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Constitutional Law - Judicial Power - Power to Compel Fair Apportionment by the Legislature

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CONSTITUTIONAL LAW—JUDICIAL POWER—POWER TO COMPEL FAIR APPORTIONMENT BY THE LEGISLATURE—At a general election on November 6, 1956, voters of the state of Washington approved by popular initiative a reapportionment of the legislature based upon political sub-divisions as described in the federal census of 1950. On December 6, 1956, the governor proclaimed the measure to be law and it was enrolled as chapter 5, Laws of 1957.[1] At the regular 1957 session of the state legislature, chapter 289, revok-

[1] Wash. Laws (1957) c. 5, §56: "Census tracts referred to herein are all the political divisions, subdivisions, census tracts and other terms to describe census divisions used in the current census division system used and approved by the United States Bureau of the Census. . . ."

ing the initiative and calling for the use of the election precinct as the unit of population for forming legislative districts, was passed by a vote of more than a two-thirds majority of the members in each house. It became law without the governor's signature on June 12, 1957.[2] An original proceeding was brought in the Supreme Court of Washington seeking a writ of mandamus compelling the secretary of state to perform his duties with reference to redistricting the state in accordance with chapter 5, Laws of 1957, rather than chapter 289, Laws of 1957. It was contended that the latter enactment contravened Article II, section 3 of the state constitution.[3] *Held,* four justices dissenting,[4] although the constitutionality of a reapportionment statute is subject to judicial review, the relator failed to meet the burden of proving the resulting disproportionateness between representation and distribution of population. *State ex rel. O'Connell v. Meyers,* (Wash. 1957) 319 P. (2d) 828.

Provision for adequate and equitable representation in the legislature has proved a vexing problem for the republican form of government, and continues to plague the great majority of states. While state constitutions generally grant exclusive power to the legislatures to reapportion at periodic intervals, usually in relation to the federal census, legislative inaction has been the rule. This failure on the part of the legislatures to reapportion has resulted in great inequality among districts. Consistent with ideas of separation of powers, however, the judiciary will not compel the legislature to redistrict, regardless of the wording of the constitutional mandate.[5] So long as the reapportionment function is left to the legislature, the courts are thus powerless to prevent this "silent gerrymandering" which often deprives heavily populated areas of their rightful degree of representation. When the legislatures do attempt to redistrict, such statutes are subject to judicial review prior to use as the basis for a general election.[6] Reapportionment statutes enjoy the presumption of constitutionality accorded all state legislation,[7] and courts have been slow in striking down

2 Wash. Laws (1957) c. 289: "Section 56, chapter 5, Laws of 1957 is hereby repealed."

3 WASH. CONST., art. II, §3: "The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants. . . ."

4 The dissenting opinion argued vigorously that the legislative enactment was a repeal of chapter 5 in violation of the state constitution, and that the court should take judicial notice of the existing method of census taking, distribution of population and the resulting disproportionateness.

5 Jones v. Freeman, 193 Okla. 554, 146 P. (2d) 564 (1943); Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926). See generally 46 A.L.R. 964 (1927).

6 Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); People ex rel. Woodyatt v. Thompson, 155 Ill. 451, 40 N.E. 307 (1895); Giddings v. Blacker, 93 Mich. 1, 108 N.W. 749 (1892).

7 State ex rel. Broughton v. Zimmerman, 261 Wis. 398 at 408, 52 N.W. (2d) 903 (1952).

statutes which approximate equality[8] regardless of the motives underlying the enactment.[9] Wide difference of judicial opinion exists as to the permissible descrepancy between the greatest and least populated districts when the legislation is reviewed in light of the constitutional requirement of equality.[10] Courts often compare the distribution under the statute before them with prior distribution in their determination of the statute's validity.[11] (It should be noted that this review power is of little practical value in that a striking down of the new reapportionment provisions would only serve to revive the old statute, which in all probability is even less satisfactory.) An apportionment act, valid when enacted, does not become invalid through a subsequent shift in population,[12] and it has been held that a legislature elected under such an apportionment statute may be upheld either as a de jure[13] or a de facto legislature.[14] On the federal level, reapportionment has been regarded as a "political question" and therefore beyond the review powers of the Supreme Court.[15] Because of the hesitancy on the part of state legislatures to redistrict, and the discretion afforded them by the courts when they do, the popular initiative and referendum have been utilized to accomplish reapportionment. This method, however, has not necessarily proved successful, and with the Colorado experience a possible exception,[16] cannot be regarded as a panacea. The most adequate solution to the problem seems to lie in the establishment, by constitutional amendment, of a committee empowered to reapportion at designated periods.[17] This has been done in several states and although the provisions vary in form and method, the duty to reapportion has been removed from the legislative prerogative and the committees are made subject to a writ of mandamus compelling affirmative action. States which refuse, or are unable, to remove the reapportionment function from the legislature will continue to suffer the plight of existing or potential unequal representation evidenced in the principal case.

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8 Attorney-General v. Suffolk County Apportionment Commissioners, 224 Mass. 598, 113 N.E. 581 (1916).

9 State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916); People ex rel. Woodyatt v. Thompson, note 6 supra.

10 Brooks v. State ex rel. Singer, 162 Ind. 568, 70 N.E. 980 (1904) (invalidating a statute where the disparity index equalled 1.65); People ex rel. Carter v. Rice, 135 N.Y. 473, 31 N.E. 921 (1892) (upholding a statute where the disparity index equalled 2.28).

11 Jones v. Freeman, note 5 supra; State ex rel. Broughton v. Zimmerman, note 7 supra.

12 Daly v. County of Madison, 378 Ill. 357, 38 N.E. (2d) 160 (1941).

13 People v. Clardy, 334 Ill. 160, 165 N.E. 638 (1929).

14 Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37 (1896).

15 Colegrove v. Green, 328 U.S. 549 (1946); Smiley v. Holm, 285 U.S. 355 (1932).

16 Armstrong v. Mitten, 95 Colo. 425, 37 P. (2d) 757 (1934), where an initiated reapportionment act was upheld over a smilar legislative act.

17 See McClain, "Compulsory Reapportionment," 40 NAT. MUNIC. REV. 305 (1951).