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THE ROLE OF FEDERAL COURTS IN THE REAPPORTIONMENT OF STATE LEGISLATURES

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A very significant readjustment, if not a revolution, in American government is now in process as a result of the authority conferred on the Federal Courts by Congress in 28 U.S.C. 1343(3) as its applicability to Article 3, §2 of the Federal Constitution has been interpreted by the Supreme Court of the United States. The need for this change and the pressures generating it have been well discussed by a number of writers[1] and it has on occasion been described as a game of "ducks and drakes,"[2] a three-act play,[3] and by other metaphors.

It is the purpose of this article to analyze the role which Federal courts have played in this process, with particular emphasis on events in Virginia.

The Primary Authorities

The jurisdictional provision upon which the entire role of the Federal Courts in the reapportionment of state legislatures is premised reads as follows:

> The district courts shall have original jurisdiction 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....[4]

Pursuant to the authority of this statute, during the past several years, civil actions have been instituted all over the United States to endeavor to use the Federal courts as the forum before which to achieve a reduction of disparities in the weight accorded the vote of an individual because he happens to live in one of our rapidly growing urban areas. A number of these cases were decided by the Supreme

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[1]*E.g.*, Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).

[2]Lucas, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases*, 38 NOTRE DAME LAW. 401 (1963).

[3]McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487 (1963).

[4]28 U.S.C. § 1343(3).

Court[5] in 1964 as a follow-up to *Baker v. Carr* (discussed *infra*) and decisions continue to come down applying these cases.[6]

The courts have derived their authority to act and to formulate standards in reapportionment matters from the first section of the Fourteenth Amendment to the Constitution of the United States and most particularly the last clause of that Section:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*[7]

Baker v. Carr—District Court Action

The initial impact of efforts toward readjustment was unleashed with the decision of the United States Supreme Court in *Baker v. Carr*.[8] In that case, a group of persons qualified to vote for members of the Tennessee legislature instituted a class action in the United States District Court for the Middle District of Tennessee for a declaration that the Tennessee Apportionment Act of 1901 was unconstitutional and for an injunction restraining the defendants from conducting any further elections under the Act. The basis of the action was an alleged violation of the Fourteenth Amendment in its utter disregard of any standard for apportionment, with a resultant gross disproportion of representation to voting population and the placement of plaintiffs in a position of constitutionally unjustifiable inequality.

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[5]Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama); Pinney v. Butterworth, 378 U.S. 564 (1964) (Connecticut); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) (Colorado); Roman v. Sincock, 377 U.S. 695 (1964) (Delaware); Swann v. Adams, 378 U.S. 553 (1964) (Florida); Wesberry v. Sanders, 376 U.S. 1 (1964) (Georgia); Germano v. Kerner, 378 U.S. 560 (1964) (Illinois); Hill v. Davis, 378 U.S. 565 (1964) (Iowa); Maryland Committee v. Tawes, 377 U.S. 656 (1964) (Maryland); Marshall v. Hare, 378 U.S. 561 (1964) (Michigan).

WMCA v. Lomenzo, 377 U.S. 633 (1964) (New York); Nolan v. Rhodes, 378 U.S. 556 (1964) (Ohio); Williams v. Moss, 378 U.S. 558 (1964) (Oklahoma); Scranton v. Drew, 379 U.S. 40 (1964) (Pennsylvania); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Meyers v. Thigpen, 378 U.S. 554 (1964) (Washington).

See also, Stout v. Hendricks, 228 F. Supp. 568 (S.D. Ind. 1964); League of Nebraska Muncipalities v. Marsh, 232 F. Supp. 411 (D.C. Neb. 1964); Paulson v. Meier, 232 F. Supp. 183 (D.C.N.D. 1964); Petuskey v. Clyde, 234 F. Supp. 960 (D.C. Utah 1964); Buckley v. Hoff, 234 F. Supp. 191 (D.C. Vt. 1964); Daniel v. Davis, 220 F. Supp. 601 (E.D. La. 1963); Baker v. Carr, 222 F. Supp. 684 (M.D. Tenn. 1963); Dyer v. Abe, 138 F. Supp. 220 (D.C. Hawaii 1956).

[6]*E.g.*, Swann v. Adams, 385 U.S. 440 (1967).

[7]U. S. CONST. amend. XIV § 1 (Emphasis added).

[8]369 U.S. 186 (1962).

The case was initially dismissed by the District Court.[9] This action was in accord with an imposing array of decisions by our highest judicial tribunal,[10] which in the lower court's opinion, stood for the proposition that the question of the distribution of political strength for legislative purposes is not an appropriate matter for Federal courts to concern themselves with, either for lack of jurisdiction or because of inappropriateness of the subject matter for judicial consideration.

The court reached the conclusion that even though a violation of the plaintiff's rights under the state and Federal constitutions by the legislature of Tennessee was clear and that the evil should be corrected without delay, the remedy did not lie with the courts. The district court found that the situation involved one of those rights guaranteed by the Constitution for the violation of which the courts cannot give redress.[11] The court appeared to be dismayed by the "political thicket" into which it was asked to inject itself, and at the time, such a reaction must have seemed highly appropriate. The remedies which would have been required to effect relief, in the court's opinion, would have amounted to a form of judicial legislation and an unwarranted intrusion into the political affairs of the state.

Supreme Court Reaction

The Supreme Court determined that the conflict between the court's judicial duty to protect individuals against violation of their constitutional right to equal protection of the laws and its further obligation to avoid interference with other branches and levels of government and intervention into political matters should be resolved differently.[12]

In holding that dismissal by the District Court was error and that the cause should be tried, the Supreme Court noted particularly the failure of the Tennessee General Assembly to reapportion for more than 60 years.[13] During this period substantial growth and shifts in concentration of population occurred in Tennessee as they have throughout many areas of the United States. The composition of the legislature as a result of continued operation under Tennessee's 1901

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[9]Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959).

[10]Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 342 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946); Colegrove v. Green, 328 U.S. 549 (1946).

[11]179 F. Supp. 824, 828 (1959); see also Colegrove v. Green, 328 U.S. 549, 556 (1946).

[12]369 U.S. 186 (1962).

[13]*Id.* at 191.

Apportionment Act[14] was such that redress of the situation was most unlikely to be forthcoming from that body, although no one could dispute that it was clearly the most appropriate organ to undertake action to correct the problem. In the case of Tennessee, the matter was further aggravated by the fact that the second most appropriate alternative, popular initiative, is not provided for in that state.[15]

Federal Courts Have Subject Matter Jurisdiction

The Court was then faced with a constitutional claim resting squarely, although not solely, upon an alleged violation of the Fourteenth Amendment's "equal protection" clause, and found it unnecessary to go further in developing a basis for consideration of plaintiff's case.[16] The circumstances were such as to cause the Court to conclude that it could not assume a role of impotence to correct the violation.

The Court held that the matter was a substantial one arising under the Constitution to which the judicial power extends under Article 3, Section 2 of the Constitution, and was therefore within the scope of 28 U.S.C. 1343 (3), and that the District Court had jurisdiction of the subject matter, regardless of whether the claim might later be established on its merits.

The Political Question is Justiciable

The Court further reviewed the matter of justiciability and the presentation of a "political question," and held that a "challenge to an apportionment presents no non-justiciable 'political question'."[17] The point was brought out in discussion that the mere fact that a suit seeks protection of a political right does not mean that it presents a political question.

Consideration of a substantial body of political question cases led the Court to the conclusion that it is the relationship between the judiciary and coordinate branches of the Federal government and not the Federal judiciary's relationship to the States, which gives rise to the political question theory. The non-justiciability of a political question was found to be primarily a function of the separation of powers rather than a product of the state-Federal relationship. The Court failed to evaluate adequately the fact that it was being asked

[14]Acts of 1901, S.J. Res. No. 35; Acts of 1901, c. 122.
[15]369 U.S. 186, 193, n.14 (1962).
[16]*Id.* at 195, n.15.
[17]*Id.* at 209.

to review an essentially legislative function even though that function would be performed by State legislatures, but instead, chose simply to look upon the political question doctrine as "... a tool for maintenance of governmental order, ... not (to be) so applied as to promote only disorder."[18] The Court also indicated that Federal courts should not stand for a "manifestly unauthorized exercise of power."[19]

The Court synopsized the factors which it had distilled from the political question cases in reaching a conclusion on the issue of justiciability in the following language:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[20]

These factors easily could have been applied to reach a different conclusion had the Court chosen to view the legislative function as a concept apart from the level of its exercise. But the Court was determined to deal effectively with the question which is ultimately involved in *Baker v. Carr* and all state legislative apportionment cases—the consistency of state action with the Federal Constitution—the resolution of which involves perhaps a partial abandonment of traditional political question precepts, although the Court did not face the point quite so frankly.

At this point, the role which the Court appeared to have fashioned for itself was one of toleration of the exercise of state power wholly within the domain of state interest insulated from judicial review, but it would not permit this insulation to carry over to situations where state power is used as an instrument for circumventing a federally protected right.

Reaction to the Decision

The awareness of the several Justices of the impact of their decision on the relationship of the Federal Courts to the states is clearly re-

[18] *Id.* at 215.
[19] *Id.* at 217.
[20] *Id.* at 217.

flected in some of the concurring opinions,[21] as is the Court's awareness of the fact that the root of the problem lies in what the state legislatures have or have not done with respect to reapportionment, rather than in weaknesses in state constitutional policy.[22]

Mr. Justice Frankfurter and Mr. Justice Harlan view the opinion of the majority with outspoken disapprobation. Their feeling is shared by a substantial body of patriotic and thoughtful citizenry throughout the country; and indeed this case has become one of several focal points in a continuing discussion of the relationship between the states and the Federal government.[23]

Criticism of Criticism

These critics, while making some valid legal objections, tend to ignore a most important point made by a State Senator and member of the Virginia Commission on Constitutional Government.[24] His comment illustrates a basic fallacy in their viewpoint, derived from its assumption that the states are sovereign, and therefore immune from certain restraints. Sovereignty under our Constitution resides with the people and they have delegated certain of its attributes to the agents they have found it necessary or desirable to establish, the states and the central government.[25] This delegation has not included permission to flaunt with impunity requirements of Federal and State Constitutional law relating to reapportionment. Neither of these agents should be permitted to forget for whose benefit they act or to become unrepresentative of the people. Nothing could be more basic to the survival of our system of government.

This view of the matter is actually entirely consistent as a matter of logic with the feelings of those who strive to maintain the basic constitutional precepts upon which our nation is established and more particularly the relative status of the states in the overall plan for our government. As is pointed out in the brief for Appellees in the Virginia Reapportionment case, genuinely representative state governments responsive to the needs of their citizens, can reverse the trend of increasing federalism, and may serve the cause of states' rights,[26] once the state governments are positioned with respect to the people in a

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[21]*Id.* at 242 (Douglas, J., concurring).

[22]*Id.* at 254 (Clark, J., concurring).

[23]*E.g.*, VA. COMM'N ON CONSTITUTIONAL GOV'T, THE TENNESSEE REAPPORTIONMENT CASE (1962).

[24]*Id.* at 20.

[25]U.S. CONST., Preamble; KY. CONST., Preamble.

[26]Brief for Appellee at 16, Davis v. Mann, 377 U.S. 678 (1964).

manner that will insure acceptance of the responsibilities that go with those rights. It is unreasonable to assume or expect that states' rights may achieve respect in an atmosphere of detachment from the electorate on the part of state governments.

Reynolds v. Sims

Baker v. Carr made it clear that the Federal Courts can and will take effective action to assure fair and reasonable apportionment of state legislative seats. Subsequent decisions have indicated the standards and remedies which the Federal courts will apply, *Reynolds v. Sims*,[27] being the lead-off of a new series of decisions by the Supreme Court in this field in 1964. This case deserves particular consideration because as the Court points out, it "is signally illustrative of the seriousness of this problem in a number of states."[28]

This case began as a challenge by certain taxpayers and voters of two urban Alabama counties of the validity of the existing apportionment provisions of the Alabama legislature, which created a 35-member state senate elected from 35 districts varying in population from 15,417 to 634,864 and a 106-member state house of representatives with population-per-representative variances from 10,726 to 43,303; and a "standby" statutory measure creating a 35-member state senate elected from 35 districts varying in population from 31,175 to 634,864, and a 106-member state house of representatives with population-per-representative variances from under 20,000 to over 52,000.

The three-judge district court held all three schemes unconstitutional, and in order to "break the stranglehold" of the rural counties on the legislature so that it could reapportion itself, the court ordered a temporary reapportionment following the proposed amendment's provision with respect to the state house of representatives and the standby statutory measure's provisions with respect to the state senate.[29]

The United States Supreme Court affirmed on direct appeal holding that the equal protection clause requires that the seats in both houses of a bicameral legislature be apportioned on a population basis as a fundamental constitutional requirement—thus indicating the source from which applicable standards for an apportionment would be derived. The Court flatly rejected the possible applicability of the

[27]377 U.S. 533 (1964).
[28]208 F. Supp. 431.
[29]377 U.S. 533, 569 (1964).

Federal analogy as a basis for a state legislative apportionment scheme.

Pursuant to the foregoing principles, the Court found the three Alabama plans in question unconstitutional as a whole and in their separate parts relating to the respective houses of the legislature. The District Court's action in ordering a temporary reapportionment to "break the stranglehold" was approved as an appropriate remedy in the situation.

Mathematical Precision Not Required

Though holding as it did, the Court yet took pains to make it clear that what the constitution required through the Equal Protection Clause was that

> "a State make an honest and good faith effort to construct districts in both houses of its legislature, as nearly of equal population as practicable.... [recognizing] that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."[30]

The Court would permit the use of political subdivision lines in establishing contiguous districts so long as the resulting apportionment was based substantially on population and the dilution of the equal population principle was insignificant. The Court refrained from spelling out any more precise constitutional test, leaving this to be developed on a case by case basis by lower courts in the context of actual litigation, but indicated that:

> "so long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both houses of a bicameral state legislature."[31]

But the emphasis must be on people, not history or economic interests or area and geography.

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[30]377 U.S. 533, 577 (1964). See Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) wherein the Court states: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

[31]377 U.S. 533, 579 (1964). See also, Dison, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367 (1963).

The Court suggests a possible solution to the dilemma created by the conflicting desire to represent each political subdivision and still maintain equal population as the basis for apportionment—create substantially more seats in the legislature than there are counties which is clearly within the discretion of each state.[32]

A decennial reapportionment appears to be the Court's objective, and where malapportionment can be corrected by enforcement of compliance with state constitutional requirements, this is the appropriate remedy, but the mandate of the equal protection clause must be complied with regardless of existing state law.[33]

As to remedies, once a given apportionment scheme has been found unconstitutional, the Court talks rather gingerly, but clearly implies that a Court would be justified in taking action to insure no further elections are conducted under the invalid plan, either immediately or at a more appropriate time-proximity of an election being considered in accordance with equitable principles.

The allowance of adequate time for corrective action by the state's legislature, which the Court recognizes as the most appropriate organ for action, is proper and appropriate. Upon the legislature's failure to take effective action to remedy the state's legislative apportionment scheme, the court may order a temporary provisional plan into effect.

Davis v. Mann

Of particular interest and pertinence to Virginia was the companion case of *Davis v. Mann*,[34] decided on the same day and as a part of a series of decisions handed down by the Court dealing with the reapportionment of state legislatures.[35] This case began in the Eastern District of Virginia[36] as a challenge of the constitutionality of the apportionment of seats in the Virginia General Assembly under which in the state senate, the population per senator disparities among the districts ranged from 61,730 to 163,401 with 41.1 per cent of the state's population electing a majority of the state senate, and in the state house of delegates, the population per delegate disparities among the districts ranged from 21,825 to 95,064, with 40.5 per cent of the state's population electing a majority of the house.

The case reached the Supreme Court on direct appeal from a

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[32]377 U.S. 533, 581 (1964). See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 698-699 (1963).

[33]377 U.S. 533, 584 (1964).

[34]377 U.S. 678 (1964).

[35]Note 5, *supra*.

[36]213 F. Supp. 577 (E.D. Va. 1963).

decision holding that the apportionment was invalid as violative of the equal protection clause.[37]

The relief sought in the case included (1) a declaratory judgment that the statutory scheme of legislative apportionment in Virginia, prior as well as subsequent to the 1962 amendments, contravenes the Equal Protection Clause of the Fourteenth Amendment and is thus unconstitutional and void, which was granted; (2) the issuance of a prohibitory injunction restraining defendants from performing their official duties relating to the election of members of the general assembly pursuant to existing statutory provisions, which was granted but stayed in effect until January 31, 1963, to give time for the legislature to act or an appeal to be taken; and (3) a mandatory injunction requiring defendants to conduct the next primary and general elections for legislators on an at-large basis throughout the state, which, as circumstances developed, did not become necessary.

Virginia Requirements

Reapportionment in Virginia is governed by state constitutional requirements setting the number of senators at no more than 40 nor less than 33 and the number of delegates at no more than 100 nor less than 90, with reapportionment to take place at least decennially.[38] This had been carried out by the Legislature in 1932, 1942, 1952, and 1962. The last two instances were done in a manner reflecting the Legislature's growing distaste for the process. The 1952 reapportionment was done by a special session of the Virginia Legislature after the regular session had adjourned without action on the matter.

In 1962, the Legislature was presented with alternative plans prepared by a gubernatorial commission on redistricting with aid of the Bureau of Public Administration of the University of Virginia. The Bureau prepared two schemes for apportionment of the House and three for apportionment of Senate seats following various criteria considered in previous apportionments, and complying with the constitutionally prescribed size limitations on both of the houses. The Commission's actual recommendation differed from the Bureau's plans, being based on political compromise, and deviated further from population-based representation. At the 1962 regular session, the General Assembly completely disregarded all of these ideas and adopted apportionment schemes of its own, making only minimal changes in existing statutory provisions, which resulted ultimately in litigation.

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[37]*Ibid.*

[38]VA. CONST. art. 4 §§ 41, 42, 43.

While requiring an apportionment decennially, the Virginia Constitution contains no express standards thus leaving the matter to the sole discretion of the Legislature. However, population has been the most important factor for legislative consideration in reapportioning and redistricting. The Legislature has also consistently refrained from splitting or dividing cities or counties whose populations entitle them to more than one representative, so that there have always been less than 100 delegate districts and less than 40 senatorial districts. Because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them which has resulted in occasional utilization of floterial districts.[39] Various other factors, in addition to population, utilized in enacting apportionment statutes by the Virginia Legislature have included compactness and contiguity of territory forming a district, geographic and topographic features, and community of interests among the people in various districts.

The 1962 amendment to the Virginia Code[40] which provided for the apportionment of the State Senate, divided the State into 36 senatorial districts for the allocation of 40 seats. Under 1960 population figures, each senator would ideally have representated 99,174 persons but the statute gave senators from the complaining jurisdictions in *Davis v. Mann*[41] up to 163,401 constituents while leaving the smallest senatorial district only 61,730.[42] The population variance ratio of 2.65 to 1 is self-evident. Approximately 41.1 per cent of the State's population could elect a majority of the State Senate.

A similar situation prevailed with respect to the House under the 1962 statute,[43] which created 70 House districts among which the 100 House seats were distributed. Ideally, each delegate would have represented 39,669 persons, but the average population per delegate in Fairfax County was 95,664 while Shenandoah County with only

[39]The term "floterial district" is of particular interest to this writer. It is used to refer to a legislative district which includes within its boundaries two or more political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned. One such district was created to represent the City of Alexandria and Fairfax County as a result of Davis v. Mann, and this writer was a candidate for that seat in the Democratic primary election of 1965.

[40]VA. CODE ANN. § 24-14 (Supp. 1962).

[41]Arlington & Fairfax Counties and the City of Norfolk.

[42]213 F. Supp. 577, 518-82 (1962).

[43]VA. CODE ANN. § 24-12 (Supp. 1962).

21,825 persons and Wythe County with 21,975 each had one delegate to the Virginia House. The maximum population variance ratio of 4.36 to 1 is once again self-evident. Approximately 40.5 per cent of the state's population lived in districts which could elect a majority of the House.

The Court in *Davis v. Mann* could not ascertain the existence of an adequate political remedy by which legislative reapportionment could be obtained,[44] since Virginia, like Tennessee, has no provision for the initiative procedure. An approach to this through amendment of the Virginia Constitution would require a vote of a majority of both houses of the Virginia General Assembly.[45]

Judicial relief from state Courts appeared as an alternative possible source of corrective action in view of the decision by the Virginia Supreme Court of Appeals in *Brown v. Saunders,*[46] wherein the Virginia Court held a congressional districting statute invalid because it conflicted with Virginia constitutional requirements[47] of equally populated congressional districts. Thus, there was precedent for the justiciability of apportionment questions, but only in the context of a clear state constitutional requirement which does not exist with respect to the state legislature. The failure of the Circuit Court of the City of Richmond to act on, and indeed to dismiss on its merits, a suit filed shortly after the Federal District Court proceeding[48] is perhaps indicative of the result that might have occurred had resort to state courts been pursued in this instance.

A contrary result was obtained from the United States Supreme Court, which upheld the finding of the District Court that the Virginia legislative apportionment violated the Equal Protection Clause, even though the Legislature in Virginia was not so malapportioned as had been the case in Alabama, Tennessee and elsewhere, and had been apportioned periodically.[49] Virginia's prime failure was simply an insufficient compliance with Federal constitutional prerequisites.

Proffered explanations in terms of military and other transient personnel were rejected as insufficient justification for the imbalance, as was the inconsistent suggestion of an effort to balance urban and rural

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[44] 377 U.S. 678, 689 (1964). But this may not have been a significant factor in the decision. See Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736-37 (1964).

[45] VA. CONST. art. 15 § 196-197.

[46] 159 Va. 28, 108 S.E. 105 (1932).

[47] VA. CONST. art. 4 § 55.

[48] Tyler v. Davis, filed in the Circuit Court for the City of Richmond, March 26, 1963.

[49] 377 U.S. 678, 690-91 (1964).

power—when considered in light of a comparison of the Richmond area with the complaining urban areas.[50] The Court tacitly approved use of the equitable remedies sought in the District Court, if their use should become necessary after allowing the Legislature ample time to enact a constitutionally valid scheme in time for the 1965 election.

This approach proved successful, as is reflected in the work of the Special Session of the 1964 General Assembly;[51] Virginia adjusted her state legislative apportionment in a manner which made it unnecessary for the jurisdiction retained by the District Court to be invoked for purposes of enforcing its order of November 28, 1962,[52] or for further proceedings to be had such as were necessitated in *Swann v. Adams.*[53]

Subsequent Litigation

However, activity and debate have continued, and the District Court has been requested to review certain facets of the aforecited 1964 apportionment statutes, particularly those provisions thereof creating an eight-member district encompassing Richmond and Henrico County, and those relating to Shenandoah County.[54] In a decision subsequently affirmed by the Supreme Court,[55] the Richmond-Henrico floterial district was sustained in the face of a claimed violation of the rights of Negroes to a chance to elect one of their race to the General Assembly. The Court indicated that "Government has no business designing election districts along racial or religious lines."[56]

However, it was found that an invidious discrimination had been visited upon Shenandoah County in joining it with a district containing 90,760 people, far above the ideal figure of 39,669. With respect to this point only, the Court set aside the 1964 apportionment of the 50th and 59th districts. It ordered in lieu thereof that the counties of Page, Rockingham, Shenandoah and the City of Harrisonburg be assigned two delegates to represent all four of these political subdivisions jointly to provide for a representation of 45,380 persons per delegate.

In all other respects the Court approved the 1964 Reapportionment Acts in order to remove any question as to the validity of subsequent legislative enactments. This case appears to have marked the

[50] *Id.* at 691.
[51] Va. Acts of 1964, chs. 1, 2 at 3-5.
[52] Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964).
[53] 385 U.S. 440 (1967).
[54] 245 F. Supp. 241 (E.D. Va. 1964).
[55] Burnette v. Davis, 382 U.S. 42 (1965); Thornton v. Davis, 382 U.S. 42 (1965).
[56] Mann v. Davis, 245 F. Supp. 241, 242 (E.D. Va. 1964), citing Wright v. Rockefeller, 376 U.S. 52 (1964).

end of litigation in Virginia over the 1964 apportionment, and with its earlier companion decisions, leaves a clear impression of what may be anticipated from Federal Courts in Virginia in the way of applicable standards and appropriate remedies. The major precedents have come down in *Baker v. Carr* and *Reynolds v. Sims,* leaving the District Courts primarily with considerable discretion as to the application of remedies, but with rather less discretion as to deviations from the "one man, one vote" standard.

Conclusion

Indeed, at this point in the evolution of the role of Federal Courts in the apportionment of state legislatures, it is becoming abundantly clear that Federal equal protection standards will be applied regardless of what other rational basis may exist for a plan and what given state constitutions may have to say on the subject. It is now equally clear that those standards will be enforced by the application of drastic equitable remedies, albeit with restraint wherever restraint will suffice. In a complex society such as ours, it is not impertinent to debate the wisdom of almost total reliance upon the population standard in the apportionment of both houses of bicameral state legislatures, and the debate does continue although shifting more to the legislative arena for the present.[57]

The real battle to determine the future of standards in this field is in fact being waged in the United States Senate under the leadership of Senator Everett Dirksen, who has headed efforts to bring about action to inject other standards into apportionment schemes through Federal legislative action and Constitutional Amendment, on the one hand, and Senators Tydings and Proxmire on the other, and in state legislatures throughout the country, thirty of which have to date passed resolutions petitioning Congress to call a constitutional convention for the purpose of proposing a constitutional amendment which would permit the apportionment of one house of bicameral state legislatures on the basis of factors other than population.[58] The Courts have played the major portion of their role, and it is now up to the people to make the final determination as to whether they wish to abide by the Courts' interpretation of the Constitution, or establish the validity of other standards through legislation.

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[57]*The National Voter,* April 1967, at 4.
[58]*Id.* p. 4.