CONGRESSIONAL AND LEGISLATIVE REAPPORTIONMENT

A LEGAL HISTORY.

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The first three cases in which the Supreme Court addressed itself to legislative apportionment were Baker v. Carr, 369 U.S. 186 (1962), Scholle v. Hare, 369 U.S. 429 (1962), and WMCA Inc. v. Simon, 370 U.S. 190 (1962). These cases established (a) the jurisdiction of the federal courts; (b) the standing of qualified voters; (c) that the allegations presented of a denial of the equal protection clause of the 14th Amendment presents a justiciable cause of action. Shortly thereafter came Gray v. Sanders, 372 U.S. 368 (1963) and Wesberry v. Sanders, 376 U.S. 1 (1964) wherein the court established the "1 person, 1 vote" concept.

On June 15, 1964 the apportionment plans of six states were rejected. Thesewere Alabama in Reynolds v. Simms, 377 U.S. 533; New York in WMCA, Inc. v. Lomenzo, 377 U.S. 633; Maryland in Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656; Virginia in Davis v. Mann, 377 U.S. 678; Delaware in Roman v. Sincock, 377 U.S. 695; and Colorado in Lucus v. 44th General Assembly, 377 U.S. 713. Briefly the rules laid down in these six cases are as follows:

1. The right to vote is an individual right protected by the equal protection clause of the 14th Amendment and this right is unconstitutionally impaired when its weight is substantially diluted in comparison with the vote of citizens living in other parts of the state.

2. The equal protection clause requires that both houses of a bicamerial legislature must be apportioned substantially on a population basis.

3. The right to vote is an individual right which cannot be denied by a majority of the electorate.

4. Regardless of the issues in a lower court the Supreme Court in reviewing a state legislative apportionment must consider the scheme as a whole.

5. Apportionment is primarily a legislative responsibility; however, if the legislature fails to act after having adequate opportunity to do so the court should not allow elections under a constitutionally invalid scheme.

6. It is neither practicable nor desirable to establish rigid mathematical standards for the validity of an apportionment plan. Determination of constitutional validity involves consideration of possible arbitrariness or discrimination.

7. Reliance on either the federal senate and house analogy or on the federal electoral college analogy is misplaced.

8. Consistent with the equal protection clause a state may provide for only periodic revision of its reapportionment scheme. Decennial reapportionment would clearly meet the minimal requirements of the 14th Amendment.

The Minnesota Experience

The principal of equal representation for equal population which the Supreme Court drew from the 14th Amendment is embodied in the Minnesota Constitution in Article 4, Section 2. "Representation in both houses shall be apportioned equally throughout the different sections of the state, in proportion to the population thereof."

Assuming the 1959 reapportionment act (Laws 1959, Extra Session Chapter 45, MSA Sections 2.02 to 2.715) to be unconstitutional, Governor Rolvagg established the Bipartisan Reapportionment Commission on July 28, 1964 to submit an apportionment plan to the legislature by December 1964. Before the commission had completed its work a three judge United States District Court held the 1959 reapportionment act was in fact unconstitutional (see Honsey v. Donovan, 236 Fed. Sup. 8 D.C. Minnesota 1964). On January 15, 1965 the commission reported their plan for the reapportionment of both houses of the state legislature.[1]

Although the commission plan was not adopted the 1965 Legislature passed by majority vote of both houses Senate File 102; however, on May 24, 1965 the Governor vetoed the bill and it was not passed over his veto. This power of the Governor to veto a legislative reapportionment bill was challenged in the Minnesota Supreme Court and upheld on November 26, 1965 (Dunbury v. Donovan, 138 N.W. 2nd edition 692).

On December 17, 1965 Governor Rolvaag reconvened the Bipartisan Reapportionment Commission and asked it to recommend another reapportionment scheme. The second report of the commission was submitted to the Governor on March 7, 1966, and the Governor called a special session of the legislature in April. One week after the first legislative apportionment proposal passed and was vetoed by the Governor a compromise measure was worked out and approved in time for

[1] See 49 Minn. Law Review 367 through 398.

November elections.

Criteria for Reapportionment

Equality of Representation

In judging the equality of representation the court has used a number of standards of deviation. Among these have been the ratio of the population of the largest district to that of the smallest district, the percentage of the population needed to elect a majority of the legislators, and the percentage difference by district between actual population and ideal population (ideal population being the total population of the state divided by the total number of representatives.)

The standard for population base has been somewhat flexible, but adherance to equality with respect to total population has been rather strict. States such as New York with large alien populations have used total citizens as a base. Other states have apportioned on a base of registered voters, eliminating minors, felons and the insane from the population base. Federal court interpretation of the base problem has varied, but the Supreme Court has given no adverse comment to any of these bases. In April 1966, the Supreme Court ruled the use of registered voters would be constitutionally permissible only if it did not result in malapportionment, particularly in discrimination against politically inactive groups. (Burns v. Richardson, 384 U.S. 73, 1966.) See also Cravalho v. Richardson and Abe v. Richardson. This seems to allow the use of any base providing the effect is the same as the use of total population.

After a number of decisions rejecting increasingly smaller population variances, the Supreme Court in Kirkpatrick v. Priestler, 394 U.S. 526 (1969) more narrowly defined the "equal as nearly as practicable" clause of Wesberry v. Sanders. In this case the court overturned a Missouri Congressional Districting plan which produced a deviation range of from 2.83 percent below the ideal to 3.13 percent above the ideal district size. In overturning the Missouri plan, the court rejected the argument that variations can be small enough to be considered de minimus error i.e. so small as to be insignificant. "To allow for a de minimus standard would delute the equal population mandate of the constitution and encourage legislatures to seek the widest permissible deviation of equality."

In rejecting the de minimus standard, the court relied on Swann v. Adams, 385 U.S. 440 (1967) which established that the burden was upon the state to present acceptable reasons for population variances. Kirkpatrick goes farther than Swann in requiring the state to carry the additional burden of demonstrating the validity of those justifications. (Kilgarlin v. Hill, 386 U.S. 120 affirms Swann insofar as it ruled the burden of justifying variations lies upon the state and not appellants.)

In Kirkpatrick the court also restricted the number of legally acceptable justifications. A state may take into account factors which suggest change or inaccuracies in population

distribution figures.[2] The argument that representation of distinct political economic geographic and social interests in Congress justifies variances was specifically rejected. Other unacceptable justifications included maintenance of traditional or historic boundaries, political subdivision lines, or district compactness. The court declined to decide whether population data could be adjusted for the transient nature of certain segments of the population.

Wells v. Rockefeller, 394 U.S. 542, the companion case to Kirkpatrick affirmed the principle that equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good faith effort, or for which justification is shown. The court specifically rejected the value of New York's plan to create districts with similar civic interests orientation.

It is interesting to note that since the Kirkpatrick decision in April 1969, Missouri has redistricted and attained a miniscule average population deviation of 0.0674 percent. As was to be expected from the increased demand for mathematical equality and the decreased need for compactness, the Missouri plan would seem to be a gerrymander. The state senate minority leader described one district as "a northbound

[2](See Cahoon et al v. Fortson, Civil Action Number 13011 decided in December 1969 by a U.S. District Court which rejected the use of projected population shifts and numbers on the grounds of their being inaccurate and piecemeal. Also, in Hensey v. Donovan the court in overturning the 1959 Minnesota Reapportionment Act declined to accept the argument of intervening defendants that the plan embodied population figures projected to 1959 from the 1950 census.)

flying turkey with its neck and body in the city and its wings reaching into four subburban townships."

Continuity and Compactness

The Minnesota Constitution requires that congressional and legislative districts be convenient and contiguous, and that no representative district be divided in the formation of a senate district. As mentioned before, the emphasis on compactness in redistricting has declined. In Reynolds v. Sims the Supreme Court condemned gerrymandering but said that deviations from population based representation cannot be based solely on geographical considerations. In WMCA v. Lomenzo a federal district court held that an allegation of gerrymandering failed to raise a constitutional question. This decision was subsequently affirmed per curiam by the Supreme Court without opinion.

Multi-member Districts

Although the court suggested in Reynolds that multi-member districts might be used as a deterrent to gerrymandering, at-large elections have been criticized because they often discriminate against political, racial and other minorities which might have been represented in single member subdistricts. The first case decided by the Supreme Court relating to the constitutionality of multi-member districts was Fortson v. Dorsey, 379 U.S. 433 (965). The court reversed a district court decision that multi-member districts were invalid per se, but in absence of support in the record, withheld the determination that multi-member schemes that operate to cancel out the voting strength of

certain minorities would be unconstitutional as discriminatory. Later in Burns v. Richardson, 384 U.S. 73 (1966) the court again ruled that sufficient evidence had not been adduced to show discrimination in Hawaii's multi-member districts. The decision made it clear that the choice of multi-member districts essentially involves a choice of one theory of representational democracy; however, whenever this scheme operates to minimize or cancel the voting strength of an element of the population, invidious discrimination ensues. Burns further specified the standard in Fortson by stating "it may be that this invidious affect can more easily be shown if . . . districts are large in relation to the total number of legislators, if districts are not appropriately sub-districted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicamerial legislature rather than one" 384 U.S. 73.

In Chavis v. Whitcomb, 38 LW 2104 (1969) a state legislative case decided by an Indiana Federal District Court, both the Fortson and the Burns cases were reviewed and the following requirements adduced for relief: 1. An identifiable racial or political element within the multi-member district which has significantly different interests from other elements within the district. (In a ghetto area of Marion County composed of 90% Negroes, substantial similarities exist in socio-economic class, unemployment rates, welfare recipients, automobile ownership, crime rates, and the number of crowded dwelling units.) 2. Minimization

of voting strength resulting from at-large elections, the control the political parties exert over same, and the larger number of candidates the voter must familarize himself with which also contributes to partisan control. (Within Marion County, the ghetto area has 41.14% of the population while being the residence of 9.51% of the senators and 17.91% of the state representatives.) 3. The partial representation of the cognizable element by all the representatives does not constitute responsive and affective legislative representation. 4. They also point out that the circumstances expressed in Burns, which were not present in Fortson, that more easily identify "invidious discrimination" are all present in this instance.

In the context of every discussion involving multi-member districts the question of long ballots arises. The Supreme Court commented upon this situation in Lucus v. 44th General Assembly, 377 U.S. 713. In Colorado senators and representatives were elected at-large from county-wide districts. In Denver for example, each elector voted for 8 senators and 17 representatives. The Supreme Court noted that "an intelligent choice among candidates" was "made quite difficult."

Incumbent Legislators

Legislators who anticipate that reapportionment plans would jeopardize their seats have taken two courses of action. The most common has been to draw the new apportionment plans such that they interfere with as few sitting members as possible and avoid requiring

incumbent members to run against each other. Although the interests of stability in government are certainly served by such a program, whenever such a plan results in population deviations or is deficient of any other rational basis the result is an unconstitutional plan. (See League of Nebraska Municipalities v. Marsh, D.C. Neb. 253 F. Supp. 27.)

In the event that a new apportionment, and a consequent new election cuts short the term of incumbent legislators, the courts have uniformly held that the terms of office end. An Oklahoma Federal District Court said "no office holder has a vested right in an unconstitutional office any more than he has a right to be elected to that office. We believe that it would be invidiously indiscriminatory." (Reynolds v. State Election Board, D.C. Okla. 233 F. Supp. 323.) Similar action was taken by the Federal District Court in Virginia, where it was affirmed by the Supreme Court (Davis v. Mann, 377 U.S. 678), and by the Federal Court in Hawaii.

Thus the interests of incumbent legislators in preserving their seats have not prevailed over the other criteria which governs apportionment.

Applicability of Federal Principle

The principles laid down by the Supreme Court regarding reapportionment have resulted from cases dealing with congressional and state legislative districting. Consultation with authorities has produced some consensus of thought that standards for state action, regardless of whether it be congressional or state legislative districting, will control apportionment of any representative body with legislative function.

The Minnesota case of Hanlon v. Towey, 274 Minn. 187 (1966) found that the "one man, one vote" principle applied to representation in county government. The analogy drawn included the fact that county government was by statute representative, and that the county board performed certain legislative functions drawing it into confrontation with the impact of the prior reapportionment decisions.

Although the federal district court case of Sims v. Baggett, 247 F. Supp. 96 (1965) suggested that larger deviations should be allowed for state legislative reapportionment than in congressional districting, the recent New York Supreme Court case of Duquette v. Board of Supervisors of the County of Franklin, 302 N.Y.S. 2d 501 (1969) has affirmed Kirkpatrick (a congressional districting case.)

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