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Constitutional Law - Apportionment and Election of Members of State Legislatures - Validity of Multi-Senatorial Districts

Thomas H. Andrews

RECENT CASE

CONSTITUTIONAL LAW—APPORTIONMENT AND ELECTION OF MEMBERS OF STATE LEGISLATURES—VALIDITY OF MULTI-SENATORIAL DISTRICTS—In an original action in the nature of quo warranto, the petitioners asserted that respondents, state senators elected from multi-senatorial districts, held their offices in the contravention of section 29[1] of the North Dakota Constitution, and therefore respondents' continuation in office was an unconstitutional usurpation of authority. Petitioners maintained that section 29 states each senatorial district shall be represented by one senator and no more. Respondents contended that section 29 had been declared unconstitutional by the federal court and therefore is no longer in effect and incapable of violation.[2] Respondents further argued that the 1960 reapportionment amendments of the North Dakota Constitution, including section 29, were adopted by the people with the intent to enact a "little federal system"[3] and subsequent United States Supreme Court decisions have rendered a scheme, not based on population, invalid. Finding that there was a failure to make allowance for future population changes, the Supreme Court of North Dakota *held* that permanently constituted senatorial districts were invalid as envisioned under section 29 of the North Dakota Constitution. The court *further held* section 29 unconstitutional as an invalid expression of the people's intent when considered without single senatorial districts. *State ex rel. Stockman v. Anderson*, 184 N.W.2d 53 (N.D. 1971).

In 1964 the Federal District Court for North Dakota in *Paulson v. Meier*,[4] declared section 29 as well as sections 26 and 35 of the North Dakota Constitution and section 54-03-01 of the North Dakota Century Code unconstitutional as violative of the Equal Protection Clause of the fourteenth amendment to the Federal Constitution.[5]

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1. Section 29 provides: "Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more."

2. Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964).

3. The term "little federal system" was quoted by the court in Stockman and refers to the theory propounding a state form of government modeled after the representative requirements of the federal government. State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53, 56 (N.D. 1971). This analogy was struck down by the United States Supreme Court in Lucas v. Forty-Fourth General Assembly of the State of Colo., 377 U.S. 713, 734 (1964), where the Court again held that both houses must be apportioned "substantially on a population basis."

4. Paulson v. Meier, 232 F. Supp. 183, 186-7 (D.N.D. 1964).

5. Sections 26, 29 and 35 of the North Dakota Constitution were amended by the people of the state in June 1960. Section 26, as amended, merely provides that the North Dakota senate shall be composed of forty-nine members. Section 35 sets out the appor-

The effect of this decision was to leave North Dakota without an apportionment plan. One year later, the Federal District Court, having retained jurisdiction, declared House Bill 566, North Dakota's legislative attempt at enacting a new apportionment law, invalid on the same Equal Protection Clause grounds.[6] The Federal District Court thereupon adopted its own reapportionment law for the State of North Dakota. This law, termed the Smith Plan, utilized multi-senatorial district representation. The petitioners in *Stockman* alleged this act by the Federal District Court was done without regard to the specific constitutional mandate of the North Dakota Constitution, that each district shall be represented by one senator and no more.

The decision of the North Dakota Supreme Court in *Stockman* appears, on the face of it, to be more or less of an affirmation of the Federal District Court's ruling in *Paulson v. Meier*.[7] It is significant that the court does not discuss the validity of multi-sentaorial districting but rather confines itself to the issue of the constitutionality of section 29.[8] However, the silence of the court has the effect of supporting multi-member districting in North Dakota with the caveat that any apportionment scheme must be based on the "discoverable standards" provided by the Equal Protection Clause.[9] What these "discoverable standards" are has been the subject of numerous court inquiries since the United States Supreme Court first assumed jurisdiction in apportionment cases in *Baker v. Carr*.[10]

The *Baker* decision was clarified by a series of decisions collectively termed the *Reynolds Cases*,[11] handed down by the Court in 1964. The main case, *Reynolds v. Sims*,[12] was relied on by the Supreme Court of North Dakota in affirming that any legislative attempt to freeze state district representation without regard to future population changes would clearly be invalid as violative of the Equal

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tionment procedures for the state and determines the manner of representation for the house of representatives. It is based on the permanently drawn senatorial districts. State *ex rel.* Stockman v. Anderson, 184 N.W.2d 54, 55 (N.D. 1971).

6. Paulson v. Meier, 246 F. Supp. 36, 39-43 (D.N.D. 1965).

7. *Id.*

8. To date North Dakota is still without its own legislatively enacted apportionment scheme and is dependent upon the Smith Plan enunciated by the Federal District Court in Paulson v. Meier, 246 F. Supp. 36 (D.N.D. 1965). The scope of the issue presented in Stockman brought before the North Dakota Supreme Court the opportunity to clarify the judicial parameters of multi-member districting for the benefit of the state's legislative body. The court's abstention from discussing the multi-senatorial districting scheme in effect shifts responsibility back to the legislature for delineating appropriate apportionment measures and leaves the legislature no alternative other than to assume that the multi-senatorial districting scheme enacted by the Smith Plan is valid as it stands. Query whether it would not have been more appropriate for the court to declare this issue *res Judicata* thereby at least clothing the Smith Plan with greater credulity?

9. State *ex rel.* Stockman v. Anderson, 184 N.W.2d 53, 56 (N.D. 1971).

10. Baker v. Carr, 369 U.S. 186, 198-204 (1962).

11. Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964); Davis v. Mann, 377 U.S. 678 (1964).

12. Reynolds v. Sims, 377 U.S. 533 (1964).

Protection Clause.[13] The *Reynolds Cases* determined that state legislatures must be apportioned according to population and thereby further enhanced the one man-one vote theory hinted at by the court in *Baker*. The *Reynolds* decision further held that the "little federal system" analogy was inapplicable to state legislative apportionment matters and also indicated that multi-member districts would be acceptable if they evinced a substantial equality of population among the various districts so that the vote of any citizen is approximately equal in weight to that of any other citizen.

In the subsequent decisions by the United States Supreme Court in *Fortson v. Dorsey*[14] and *Burns v. Richardson*,[15] the Court held that multi-member districting was not inherently discriminatory on its face and that the burden would be on the plaintiff to prove invidious discrimination before such districting would be held invalid.

In the recent *Chavis v. Whitcomb*[16] decision, the United States Supreme Court struck down an at-large multi-member districting scheme as racially and politically discriminatory. The test used was proof of invidious discrimination which was satisfied in this case by the lack of representation of a cognizable minority group.[17]

The Supreme Court of North Dakota's *sub silento* affirmation of multi-senatorial districting in the instant case leaves the legislature little in the way of constructive guidelines for future reapportionment efforts. However, the *Reynolds* caveat indicated by the court in *Stockman*, of equal voting weight and provision for future population changes indicates the court's general attitude toward reapportionment. Multi-member districting need not require mathematical precision nor does it require sophisticated geographical gerrymandering.[18] Deviations from a strict population basis for senatorial districts have been allowed in order to maintain the integrity of po-

13. The expansion of the Equal Protection Clause after Baker was first clearly enunciated by the United States Supreme Court in Gray v. Sanders, 372 U.S. 368, 380 (1963), where the Court stated: "[E]very voter is equal to every other voter in his State . . . ." The Reynolds Cases collectively began a determination of the parameters of the one man-one vote doctrine. Reynolds itself specifically held that the overriding determination of the validity of any apportionment scheme would be the neccessity of substantial equality of representation and equally weighted voting rights. The Court in Reynolds indicated that stringent requirements which may attach to apportionment schemes when it stated: "Malapportionment can, and has historically, run in various directions. However, and whenever it does, it is constitutionally impermissable under the Equal Protection Clause." Reynolds v. Sims, 377 U.S. 533, 567 n.43 (1964).

14. Fortson v. Dorsey, 379 U.S. 433 (1966).

15. Burns v. Richardson, 384 U.S. 73, 88-89 (1966).

16. Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1970).

17. In Chavis the plaintiff, a black resident of the Center Township ghetto in Indianapolis, filed a complaint in federal district court alleging that the statutes apportioning the Indiana Legislature were unconstitutional. He claimed the multi-member districting scheme denied him equal protection because it detracted from his voting power by minimizing the voting power of ghetto dwellers as a group. The court, after examination of social, economic and housing conditions of the inner city, found that this system constituted invidious discrimination and ordered that the entire State be reapportioned. Chavis, v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969).

18. Reynolds v. Sims, 377 U.S. 533-535, 577-581 (1964); Denis v. Volpe, 264 F. Supp. 425 (D. Mass. 1967), *aff'd*, 389 U.S. 570 (1968).

litical subdivisions, maintenance of compactness and contiguity in legislative districts or recognition of natural or historical boundary lines.[19] Judicial examination of various multi-member district schemes have generally concerned themselves most with the good faith effort evinced by the legislature in attempting to maximize equality of voting.[20]

The issues presented to the court in *Stockman* provided a forum wherein the court might have aided the legislature through discussion of the requisites of multi-senatorial districting. In confining itself to a determination of the validity of section 29, the court clearly evidenced a refusal to take up where the federal court left off in *Paulson*. By upholding the authority of senators elected from multi-senatorial districts and then refusing to discuss or define outright the validity of multi-senatorial districting, it would seem the court has violated its own admonition by not making allowances for the future.

THOMAS H. ANDREWS

19. Long v. Docking, 282 F. Supp. 256, 258-259 (D. Kan. 1968); Jackman v. Bodine, 53 N.J. 583, 252 A.2d 209, 210 (1969); Burns v. Gill, 316 F. Supp. 1285 (D. Hawaii 1970); Girth v. Thompson, 11 Cal. App. 3d 325, 89 Cal. Rptr. 823 (1970).

20. Bannister v. Davis, 263 F. Supp. 202-203, 206 (E.D. La. 1966); Denis v. Volpe, 264 F. Supp. 425 (D. Mass. 1967); *see* Wesberry v. Sanders, 376 U.S. 1 (1964); *But see* Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Preisler v. Sec. of State of Mo., 238 F. Supp. 187, 191 (W.D. Mo. 1965).