COMMENTS

THE SUPREME COURT'S FIRST ESSAY IN THE "POLITICAL THICKET"

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Georgia's county unit system has been finally laid to rest. Declaring that "the conception of political equality . . . can mean only one thing—one person, one vote," the United States Supreme Court found in *Sanders v. Gray*[1] that the county unit system of vote-weighting is unconstitutional.

Reapportionment and vote-weighting systems such as the county unit system are two different questions which together make up the problem of malapportionment. The *Sanders* case dealt only with one phase of the problem: the county unit system as a vote-weighting device.[2] After considering briefly an outline of the legal battle culminating in the *Sanders* decision, evaluation of the decision is best obtained if it is considered in its broader context—as part of the much larger problem of malapportionment.

GENERAL BACKGROUND

The right to vote and to have one's vote counted has been abundantly affirmed by the Supreme Court.[3] And, in order to prevent "an

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1. ___ U.S. ___, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963).
2. The way in which the county unit system worked in Georgia statewide primaries at the time the *Sanders* suit was filed was as follows: Whenever a primary election for the nomination of candidates for United States Senator, Governor, statehouse officers, Justices of the Supreme Court, and Judges of the Court of Appeals was held, those candidates who received the highest number of popular votes in any county were considered to have carried such county and were entitled to the full vote of the county on the county unit basis, that is to say, two votes for each Representative such county has in the lower house of the General Assembly. Representatives in the lower house of the General Assembly are apportioned among the counties of the State as follows: to the eight counties having the largest population three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining one hundred twenty-one counties, one representative each. The majority of the county unit vote nominated a United States Senator and Governor. The plurality of the county unit vote nominated the others.
3. See, for example: Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); Wiley v. Sinkler, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); Swafford v. Templeton, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); U.S. v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1926); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1931); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

interference with the effective choice of the voters,"[4] the Supreme Court has held that protection of this right should extend to primaries: "Where the state law has made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected. . . . "[5] This holding is applicable to Georgia primaries, since Georgia operates under a one-party system where the Democratic nomination is tantamount to election.

With this background, it might seem that it would have been a relatively easy matter to have had the federal courts pass on questions of reapportionment or the constitutionality of the county unit system. But the Supreme Court in another line of decisions had refused to enter into the area of what it termed to be "political questions."

In *Colegrove v. Green*[6] the court refused to pass on reapportionment in Illinois Congressional districts, saying it would not " . . . enter this political thicket."[7] Plaintiff, in the *Colegrove* case, sought a judgment declaring Illinois statutes apportioning the state of Illinois into Congressional districts invalid, in that such districts lacked compactness of territory and approximate equality of population. In denying the relief sought, the Court pointed out that this was not an action based on the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for this suit was not a private wrong, but a wrong suffered by Illinois as a polity. Mr. Justice Frankfurter, writing for the majority, said that this was not a matter for judicial determination, that the issue was of a political nature, and that the remedy lay with the people through the ballot. "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[8] Courts, he stressed, should not usurp the function of the legislature.

After *Colegrove v. Green,* the Court's "political questions" doctrine was also extended to " . . . political issues arising from a state's distribution of electoral strength among its political subdivisions."[9] So although the Georgia county unit system has been under numerous attacks before *Sanders v. Gray,* and four of these attacks reached the

4. U.S. v. Classic, 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, 1377 (1941).
5. *Id.* at 318, 61 S.Ct. at 1039, 85 L.Ed. at 1379.
6. 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).
7. *Id.* at 556, 66 S.Ct. at 1201, 90 L.Ed. at 1436.
8. *Ibid.*
9. South v. Peters, 339 U.S. 276, 277, 70 St. Ct. 641, 642, 94 L.Ed. 834, 837 (1950).

Supreme Court of the United States,[10] the federal courts have consistently refused to decide what was considered by them to be a political question. The position was substantiated by the fact that the relief generally sought was equitable in nature, and equitable relief is discretionary.

ATTACKS ON THE COUNTY UNIT SYSTEM BEFORE SANDERS V. GRAY

In the first of the four attacks against the county unit system which reached the Supreme Court level, *Cook v. Fortson* and *Turman v. Duckworth* were decided together by the Court.[11] The *Cook* case dealt with the use of the county unity system in the Democratic primary for nominations for the office of Congressman from the Fifth District of Georgia. The candidate winning the majority of popular votes lost in that election under the county unit system. The *Turman* case dealt with the use of the county unit system in the Democratic primary for nominations for the office of Governor. Eugene Talmadge won the nomination by capturing a majority of county unit votes even though one of his opponents, James V. Carmichael, won the most popular votes of any candidate. The Supreme Court in a 6-3 decision refused to review the cases for want of jurisdiction. Mr. Justice Black and Mr. Justice Murphy thought that probable jurisdiction should have been noted. Mr. Justice Rutledge would have delayed determination of the question of jurisdiction until after the cases had been heard on their merits.

Because of the district court's advice in the *Cook* and *Turman* cases to the effect that a better case might be made if a suit were brought before the primary, plaintiffs in *South v. Peters*[12] sought a permanent injunction against the use of the county unit system in a forthcoming election for United States Senator. The district court found there was no constitutional principle forbidding the use of territorial subdivisions in conducting an election by the people. "Whether subdivisions shall be made and how closely they shall be equalized is a matter of policy, that is to say, is a political question in which courts of equity may not meddle to set up their own ideas."[13] Political relief must be sought in the state legislature or Congress. Judge Andrews in his dissent said:

10. Cook v. Fortson and Turman v. Duckworth, 329 U.S. 675, 67 S.Ct. 21, 91 L.Ed. 596 (1946); South v. Peters, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834 (1950); Cox v. Peters, 342 U.S. 936, 72 S.Ct. 559, 96 L.Ed. 697 (1952); Hartsfield v. Bell (Sloan), 357 U.S. 916, 78 S.Ct. 1363, 2 L.Ed.2d 1362 (1958).
11. 329 U.S. 675, 67 S.Ct. 21, 91 L.Ed. 596 (1946).
12. 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834 (1950).
13. 89 F.Supp. 672, 680 (N.D. Ga. 1950).

> It is difficult to imagine a more obvious denial of equal protection of the laws than that imposed on plaintiffs by the county unit system or one with less foundation in experience, practicality or necessity. . . . [T]he basis of the discrimination is *place of residence,* a discrimination not justified on any reasonable basis of classification. . . . [14]

> The right to have the vote counted includes the right to have it counted without dilution and at full value.[15]

The Supreme Court did hear the case on appeal, where four years earlier in *Cook v. Fortson* and *Turman v. Duckworth* it had denied jurisdiction. But in a *per curiam* decision it did not pass specifically on the validity of the system; it simply held that the issue had been decided in previous decisions. There was a sharp dissent by Mr. Justice Douglas, in which Mr. Justice Black concurred. He stressed that "plaintiffs sue as individuals to enforce rights political in origin and relating to political action. But as Mr. Justice Holmes said of the same argument in *Nixon v. Herndon,* . . . it is 'little more than a play upon words' to call it a political suit and therefore a nonjusticiable one. The rights they seek to enforce are personal and individual. . . . The interference with the political processes of the state is no greater here than it is when ballot boxes are stuffed or tampering with the votes occurs and we take action to correct the practice. . . . "[16]

The previous two attempts to strike down the county unit system had been made in the federal courts. In 1951, in *Cox v. Peters*[17] relief was originally sought in the state courts. Plaintiff there alleged that he had been denied certain rights and privileges due a Georgia citizen under the Georgia Constitution. Most of these rights and privileges concerned the right to vote and elections by the people. A demurrer to plaintiff's petition was sustained by the superior court judge. The Georgia Supreme Court affirmed the lower court's decision, holding that when a political party holds a primary for nomination of a party candidate, such a primary is not an election within the meaning of that term as used in the constitutional provisions relied on by plaintiff. This decision was appealed to the United States Supreme Court which dismissed the petition for want of substantial federal question. Once again Mr. Justice Douglas and Mr. Justice Black dissented, believing that probable jurisdiction should have been noted.

In 1958, Mayor Hartsfield of Atlanta field a suit in the federal district court against the president and secretary of the State Demo-

14. *Id.* at 681.
15. *Id.* at 682.
16. 339 U.S. 276, 280, 70 S.Ct. 641, 644, 94 L.Ed. 834, 838 (1950).
17. 342 U.S. 936, 72 S.Ct. 559, 96 L.Ed. 697 (1952).

cratic Executive Committee and Secretary of State Fortson. The petition claimed that the system, by diluting his vote, violated the equal protection clause of the fourteenth amendment. Hartsfield asked for a three-judge tribunal to decide the matter. (A three-judge district court is proper when the constitutionality of a state statute is in question. Furthermore, the decision of the three-judge district court can be appealed directly to the Supreme Court.) Judge Sloan denied plaintiff the three-judge panel since there was no substantial federal question involved which had not been conclusively settled by prior court decisions. Motion was filed with the United States Supreme Court for leave to file a writ of mandamus to compel Sloan to convene a three-judge court. In a 5-4 decision the Supreme Court refused to grant the motion[18]; thereby in effect the Supreme Court had once more refused to look into the merits of the county unit system.

The margin of victory for supporters of the county unit system was narrowing. Chief Justice Earl Warren and Justices Black, Douglas, and Brennan believed in the *Hartsfield* case that a rule to show cause should issue. Also in 1958 a Minnesota federal district court, refusing to follow the view that legislative reapportionment was a political question, forced the Minnesota legislature to reapportion itself.[19] Plaintiffs in the Minnesota action contended that by virtue of the substantial increase and major shifts in population within the state since 1913 (when Minnesota had last been redistricted, based on the 1910 census), there was gross inequality in representation suffered by the more populous areas of the state; *e.g.*, a vote in the fortieth district was equal to 14.7 votes in the thirty-sixth district. The Minnesota state legislature had failed to reapportion the state as required by the Minnesota Constitution. As a result, plaintiffs alleged deprivation of liberty and property without due process of law, and lack of equal protection of the laws under the fourteenth amendment. Defendants moved to dismiss the action on the ground that the court had no jurisdiction. The court denied the motion and stated it had jurisdiction because of the federal constitutional issue asserted. It stated, however, that it would make no attempt to decide the issues until after the legislature of the state had once more had an opportunity to deal with the problem. The legislature was scheduled to meet shortly, and the court said it would give it an opportunity to redistrict Minnesota. The court, however, retained jurisdiction of the case and stated that the plaintiffs could petition within sixty days after the adjournment

18. Hartsfield v. Bell (Sloan), 357 U.S. 916, 78 S.Ct. 1363, 2 L.Ed.2d 1362 (1958).
19. Magraw v. Donovan, 163 F.Supp. 184 (D.C. Minn. 1958).

of the next session of the legislature for any relief they might still feel was necessary.

As a result of these developments, Georgia political leaders began to fear an outright abolition of the county unit system. However, no concrete action as to any modification of the system was taken at this time.

This then was the state of affairs at the time of the decision in *Baker v. Carr*.[20]

BAKER V. CARR

The *Baker* case is the turning point in the story of malapportionment. It introduces a new chapter of which *Sanders v. Gray* is but the first sentence. In *Baker v. Carr,* the Supreme Court, over strong dissents by Justices Frankfurter and Harlan, overruled its previous decisions and removed its self-imposed judicial restraint in regard to political questions.

The issue in the *Baker* case was reapportionment. Tennessee had experienced considerable growth and redistribution in population since the 1901 Apportionment Act, and the Tennessee General Assembly had failed to reapportion under that Act. Plaintiffs alleged they were being denied equal protection of the laws as guaranteed by the fourteenth amendment. Plaintiffs' complaint was dismissed by a three-judge federal district court for lack of jurisdiction of the subject matter and lack of a justiciable cause of action. It was on appeal to the Supreme Court that the turning point was reached. The Supreme Court reversed the district court, holding that the court had jurisdiction, that there was a justiciable cause of action, and that plaintiffs had standing to sue. As to jurisdiction, previous decisions had held that the Supreme Court had jurisdiction but had decided that it would not exercise its equitable powers in political questions. By a justiciable cause of action, the Court explained that there was a case or controversy, and that protection for the right asserted can be judicially molded. As to the term "standing to sue," the gist of the question of standing to sue is "have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions?"[21]

The decision in the *Baker* case means that any voter now has standing to sue in the federal courts for deprivation of his voting rights by state action. But the Court in the *Baker* case laid down no guide lines

20. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).
21. *Id.* at 204, 82 S.Ct. at 703, 7 L.Ed.2d at 678.

for the states to follow and set no requirements as to what a proper diffusion of voting power would be. The implementation of the decision was left to the district courts. Furthermore, the Court made it clear that the federal courts would not themselves redistrict a state or set up voting regulations for a state, but would only pass on the constitutionality of the states' actions with respect to these matters.

SANDERS V. GRAY

The *Sanders* action was filed on the day the *Baker v. Carr* decision was announced and represents the Court's first essay in the political thicket. The plaintiff alleged that the residents of Fulton County comprised 14.11% of Georgia's total population; but under the county unit system, the six unit votes of Fulton County constituted 1.46% of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population. On the other hand, Echols County, the least populous county in Georgia, had .05% of the State's population, but the unit vote of Echols County was .48% of the total unit vote of all counties in Georgia, or ten times Echols County's statewide percentage of population. One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County. Plaintiffs asserted that their rights under the fourteenth[22] and seventeenth[23] amendments had been violated.

On the same day as the hearing in the district court, and one day before the decision was announced, the Georgia legislature amended the statutes originally challenged in the complaint[24] in an effort

22. " . . . 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."

23. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof. . . . "

24. Under the amendment unit votes were allocated to counties under a bracket system. Counties with from 0 to 15,000 people were allocated two units; an additional one unit was allocated for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and thereafter two more units for each increase of 30,000 persons. All candidates for statewide office (not merely for Senator and Governor as under the earlier Act) were required to receive a majority of the county unit votes to be entitled to nomination in the first primary. In addition, in order to be nominated in the first primary, a candidate had to receive a majority of the popular votes unless there were only two candidates for the nomination and each received an equal number of unit votes, in which event the candidate with the popular majority won. If no candidate received both a majority of the unit votes and a majority of the popular votes, a second run-off primary was required between the candidate who received the highest number of unit votes and the candidate who received the highest number of popular votes. In the second primary, the candidate receiving the highest number of unit votes was to prevail. But again, if there was a tie in unit votes the candidate with the popular majority would win.

" . . . 'to comport with sharp new legal precedents.' "[25] While the district court found the state law as amended to be an "improvement,"[26] it nevertheless felt that the new system still "misses the mark."[27] It stated that under the amended act "the vote of each citizen counts for less and less as the population of the county of his residence increases."[28] However, the district court did not strike down the county unit system as such, but only in the form as it then stood. The district court decided that the county unit system would not be invidiously discriminatory and would be constitutional (1) so long as that system would not discriminate in a state among its counties to any greater extent than the use of the electoral college discriminated against any state in the election of the President of the United States, or (2) if the disparity against any county is not in excess of the disparity that exists under the equal proportions formula for representation of the several states in Congress, and (3) provided provision is made for allocations to be adjusted to accord with changes in the basis at least once each ten years.

After the district court decision, the Democratic Committee voted to hold the 1962 primary for nomination of a United States Senator and statewide officers on a popular vote basis in an attempt to make the issue moot when it reached the Supreme Court. As to this, the Supreme Court however said: " . . . the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing." Since the 1962 act was still in force, " . . . if the case were dismissed as moot appellants would be 'free to return to (their) old ways.' "[29]

In the Supreme Court the majority and concurring opinions in the *Sanders* case took a different view of the merits of the case from that of the district court. They carefully distinguished the issue in the *Sanders* case from that presented in *Baker v. Carr*: The *Sanders* case " . . . is only a voting case,"[30] and did not present the same issue as *Baker v. Carr,* which had dealt with reapportionment. The Court therefore found that the district court's analogizing the use of Georgia's county unit system to the federal electoral college or to districting and redistricting with regard to representation in state or federal legislatures was not applicable. In deciding the *Sanders* case, the Court stated that the Constitution visualizes no privileged class of voters

25. 203 F.Supp. 158, 170 (N.D. Ga. 1962).
26. *Ibid.*
27. *Ibid.*
28. *Id.*, at n. 10.
29. Sanders v. Gray, ___ U.S. ___, ___, 83 S.Ct. 801, 806, 9 L.Ed.2d 821, 827 (1963).
30. ___ U.S. ___, ___, 83 S.Ct. 801, 807, 9 L.Ed.2d 821, 829 (1963).

but equality among those who meet the basic qualifications. It pointed out that while the state has the right to specify the qualifications of voters both in state and federal elections, it could not weight the vote of one group more heavily than that of another:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.[31]

The Court went on to find that the only vote-weighting sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. These were included in the Constitution as a result of specific historical concerns. Nothing was implied about the use of a similar system by a state in a statewide election.

The Court was careful, however, to note that the one voter, one vote, requirement would not necessarily apply in reapportionment.

Mr. Justice Harlan dissented, bemoaning the fact that this was the first of an innumerable number of electoral cases of one kind or another which had been filed since *Baker v. Carr* and which the Court would now unfortunately have to decide. He went on, however, to agree with the district court that the county unit system as such was not unconstitutional if the discrimination against voters was not greater than that which exists in the electoral college or under the equal proportions formula for representation of the states in Congress.

Evaluation of the Sanders Decision

Some of the effects of the *Sanders* decision will be felt almost instantly: From a political standpoint, persons who are subject to election are now likely to give greater weight to the interests of urban voters than before. Other effects of the decision should be felt in the near future: From an economic standpoint, the abolition of the county unit system should have some favorable results. Dr. Kenneth C. Wagner, director of the Georgia Institute of Technology's Industrial Development Branch, points out that the county unit system had hurt Georgia's chances for growth: "Company executives concerned about having at least some reasonable voice in taxes and other matters vital to the financial success of their business operations have often looked with jaundiced eye on Georgia's governmental operations."

31. *Id.* at ___, 83 S.Ct. at 808, 9 L.Ed.2d at 829.

Aside from these practical considerations, the *Sanders* decision should also be fitted into and assessed as a part of larger picture: Plaintiffs in *South v. Peters*[32] and *Hartsfield v. Bell*[33] had alleged that the county unit system had its origin in the hostilities of the rural political elements in Georgia against the urban voters, and had the additional present effect and purpose of preventing the Negro and organized labor and liberal elements of urban communities from having their votes effectively counted in primary elections. But to regard *Sanders v. Gray* as being representative of a local struggle only is to take a near-sighted view of the matter involved. The county unit system is part of a general problem of malapportionment in the United States. This problem does not exist solely in any one locale. Michigan's Congressional districts are far less representative than are Louisiana's. The question is as pressing in California, Illinois or Ohio, as it is in Georgia.[34]

Malapportionment, in part, is the result of the urbanization of the American community. The rate and scale of population movements in our country has been enormous, and the urban sector of our population which was four per cent in 1790 now amounts to seventy per cent of the country. The farm population is now less than half of what it was in 1936. Seventy per cent of the people now live on about one per cent of the land.[35] The population explosion has intensified the situation and will continue to do so to an even greater extent.

In the great majority of states, the legislature is the agency designated by the constitution to reapportion. The legislatures thus have strategic control over the political process, and most legislators with a vested interest in retaining the scheme under which they were elected would not consent to the passage of laws or to alterations to the constitution which would promote more equitable representation. The process of intiative and referendum is not available in most states (referendum alone would not be enough). Courts in most states adopted the "political question" doctrine and would not compel a legislature to undertake reapportionment in conformity with the state constitutional requirement to do so.[36] The inequities in malapportionment were thus for all practical purposes self-perpetuating.

Reaction to the *Sanders* decision brings on again the raging argument over the Supreme Court today. Once again the questions that frequently follow a controversial decision are posed: Is this decision

32. 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834 (1950).
33. 357 U.S. 916, 78 S.Ct. 1358, 2 L.Ed.2d 1362 (1958).
34. See footnote to Mr. Justice Frankfurter's dissenting opinion in Baker v. Carr, 369 U.S. 186, 269, 82 S.Ct. 691, 738, 7 L.Ed.2d 663, 715 (1962).
35. U.S. Bureau of Census.
36. A notable exception is the Minnesota case, *supra*, note 19.

by the Court judicial legislation, or would continuing to refrain from deciding cases such as *Sanders v. Gray* constitute judicial abdication? Has the Court by this decision usurped the legislative power of Congress and state legislatures? Is the Supreme Court in this decision and others in the last decade assuming too much power and upsetting the balance of power intended by our Constitution to be distributed among the executive, legislative and judicial branches of government?

When the election process as established and perpetuated by the state legislatures and as confirmed by the inaction of the state courts results in a denial of constitutional rights, then only the federal judiciary can provide the necessary redress. It would seem that the Supreme Court's decision to enter the "political thicket" of malapportionment was justified.