THE CONTROVERSY OVER APPORTIONMENT

By Alfred de Grazia

The views of the Supreme Court and numerous allies on the continuing controversy over representation and apportionment, it seems to me, are in need of a fairly systematic rebuttal. For example, the New York Times, in its reporting and editorials, has given the impression that the federal courts have now found the one road of light and truth and are compelling the state governments to follow it. For many reasons this may be doubted.

Representative government is a collection of laws and devices intended to give weight to numerous interests and abilities of the country in the formation of public policy. The total scheme is laid down over time by constitutional authorities, which consist usually of constitutional conventions, the written constitution, the courts, and the legislature. These laws and devices are many, and among them are found a system of apportioning some or all of the people into constituencies or districts for the purpose of electing members of the state legislature. Often the law calls for contiguous, and compact districts of equal population. Usually these criteria are considerably modified to give weight to rural interests and ideas, and take weight from big-city ones.

The constitutional provisions regarding apportionment

are a primary power of the government, and are initially adopted after a political debate on the merits of alternative systems. Subsequent alterations in the structure are also political questions, and so are any failures to operate the structure in a manner prescribed by the constitution.

Apportionment usually has one characteristic that causes much trouble; since Americans have historically been eager to introduce public opinion into government on a strong and wide base, they have constitutionally provided for periodic change in some part of the representative structure, usually in the boundary lines of districts, so as to permit any fresh outlook that might be engendered by a growing and shifting population to find some degree of expression in the legislature. The legislature is normally charged with rearranging the districts. This provision for government by public opinion has often been blocked, partly because legislators from areas of relatively declining populations might lose their seats, and because the new winds of opinion might, if generated, be unfavorable to existing ideas and interests.

When the provisions of a constitution for a change in apportionment are so ignored or manipulated illegally, a case at law arises, but the courts everywhere have been loath to take up such cases. They have continually referred the matter back to the legislatures. Here is evident a common feature of all constitutional government; when two principles are incompatible, one, logically the more critical one, must prevail

over the other. Thus the need for public safety will sometimes prevail over the right of free speech and vice versa.

In cases arising out of a failure of the legislature to reapportion election districts, the federal courts are naturally disinclined to intervene, since not only is the independence of the State interrupted at a critical point, threatening the federal system, but also the judgment of the court is substituted for that of a legislature, and the separation-of-powers principle is endangered.

However, when violations are flagrant, the courts may become restless. After many years of self-restraint in regard to apportionment, the Supreme Court of the United States has indicated in the case of Baker v. Carr that it is prepared to bring pressure upon state governments to reapportion. The opinion of the Court was not unanimous; six justices addressed separate opinions and one justice was absent. It is only exact to say that the resulting law is confused. The opinion has resulted in much new litigation around the country, and lower courts are being asked to decide the new cases without clear guidelines.

I estimate that the Supreme Court, at a minimum, declared the law that extreme cases of neglect or action by legislatures to deny the type of apportionment prescribed by a State Constitution would be in violation of the 14th amendment of the Federal Constitution. That amendment forbids any state to "deny any person within its jurisdiction equal protection of

the laws." Several states, but probably not New York State, would undergo compulsory redistricting under this minimal interpretation.

At a maximum, the Court's opinion opens Pandora's Box. Here I repeat not my own views but those of persons and groups who view the case of Baker v. Carr as a radical breakthrough along the lines of their interests. According to the maximum view of the decision, the Supreme Court will regard as repugnant to the Federal Constitution any provision of any State Constitution or any legislative act, conforming to such a State Constitution, or any act of any State agency of any kind that tends to let any State legislative districts exceed any other district in population, beyond practically irreducible limits, and that does not provide the maximum possible compactness and contiguity of all legislative districts.

Working on this interpretation of the Court's decision, a movement--it could almost be called a legal stampede--is occurring to challenge every State apportionment inconsistent with this doctrine. Suits, demands for special sessions of legislatures, and other tactics are being brought to bear in the situation. It is therefore urgent that responsible officials, civic leaders, and experts promptly engage themselves to examine this maximum thesis and, if it is weak or in error, to resist it by every proper means.

It appears to me to be likely that the residual precedent, the effective legal doctrine, of Baker v. Carr will resemble much more the minimal than the maximum position.

I believe that this will be the case because the Courts cannot help but discover, in what necessarily must be extensive philosophical and scientific investigations, that only the minimum doctrine is, can be, and should be law.

In support of this reasoning, I offer the following arguments:

1. Representation (and apportionment) is inevitably and always an arrangement that permits certain voices in society to speak more loudly than their sheer numerical proportion will allow.
   There is no system--proportional representation (PR) being only the closest but not very close--that provides or can provide an equal voice to every one of any kind of selected unit of the population.

2. To take away from the Constitutional authorities of a State (beginning with its very Constitutional Convention) the right to determine the character of its representative system--excepting in such cases as are formally incorporated in the U. S. Constitution as barriers against racial and sex discrimination in the franchise--will injure the federal system. For the Supreme Court, itself unelective, to demolish partially the representative structure of the States on some wholly inferred and necessarily fictional doctrine of "equal representation", whereby legislative power is null unless distributed equally among individuals in the large population, would be the crowning irony in the history of judicial law-making.

3. The Courts will discover that systems of apportionment are exceedingly difficult to set up and administer. It would prove a great, even an impossible burden to support and the "rules of thumb" that would ensue would probably arouse a new movement of dissatisfaction.

4. The logical next step, after enforcing Baker v. Carr, will be one much more clearly called-for, to force the Congress to carry out the specific demand of another part of the 14th amendment: whatever proportion the persons over 21 denied the right to vote for Federal or State officers are to the total adult population shall be substracted from the total population of the State in determining its alloted number of Representatives in Congress. This might take the form of a writ to Congress, a denial of the legality of membership in Congress, or other means of implementation. However desirable this may be, and I incline to regard it as desirable, it may be accomplished without a rocky and circuitous journey through State apportionment problems. There is no use burning down the house to roast a pig.

5. The expectations of the advocates of reapportionment regarding the effects of reapportionment, even according to the absolute doctrine of contiguous compact districts of equal population, are not at all very likely to occur. Centuries of study have mainly established the fact that a free vote for the election of public officers is a valuable instrument of a constituency. These studies have failed to establish with any degree of exactitude the weight that any ingredient among the hundreds of detailed rules, laws, and customs defining the act of voting possesses relative to all the others and to the total effect of the vote. To turn inside out an existing and long-lived system of law and conduct on tenuous assumptions is not a radical act, nor a conservative act, nor any other kind of rational act; it is a wanton act born of frustration.

   For example, the commonest hope among advocates of an extreme interpretation of the Court is that the cities of America will be able to solve some of their grave problems by overcoming unsympathic rural legislators by

weight of numbers in the legislature. Possibly this was a real issue 30 years ago: today, it is the suburban areas who will win most of the new seats if the equal population principle is established. Now is there any proof that suburban politicians are better disposed to the solution of big city problems than rural politicians? (It is amusing that interests who decry a particular kind of apportionment for not being up-dated are themselves badly in need of up-dating on the probable effects of urban change.) Besides, a sheer numerical increase in urban legislators will not by itself guarantee better urban legislation; it is questionable whether most state legislators who come from the big city are competent to deal with the problems facing their city or cities in general; all that can be surely said is that more jobs, favors, and works projects will flow into suburban and urban districts; the notorious lack of ideas, planning, and dedication to larger responsibilities found among State legislators will not solve the complex and tremendous problems of American metropolises. Moreover, liberals who are avidly supporting the maximum interpretation of the Supreme Court's inscrutable decision have only to think a bit to realize that even granted certain effects favorable to their ideas, certain other favorite ideas will be made impossible; thus, the reform of New York State divorce law might become even less possible than it has been, if representation in the State is arranged according to the view under discussion.

To take a second large example, mechanical equal apportionment, disregarding economic and social groupings in favor of survey geometry, tends to weaken these interests which, in the last analysis, are the responsible building blocks of society. Indirectly, then, "big government" and executive centralization are likely to be fostered, more than are individual liberty and equality. Philosophers

as diverse as the idealist Immanuel Kant and the pragmatist John Dewey have dwelt upon the danger to healthy non-totalitarian democracy caused by levelling and equalizing. I believe that we need a reform of representation, but it will not come about through the present ideology that is close to becoming the law of the land. When it comes down to rock bottom, the major beneficiaries of the proposed changes in apportionment will be certain party politicians and their cohorts. In New York and most places, they would be mostly Democratic; elsewhere, as in North Carolina, Republican. All the more important then that every citizen make up his own mind regarding the merits of the case: an ultimate Supreme Court position favoring the maximum position is unlikely, but still each citizen should ask whether the minimum or the maximum view is more likely to maintain the political and governmental position of his or her choice. The fate of a few politicians who have shown no great capacity or understanding should be the least of his worries.

It is a serious failure of politics in our country that we have surrendered to courts the determination of great moral and intellectual issues. The courts are not organized or equipped for this job and it is only with great reluctance and with many warning that the more respected courts of our democracy have taken it on. That they recognize they are acting because of the moral defect and passivity of politicians is manifest in their opinions and words. That they must be ultimately ineffective in such moral tasks in an amoral and irresponsible political climate is also plain in their opinions.

The best way to correct the exaggeration of judicial power is not to defy or condemn it, but to make it unnecessary. When the good judge is faced by the Hobson's choice of an extension and exaggeration of his power or the failure of his conscience as a human being, he does not avoid the issue; he is not a Nazi, not an Eichmann; he accepts his human responsibility. But he is a better judge, and his country is better governed, when his own work as a responsible citizen and as a judge is supported and reinforced by all other elements of the citizenry performing their own respective duties--as citizens and politicians, as citizens and army officers, as citizens and officials, as citizens and businessmen, as citizens and experts, and as citizens pure and simple.

Accordingly, those politicians, officials, experts, and civic leaders who should be responsible for the state of representation in our society ought to assume three tasks:

1. To redress as equitably as possible the deviations from the existing laws of apportionment found in a number of States, no matter upon whom the losses of power and position will fall. The rule of law must be maintained.

2. To reaffirm that representation (and apportionment) are never a matter of arithmetic and mechanics but always an arrangement of continuous and enduring channels for the expression of interests, knowledge and virtue in the halls of government.

3. To enhance the possibilities of improved and rational representation in New York State, New Jersey, and throughout the nation by creating a wise and skilled

research body to launch an inquiry along five major lines:

A. What are the most desirable traits, features, and institutions of the American community, that should be represented in the forming of public policy?

B. What effects is the existing system of representation having on the solution of the problems of our age?

C. What are the means of organizing the population into acting and voting groups for bringing to the fore the sought-for elements?

D. What system of representation is optimal for the State?

E. How should it be achieved?

Thus the restudy of the whole question of representation in American democracy should consider not only the changes that have occurred between 1789 and 1938 but also between 1938 and 1962 and especially the projections of these changes into the next generation of America's mission at home and over the world. The system of representation, including apportionment, should reflect an ideal image of America and facilitate its achievement.