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The Courts and Legislative Reapportionment

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It is interesting to note that California has exactly the same statute[30] as North Dakota. It has one case[31] dealing with usury and conflict of laws which does not expressly mention the statute but in effect holds as if the statute had been applied.

Even in cases not involving usury, the courts of North Dakota have not applied this statute[32] in determining the validity of a contract when there is a conflict of laws. Instead, in such cases, North Dakota courts are inclined to apply the law of the place where the contract was made to govern validity.[33] It appears that they have merely used the statute to interpret the terms of a valid contract.[34]

It is not certain if North Dakota courts would apply the statute or the dictum of *United States Savings and Loan Co.* v. *Shain*[35] in cases involving usury and conflict of laws. One might conclude, however, that the above case would be authority for usury cases in North Dakota. As a result this state would follow the weight of authority, applying the law of the state which would uphold the validity of the contract when there is no express stipulation therein, so long as that law has some natural connection with a vital element of the contract.

G. EUGENE ISAAK

THE COURTS AND LEGISLATIVE REAPPORTIONMENT

INTRODUCTION

Disproportioned legislatures stem from two causes. One reason is that some state constitutions call for representation in one house based on things other than population. The other reason is that legislators fail to act on the provisions for reapportionment as outlined by their respective state constitutions.

Disproportion may also be of two different kinds. One type is the unequal population of the districts, while the other variety is encountered by physical manipulation of the shape of the districts. This article will primarily deal with the legislators failure to re-

30. Cal. Civil Code Ann. § 1646 (West 1954).

31. Kraemer v. Coward, 2 C.A.2d 506, 38 P.2d 458 (1934) (where place of performance was either California, Michigan, or at such place as holder of note should select. Payment was actually made in California; therefore, California law was used to determine usury).

32. N.D. Rev. Code § 9-0711 (1943).

33. Douglas County State Bank v. Sutherland, 52 N.D. 617, 204 N.W. 683 (1925) (dissent would apply place of performance); Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 209, 202 N.W. 404 (1924).

34. Kansas City Life Ins. Co. v. Wells, 132 F.2d 224 (8th Cir. 1943); Cosgrave v. McAvay, 24 N.D. 343, 139 N.W. 693 (1913) (had the place of payment not been stipulated, the contract is to be *interpreted* according to the law and usage of the place where it is made).

35. 8 N.D. 136, 77 N.W. 1006 (1898).

apportion districts where there have been population shifts great enough to cause malapportionment. This paper assumes that a legislature which does not equably represent the people of a state contains an innate weakness which limits the effective functioning of that government on many types of problems.[1]

It is the thesis of this article that the courts have a duty to aid in abolishing these "rotten borroughs."[2]

> "The question is not whether the courts can do everything but whether they can do something. Moreover, the cleavage between growth from within and alteration imposed from without is not absolute. Education and the practice of self improvement may be fostered by judicious judicial intervention."[3]

Legislative reapportionment and redistricting enactments are now universally recognized as a proper subject for judicial inquiry,[4] but in the past the courts have hesitated to enforce existing constitutional provisions for timely reapportionment.[5]

It appears that the majority of the various reasons the courts have given for denying relief can logically be divided, for the purposes of this paper, into two groups. The first classification will deal with the reasons given by the court in denying relief because of innate weaknesses in the cases brought by the plaintiffs. The second group of reasons to be discussed involve cases which were dismissed because of judicial extension of recognized doctrines. The question of whether the court has jurisdiction to entertain these suits is discussed later.

CASES HAVING INNATE WEAKNESSES

The courts have dismissed cases which they felt, in the exercise

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1. In a study of reapportionment in Minnesota, the following evils attending legislative disproportion were given:
   1. Decline in legislative prestige;
   2. Concentration of power in federal government;
   3. Insoluble urban problems;
   4. Home rule is often denied, limited, or taken back by rural dominated legislatures;
   5. Elimination of unnecessary local government units has often been opposed by rural blocs;
   6. Unfair distribution of taxing power and receipts;
   7. A disrespect for the law on the part of the legislators and citizens,

League of Women Voters of Minnesota, Democracy Denied, pp. 8-12 (1954). For a more detailed analysis of legislative reapportionment, see the symposium on this problem in 17 Law & Contemp. Prob., 253 (1952).

2. Boroughs, which at the time of the Reform Act of 1832 contained few voters, yet retained the privilege of sending a member to Parliament. Hence, by extension, any political unit in a republican form of government that has more than its due proportion of representatives in a representative body.

3. Freund, *The Supreme Court And Civil Liberties*, 4 Vand. L. Rev. 533, 552 (1951).

4. See Walter, *Reapportionment of State Legislative Districts*, 37 Ill. L. Rev., 20, 23 (1942).

5. Colegrove v. Green, 328 U.S. 549 (1946). *Contra*, Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956).

of judicial discretion, were without merit. The Minnesota Supreme Court in *State ex rel. Meighen* v. *Weatherill*[6] refused to declare a reapportionment act, passed the year before, invalid on the grounds of unequal population. The court said perfect exactness is neither required nor possible. In another suit to compel the secretary of state to redistrict in accordance with a law based on popular initiative rather than one passed by the legislature six months later, it was held that the petitioner failed to prove disproportion between representation and distribution of population.[7]

Suits have also been dismissed for technical reasons. One of the reasons relief was denied in *Remmey* v. *Smith*[8] was that the suit was premature because the legislature was still in session and had an opportunity to enact a new reapportionment law. In *Colegrove* v. *Green*,[9] Justice Rutledge, who cast the deciding vote, felt there wasn't enough time left to effectuate the requested change in the law before the election. Due to this lack of time he felt an election at large might be an instance where "the cure sought may be worse than the disease." Justice Rutledge expressed essentially the same views in *MacDougall* v. *Green*[10] two years later.

Courts have denied suits where the relief asked for would have a crippling effect on the government. Cases in this group are those where a party seeks to have declared void statutes passed by a legislature elected under an invalid apportionment act,[11] or to oust by quo warranto proceedings legislators sitting in session,[12] or to restrain the United States Collector of Internal Revenue from collecting income tax in a state,[13] or to enjoin the expenditure of public funds to carry out an election.[14]

DISMISSAL BECAUSE OF EXTENSION OF RECOGNIZED DOCTRINES

One of the principles applied to reapportionment suits is that the courts will not involve themselves in political matters. In *Colegrove* v. *Green*,[15] the leading case on reapportionment, Justice Frankfurter stated the issue was of a political nature and therefore not for judicial determination. In *Remmey* v. *Smith*,[16] *Perry* v. *Fol-*

6. 125 Minn. 336, 147 N.W. 105 (1914).
7. State *ex rel.* O'Connell v. Myers, 319 P.2d 828 (Wash. 1957).
8. 102 F. Supp. 708 (1951).
9. 328 U.S. 549, 566 (1946).
10. 335 U.S. 281 (1948).
11. People v. Clardy, 334 Ill. 160, 165 N.E. 638 (1929).
12. People *ex rel.* Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930).
13. Keogh v. Neely, 50 F.2d 685 (7th Cir. 1931) *cert denied*, 284 U.S. 583 (1931).
14. Daly v. County of Madison, 378 Ill. 357, 38 N.E.2d 160 (1941).
15. 328 U.S. 549 (1946).
16. 102 F Supp. 708 (1951).

som,[17] and *Radford* v. *Gary*,[18] three subsequent well known Federal Court cases on reapportionment, the court also felt they should stay away from political issues.

In 1903, Justice Holmes speaking for the majority of the court, denied a negro plaintiff all relief on the grounds that a political question was involved.[19] It is interesting to note that twenty-four years later in reversing the judgment of a lower court, which dismissed the plaintiff's petition on the ground that a political question was involved, the same Justice Holmes stated that the objection that the subject matter of the suit is political is little more than a play on words.[20] Chief Justice Stone stated that "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."[21] In discussing whether a question was justiciable or not because the issue was political in nature, Chief Justice Fuller said " . . . the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States . . . . "[22] The political-question doctrine alone is an unconvincing basis for a decision to turn on since malapportionment so plainly resembles state discrimination of the kind often remedied by the federal courts.[23]

The separation of powers doctrine has been put forth by the courts as a reason for denying relief in reapportionment suits.[24] But upon close scrutiny this idea loses its vigor. One has only to view the United States Government today to take notice of the liberal construction of the doctrine of separation of powers. The creation of administrative tribunals allows executive elements of the government to perform judicial functions. The delegation of rule making powers to administrative agencies permit elements of the executive branch to perform legislative functions. The congressional investigative power, so widely ordained today, smacks of a judicial nature. The important purpose of this doctrine is the protection of the people from the arbitrary usurpation of power.[25] It stands to reason then that refusal of the courts to grant redress, because of violation

17. 144 F. Supp. 874 (N.D. Ala. 1956).
18. 145 F. Supp 541 (W.D. Okla. 1956).
19. Giles v. Harris, 189 U.S. 475 (1903).
20. Nixon v. Herndon, 273 U.S. 536, 540 (1927).
21. Snowden v. Hughes, 321 U.S. 1, 11 (1944).
22. McPherson v. Blacker, 146 U.S. 1, 23 (1892).
23. Snowden v. Hughes, 321 U.S. 1 (1944); Nixon v. Herndon, 273 U.S. 536 (1927).
24. Fergus v. Marks, 152 N.E. 557 (1926). *Reapportionment: Is It Really a Political Question?* 17 La. L. Rev. 593, 596 (1957). The author has collected cases in point in this article in footnote 19.
25. Parker v. Riley, 18 Cal.2d 83, 113 P.2d 873 (1941) (dictum).

of the theory of separation of powers, does not preserve the integrity of the legislature but grants an insidious usurpation of power to a minority group. This is precisely what this doctrine was designed to prevent. Therefore if relief was granted it would not violate the doctrine of separation of powers but uphold the basic principles of that doctrine. Is it not logical and justifiable that the doctrine of separation of powers should yield where its application only serves to deprive citizens of their civil rights?

The doctrine of state sovereignty is another principle upon which federal courts ground their refusal to give relief. Federal District Judge Grooms in an Alabama reapportionment case,[26] used strong language to defend state sovereignty. "If the federal courts attempt to exercise the sovereignty vested in the States, as plaintiff here seeks, state sovereignty will suffer serious if not fatal impairment . . . . When our fathers founded these States and established this Union, it [state sovereignty] was one of the corner posts in the constitutional barriers which they erected to shield their newly won rights from the tyranny of the all-powerful state. No federal court should remove or mar these ancient landmarks, 'which they of old times have set in thine inheritance'."

It seems that the judge did not take notice of the Supreme Court decisions in the school segregation cases.[27] Here the alleged delicacy of federal-state relations as a reason for denying protection of the Fourteenth Amendment is certainly battered down. The right to an equal voice in the choice of representatives appears even more important than the right to an equal education.

Some state courts have adopted the viewpoint that if the statute was valid when enacted it is still valid no matter how extreme a population shift took place since that reapportionment was enacted, since the courts are precluded from coercing the legislature to enact a new statute.[28] Thus it seems the separation of powers doctrine will not allow an outdated reapportionment statute to become unconstitutional.[29] This idea certainly lacks logic as the idea behind the reapportionment statutes is that the shifting population is to be accorded its fair share of representation periodically. It is submitted that the court, in approving the once valid still valid theory, failed to grant sufficient weight to cases

26. Perry v. Folsom, 144 F. Supp. 874, 877 (N.D. Ala. 1956).
27. Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 916 (1952).
28. Daly v. County of Madison, 378 Ill. 357, 38 N.E.2d 160 (1941).
29. Smith v. Holm, 220 Minn. 486, 19 N.W.2d 914 (1945).

where subsequent changed conditions affected the constitutionality of enactments in question.[30]

JURISDICTION PROBLEM

In most of the federal reapportionment cases the court has toyed with the problem of jurisdiction either openly or implied. Some said no,[31] some said yes,[32] some wouldn't say.[33] There is virtually no question of justiciability in the state courts. Most of the plaintiffs in the state court cases have been described as citizens, voters, and taxpayers, that status being sufficient to challenge the apportionment.[34]

It appears jurisdiction should clearly exist for the federal courts because of the clear violation of the due process clause of the Fourteenth Amendment.[35] Further, it seems that a person is given a definite right to bring suit in federal court under 42 U.S.C.A. § 1983[36] and 28 U.S.C.A. § 1343 (3).[37] *United States* v. *Cruikshank*[38] made it clear that while the right to vote in a state election is conferred by the state, the right to be protected from unlawful discrimination comes from the United States and is a federally protected right that is enforceable in the federal courts.

Colegrove v. *Green*[39] appears to have decided that a federal court has jurisdiction on reapportionment questions. In the three, one, three decision, three of the justices felt the court lacked jurisdiction and three felt jurisdiction existed and should be exercised. Justice Rutledge, in his deciding vote, felt jurisdiction was present but that it should not be exercised in this particular case.

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30 Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education, 347 U.S. 483 (1954); Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405 (1935).

31 Perry v. Folsom 144 F. Supp. 874 (N.D. Ala. 1956).

32 Magraw v. Donovan, 163 F. Supp. 184 (D. Minn. 1958).

33. Remmey v. Smith, 342 U.S. 916 (1952).

34. See, *e.g.*, Brooks v. State *ex rel.* Singer, 162 Ind. 568, 70 N.E. 980, 983 (1904); Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1067 (1958).

35. See Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 226 (D. Hawaii 1956).

36. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This statute is often called the Civil Rights Act.

37. "The district courts shall have original jurdisdiction of any civil action authorized by law to be commenced by any person:

"(3) . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

38. 92 U.S. 542 (1875).

39. 328 U.S. 549 (1946).

Thus, four of the seven justices decided that the court had jurisdiction.

Prior to *Colegrove* v. *Green* the United States Supreme Court took jurisdiction and reversed a Minnesota Supreme Court decision, consequently all candidates for congress in Minnesota in 1932 ran at large.[40] The United States Supreme Court also exercised jurisdiction and declared invalid a New York[41] and Missouri[42] redistricting act that same year.

RELIEF FROM SOURCES OTHER THAN THE COURT

In conjunction with dismissal of a suit the court sometimes says where the remedy lies. Justice Frankfurter in *Colegrove* v. *Green*[43] said the remedy is to secure legislatures that will apportion properly. A member of the Minnesota Supreme Court said the remedy lies in the political conscience of the legislature.[44] In *Radford* v. *Gary*[45] the court cites cases saying the remedy lies in the hands of the people through the ballot. It appears to be poor logic for the court to say the voter has a chance for redress at the polls when the people who are being short-changed on their right to equal representation have only their partial or diluted vote to use to effect this change.

The citizen may attempt to enact appropriate legislation by the iniative process or effect the calling of a constitutional convention. An amendment calling for a commission of state officers,[46] or some other constitutional device to reapportion if legislature fails to do so would work fine, but such solutions are difficult and impractical because public inertia must be overcome to adopt such enactments. The initiative, when tried, has found a rather poor reception in the courts. The Missouri Supreme Court refused to allow the use of the initiative for reapportionment stating the Missouri Constitution did not allow the initiative to be used for this purpose.[47] A Massachusetts Court declared the method inapplicable to the creation of state senatorial and representative districts.[48] The Washington

40. Smiley v. Holm, 285 U.S. 355 (1932).
41. Koenig v. Flynn, 285 U.S. 375 (1932).
42. Carroll v. Becker, 285 U.S. 380 (1932).
43. 328 U.S. 549 (1946).
44. Smith v. Holm, 220 Minn. 486, 19 N.W.2d 914 (1945).
45. 145 F. Supp. 541 (W.D. Okla. 1956).
46. N.D. Sess. Laws 1959, c. 438, § 3. This amendment to the North Dakota Constitution will be submitted to the qualified electors at the primary election in June, 1960. It provides for the Chief Justice of the Supreme Court, Attorney General, Secretary of State, and the majority and the minority leaders of the House of Representatives to make the required apportionment within ninety days after the adjournment of the legislature at the first session after each federal decennial census if the legislature fails to act.
47. State *ex rel.* Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910).
48. *In re* Opinion of the Justices, 254 Mass. 617, 151 N.E. 680 (1926).

Supreme Court upheld a reapportionment act passed by the legislature after a more fair reapportionment act was approved by the voters by popular initiative. In the four, one, four decision the court said the Washington Constitution permitted the legislature to so amend an initiative act.[49]

In Colorado though, an initiated reapportionment act was upheld over a similar legislative act passed subsequently.[50]

HOPE FOR COURT RELIEF

It seems axiomatic that if our courts enforce United States Constitutional provisions concerning the ballot against the hazard of stuffing,[51] miscounting,[52] and denial[53] that the court should also provide protection against dilution of the ballot, and disproportion of representation amounts precisely to dilution.

The hope for court intervention, especially federal court intervention, is becoming brighter. In a 1956 Hawaiian case,[54] Justice McLaughlin, speaking for the federal court in a sound and logical decision, broke away from the traditional reluctance of the federal courts to intervene in reapportionment problems. This case has been distinguished, however, because of the territorial-federal relationship involved. It has been said that state-federal relationship presents a different question.[55] However, the most recent federal reapportionment case,[56] which was brought in Minnesota in 1958, seemed to indicate a change in attitude of the federal court in dealing with reapportionment. The court in this instance deferred its decision but retained jurisdiction of the case, giving the new legislature a chance to reapportion before deciding the delicate questions involved. This unusual action evidently prompted the legislature into acting because at the next session a new apportionment law was passed,[57] the first one since 1913.[58] Consequently, the suit was dismissed without prejudice in the fall of 1959[59] because the plaintiff's prayer for relief had been satisfied. Therefore, at this time, it seems the courts are at least indirectly, again headed in the direction of preserving the equality and integrity of the ballot.

49 State *ex rel.* O'Connell v. Myers, 319 P.2d 828 (Wash. 1957).
50. Armstrong v. Mitten, 95 Colo. 425, 37 P.2d 757 (1934).
51. United States v. Saylor, 322 U.S. 385 (1944).
52. United States v. Classic, 313 U.S. 299 (1941).
53. Smith v. Allwright, 321 U.S. 649 (1944).
54. Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956).
55. Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956).
56. Magraw v. Donovan, 163 F. Supp. 184 (D. Minn. 1958).
57. Minn. Ex. Sess. Laws 1959, c. 45.
58. 1913 Minnesota Legislative Redistricting Act, M.S.A. § 2.02 et seq. (1946).
59. Magraw v. Donovan, 177 F. Supp. 803 (D. Minn. 1959).

REMEDY

In view of the foregoing, it seems a possible and practical solution to effectuate reapportionment by court action would be by the following procedure. Join the officials who run the election—secretary of state and county auditors—and ask for a declaratory judgment that the existing statute is invalid. Then ask for an injunction against these officers to prohibit further elections under that statute and for a writ of mandamus to cause an election at large. An election at large is naturally not desirable, but it is reasonable to assume that the legislators would reapportion rather than face the prospect of an election at large.

CONCLUSION

If results alone are considered, the vast majority of cases would appear to weigh against positive court action in reapportionment suits. However, the ruling factors considered by the courts in reaching their decisions are not, for the main part, inconsistent with the position urged by this article.

If by sound and logical judicial reasoning, the courts can point out innate weaknesses in a plaintiff's case, no relief will be given or should be given. But if relief is denied only on the basis of following old doctrines the court is failing to exert it's authority and influence in moulding new law where new law is necessary. The reasons for following these stodgy doctrines are unwarranted because, as applied to reapportionment suits, they were either bad law ab initio, or became so by passage of time and the trend of our government to be more cognizant of civil liberties.

The basic political right of fair representation should have the aid of the judiciary just as well as other political rights and liberties such as speech and press. This problem must be solved, and the courts should be the source of the remedy. Reliance on the legislature for action has not been effective nor is it legally required.

VANCE HILL

FAILURE TO PROMPTLY HOLD PRELIMINARY HEARING AS BAR TO CONVICTION

INTRODUCTION

In the interval between the arrest and preliminary hearing, the established safeguards against arbitrary exercise of power over the prisoner's freedom of motion ordinarily do not become effective. Until the preliminary hearing before a magistrate, a prisoner is