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United States: Apportionment of Representatives

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actions prosecuted by public servants may vanish to appear no more. On the other hand, if the proof of malice still remains within the realm of reasonableness it is more likely that the decrease in the number of these actions will not be appreciable.

The results reached in this decision seem to have been achieved by weighing the possible impairment to Sullivan's reputation against the public need to discuss freely all issues of public concern. That libelous free speech would triumph will be shocking to some, but consolation lies with Judge Learned Hand when, speaking of the first amendment, he said that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all."21

Rick Loewenherz

UNITED STATES: APPORTIONMENT OF REPRESENTATIVES

Traditionally the Supreme Court of the United States has operated under a self-imposed restraint with regard to delving into political questions.1 In 1962 the Court broke this tradition with its decision in Baker v. Carr2 and entered the first of the two major fields of political controversy, that of state reapportionment. Now by their decision in Wesberry v. Sanders, 376 U.S. 1 (1964) they have entered the second of these major fields of controversy, that of congressional redistricting. (For convenience, realignment of state legislative districts will be termed reapportionment, and the subject matter of this note, realignment of the federal congressional districts, will be termed redistricting.) The plaintiffs in this case were citizens of Fulton County Georgia, and were eligible voters in Georgia's Fifth Congressional District. The population of this district was about twice the average population of the districts in Georgia, and was over three times that of the smallest, the Ninth. They brought this action claiming the Georgia statute setting the congressional districts deprived them of the full benefit of their right to vote as guaranteed by the federal constitution. Four questions of law arise in considering this new area of activity by the federal judiciary.

I

First is the issue of whether matters of congressional redistricting are justiciable. Clearly this is a political question, and there is a political answer— redistricting by either the state legislatures or the Federal Congress.3 Nevertheless the restraint on entering the political arena was imposed by the Court and it may be lifted by the Court. Actually the Court had lifted their self-imposed restraint on political questions before


Baker v. Carr, but had reached a decision not to act on other grounds, such as declaring the "want of equity." The significant point here then is not whether the Court can decide political questions (clearly it can), but whether its original policy of judicial restraint was not more sound.

II

Second is the question of "want of equity." While the issue of whether the matter is justiciable is common to both state reapportionment and congressional redistricting, there is another issue peculiar to the redistricting which makes the Court's position less tenable in Wesberry than it was in Baker. That issue is "want of equity." The United States Constitution says:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of Chusing Senators.... Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members....

Thus the Constitution clearly directs that representatives be selected in any manner prescribed by the states subject only to congressional regulation.

Originally the representatives ran at large where of course each person's vote within a state had equal weight. Then Congress made the policy decision that it would be better if they were elected from districts, a decision that it almost universally conceded to be a good one. Thus Congress had exercised the authority vested in it by the Constitution to limit the otherwise unlimited discretion of the states in the method of selecting representatives to the Federal Congress. The first acts provided that the districts be contiguous, compact and, as nearly as practicable, equal in population. An excellent example of that is the act of 1911. But in 1929 Congress passed a redistricting act superseding the 1911 act, which deliberately left out the contiguous, compact and equal population provisions.

The constitutionality of state redistricting laws which resulted in unequal districts quickly came before the Court in Wood v. Broom. In this case it was held that the Constitution had committed the matter of congressional redistricting exclusively to the political process. This was reaffirmed in Colegrove v. Green. In both cases the petitioners had raised the issue of denial of equal protection as guaranteed by the fourteenth amendment. It is interesting to note in Colegrove that it was conceded in both the majority opinion and in Black's dissent that the Court could not affirmatively set new districts, but at most could only declare existing unconstitutional laws void.

The majority in Wesberry departed from the Wood and Colegrove

5 Colegrove v. Green, 328 U.S. 549, (1946).
9 287 U.S. 1 (1932).
10 328 U.S. 549 (1946).
line of reasoning. They held instead that 1) the concept of Baker was applicable to congressional redistricting and 2) the constitutional provision that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several states . . . " was evidence that Congressmen should be allocated proportionally among the people within the state.

Disregarding for a moment the unbroken chain of precedent and all of the Constitution except the brief passage quoted by the majority, this second contention appears reasonable. And so it is to prove what the majority sought to prove, namely that the plaintiff had suffered a philosophical damage. The majority made little effort to reconcile their second contention with the precedent of Wood and Colegrove that congressional redistricting is a matter for the political process, not the judiciary; this was because by their own admission they were considering only the "merits." "This brings us to the merits," the majority said in leading into the discussion of their second contention. That is, on the premise that the state's act constituted a legal wrong, the Court was determining if the plaintiff had suffered any real loss. This begs the critical question of "want of equity." Just as injuria absque damno will not support a cause of action, neither will damnum absque injuria. Thus the majority determined in their second contention only that there was actual loss; this will be discussed in greater detail later under the merits of the case.

The critical issue of legal wrong was disposed of with the first contention. The holding of Broom and Colegrove was that at most there was damnum absque injuria, that is there was a real loss but the thing causing it—unequal state districting laws—was not a legal wrong (in that there was no remedy at law) or as the courts termed it, there was a "want of equity." The holding of Wesberry is that the action of a state to so district as to dilute one person's vote relative to another's is an actionable wrong. How did the Court arrive at this conclusion in light of the plain statement of the Constitution to the contrary? In the words of the majority: "(T)he court in Baker held . . . the plaintiffs had stated a . . . cause of action on which relief could be granted. The reasons which led to these conclusions in Baker are equally persuasive here." Thus stripped of the pages of excess verbiage on the merits of the case, a matter not even a significant issue since the lower court had accepted the plaintiff's position on the matter of the merits, this case turns on the majority's summary statement that the conclusions in Baker are persuasive. And what were those conclusions? Justice Brennan in the majority opinion of Baker said: "The right asserted is within judicial protection under the Fourteenth Amendment." It should be noted that Justice Black in his dissent in Colegrove said: "The equal protection clause of the Fourteenth Amendment forbids such discrimination."

Now the conclusions in Baker may well have been sound. With the

12 376 U.S. at 7.
13 Id. at 5, 6.
14 369 U.S. at 237.
15 328 U.S. at 569.
Constitution unclear as to the role of the federal judiciary in the matter of state reapportionment, it was presumably within the discretion of the Court to interpret the equal protection clause of the fourteenth amendment as precluding state reapportionment laws which were invidiously discriminatory. But no such situation existed in Wesberry. Here, in the words of dissenting Justice Harlan, "... the Constitution, as plainly as can be, has committed (this field) exclusively to the political process."6

There are only two ways the majority decision can be interpreted. One is to assume that they held that the fourteenth amendment repealed by the implication all previous parts of the Constitution which are inconsistent with the "one man-one vote" concept which it has recently been construed to embody. The other is to assume that the majority simply disregarded the Constitution. The dissent of Justice Harlan took the later position. He then voiced opposition to this situation, saying: "This Court, no less than the other branches of government is bound by the Constitution."7 It is not apparent why the majority only incorporated by reference the critical reasoning behind their historic decision and then went on to distract attention from what they had done by a long philosophical discussion of the merits of a substantially uncontested issue.

III

Third is the question of the merits. Here the majority presented an excellent case for the proposition that it is wise to follow the policy of weighting each person's vote the same.

Clearly the plaintiffs had suffered a political injury through unequal representation. In Georgia the fifth district contains about three times as many people as the ninth district. Other states have similar conditions. In Oklahoma the most populous district contains about twice as many people as the least populous. Only five states where the election is by districts, Iowa, Maine, New Hampshire, North Dakota and Rhode Island have districts that vary less than 100,000 in population. Thus only 37 of the 435 members of the House of Representatives are elected from numerically equal districts or at large. It may be that this apparently inequitable situation led the majority to reach the decision it did. The argument that the Constitution leaves this to the political sphere must have some weakness, else such a condition could not have resulted. And indeed it may. Many of the state legislators are elected from malapportioned districts.8 Thus the malapportioned state legislators and the maldistricted Congressmen frequently represent about the same political philosophy. They can help each other and possibly they do. The state legislators frequently do not redistrict and in return the Congressman may tend to favor legislation acceptable to these state legislators, such as aid in preventing reapportionment. However the weakness is not insurmountable. Since many states, such as Oklahoma, have a referendum provision the people are always capable of adjusting inequities that become truly onerous through the existing political processes. Also in light of the

16 376 U.S. at 48.
17 Ibid.
18 Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943).
Baker decision that state legislatures must reapportion, the cycle of malapportioned legislators aiding maldistricted Congressmen aiding malapportioned legislators is broken, if indeed it ever existed.

IV

The fourth matter to be considered is the mechanics of this court ordained redistricting. Justice Black in his majority opinion in Wesberry conceded that it could not be done with mathematical precision. Furthermore both the dissenting and majority opinion in Colegrove conceded that the court could not set the new districts. (Although this was done by the federal court in Moss v. Burkhart as to reapportionment of the Oklahoma State Legislature.)

So far as the Oklahoma congressional districts are concerned, they could be formed without even dividing a county (not that there is anything wrong with doing that) so as to be substantially equal in population. The following plan might be acceptable to the Oklahoma Legislature since it achieves substantial equality with the least possible change in the existing districts and yet, as nearly as possible, groups areas of like interest together.

<table>
<thead>
<tr>
<th>District</th>
<th>Counties</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lincoln, Payne, Logan, Noble, Kay, Grant, Garfield, Kingfisher, Canadian, Alfalfa, Major, Woods, Woodward, Harper, Beaver, Texas, Cimarron, Pawnee, Custer, Blane, Dewey, Roger Mills, Ellis.</td>
<td>0.96</td>
</tr>
<tr>
<td>2</td>
<td>Osage, Washington, Nowata, Craig, Ottawa, Rogers, Mayes, Delaware, Wagoner, Cherokee, Adair, Okmulgee, Muskogee, Sequoyah, McIntosh, Haskell, Okfuskee.</td>
<td>0.98</td>
</tr>
<tr>
<td>3</td>
<td>Atoka, Bryan, Carter, Choctaw, Coal, Garvin, Hughes, Johnston, Latimer, LeFlore, Love, McCurtain, Marshall, Murray, Pittsburg, Pottawatomie, Pushmataha, Seminole.</td>
<td>0.96</td>
</tr>
<tr>
<td>4</td>
<td>Tulsa, Creek</td>
<td>1.00</td>
</tr>
<tr>
<td>5</td>
<td>Oklahoma</td>
<td>1.13</td>
</tr>
<tr>
<td>6</td>
<td>Beckham, Caddo, Cleveland, Comanche, Cotton, Grady, Greer, Harmon, Jackson, Jefferson, Kiowa, Stephens, Tillman, Wachita, McClain.</td>
<td>0.96</td>
</tr>
</tbody>
</table>

Or by giving Canadian County to District 6, Jefferson to District 3, Pawnee to District 2, and splitting out 50,000 from Oklahoma County to District 1, all districts would be within 1 per cent of the average.

These proposed districts are equal in population and are contiguous but are not necessarily the most compact possible. It has been proposed that to get just what Justice Black said was impossible, mathematical precision, the most compact districts possible be determined by calculating the "population moment of inertia." That is, the popul-

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2. Ratio of district population to average population based on 1960 census.
tion of a given unit is multiplied by the square of the distance from an arbitrary population center to get this unit's “population moment of inertia.” These are all added up and the district whose “population moment of inertia” is the least is, of course, the most compact. Compactness and population equality can both be taken into consideration in these computations. Obviously this would require many calculations since it is essentially a trial and error method, so a computer would have to be used. This computer method appears to have considerable merit.

So much for the four questions of law. At this point it seems appropriate to speculate on the effects of this decision on our system of government, especially since part of the criticism of the majority's position is based on policy considerations rather than on differences in interpretation of the Constitution.

It would appear that the Court's holding was, in the words of dissenting Justice Harlan, "a disservice both to itself and to the broader values of our system of government." The unique political and economic success of the United States under the concept of a separate legislative, executive and judiciary at the federal level, testifies to the wisdom of this approach to government. Yet the success of this system has depended on responsible restraint in all the coordinate branches. One usually thinks of the Supreme Court when thinking of self-imposed restraint. However the executive, too, wields less power than is available to it, for instance in its general practice of concluding international agreements by treaty which requires Senate approval when this could be done unilaterally under the inherent powers of sovereignty which are vested in the executive. But most of all, Congress has failed to exercise all of the power available to it. For instance the Civil Rights Act of 1964 states: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of state laws . . . ."

With state legislatures now being reapportioned, and hence able to deal with the problem of redistricting, there should have been greater justification for maintaining the policy of judicial restraint in Wesberry than there was when this matter was before the Court in Wood and Colegrove. Furthermore, inherent in any judicial activity in the area of congressional redistricting is the formation of policy. It may be wise and good that districts be equal in population, but this is a policy decision which should be—and is—delegated exclusively to the legislative branch of government. It is not a function of the judiciary to consider the wisdom of the statutory or constitutional provisions it seeks to interpret.

Congress has the authority under the Constitution to take away all Supreme Court jurisdiction in this area since it can make whatever regulations and exceptions it sees fit in the area of appellate jurisdiction. 22

22 376 U.S. at 48.
25 Pub. L. 88-352 § 1104. 26 U.S. CONST. art. III, § 2. "... (T)he supreme Court shall have appellate Jurisdiction . . . with such Exceptions and under such Regulations as the Congress shall make."
It can only be hoped that judicial encroachment into the policy-making functions of the legislative branch will never be so extensive that Congress is forced to exercise this power.

Archie Robbins