Following are commentaries, from widely differing points of view, by three academic authorities—a Professor of Government and two Professors of Law—on the apportionment resolutions adopted by the Board of Managers of the Council of State Governments and the Seventeenth Biennial General Assembly of the States last December, and by the House of Delegates of the American Bar Association in February. *(See pages 104–05, this issue, for introductory statement.)*

Righting the Wrongs of Representation

*by Alfred de Grazia**

WHEN A mistaken policy is adopted by some one branch of government, the whole wrong, wherever possible, should be righted. The Supreme Court has insisted in a series of cases that each chamber of a state legislature be apportioned so that its members will come from districts of equal population. The two questions then must be: Is the policy of the Supreme Court right or wrong? If wrong, can the wrong be corrected?

THE WRONG

It is rare for the Supreme Court to be so mistaken and so consistently mistaken as in the decisions that began with *Baker* v. *Carr,* extended through *Gray* v. *Sanders* and ended temporarily with *Reynolds* v. *Sims* and several associated cases. The errors of the Court and its supporters are several, each of which must be understood, if a proper reform is to be planned.

The prevailing opinions rewrite history grotesquely. They deny the widescale sentiment that has throughout American history insisted upon the analogy between the federal government and the state government structures. They create bodies of public opinion where opinion did not exist and inflate the extent of popular support for certain doctrines, making majority beliefs out of minority ones to suit their convenience.

The Court decisions grossly distort the Constitution. Only if it is good law now to disregard utterly the intentions of those who framed constitutional language, and to coin meanings freely, can the theories of the several opinions be defended on constitutional grounds. The Fourteenth Amendment was *not* intended, despite its importance in other regards, to reconstruct the legislatures of the states.

Damages Done

The judges have damaged the federal system. National law can now penetrate a large and vital area of state government on the flimsiest pretext. American federalism, unique in its strength and durability in world history, depends upon the autonomy of the states, which in turn depends upon the independence of four state institutions—the elective system, the police system, the court system, and the legislative system with its powers to tax and spend. Intervention and disruption of any one of these must be considered to have serious import for the whole federal structure. The apportionment decisions have weakened the general role of the states in the government of Americans.

The Court has also invaded the legislative branch, in violation of the formal and widely

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accepted principle of the separation of powers. It has taken upon itself the reconstituting of the basis of power in the state governments. It has set itself above the law, above the state constitutions, and above the people, wherever the people, as in Colorado and other states, can be said to have expressed themselves on the question in opposition to the Court.

The Justices have imposed upon themselves and the state and lower federal courts the quixotic task of making countless political decisions on detailed matters of the organization of state government. Congress had shown no interest in this task, the people had shown no interest either, but the states were now adjudged incompetent for the purpose, while the courts, with their infrequent sessions, popular unaccountability, disgraceful backlogs of cases, and a structural incompetence to formulate, organize, integrate, and promulgate legislation, have opted for the task.

The Principle Proposed

In all of this, the dimensions of which must sometimes astonish its creators, some end is sought. And one point should be admitted: History, the Constitution, the federal system, the separation of powers, and the efficient performance of judicial tasks—all of these can be dismissed in the face of some great and pressing need, some emergency, something larger than all of these principles and institutions. Only in order that some one great principle, some one great need, be served, can it be granted that these should be shunted aside, temporarily or permanently.

What is this principle or need? It is buried in a mass of double-talk and verbiage, but it is there. It turns out to be a point of view, a sentiment, a sympathy, which is philosophically disputable, to say the least, and which, though it be even conceded, is without the consequences that are intended to follow its victory.

The principle rests behind the doctrine of equal-population districts (which for propaganda purposes is often termed the "one-man one-vote" doctrine). The doctrine of equal-population districts (which could, expecting a number of different consequences, be called also the doctrine of "equal voter-population districts" and other related terms) is one part of one major stream of democratic thought that seeks to equalize power among individuals regardless of their different abilities, contributions, background, knowledge, civic interest, or promises to perform services.

In a hundred different institutions of the government of the American republic, this idea is contradicted and even discriminated against, whether for the sake of differing democratic principles or for practical reasons. American government—national, state, and local—is simply not intended to operate, nor does it operate, according to this idea.

If that is so, then this principle, in all of its vagueness, must take its place along with many another principle that can be employed in the philosophical underpinnings of government. The Supreme Court has never been charged with creating the political philosophy of Americans. It has been entitled only to take the opportunities afforded it, within the limits set by the governmental process and the Constitution, to lend its voice to the concert of voices setting the philosophical tone of American politics.

Nonexistent Justifications

The illegitimacy of the Supreme Court as authoritarian philosopher in the apportionment cases might be again overlooked, as might all the highly dangerous conditions it has additionally created as defined above, provided that, philosophy and principles aside, some real emergency of the people is shown to exist. Such is not the case.

The courts of the land, beginning even before the decision in *Baker* v. *Carr,* have tested the doctrine of equal population districts by every imaginable justification:

They have sought proof by history and tradition and have failed.

They have said the doctrine possessed intrinsic rationality, and thereupon found "rationality" wherever they wished and "non-rationality" in the same way.

They have sought to apply the test of racial discrimination. Yet they have not found it gen-

erally in opposition to their general principle of equal population districts. Even the opposite was discovered in New York City and elsewhere.

They have looked for some over-arching partisan favoritism to be attacked by the doctrine, and found now one party and now another contented or discontented.

They have sought invidious discrimination and have not found it, except by calling whatever they disliked "invidious."

They have searched for discrimination against urban areas, and have found correlations without proven consequences.

They have applied the test of "fairness" only to become "unfair" to other equally good Americans.

They have sought to unblock certain avenues of opinion in state government, and in doing so have obstructed other channels.

In seeking for simplicity they have compounded confusion.

The final judgment in this regard can only be that the Supreme Court has been moved, by a blind faith in "numbers-magic," to unreasonable and arbitrary opinions. A kind of black magic has driven the Court into every state of the land, to the desolation of its institutions.

No one should, of course, attempt to fend off the attacks of the Court by a senseless defense of state government as it exists, and especially of the system of representation and apportionment. The states do not stand right and well as they are. Very little constructive imagination has been employed to adapt the representative governments of the states and localities to the problems of large cities, mass education, and performance of local functions independently of national executive direction.

But the solution of these problems and the part that the reform of representative government can play in their solution are irrelevant to the present discussion. Suffice to say that much, and to add that the Supreme Court decisions lend no direction to their solution. A regime by judiciary cannot substitute for a forthright assault upon these problems by the constitutional authorities and forces of opinion in the states and localities themselves.

THE REMEDY

If the Court is wrong, then what is the remedy?

The remedy that has been most prominently proposed and which has achieved an admirably concerted response is an amendment to the Constitution. This amendment, which may originate in the legislatures of the states, or in the Congress, would reintroduce something other than the so-called population principle into one branch of the legislature, provided the people of the state approve the modification of that principle.

This proposed remedy, it is fair to say, has been put forward by men who would, under other circumstances, agree with the position generally contained in this paper.

However, they would assert that "half a loaf is better than none." Therefore, three questions arise: Is the proposed amendment likely to do good? Is another proposal superior? Is any other proposal more likely to be adopted?

Current Proposal Found Wanting

The proposed amendment has one substantive merit and several substantive defects:

The merit lies in permitting, under restricted conditions, the experimentation or continuation in one house of a legislature of devices other than equal population groupings to compose the basis for seats. Thus if society, for the purposes of representative government, is felt to consist of something other than numbers, which thing would not be reflected well by sheer nose-counting, then some means is provided for expressing that feeling.

A defect of the proposed amendment is that its application is too limited and constraining. It shuts off avenues of reform excepting the narrow one opened up. It prevents the full planning of representation in the modern state government, and forecloses many potential moves of the future.

By defining the population principle as such it admits it as a concrete enforceable principle, which it is not. By stating it, so necessarily vague in language, the amendment may be inviting almost as much litigation and political

controversy as the present opinions of the Court allow.

The apportionment scene is further complicated by the amendment when it constrains the states to adopt a principle other than population only by prescribed means; that is, by popular vote. The amendment practically demands that the popular vote be the only way of providing for apportionment plans. Providing such means furthermore lends an implication that any deviation from the population principle is suspect and has to be approved by the popular referendum.

Finally the amendment is negative in spirit and language. It improves nothing about state government, save that it resists some element of the law, which by its resistance, it accepts as a whole. It only apparently blocks the trend. It may be little more than a disdainful flick of the cat's tail as it marches out of the forbidden room.

Proposed Solution:
Strengthen the Tenth Amendment

The proper remedy for the decisions of the Supreme Court is a constitutional amendment that would begin to reconstruct the Tenth Amendment to the Constitution. That amendment, as is well known, was one of the most popular ever to be adopted. It holds that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

To it should be appended the rule that among the powers reserved to the states is that of determining the character, construction, and disposition of the constituencies that compose their legislatures, and of all other constituencies that compose the conciliar bodies of all units of government created by the states.

An amendment of this nature would be true to the philosophy that is only partially expressed in the amendment under consideration. It would permit flexible and full reforms of representative government in the states. It would be positive in spirit. It would restore the initiative for self-governing institutions to the states themselves. It would relieve the courts of the burdens they have unreasonably and arbitrarily brought upon themselves. It would wipe out completely the unfortunate record of the apportionment cases.

Furthermore, such a proposed amendment would have no less chance of becoming law. The "one-house" amendment would not muster as strong support because it is too readily identified as mildly ameliorative and more than mildly illusive in its effect. The same public arguments will have to be made in the controversies over both proposals. People will have to be persuaded and mobilized for action on the same philosophical and practical grounds.

Yet the full force of the argument against the Court position will not be available under the one-house amendment, because so much of the Court's case is conceded. All the underpinnings of the Court case, which have been here shown to be dangerously unbalanced, would be approved in fact and the superstructure changed only somewhat.

It is possible that neither amendment will be approved. The large and scattered mass of sentiment around the country which favors our being governed as a republic has once again shown that it is incapable of coming together for constructive purposes, and neither can it act effectively for constitutional defense. A supreme effort of organization would be required in any case to put through an amendment. The amendment adopted—or failed—then should be the best and truest mirror of the ideal.

Apportionment, like representation as a whole, should be conceived as one way to achieve a better form of society. Federalism, which has much at stake in this same controversy, has a similar goal. If the institutions of the state and the federal system are to be weakened by the process of judicial domination, and continuously weakened, the states will finally be only haunted houses whose shutters bang to recall another age. Then, as many supporters of the Court in these matters more or less secretly hope, the structures may be completely demolished to make way for a fine new building.

No signs indicate that this fine new institu-

tion is to be, or is even imagined. It is difficult to see what the alternative to federalism can be except a *reformed* federalism, still based on the principles of an independent, representative government, having independent powers of taxing, spending, police and courts. If the states were gutted or destroyed, they would have to be reinvented. But the invention would have to be designed and adopted in the face of a centralized, bureaucratized government. Chances for success under the circumstances would be small.

It is much more reasonable and sure of success to seek now those reforms which, while always difficult to enact, will become increasingly so later on. Unity in diversity, efficiency amid liberty, friendship within the great society—these goals bespeak a federal republic whose internal constitution is founded upon federated and representative communities, a congeries of smaller and smaller territorial and functional republics existing in fact and guarded by law. To gain such ends it is well to decide upon full measures.

The Reapportionment Amendments and Direct Democracy

*by Robert G. Dixon, Jr.**

Delusive exactness is a source of fallacy throughout the law.—*Justice Holmes*

Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation.—*Justice Brandeis*

EXTREMIST POSITIONS have tended to dominate discussion of our current constitutional crisis in legislative reapportionment. The Supreme Court has been damned as an unconscionable usurper in the field of politics, and the Court's new "equal population district" rule has been praised as an exclusive and certain path to civic virtue. There has been an excess of simple generalization rooted in emotionalism and a paucity of qualified analysis rooted in reason. This extremism has been reflected in the range of popular and congressional reaction, including proposals for constitutional amendments and for statutory redefinitions of court jurisdiction, which followed in the wake of *Baker* v. *Carr*[1] in 1962 and the *Reapportionment Decisions*[2] in 1964.

THE MIDDLE POSITION

An intelligible middle position is possible, however, and seemed to be emerging as Congress proceeded to hold hearings on a series of proposed reapportionment constitutional amendments early in the 1965 session. The possibility of a sound and needed middle position was recognized by the *Washington Post* editorially on March 8, 1965.

The key to this middle position, amplified further below, is a carefully limited amendment. It would permit one house of a bicameral state legislature to be on a mixed representation basis, rather than on numbers alone, *provided* the plan be approved decennially in a statewide popular referendum, and perhaps

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[1] 369 U.S. 186 (1962).

[2] *Reynolds* v. *Sims*, 377 U.S. 533 (1964) from Alabama, and companion cases from Colorado, Delaware, Maryland, New York and Virginia.

provided also that certain outer boundaries of population deviation not be exceeded. Such a limited amendment could be characterized as a "one man, one vote" or "direct democracy" approach. After discussing this approach the *Washington Post* editorial concluded:

"Such a carefully limited plan would not amount to going back to the 'rotten-borough' system which Senator Douglas so vigorously deplored. Rather, it would merely allow the states some of the discretion that they have always exercised in shaping their own government."

"RETURNING POLITICS TO THE PEOPLE"

Such a limited amendment approach needs to be related carefully to what has gone before. The thrust of the Supreme Court's decision in the Tennessee state legislature case, *Baker* v. *Carr,* three years ago, and of most of the *Reapportionment Decisions* of last June except the Colorado decision, was to *return politics to the people.* We need not now review in detail the record with which we are all familiar. In many states, in regard to both houses of the legislature, there was not only a "rotten borough" system but also a political freeze. Sitting legislators are naturally disinclined to change the system which has given them their seats. In this context, *Baker* v. *Carr* was a high political act. With political avenues for redress of malapportionment blocked in many states and with protest mounting, the Court concluded that some judicial participation in the politics of the people was a precondition to there *being* any effective politics of the people.

This basic purpose of *returning politics to the people,* which is central to *Baker* v. *Carr* and to most of the subsequent reapportionment litigation, has roots in the liberal movement for governmental reform in the midwestern and western states a few decades ago. I refer to the Populist movement, and more particularly to the Progressive movement with which the name of LaFollette is so prominently associated. Progressivism was based in part on an awareness that governmental forms and institutions are intrinsically imperfect; that electoral district systems can be rigged to produce political inequity with or without an "equal population" rule; that internal legislative maneuvering can defeat or thwart dominant popular feeling; that minority factions often can gain exaggerated strength by holding the balance of power in key district elections, and in the internal operation of the legislature, etc. The list could be extended by reference to extensive literature.[3]

Out of this Progressive movement came many devices for "direct democracy" in contrast to the customary indirect democracy of representative legislatures based on apportionment systems and district elections. These devices for direct democracy include the initiative, the referendum, the recall, the direct primary. They, of course, are not intended to displace entirely the customary system of representative democracy.

There are pros and cons on "direct democracy" devices, and like all governmental institutions they are themselves imperfect. Critics have mounted many arguments; they have suggested that these devices would wreck the prospects for responsible political parties. However, the disasters predicted have not occurred, according to a study by two political scientists a few years ago.[4] Use of popular referenda is especially relevant where the issue is not simply a personal civil right, but is a question of whether a given apportionment system produces a *representative* expression of the popular will in such fashion as to approximate a *direct* expression of popular will.

THE COMPLEXITIES OF "FAIR REPRESENTATION"

Of course, *if* we were dealing simply with a personal civil right, *and* if equal population districts could be counted on to solve the problem of achieving fair representation, there would be no need to consider a modest constitutional amendment. But neither proposition is true.

[3]See Hofstadter, *The Age of Reform,* 254–269 (1955), Ranney and Kendall, *Democracy and the American Party System,* 57–81 (1956), and sources cited in these works.

[4]La Palombara and Hagan, "Direct Legislation: An Appraisal and Suggestion," 45 *American Political Science Review* 400 (1951).