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WESBERRY v. *SANDERS*: A CASE OF OVERSIMPLIFICATION

RICHARD V. CARPENTER†

I.

INTRODUCTION

ON FEBRUARY 17 of this year, the United States Supreme Court struck a questionable blow for liberty by its six-to-three decision in *Wesberry v. Sanders*,[1] holding that the Georgia statute setting up the ten Georgia Congressional districts violated the Constitution and was hence null and void. The ground for the decision was the malapportionment of population which the statute effected among the ten districts. For example, Georgia's Fifth Congressional District, as set up under the statute, had a population according to the 1960 census of 823,680. The average population of all ten districts was 394,312, less than half of the Fifth. One district had only 272,154 people, less than one-third as many as the Fifth. Since the malapportionment was thus rather extreme, the actual result reached by the Court is not too surprising especially in the light of the Court's decision two years ago in *Baker v. Carr*.[2]

II.

BAKER V. CARR

Baker v. Carr involved the malapportionment of population under the Tennessee statute prescribing the state legislative districts. It overruled or at least substantially modified the decision of *Colegrove v. Green*.[3] In *Baker*, the Supreme Court held: (1) that federal courts have subject matter jurisdiction over claims that state legislative apportionments have violated rights to equal protection under the Fourteenth Amendment, (2) that voters have standing in court to assert such claims and (3) that such claims present justiciable causes of action despite prior contrary decisions with respect to "political decisions." The decision, however, still left some reason to speculate that the Court

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1. ... U.S. ..., 84 S.Ct. 526 (1964). Justices Harlan and Stewart dissented. Mr. Justice Clark dissented with respect to the "one man, one vote" principle.

2. 369 U.S. 186, 82 S.Ct. 691 (1962).

3. 328 U.S. 549, 66 S.Ct. 1198 (1946), a landmark decision seemingly indicating that the Court would not get involved in a "political question" of which the present case is an example.

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might be more reluctant in intervening to correct inequality in Congressional districting than it was in intervening to correct state legislative apportionments. The reason, of course, was that sections four and five of article one of the Constitution seem so explicit in vesting in Congress, rather than in the courts, the ultimate supervisory power over Congressional apportionments. The *Wesberry* decision leaves no further room for such speculation.

Baker v. Carr did not adjudicate the merits of the claim of unconstitutional discrimination in the Tennessee scheme of apportionment. The Supreme Court merely remanded the case to the lower court without indicating any guidelines for definition of the latitude, if any, which is left to legislators in weighing the vote cast in one district more than the vote cast in another district. Mr. Justice Clark, however, in his concurring opinion, did try to be constructive. At one point he declares: "No one — except the dissenters [Harlan and Frankfurter] . . . — contends that mathematical equality among voters is required by the Equal Protection Clause."[4] Moreover, he refers favorably to the apportionment policy incorporated in Tennessee's Constitution, calling it "rational" and "reasonable."[5] To his mind it would have raised no constitutional problem if the Tennessee legislature had complied with the state constitutional policy. Yet the Tennessee Constitution prescribed that a county with a population equal to .67 of the average representation ratio (of population) would be entitled to one representative, whereas a county with 1.5 times the ratio would be entitled to no greater representation. This, of course, could lead to variances between the value of votes in individual counties substantially in excess of 2 to 1. Still Mr. Justice Clark apparently would approve.

Under the facts of *Baker*, a single vote for a state representative in one Tennessee county was said to be worth 19 votes in another county. Thirty seven per cent of the voters of the state (mostly rural) elected 20 of the 33 Senators, while forty per cent of the voters elected 63 of the 99 members of the House. As a consequence, the Tennessee majority voters were in a permanent bind, since by reason of the malapportionment the minority rural voters were entrenched in their control of the only political machinery by which the malapportionment could be cured, and they were not apt to relinquish that control voluntarily. Referring to these facts Mr. Justice Clark said:

> Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the

4. 369 U.S. 186, 258, 82 S.Ct. 691, 732 (1962).
5. *Id.* at 253–54, 82 S.Ct. at 729.

> people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' Tennessee has no initiative and referendum. . . . The people have been rebuffed at the hands of the Assembly.[6]

It is clear from this expression of Mr. Justice Clark's views that he would still leave to the legislatures very broad discretion, indeed, in the apportionment of population among voting districts. He remained consistent with these views in the *Wesberry* case when he voted in favor of remanding the case to the lower court for a hearing on the merits in accordance with the standards laid down (by him) in *Baker v. Carr*.[7]

III.

ONE-MAN-ONE-VOTE PRINCIPLE

We have already remarked that the actual result reached in the *Wesberry* decision is in line with the *Baker* decision and should have caused no great surprise. Mr. Justice Black's opinion, on the other hand, is another matter. He stands firmly for the one-man-one-vote principle, by which he means an *equal* vote for every man. He says:

> We hold that, *construed in its historical context,* the command of Art. I, § 2, that Representatives be chosen 'by the People of the Several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's . . . . To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention.[8] (Emphasis added.)

He concludes his opinion in the same vein:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[9]

Most of Mr. Justice Black's opinion is taken up with a development of his "historical context" which he believes supports the "command" which he has read into article one, section two of the Constitution. Mr. Justice Black's forays into history can be painful. He has a procrustean gift for stretching or lopping facts of history to fit the

6. *Id.* at 258–59, 82 S.Ct. at 732–33.
7. 84 S.Ct. 526–36 (1964).
8. *Id.* at 530.
9. *Id.* at 535.

result he wishes to attain.[10] After reading Mr. Justice Harlan's critique of Black's "historical context," one wonders why sheer embarrassment did not cause the latter to recast his argument. In introducing his comment on the majority opinion Mr. Justice Harlan includes these words:

> Stripped of rhetoric and a 'historical context' . . . which bears little resemblance to the evidence found in the pages of history, . . . the Court's opinion supports its holding only with the bland assertion that 'the principle of a House of Representatives elected, by the People' would be 'cast aside' if 'a vote is worth more in one district than in another' . . ., *i.e.*, if congressional districts within a State, each selecting a single Representative, are not equal in population.[11]

Harlan's development of this thesis seems incontrovertible. Mr. Justice Clark says of it: "[I]n my view, Brother Harlan has clearly demonstrated that both the historical background and language preclude a finding that Art. I, § 2, lays down the *ipse dixit* 'one person, one vote' in congressional elections."[12] Mr. Justice Stewart added tersely: "I think Mr. Justice Harlan has unanswerably demonstrated that Art. I, § 2, of the Constitution gives no mandate to this Court or to any court to ordain that congressional districts within each State must be equal in population."[13]

The appendix to Mr. Justice Harlan's dissent in the *Wesberry* case[14] discloses wide variances between the populations of the existing congressional districts of the several states. In seventeen states the maximum variance ratio exceeds 2 to 1, including six states in which it runs higher than 3 to 1, including two states (Texas and Michigan) in which the maximum variance ratios exceed 4 to 1. Even if the Court should eventually tolerate population variances within the ratio of 1.5 to 1 (which is the maximum tolerance proposed under a bill currently under consideration by the House Judiciary Committee), the congressional districting in no less than twenty-eight states would apparently run afoul of the new mathematical equality rule. Enormously

10. *E.g.*, Mr. Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1683 (1947). There he presented a pretentious historical argument in support of his "bill of rights" theory of the Fourteenth Amendment, extending over 24 pages plus a 32 page appendix. The argument provoked the well-known 200 page refutation by Charles Fairman and Stanley Morrison at the end of which Professor Morrison remarked: "The real significance of Adamson v. California is that four of the judges [namely, the dissenters: Black, Douglas, Rutledge and Murphy] are willing to distort history, as well as the language of the framers in order to read into the Constitution provisions which they think ought to be there." Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 162 (1949); see also Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

11. 84 S.Ct. 526, 538 (1964).

12. *Id.* at 535.

13. *Id.* at 553.

14. *Id.* at 551.

greater malapportionment exists in state legislative districting.[15] The practical and political results of such evidence are legion.

A curious feature of the Court's *Wesberry* opinion is its total reliance on article one, section two of the Constitution, without once invoking the sanction of the Fourteenth Amendment on which the petitioner had principally relied throughout the proceedings. One may speculate as to whether this fact has any significance for us.

IV.

GENERAL DISCUSSION

The *Wesberry* decision is revolutionary. From the beginning of our nation's history, those concerned with the process of legislative apportionment have given consideration and weight to factors other than the proportionate number of voters or population in the respective voting districts. The most notable instance of this is found in the Constitution itself, which allocates two senators to each state, regardless of population. In addition, we have traditionally given weight to such items as state and county lines and geographical barriers, as well as the relative density of population, ease of communication and the unity or diversity of interests within given areas. As Mr. Justice Harlan said of the majority opinion:

> [B]y focusing exclusively on numbers in disregard of the area and shape of a congressional district as well as party affiliations within the district, the Court deals in abstractions which will be recognized even by the politically unsophisticated to have little relevance to the realities of political life.[16]

What can the Court majority say of the equality of a Democrat voter in a solid Democratic district as compared to a Republican voter in any district where the Republicans have a small majority? If the Court should carry its predilection for vote equality to its logical ultimate, it should impose on us, by judicial fiat, an "at large" system of elections either by proportional representation or by cumulative voting. Judging from other countries which "enjoy" vote equality under systems of proportional representation, this would probably lead to a proliferation of parties and factions, to the destruction of our two-party system and to further instability of government. We confess that we do not actually expect this Court to reach any such "parade of horribles." It is well to bear in mind, however, that revolutions today are achieved by the "salami slicing technique," one slice at a time.

Generally speaking, it seems unfortunate that the Supreme Court should be the branch of government to initiate revolutionary changes

15. See tables in Tyler, *Court Versus Legislature*, 27 LAW & CONTEMP. PROB. 390, 391, 393 (1962).
16. 84 S.Ct. 539 (1964).

which uproot long established laws and customs. Law in a democracy should be based on the consent of the governed. Thus, the moving force of revolutionary changes in law should be the legislature, which is the most democratic branch of government — the one most responsive to the popular will. The Court, on the other hand, is the least democratic branch of our government and seems least suited to introduce radical innovations in the law, uprooting established and perhaps cherished practices and customs, when Congress and the legislatures have not seen fit to act.

The *Wesberry* Court would apparently freeze its new "mathematical equality" rule into a constitutional absolute. It presumably would subject to such absolute all efforts of the political representatives of government who might seek to accommodate area and economic groups in an effort to achieve more delicate balances of power, or to obtain more adequate representation of minority interests or areas.

The fact remains, of course, that constitutional law is what the Supreme Court says it is from time to time, regardless of error or weakness in the reasons given, or even the total absence of such reasons. A majority of the justices appear to regard self-restraint not as a judicial virtue, but as indication of timidity unworthy of judges sitting on the highest Court in the land. The Court has assumed the unabashed role of a super-legislature, which may freely make new law by overruling or disregarding all precedents, even its own prior decisions, whenever a change of personnel shifts the weight of judicial predilection from one side of a question to the other. In a recent disagreement as to the theory underlying a decision, Mr. Justice Douglas challenged the majority with these words: "[H]appily, all constitutional questions are always open. Erie R. Co. v. Tompkins. . . . And what we do today does not foreclose the matter."[17]

V.

CONCLUSION

Mr. Justice Clark, in both his *Baker* and *Wesberry* opinions, has indicated a middle ground by which the Court could prod Congress and the state legislatures to take appropriate political action to achieve a rational reapportionment of voting districts. He has suggested standards or guidelines which would leave considerable leeway to the

17. Gideon v. Wainwright, 372 U.S. 335, 346, 83 S.Ct. 792, 798 (1963). Here involved was the "bill of rights" theory of the Fourteenth Amendment which Mr. Justice Douglas avows. It is curious to compare Mr. Justice Douglas' words quoted in the text to the earlier language of Mr. Justice Frankfurter who rejected the theory. He wrote: "The notion . . . has been rejected by this Court again and again, after impressive consideration. . . . The issue is closed."

legislative branches to work out flexible solutions. Mr. Justice Clark, of course, represents a minority, but there are two other possibilities which leave small openings of hope for those who would like to see a moderate — and reasonable — solution of the problem.

First. Shortly after the *Wesberry* decision, the House Judiciary Committee decided to hold hearings on a proposed bill which would set standards of equality in population, compactness and contiguity for congressional districts. The bill in its proposed form would permit variations of twenty per cent in the population of districts either above or below the average. Thus, if the average population per district within a state were 100, the proposed bill would permit variations of from 80 to 120, or a maximum variance ratio of 1.5 to 1. If Congress should enact this bill, thus purporting to fulfill the supervisory functions explicitly ascribed to it by article one, section four of the Constitution, it remains to be seen if a majority of the Court would have the temerity to intervene on the ground that the Congressional standard does not meet the mathematical equality which the *Wesberry* Court would canonize into a constitutional absolute.

Second. We have referred above to the possible significance of the fact that the *Wesberry* majority opinion failed to invoke the sanction of the Fourteenth Amendment on which the petitioners had principally relied. One wonders if perhaps at least some of the Court's majority impute to the due process clause and to the equal protection clause of the Fourteenth Amendment a less exacting standard of mathematical equality in legislative apportionment. This would be in accord with Mr. Justice Clark's observation in his *Baker* opinion that none of the seven judges concurring in that decision contended that mathematical equality among voters is required by the equal protection clause.[18] If so, we could hope to see the Court distinguish between the standards imposed on the apportionment of Congressional districts and those imposed by the Fourteenth Amendment on the apportionment of state legislative districts. Any such future distinction by Mr. Justice Black, however, seems unlikely if we are to read any significance into his *Wesberry* rhetoric which equates mathematical equality with "our fundamental ideas of democratic government" and with "the high standard of justice and common sense which the Founders set for us."[19] Other members of the majority, perhaps, may be more inclined to relax the canon of mathematical equality in dealing with state legislative apportionment.

In any event the play is not yet over.

18. Baker v. Carr, 369 U.S. 186, 258, 82 S.Ct. 691, 732 (1962).

19. Wesberry v. Sanders, 84 S.Ct. 530, 535 (1964).