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South Carolina Looks at Reappointment

Thomas E. Walsh
Spartanburg, SC

SOUTH CAROLINA LOOKS AT REAPPORTIONMENT

THOMAS EMMET WALSH*

For the past two years, the problem of reapportionment of state legislatures has been talked about and written about more than any other matter affecting state government in the United States. Since June 15, 1964, there has been increasing attention given in nearly every state of the union to the historic and controversial decisions handed down on that date by the United States Supreme Court.

It is not my purpose to catalog and re-examine each and every decision in both state and federal courts affecting this subject. Because South Carolina has heard very little about the problem and has given a relatively small amount of attention and study to it, it is hoped that we can set down certain thoughts which might be of assistance in understanding our historic background and how this problem affects South Carolina.

Since 1895 the South Carolina General Assembly has very fairly and promptly reapportioned the house of representatives every ten years in accordance with the state constitution and on a population basis. It seems to the writer that the present apportionment of seats in the South Carolina House of Representatives is allocated as nearly on the basis of population as is practical. Our problem, in fact, affects the organization of the state senate. So, let us look for a moment at the two basic decisions which now constitute the law of the land unless changed by constitutional amendment.

In 1962, in a case originating in Tennessee, the Supreme Court of the United States decided the case of *Baker v. Carr*.[1] To condense this decision, we can say that the Court held:

(1) That individual voters have standing in court to prevent dilution of their voting rights.

(2) That courts must consider such claims and grant relief if warranted by the facts.

(3) That the protection of such voting rights by a court raises a question of constitutional right rather than "a political question."

* Attorney at Law, Spartanburg, South Carolina.

1. 369 U.S. 186 (1962).

(4) That in Tennessee there was "invidious discrimination" in apportioning legislative seats in violation of the fourteenth amendment.

After *Baker v. Carr*, there was either judicial, legislative or constitutional action in relation to reapportionment in forty-three out of the fifty states. In only seven states was there a complete absence of action in this regard and these states were: Alaska, Arizona, Arkansas, Minnesota, Montana, South Carolina and South Dakota.

On June 15, 1964, the Supreme Court of the United States, in the Alabama case of *Reynolds v. Sims*,[2] stated:

> We hold 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. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state.[3]

This decision indeed loosed a torrent of criticism against the Supreme Court and, at the same time, confirmed the predictions of many attorneys throughout the United States who had been fighting the reapportionment battle for many years.

Summary of South Carolina Constitutions

In order to look at these land-mark decisions from a view point of South Carolina history, a brief glimpse at the various constitutions under which the people of this state have lived is appropriate.

The constitution of 1776 was the first basic law under which South Carolina operated. It provided for a general assembly; from its own membership, the assembly elected an upper body consisting of 13 men and known as the legislative council. To be eligible as a member of the general assembly, one had to be a white man, of Protestant religion and own at least 500 acres of land, ten slaves and 1,000 £ in houses, buildings, town lots or other lands. A member was not required to live in or own land in the district or parish from which he was elected.

In commenting on apportionment under this constitution, Dr. D. D. Wallace, in his *History of South Carolina*, stated:

2. 84 Sup. Ct. 1362 (1964).
3. *Id.* at 1385.

> The General Committee settled the question of apportionment as follows: Colonel Charles Pinckney proposed thirty for the City (apparently on the basis of its thirty in the Committee) and the Country to take as many as they pleased. * * * County members suggested their parishes would not send over six, which number was accordingly adopted for each parish outside of Charleston, the two parishes of which (St. Philip's and St. Michael's) were given initially thirty. This originated the custom, enduring until after the War of Secession, of treating the City as a political unit, after which time it was merged into the County, which it dominated.[4]

In 1790, following the ratification of the United States Constitution in 1787, South Carolina again got a new constitution. This was the state's first constitutional convention with delegates elected by popular vote. Again property qualification was a part of the constitution and the governor and lt. governor were both elected by the general assembly for two years. Equitable apportionment was a burning issue at this constitutional convention. General Winn from Greenville insisted that the upcountry should receive more equitable representation because some of their districts had, in the last twenty years, increased in population 4,000 per cent. About this constitution, Dr. Wallace had the following comment:

> It is needless to say that there was no submission to popular vote of this constitution giving control of both Houses of the Legislature to one-fifth of the citizens and through the election of practically all officers from the Governor down, by the legislature, control of local government in each county as well . . .
>
> It placed control in the hands of a propertied, slave-holding aristocracy, where it remained to a degree unexampled in any other state until 1865.[5]

Under the constitution of 1790, the upper division of the state contained four times the population of the lower division. The upper division with 111,534 whites elected 54 representatives and 17 senators. The lower division with 28,644 whites elected 70 representatives and 20 senators.

4. 2 WALLACE, HISTORY OF SOUTH CAROLINA 115 (1934).
5. *Id.* at 350.

Quite obviously such disparity continued to cause unrest in the state and in 1808 a constitutional amendment sometimes referred to as "the compromise of 1808" was adopted. Under this amendment, representation between the low country and the upper country was further equalized. However, the low country divided its judicial districts into parishes, each of which had representation; whereas, in the upper country, the judicial districts were the same as election districts and had the same representation. Therefore, although there was a further equalization of representation, the low country continued to control and dominate the state from a standpoint of representation in the general assembly.

The progress of democracy in America, however, continued its slow advance and, from time to time, took hold in South Carolina. The constitution of 1865 was put into effect as a result of the presidential reconstruction program. This constitution abolished the parish system and the election districts of the low country were made to conform with judicial districts similar to those established in the up country under prior constitutions. Each judicial district constituted one election district except for Charleston which continued to have two parishes and thus entitled to two senators in the general assembly. For the first time, members of the general assembly were required to be residents of the district from which elected, and the governor and lt. governor were elected by popular vote for a term of four years. Under the constitution of 1865, the lower house continued to be apportioned according to white population and wealth. Equal representation on the basis of population was again a very critical issue. Governor Perry, a former officer in the Confederate Army, appointed by President Johnson to bring South Carolina back into the Union, made the following plea to the convention in 1865:

> Hence it is that the parish representation in the Senate is unequal and unjust. Twenty or thirty voters in one of the parishes, whose population and taxation combined entitled it to only one member of the House of Representatives, have the same representation in the Senate that three thousand voters have in Edgefield District, whose population and taxation entitled it to six members in the House. This is contrary to all republican principles of political justice and equality.

> In the early history of South Carolina, the representation in the parishes were repeatedly changed to equalize it among the respective election districts; but all such changes have been obstinately refused during the last seventy-five years.[6]

Following the Reconstruction Act of the United States a constitutional convention was called in 1868 and South Carolina again had a new constitution. For the first time in history, election districts now were called counties and, with two exceptions, had the same boundaries as previously. One important advance made in the constitution of 1868 was that the members of the house of representatives were allocated on the basis of population only. This constitution was not radically different from the constitution of 1865 but, in some respects, was a further advance in democracy. Dr. Wallace had the following comment in 1934 about the 1868 constitution:

> The new Constitution was a distinct advance in democracy, though it can hardly be doubted that this change as a part of an irresistible world movement would soon have come anyhow. On an entirely groundless analogy to the Federal Constitution, each county was allowed to keep one Senator (with two for Charleston). This undemocratic custom is now (1934) found in only two other states; but representation in the lower house was for the first time in our history based on population alone.
>
> The rudiments of a system of county government were provided which have not yet received adequate amplification.[7]

In 1895 the people of South Carolina approved the constitution under which we now operate. Under this constitution, each of the thirty-five counties were to have one senator, and the members of the house of representatives were to be apportioned on the basis of population each ten years. For the first time in the history of the state, the city of Charleston and Charleston County were treated the same as other cities and counties.

Perhaps the predominant feature of the constitution of 1895 is that it has been amended to such an extent that it is sometimes difficult to find the original constitution itself. Although probably as good a document as could have been obtained under the circumstances existing in 1895, it, nevertheless, fell far short of

6. *Id.* at 869.
7. *Id.*, vol. 3 at 256.

giving the sort of local government which the people of South Carolina needed, particularly in the field of county government. The counties were still thought of as mere instruments of the state government in carrying out its functions. One can readily see the carry-over from the days when the general assembly appointed all officers in the county as an adjunct to its duty to govern the state.

Dr. Wallace felt that the Constitution of 1895 was not as good as the people deserved.

> The rest of the constitution merely perpetuates the usual American system of a split up executive department, with a Governor denied power to execute the laws he is sworn to uphold; a legislature encumbered with local legislation and so shackled with limitations that it is frequently straining its morals to circumvent the restrictions it has sworn to observe, and a judiciary ham-strung in its race against crime and legal delays, all of which is largely a heritage of George III's teaching the American people that government is the enemy of liberty. Of the enlightened statesmenship which in a number of states have to some extent remedied these chronic evils of American state government, South Carolina has given slight manifestation. Unless something of that lesson is learned, another Constitutional Convention is useless.[8]

From a population standpoint, it is interesting to note that following the adoption of the constitution of 1895, eleven additional counties were formed in the succeeding years so that we now have forty-six. Eleven of the counties forming a part of the state in 1895 have less population today than in 1900. Although the growth has not been as pronounced as in other states, the trend is the same in South Carolina as in all other states of the Union: population growth has taken place in major urban areas in the State. This has principally come about in the Charleston area, the Greenville-Spartanburg area and the Richland-Lexington-Aiken area.

In 1900 only twenty counties had towns or cities large enough to be classed as urban. In 1960 every county in the state had a town or area which was classed as urban with the exception of Calhoun, Hampton, Jasper and McCormick. The urban population has increased from 12.8 per cent of the population in 1900

8. *Id.* at 379.

to 41.2 per cent of the population in 1960—a 47.3 per cent increase as compared to a 19.8 per cent increase in rural population.

These figures are cited to show that South Carolina has also experienced vast changes in the type of population during the time the 1895 constitution has been in effect. But state and county government has scarcely kept pace to meet the different and increased problems confronting the people.

Baker v. Carr Background

How did *Baker v. Carr* get to the United States Supreme Court? The constitution of the state of Tennessee[9] provided that the general assembly will be comprised of a senate and house of representatives. The constitution provided for a maximum number of senators and members of the house, provided for the apportionment of seats in the senate house according to the qualified voters among the counties or districts and further provided for an enumeration of qualified voters and an apportionment every ten years following the year 1871.

The last apportionment in Tennessee took place in 1901. At that time the constitution was ignored in that an enumeration of qualified voters was not made and the actual number of qualified voters in the state was ignored. In 1911 and each succeeding ten years thereafter, no further effort was made to comply with the provisions of the Tennessee constitution. Systematically since 1901, each general assembly had defeated all bills proposing reapportionment of the legislature. During the period from 1900 to 1950, the counties, represented in the action resulting in the decision by the United States Supreme Court, had experienced a substantial growth in population. Davidson County had a voting population in 1900 of 33,311 and by 1950 had grown to a voting population of 211,930. Likewise, Shelby County (Memphis) had grown in that period of time from 43,843 to 312,345. The other counties containing large urban population had experienced an equal growth. As a consequence of the changes in population, the disparity in representation between urban and rural voters reached unacceptable proportions. One rural vote was worth twenty urban votes. In 1957 an action was brought by representatives of the four major cities in Tennessee seeking a way to enforce compliance with the Tennessee constitu-

9. TENN. CONST., art. 2, § 5 (1870).

tion. It was through this effort that the case reached the United States Supreme Court resulting in the decision as outlined at the beginning of this article.

The State of Illinois is similar to Tennessee. The Illinois constitutions of 1818, 1848 and 1870 provided that the basis for apportionment in both the house and senate would be from districts that are equal or substantially equal in population. But, prior to 1955, the general assembly of Illinois had failed to re-district the senate for fifty-four years. As a result, approximately 29 per cent of the people could elect a majority of the members of the senate. In 1955 the general assembly submitted a constitutional amendment to the people which was adopted. Under this amendment, the hitherto unapportioned senate was made legal. It was this amendment that was attacked in the case of *Germano v. Kerner*.[10]

The case of *Reynolds v. Sims*,[11] arose in Alabama where little action had been taken by the legislature to re-apportion according to the state contitution over the past sixty years. In an action brought in the district court it was held that the Alabama legislature was unconstitutionally apportioned, and that there was no political or judicial remedy available. As a result of a prior decision in this court, the Alabama legislature offered two solutions to the problem. It was a combination solution passed by the Alabama legislature which was considered by the Supreme Court and held to be in violation of the Fourteenth Amendment to the Constitution of the United States.

A Little Federal Plan As Applied To States

In the case of *Baker v. Carr*,[12] the Supreme Court did not decide whether one house in a bicameral legislature could be apportioned on a geographic basis. Shortly thereafter a number of cases arose in which the apportionment of either the house or the senate on a geographic basis was challenged.

The argument was advanced that since one house of our national congress is based on the equality of man and the other house on the equality of states, such a plan should be applicable to representation in a state legislature.

Shortly after *Baker v. Carr*, Charles S. Rhyne, past president of the American Bar Association and one of the attorneys in that case, made the following statement with regard to this issue:

10. 220 F.Supp. 230 (N.D. Ill. 1963).
11. 84 Sup. Ct. 1362 (1964).
12. 369 U.S. 186 (1962).

> But the equality of man provision in the Fourteenth Amendment does expressly apply to all state laws, including those fixing representation in state legislatures. The U. S. Supreme Court, sooner or later, will not sustain unjust urban-voter discrimination on the basis of this so-called "little federal plan."[13]

In view of the decisions on June 15, 1964, this was indeed a most prophetic statement.

But, let us look further at the question of whether the history of state government supports the conclusion that both houses of a bicameral legislature should be apportioned on the basis of population.

The best statement on the apportionment of both houses of a state legislature according to population was made by the Advisory Commission on Intergovernmental Relations in December, 1962. This commission was composed of congressmen, governors, state legislators, county officials, city officials and public members and they reached the following conclusion:

> "Equal protection of the laws" would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population.
>
> The Fourteenth Amendment to the United States Constitution is an amendment designed for the protection of the people. It is not intended to protect political subdivisions, minority views, or any particular form of governmental structure. The Fourteenth Amendment is concerned with one thing, and one thing only—that each person be treated equally in the eyes of the law of each and every State.[14]

The Supreme Court of the United States in *Reynolds v. Sims*, said:

> We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our

13. Address by Charles S. Rhyne, *University of Virginia School of Law*, 1962.

14. REPORT OF THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, APPORTIONMENT OF STATE LEGISLATURES 67 (1962).

> States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.[15]

Furthermore, the political subdivisions of a state, whether they be counties, cities or by whatever name called, have never been considered soverign entities. It is clear from South Carolina history that these political subdivisions of the state have been changed from time to time throughout its history to such an extent as would meet the problems of the day. For the greater part of our history, subordinate governmental units were created by the state purely for the purpose of assisting in carrying out the state governmental functions. This was and has been the predominant characteristic of most of the states of the Union.

Thomas Jefferson, the man we often think of as the Father of Democracy in America, felt strongly that there should be equal representation in each state. He repeatedly denounced the inequality of representation provided under the 1776 Virginia constitution and proposed changing the state constitution to provide that both houses be apportioned on the basis of population. In 1819, Thomas Jefferson, in a letter to William King, said:

> Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified.[16]

I am sure it comes as a shock to many South Carolinians, as it did to me, to find that history is not what it was thought to be. Notwithstanding considerable deficiencies in local municipal and county government, South Carolina has enjoyed good government during the past sixty years. But, like it or not, the realities of the law at this moment are such that South Carolina cannot avoid studying, understanding and taking some action on the question of reapportionment. It is a most serious problem

15. 84 Sup. Ct. 1362, 1387 (1964).
16. 84 Sup. Ct. 1362, 1387 n. 53 (1964).

in state government and one which must be faced realistically, responsibly, with care and understanding.

What Should The States Do Now?

Soon after the decisions of the Supreme Court on June 15, 1964, we heard a lot of talk in South Carolina and in many other states regarding an amendment to the United States Constitution to permit one house in a bicameral legislature to be apportioned directly on population and the other house to be apportioned on the basis of geography or area. A realistic appraisal of what has happened since then leads to the conclusion that the passage of such an amendment is highly unlikely. When the Congress of the United States attempted to pass a resolution requesting the federal courts to postpone effective reapportionment orders, it met with defeat. In view of the changed composition of the United States Congress as a result of the recent national election, the possibility of obtaining any change seems remote.

In addition, even if the Congress were to pass an amendment which would give some relief, it is again highly unlikely that 38 states would ratify that amendment. At this time there has already been a very substantial reapportionment and change in an overwhelming majority of the legislatures of the 50 states. It would be difficult to see how the reapportioned legislatures would vote to go back to the old ways after fighting for so many years to achieve voting equality.

As was noted at the beginning, South Carolina is one of a very few states in which action has not already been taken by way of a state statute, state court action, constitutional convention or federal court action to comply with the decisions of the United States Supreme Court.

A second course of action would be to wait and do nothing, hoping that no interested party in the state would initiate court action in order to require a reapportionment of the senate of South Carolina. It is submitted that this would be a potentially dangerous course to follow.

A third course of action is for South Carolina to recognize the problem facing it and to set up machinery for a complete analysis and study of how the problem of reapportionment has been met and solved in the other 49 states and how it can be met and solved here. Such a study should be made by a group large enough and sufficiently representative of a majority of

the citizens of the state so that it could, as nearly as possible, present a fair analysis of the problem and suggest workable solutions.

It would seem that such a study and such an analysis should precede any legislative action and should precede any plans or thought about a constitutional convention. It is possible that a solution could be achieved through the amendment of the present state constitution. However, it would certainly be desirable to consider a constitutional convention with representatives elected directly by the people for the purpose of formulating a new basic constitution for the state.

In view of the recognized *de facto* executive authority exercised by the senator in most counties, any reapportionment from the present basis of the senate would undoubtedly result in a dislocation of county government. It is for this reason that a thorough study of new forms of county government in the state is imperative and should go hand in hand with any proposal regarding reapportionment. Coupled with a study in the improvement of county government should be a study to improve municipal government, particularly with regard to giving towns and cities more authority to control their own local affairs without application to the state legislature, the providing of tax sources to towns and cities in such a way as to eliminate "double taxation" and a system whereby towns and cities receive their share of funds sent from the state to the counties on a more equitable basis.

Reapportionment can produce chaos but it need not if we recognize and face the primary responsibility upon the people of South Carolina to meet and solve this challenge in a reasonable and fair fashion. It is to be hoped that the people of the state, acting through the governor and the general assembly, will meet this responsibility without the intervention of a court, either state or federal, and that we will use this occasion for revising or rewriting anew our state constitution and up-dating county and municipal government in South Carolina so that the pressing problems of local government can be met and solved on a local basis.