CONSTITUTIONAL LAW—CONGRESSIONAL APPORTIONMENT—POPULATION PRIME FACTOR

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A petition for a writ of mandamus was filed in the Supreme Court of Appeals of Virginia against the State Board of Elections praying that the Board be commanded to certify only candidates at large for Congress until the General Assembly should enact a legal apportioning of congressional districts. Grounds alleged for the writ were that the existing apportionment act[1] was in violation of Section 55 of the VIRGINIA CONSTITUTION[2] and of rights guaranteed under the UNITED STATES CONSTITUTION in that the congressional districts were not substantially equal in number of inhabitants. *Held,* for petitioner.[3]

The districts provided by the assailed statute ranged in population from about 313,000 to about 527,000 persons, while a mathematically equal apportionment would have resulted in districts with a population of about 395,000 persons each. This variance was not shown to come as close to equality as practicable, and so violated the CONSTITUTION OF VIRGINIA.

In so ruling the court rejected conclusions drawn by a commission appointed by the Governor of Virginia to report recommendations concerning congressional apportionment to the General Assembly in light of the 1960 census. The commission had recommended that the APPORTIONMENT ACT OF 1952[4] remain unchanged. It was reasoned that the existing districts represented

> nearly the ideal in community of interest, compactness, contiguity and other factors, exclusive of population, to be considered in a reapportionment.[5]

The conclusion rejected by the court was that,

> [t]o bring the districts to approximately equal population would involve changes of doubtful practicality, the dissolu-

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1. REDISTRICTING ACT OF 1952, VA. CODE §24-3 (1950).
2. The section reads: The General Assembly shall by law apportion the State into districts, corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants.
3. Wilkins v. Davis, ___ Va. ___, 139 S.E.2d 849 (1965).
4. *Supra* n. 1.
5. *Supra* n. 3 at 851.

> tion of districts which have the greatest community of interest, and mean a radical restructuring of the State.[6]

After noting that "community of interest" was not one of the requirements of the VIRGINIA CONSTITUTION,[7] the court spelled out the duty of the legislature to enact legislation in accord with that constitution without regard to any "community of interest" within the districts except as that "be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts."[8] Thus other factors were subordinated to that of population.

It is on this point that the principal case refines the law of Virginia. It had been held that the provision now embodied in Section 55,[9] in force in substantially the same form since 1830, did not require exact equality, but that variations would necessarily result from giving effect to the "community of interest" within the districts.[10] The refinement takes the form of a more strict interpretation of the state constitution.

The holding, however, was not limited to the state constitutional provisions, but was based in part on the newly emerged "one-man-one-vote" doctrine of the United States Supreme Court. This doctrine, now espoused by the judiciary, finds its origin in congressional acts dating to 1842 when it was provided that representatives be elected by district in those states entitled to more than one representative.[11] This provision was broadened in 1872[12] with the addition of language identical to the VIRGINIA CONSTITUTION.[13] This provision that congressional districts should consist of contiguous, compact territory and be as nearly equal in population as practicable was carried forward until 1929[14] when Congress eliminated it from the ACT OF JUNE 18, 1929.[15] While there was no express repeal, it was held that it was no longer applicable to congressional elections.[16] Since 1929 Congress has been content to leave the law unchanged.[17]

From that time until the decade of the sixties this field of the law was left entirely to the states. Then, in 1962, the federal judiciary entered the field and brought about a dramatic alteration. The meta-

6. *Id.* at 852.
7. *Id.* at 853.
8. *Id.* at 856.
9. *Supra* n. 2.
10. Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932).
11. ACT OF JUNE 25, 1842, §2, 5 STAT. 491.
12. ACT OF FEB. 2, 1872, §2, 17 STAT. 28.
13. Section 55, *supra* n. 2.
14. ACT OF FEB. 25, 1882, §3, 22 STAT. 5, 6; ACT OF FEB. 7, 1891, §3, 26 STAT. 735; ACT OF JAN. 16, 1901, §3, 31 STAT. 733, 734; ACT OF AUG. 8, 1911, §3, 37 STAT. 13, 14.
15. 46 STAT. 21.
16. Wood v. Broom, 287 U.S. 1 (1932).
17. The present statute is the Act of November 15, 1941, 55 STAT. 761, 2 U.S.C. 2a, 2 U.S.C.A. 2a.

morphosis began with the revamping of the state legislatures to assure that all persons within a state would be equally represented in those bodies.[18] Over the strong protest that the federal courts were injecting themselves into an "area of state concerns,"[19] the Supreme Court became committed to the concept that the equal protection clause of the fourteenth amendment guaranteed that members of state legislatures be elected according to population. That commitment has been extended in the few intervening years to demand that in states with bicameral legislatures "both houses . . . must be apportioned on a population basis."[20]

Equal protection is not, however, the ground upon which the reapportionment decisions dealing with congressional representation have been based.[21] Rather, the general provisions of art. I, section 2, cl. 1 of the UNITED STATES CONSTITUTION,[22] in its historical context, were held to require that "one man's vote in a congressional election . . . be worth as much as another's."[23] At least one federal District Court has held that this decision demands that population be the sole factor to be considered in congressional apportionment.[24]

This, then, is the state of the law:

> [w]hile it may not bt possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.[25]

The "one-man-one-vote" doctrine, whether grounded upon art. I, section 2,[26] or upon the equal protection clause, finds its greatest support in the premise that a democratic form of government depends upon the equality of each man's vote.[27] It is suggested that the authors of the CONSTITUTION had this in mind when they provided that the membership of one chamber of the national legislature be determined by reference to the population of the respective states.[28] The other

18. Baker v. Carr, 369 U.S. 186 (1962).
19. Justice Harlan dissenting in *Baker, supra* n. 18.
20. Reynolds v. Sims, 377 U.S. 533 at 568 (1964).
21. Justice Clark concurring in Wesberry v. Sanders, 376 U.S. 1 (1964), would have it otherwise.
22. "The House of Representatives shall be composed of Members chosen every second year by the People of the several states. . . ."
23. Wesberry v. Sanders, *supra* n. 21 at 8.
24. Meeks v. Anderson, 299 F.Supp. 271 (D.C.Kan. 1964).
25. Wesberry v. Sanders, *supra* n. 21 at 18.
26. *Supra* n. 22.
27. See Reynolds v. Sims, *supra* n. 20, where it is said at page 555:
> The right to vote freely . . . is of the essence of a democratic society. . . . And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
28. See Wesberry v. Sanders, *supra* n. 21.

part of the "Great Compromise of the Constitutional Convention" set up a Senate in which all states would be equally represented.[29] Noting this the Supreme Court in *Wesberry*[30] held, despite more than 170 years of contrary practice, that the

> principle [of the] Great Compromise [would be defeated if it were held] that within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[31]

Congress is required to readjust the number of representatives to which each state is entitled after each decennial census;[32] this new doctrine requires each state legislature to perform virtually the same function to keep the votes of each citizen substantially equal.

The obverse of the "one-man-one-vote" controversy is that the Court has proscribed the prerogatives of the States.[33] This argument holds that the states are the best judges of the interests they wish to have represented in Congress. It is at least arguable that some parts of the CONSTITUTION itself undermine the theory that population is the sole factor,[34] and also that economic elements such as topography, geography, means of transportation and industrial, agricultural and resort activities are worthy of consideration if any state desires to make use of factors other than population.[35]

The decision in the principal case should satisfy the adherents of both sides of the controversy. The almost incidental mention of the new federal concept may be disturbing to the opponents of the "one-man-one-vote" doctrine, but it is inescapable that the VIRGINIA APPORTIONMENT ACT OF 1952[36] was declared invalid because it violated *state* constitutional policy that antedates the federal rule.[37]

29. Art. I, §3, U. S. CONST.
30. *Supra* n. 21.
31. *Id.* at 14.
32. 2 U.S.C. 2a, *supra* n. 17.
33. This position is based on art. I, section 4 of the U. S. CONSTITUTION which gives the states power to select the times, places and manner of elections, subject to a power in Congress to regulate all but the places of choosing Senators.
34. See dissent of Justice Harlan in *Wesberry, supra* n. 21, in which art. I, §2, cl. 3, providing for the 3/5 slave count to be taken into account in arriving at the proper representation for a state, and assuring each state of at least one Representative, are cited in this regard. Justice Harlan further declared that Congress has, since 1929, chosen not to exercise its supervisory power (see *supra* p. 447) to enforce equal apportionment, thus leaving the field entirely to the states.
35. See *e.g.*, Thigpen v. Meyers, 211 F.Supp. 826 (D.C.W.D.Wash. 1962), *aff'd* as to apportionment of Washington legislature, 378 U.S. 554 (1964). No appeal was taken on the congressional districting question. See also Lund v. Mathas, 145 So.2d 871 (Fla. 1962) for a state court decision.
36. *Supra* n. 1.
37. See *Supra* p. 447.