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SOME COMMENTS ON THE REAPPORTIONMENT CASES

*Paul G. Kauper**

ANY appraisal of the Supreme Court's decisions in the legislative reapportionment cases must necessarily distinguish between the basic policy ingredients and social consequences of the decisions on the one hand, and the question whether the results were reached by a proper exercise of judicial power on the other. Respecting the first of these considerations, I have no difficulty identifying the social advantages accruing from these decisions. Because of the stress on the population principle, the decisions will afford a greater voice to urban interests, will make the legislative process more responsive to current needs of particular concern to urban dwellers, will force the states to adhere more faithfully to standards that, in part at least, they have already set for themselves, and, in vitalizing the processes of state government, hopefully will contribute to the strength and integrity of our federal system. These plus considerations must be weighed against the risk that the kind of apportionment now required by judicial mandate will subject various kinds of minority interests to the overriding concerns of well-organized majorities and against the further consideration that the adoption of a single rule of apportionment, frozen into the Constitution by judicial interpretation, may preclude consideration of other and varied schemes that are responsive to the extensive, expert thinking that has gone into the subject. At this point, however, it may be conceded that the immediately discernible social advantages accruing from the decisions outweigh the more speculative disadvantages.

But whether these results were appropriately achieved through the exercise of judicial power is another matter, and it is to this question that my comments are addressed. The Court's decisions deal with a problem that is essentially political: namely, what are the proper standards for legislative representation. Admittedly, the decisions are revolutionary in character, and here I speak particularly of the recent state legislative reapportionment cases. These decisions, lacking support in judicial precedent, force the states to depart from legislative apportionment patterns that have had the sanction of history and from schemes that have been approved by the electors of the states through their own constitutional processes.

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Moreover, the implementation of the Court's decisions has had the effect of giving federal and state courts a field day in using their equity powers with an almost cavalier disregard of the legislative power and of the orderly processes of government. We are being treated to an unprecedented assertion of judicial supremacy. These consequences give ground for pause before standing up to give three cheers for the decisions.

I. Evolution of the One Man-One Vote Rule

Baker v. Carr[1] opened this new chapter of judicial adventurism. That decision was understandable: I have no basic quarrel with the proposition that a state apportionment scheme is subject to judicial examination under the Constitution. The situation in Tennessee presented a particularly appealing case, since the state legislature had failed to act in accordance with the mandate of the state constitution and the state constitutional system provided no effective opportunity for redress through the processes of popular referendum or initiative.

The real difficulty presented by *Baker*, it appears to me, was the Court's reliance upon the equal protection clause as the basis for judicial examination. It is difficult to avoid Mr. Justice Frankfurter's conclusion, stated in his dissent, that the Court, in the name of equal protection, was in effect opening up the question of what constitutes a republican form of government for judicial examination.[2] This is the central issue in these cases—what form of apportionment is compatible with a representative form of government—and the guarantee of a republican form of government is the explicit constitutional provision relevant to the problem. But, the emphasis on equal protection and its subsequent development in terms of a discriminatory impairment of the right to vote paved the way for a judicial treatment that centered upon what I regard as a specious conception of personal right rather than upon the institutional aspect of the problem. This was not a necessary consequence, however, since the equal protection standard was broad and flexible enough to permit an inquiry directed to the question whether a state apportionment scheme was unreasonable or arbitrary when measured by a general standard of what is essential to the processes and institutions of representative government.

The later decision of *Gray v. Sanders*,[3] holding invalid the county

1. 369 U.S. 186 (1962).
2. *Id.* at 297.
3. 372 U.S. 368 (1963).

unit system employed in Georgia to count votes cast for state officers in a state-wide election, understandably rested upon an equal protection ground. Once a state has determined the boundaries of a voting district (for the purpose of this election the state was the district) it is difficult to defend the rationality of a subclassification that deliberately weights the votes cast on a county basis, thereby giving to some electors a disproportionate voting power in the choice of state officers. Mr. Justice Douglas stated that "the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote."[4] *Gray* dealt with a very special question that did not go to the heart of the legislative apportionment problem. Thus, the holding in *Gray* could be kept within narrow limits. But the broad statement by Mr. Justice Douglas was expansible and capable of being forged into a principle premised upon personal right, which, if carried far enough, would furnish an almost automatic answer to the legislative apportionment problem.

Next in progression was *Wesberry v. Sanders*,[5] wherein the Court committed itself to the one man-one vote principle (whatever this may mean in this context), so far as apportionment of the House of Representatives of the Congress of the United States is concerned. This decision was based upon interpretation of article I of the Constitution, which provides that Representatives shall be elected by the people of the several states. Starting with this constitutional requirement, the Court leaps to the dubious conclusion that districts set up under state law must, as far as practicable, be equal in population. Mr. Justice Black found support for this conclusion in the proceedings of the Constitutional Convention and in the views of prominent figures in the early history of the country. Mr. Justice Harlan, in his dissent, does an effective job in demolishing Mr. Justice Black's historical argument by establishing that those historical facts prove nothing more than that it was intended that representation of a state in the lower house of Congress should be determined on a population basis as distinguished from the Senate where each state was to have two representatives regardless of population. Moreover, as Mr. Justice Harlan points out, article I of the Constitution commits to Congress the ultimate authority to legislate with respect to congressional districting. Congress did expressly

4. *Id.* at 381.

5. 376 U.S. 1 (1964).

exercise this power for some years and did require voting districts to be approximately equal. But, it later repealed this legislation and thereby left the fixing of congressional districts to the discretion of state legislatures. There is much strength in Mr. Justice Harlan's argument that Congress, with ultimate authority in this matter, has made a decision within the sphere of its constitutional competence, that this determines the status of the question as a "political question," and that there is, therefore, no room at this point for judicial intervention. It should be kept in mind, in this connection, that the Court in its earlier opinion in *Baker* had said that it was the relationship between the judiciary and the coordinate branches of the federal government that had given rise to the political question concept, thereby strongly intimating that the Court would not impose its will in an area committed by the Constitution to congressional discretion. Yet this aspect of *Baker* is promptly disregarded in *Wesberry*, which dealt with a question committed to a coordinate branch of the federal government. *Wesberry* can possibly be interpreted to mean that the standard stated by the Court is the one to be followed by the states in the absence of standards stated by Congress. Since the Constitution requires representation of the states in the House of Representatives to be based upon population, it is not unreasonable for the Court to say that equality of districts in terms of voting population should be the general rule unless different or more flexible standards are prescribed by Congress. This, however, is a strained interpretation of the *Wesberry* opinion, which, on its face, quite clearly demonstrates that the Court has now fixed a single constitutional standard for congressional districting and that there is no room for congressional legislation that would permit deviation from this standard. Given this latter, more realistic construction, *Wesberry* does represent a substantial judicial intrusion upon congressional power and a judicial decision on a "political question" as the Court defined that concept in *Baker v. Carr*.

A feature of the *Wesberry* case that deserves special attention is the emphasis in the latter part of Mr. Justice Black's opinion on the right to vote.[6] He there points out that the right to vote for federal offices is a constitutionally created right under article I, and he makes it clear that, in his opinion, this right to vote is unconstitutionally abridged or restricted unless congressional seats in a state are equally apportioned on a population basis. From the right to

6. *Id.* at 17-18.

vote, he deduced the one man-one vote principle, which in turn is the key to equality in representation. There is a gap in this reasoning. No one was contending in this case that qualified voters were denied a right to vote for congressmen, and it was equally clear that every qualified voter had one vote. The right that the Court relied upon was not the right to vote, but rather a personal right to a numerically determined proportionate share of political influence. But the Constitution does not speak of such a right. Of course, there is a constitutionally created right to vote for federal officers, and Congress may act to protect this right by punishing fraud, corruption, and intimidation at the polls; the cases cited by Mr. Justice Black prove no more than this. It is another thing to say that this right to vote furnishes the key to legislative apportionment problems.

It is also easy to see that, if the right to vote, expanded into a right to equal representation based on numbers, furnishes the basic premise in these cases, the Court has equipped itself with a simple answer to the apportionment problem. By assuming this question-begging premise, the Court's conclusion is clearly indicated. This became evident when the Court handed down its decisions in the batch of state legislative reapportionment cases at the end of the recent term.[7] According to these cases, only one general standard —the population standard—is constitutionally permitted in apportioning both houses of a state legislature. This in turn means that population must be apportioned to the several voting districts on an equal basis, so far as practicable, and that any deviation therefrom will be permitted only when a rational necessity for the deviation is shown. With one blow the Court struck at the heart of the well-established, traditional bicameral system of state government. Even more surprising was the Court's decision in the Colorado case, setting aside a legislative apportionment scheme that had been submitted to and approved by the electors in a free and open election. The Court felt it necessary to assume a guardian's role in order to protect the voters against themselves and in order to establish the Court's own predilection as to the kind of political system that our Constitution should sanction, even though this frustrated the expression of the popular will.

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7. Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713 (1964) (Colorado); Roman v. Sincock, 377 U.S. 695 (1964) (Delaware); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) (Maryland); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (New York); Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama).

II. Problems of Analysis and Application

As stressed earlier, the basic issue in these cases is what kind of representation processes and institutions are required to assure a government that rests upon the will of the people. This issue opens up a large and complex area involving many theories and modes of representation. Although the Constitution does not provide express answers for the states, the Court devised a single and simple solution: all representation must be based upon population alone, and population must be equally apportioned to the several districts.

My basic criticism is that the Court, by judicial fiat, is projecting a simple, but absolute, solution to a complex problem. I find nothing in history or political theories of representation to support the idea that representation on the basis of population equally apportioned is the only system consistent with either republican or democratic ideas of government. If effectuation of majority rule is the premise underlying this exclusive theory of representation, then why not carry through to the logical conclusion and require statewide election of all legislators? Or, if effective counting of each man's vote is the objective, then why not say that the Constitution requires a system of proportionate voting and representation? To raise these questions is to suggest the complexity of the problem and the range of possible solutions. The basic scheme of representation goes to the heart of a state's political processes: how political strength and influence shall be distributed and diffused. This is a matter that should be left to the people of the state to determine through their own constitutional processes, subject to a judicial check to determine whether the system chosen employs standards that are constitutionally objectionable, such as race or religion, or is otherwise so arbitrary or capricious that it cannot fit into any rational scheme of representation. Population, geography, the political organization of the state, the nature and variety of economic interests, and the diffusion or concentration of voting strength are all factors that are relevant in determining whether a state by its apportionment scheme has worked out a fair and balanced scheme of representation responsive to the state's own characteristics. The fact that the people of a state in an open election have by majority vote adopted a scheme that they deem responsive to the state's needs and characteristics is also a consideration that should carry substantial weight in any judicial determination of the issue. And surely history should not be lightly disregarded. One may cheerfully concede that the pattern established for the Congress of the United States does not

in itself prove the validity of any particular apportionment scheme adopted by the states; yet, the long established state bicameral legislative scheme, which gives effect to varying theories of representation as between the two houses, affords persuasive evidence of what we heretofore have understood the republican form of government to include.

The Court uses the equal protection clause as the formal vehicle for condemning apportionment schemes that do not satisfy the population standard. Its conclusion is that a system that does not afford equal representation to voters results in discriminatory denial of the right to vote. The right to vote emerges, then, as a critical element. This raises interesting questions. For example, what is the constitutional source of the right to vote? Article I assures the right to vote for federal officers. The right to vote for state officers must have its source elsewhere. The Court refers to it as a fundamental right.[8] As a fundamental right, it must have its source either in the substantive rights interpretation of the due process clause or in the guarantee of a republican form of government.

Actually, in applying the equal protection clause, it is not necessary to show that there is a discriminatory denial of a *fundamental* right. It is enough to show that a person is denied the equal enjoyment of a right, privilege, or immunity by reference to an *irrational classification.* But, the Court chose to rely upon its characterization of the right to vote as fundamental in constructing its theory under the equal protection clause: The more fundamental the right, the more important it is that the Court inject its theory as to the kinds of classifications that may be used to restrict this right; an apportionment system that does not rest upon equal apportionment of population dilutes and debases the fundamental right to vote and, hence, results in discriminatory treatment. It dilutes and debases the right because it does not afford equal representation.

Here again, the right to vote gets tangled up with the Court's theory of proper representation. There can be no quarrel with the proposition that the Court should look carefully at classifications that determine a person's right to vote; however, what is really involved in these cases is not a discriminatory denial of the right to vote, but rather a violation of the judicially created right to a system that recognizes numbers as the only basis for representation. That the right to vote drops out of the picture at this point is

8. Reynolds v. Sims, *supra* note 7, at 561-62.

evidenced by the fact that the Court, in speaking of population as the proper standard, does not speak of voting population but instead speaks of the total population of a given district.

By reading all that it does into the right to vote, the Court automatically reaches its conclusion under the equal protection argument. For, if the right to vote carries with it a personal right to a proportionate share of political influence determined only upon the basis of numbers by the ratio of one man's vote to the total population in the state, then, of course, any system of apportionment not based upon equal apportionment of population must necessarily fail. The right that the Court creates leaves no room for a judicial inquiry into whether a legislative apportionment scheme can be fitted into a rational scheme of representation by reference to the characteristics and problems of a particular state. The Court, by the premise it postulates on the nature of the right, assumes the conclusion respecting the equal protection argument. Indeed, by positing this right the equal protection argument becomes merely a facade that embellishes the conclusion. Thus, the decisions turn less upon equal protection than upon a new conception of fundamental right or upon the Court's implied understanding of what constitutes a republican form of government.

Ample precedent supports the idea that legislative classification meets equal protection demands if it rests upon a rational basis by reference to the purpose of the legislation. According to the established theory of equal protection, a voter's right to equal treatment is satisfied if he is treated equally with other voters within a class established pursuant to a rational theory of legislative representation. As Mr. Justice Stewart pointed out, a wide variety of considerations may be taken into account by the legislature or by the people themselves in determining the basis of representation.[9] In deciding that the Constitution permits only representation based upon population equally apportioned, the Court makes a policy decision and expresses its preference for one exclusive theory of apportionment.

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9. "What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, since each State is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational." Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713, 751 (1964).

It may be argued that, once the Court had embarked upon the process of examining apportionment schemes, it had a bear by the tail and had no choice in the end except to adopt a population standard, since any inquiry into the rationality of an apportionment scheme would have required the Court to articulate and weigh the factors determining rationality, whereas the population factor furnishes a clear-cut and simple standard. The simple solution to complex problems by the invocation of absolutes has its appeal, whether in politics or in law. As Dean Griswold has pointed out, reliance upon absolutes avoids the necessity of the kind of judgment that appraises all of the relevant considerations.[10] Yet, it is this kind of judgment that goes to the heart of the judicial process. Surely the Court has the resourcefulness to conduct a meaningful review of state apportionment schemes, based upon the wide thinking and literature on the subject, without having to make a radical break with the system and theories that find ample support in American experience and practice.

Justices Stewart and Clark demonstrated in their opinions that the Court could have made an inquiry into legislative apportionment schemes without setting up any single, judicially formulated standard and that such an inquiry would have been meaningful and would not have meant a judicial rubber-stamping of just any apportionment scheme or practice.[11] According to Mr. Justice Stewart, the equal protection clause demands but two basic attributes of any plan for state legislative apportionment. "First, it demands that in the light of the state's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the state. I think it is apparent that any plan of legislative apportionment which could

10. Griswold, *Absolute Is in the Dark*, 8 UTAH. L. REV. 167, 171-75 (1963).

11. Both concurred in the holdings in the cases dealing with the legislative apportionment plans in Alabama, Virginia, and Delaware. Mr. Justice Clark concurred in the result in the Maryland case, whereas Mr. Justice Stewart voted to vacate the judgment and to remand the case to the Maryland Court of Appeals for consideration of the question whether the Maryland apportionment "could be shown systematically to prevent ultimate effective majority rule." Both dissented in the New York and Colorado cases. Their basic views are set forth in their dissenting opinions in Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713, at 741 and 744 (1964). Mr. Justice Clark, while writing a short opinion of his own, also joined Mr. Justice Stewart's opinion.

Mr. Justice Harlan, it should be noted, dissented from the decisions in all the recent state legislative apportionment cases. His dissenting opinion, applicable to all the cases, is found in Reynolds v. Sims, 377 U.S. 533, at 589 (1964). His dissent, in accordance with his views expressed in dissent in *Baker*, *Gray*, and *Wesberry*, is based on the central proposition that questions of legislative apportionment are political questions not appropriate for judicial determination.

be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards."[12]

Mr. Justice Stewart's pragmatic approach makes much sense. It suggests a meaningful judicial inquiry that is empirical because it examines actual data to see what are the problems of representation faced by a state; it recognizes the variety of interests that may be appropriately considered by a state in its apportionment scheme; it preserves the primacy of the states in making choices in an area where the Constitution does not dictate a single formula; and it sets an outer limit on choice by reference to a concept of "ultimate effective majority rule." I find it regrettable that the majority saw fit instead to impose a single standard that incorporates "their own notions of wise political theory."[13] It strains credulity to suggest that this result is required by the Constitution.

Any comments upon the Court's decisions must take account also of the extraordinary authority assumed by some lower federal courts and some state courts in dealing with apportionment issues. Never before has the country witnessed such a spectacle of judicial power run riot. Courts have issued ultimata to legislatures and, in a few instances, have themselves undertaken to prescribe proper apportionment plans. This bold intrusion of the judiciary into the apportionment struggle invites the risk that the courts, wittingly or unwittingly, may become involved in the process of political gerrymandering. Moreover, in this election year, courts, in a scramble to implement the Supreme Court's decisions, have displayed a reckless impatience and imprudence in forcing adoption of new schemes without opportunity for careful consideration and at the expense of orderly election processes. For this chaotic state of affairs the Supreme Court must assume some responsibility. Its failure to establish standards in *Baker* created a situation that led lower courts to shift for themselves. What is more important, the Court could have firmly and effectively directed the lower courts to proceed in an orderly and deliberate way in implementing the new constitutional principle.

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12. Lucas v. 44th Gen. Assembly of Colo., *supra* note 11, at 753-54. According to Mr. Justice Clark, "if one house is fairly apportioned by population . . . then the people should have some latitude in providing, on a rational basis, for representation in the other house." *Id.* at p. 742.

13. *Id.* at 748. Mr. Justice Stewart dissenting in Lucas v. Forty-Fourth Gen. Assembly of State of Colorado.

III. Some Concluding Observations

The reapportionment cases again reveal the dilemma of judicial review in a democratic society. As long as a court is vested with the power to review legislation, the temptation is present to use judicial power as a means of creating constitutional policy in accordance with the Court's conception of the ideals served by the Constitution or in accordance with what the Court regards to be wise policy as determined by its own predilections and preferences. To adapt constitutionally stated policy to new conditions is one thing; to create new constitutional policy in the guise of judicial interpretation is another.

It may well be that the new constitutional principle forged by the Court is a good one. As stated at the outset, the total consequences are likely to be salutary. Perhaps we should say that representation based upon equal apportionment of population affords the only permissible basis of representation in a system that rests upon the will of the people. It may be that the idea of a bicameral legislature is obsolete. But, I am not prepared to accept the idea that these conclusions should be forced upon the people by the judiciary, absent a clear-cut mandate to this effect in the Constitution. The notion that the Court, by creating new constitutional principles, should push the nation forward to the achievement of what the Court regards as the national ideal is not without its advocates. As stated by Mr. Justice Harlan in his dissenting opinion in *Reynolds v. Sims,* the view exists in some quarters that "every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act."[14] It may be that we shall make greater advances in our national life if basic policy questions are decided for us by what Professor Burgess described as the "aristocracy of the robe,"[15] or by what Judge Learned Hand more bluntly characterized as a "bevy of Platonic Guardians."[16] Any court, however, that aspires to a constitutional policy-making role creates for itself the risks and hazards to which political organs are subject. I would prefer that the Court take a more modest view of its role and authority, if for no other reason than that it is important for the Court to retain the popular respect earned by it over the years as a judicial tribunal interpreting and

14. Reynolds v. Sims, 377 U.S. 533, 624 (1964).
15. 1 Burgess, Political Science and Constitutional Law 365 (1891).
16. L. Hand, The Bill of Rights 73 (1958).

applying the principles expressed in the Constitution. Fortunately, as our history amply demonstrates, public opinion and the reaction of the coordinate branches of the government operate with a salutary force in restraining the Court when it ventures too far in imposing its will in areas that belong primarily in the domain of legislative discretion or the popular will. I expect this to be the case with respect to the new wave of judicial activism we are now experiencing.

The Court had a function to perform in rescuing the state legislative process from systems of apportionment that could not be fitted into a rational scheme and that, in a number of instances, did not conform to the standard prescribed by state law itself. Indeed, if the Court had contented itself with the responsibility of requiring the states to bring their legislative apportionment up to date in order to conform with the plan of representation provided for in their own constitutions, it would have rendered a valuable service. But, in condemning all plans that do not conform to the Court's conception of wise apportionment policy—a policy buttressed by reference to a synthetic right forged from question-begging premises —and in reaching its sweeping conclusions in disregard of history and accepted principles of constitutional interpretation, the Court has gone far beyond the necessities of the case.