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ONE MAN–ONE VOTE

A statement of basic principles of legislative apportionment as agreed upon at a conference of research scholars and political scientists held by the Twentieth Century Fund.

THE TWENTIETH CENTURY FUND

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PREFATORY NOTE

On June 15, 1962, the Twentieth Century Fund assembled a conference of scholars to discuss the problems of legislative apportionment. The conferees were political scientists, research scholars and others with particular experience and interest in the apportionment field. A principal purpose of the meeting was to lay out paths for future scholarly research. But the discussion disclosed a significant unanimity of view on basic issues in apportionment among the conferees, who were of varying disciplines and interests. It was thought that publication of the consensus of the conference on these basic issues might contribute to the developing national re-examination of the apportionment problem.

This paper is a statement of the consensus at the conference. It was prepared by the conference reporter, Anthony Lewis. The conclusions were those reached by the conferees as a group; the particular phraseology cannot be attributed to any conferee but is the responsibility of the Twentieth Century Fund. The Fund hopes that this statement will play a role in clarifying opinion upon a fundamental issue which has been the subject of wide uncertainty and controversy.

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Director, The Twentieth Century Fund

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THE STATEMENT OF PRINCIPLES

ONE MAN—ONE VOTE

Background

In many countries with a long tradition of representative government, legislative apportionment* is no longer a political issue. In Great Britain and some Commonwealth nations, for example, there is general agreement that parliamentary districts should contain approximately equal populations, and redistricting is accomplished regularly and on a non-partisan basis. But in the United States apportionment remains a vexing problem, politically divisive and significantly affecting the way the people are governed.

The shape of the problem has become increasingly clear: In the last three-quarters of a century the United States has changed from a country two-thirds rural in population, according to Census Bureau standards, to one two-thirds urban and suburban. But the legislatures have not reflected the change. Either because of state constitutional provisions freezing apportionments or be-

* Strictly defined, apportionment refers to the distribution of legislative seats among pre-existing political units, as the 435 seats in the national House of Representatives are allocated among the states after each census. The precise term for the laying out of district lines is districting. But the word apportionment is used generally to cover the entire process and will be so used in this paper.

cause of simple refusal to redistrict, the legislatures have become less and less representative of population. Less than 15 per cent of the people choose a majority of the members in both houses of one state's legislature (Florida), and in many states a third or less of the voters effectively control the legislature.

The statistics of malapportionment are well known. So are some of the effects on state government. The mushrooming problems of cities and suburbs are often ignored, and fast-growing areas tend to look to Washington for relief. Public confidence in state government falls; cynicism sets in. As President Eisenhower's Commission on Intergovernmental Relations concluded, the decline in the influence of state governments must be attributed in part to their failure "to maintain an equitable system of representation."

Present Issues

On March 26 last the quest for fair representation in the legislatures reached a turning point. The Supreme Court of the United States, in the case of *Baker v. Carr,* opened the doors of the Federal courts to lawsuits challenging legislative apportionments. And the Court indicated, for the first time, that inequitable districts may violate the rights of the individual citizen under the Federal Constitution. Specifically, the Court suggested, the citizen and voter in an underrepresented district (one with more population than other districts) may be denied the Equal Protection of the Laws which the Fourteenth Amendment guarantees. The court reserved the question

whether there may also be a violation of the same amendment's Due Process clause.

The decision in *Baker v. Carr* has set off a veritable explosion of legal activity on apportionment. The lower Federal and the state courts have held a large number of state legislative apportionments unconstitutional. Some legislatures have been effectively reapportioned by the courts; some legislatures have done the job themselves at judicial urging; others have been given time for correction, with the warning that failure to act will lead to judicial intervention.

The apportionment crisis—as it can fairly be called—has raised urgent questions for the lawyer, the political scientist and the citizen. What is a "good" apportionment? Or to put it another way, what is the proper basis of representation in a state legislature? What are appropriate methods to achieve the desired result? Specifically, what should be the role of the courts? What course should the states and their officials follow? These were some of the questions to which the conference at the Twentieth Century Fund on June 15 addressed itself.

THE BASIS OF REPRESENTATION IN STATE LEGISLATURES

It was the agreed consensus of the conferees that in the light of democratic principles, of history and of contemporary political theory, the only legitimate basis of representation in a state legislature is people. One man's vote must be worth the same as another's.

That is not a call for mathematical nicety. It is a statement of the fundamental principle upon which any proper system of legislative apportionment must be constructed. The purpose of legislative representation in a democratic system of government is just that—to represent. The legislature acts on behalf of the voters. The proper goal of the system of apportionment must, therefore, be to provide effective representation for the body politic.

The history of democratic institutions points compellingly in the direction of population as the only legitimate basis of representation today. The first parliamentary institutions reflected their feudal origins. Social, economic and political power were in the hands of a few families. Communications and transportation were primitive. Government itself had only a marginal effect on most men's lives. In those circumstances it was natural that parliaments should represent not people but great estates, titles, wealth, geographic strongholds. But as feudal concepts of privilege ended and social and economic leveling took place, political responsibility spread also.

Under generally accepted democratic theory, that responsibility falls today upon every citizen. At the same time, in an increasingly complex industrialized society, government becomes vastly more important and impinges more heavily on men's lives. It is no longer tolerable for a House of Lords to exercise real legislative power over a people with no voice in it. As transportation and communications are revolutionized, the logic of separate representation for geographic strongholds dis-

appears. The cry of "one man, one vote" heard today in the emerging new lands of Asia and Africa is no more than a reflection of democratic philosophy learned from the West.

In the year 1962 no basis of representation other than population* is defensible if candidly stated and examined for what it is. There is talk, for example, of "area representation." But acres do not vote; nor do trees. When a sparsely settled area is given as many representatives as one much more populous, it simply means that the *people* in the sparse area have more representation. No matter how stated, it is people who choose the representatives.

And so any forthright statement of a non-population theory of representation must rest on one of two propositions: Either there must be an implication that the residents of sparsely populated areas are more virtuous than other Americans and hence deserve more representation in legislatures, or else a contention that they have special needs which can only be met by giving them greater representation than that afforded others.

Belief in rural virtue does exist, but that is not likely to be advanced seriously as a reason for non-population apportionments. Not many legislators would stand up and argue openly that their constituents are so much more honest and intelligent than others that each should have two or three or ten votes. In any case, it is impermissible in a mature democracy to start comparing the

* The conferees discussed defining population for apportionment purposes as residents or, alternatively, as actual voters. No position was taken on the question, it being considered one suitable for further research and state experimentation.

merits of different population groups for purposes of weighting their votes.

The principal reliance, then, of those who advance something other than population as a basis for representation must be on the argument that certain classes of citizens have special problems that justify giving them more than proportionate power in the legislature. This contention is indeed made in behalf of the rural areas which are now so generally overrepresented in state legislatures; it is often said that the rural population is a minority with special needs that would be neglected in a legislature faithfully representing the state's population as a whole. But surely the problems of cities and suburbs, and their need for government aid, have been as great as those of rural areas in recent decades; yet no one has been heard to argue that city and suburban voters should therefore have been given disproportionate weight in legislatures. As for the argument that rural citizens are a minority needing special protection, would anyone contend that in the states still predominantly rural—North Dakota, for example, or Mississippi—the urban minorities should be given extra legislative seats?

Our constitutional system protects minorities by other means than giving them majority control of legislatures (as rural minorities now have in many states); and the claim that such legislative control is needed by the rural minority leads to some absurd results. In Maryland rural counties containing less than 15 per cent of the state's population elect a majority of the members of the state senate. This apportionment has been defended against legal attack on the ground that the rural counties must

have such control for protection of their minority interests. But Negroes are a slightly larger minority in Maryland than the population of those rural counties; they make up almost 17 per cent of the state's population. Logically it should follow that Negroes are entitled to elect a majority in one house of the Maryland legislature—if legislative control were the American method of protecting minority rights. But of course it is not and logically cannot be.

Some other, less important arguments are also made in favor of "area representation"—i.e., a system that gives residents of sparsely populated areas extra weight at the polls. One is that campaigning is more difficult in a large, unpopulous district. But many politicians feel the contrary is true: It is easier to make news and get one's name known in country districts than in cities. Another argument heard is that non-rural voters indulge in "bloc voting," which is bad, and are under the control of political machines. Actually, "bloc voting"—or, at least, predictable voting on certain issues—seems about as prevalent in rural areas as in cities. At all events, this argument seems at heart simply a variant of the belief in the rural voter's superior virtue.

Regionalism remains a factor within states, but regional interests can be recognized without distortion of voting power. It is desirable to consider regional characteristics when drawing up districts for a state legislature, but it is neither necessary nor proper to give any one regional population group greater voting power than some other group. It is good for dairy farmers in New York, for example, to have a voice in the legislature through one

or more members from dairy areas; it does not follow that the votes of dairy farmers should carry greater weight than those of business men or union members.

The central fact is that any basis of representation other than population gives one citizen's vote greater value than another's. There is no justification in our democratic heritage, in logic or in the practical requirements of government for choosing such a course.

The Second House

A second major point on which the conferees were agreed is that the principle of apportionment on the basis of population is equally applicable in both houses of a state legislature. The fact that all voters have an equal voice in the choice of one house would be no reason to give some voters more weight than others in electing the second chamber.

The arguments for basing representation in one state legislative chamber on something other than people are the familiar ones: principally, that the rural population has special interests requiring protection by disproportionate voting power. Two further arguments are made.

First, it is pointed out that in Congress the House represents people and the Senate states. This is said to provide precedent and justification for a similar "Federal plan" in the state legislature, with one house representing people and the other counties or some similar geographic unit. But the analogy is false. The United States was created by thirteen sovereign states, and the Constitution embodies a theory of federalism which divides sovereign power between the nation and the states. A key device

for protecting their residual sovereignty was the equal state voice in the Senate. Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, by contrast, were never independent or sovereign. They did not create the states but were created by them. They are wholly creatures of the states and may at any time be merged, divided or abolished by state governments.

Federalism as a political theory has had and continues to have value as a device of compromise permitting the joining of lesser sovereignties into greater unions; an example in process is the European Economic Community. But to speak of federalism within a state is to reduce a great principle to an absurdity. "The United States Senate is both irrelevant and improper as a model for representation within a state," Professor Paul David of the University of Virginia has written, because "a state is not a federal union of sovereign counties." Too often, the argument for a "Federal plan" of representation in state legislatures is born of simple ignorance of its actual background and implications. At worst, it may be advanced as a disingenuous cover for the disenfranchisement of urban and suburban voters.

Second, it is contended that a bicameral legislature would have no purpose if both houses were representative of population. This argument assumes two propositions: that the only function of bicameralism is to provide contrasting bases of representation in the two houses (i.e., one people and the other "area"), and that making both houses representative of population would make the

second house a mirror of the first and hence redundant. Neither proposition can be supported.

The second house has a function quite apart from giving preferred political status to one population group —the function of providing checks and balances in the legislative process, of assuring more mature and deliberate consideration before a law is enacted. That was in fact the reasoning that underlay the adoption by many states during the nineteenth century of a population basis for both houses of their legislatures.

Later in that century, and in this, factors other than population were often introduced, by constitutional amendment or by failure to reapportion. Those who held political power abandoned population representation in order to retain their control in the face of population changes that they saw coming. Such philosophical justifications as the so-called "Federal plan" were designed to obscure the real motivation, just as today most of the elaborate arguments against representation on the basis of people are simply covers for a naked struggle to retain political power.

The justification for bicameralism remains the provision of checks and balances. Bicameralism may also serve to further the very objective of representing the people equitably in a legislature. In any districting, geographic features are bound to cause some inequalities of population among districts. When there are two houses, an area that is somewhat underrepresented in one may be given a compensating advantage in the other and minor inequities in apportionment thus be balanced off.

Nor is it true that two houses based on population will

be mirror images of each other. They will, rather, present different reflections or combinations of the various elements that make up the population. For one thing, one house will have more members than the other, representing smaller districts. The length of terms will differ. In addition, members of one house may be elected from single-member districts, while multi-member constituencies are used in the other house. And, not least, politicians are human beings whose differing personalities produce institutions of differing qualities.

A number of states offer contemporary evidence that two houses based on population are by no means duplicates of one another. In Massachusetts both houses are apportioned on the basis of population; the two houses are among the most representative in the country. But the House has 240 members, the Senate 40, and even under control of the same party the two bodies manage to disagree often enough. In Washington and Oregon both houses are based on population; though less disparate in size than the Massachusetts chambers (there are about half as many senators as representatives), the two houses are quite different in political outlook.

There is no justification for making one house of a state legislature reflect the will of all the voters and the other the will of particular regions or classes.

THE ROLE OF THE COURTS

A further basic principle on which the scholars and experts agreed was that it would be desirable if the problems of legislative apportionment could be resolved

without the help of the courts, but that in the United States this ideal is evidently unattainable at present. That judicial intervention was essential to break the political deadlock on apportionment had become increasingly obvious before the Supreme Court recognized as much in *Baker v. Carr.* The astonishingly swift response of the lower courts in following up that decision indicates a general understanding by the judges of the need for judicial action, and a willingness to assume the heavy responsibility. The great question is how the courts can be most effective in bringing about reform.

One problem left unresolved by *Baker v. Carr* is that of the constitutional standards for legislative apportionment: What does the Fourteenth Amendment demand of the state? Of course it is for the courts, and ultimately the Supreme Court, to define the answer. But some observations may be made.

It is clear, first, that the Constitution forbids a state to draw up districts in a way that deliberately and invidiously discriminates against one class of citizens. This was the point of the Tuskegee gerrymander case, *Gomillion v. Lightfoot,* in which the Supreme Court invalidated the redrawing of city boundaries for the purpose of excluding Negro voters.

Second, the opinion of the Court in *Baker v. Carr* indicated that an apportionment is constitutionally invalid if it represents no rational policy but merely "arbitrary and capricious action." Justice Clark, in his concurring opinion, said that the very Tennessee districts at issue in that case must fail in those terms, since population disparities among them made the apportionment "a crazy

quilt without rational basis." Lower Federal courts have applied this standard in holding districts unconstitutional.

There is, third, the question whether the Constitution permits a state to adopt a calculated policy of representation on some basis other than population. Solicitor General Archibald Cox, in a speech at Nashville, Tenn., on June 8, 1962, put forward as a possible standard that one house must be apportioned "in direct ratio to population" while the second may reflect other factors *"provided that the departure from equal representation in proportion to population is not too extreme."* (Emphasis in original.) This approach suggests that if the complaining citizen makes out a prima facie case of population disparity among districts, the burden would be on the state to demonstrate a compelling and legitimate reason for deviation from population equality. Such a standard would be consistent with that applied by the Supreme Court in protecting what Justice Frankfurter has called the "indispensable conditions of a free society." Thus in matters of economic regulation the Court has given the states broad discretion. But when it comes to racial discrimination or censorship or any step toward an establishment of religion, the Court has put a heavy burden of justification on the state. As the Court has read into the general language of the Due Process and Equal Protection clauses these strict guarantees of what our society regards as essential freedoms, so may it find in those clauses a guarantee of the worth of the individual vote.

It may be added that in determining the Federal constitutionality of an apportionment, the conferees agreed that it should make no difference whether the

apportionment is embodied in a state constitution or in a statute. That a past generation (as long as 150 years ago, in some states) froze into the constitution a basis of representation that the state's citizens have no political means of changing today cannot enhance the standing of the districts before the Federal Constitution.

Nor would it seem to matter if a state permits its people to legislate through initiative and referendum, or even if the people by such method have chosen a basis of apportionment other than population. The Constitution protects minorities as well as majorities. A Protestant majority could not lawfully adopt an initiative measure prohibiting Catholics from voting. If the Fourteenth Amendment protects the worth of the individual vote, no political majority may constitutionally deprive any protesting citizen of that right.

Another aspect of the legal problem still being explored by the courts is the question of judicial remedies for invalid apportionments. Courts, and especially the Federal courts, wisely shy away from getting into the actual business of drawing district lines. The function of the court is rather to goad the political process into action on apportionment. There are a number of possible remedies consistent with that purpose:

1. One remedy is to order an election at large unless the legislature reapportions. That is a drastic course which could have some ill effects. However, many political experts believe that most legislators probably would rather accept reapportionment than face the prospect of running state-wide.

2. A second remedy is for a court to cure the most egregious inequalities by consolidating a few of the least populous districts and awarding the seats to underrepresented areas, as Justice Clark suggested in *Baker v. Carr.*
3. Again, a master or masters may be appointed to draft a new apportionment.
4. Alternatively, a court may simply declare the existing districts invalid and give the legislature a fixed time to reapportion, leaving the question of further relief open.
5. Or finally, as an interim measure, the court could weight the votes of the existing members of the legislature to reflect the population each member represents—giving the member with the smallest district one vote, members with districts approximately twice as populous two votes, etc. The legislature so weighted would draft a permanent new apportionment. This course would have the advantage of leaving the existing districts undisturbed for the moment, avoiding the political pain of actually costing incumbents their seats.

THE ROLE OF THE STATES

The courts have been called in to help solve the apportionment problem, and have responded to the call, only because the states have refused for so long to act themselves. A final basic principle on which the conferees agreed was that reliance on the courts can end only when state governments accept the responsibility for providing their citizens with fair representation.

What is necessary is the provision of some effective mechanism to carry out frequent reapportionment. If there is one thing that history has made unarguable, it is that the duty of apportionment frequently has been neglected by the legislature. Often it is simply too much to ask men to vote themselves out of office; they will not do it. A number of states have found a way out of the dilemma by taking the reapportionment function from the legislature and giving it to some other institution that can be held to the responsibility—a special board (Arkansas is an example), the secretary of state (Arizona, for example) or the governor (Alaska and Hawaii). Oregon leaves the initial responsibility with the legislature but, if it fails to act, empowers the secretary of state to reapportion. And in Oregon, as under most of these plans, the state supreme court is given broad authority to force action and to hold the apportioning body strictly to the standards laid down in the state constitution.

Some such mechanism—to supplement or replace the legislature in the reapportionment process—may be essential if the states are to be counted upon to carry out regular reapportionment.* To work most effectively, the mechanism should be almost automatic; apportionment standards ideally should be so simple and clear that applying them is almost a clerical job. State courts should be given explicit jurisdiction to police the process of apportionment from beginning to end.

By thus insuring local action, state governments can end the divisive political quarrel over apportionment of

* William Pincus expressed himself as being in accord with the statement in general, but takes no position on the need for a separate reapportionment agency.

their legislatures,* relieve the Federal courts of a delicate responsibility and avoid possible strains on our federal system.

* The conference also touched briefly on the question of Congressional districts. The conferees were agreed that the districts in any state should be as nearly equal in population as practicable, that the Constitution (in Article 1 and Amendment 14) provides for such equality and that the voter in an underrepresented Congressional district is as clearly entitled to judicial relief from the devaluation of his vote for Federal office as the citizen complaining of underrepresentation in a state legislature. The conferees suggested further research on political mechanisms for assuring regular redrawing of Congressional districts.

A DISSENT

Alfred de Grazia, Professor of Government, New York University and editor of *The American Behavioral Scientist,* attended the conference but did not wish to have his name associated with the statement and offered a general dissent, which is printed below.

No doubt the statement on apportionment prepared for release reflects the prevailing view of the conference, but I disagree with it. If a dissent is in order, I should like to make three points:

1. The statement says: "The central fact is that any basis of representation other than population gives one citizen's vote greater value than another's. There is no justification in our democratic heritage, in logic or in the practical requirements of government for choosing such a course." To this I say that *every* basis of representation, including population, gives one citizen's vote greater value than another's. That is, every device of government works to give different weights to different ideas and people. Hence, any newly imposed procedure or established procedure takes from some interest and gives to another. Furthermore, it is *completely erroneous in fact and principle* to say there is no justification in our democratic heritage, in logic, or in practical requirements of government for choosing such a course. There are, on the contrary, practices and justification in all three regards, each in its own way as important or more important than the equal-populations doctrine. Making way for the active participation of the people in elections and government is very important. At the same time, the *Federalist* papers, the U. S. Constitution and all the State Constitutions, and indeed the prevailing doctrines and practices through history and around the world, incorporate and defend principles such as the representation of communities *per se,* the representation of interests of functional groups such as business, unions and

associations, the interests of minorities, and the interest of "efficient administration."

2. The statement approves an *extended* interpretation of the Supreme Court's decision in *Baker v. Carr* and a number of subsequent lower court decisions soon to be reviewed. I neither approve of this extended interpretation nor of the lower court actions referred to. For the courts to engage in a wholesale reorganization of the legislative bodies of America, except under conditions of national emergency, is damaging to the rule of law and the ultimate position of the courts themselves. The problem of apportionment (as distinguished from malapportionment) is utterly unsuited to the judicial process, as well as being *ultra vires*. The statement itself recognizes some of the danger when it says that the "courts, and especially the Federal courts, wisely shy away from getting into the actual business of drawing district lines."

3. The statement shows little appreciation of the true problems of its own pretended beneficiaries, the mass of people and the cities. A few unproven allegations tying the evils of the cities to the apportionment of State legislatures are not enough. There are, besides, no suggestions for research of this subject, which was one of the reasons for calling the Conference. More importantly, the statement does not envision what I should regard as a task precisely suited to the history and character of the Twentieth Century Fund, namely the study of a new system of representation for the new America. Lacking this larger and more significant vision, the statement becomes less useful and might be unfortunately construed as intended to fit the needs of a current political controversy.

I would hope that my dissent might be carried with any published statement of the views of the Conference.

ALFRED DE GRAZIA

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