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The Reapportionment Cases--An End to Judical Restraint

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THE REAPPORTIONMENT CASES—AN END TO JUDICIAL RESTRAINT

It may be safely stated as a general principle that it is not within the province of any court to control or review the determinations of the political branch that are *within the limits of the constitution.*[1] Although this line between judicial and legislative functions in government has not been drawn with precision, for many years the judiciary has refrained from interference in those fields which it considers purely political in nature.

The courts have long felt that each department should be limited to a sphere of activity for which it is best fitted;[2] and consequently they have denied jurisdiction over the subject matter or declared non-justiciable[3] questions in such fields as foreign relations,[4] validity of enactments,[5] the status of Indian tribes,[6] and legislative apportionment.[7] In 1840 the English justices refused to intervene in *The Duke of York's Claim to the Crown.*[8] In 1844 the famous Dorr's rebellion broke out in Rhode Island, and Dorr was elected governor under a government organized by a popular assembly without regard to the existing charter government. Our Supreme Court, called upon to determine the duly constituted government, refused to undertake jurisdiction, holding that the question was one which Congress alone must decide.[9] Then, as late as 1946, the Court refused to exercise its equity powers over a claim challenging the constitutionality of the apportionment of congressional districts in the state of Illinois.[10]

These decisions have been predicated on the belief that such controversies ought to be determined by the people in their sovereign capacity or that full discretionary powers should be left to the legislative or executive departments.[11] The doctrine that has evolved from these cases has come to be known as the

1. Wilson v. Shaw, 204 U.S. 24 (1907).
2. Finkelstein, *Judicial Self Limitation,* 37 HARV. L. REV. 338, 363 (1924).
3. If the duty asserted may not be judicially identified and its breach judicially determined or if protection for the right cannot be judicially molded, then the claim is non-justiciable. Justice Brennan for the majority in Baker v. Carr, 369 U.S. 186, 198 (1962).
4. Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
5. Coleman v. Miller, 307 U.S. 433 (1939).
6. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
7. Colgrove v. Green, 328 U.S. 549 (1946).
8. 5 Rot. Parl. 375, WAMBAUGH, CASES ON CONSTITUTIONAL LAW 1 (1460).
9. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
10. Colgrove v. Green, 328 U.S. 549 (1946).
11. In Re McConaughy, 106 Minn. 392, 119 N.W. 408 (1909).

doctrine of "political questions"—a prime example of judicial self restraint. However the scope of its jurisdiction is a question the Court itself must decide[12]—a fact unquestionably demonstrated by the radical change in the Court's treatment of legislative reapportionment reflected in the cases which follow.[13]

COLGROVE v. GREEN

In 1946 a suit was brought under the Federal Declaratory Judgements Act challenging the apportionment of congressional districts in Illinois as unconstitutional. The district court dismissed the action for want of equity, stating that the issue was of a peculiarly political nature and therefore not within the province of the courts to decide.[14] The Supreme Court in a four to three decision (Justice Rutledge concurring) affirmed the decision of the lower court,[15] finding the "issue to be of a peculiarly political nature and therefore not meet for judicial determination."[16] Justice Frankfurter, writing for the majority cited article I, section 4 of the Constitution providing that the manner of electing 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 . . ." [Emphasis added]. The majority felt that the short article I, section 4 was that the Constitution had conferred *on Congress* the exclusive authority to secure fair representation in the states, and furthermore, that it would be unwise for the courts "to enter this political thicket."[17]

Justice Black, joined by Justices Douglas and Murphy, dissenting, felt that the complaint presented a justiciable cause and controversy and that the court should exercise jurisdiction.[18] He argued that existing malapportionment amounted to a willful discrimination against urban voters and a denial of equal protection of the laws. Black was of the opinion that the malapportionment of the congressional districts destroyed the effectiveness of the plaintiffs' vote, and that such dilution was no

12. Weston, *Political Questions*, 38 HARV. L. REV. 296, 302 (1925).
13. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Westberry v. Sanders, 84 Sup. Ct. 526 (1964); Reynolds v. Sims, 84 Sup. Ct. 1362 (1964).
14. Colgrove v. Green, 64 F. Supp. 632 (1946).
15. Colgrove v. Green, 328 U.S. 549 (1946).
16. *Id.* at 552.
17. *Id.* at 556.
18. *Id.* at 557, Black dissenting.

more constitutionally permissible than denying their vote altogether.

Justice Rutledge concurred in the affirmance, contending that the "cure sought may be worse than the disease,"[19] and consequently that the case should be dismissed for want of equity. Though he agreed with the dissent that the "Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable,"[20] there are "important points of concurrence" with the reasoning of the majority.[21] Thus it was questionable for some sixteen years whether *Colgrove* "flatly held that there was jurisdiction over the subject matter,"[22] or merely denied jurisdiction as a matter of equitable restraint, "though not in the strict sense of want of power."[23] Those *per curiam* decisions on similar cases after *Colgrove* did little to answer the question.[24]

Some indication of a possible change of position was apparent from the Court's decision in *Gomillion v. Lightfoot*.[25]

> Legislative control of municipalities, *no less than other state power*, lies in the scope of relevant limitations imposed by the United States Constitution. [emphasis added].[26]

In declaring unconstitutional the redefining of the municipal limits of Tuskeegee, Alabama, the Court held that the systematic exclusion of Negroes was an abridgement of their rights under the fifteenth amendment.[27] *Colgrove* was distinguished as involving merely legislative inaction and the resulting dilution of voting power, whereas *Gomillion* involved an affirmative action depriving a readily isolated racial minority of their votes and the consequent advantages of the ballot.

BAKER v. CARR

In 1962 an action was brought challenging the constitutionality of Tennessee's 1901 apportionment statute on the grounds that it denied the plaintiffs and those similarly situate equal

19. *Id.* at 566, Rutledge concurring.
20. *Id.* at 565, Rutledge concurring.
21. Baker v. Carr, 369 U.S. 186, 277 (1962), Frankfurter dissenting.
22. *Id.* at 202, Brennan for the majority.
23. *Id.* at 277, Frankfurter dissenting.
24. For an enumeration of Colgrove's spawn, see Baker v. Carr, 369 U.S. 186, 202-203.
25. 364 U.S. 339 (1960).
26. *Id.* at 344-345.
27. Justice Whitaker concurred on the basis of the protection of the fourteenth amendment.

protection under the laws. A three judge district court, relying on *Colgrove*, dismissed the complaint on the grounds that it lacked jurisdiction over the subject matter and that no claim was stated upon which relief could be granted.[28]

On appeal the Supreme Court in six separate opinions (three concurring and two dissenting) reversed the lower court and remanded the case for trial on the merits.[29] Justice Brennan, writing for the majority (with whom Chief Justice Warren and Justice Black concurred), held only (a) that the court possessed jurisdiction of the subject matter; (b) that the claim stated a justiciable[30] cause of action; and (c) that the appellants had standing to challenge the Tennessee apportionment statutes. The court disposed of *Colgrove* by stating that the district court misconceived the holding of the case as authority for lack of jurisdiction of the subject matter.

> The holding was precisely to the contrary of their reading of it. Seven members of the Court participated in the decision. . . . Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter.[31]

The majority then restricted the "political questions" aspect of *Colgrove* to those cases involving separation of powers between co-ordinate branches of the federal government, and those claims arising under the "guaranty clause" of article 4, section 4.[32]

Having thus restricted *Colgrove*, the court was faced with two major questions: (1) were there sufficient "judicially manageable and discoverable principles"[33] to resolve the issue and (2) would the consequences be so tremendous as to dictate judicial restraint? The Court disposed of the first question simply by declaring that "judicial standards under the Equal Protection Clause are well developed and familiar."[34] Turning then to possible consequences, Justice Brennan observed that "we risk [no] embarrasment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the consti-

28. Baker v. Carr, 179 F. Supp. 824 (1962).
29. Baker v. Carr, 369 U.S. 186 (1962).
30. Justice Brennan defined justiciability as the ability to identify the duty asserted and to determine its breach and the ability judicially to mold protection for the asserted right. Baker v. Carr, 369 U.S. 186, 198 (1962).
31. Baker v. Carr, 369 U.S. 186, 202 (1962).
32. "The United States shall guarantee to every State in this Union a Republican Form of Government . . ."
33. Baker v. Carr, 369 U.S. 186, 226 (1962).
34. *Ibid.*

tutionality of her action here challenged."[35] Consequently, in the words of the Court, the fourteenth amendment was held to prohibit state action that reflected "*no* policy, but simply arbitrary and capricious action."[36]

Justice Douglas and Clark, in separate concurring opinions, would have had the Court in *Baker* go beyond the mere declaration of jurisdiction to a determination of substantive law. Both construed the fourteenth amendment as prohibiting "invidious discrimination," and Justice Clark interpreted the majority as holding, "at least sub silentio," that invidious discrimination was present.[37] Justice Clark then concluded by stating that, in his opinion, "the *ultimate* decision today is in the greatest tradition of this Court" [emphasis added],[38] a statement that led many to wonder just what the ultimate decision of *Baker* really was.

Justice Frankfurter, with whom Justice Harlan concurred, dissenting, was of the opinion that the appellants were asking the Court to choose among competing theories of political philosophy, and, in effect, to make their own "private views of political wisdom the measure of the Constitution."[39] He maintained that there was not a judicial remedy under the Constitution for every political mischief and that federal courts consistently have refused to exercise their equity powers in cases involving purely political issues. Frankfurter categorized the present case as one of a class of controversies which neither lend themselves to judicial standards nor judicial remedies, but which should be fought out in a non-judicial forum.

Frankfurter and Harlan both felt that the majority decision had empowered the courts to devise permissible standards for the proper composition of state legislatures, and in so doing, had catapulted the lower courts into a "mathematical quagmire" without "a legal calculus as a means of extrication."[40] The dissent contended that the present case, having all the elements that had made Guaranty Clause cases non-justiciable, was, "in

35. *Ibid.*
36. *Ibid.*
37. *Id.* at 261.
38. *Id.* at 262.
39. *Id.* at 301, Frankfurter dissenting.
40. *Id.* at 268, Frankfurter dissenting.

effect, a Guaranty Clause claim masquerading under a different label."[41]

Justice Harlan, dissenting separately, stated that there was nothing in the Constitution preventing a state from rationally choosing any electoral structure best suited to its interests, and therefore that the complaint should have been dismissed for failure to state a claim upon which relief could be granted.

Baker, with its unexplained and debatable substantive principles and contemplation of remedies both novel and drastic, had become the most momentous decision since the 1954 decision in *Brown v. The Board of Education*.[42] Yet, unlike *Brown*, it rested on a more precarious base—a fragmented Court and an abrupt reversal of position.[43] But the most disturbing aspect of *Baker* was that the majority purported to make a great pronouncement without complete agreement even on what questions were to be answered.[44] All six majority Justices, however, did apparently agree (a) that apart from the "political questions" problem, the court did have jurisdiction over the subject matter; (b) that *Colgrove* and its progeny of memorandum decisions had not authoritatively settled the issue as a non-justiciable "political question;" and (c) that, in fact, the apportionment of state legislatures (as distinguished from congressional district apportionment) is not a "political question."[45] Nevertheless the Court's cryptic statement that they had "no cause at this stage to doubt the district court will be able to fashion relief"[46] left one important question unanswered—just what would be considered "invidious discrimination" or would reflect "*no* policy, but merely arbitrary and capricious action?"

GRAY v. SANDERS

Some of those questions left unanswered by *Baker* were resolved by the Court in an action attacking the Georgia county

41. *Id.* at 297, Frankfurter dissenting. *Contra,* Baker v. Carr, 369 U.S. 186, 228 (1962), Brennan for the majority. "We conclude then that the nonjusticiability of claims resting on the Guaranty Clause (article 4, section 4) which arises from their embodiment of questions that were thought 'political' can have no bearing upon the justiciability of the equal protection claim presented in this case."
42. 349 U.S. 294 (1954).
43. Neal, *Baker v. Carr: Politics in Search of Law,* SUP. CT. REV. 253 (1962).
44. *Ibid.*
45. *Id.* at 270.
46. Baker v. Carr, 369 U.S. 186, 198 (1962).

unit system.[47] The district court in *Gray v. Sanders*[48] held that the county unit system was not per se violative of the equal protection clause, but that it must be so employed that no greater disparity exists against any county than exists against any state in the conduct of national elections. Analogizing from the Federal Electoral College, the district court felt that such a system applied rationally in a state among its counties could hardly "be termed invidious."[49] This questionable constitutional concept applied by the court had a surprisingly double effect: first, it based Georgia's electoral system on the rate of change in the population of the great state of Alaska,[50] and, second, it belied Justice Brennan's confidence that the district courts would have no trouble fashioning relief.[51]

The Supreme Court, Justice Douglas writing for the majority, reversed, declaring the county unit system, however applied, to be violative of the fourteenth amendment.[52] The Court found that the inclusion of the electoral college with its "inherent numerical inequality" allowed no implication of an analagous system in statewide elections;[53] and that the fourteenth amendment required that, within any one constituency, there can be no other rule than "one person, one vote."[54] Justice Stewart, apparently disturbed by the possible implications of Justice Douglas' "one person, one vote" pronouncement, wrote a separate concurring opinion stressing that the decision did not involve apportionment of state legislatures.

Justice Harlan, dissenting, challenged the Court's "doctrinaire"[55] "one person, one vote" ideology as constitutionally untenable, flying in the face of history, and opening the flood gates to those theory problems which the court so "studiously strove to avoid in *Baker v. Carr*."[56]

47. Whoever received the majority of votes in a county received the full vote of such county on a county unit basis.
48. 203 F. Supp. 158 (1962).
49. *Id.* at 169.
50. Neal, *Baker v. Carr: Politics in Search of Law,* SUP. CT. REV. 253, 318 (1962).
51. Baker v. Carr, 369 U.S. 186, 198 (1962).
52. Gray v. Sanders, 372 U.S. 368 (1963).
53. *Id.* at 378.
54. *Id.* at 381.
55. "It would be strange indeed, and *doctrinaire,* for the Court, applying such broad constitutional concepts as due process and equal protection under the laws, to deny a state the power to assume a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses . . . . *The Constitution—a practical instrument of Government—makes no such demands on the states.*" [italics added]. MacDougall v. Green, 335 U.S. 281, 283 (1948).
56. Gray v. Sanders, 372 U.S. 368, 388-389 (1963), Harlan dissenting.

WESTBERRY v. SANDERS

Another Georgia skirmish brought up the exact question answered seventeen years earlier in *Colgrove*, but this time to a more receptive court. The majority of a three judge district court had dismissed a claim that the congressional district apportionment in Georgia was grossly discriminatory. Relying on what little there was left to *Colgrove*,[57] the lower court held that it raised only "political questions" and therefore was not justiciable.[58] The Supreme Court, Justice Black for the majority,[59] reversed.[60] Black concluded that article I, section 2 of the Constitution—that "the House of Representatives shall be composed of Members chosen every second year by the *People* of the Several States"—when construed in its historical context, meant that as nearly as practicable one man's vote is worth as much as another's. The Court cited *Gray v. Sanders*[61] as authority for the "one person, one vote" rule.

Justice Clark dissented in part, arguing that article I, section 2 did not lay down the *ipse dixit* "one person, one vote" rule in congressional elections, but that the claim should have been examined according to the requirements of the equal protection clause of the fourteenth amendment.

Justice Harlan again dissented, declaring the Court's decision to be logically and historically unsound. He cited article I, section 4—that the manner of holding elections for congressional representatives was to be prescribed by the state legislatures subject to review *by Congress*—and article I, section 5—that *each house* shall be the judge of the election and qualifications of its members. Harlan then concluded that, according to those sections, only Congress and the state legislature could regulate the apportionment of congressional districts—that all the Constitution required is that Georgia's ten representatives are elected by the *people* of Georgia. While conceding that perhaps most of the framers of the Constitution believed that representation should be based on population, he doubted that they surreptitiously slipped "their belief into the Constitution in the phrase 'by

57. See Baker v. Carr, 369 U.S. 186, 310 (1962), maintaining that the overriding reason why there was no "political question" involved was that it did not relate to a co-ordinate branch of the federal government.
58. Westberry v. Vandiver, 206 F. Supp. 276 (1962).
59. See Black's dissent in Colgrove v. Green, 328 U.S. 549, 566 (1946).
60. Westberry v. Sanders, 84 Sup. Ct. 526 (1964).
61. 372 U.S. 368 (1963).

the people' to be discovered one hundred and seventy-five years later like a Shakespearian anagram."[62]

REYNOLDS v. SIMS

There was still a need for determining the basic standards and drawing applicable guidelines to implement *Baker v. Carr* as it applied to the apportionment of state legislatures. This was not long in coming, for in June of 1964 the Court ruled on claims against the constitutionality of statutes apportioning the legislatures in Alabama,[63] New York,[64] Colorado,[65] Maryland,[66] Virginia,[67] and Delaware.[68] In those cases, the Court held 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."[69] The Court rejected the federal analogy as "inapposite and irrelevant to state legislative distributing schemes;"[70] not because "such a plan is irrational or involves something other than a 'republican form of government;'" but because it involves the "submergence of the equal population principle in at least one house of a state legislature."[71]

Chief Justice Warren, writing for the majority, conceded that *Gray* and *Westberry* were not directly controlling, but held that *Westberry* had clearly established that the fundamental principle of representative government is one of equal representation for equal numbers of people. Thus the question to be determined was whether there was such discrimination against certain of the state's voters to constitute "an impermissible impairment of their constitutionally protected right to vote;"[72] and, if so, were there any constitutionally cognizable principles that would justify a departure from that principle in apportionment of state legislatures.

The court felt that the effect of giving the same number of representatives to unequal numbers of constituents was, in effect,

62. Westberry v. Sanders, 84 Sup. Ct. 526, 541 (1964).
63. Reynolds v. Sims, 84 Sup. Ct. 1362 (1964).
64. WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418 (1964).
65. Lucas v. Forty-Fourth General Assembly of Colorado, 84 Sup. Ct. 1472 (1964).
66. Maryland Comm'n for Fair Representation v. Tawes, 84 Sup. Ct. 1442 (1964).
67. Davis v. Mann, 84 Sup. Ct. 1453 (1964).
68. Roman v. Sincock, 84 Sup. Ct. 1462 (1964).
69. Reynolds v. Sims, 84 Sup. Ct. 1362, 1385 (1964).
70. *Id.* at 1387.
71. *Id.* at 1389.
72. *Id.* at 1381.

weighing the votes of citizens differently merely because of where they reside. This, they felt, was no more constitutionally permissible than denial of their right to vote altogether. Thus, when malapportionment is the result of legislative inaction despite shifts in population, there then arises an affirmative duty to reapportion;[73] and when the malapportionment is a result of the provisions of the state constitution, the supremacy clause of the federal constitution controls.

In declaring the apportionment of the state of New York to be unconstitutional,[74] the Court found that the complicated ratio system, requiring more populous counties to obtain an additional full ratio to be given more than three senate seats, was no more than a sophisticated form of discrimination. The court noted that assemblymen representing thirty-four per cent of the citizenry constituted a majority in the assembly and that those representing forty-one per cent constituted a majority in the senate. They were also impressed with the fact that there was no adequate remedy to alleviate the malapportionment other than through the state legislative process.[75]

On the other hand, the Court recognized that the initiative device in Colorado[76] provided a practical political remedy, but they nevertheless found "no significance in the fact that a nonjudicial, political remedy may be available."[77] They discounted the fact that an amendment apportioning the Colorado legislature purely on a population basis had been defeated by more than a two-to-one margin by noting that such a system would have created multi-member districts. This, they thought, would result in representatives in the more populous counties having no identifiable constituency, a scheme not "in all probability, wholly acceptable to the voters in the more populous counties."[78] And even lacking such undesirable features, the majority of

73. *Id.* at 1392-3. "Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth . . . . But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

74. WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418 (1964).

75. *Ibid.*

76. Lucas v. Forty-Fourth General Assembly of Colorado, 84 Sup. Ct. 1472, 1484 (1964).

77. *Id.* at 1486.

78. The system of apportioning South Carolina's House of Representatives contains the same "undesirable" feature.

the voters could not deny the constitutional rights of the minority.[79]

Justice Stewart, with whom Justice Clark concurred,[80] argued that a rational plan drawn in the light of a state's own characteristics and needs should be upheld. He felt that the cases should be decided by the application of those accepted principles under the fourteenth amendment that the Court recognized in *Baker v. Carr*—whether the apportionment plan reflect "*no* policy, but simply arbitrary or capricious action or inaction." Justice Stewart argued that both the New York and Colorado plans were designated in a rational way to insure the minority some voice in legislative affairs while insuring that the will of the majority would prevail.

Justice Stewart felt that the Court had converted a particular political philosophy—that of equal representation for equal numbers of people—into a Constitutional rule. And even if this should be found to be the most desirable general rule of political theory, the Constitution cannot be said to have frozen forever this one political theory into our system of government. Justice Stewart criticized the majority's decision as interpreting the Constitution not "by what it says, but by their own notions of wise political theory."[81]

Justice Harlan, dissenting, foresaw "a jarring picture of courts threatening action in an area which they have no business entering" and rendering "political judgments which they are incompetent to make."[82] In Justice Harlan's opinion, "the Constitution is not a panacea for every blot upon the public welfare"[83] and the Court should have been guided by basic concepts of judicial restraint in dealing with questions of such delicate nature.

A possible indication of the Court's refusal to further restrict, at least temporarily, the power of the states to control suffrage may possibly be inferred from its memorandum affirmance of

79. Lucas v. Forty-Fourth General Assembly of Colorado, 84 Sup. Ct. 1472, 1486 (1964). "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate. . . ."

80. WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418, 1441 (1964), Clark dissenting. "In my view, if one house is fairly apportioned by population (as is admitted here) then the people should have some latitude in providing, on a rational basis, for representation in the other house."

81. *Id.* at 1431, Stewart dissenting.

82. Reynolds v. Sims, Sup. Ct. 1364, 1412 (1964), Harlan dissenting.

83. *Id.* at 1414, Harlan dissenting.

Boineau v. Thornton.[84] Republican candidates for the state house of representatives from Richland County, South Carolina, brought an action to enjoin election officials from conducting further elections under a South Carolina statute[85] requiring a voter to vote for the exact number of candidates to be elected to a particular office or not have his vote counted.

The plaintiffs contended that a voter wishing to vote for a Republican candidate—there being only two running in a race for ten house seats—must either vote for eight Democrats or resort to the complicated write-in process. They maintained that this resulted in a dilution of Republican votes and was thus violative of their rights under the fourteenth amendment.[86]

Judge Haynesworth, writing for a special three judge district court, recognized that the statute "does impose some burden" on the Republican nominees and that such dilution could be minimized only at "the cost of some detriment to them."[87] However, in dismissing the complaint, the court found a legitimate purpose behind the statute, interpreted *Reynolds v. Sims* as prohibiting only arbitrary dilution of voting power, and held that whether "the legislature might have made it a wiser choice is not a justiciable question."[88] The Supreme Court affirmed.[89]

CONCLUSION

Baker recognized the more traditional concept of the fourteenth amendment—that it prohibited any state action that was arbitrary or capricious or reflected an invidious discrimination. The application of this standard would have involved a factual determination in each case of whether the apportionment scheme represented a recognizable and bona fide state policy that was not invidiously discriminatory against any segment of the populace. And, while the fact that an apportionment scheme was based on the federal analogy or other rational considerations would not have conclusively settled its validity, it would have been persuasive argument.

84. 235 F. Supp. 175 (1964).
85. S. C. Code § 23-357 (1962).
86. One plaintiff also maintained that the statute was violative of her right under the nineteenth amendment to cast her vote only for women candidates, but the court dismissed this contention on the grounds that the statute was "sexless."
87. Boineau v. Thornton, 235 F. Supp. 175, 178 (1964).
88. *Id.* at 182.
89. Boineau v. Thornton, 85 Sup. Ct. 151 (1964).

But *Reynolds* delineates a more inflexible constitutional standard. It prohibits any apportionment scheme that substantially deviates from the strict "one person, one vote" principle. The application of this standard does have the beauty of laying down more precise guidelines under the fourteenth amendment. But it precludes the application of those principles which, in the light of political reality, may result in a more stable state government and may even be less arbitrary and capricious than strict population based apportionment.

A possible rationalization of *Reynolds* in the light of the more traditional concepts of the fourteenth amendment runs somewhat as follows: First, it is unreasonable to allow a minority to thwart the will of the majority. And, where a majority of legislators represent somewhat less than fifty per cent of the citizenry, it follows that the will of the majority is thwarted and therefore that the apportionment scheme is unreasonable. Second, if the scheme is unreasonable, it runs afoul of the "Thou shalt not be arbitrary and capricious" pronouncement in Baker, and, hence, is unconstitutional. And third, given the above, the only constitutionally permissible system of apportionment is one in which *both* houses are apportioned substantially on a population basis.

Justice Stewart had the unkindness to refer to this type of logic as the "uncritical, simplistic, and heavy-handed application of sixth grade arithmetic."[90]

This type of rationalization rests on two basic suppositions. First, it involves the assumption that the aggregate feeling of the constituency will necessarily be reflected in the vote of their representative; and, second, it assumes a homogeneity of voters within the majority and minority districts. If these suppositions are not contrary to fact with respect to any one particular issue, they would certainly seem so when extended to the whole range of issues in the legislative spectrum.

Indeed, the homogeneity of districts necessary to validate this assumption could be promoted only by drawing district lines so as to segregate the population by major interest groupings.

90. WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418, 1432-3 (1964). Apparently Justice Stewart was more impressed with the arithmetical prowess displayed in the briefs of counsel than with that of the majority opinion. In an oral argument he credited them with the mastery of "eight grade arithmetic." 32 U.S.L. Week 3189 (1964).

This is precisely the technique prohibited in *Gomillion v. Lightfoot.*[91]

Applying similar logic and given a bare majority in each legislative district,[92] slightly more than twenty-five per cent of the electorate will elect a majority of a legislature apportioned *strictly* on a population basis. It would be absurd to contend that this twenty-five per cent will control the legislature—and equally absurd to maintain that they will thwart the will of the remaining seventy-five per cent. Similarly, the assertion that the consideration of historic, economic, or geographic factors in legislative apportionment is per se "arbitrary" or "capricious" has no more merit than the argument that apportionment purely on a population basis does no more than to place a premium on fertility.

There may be no perfect answer to the apportionment dilemma. But one thing is painfully clear: it is much too complex a problem to be solved by any such pronouncement as "legislators represent people, not trees or acres."[93]

J. KENDALL FEW

91. 364 U.S. 339 (1960).
92. The court did not prohibit the use of legislative districts. To the contrary, Chief Justice Warren regarded the lack of legislative districts and identifiable constituencies as one of the "most undesirable features" of one of Colorado's apportionment schemes. Lucas v. Forty-Fourth General Assembly of Colorado, 84 Sup. Ct. 1472, 1483 (1964).
93. Reynolds v. Sims, 84 Sup. Ct. 1362, 1382 (1964), Chief Justice Warren writing for the majority.