters had chosen unequal districting through the use of the initiative. In Oklahoma, the federal district court rejected the contention that the majority had chosen to give more representation to the majority.[90] On the other hand, a federal district court in Colorado asserted that a rejection of the approved apportionment plan would be "a denial of the will of the majority," pointing out that "if the majority became dissatisfied with that which it has created, it can make a change in an election in which each vote counts the same as every other vote.[91]

All in all, the courts showed the most uniformity where legislative inaction over a long period of time had created inequalities in spite of the state constitutional provisions; where inequities could be traced to the constitutions themselves, the decisions reflected more diversity. Moreover, the courts insisted that wherever possible the

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[89] Maryland Committee for Fair Representation v. Tawes, 182 A. 2d 877 (Md.,1962); Toombs v. Fortson, 205 F. Supp. 248 (Ga.,1962); Lisco v. Love, 219 F. Supp. 922 (Colo.,1963).

[90] Moss v. Burkhart, 207 F. Supp. 885 (Okla.,1962).

[91] Lisco v. Love, 219 F. Supp. 922, 926 (Colo.,1963). The Court also held that although disparities existed, the apportionment provisions providing for the inequalities were "rational."

legislatures reapportion themselves. They had, in general, "taken minimum rather than maximum steps."[92] Only in Alabama and Oklahoma did the courts feel compelled to enforce their own apportionment plan, although several courts used this as a threat to speed up legislative action.[93]

The Legislative Reapportionment Cases of 1964

As the lower courts grappled with such issues, the Supreme Court was moving toward disposition of several of the uncertainties attendant to its 1962 decision. In 1963, it finally assumed jurisdiction over and struck down Georgia's county-unit system as a method for statewide primary elections. Although Justice Douglas specifically distinguished the case from those relating to legislative apportionment, his opinion that "the conception of political equality. . .can mean only one thing -- one person, one vote"[94] had obvious implications for the reapportionment cases. In 1964, the Court ruled that Article I, Section 2 of the United States Constitution, which required that Representatives be chosen "by the people of the several States", meant that congressional election

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[92]James E. Larson, "Awaiting the Other Shoe," National Civic Review, LII (April, 1963), 190.

[93]See Sims v. Frink, 208 F. Supp. 431 (Ala. 1963); Moss v. Burkhart, 220 F. Supp. 149 (Okla. 1963). Both courts had allowed additional time for the legislature to act, but as the Oklahoma court observed, "the legislature, as now constituted, is either unable or unwilling to reapportion itself, in accordance with our concept of the requirements of the equal protection clause of the Fourteenth Amendment."

[94]Gray v. Sanders, 372 U.S. 368, 381 (1963).

districts were to be as nearly equal in population as practicable.[95] Then, on June 15, 1964, in cases involving Alabama,[96] New York,[97] Maryland,[98] Virginia,[99] Delaware,[100] and Colorado,[101] the Court announced its guidelines for legislative apportionment.

Chief Justice Warren delivered the opinion of the Court in each of the six cases. Although it took a total of fourteen opinions and 65,000 words for all of the Justices to clarify their positions, it required only one sentence of thirty-one words to demolish apportionment systems representing decades of struggle and compromise. "We hold," the Chief Justice wrote, "that, as a basic constitutional standard, the equal protection clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[102]

To reach this conclusion, the Chief Justice began with some observations about the right to vote and representation.

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[95] Wesberry v. Sanders, 376 U.S. 1 (1964).

[96] Reynolds v. Sims, 377 U.S. 533 (1964).

[97] WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[98] Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964).

[99] Davis v. Mann, 377 U.S. 678 (1964).

[100] Roman v. Sincock, 377 U.S. 695 (1964).

[101] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).

[102] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

He noted that the Court had consistently protected the right to vote, a right which "is of the essence of a democratic society." The reapportionment cases did not concern direct denial of the right to vote, but the Court held that the right of suffrage could be denied by "debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[103] Because legislators "represent people, not trees or acres,"

> Full and effective participation by all citizens in state government requires. . .that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.[104]

To insure that each citizen had this "full and effective voice," the Court found that the Constitution required that each state make "an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable."[105] The Court declined to lay down any "rigid, mathematical standards" by which to test this equality. Rather, the courts would have to determine, on a case-by-case basis, whether "under the particular circumstances existing in the individual state. . . there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as

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[103] Ibid., p. 563.

[104] Ibid., p. 577.

[105] Ibid., p. 577.

may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."[106]

Obviously, such a strict adherence to population precluded adoption by a state of the so-called "little federal plan." The Court rejected outright any analogy between the state legislatures and Congress with regard to the basis of representation in the United States Senate.[107] Some use of governmental or historical boundaries within the state might still be made, so long as it did not work to "submerge" the population principle. Nevertheless, the equal protection clause prevented giving the two houses of a legislature essentially different bases even when those bases were approved by a majority of the voters in a free election.[108] Equal representation in one house would mean little if the will of the majority could be blocked by an overrepresentation of a minority in the other house.[109] As use of the federal analogy was irrelevant, so was any argument that a state's apportionment more nearly approximated population-based representation than did the federal electoral college. Moreover, a state could not rationally justify population differences

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[106] Roman v. Sincock, 377 U.S. 695, 710 (1964).

[107] Reynolds v. Sims, 377 U.S. 533, 571-573 (1964).

[108] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736 (1964).

[109] Reynolds v. Sims, 377 U.S. 533, 576 (1964).

in districts that were intended to balance urban and rural power in a legislature.[110] It could not constitutionally guarantee representation to sparsely settled areas or prevent districts from becoming so large that limitations were placed on the accessibility of representation to their constituents.[111] Nor could a state give special consideration to history, "economic, or other sorts of group interest."[112]

Since each of these factors had been used to justify the apportionment systems in one or more of the states involved in the various cases, the Court found each state invalidly apportioned. It affirmed a district court order providing a temporary apportionment plan for the Alabama legislature, which had not reapportioned for over sixty years.[113] It ruled unconstitutional the apportionment formula established by the New York constitution which disadvantaged the largest counties in the state. "However complicated or sophisticated an apportionment scheme might be, it cannot. . .result in a significant underevaluation of the weights of the votes of certain of a state's citizens merely because of where they happen to reside." The apportionment formulas

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[110] Davis v. Mann, 377 U.S. 678, 692 (1964).

[111] Reynolds v. Sims, 377 U.S. 533, 580 (1964).

[112] Reynolds v. Sims, 377 U.S. 533, 579-580 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736 (1964).

[113] Reynolds v. Sims, 377 U.S. 533 (1964).

in New York, it found, had a "built-in bias" against those living in the more populous areas.[114]

Maryland's senate apportionment had been upheld by the Maryland Court of Appeals on the grounds that equal representation of counties had been a part of the government since 1837 and had consistently possessed and maintained "district individualities"; and that the Maryland senate was closely analogous to the national senate. In this instance, the United States Supreme Court held both houses unconstitutionally apportioned, even though the apportionment of the lower house had not been questioned; it also found that the Court had to consider the challenged scheme as a whole to determine whether an entire plan met federal constitution requisites.[115]

The Virginia legislature had consistently reapportioned decennially, but the three largest counties of the state continued to be underrepresented, and the Court rejected the allegation that the discrimination resulted from a concentration of large numbers of military personnel. "Discrimination against a class of individuals, merely because of the nature of their employment. . .is constitutionally impermissible."[116] A constitutional amendment passed in Delaware in 1963 had shifted seats in both houses slightly, but even under that

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[114] WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653-654, (1964).

[115] Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 673, (1964).

[116] Davis v. Mann, 377 U.S. 678, 691 (1964).

amendment a majority of the house could be elected by twenty-eight per cent of the voters, with the result that the amendment had not resulted in either house meeting the Court's standards.[117]

Of the June 15 cases, that from Colorado presented issues which raised an especially difficult problem. The Court was concerned with majority rule. Yet the Colorado electorate, by a vote of 305,700 to 172,725, had defeated a proposed constitutional amendment for an apportionment based almost entirely on population for both houses. It adopted instead one which provided for apportionment of the House of Representatives on the basis of population while retaining the existing apportionment in the senate, which was based on other factors in addition to population. A majority of voters in every county approved the latter amendment. Furthermore, in the case of Colorado, the Court found that the lower house of the legislature was "at least arguably apportioned on a population basis", reflecting more closely than the other legislatures examined a true division of representation in the legislature. As the Court had established the personal nature of the right of representation, however, it invalidated the apportionment on the ground that "a citizen's constitutional rights can hardly

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[117] Roman v. Sincock, 377 U.S. 695 (1964).

be infringed simply because a majority of the people choose it to be."[118]

By the time the Chief Justice had found all the state apportionment schemes invalid, he had also disposed of most of the problems the lower courts had encountered in giving effect to the Court's decision in Baker v. Carr. Just as important, he had ended public speculation about how far the Court would go in requiring equal districting in the states. The Court had disposed of one issue; now it faced the possibility of an even more difficult phase of the "reapportionment revolution." Only time could tell whether the adoption of the equal population principle as a new constitutional right would withstand the counterpressures of political reaction.

Chief Justice Warren anticipated the critics of the apportionment decisions by stating that

> we are told that the matter of apportioning representation. . .is a complex and many faceted one. . . . We are admonished not to restrict the power of the States. . . . We are cautioned about the danger of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.[119]

After years of agitation, the principle of "one man, one vote" was now a fact. Exactly how it was received will be explored in the next chapter.

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[118] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 737-738 (1964).

[119] Reynolds v. Sims, 377 U.S. 533, 624-625 (1964).

CHAPTER III

POLITICAL REACTION TO THE EQUAL POPULATION DOCTRINE

The reapportionment decisions have been described as illustrating the current role of the Supreme Court as one in which it acts as "the spokesman of the nation's moral standards, the keeper of its civic conscience."[1] If this assessment is correct, such a role is, of course, not without its perils. Political opposition to Supreme Court decisions is certainly not new in the nation's history, and few major decisions by the Court are "final" in any absolute sense. Rather, they remain "in a never-ending dialogue," subject to possible limitation or reversal by the political branches of the government.[2]

It was to be expected that a decision or an issue as important as that of legislative apportionment would not meet with universal approval. The political reaction to the state legislative reapportionment rulings of 1964, however, was much more intense and critical than that which had greeted either the 1962 decision in Baker v. Carr or the Court's

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[1]Benjamin F. Wright, "The Rights of Majorities and of Minorities in the 1961 Term of the Supreme Court," The American Political Science Review, LVII (March, 1963), 98.

[2]Alpheus T. Mason, "Understanding the Warren Court: Judicial Self-Restraint and Judicial Duty," The Political Science Quarterly, LXXXI (December, 1966), 563.

application in 1964 of the equal population doctrine to congressional districting. The reaction was such that an observer in the nation's Capital wrote of "even some liberal-minded persons, admirers of the modern Supreme Court" as being "stunned" by the decisions. Although they approved "of where the Court is going," he noted, "they hope it will take care not to try to go too far too fast -- for the sake of self-preservation if for no other reason."[3]

Dissent on the Court and the Initial Political Reaction

As is often the case in controversial decisions, the division among the Justices themselves suggested the possible direction of public and political opposition. Basically, two lines of thought concerning constitutional protection and legislative apportionment were to be found in the dissents of Justices Harlan, Clark, and Stewart.

Justice Harlan dissented in every case. Adhering to the position taken by Justice Frankfurter, who had left the Court in 1962, he disagreed with the idea that the cases were appropriate areas for judicial inquiry and was especially displeased that the Court had chosen to give constitutional sanction to the equal population principle. The decisions, he wrote,

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[3]Anthony Lewis, "Supreme Court Moves Again to Exert Its Powerful Influence," New York Times, June 21, 1964, sec. 4, p. 3.

> are refuted by the language of the Amendment they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history. . . .[4]

He criticized the Court for giving support to "a current mistaken belief" that the Court "should 'take the lead' in promoting social reform when other branches of the government fail to act."[5]

Justices Clark and Stewart, on the other hand, agreed with the majority that the Fourteenth Amendment afforded some protection against the more extreme cases of unequal districting. Nevertheless, both Justices dissented in the cases involving New York and Colorado, preferring to apply less stringent standards than those adopted by the Court.

Justice Clark, concurring in Reynolds v. Sims, wrote that the proper test under the equal protection clause was whether an apportionment was a "crazy quilt," adding that at least one house of the legislature could be based on factors other than population so long as the resulting pattern was "rational."[6]

Justice Stewart, citing with approval a previous opinion of the Court relating to the police powers of a state and economic regulation,[7] would have required only that (1) "in

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[4]Reynolds v. Sims, 377 U.S. 533, 614-615 (1964).

[5]Ibid., p. 625.

[6]Ibid., p. 588.

[7]McGowan v. Maryland, 366 U.S. 420, 425-426 (1961), in which the Court held that "a statutory discrimination will not be set aside if any state of facts may be conceived to justify it."

the light of the State's own characteristics and needs," the plan be "rational," and (2) that it must not "permit the systematic frustration of the will of the majority."[8] Using these tests, Justices Clark and Stewart found the apportionments of both Colorado and New York "rational," in that they prevented one section of the state from dominating in the legislature.[9]

If the Court had followed this reasoning, it might have escaped much, if not most, of the criticism that the reapportionment decisions evoked. It has been noted above that, although certain dicta might have indicated the choice it would finally make, the Court had not established any standards in Baker v. Carr. Opinion concerning the standards that would be acceptable to the Court naturally varied, and speculation that the Court would adopt the test of "rationality" suggested by Justices Clark and Stewart probably took some of the edge off the impact of the 1962 decision.

In an address before the General Assembly of the States in 1962, for example, the Attorney General of Colorado said that the Court would probably allow "giving consideration to the variety of needs of different areas of a state." This

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[8] WMCA, Inc. v. Lomenzo, 377 U.S. 633, 753-754 (1964). Many of the lower courts had used this test of "rationality" in judging the constitutionality of state apportionment schemes prior to Reynolds v. Sims.

[9] Ibid., pp. 759, 763-764.

would permit "considerable leeway" for the state to "evaluate its own individual system of apportioning seats in light of the needs and interests of its own people."[10]

The Solicitor General of the United States, speaking before the National Association of Attorneys General in 1963, said that the Court would probably allow recognition of historical, political, and geographical factors in at least one house of the legislature.[11] Moreover, it might have been possible for the Court to have reached the same disposition in the cases without announcing general guidelines that would apply to every state.[12] By linking equal districting to the right to vote, however, the Court placed the matter of apportionment within the category of "preferred freedoms" to which it has accorded more exacting scrutiny.[13] Furthermore, by rejecting the "federal analogy" and apparently branding as constitutionally impermissible almost any consideration other than population, the Court adopted a standard not generally practiced in the states. As Justice Stewart remarked critically, it had in effect made unconstitutional the legislatures of almost all of the fifty states.

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[10]Quoted in "Legislative Reapportionment," State Government, XXXVI (Winter, 1963), 5.

[11]Archibald Cox, "Current Constitutional Issues," American Bar Association Journal, XLVIII (August, 1962), 712.

[12]See J. Lee Rankin, "The High Price Exacted For Not Entering the Political Thicket," The American University Law Review, XV (December, 1965), 20.

[13]Mason, op. cit., p. 558.

Finally, it should be mentioned that intensity of the political reaction resulted in part from more than mere difference of opinion concerning the desirability of population as a criterion for apportionment. The June 15 decisions called up the broader question of the role of the Court in the political system. Court rulings in such politically sensitive areas as criminal law procedure, national security, and religion, in addition to the explosive issue of segregation, had already created a bloc of opposition to the Court that called into question the power of judicial review itself.[14] The reapportionment decisions were often regarded not only as reflecting bad judgment on the part of the Justices, but as another attempt by the Court to "usurp" the power of Congress and the states.[15]

Again, the dissenting opinions gave support to this view. Justice Stewart asserted that the decisions marked

> a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory.[16]

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[14] Loren P. Beth, "The Supreme Court and the Future of Judicial Review," The Political Science Quarterly, LXXVI (March, 1961), 11-15.

[15] See, for example, Paul C. Bartholomew, "Our Legislative Courts," The Southwestern Social Science Quarterly, XLVI (June, 1965), 11-14.

[16] WMCA, Inc. v. Lomenzo, 377 U.S. 633, 747-748 (1964).

Justice Harlan accused the Court of exceeding its authority by substituting "its view of what should be so for the amending process."[17]

Some politicians were even more critical. In a speech before the American Political Science Association in Chicago, September 11, 1964, Senator Goldwater, using the decisions on apportionment and school prayer as examples, charged that the Court had violated "the constitutional tradition of limited government" and "the principle of legitimacy in the exercise of power."[18] In Congress, Representative Howard Smith of Virginia warned his colleagues that unless Congress intervened, they could "come to live under just as much of a dictatorship as any European country which has gone through the regimes of Hitler and Khrushchev."[19]

Criticism of the decisions in the states and calls for congressional action began immediately after the announcement of the decisions. Only two days after the rulings, the lieutenant governor of Texas said that he intended to ask the lieutenant governors of the other states to seek congressional relief from the ruling.[20] The New Jersey senate

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[17] Reynolds v. Sims, 377 U.S. 533, 625-626 (1964).

[18] New York Times, September 12, 1964, p. 10.

[19] Congressional Record, 88th Congress, 2d Session, CX, 20220.

[20] New York Times, June 18, 1964, p. 24.

passed two resolutions asking Congress to initiate an amendment allowing regional representation in one house of a state legislature -- one resolution sponsored by a Democrat, the other by a Republican.[21] In the same week that the decisions were announced, the Southern Conference of the Council of State Governments, a bipartisan conference of state legislators, adopted a resolution urging an amendment which would "unequivocally" empower a state to adopt "any criteria as in its wisdom may be in its individual best interest" in apportioning one house.[22] Before the year was over, similar requests had been made by such state organizations as the Western Conference of the Council, the Southern Governor's Conference, and the National Conference of State Legislative Leaders.[23]

Members of Congress moved quickly to satisfy these requests. On June 16, Representative William M. Tuck of Virginia, calling the June 15 decisions "a new and shocking interference by the federal judiciary," introduced a bill to remove federal court jurisdiction over legislative reapportionment cases.[24] Numerous similar bills and resolutions

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[21] Ibid., June 23, 1964, p. 24.

[22] "The Apportionment Problem," State Government, XXXVIII (Winter, 1965), 6.

[23] Ibid., pp. 6-7.

[24] Congressional Record, 88th Congress, 2d Session, CX, 13940, 14037.

proposing constitutional amendments followed during the next weeks. By August 19, 1964, according to Emanuel Celler, chairman of the House Judiciary Committee, one hundred and thirty-eight such bills and resolutions had been introduced in the house by ninety-nine Congressmen.[25]

Congressional Action, 1964

It was in this politically charged atmosphere that the Republican floor leaders of Congress -- Representative Charles Halleck of Indiana and Senator Everett Dirksen of Illinois — issued a statement that the Republicans intended to "take the lead" in efforts to overturn the reapportionment decisions. "We Republicans," their statement read, "believe the. . .legislative balance which has protected minority rights and interests for 175 years should be preserved."[26] Accordingly, on July 23, Senator Dirksen introduced a resolution which, if passed as a constitutional amendment, would give the states "exclusive power" to determine apportionment of their legislators if (1) at least one house of a bicameral legislature was based on population and (2) use of factors other than population had been approved by a majority of the state.[27]

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[25] Ibid., p. 20237.

[26] New York Times, June 27, 1964, pp. 1, 8.

[27] S. J. Res. 185, Congressional Record, 88th Congress, 2d Session, CX, 16689.

However, proposals for constitutional amendments were not to receive the major attention in what remained of the 1964 session. Because of pressure to adjourn Congress before the Democratic National Convention, scheduled to convene August 24, the efforts of the opponents of the reapportionment decisions were directed toward getting approval of legislation to slow down the progress of such cases or to remove the issue from the jurisdiction of the courts entirely.

On August 4, Dirksen introduced a bill which would have kept the courts from deciding apportionment cases for from two to four years. It stated that in cases involving the question of legislative apportionment

> such action or proceeding shall be stayed until the end of the second regular session of the legislature of that State which begins after the enactment of this section, and the Court may make such orders with respect to the conduct of elections as it deems appropriate except that no order shall be inconsistent with any apportionment made pursuant to referendum.[28]

The principal reasons for introduction of the bill were given in the August 5 report of the Senate Judiciary Committee. The stay, according to the report, would give Congress and the states time to consider a constitutional amendment. Moreover, it would relieve the states from "hurried acts of reapportionment," since "a breathing spell" was needed "both for the harassed States and for the Congress."[29]

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[28] S. 3096, Ibid., p. 17724.

[29] Senate Miscellaneous Reports, 88th Congress, 2d Session, Report No. 1328, Part 4 (Washington, 1964), p. 3.

In light of the progress being made in giving effect to the Court's reapportionment rulings, this "breathing spell" probably seemed essential to those who supported the move for a constitutional amendment. As though to emphasize the impact of the decisions, the Supreme Court, on June 21, sent cases back to nine other states to be reheard according to the standards set forth in Reynolds v. Sims.[30] By the end of 1964, the legislatures of at least one-half of the states were confronted with orders to reapportion, and in most instances the time limit set by the courts did not extend beyond the November, 1966, elections.[31]

As the weeks passed, therefore, the possibility increased that, by the time any amendment received the requisite majorities in Congress and the states, apportionment based on population would be an accomplished fact. There was the additional consideration that a legislature already reapportioned would probably be less likely to ratify such an amendment.

In order to speed up passage of his bill and to lessen the chances of an executive veto, Senator Dirksen decided to

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[30] Swann v. Adams, 378 U.S. 553 (1964) (Florida); Meyers v. Thigpen, 378 U.S. 554 (1964) (Washington); Nolan v. Rhodes, 378 U.S. 556 (1964) (Ohio); Williams v. Moss, 378 U.S. 558 (1964) (Oklahoma); Germano v. Kerner, 378 U.S. 560 (1964) (Illinois); Marshall v. Hare, 378 U.S. 561 (1964) (Michigan); Hearne v. Smylie, 378 U.S. 563 (1964) (Idaho); Hill v. Davis, 378 U.S. 565 (1964) (Iowa); Pinney v. Butterworth, 378 U.S. 564 (1964) (Connecticut).

[31] "Nation-wide Changes Ruled for Districts," National Civic Review, LIV (January, 1965), 31.

attach it to the foreign aid authorization bill then pending in the senate. This, plus a threatened filibuster by a small group of liberals, caused majority leader Mike Mansfield to enter negotiations with Senator Dirksen in an effort to arrive at a compromise that would command support of a majority of the senate. After an all-day conference, in which Deputy Attorney General Nicholas Katzenbach and Solicitor General Archibald Cox participated, the legal aides to the two senators managed to work out the language of the compromise measure.

The Dirksen-Mansfield proposal authorized a stay in court proceedings "in the absence of highly unusual circumstances" to permit any state election before January 1, 1966, to be conducted according to the laws in effect before the court action was begun. It also directed the courts to allow the state legislatures "reasonable opportunity" to effect a reapportionment following a court judgment that the state's former apportionment was unconstitutional.[32]

After agreement had been reached, Senator Mansfield told reporters that he was "unhappy" about the settlement, but that he was "just facing up to realities." Senator Dirksen, on the other hand, was described as "quite contented," since the compromise retained almost all of the mandatory character of the legislation he had originally proposed.[33]

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[32] Congressional Record, 88th Congress, 2d Session, CX, 19171.

[33] New York Times, August 13, 1964, p. 1.

On August 12, explaining that he had to "select a vehicle that would get to the President's desk before adjournment," Senator Dirksen offered the measure as an amendment to the pending foreign assistence authorization bill.

The compromise was not satisfactory to the liberals who had threatened to filibuster against the original Dirksen proposal, and when the measure came up the next day they began an extended "educational debate." This small group -- including Senators Paul Douglas of Illinois, William Proxmire of Wisconsin, Wayne Morse of Oregon, and Philip Hart of Michigan -- wrecked any hopes for a quick passage of the Dirksen-Mansfield proposal or for adjournment before the beginning of the National Democratic Convention. They attempted in their speeches to remain germane to the topic and they were willing to let other measures be considered, but they effectively blocked consideration of the Dirksen-Mansfield rider.[34]

The House, meanwhile, was giving consideration to an even more drastic limitation on the powers of the courts. When it appeared that Representative Celler, as chairman of the House Judiciary Committee, was unwilling to let any legislation affecting legislative apportionment be reported, the

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[34]"Tough Act to Follow: Filibuster Aimed at Dirksen's Amendment," Newsweek, LXIX (September 21, 1964), 35.

House Rules Committee brought a bill to the floor that had been introduced by Representative William Tuck. As passed by the House August 19, the bill denied to both the United States Supreme Court and federal district courts the right to hear "any action taken upon a petition or complaint seeking to apportion or reapportion any legislature of any state in the Union. . . ." One amendment to the bill was approved. Offered by Representative Howard Smith of Virginia, chairman of the House Rules Committee, it added that "nor shall any order or decree of any district court now pending and not finally disposed of by actual reapportionment be hereafter enforced." The amendment was apparently the result of questions that had arisen during debate as to whether the Tuck Bill would apply only to future court action or also to cases already begun.[35] Just such a case, in fact, was then being considered by a federal district court in Virginia.[36]

It was speculated that the Tuck Bill had been passed in order to secure a favorable response in the senate on the milder Dirksen-Mansfield proposal. Seeing the chance that the Tuck Bill might become law, so the reasoning went, a majority of the senate might find it desirable to accept

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[35] Congressional Record, 88th Congress, 2d Session, CX, 20290-20292.

[36] Mann v. Davis, 238 F. Supp. 458 (Va. 1964).

the more moderate proposal in order to prevent it.[37] Representative John Lindsay of New York, for example, during House debate, referred to the Tuck Bill as "a tactical move in our relations with the other body."[38] However, the House defeated an attempt to substitute language similar to that of the Dirksen measure for the stronger wording of the Tuck Bill.[39] A majority of the House was apparently in sympathy with arguments such as those presented by Representative Milton Glen of New Jersey. The Court's decisions, he reasoned, had destroyed the basis of bicameral legislatures by rejecting use of factors other than population in at least one house; the reapportionment decisions represented a threat to minorities, since in many states the legislature would be dominated by urban-based majorities; and the bill would prevent "a chaotic condition in the governments of the fifty states. . . ."[40]

Apart from the question of whether the Tuck Bill and the Dirksen-Mansfield proposal were necessary or desirable, much of the debate centered on the uncertainty as to whether they were constitutional. Article III, Section 1 of the United States Constitution vests in Congress the power to

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[37]Robert G. Dixon, Jr., "Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation," Michigan Law Review, LXIII (December, 1964), 231.

[38]Congressional Record, 88th Congress, 2d Session, CX, 20237.

[39]Ibid., p. 20298.

[40]Ibid., p. 20223.

create lower federal courts, and this apparently carries with it rather broad power to limit the jurisdiction of these courts.[41] Section 2 of the same Article assigns appellate jurisdiction to the Supreme Court "with such exceptions and under such regulations as the Congress shall make." Proponents of the Tuck Bill could point to several precedents for the power of Congress to limit the appellate jurisdiction of the Supreme Court. Possibly the most famous (or notorious) case was that of Ex parte McCardle, decided by the Court in 1869. In that case the Court upheld the right of Congress to repeal an act giving the Court jurisdiction over a case which it had already taken under advisement.[42]

Nevertheless, the Court had not ruled specifically on the issues presented by the Tuck Bill and the Dirksen-Mansfield proposal. Here the intention was to prevent or limit the right of the courts to enforce a constitutional rule already pronounced by the Supreme Court. Moreover, the McCardle case had said nothing about the power of Congress to limit appeals from state courts where federal rights were involved, nor had it been faced with a situation

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[41] See, for example, Lockerty v. Phillips, 319 U.S. 182 (1943), in which the Court ruled that "all Federal Courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts. . . ."

[42] Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). See also Yakus v. United States, 321 U.S. 414 (1944).

in which total federal relief had been withdrawn. It is possible that, while Congress might withdraw jurisdiction from federal district courts, or from the Supreme Court, an act combining both might be subject to question as a violation of the due process clause of the Fifth Amendment.[43] Thus it seemed reasonable to assume, in view of the "special setting" of the McCardle case, that the Court had not "definitely resolved the conflict between the 'exceptions' clause of Article III and the spirit of the rest of the article, as developed in the tradition of judicial review."[44] At least one Supreme Court Justice, in fact, had suggested that if the Court were presented with the same issues as those involved in McCardle, the Court would probably not render the same decision.[45]

Such considerations undoubtedly had some influence on those in the senate not definitely committed to either side of the controversy. There were other pressures as well. Fifteen prominent law school deans and professors sent a telegram to Senators Dirksen and Mansfield objecting to the proposal as an approach which "unwise and indeed dangerously

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[43]This was the conclusion of a study of the question by Robert L. Tienken, legislative attorney in the American Law Division of the Legislative Reference Service. See Congressional Record, 88th Congress, 2d Session, CX, 20252-20256.

[44]Dixon, op. cit., p. 235.

[45]Glidden Co. v. Zdanok, 370 U.S. 530, 605 (1962), dissenting opinion by Justice Douglas.

threatens the integrity of our judicial process."[46] The proposal also came under fire from Democratic mayors of several large cities, who objected to the fact that Justice Department officials had cooperated in framing the proposal.[47]

When Congress reconvened after the recess for the Democratic National Convention, it became obvious that the Dirksen-Mansfield proposal was in trouble. On September 10, the senate rejected a cloture motion by Senator Dirksen. Then, by a vote of thirty-eight to forty-nine, it refused to table and thus kill the proposal.[48] A bipartisan measure, co-sponsored by Senator Hubert Humphrey, apparently with the approval of the President,[49] was attacked by the Dirksen supporters because it was not binding on the courts. It was defeated September 15.[50] Immediately thereafter, Senator Strom Thurmond attempted to substitute the language of the Tuck Bill, but the measure passed by the House proved too strong for a large majority of the Senate.[51]

Finally, unable to reach an agreement with Senator Dirksen on any further changes in the language of their

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[46] New York Times, August 10, 1964, p. 36.

[47] Ibid., August 19, 1964, p. 16.

[48] Congressional Record, 88th Congress, 2d Session, CX, 21896-21900.

[49] "The Dirksen Breather," Time, LXXXIV (September 18, 1964), 37.

[50] Congressional Record, 88th Congress, 2d Session, CX, 20291-20295.

[51] Ibid., p. 20295.

proposal, Senator Mansfield introduced a "sense of Congress" resolution which the liberals were willing to accept. It stated that it was the "sense of Congress" that the courts "could properly, in the absence of unusual circumstances," allow the state's legislature at least six months to reapportion, and the courts were to permit the November, 1964, elections to be held under existing state law. It further provided that if the legislature failed to reapportion within the allotted time, the court was to make the reapportionment itself.[52]

Although this "sense of Congress" proposal ended the filibuster, it was not acceptable to those who preferred mandatory restrictions. Senator Dirksen saw it as "not worth the paper upon which it is written," a "prayer" and "hope" that would not have any effect on the reapportionments being undertaken in the courts.[53] Nevertheless, on September 24 the Mansfield proposal was adopted as an amendment to the foreign aid bill by the narrow margin of forty-four to thirty-eight.[54]

This "sense of Congress" resolution did not get out of the deliberations of the conference committee, so that in 1964 no official statement regarding the reapportionment decisions issued from Congress. Nevertheless, the votes in

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[52] Ibid., p. 22564.

[53] Ibid., p. 22755.

[54] Ibid., p. 22758.

both houses indicated that a majority of the members favored some restriction on those decisions, at least to the extent of a slow-down in litigation. This fact did not have any appreciable effect on orders from the courts, however. In Virginia, for example, a federal district court ordered reapportionment by December 15, 1964,[55] and a request for a stay was denied by Chief Justice Warren in October.[56]

One question central to this disagreement between Congress and the courts was the extent to which this congressional activity reflected the attitude of the public. A correspondent for the New York Times wrote that Reynolds v. Sims had not "aroused large-scale opposition among the public," characterizing the efforts to restrict the effects of the reapportionment decisions as "strictly a politician's rebellion." The opposition appeared to originate among those members who represented interests that stood to lose from reapportionment. About Republican opposition, he noted that even if the Republican Party gained from general reapportionment, those elected would be "a different breed of Republican," the "new, smooth politicians of the suburbs instead of the solid country types. . . ."[57] Another writer

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[55]Mann v. Davis, 230 F. Supp. 458 (Va., 1964).

[56]New York Times, October 29, 1964, p. 1.

[57]Anthony Lewis, "Decision to Reapportion the State Legislatures Stirs Opposition," New York Times, August 16, 1964, sec. 4, p. 3.

saw the fight in Congress as one between "standpatters and progressives of both parties," between "the new and old America."[58]

In Congress, the point was made that a Gallup poll indicated that the public favored the reapportionment decisions by a margin of three to two.[59] In August, Senator Joseph Clark of Pennsylvania charged that the talk about a "crisis"

> . . .comes only from the politicians of the State legislatures, their friends, their sycophants, their supporters. It has no grass roots basis at all. It is merely the normal fear that someone will lose his job.[60]

While this language is perhaps a little strong, a study of votes on the issue suggested that the reapportionment decisions were favored by a coalition composed primarily of rural-supported senators of both parties, "representing existing Democratic strength in the south and Republican strength in the rest of the nation." The few Republicans who did not support the Dirksen point of view were from states with a large metropolitan population.[61]

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[58]Kenneth Crawford, "Old Order Against New," Newsweek, LXVI (August 2, 1965), 30.

[59]Congressional Record, 88th Congress, 2d Session, CX, 20842.

[60]Ibid., p. 20002.

[61]"Note: Reapportionment," Harvard Law Review, LXXIX (April, 1966), 1239.

Attempts to Amend the Constitution

Efforts to overturn the reapportionment decisions did not end with the 1964 defeat. After that year, however, attention centered primarily on attempts to initiate a constitutional amendment that would permit use in the states of factors other than a strict population base in apportioning the legislatures. Bills proposing legislation to limit the federal courts' jurisdiction continued to be introduced, and they were tied up in committee.[62]

Again, Senator Dirksen led the efforts. On January 6, 1965, he introduced the following resolution:

> Nothing in this Constitution shall prohibit the people from apportioning one house of a bicameral legislature upon the basis of factors other than population, or from giving reasonable weight to factors other than population in apportioning a unicameral legislature, if, in either case, such apportionment has been submitted to a vote of the people. . . .[63]

Although the Dirksen resolution would undergo several modifications during its consideration in the senate, its basic outlines remained intact. The proposed amendment was sent to a subcommittee of the Committees on the Judiciary which,

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[62]Representative Tuck again introduced a bill denying federal court jurisdiction over reapportionment cases, for example. H. R. 1534, Congressional Record, 89th Congress, 1st Session, CXI, 126. Senator Strom Thurmond introduced a similar bill. S. 534, Ibid., p. 697.

[63]S. J. Res. 2, Ibid., p. 172.

under the chairmanship of Senator Birch Bayh of Indiana, held hearings on it and similar proposals from March 3 to May 21.[64]

Supporters of a constitutional amendment were not concentrating all their efforts on securing approval of the Dirksen resolution. Apparently in an attempt to increase support in the Senate for an amendment and to provide an alternative in the event the Dirksen amendment failed to get the necessary two-thirds majority, opposition to the reapportionment decisions also took the form of petitions from the states asking Congress to call a national constitutional convention. This method of amending the Constitution, never before used, requires petitions from two-thirds of the states.[65] By the end of 1964, sixteen states had already passed resolutions asking Congress for such a convention.[66]

In December of the same year, the move for a national convention was endorsed at the Seventeenth Biennial General Assembly of the States. The resolution adopted by that assembly included a specific proposal for the language of the amendment, language almost identical to that of the Dirksen Amendment.

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[64] Hearings Before the Subcommittee on Constitutional Amendments of the Committee of the Judiciary, U.S. Senate, 89th Congress, 1st Session (Washington, 1965). (Cited hereafter as Hearings.)

[65] Constitution of the United States, Article V..

[66] New York Times, December 13, 1964, p. 54.

> Nothing in this Constitution shall prohibit any state which shall have a bicameral legislature from apportioning the membership of one house of such legislature on factors other than population, provided that the plan of such apportionment shall have been submitted and approved by a vote of the electorate of that state.[67]

Majority Rule, Minority Rights, and Constitutional Amendment

The arguments of those who supported and those who opposed a constitutional amendment took many forms, of course, but several basic arguments developed in Congress, as well as in public and academic commentary on the proposal. Generally, both groups offered differing views as to the effect of both the Supreme Court decisions and the proposed amendment on the representative process in relation to majority rule and the right of minorities in the states.

Proponents of the Dirksen Amendment argued at once that the Supreme Court decisions presented a threat to majority rule and minority interests. Justice Stewart suggested the basic rationale against the decisions. Representative government, he wrote, is

> a process of accomodating group interests through democratic institutional arrangements. . . . Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in a state's legislature. . .of the various groups and interests making up the electorate.[68]

The apportionment plan, in his opinion, should achieve "a fair, effective, and balanced representation of the regional,

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[67]"The Seventeenth Biennial General Assembly of the States," State Government, XXXVIII (Winter, 1965), 62.

[68]WMCA, Inc. v. Lomenzo, 377 U.S. 633, 749 (1964).

social, and economic interests within a state." The public interest could be better served by a "medley of component voices than by the majority's monolithic command."[69] As another writer put it, representative government

> means that the institutions must not merely represent a numerical majority. . .but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process.[70]

Thus, in the hearings before the Senate Judiciary subcommittee, the President of the American Farm Bureau Federation, an organization actively campaigning for the amendment, supported the Dirksen proposal on the grounds that it would insure "a republic which is a truly republican form of government with consideration for minority and area interests."[71] Senator Javits, stating his general approval of the reapportionment decisions, felt that "questions of area resources, local government, geographic and economic interests may well be determining factors with the people in some states." By allowing the people of a state to decide whether they wanted to retain the "federal system" in their legislature, such interests could be given sufficient weight in at least one house.[72]

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[69] Ibid., p. 751.

[70] Alexander M. Bickel, "Reapportionment and Liberal Myths," Commentary, XXXV (June, 1963), 488.

[71] Hearings, p. 147.

[72] Ibid., p. 240.

This desire to protect special interests in a state was combined with the argument that in those cases where the Supreme Court struck down apportionment plans that had been approved by a majority of those voting in a state — as in Colorado — the Court had actually denied effective majority rule. Thus Senator Dirksen described his proposal as defending "a basic issue of free government. . ."

> Shall the people themselves be allowed the right to determine the organic structure of their state government?. . . . If the people are not permitted to make this decision, then who is to make it for them?. . . . Freedom will flourish and can flourish only when the people retain free exercise of the powers of government.[73]

This concern for majority rule and minority protection, however, raised several questions that supporters of the reapportionment decisions considered fatal to the desirability of accepting any amendment similar to that proposed by Senator Dirksen. In the first place, what interests would be represented? It could be argued that no individual has only one basic "interest" that might be represented, nor do persons generally group themselves in particular geographic areas according to interests. Moreover, the Dirksen amendment made it possible, it was argued, for an urban majority to give the rural areas even less representation than they would be entitled to under the population standard.[74]

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[73] Ibid., p. 8.

[74] See the testimony of Senator Joseph Tydings, Hearings, pp. 64-66; and that by Robert B. McKay, Ibid., pp. 435-436.

There was also a serious question as to exactly what "factors other than population" could be represented. As early as June, 1964, the Republican position had been protested by the chairman of the New York State Committee for Fair Representation and by James Farmer, the national director of the Congress on Racial Equality, as presenting a threat to minority voting rights. Malapportionment, it was contended, had been a "fundamental weapon in the hands of southern racists."[75] Civil rights groups in Washington lobbied against the amendment, and the Washington representative of the National Association for the Advancement of Colored People charged that past referendum campaigns on the question of reapportionment had been marked by exploitation of the fear of giving power to racial, ethnic, and labor groups in the cities.[76]

Finally, it was argued that the adoption of the Dirksen Amendment could accelerate a trend that might be reversed by the reapportionment decisions: the inability or unwillingness of the state legislatures to meet the growing needs of the cities, and the concomitant growth of federal power vis-à-vis the states. One of the major reasons given for the general loss of power and prestige of state legislatures prior to

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[75] New York Times, June 29, 1964, p. 20.

[76] Hearings, p. 817. See also the testimony of Theodore Sachs, who described referendum campaigns in Michigan as being marked by "acrimonious, deceitful, and vicious debate, or uninformed politicking, at best." Ibid., p. 909.

the reapportionment decisions had been the alleged lack of interest of rural-dominated legislatures in urban problems,[77] and numerous examples of discrimination against the cities by the legislatures were cited as arguments against any effort to freeze the status quo in the Constitution.[78]

Support for the Dirksen Amendment came largely from farm and business groups, as well as state legislators and several governors; while the Amendment was opposed by such groups as civil rights organizations, organized labor, mayors of the larger cities, and several organizations of citizens interested in retention of the population standard.

Although the Dirksen Amendment received a favorable vote in the subcommittee, the best the senator could expect in the full committee was a tie vote. It is indicative of the bipartisan nature of the issue that the lack of a majority was immediately due to a change of heart by Senator Javits, whose major base of power was New York City, and who reportedly came under heavy pressure from organized labor and civil rights groups to oppose the Amendment.[79]

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[77]See, for example, V. O. Key, Jr., American State Politics: An Introduction (New York, 1956), pp. 76-77.

[78]Mayor Richard Daley of Chicago cited the refusal by the Illinois Senate to agree to permissive revenue bills for the city and the refusal by the legislature to grant home-rule powers. Hearings, pp. 278-279. Mayor Jerome Cavanaugh of Detroit blamed a rural-dominated Senate for defeat of social legislation, permissive rent control acts and urban renewal proposals. Ibid., p. 688-689. See also pp. 694-697. "Why Cities Are Turning to Washington for Cash," U.S. News and World Report, LIX (August 23, 1965), 44-45.

[79]Crawford, op. cit., p. 30.

Senator Dirksen managed to get his resolution before the Senate August 4 by substituting its language for that of a minor bill proclaiming National American Legion Baseball Week.[80] In order to meet some of the objections that had been raised, however, he agreed to several changes in the resolution before the final vote. Among the more important changes were (1) substituting the phrase "population, geography, and political subdivisions" for the broader "factors other than population;" (2) providing that when a plan for using these factors was submitted to the people, an alternative plan of apportionment "based upon substantial equality of population" would also be submitted; and (3) requiring that if a plan using factors other than population in one house were adopted, it would have to be resubmitted to the people every ten years.[81]

Although the group that had prevented Dirksen's bill from reaching a vote in 1964 had threatened another filibuster, Senator Douglas announced that they had decided not to oppose consideration of the Amendment.[82] No filibuster was necessary. Although the Senate voted to substitute the Amendment for the baseball bill, on the question of whether

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[80] Congressional Record, 89th Congress, 1st Session, CXI, 19355.

[81] Ibid., p. 19248-19249.

[82] Ibid., p. 17843.

to pass the modified resolution the vote was fifty-seven to thirty-nine -- seven votes short of the necessary two-thirds majority.[83]

At least one commentator felt that the measure would have passed if it had received the support of President Johnson,[84] a conclusion that seems reasonable in view of the narrow margin by which it failed to pass. The President, however, while saying that he was "generally sympathetic with the reapportionment that is taking place throughout the country in compliance with the Supreme Court's decision," refused to take a public stand on the issue on the grounds that a constitutional amendment did not require executive approval.[85]

On August 11, 1965, Senator Dirksen introduced still another proposed amendment. The new bill had been changed even more. Pointing out that he had added the language of the dissenting opinions of Justices Stewart and Clark, he explained that

> every effort has been made to insure that the will of the majority of the state will govern not only the ratification of such an amendment, but also the form and content of any plan of apportionment submitted to the people by a bicameral legislature.[86]

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[83] Ibid., 19373.

[84] Kenneth Crawford, "Big Game, Choosing Sides in the Senate," Newsweek, LXV (June 14, 1965), 50.

[85] New York Times, June 2, 1965, p. 16.

[86] S. J. Res. 103, Congressional Record, 89th Congress, 1st Session, CXI, 20122.

The new proposal contained three major changes. (1) A proposal for adopting factors other than population in one house would have to be "approved prior to such election by both houses" of the legislature, "one of which shall be apportioned on the basis of substantial equality of population. . . ." This change was the result of objections to having a malapportioned legislature draw up plans which would assure continued existence of the malapportionment. (2) Apportionment according to geography or political subdivisions would have to insure "effective representation in the state's legislature of the various groups and interests making up the electorate" — a phrase intended to preclude partisan or racial gerrymandering. (3) One house of any legislature ratifying the amendment would have to be based on "substantial equality of population."[87]

This resolution did not reach a vote in the 1965 session of Congress, and before the question came up in the 1966 session, new efforts were made to develop support. In January, 1966, a major attempt to revive the Dirksen Amendment on a grassroots level began with the creation of the Committee for Government of the People, uniting "powerful business and agricultural interests" under the direction of a public relations firm. The chairman of the firm disputed the idea

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[87] Ibid., 20049.

that "time had run out" for the Dirksen Amendment and promised "a big, national grassroots campaign" on behalf of the Amendment.[88]

The 1966 attempt, however, was generally viewed as the last opportunity for the Dirksen forces. Although several state legislatures were seen as "treading water" in hopes that an amendment would be passed, there had been apparently no important change in sentiment in Congress, and the rapid reapportionment in the states made the call for a constitutional convention even less likely to be successful.[89]

The quick pace of reapportionment, in fact, caused Senator Dirksen April 13, 1966, to warn that, given time, the courts would ultimately challenge the composition "of the park board and school boards and sanitary districts and any other kind of board that may come along."[90] Once again the bill failed to receive a two-thirds majority — this time the vote was fifty-five to thirty-eight.[91]

Despite this defeat, Senator Dirksen promised another try in 1967; but by the middle of 1966, the chances of success looked even worse than at the beginning of the year. By June,

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[88] New York Times, January 19, 1966, p. 28.

[89] Kenneth Crawford, "Dirksen's Last Chance," Newsweek, LXVI (December 6, 1965), 40.

[90] Congressional Record, 89th Congress, 2d Session, CXII, 7729 (April 13, 1966, daily edition).

[91] Ibid., 8185 (April 20, 1966, daily edition).

reapportionment in conformity with the 1964 reapportionment decisions were already in effect, or would go into effect with the November, 1966, elections, in at least forty-seven states.[92] In addition, it had already been reported that eighteen state legislatures had rejected proposals for a national convention. Thus, it appeared that the issue of a constitutional amendment was no longer politically significant either in Congress or in the states.

A New Chance for Passage of the Dirksen Proposal

Supporters of the Dirksen Amendment were not convinced that the issue was beyond salvaging, and on March 18, 1967, the New York Times reported that thirty-two states -- only two short of meeting the constitutional requirement -- had passed resolutions calling for a constitutional amendment to modify the Supreme Court's reapportionment rulings. Apparently no official count had been kept of these resolutions, and the fact that they had been passed in so many states was said to have come as a surprise to official Washington. Reportedly hoping to keep the progress of the move quiet until the requisite number of resolutions had been adopted, members of Dirksen's staff were credited with helping to secure such resolutions in Colorado and Illinois -- which brought the total to thirty-two -- in March, 1967.[93]

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[92]"Dirksen's Amendment Defeated in Senate," National Civic Review, LV (June, 1966), 341.

[93]New York Times, March 18, 1967, pp. 1, 12.

This renewed interest in a constitutional convention raised a number of procedural questions. Because there existed no precedent for this method of amendment, no certain answer could be given as to whether the Constitution required the calls from the states to be identical in wording. Other questions related to the time span allowed for submission for such proposals, whether a state could rescind a previous call, and whether Congress was obliged to call a convention once two-thirds of the states made the request.[94]

An objection to the validity of such calls was mentioned by Senator Proxmire before the Senate on March 22, 1967. According to an estimate made by the Legislative Reference Service of the Library of Congress, all but six of the thirty-two state legislatures were malapportioned at the time the resolutions were adopted. For Congress to accept such petitions, the Senator argued, "would be like permitting all Democrats to have two votes in a referendum to determine whether or not all Democrats should have two votes."[95] Opponents of a constitutional amendment were also concerned with the relative speed and secrecy with which some of the resolutions were supposedly passed.

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[94]"Reapportionment Convention Call Issued by 32 States," Congressional Quarterly Weekly Report, XXV (March 24, 1967), 439-440.

[95]Congressional Record, 90th Congress, 1st Session, CXIII, 54209 (March 22, 1967, daily edition).

It was suggested that the real purpose of the call for a constitutional convention was to convince Congress "that there was a groundswell of public opinion against the principle of 'one man, one vote.'"[96] Since the 1966 vote on the question in Congress, four of the thirty-eight senators who voted against the amendment had retired or had been defeated for re-election, and it was uncertain how many other votes might be affected by the campaign in the states. As there was some question whether a national convention would be limited to proposals concerning legislative apportionment, it appeared that members of Congress might be more willing to vote for an amendment than for a constitutional convention.[97]

Thus, despite the amount of reapportionment that had taken place, debate continued over the merits of the equal population doctrine enunciated by the Supreme Court in 1964. Although chances for a constitutional amendment limiting the doctrine appeared to have diminished considerably, passage of such an amendment in Congress remained a distinct possibility.

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[96]"National Convention Battle is Continued," National Civic Review, LVI (May, 1967), 279.

[97]Ibid.

CHAPTER IV

THE COURTS AND LEGISLATIVE APPORTIONMENT AFTER 1964

While members of Congress and the state legislatures debated the merits of a constitutional amendment to overturn or restrict the impact of the 1964 reapportionment decisions, the rules established in those decisions, even then, were undergoing refinement and expansion. Initially, the Supreme Court had declined to set precise standards by which all apportionment plans could be tested or judicial remedies applied. Rather, in Reynolds v. Sims it explained that

> developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of legislative apportionment. . . . Thus, we proceed here to state only a few general considerations which appear to us to be relevant.[1]

On the judicial level, the question was no longer whether the principle of equal population districts was desirable as a constitutional mandate, but whether the courts would be able to develop standards capable of practical application in the states. This challenge was noted by Justice Harlan:

> No set of standards can guide a court which has to decide how many legislative districts a state shall have, or what the shape of the districts shall be, or where to draw a particular line. . . . In all these respects,

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[1] Reynolds v. Sims, 377 U.S. 533, 578 (1964).

> the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatever.[2]

Other critics were more to the point: "[T]he substitution of 'hallowed catchword and formula' for reasons. . .hardly provide guidance for the resolution of cases that are not quite so simple as simple-minded people would make them."[3]

Obviously, if this evaluation of the future of the reapportionment issue proved correct, the equal population principle -- whatever its value as an ideal -- would involve the judiciary unnecessarily and even hopelessly in intricate political issues. It would represent, in Justice Frankfurter's words, no more than "a hypothetical claim resting on abstract assumptions. . .for affording illusory relief. . . ."[4]

More than this, the fact that the Court spoke in intentionally broad language meant that the full impact of its decisions in 1964 could become known only as it later dealt with specific issues in particular cases. Many of the Court's later decisions, in fact, were brief per curiam opinions merely affirming or rejecting lower court decisions. However, as it reviewed these cases, the basic thrust of the Court's position became clearer.

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[2] Ibid., p. 621.

[3] Philip B. Kurland, "Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," Harvard Law Review, LXXVIII (November, 1964), 170.

[4] Baker v. Carr, 369 U.S. 186, 267 (1962).

Thus, a review of the major issues which were a part of the continuing reapportionment litigation following 1964 may serve two purposes. In the first place, it may help to indicate whether the principle established by the Supreme Court in 1964 was one which was amenable to judicial action. Secondly, such a review might also give some suggestion of the political implications of the 1964 decisions.

The Meaning of "Equal" Districting

The basic question which any court studying a legislative apportionment plan had to answer was to what extent legislative districts could legitimately vary in population. On this question, the Supreme Court had not only pointed out the impossibility of constructing districts of identical populations, but went on to disavow any intent of setting up the precise guidelines to be followed. In fact, it explicitly rejected a suggestion by a district court that such a standard was desirable. According to the Court:

> The proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.[5]

As reapportionment cases continued, the courts developed several methods of measuring the reapportionment plans.

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[5] Roman v. Sincock, 377 U.S. 695, 710 (1964).

Consequently, it is difficult -- if not impossible -- to discuss this facet of the reapportionment decisions without some mention of those measurements. Generally, the courts adopted three different devices for comparing district population: (1) calculating the population ratio between the largest and smallest district (referred to as the maximum population variance ratio); (2) calculating the percentage of deviation in any district from the average population of all the districts of a state; and (3) computing the percentage of a state's population that could theoretically elect a majority ofboth houses of the legislature (the Dauer-Kelsay method).[6]

In view of the Supreme Court's desire to avoid mathematical exactness, decisions in the lower courts tended to vary in regard to the deviations permitted under any of these measurements. Thus, at least one court permitted no more than a ten per cent deviation in any district from the statewide average.[7] On the other hand, another court drew up its own plan allowing a deviation greater than twenty-five per cent.[8]

One reason for such differences, apart from "the particular circumstances existing in the individual state," related to the use of political subdivisions in apportionment

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[6]See pp. 12-15, Supra.

[7]Stout v. Bottoroff, 246 F. Supp. 825 (Ind. 1965).

[8]Herwig v. Thirty-Ninth Legislative Assembly of the State of Montana, 246 F. Supp. 454 (Mont., 1965).

plans. Although it admonished the courts that such a policy could not be "carried too far," the Supreme Court expressly provided for some deviation from a strict population base to insure "some voice to political subdivisions, as political subdivisions." The Court felt that giving some weight to political subdivisions "as natural or historical boundary lines" might "deter the possibilities of gerrymandering." Furthermore, the Court noted that local government is often "charged with various responsibilities incident to the operation of state government," and that legislative activity may involve "the enactment of so-called local legislation, directed only to the concern of particular political subdivisions."[9]

This concern for the integrity of political boundaries left open the question of when such a policy had been carried too far. In Wyoming, for example, the legislature's effort to provide for minimum representation for the smallest counties met with the approval of the federal district court reviewing the reapportionment plan. The court observed that the formula created a situation "whereby the four smallest counties in the state have some advantage in their representation in the House. . . ." The divergence from a strict population standard was, nevertheless, "the result of an honest attempt, based on legitimate considerations, to effectuate a rational and practical policy. . .under conditions as they exist in

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[9]Reynolds v. Sims, 377 U.S. 533, 580-581 (1964).

Wyoming."[10] On the other hand, a federal district court rejected an attempt to continue representation for two small counties in the Vermont senate, despite the fact that the senate ranked third among all the upper houses of the states according to the Dauer-Kelsay scale. In spite of this high degree of "representativeness," the Court found that "the disparity caused by the representation of the two counties of Grand Isle and Essex causes the inhabitants of the 12 other counties to be under-representated. . . ."[11]

Such differences in judgment could be viewed two ways. On the one hand, it could be explained -- as the Supreme Court had indicated -- that differing circumstances in the states required differing interpretations of apportionment plans. In states where there were few counties in relation to the size of the legislature, it might be possible to satisfy both the equal population principle and state constitutional requirements for county representation. At the same time, the lack of definite standards other than the requirement for a "good faith" effort on the part of the legislature undoubtedly worked an additional hardship on legislators directed to formulate new plans.

Possibly as a result of this latter consideration, a few courts suggested more specific guidelines for the legislators to follow. Thus, in Georgia, a federal district court

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[10] Shaefer v. Thompson, 240 F. Supp. 247, 251 (Wyo., 1964).

[11] Buckley v. Hoff, 234 F. Supp. 191 (Vt., 1964).

advised that without "later elucidation by the Supreme Court on this complex question," a deviation of any county from the statewide average of more than fifteen per cent "would be difficult, if not impossible, to justify."[12] The state supreme court of California required even greater exactness; it specified that a valid plan must, in addition to the fifteen per cent figure mentioned above, permit no less than forty-eight per cent of the population to elect a majority of the legislature.[13]

There was some precedent for this figure of fifteen per cent. Although state courts had allowed the legislatures greater discretion in the matter of reapportionment prior to the Supreme Court's reapportionment decisions,[14] political scientists generally had suggested this percentage as the maximum deviation consistent with equitable reapportionment.[15] By 1966, according to one study:

> Most federal district and state supreme courts have assumed that a plan in which no district have a population of more than fifteen per cent above or below that of the perfect district is sufficiently equal in

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[12] Toombs v. Fortson, 241 F. Supp. 65, 70 (Ga., 1965).

[13] Silver v. Brown, 405 P. 2d 132 (Cal., 1965).

[14] Arthur L. Goldberg, "The Statistics of Malapportionment," The Yale Law Journal, LXXII (November, 1962), 93.

[15] "Reapportionment of Congress," The American Political Science Review, XLV (March, 1951), 156; Paul T. David and Ralph Eisenberg, Devaluation of the Urban and Suburban Vote (Charlottesville, Virginia, 1961), p. 1; National Municipal League, Model State Constitution, sixth edition (New York, 1963), pp. 45-48.

> population. . . . Many district courts have not **verbally established an allowable percentage deviation,** but when the approved and disapproved plans are examined, **it is apparent that they followed the fifteen** per cent rate rather closely.[16]

If tacit acceptance of this rule created more certainty about standards, it also raised the possibility of other problems. Use of any single measuring device, for example, might tend to emphasize disparities that reflected unusual -- and justifiable -- extremes. As an illustration, a district court in Nevada approved a reapportionment plan under which the greatest deviation from the average district was above twenty per cent. Using only this test, the court might have found the plan objectionable. At the same time, the amount of population theoretically required to elect a majority of the legislature was as high as 49.7 per cent for the senate and 46.8 per cent for the house. The court pointed out that it accorded "little weight" to the deviation from the average figure, since these percentage figures represented only the deviations from the average of one small county district in each house.[17]

Moreover, adherence to any specific standard could have the effect of reducing the flexibility in reapportionment cases that the Supreme Court apparently desired. This possibility, however, was somewhat discouraged by the Court in 1967.

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[16] William B. Saxbe, "Criteria Established by Court Decisions," Reapportioning Legislatures: A Consideration of Criteria and Computers, edited by Howard D. Hamilton (Columbus, Ohio, 1966), pp. 25-26.

[17] Dungan v. Sawyer, 253 F. Supp. 352 (Nev., 1966).

In that year, the Court used two cases to re-emphasize and to develop further its attitude toward the proper test for challenged reapportionment plans.

In Swann v. Adams[18] the Supreme Court considered the Florida legislature's third attempt to create an acceptable reapportionment plan.[19] The federal district court found that only one senate district deviated from the average by more than fifteen per cent, and only three house districts showed a comparable deviation. The minimum percentage of persons that could elect a majority of the legislature was 48.33 per cent in the senate and 47.79 per cent in the house. It therefore concluded that the departures from the average that existed were not sufficient in number or great enough in percentages to require invalidating the plan.[20]

The United States Supreme Court reversed the decision of the district court. It is noteworthy that in its opinion the court gave emphasis to a ten per cent deviation figure, pointing out that twenty-five per cent of the state's population lived in districts over or underrepresented by that number.[21] More important than this, the Court reversed the decision on the grounds that the state failed to present and

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[18]87 S. Ct. 569 (1967).

[19]See Swann v. Adams, 378 U.S. 553 (1964); Swann v. Adams, 383 U.S. 210 (1965).

[20]Swann v. Adams, 258 F. Supp. 819 (Fla., 1966).

[21]Swann v. Adams, 87 S. Ct. 569, 571 (1967).

the district court failed "to articulate acceptable reasons for the variations among the population of the various legislative districts. . . ." In addition, plans had been submitted to the district court

> which revealed much smaller variations between the districts than did the plan approved by the District Court. Furthermore, appellants suggested to the District Court specific amendments to the legislative plan while, if they had been accepted, would have measurably reduced the population differences between many of the districts.[22]

To make its point clearer, the Court cited the opinion of a district court in Maryland that even deviations of less than fifteen per cent were not acceptable when there was no evidence that "the difference of one-third is unavoidable or justified upon any legally acceptable ground."[23]

Whatever doubts may have remained concerning the rules suggested in the Florida case should have been dissipated by the Court's decision February 20, 1967, in Kilgarlin v. Hill.[24] In 1965, the Texas legislature, under court order to reapportion both house and senate districts, adopted a plan incorporating single-member districts for the senate and a combination of single-member, multi-member, and flotorial districts for the house. The districting plans for

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[22] Ibid., p. 572.

[23] Ibid., citing Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 235 F. Supp. 731, 733, (Md., 1964).

[24] 87 S. Ct. 820 (1967).

the house were again challenged. The district court upheld the plan, except for the use of flotorial districts.[25]

Before the lower court, plaintiffs introduced plans which would have produced smaller disparities in population among the districts than that adopted by the legislature. They argued that once it was shown that better plans had been presented, the burden of proof shifted to the state. The lower court, referring to this "best plan rule" as "new doctrine," rejected the contention.

> The only function of this Court is to gauge the **validity of an apportionment as adopted by the legis**lature. . . . Whether or not the legislature might **have made a better or wiser choice. . .is not a justi**fiable question. . . .

The Court also found that the state had justified to its satisfaction that the existing disparities resulted from legitimate efforts to conform to state policy requiring reapportionment plans to respect county boundaries when possible.

The Supreme Court found this judgment defective. In so doing, it set certain guidelines which appeared to make any precise mathematical standards impractical. In the first place, this time it pointed to the number of districts in which the population per representative varied from the ideal by more than six per cent, expressing doubt that the deviations in the reapportionment plan could be justified by "local policies counseling the maintenance of established

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[25] Kilgarlin v. Martin, 252 F. Supp. 404 (Tex., 1966).

political subdivisions in apportionment plans." Moreover, it reversed the lower court decision because that court "did not relate its declared justification to any specific inequalities among the districts. . . ."[26] Finally, the district court did not "articulate any satisfactory grounds for rejecting at least two other plans. . .which produced substantially smaller deviations from the principles of Reynolds v. Sims."[27]

It thus appeared that three years after the original standards had been set in 1964, the Supreme Court was evincing a desire to see the equal population principle applied to a degree greater than had been generally the case. Apparently it would no longer be sufficient for a court to justify an apportionment plan on the grounds that after much "travail, frustration, boredom, clowning, hard work, hot anger, honest compromise, barely concealed self-interest, enlightened statesmanship and even tears," the legislature had devised the best possible compromise.[28] The Court continued to refuse to set any precise standard, but the 1967 decisions indicated that almost any divergence from the population principle would require justification by the state -- especially when the possibility of better plans could be demonstrated.

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[26]Kilgarlin v. Hill, 87 S. Ct. 820, 822 (1967) (Italics added).

[27]Ibid.

[28]Dungan v. Sawyer, 253 F. Supp. 352, 358 (Nev., 1966).

It is perhaps significant that these decisions came in the early part of 1967. By that time, most lower court activity had been completed, so that it could be concluded that "most judicial challenges have now been settled and. . . the others soon will be."[29] The Court may have felt that with the completion of the first rush of reapportionment litigation, with the equal population principle effective in all the legislatures to some degree, the time was propitious for further extension of that principle. At any rate, it appeared that the Court would give even closer scrutiny to differences in district populations in the future.

Use of Apportionment Bases Other Than Total Population

Another issue left open by the 1964 decisions was whether total population was the only permissible base. In the 1964 reapportionment cases, the Supreme Court made no distinction between the terms "population," "citizen," or "voter" in regard to districting.[30]

Nevertheless, the base chosen could have the effect of changing the apportionment patterns in some states. A study of New York districts indicated that use of a "citizen" base had no appreciable effect, since "inclusion of aliens in the apportionment base in 1953. . .would not have transferred a

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[29]"Judicial Standards Undergo Analysis," National Civic Review, LVI (January, 1967), 25.

[30]See Reynolds v. Sims, 377 U.S. 533, 577 (1964).

single Senator or Assemblyman from one county to another."[31] A change from citizens to actual voters in the same state, however, would have had the effect of discriminating against New York City.[32] In Texas, where apportionment of the state senate was based on qualified voters,[33] a 1964 study concluded that "a senatorial apportionment based on qualified electors would look quite different from one based on population. . . ." The number of persons becoming qualified voters ranged from more than forty per cent of the population in thirty-three counties to less than twenty per cent in twelve counties.[34]

By changing from "population" to some other base, rural areas might be able to preserve some of the inequalities among legislative districts that existed before Baker v. Carr and Reynolds v. Sims. Thus:

> Metropolitan areas which have highly mobile populations may well be penalized under a system that uses registered or qualified voters as the base. Failure of places with declining populations to purge their registration lists would give reverse results and might encourage political leaders to be less willing to have election lists periodically raised. . . .[35]

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[31]Ruth C. Silva, "Apportionment of the New York State Legislature," The American Political Science Review, LV (December, 1961), 880.

[32]WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 924-925 (N.Y., 1965).

[33]Constitution of Texas, Article III, Section 25.

[34]James R. Jensen, Legislative Apportionment in Texas (Houston, Texas, 1964), pp. 25-26.

[35]John H. Romani, "Legislative Representation," Salient Issues of Constitutional Revision, edited by John P. Wheeler

On the other hand, use of a population base could have the effect of giving less representation to the politically active segments of the state.

By 1967, two such bases had been approved, at least with important qualifications. In New York, while it rejected plans using actual voters, a federal district court upheld the use of "citizens" as a base.[36] This decision was affirmed by the Supreme Court, per curiam and without an opinion. In a concurring opinion, Justice Harlan wrote that the Court's affirmance meant approval of the concept that the "citizen" base did not violate the United States Constitution.[37]

The clearest answer in regard to use of bases other than total population came in 1966. The Supreme Court accepted the use of registered voters rather than total population as an apportionment base in Hawaii. However, it should be noted that the circumstances in Hawaii were such that the Court's approval did not mean unqualified approval of such a base. The Court mentioned the fact that use of registered voters or actual voters may depend "not only upon criteria such as govern state citizenship, but also upon the extent of the political activity of those eligible to register and vote." Each of these bases were, therefore, susceptible to

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[36] WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (N.Y., 1965).

[37] WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965).

> improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment". . . . In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because. . . it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population base.[38]

As though this statement was not enough to warn against too broad an interpretation of the Court's decision, it added that the decision did not mean that it had decided the validity of the registered voters base "for all time or circumstances."[39]

By 1967, then, the Court had made it evident that, in so far as numerical equality was concerned, no factors would be allowed to subvert the basic doctrine announced in Reynolds v. Sims. Whatever base a state might use, its constitutionality would ultimately rest on its relationship to the population of the state. Again, this would be decided on a case-by-case basis.

Single-Member Districts, Multi-Member Districts, and Gerrymandering

In addition to the issue of what constituted the proper basis for an apportionment plan, equally important questions were involved in how the districts were to be drawn once that basis had been determined. The more important of these

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[38]Burns v. Richardson, 384 U.S. 73, 92-93 (1966).

[39]Ibid., p. 96.

concerned the use of multi-member legislative districts in constructing reapportionment plans and the political practice of gerrymandering.

Since the major objective of the Supreme Court's decisions was to insure equality among voters, it might at first appear that the use of multi-member districts was not one which would be involved in those decisions, so long as numerical equality was retained. For example, if one person resided in a district of five hundred persons and elected one representative, and another voted for two representatives in a district containing one thousand persons, it could be argued that both have an "equal vote."

Nevertheless, shortly after the 1964 reapportionment decisions, a federal district court in Pennsylvania indicated that persons in multi-member constituencies actually had more voting power and greater representation than persons situated in single-member districts. A person in a multi-member district, the court felt, allowed some voters to elect two, three, or four representatives, while others voted for only one. According to the court, this would result in unequal representation, since a resident of a multi-member district would have more representatives who would be "especially concerned with his views and interests and amenable to his persuasion."[40] In Georgia, an electoral

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[40] Drew v. Scranton, 229 F. Supp. 310 (Pa., 1964).

system using multi-member districts was also invalidated as violating the equal population doctrine.[41]

In view of the interest generated in multi-member districts by the reapportionment decisions, it should be mentioned that the existence of such districts in a state was not necessarily the result of the reapportionment decisions. (As early as 1955, more than forty-five per cent of the seats in the lower houses of the state legislatures were in multi-member districts, and only nine states chose all of their legislatures from single-member districts.[42] This general pattern still held in 1960, when multi-member districts could be said to dominate in the lower houses of twenty-one states and in the senates of eight states.[43]

The reapportionment decisions, then, represented a potential threat to still another political practice of long standing. In addition, any judicial determination of the constitutionality of such districts could have important political consequences, although there existed some disagreement as to exactly what those consequences might be with

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[41] Dorsey v. Fortson, 228 F. Supp. 259 (Ga., 1964).

[42] Maurice Klain, "A New Look at the Constituencies: The Need for a Recount and a Reappraisal," The American Political Science Review, XLIX (December, 1955), 1106-1107.

[43] Romani, op. cit., p. 41.

regard to such consideration as voting behavior, political control, and gerrymandering.[44]

In Reynolds v. Sims the Supreme Court indicated that it would find multi-member districts acceptable,[45] and in 1965 and again in 1966 it made this ruling explicit. The first challenge to such districts involved Georgia's use of both multi-member and single-member districts. In the seven most populous counties of the state, representatives had been allotted in groups of from two to seven. One of the features questioned in the apportionment plan was the fact that these counties were sub-districted for purposes of residence, but in the election the candidates ran countywide.

The Supreme Court found nothing wrong with this arrangement. It found that there was "clearly no mathematical disparity" among the districts. It also held that

> the statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the countywide electorate he must be vigilant to serve the interests of all the people in the county;. . .thus in fact, he is the county's and not merely the district's senator.[46]

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[44]See, for example, Paul T. David, "1 Member vs. 2, 3, 4, or 5," National Civic Review, LV (February, 1966), 75-81; Ruth C. Silva, "Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District," The Western Political Quarterly, XVII (December, 1964), 742, 769.

[45]Reynolds v. Sims, 377 U.S. 533, 577-579 (1964).

[46]Fortson v. Dorsey, 379 U.S. 433, 437-438 (1965).

This approval of the Georgia plan was strengthened in 1966 when the Court overruled a federal district court's objections to the use of multi-member districts in Hawaii. In that decision the Court emphasized that there were no constitutional prohibitions on such districts whether they were used partially in one house, exclusively in one house, or even exclusively in both houses of the legislature. In any of these cases, voting in multi-member districts did not result in an unconstitutional "dilution" of voting power;[47] nor would a mixture of single-member and multi-member districts result in a "crazyquilt" pattern which the Court would find objectional.[48]

There was one important qualification to this approval of multi-member districts. The holdings of the Court mentioned above related only to one aspect of a state's districting plan: (1) the possibility of discrimination resulting from the method of representation or (2) the size of districts with respect to other districts. A possibly more important issue was the effect of multi-member districts on the voting rights of persons within the district.

A number of reasons may be used to explain the existence of multi-member districts, prior to and following Reynolds v. Sims. For one thing, there was a reluctance on the part of many state legislatures to cross county or city boundaries in

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[47] Burns v. Richardson, 384 U.S. 73 (1966).

[48] Ibid.; See also Kilgarlin v. Hill, 87 S. Ct. 820 (1967).

drawing district lines, and this could be avoided by having several representatives elected at-large within the political subdivision in question. In other instances, a more equitable district might result when two counties were combined to give them more representatives than they would have received individually. Many such districts, then, resulted both from the "facts of geography" and the problem of "awkward county population."[49]

It was charged, however, that in some states the creation of multi-member districts resulted from efforts to discriminate against political and minority groups within the urban areas. In Texas, for example, after trying to draw reasonable single-member districts for the metropolitan counties, the House Committee on Congressional and Legislative Districting decided on continuation of the use of multi-member, county-wide districts. Political as well as geographical considerations may have had something to do with that decision. The results of a survey of voting patterns, for example, were said to have "startled and dismayed the Conservative Establishment" when it was discovered that single-member districts in Harris County could result in the election of "11 liberal, and/or Negro Democrats, five Republicans, and only three Conservative Democrats. . . ." (A majority of the house members

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[49]Howard D. Hamilton, "Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Flotorial Districts," The Western Political Quarterly, XX (June, 1967), 331.

were also said to fear that subdivision of the county would lead to fragmentation of their influence in the legislature.)[50]

It has already been noted that, in another context, the Supreme Court seemed to warn against attempts by the legislatures to "perpetuate a 'ghost of prior malapportionment'"; but this did not necessarily indicate that the Court would invalidate plans resulting from a desire to maintain the political or racial balance of power existing before Reynolds v. Sims. The Court recognized that multi-member districts might be used for that purpose:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[51]

It added that when facts showing discrimination were presented "it will be time enough to consider whether such a system still passes constitutional muster."[52]

However, the Court did not appear eager to move into the area of gerrymandering, whether it resulted from the submerging of racial and political elements in large multi-member districts or otherwise. In Virginia, for example, the legislature passed a reapportionment act which combined the city of Richmond and Henrico County in one district. It was

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[50]Jerry Dale Stephens, "A Case Study of Legislative Reapportionment in Texas," unpublished master's thesis, University of Texas, Austin, Texas, 1966, pp. 60-62.

[51]Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

[52]Ibid.

charged in a federal district court that this had been done to prevent the election of Negro representatives, the plaintiffs asking the court to force a division of the county and city and to require further sub-districting into single-member districts. The district court approved the legislature's plan on the grounds that the total population of the district gave both city and county more representatives than they would have been entitled to individually. In addition, the court ruled that

> the concept of "one person, one vote". . .neither connotes nor invisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.[53]

The decision was upheld by the Supreme Court without opinion.[54] A few courts continued to warn against plans which discriminated against racial groups,[55] but the courts generally treated the issue of partisan gerrymandering with caution. In Delaware, although the court found instances of gerrymandering, it was held that the question was not one upon which it could rule.[56] Moreover, a district court in Alabama noted:

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[53]Davis v. Mann, 245 F. Supp. 241, 245 (Va., 1965).

[54]Davis v. Mann, 379 U.S. 694 (1965).

[55]See, for example, Sims v. Baggett, 247 F. Supp. 96 (Ala., 1965); Baker v. Carr, 247 F. Supp. 629 (Tenn., 1965); Kruidenier v. McCulloch, 142 N.W. 2d 355 (Iowa, 1966).

[56]Sincock v. Gately, 262 F. Supp. 737 (Del., 1967).

> The practice of gerrymandering for the purpose of preventing members of a political party from being elected to office is a familiar one. That type of gerrymandering may continue to be a "political" question with which the judicial branch of government is not equipped to deal.[57]

By the early part of 1967, then, the "one man, one vote" doctrine had become somewhat clearer with respect to what the courts would expect in legislative apportionment plans, although several important issues remained unresolved. However, if the 1967 decisions concerning the apportionment statutes of Florida and Texas meant that the Supreme Court intended to require even greater conformity among legislative districts, a new round of litigation would probably begin. It was estimated that twenty-nine states had court-approved plans in which at least one house of the legislature exceeded a fifteen per cent deviation from the average district population.[58]

Judicial Enforcement of Legislative Reapportionment

Although the issue of legislative reapportionment remained very much a political issue and continued to present important judicial questions, by 1967 the more extreme predictions of public resentment and legislative recalcitrance did not appear to be justified. By February, 1967, the

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[57] Sims v. Baggett, 247 F. Supp. 96, 104-105 (Ala., 1965). See also Wright v. Rockefeller, 376 U.S. 52 (1964); WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (N.Y., 1965).

[58] New York Times, January 10, 1967, p. 1.

first round of litigation had been almost completed, as some major action on reapportionment had been taken in every state. Thirty states appeared to be completely through with reapportionment until after the 1970 federal census, while in nine other states that might make further changes the current plans already met court standards.[59]

This does not mean, of course, that such changes were made willingly or without political complication. Few state legislatures made the necessary changes without court action, and even after court orders were forthcoming, political problems often delayed or prevented effectuation of a valid legislative reapportionment statute. The reaction of the Georgia legislature has been described by state senator James Wesberry, whose suit in Wesberry v. Sanders resulted in the 1964 Supreme Court decision requiring substantial equality of population among congressional districts:

> Every fifteen minutes. . .a unique ritual occurs in the Georgia House of Representatives. The clerk reads a resolution which usually does little less than call for abolition of the United States Constitution and restoration of the Articles of Confederation. . . . The speaker calls on his followers to "restore the constitution. They do -- by clapping, yelling, turning redder than the speaker and voting for the resolution which barely passes by a vote of about 194 to 8. . .
>
> This unforgettable orgy. . .is called a "reapportionment session". . . . Any resemblance between a reapportionment session and a cannibal ritual can be easily distinguished by noting that in the former the men in the pot are all dressed in long black robes.[60]

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[59]"Reapportionment Events Recapped," National Civic Review, LVI (February, 1967), 96.

[60]James P. Wesberry, Jr., "Non-People Factors," National Civic Review, LIV (April, 1965), 188.

Hopefully, this description is overdrawn, but it illustrates another of the problems which the courts had to solve: how to make reluctant legislatures reapportion according to the equal population doctrine. In this respect, the courts almost universally showed a willingness to defer to the legislature, on the grounds that districting was a legislative and not a judicial function.

Nevertheless, the United States Supreme Court had instructed the lower courts to prevent any further elections from being held under unconstitutional apportionment plans except when elections were imminent or when such action might result in "unreasonable or embarrassing demands on a State."[61] As a result, the courts were forced to discover methods for prompting the legislatures to act. Thus, the district court in Mississippi warned the legislature that if it failed to act, (1) it could require at-large elections for all members of the legislature; (2) it could require an equal number of representatives and senators to be chosen from the five congressional districts, assuming that those districts were valid; or, (3) sitting in equity, it could itself redraw senatorial and representative districts.[62]

Despite such threats, the issue still proved too much for some legislatures. In Illinois, when both the legislature and a bipartisan commission failed to reach agreement

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[61] Reynolds v. Sims, 377 U.S. 533, 585 (1964).

[62] Conner v. Johnson, 256 F. Supp. 962 (1966).

on an apportionment plan for the house, all of the house members were required to run at-large, with the result that two hundred and thirty-six names were on the ballot.[63] The next year the commission was able to reach agreement on reapportionment for the house;[64] but a court-drawn plan was required for the state senate.[65]

In New Mexico, the legislature agreed upon reapportionment only after providing for a system of weighted voting whereby the seventy-seven members cast a total of seven hundred votes. Some members cast as many as ten votes.[66] In Nebraska, a federal district court declared a bill unconstitutional on the finding that the law was apparently passed in an attempt to keep the incumbents in office and to prevent present members from having to run against each other in the elections. This, the court declared, meant that the reapportionment could not be said to be a "good faith" effort on the part of the legislature to establish districts substantially equal in population.[67]

In at least twelve states, the courts found it necessary to assume the legislative function of producing

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[63] New York Times, October 29, 1964, p. 22.

[64] Ibid., December 5, 1965, p. 47.

[65] People ex rel. Engle v. Kerner, 210 N.E. 2d 165 (Ill., 1965).

[66] "New Mexico Tries Weighted Voting," National Civic Review, LIV (February, 1964), 90.

[67] League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (Neb., 1965).

their own apportionment plans. At times, this function was forced on them, as in New York, where the legislature adopted four plans and left the final choice to the district court.[68] In other instances, the court plan was enforced after the court felt that the legislature had demonstrated its unwillingness or its inability to effect a valid reapportionment.

Action by the courts in prescribing their own apportionment plans especially prompted charges that the courts were exercising legislative rather than judicial power.[69] In view of the Supreme Court's interest in avoiding long delays in this area, however, no other alternative may have been available.

At any rate, by 1967 such criticism did not seem to be as great a threat as it once had been. With respect to both judicial standards and enforcement of those standards, it could be asserted that "the era of equal representation is an established fact."[70] As the renewed interest in the Dirksen Amendment demonstrated, equal districting would continue for some time as a political issue, but the courts had already demonstrated their ability to give substance to the principle of districting enunciated by the Supreme Court in 1964.

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[68] WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (N.Y., 1965).

[69] Paul C. Bartholomew, "Our 'Legislative' Courts," The Southwestern Social Science Quarterly, XLVI (June, 1965), 15-19.

[70] "Introduction: The Stage and the Cast," Reapportioning Legislatures: A Consideration of Criteria and Computers, edited by Howard D. Hamilton (Columbus, Ohio, 1966), p. 2.

CHAPTER V

AN EVALUATION OF THE LEGISLATIVE REAPPORTIONMENT ISSUE

By interpreting the Constitution to include the equal population doctrine, the United States Supreme Court sought to protect what it considered to be an individual and personal right to equal protection of the laws. Quite obviously, important public and political interests were affected by the decisions as well. Almost five years after the Court's initial decision in Baker v. Carr, however, there was still no apparent concensus on what the ultimate effects of the reapportionment decisions would be. Litigation continued, as the courts sought to devise more precise standards for judging legislative apportionment plans; moreover, efforts were still being made in Congress to reduce the impact of those decisions.

Nevertheless, by mid-1967, enough time had elapsed for the basic outlines of the issue to become sufficiently clear to justify some evaluation of what had been accomplished — especially in light of the expectations and fears aroused by Baker v. Carr and Reynolds v. Sims. In addition, it had become apparent that still other important issues remained to be settled.

"Political" Question

Because the equal population doctrine was inextricably linked to the role of the courts in establishing equal districting in the states, initial consideration might be given to the issue as a "political" question. This, in turn, might suggest the propriety of giving the doctrine constitutional stature.

There can be little doubt that the reapportionment decisions involved the judiciary in "the politics of the people," as a review of the reasons for malapportionment and the reaction in Congress amply demonstrate. Because of the interests and attitudes directly involved, in fact, probably few Supreme Court decisions in recent years have seemed to have such an impact. Indeed, one writer suggested that the cases contained sufficient potential for raising doubts concerning the "unresolved conflicts of principle underlying our expedient arrangements of election districts and legislative assemblies.[1] Yet many important decisions have involved the courts in the political processes of the nation, and these were not avoided by the Supreme Court as non-justiciable.[2] As Justice Frankfurter noted in 1960, to say that an issue is "political" in this sense may be no more than a "play on words."

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[1] Robert G. Dixon, "Legislative Reapportionment and the Federal Constitution," Law and Contemporary Problems, XXVII (Summer, 1962), 329.

[2] See, for example, Charles L. Black, Jr., The People and the Court (New York, 1960), pp. 28-30.

The opinion of the court in Colegrove v. Green, decided in 1946, and the dissenting opinions in the later reapportionment cases suggested two reasons for recognizing the issue as "peculiarly political in nature." At that time the argument was that, because the Justices were not themselves directly responsible to the electorate, any decision concerning legislative apportionment should be made by the elected representatives of the people. It might be pointed out, however, that this justification for judicial restraint may presuppose the existence of effective majority rule and the possibility of adequate relief through the popular branches of government.[3]

A review of the reapportionment problems prior to Baker v. Carr, however, indicates that this possibility did not exist in many states. Precisely because the issue was so political in nature, attempts to secure legislative reform proved unavailing. Thus, in view of the steadily increasing malapportionment in the states, it seems reasonable to conclude that

> against this background the traditional closing line of the opinions, of non-interventionist courts that redress lay through the ballot box and not through the courts -- that the cure for the ills of democracy is more democracy -- took on an increasing hollow ring. . . . The structure of the democratic state

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[3]Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis, 1962), p. 184.

> itself was at stake, once it be conceded that population merits a prominent place, if not a dominant place, in any representation formula.[4]

From this point of view, then, intervention by the court might be seen, not as an attempt to frustrate the will of the people, but to insure more effective majority control of the legislatures. This conclusion was reinforced once it was accepted that the court had an important place in the operation of democratic government, that "the task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives. . . ."[5]

It has also been suggested that the political question doctrine rested upon a concern for "the possible consequences of reaching a decision." If, as the opinions of Justices Frankfurter and Harlan indicated, this meant a concern for the power of the court and judicial ability to give effect to the equal population doctrine, it appeared that their fears were generally unfounded. The reaction in Congress proved a threat for a time, of course; and even in 1967 there remained the possibility that Congress would accept the Dirksen Amendment. On the other hand, the feared crisis of public confidence in the Court -- on this issue at least --

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[4]Dixon, op. cit., p. 350.

[5]Eugene V. Rostow, "The Democratic Character of Judicial Review," Harvard Law Review, LXVI (December, 1952), 198.

failed to materialize. One writer criticized the Court for creating "bodies of public opinion where opinion did not exist" and making "majority beliefs out of minority ones to suit their convenience!" At the same time, he was forced to lament the fact that "the large and scattered mass of sentiment. . .which favors our being governed as a republic has once again shown that it is incapable of coming together for constructive purposes. . . ."[6] Whether this "large and scattered mass" would have been sufficient to form a majority may at least be questioned, in view of the public comments on the matter.[7] Rather, it appeared that the Court had "happened to hit upon what the students of public opinion might call a latent concensus."[8]

It is true that the courts had some difficulty in determining how "equal" legislative districts ought to be, much of this difficulty stemming from the Supreme Court's avoidance of setting any precise standards for making such judgments. Developing those standards, however, did not appear to present the impossible obstacles generally predicted by the opponents of judicial intervention. By 1967, the courts, despite "their infrequent sessions, popular

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[6]Alfred de Grazia, "Righting the Wrongs of Representation," State Government, XXXVIII (Spring, 1965), 113-116.

[7]See pp. 88-90, supra.

[8]Robert G. McCloskey, "The Supreme Court 1961 Term - Foreword, The Reapportionment Case," The Harvard Law Review, LXXVI (November, 1962), 57.

unaccountability, disgraceful backlog of cases, and a structural incompetence to formulate, organize, integrate, and promulgate legislation,"[9] had nevertheless managed to secure a reasonable approximation of the population base in almost all of the states. Moreover, the threat -- and sometimes the use -- of at-large elections, court-approved plans, and court-drawn plans proved generally sufficient to get action from the legislature.

The issues involved here were too controversial to be considered closed. But if it was true that the expected problems of entry by the judiciary into the area of legislative apportionment did not develop; and if it was equally true that "no one possesses a systematic and universal prescription for the proper exercise of the court's role";[10] then the equal population doctrine might more properly be judged on its own merits, apart from doubts relating to the role of the court in establishing the doctrine.

Majority Rule, Minority Rights, and the Dirksen Amendment

From the standpoint of history and contemporary legislative practices, those who opposed the equal population doctrine seemed to have the stronger case. Even though

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[9]De Grazia, op. cit., p. 114.

[10]Alexander M. Bickel, "Is the Supreme Court Too 'Political'?," New York Times Magazine, September 25, 1966, p.30.

population had been given prominence in most of the original state constitutions, following the turn of the century the inclusion of other bases seemed to indicate a disenchantment with equal population districts. There could be, however, some question as to whether the constitutional bases that existed at the time of Baker v. Carr and Reynolds v. Sims reflected the prevelant democratic theory. "Running through the whole history of democratic theories is the identification of 'democracy' with political equality, popular sovereignty, and rule by majorities."[11] If, as suggested above, the reapportionment decisions represented a return to majority government in the states, practice was thus brought closer to the ideal.

At the same time, "no one has ever advocated, and no one except its enemies has ever defined democracy to mean, that a majority would or should do anything it felt an impulse to do."[12] It has already been noted that the reapportionment decisions were objected to on two seemingly contradictory terms: (1) that they denied protection of minorities and minority interests, and (2) that they denied majority rule. Thus, the counsel to the Republican members of the Senate Judiciary Committee wrote that the decision

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[11]Robert A. Dahl, A Preface to Democratic Theory (Chicago, 1956), p. 34.

[12]Ibid., p. 36.

in Reynolds v. Sims rejected the idea "that all segments of the population should be represented in the body which governs them," while in the Colorado case the court had substituted equal representation "for the expressed will of the majority."[13] The Dirksen Amendment, it will be remembered, was intended to rectify both of these errors.

The issue of minority rights, as it developed in Congress and in public debate, suggested that a practice of districting such as advocated by Senator Dirksen might raise even more difficulties than that of equal population districts. By not rejecting the geographical basis of representation, for example, proponents of the Dirksen Amendment appeared to feel that election districts do -- or should -- reflect particular interests. It has been noted, however, that most election districts

> tend to be so heterogeneous in population attributes, so pluralistic in the character of their group life, so diverse in the kinds of values and beliefs held, that whatever measures of central tendency are used to classify a district are more likely to conceal than to reveal its real character.[14]

Even if it were possible to draw district boundaries according to concentration of single or predominant "interests," there remained the question of what interests

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[13]Cornelius B. Kennedy, "The Reapportionment Decisions: A Constitutional Amendment is Needed," The American Bar Association Journal, LI (February, 1965), 123-124.

[14]Heinz Eulau and others, "The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke," The American Political Science Review, LIII (September, 1959), 747.

were important enough to be represented. The implications of the debates in Congress, and the reasons given in favor of the Dirksen Amendment, seemed to be that rural interests — or, more precisely, the combination of interests that had benefitted from rural overrepresentation — would continue to be advantaged.[15] At any rate, those who defended unequal districting "would protect such defenseless persons only when they are concentrated geographically." According to one observer:

> It has been pointed out, for example, that negroes account for almost 17 per cent of Maryland's population; yet no one has suggested that they should be given the potential power to control one house of the Maryland legislature.[16]

Thus, it could be asked why those interests that would be advantaged by the Dirksen Amendment were more important than all the other "various conflicting economic and social needs of the people" that they deserved to become the basis for representation.[17]

One other argument against this form of minority representation was summarized in a dissenting opinion in a federal district court in Illinois:

> For ninety years, while the rural areas. . . contained a majority of the voters, there was assiduous compliance with the constitutional requirements of reapportionment. During that period, the minority

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[15] See pp. 24-27, supra.

[16] Carl A. Auerbach, "The Reapportionment Cases: One Person, One Vote — One Vote, One Value," The 1964 Supreme Court Review, edited by Philip B. Kurland (Chicago, 1964), p.50.

[17] Ibid.

> urban voters made no request for control of one of the legislative houses to "protect our minority interests," nor did the rural majority ever suggest that such a provision would be fair and just.[18]

The second point of opposition to the reapportionment decisions — that the Court had actually prevented majority rule in some states — was more difficult to answer in view of the principal defense of the decisions as returning government to the people. The fact was, of course, that in several states a majority of the voters had approved the kind of apportionments invalidated by the courts. The dissenting Justices in the 1964 reapportionment decision and supporters of the Dirksen Amendment argued that, in these instances, the majority had consciously chosen to protect the rural minority by giving rural areas minority representation in the legislature.

In some cases, at least, this reasoning could be questioned. There was first the argument that the provisions guaranteeing minimum representation in one house resulted, not from a desire on the part of urban voters to see the rural areas overrepresented, but from their desire to achieve more equitable representation in the other.[19] In addition, it was not always certain that the voters had been given a clear choice. In Colorado, the voters had been given a choice between a plan based on population and

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[18] Germano v. Kerner, 220 F. Supp. 230, 239 (Ill., 1963).

[19] See pp. 27-28, supra.

one that took other factors into account. The Supreme Court, however, pointed out that the approved plan had provided for single-member districts for both houses, whereas the rejected proposal did not. It concluded that the voters may have given more weight to the districting proposals than to the representation accorded the population factor in each plan.[20] In Michigan, the voters in 1963 approved a new constitution for the state which was opposed by various groups primarily because of its apportionment provisions. The margin of victory was 7,424 votes of the more than one million votes cast.[21] Again, however, how much of that vote could be said to reflect approval or disapproval of the apportionment provisions?

Nevertheless, commentaries of apportionment struggles in the states have indicated that popularly-approved apportionment formulas have resulted from primarily rural interests and interests within the metropolitan and big-city areas who shared the political views of the rural legislators.[22] In such a case, could it not be maintained that the majority is being represented? Here, however, advocates of the Dirksen Amendment came up against their own arguments for minority representation. Even if a majority of voters in

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[20] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 732 (1964).

[21] David A. Booth, "Michigan's New Constitution," The Southwestern Social Science Quarterly, XLIV (December, 1963), 273.

every geographical area consciously voted to continue over-representation for certain minority interests, it might be asked why those interests should take precedence over those who voted against the proposal. This question became especially important in these instances where provisions limiting urban representation apparently resulted from discrimination by one geographic area in the state against another.

Thus far, the discussion of both the equal population doctrine and the counter-proposals for limiting that doctrine have been made in the context of the existence of clearly-defined groups and interests that would be advantaged or disadvantaged by the reapportionment decisions. It might be appropriate, therefore, to consider the validity of these assumptions in light of the practical consequences expected from equal districting.

Equal Districting and the Urban-Rural Conflict

It has been suggested that "behind every proposal for altering the method for selecting officials is some assumption. . .about the effect of such charges on what decisions-makers or decision-making institutions do, and how they do it."[23] The specific evil resulting from malapportionment asserted by proponents of equal districting was

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[23]Eulau and others, op. cit., p. 743.

the effect of the urban-rural conflict on those living in urban areas. The economic and social problems besetting the larger cities were ascribed in large part to the indifference of rural legislators whose lack of "a recognized community of interest" with those in the cities "made it unnecessary for representatives of [rural towns] to consider the appeals of the city, even when they themselves would gain from the proposal."[24]

In addition, it was often felt that rural legislators tended to discriminate against the cities in favor of their own constituents in the distribution of taxes and the allocation of state expenditures. A frequently cited example of this type of discrimination was Florida, where the small counties represented by twenty-two powerful senators paid fourteen per cent of the state's taxes, but received twenty-seven per cent of the state's benefits, with a number of taxes being distributed equally among the counties.[25] Shortly after the Supreme Court's decision in Baker v. Carr, a survey of urban legislators and other public officials cited concern over such state policies as sales tax exemptions for farm implements, refusal by the legislatures to grant home-rule power to the cities, and legislative indifference

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[24]Benard K. Johnpoll, "Thwarting 'City Slickers,'" National Civic Review, LIV (June, 1965), 317.

[25]Hugh Douglas Price, "Florida: Politics and the 'Pork Choppers,'" The Politics of Reapportionment, edited by Malcolm E. Jewell (N.Y., 1962), p. 89.

toward such pressing urban problems as slum clearance and welfare programs.[26] Consequently, the reapportionment decisions were often regarded as heralding a new attitude on the part of the legislatures that could reverse the trend for cities to look to Washington for assistance.

At the same time, the fear of big-city domination of the state legislatures had often been used as an argument against reapportionment,[27] and the reapportionment decisions aroused concern that "an erasing of small community 'over-representation' would result in the degradation and impoverishment of non-metropolitan America."[28]

It seemed doubtful that more equitable districting would result in sudden domination of state policy by any single geographic grouping. Because of the malapportionment which had existed under previous apportionment schemes in most of the states, the larger cities naturally gained from the initial reapportionments following Baker v. Carr and Reynolds v. Sims. In 1960, however, in thirty-six of the states the combined population of each state's three largest cities was less than thirty per cent of the state's total

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[26] Wall Street Journal, April 17, 1962, pp. 1, 27.

[27] See pp. 26-27, supra.

[28] Alfred de Grazia, Apportionment and Representative Government (N.Y., 1963), p. 118. See also William E. Oden, "Rural Counties Have Problems, Too," National Civic Review, LV (January, 1966), 42.

population.[29] In the metropolitan areas, no central city had the necessary fifty per cent of the population necessary to dominate state politics. Moreover, population growth projections did not indicate that any city would have a population sufficient to warrant a majority of the representatives in the near future.[30]

The fear of urban domination, furthermore, seemed to postulate the existence of an "urban interest" opposed to that of a "rural interest." Even if this were true, the thesis of a simple urban-rural dichotomy had been weakened by the growth of the suburbs. Not only did many suburbs already have populations greater than the central city, but it appeared that most future growth would take place in the suburbs as well. As a result, "the United States is an urban nation, but it is not a big-city nation. The suburbs own the future."[31]

These factors may have served to allay the fears of rural inhabitants. They also cast some doubt on the predictions of sweeping changes in the states in regard to attention to urban needs and so-called "liberal" legislation.

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[29] Hearings Before the Subcommittee on Constitutional Amendments of the Committee of the Judiciary, U.S. Senate, 89th Congress, 1st Session (Washington, 1965), p. 484.

[30] William J. D. Boyd, "Suburbia Takes Over," National Civic Review, LIV (June, 1965), 295.

[31] Ibid.

Due to the population growth within the metropolitan areas and the increasing mobility of the American people,

> the new urban politics does not align a solid urban vote against an equally solid rural vote. The cleavages exploited in modern politics cut across and divide all local communities. Thus the urban vote is divided; but so is the suburban, small town, and rural vote. And the distribution of the urban vote and the votes of its suburban, small town, and rural allies makes possible new national and statewide combinations.[32]

Such new coalitions made it difficult to predict exactly how the new "urban" politics would affect state government. It may well be that in the cities the "bitterest opponents" of urban and welfare legislation would be "political enemies from within its own walls, and those camped in the adjoining areas," as suggested by a study of roll-call voting in the legislatures of Illinois and Missouri. The study, in fact, concluded that "non-metropolitan legislators have demonstrated their willingness to cooperate in the solution of metropolitan problems when metropolitan legislators can reach agreement."[33] A similar study of the Texas legislature found that over- or underrepresentation of the urban and rural areas "made little or no policy difference, because the legislators of both areas are fairly well agreed on

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[32]E. E. Schattschneider, "Urbanization and Reapportionment," The Yale Law Journal, LXXII (November, 1962), 8.

[33]David R. Derge, "Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations," The American Political Science Review, LII (December, 1958), 1065.

which policies are desirable."[34] In 1966, in still another study, the states were ranked according to the numerical equality of the state's apportionment system and according to the state's response to welfare expenditures. According to the results, there was "no obvious relationship" between the two. Moreover, there was also no "significant relationship" between a state's apportionment ranking and the amount of direct state aid to the state's two largest cities.[35]

This did not mean, of course, that reapportionment would not create new power alignments. One writer suggested, for example, that while there were probably few roll-call votes on which there were sharply defined differences, these "are likely to include some of the most important issues faced by the legislatures."[36] Moreover,

> while a granting of urban representation proportionate to population would not result in a single, cohesive urban majority, it could effectuate a considerable shift in the patterns of political power. Some urban interests that formerly had little influence would

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[34]Clarice McDonald Davis, Legislative Malapportionment and Roll Call Voting in Texas, 1961-1963 (Austin, 1965), p. 48.

[35]Richard I. Hofferbert, "The Relation Between Public Policy and Some Structural and Environmental Variables in the American States," American Political Science Review, LX (March, 1966), 73-82.

[36]Malcolm E. Jewell, "State Legislatures in Southern Politics," The Journal of Politics, XXVI (February, 1964), 102.

probably gain more, while others (notably those that enjoy an advantage from an alliance with rural forces) would lose some.[37]

By 1967, the advocates of political change within the states could point to examples of greater legislative interest programs that had received less favorable treatment prior to court-directed reapportionment -- ranging from reform of the state judiciary to greater spending for state welfare programs.[38] The speaker of Colorado's house, for example, could speak of "a fundamental change in attitude" in the reapportioned legislature, and point to such legislative action as "major and long-needed emphasis given to education," "large increases" in state funds, bills dealing with local government, and "a significant number of public health bills. . . ."[39]

The Colorado legislator's statement, however, that "reapportionment was not, in and of itself, responsible for all this legislation,"[40] could sound a warning for the future. If, as suggested above, the effects of reapportionment might not be as great as expected, the initial public

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[37]Gordon E. Baker, Reapportionment Revolution: Representation, Political Power, and the Supreme Court (New York, 1966), p. 109.

[38]Congressional Quarterly Service, Representation and Apportionment (Washington, 1966), pp. 41-43.

[39]Allan Dines, "A Reapportioned State," National Civic Review, LV (February, 1966), 73-74.

[40]Ibid., p. 74.

support of equal districting could be lost. As stated by a federal district court judge in Nebraska:

> When the glamour has faded from the slogan "one person, one vote," the citizen will ask whether what has been done for him also provided him with fair representational opportunity.[41]

Part of the difficulty was in ascertaining the extent to which the changes that had occurred could be attributed to reapportionment. How much of the changed attitude of the Colorado legislature, for example, could be attributed to the new districts, and how much to the circumstances of the 1964 presidential election? Reapportionment could be credited with strengthening the Democratic Party in the east and midwest, and Republicans in the south and southwest. It could also be pointed out, however, that the Democratic Party had been showing increasing strength for many years in former Republican strongholds such as the midwest and upper New England, while the same had been true of Republican Party strength in the south and southwest.[42] In addition, there was the uncertainty of how the Supreme Court would treat the reapportionment issue in the future.

Conclusion

It has been several centuries since John Locke, observing the "very unequal" representation in England, wrote that

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[41] League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357, 364 (Neb., 1965).

[42] "Little Effect Felt in Party Control," National Civic Review, LVI (February, 1967), 95.

> . . .it being the interests as well as intention of the people to have a fair and equal representative, whosoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community. . . . Whatsoever shall be done manifestly for the good of the people. . .is, and always will be, just prerogative.[43]

With the reapportionment cases, this suggestion had been put to an empirical test, and almost five years after the Supreme Court's initial exercise of this "just prerogative" there was still no obvious concensus as to whether the equal population doctrine would receive the "consent and approbation of the community."

It appeared a reasonable assumption that the doctrine would withstand the opposition of Congress. Even if Congress were to approve a constitutional amendment, the fact that almost all of the states had reapportioned made it doubtful that it would receive the necessary three-fourths majority of the states. Numerical equality had been achieved to a degree greater than had existed at least in the twentieth century.

The questions remaining, however, may prove to be as important as those already answered. It may be that the Supreme Court intended no more than to insure that voters should be guaranteed the right to reside in reasonably equal election districts. In that case, the Supreme Court may have

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[43]John Locke, Of Civil Government: Second Treatise (Chicago, 1955), p. 133.

reached close to its ultimate pronouncement of standards in the Florida and Texas cases.

There is the possibility that once substantial numerical equality has been achieved, the Supreme Court may choose to broaden the scope of its inquiry to include the manner in which districts have been drawn as well. Otherwise, legislators may be able to avoid much of the "equality" implied by the reapportionment decisions if gerrymandering -- whether racial, partisan, or geographical -- is allowed to continue. Quite obviously, any such decision on the part of the Court would involve it in "political" considerations far beyond what it has so far encountered. Measuring deviations from the equal population standard may be much easier than determining when political or racial elements have been "submerged" in a multi-member district. Moreover, in the event the Court enters this area of districting, it may discover the difficulty mentioned above: deciding which groups shall receive the protection of the Court.

The Court has carefully not closed the question of judicial intervention in such issues. If it decides to go beyond numerical equality, more consideration may have to be given to

> whether the "right to vote" and the "right to representation" may not be both constitutionally and politically distinct things. If it is possible and desirable in a democracy to guarantee the exercise

> of a mode of expression -- in this instance, the act of voting -- it does not follow that the opinion expressed will be given consideration. Representation, like credence, cannot be guaranteed.[44]

It may be that the reapportionment decisions promised no more than that at one point in the representational process the represented would be equal. In this sense, the phrase "equal representation" may be something of a misnomer, since the equal population doctrine says nothing about the relationship between the representative and his constituents once the size of the district has been determined. To the extent that no more than this was intended, the reapportionment decisions have added a new legal concept to the meaning of political equality.

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[44]William P. Irwin, "Representation and Apportionment: The Search for a Theory," Reapportioning Legislatures: A Consideration of Criteria and Computers, edited by Howard D. Hamilton (Columbus, Ohio, 1966), p. 150.

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