Manipulated Democracy: The Multi-Member District

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ATTEMPTS to establish equitable systems of representation in legislative bodies have had to overcome a number of barriers, such as rotten boroughs, gerrymandering, malapportionment, representation of acres rather than people and greater-than-majority requirements. Now, as a hitherto little noticed but equally formidable obstacle to effective representation, rises the specter of the multi-member district.

The use of multi-member districting is fairly common in state legislatures, existing in 13 upper chambers and 22 lower chambers across the nation. Why multi-member districts? There are many reasons, but the one that is the special concern of this study can be stated simply: By enlarging the size of the electoral district, minorities of substantial numbers can be effectively deprived of fair representation. As John Banzhaf noted more than a decade ago: "No mixed system of single- and multi-member districts—or system using multi-member districts of different sizes—can provide substantially equal representation or voting power for all citizens. This holds true even in cases of simplified mathematical models which follow the Supreme Court in ignoring many complicated political realities and treating electoral systems merely in terms of the voting rules and the relative numbers of constituents" (*Yale Law Journal,* July 1966, page 1309).

Through a series of court decisions we have seen the gradual emergence of the multi-member district as a critical matter in the structuring of representative democracy. Notable are the controversies that have risen in, among other places, Marion County, Indiana; Mobile, Alabama; and Thurston County, Nebraska.

It is not without significance that single-member districting has strong historical ties with two of the most powerful and successful representative democracies that have ever existed. Members of both the US House of Representatives and the British House of Commons

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are elected from single-member districts. This system, it is widely thought, helps to assure strong and close relations between the local constituency and the national government through the person of the representative; a particular constituency elects and is represented by one member of the house and no other, and, conversely, a particular member is elected by and represents one constituency and no other. Members of the US Senate, it may be noted, all have statewide constituencies, but a state's two Senate terms are cycled among the three classes of senators so that the two terms for a given state do not coincide. American Senate elections, then, produce a variation of the "place" or "slot" system wherein legislators from a multi-member constituency are chosen in separate contests. When, because of a midterm vacancy there are two Senate contests in a state at the same time, the candidates must announce in advance which of the two seats they are running for; it is not a case of all candidates for the two available seats running against each other.

In *Reynolds v. Sims* (377 U.S. 533, 1964), the Supreme Court ruled that equal protection required both houses of a state legislature to be apportioned on a population basis. In this case, the court seemingly rejected the notion that equal protection necessarily requires the formation of single-member districts, holding that while each person's vote must be approximately equal, "one body could be composed of single-member districts while the other could have at least some multi-member districts."

The question of the constitutionality of the multi-member district and its relation to the equal protection clause of the fourteenth amendment did not end here, however. Since *Reynolds*, other cases have challenged the legitimacy of the multi-member district, and an analysis of these will clarify the present legal status.

The first such case to be heard by the Supreme Court was *Fortson* v. *Dorsey* (379 U.S. 433, 1965), concerning the 1962 reapportionment of Georgia's Senate. Under this act, the seven most populous counties were divided into subdistricts varying in number from two to seven. The voters in each county, instead of electing only one senator from the district in which they resided, elected on a countywide basis the number of senators equal to the districts in the county. It should be noted that the plan applied only to the Senate, and that each subdistrict was guaranteed a resident senator though elected at large by the entire district. The plaintiffs brought action in federal district court seeking a decree that the countywide voting requirements in the seven multi-district counties violated the equal protection clause.

In the Georgia case, the three-judge district court granted a motion for summary judgment, holding that the difference between electing

senators in districts comprising a county or group of counties and in multi-member districts constituted an "invidious discrimination tested by any standard" (*Dorsey* v. *Fortson,* 228 F. Supp. 259 at 263, 1964). It held, in other words, that the multi-district plan was per se guilty of invidious discrimination.

The Supreme Court reversed this finding, Justice William O. Douglas dissenting. The court held that a multi-member district was not per se violative of equal protection rights. The court admitted that some multi-member district plans could result in discrimination, but pointed out that sufficient evidence to prove this did not appear in the hearing. *Fortson,* then, maintained that discrimination in a multi-member district must be proved before a remedy would be granted under the equal protection clause: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster."

In *Burns* v. *Richardson* (384 US 73, 1966), the use of multi-member districts was one of several bases for an attack on the Hawaii legislative apportionment and districting statutes. As in *Fortson,* the court denied the claim, holding that sufficient proof had not been adduced to show discrimination. In giving this decision, Justice William Brennan said, "But the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts." The court made it clear, however, that under some circumstances multi-member districting could be violative of the constitution, referring to the section in *Fortson* already quoted. The court in *Burns* went further to specify the conditions under which "invidious effects," the minimization or cancellation of voting strength, could more likely occur: "It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson,* districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one." Thus, while recognizing that multi-member district plans can lead to problems, the teaching of *Fortson* and *Burns* is that inherent discrimination is not apparent on the face of any such district scheme under the equal protection clause. Further, both cases urge the judiciary to be hesitant to upset what is seen to be a legislature prerogative within certain limits.

The case of *Chavis v. Whitcomb* (305 F. Supp. 1354, 1969) involved a specific charge that a multi-member district did invidiously discriminate against a segment of the population, notably the predominantly nonwhite residents of the "ghetto" area of Center Township, Marion County, Indiana. The effect of the at-large system was to render ghetto votes weightless, literal compliance with *Reynolds* notwithstanding. Had the county been subdistricted, the "ghetto" residents could have nominated and elected candidates of their choice. Noting *Burns,* the federal district court applied the standards found therein and previously referred to, finding that, "This case presents each of those circumstances, leading to the legal conclusions here stated." Utilizing a tremendous array of evidence, the court concluded, in part:

> that the multi-member districting provisions of the present legislative apportionment statutes of Indiana, as they relate to Marion County... operate to minimize and cancel out the voting strength of a cognizable racial minority group residing in the Center Township Ghetto . . . to the extent that the members of such minority group are deprived of equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.... The Court finds that the only practicable remedy for such unconstitutional deprivation of voting strength is the elimination of the large multi-member house and senate districts in Marion County.

Finding that an order to redistrict Marion County could not be carried out without unbalancing the entire state, the court ordered a statewide redistricting. The US Supreme Court subsequently overruled the district court, but on grounds that did not interfere with the logic or philosophy of the objections to multi-member districting.

The Supreme Court affirmed a preference for single-member districts in *East Carroll Parish* v. *Marshall* (424 US 636, 1976), wherein it held against an at-large (and thus multi-member) election for a school district. A civil rights attorney of Jackson, Mississippi, Frank Parker, commented: "It will help us convince the state legislature and the courts here not to apportion county and legislative districts on an at-large basis" (*Election Administration Reports,* March 15, 1976, page 2).

In *Chapman* v. *Meier* (420 US1, 1976), the US Supreme Court, in overturning a federal court-ordered reapportionment of the North Dakota legislature, held that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multi-member districts." The court noted that it was exercising its supervisory powers with regard to federal courts; it was not holding that multi-member districts are constitutional per se. North Dakota presently has only one multi-member district, a Senate district with two members.

More recently, last summer the federal district court in Omaha was presented with the challenge that at-large, multi-member district elections for the county board in Thurston County have had the effect of diluting the voting power of Indian residents of that county. A lawsuit filed by the US Justice Department asked the court to declare the Democratic primary election void and to halt the November election. The suit also requested a special election to be held after a district plan was developed and approved. Thurston County contains about 5,000 non-Indians and 2,000 Indians; according to the challenge, no Indians have been elected to the county governing board since single-member districts were replaced by at-large elections in 1971 (*Sioux City Journal,* September 1, 1978).

In the light of the precedents set forth in these cases, the status of the multi-member district in reference to the equal protection clause remains at least somewhat ambiguous. These cases point out that such schemes are not per se violative of constitutional rights. Further, as the district court summarized in *Chavis:*

> Choosing between specific single-member legislative districts and multi-member districts is essentially a choice between political theories of representational democracy. That decision, once made by the state legislature, which all agree is the body primarily responsible for political decisions, is to be disturbed by the judiciary *only* upon specific proof that the adopted scheme of districting is actually functioning in a manner that minimizes or cancels out the voting strength of a cognizable racial or political element of the voting population. It is largely beyond concern whether this effect occurs "designedly or otherwise."

The full burden of proof is left, then, not on any multi-member district plan, but on those who claim that any "invidious discrimination" is resultant from such a plan.

The conditions noted above apply to South Dakota's present apportionment plans, with which the rest of this article will deal.

South Dakota's Minnehaha County, the most populous in the state, affords an appropriate setting in which to test the effects of the multi-member district system. Containing 14.2 percent of the state's 1970 population—of which 78.9 percent reside in Sioux Falls—Minnehaha County elects five of the 35 state senators and 10 of the 70 state representatives under the 1971 apportionment law (*South Dakota Compiled Laws,* 2-2). That act established identical districts for both chambers, with two representatives elected for each senator.

It is not only the size of its delegation which makes Minnehaha County's legislators so significant in state legislative politics, but also the fact that whichever party turns out the larger number of voters wins a number of seats that is seldom even approximately proportionate to the ratio of that party's voters. Over the years, the minority

party, usually Democratic, has been able to convert about 45 percent of the county vote into only 5 percent of the legislative seats. In the period 1956-1972, the Republican party averaged about 55 percent of the legislative votes in Minnehaha County, and won 24 or 27 Senate seats (89 percent) and 67 or 69 House seats (85 percent).

Only in four of nine biennial elections, 1956-1972, did the minority party achieve any representation at all from the state's largest county. One Democratic senator was elected in 1956, while one Democratic representative was elected in 1958 and three Democrats went to the House in 1970. In 1972, Democrats won eight of 10 House seats and two of five Senate seats, at a time when Governor Richard Kneip, a Democrat, was carrying the county with 59.2 percent of the vote. This underrepresentation of the minority vote in multi-member district elections is considerably more severe than that which occurs in single-member district systems, which scholars have termed the cube law effect (the majority's advantage in seats won is roughly the cube of its margin in raw votes cast).

The 1970 election is particularly interesting. Only 20 votes separated the last winning candidate, who received 14,697 votes, from the most popular losing candidate, who received 14,677 votes. In 1970, the Democratic candidate for governor carried Minnehaha County by 4,000 votes; in several earlier elections, Democratic gubernatorial candidates has also done well, carrying the county in 1968 and 1972, and never falling below 40 percent of the vote. In the period 1956-1972, the Democratic share of the aggregate legislative vote fell below 40 percent only once, in 1966 to 39.5 percent. Translated to the total state political system, this suggests one fundamental reason why the minority party finds it easier to win the governor's chair than to win a legislative majority; since 1920, the Democrats have won six gubernatorial elections but have controlled the legislature only twice. The South Dakota situation is comparable to the contemporary national situation in which the Republican party, the national minority, finds it easier to win presidential elections than to achieve majorities in either chamber of the Congress.

Another striking fact about Minnehaha County politics is the residential concentration of legislators in the comparatively high-status southern parts of Sioux Falls, a finding which applies to Democratic as well as Republican legislators. Such concerns are explicitly of interest to courts in reviewing the equity of apportionments. In this regard, it should be noted that the residence of legislators is a difficult thing to manage, since both parties nominate their candidates in a primary election and there is no provision for forcing representation of particular geographical sections.

This residential concentration of legislators emphasizes one of the indirect results of the use of the multi-member district system which rather clearly discriminates arbitrarily against definable groups of citizens. Given the salary and fringe benefit provisions for South Dakota legislators, there are basic discriminations at work in determining who may run for office. This problem appears to be magnified by multi-member districts because candidates are much more likely to come out of middle and high status areas of the district. Were single-member districts employed, this status effect would certainly be moderated. This would seem to apply not only to the comparatively low status areas of Minnehaha County and Sioux Falls (not to mention similar areas in other populous counties such as Pennington and Brown), but also in Indian areas, as discussed below. Such situations emphasize the importance of court notations, cited above, to the effect that multi-member districting systems become more significant problems if the number of legislators elected from multi-member districts is "large" in relation to the total number of legislators. The adjective "large" has to be more precisely defined, but it does seem that the ratio of 10 to 35, which is the ratio of legislators from multi-member districts to the total number, is high enough to be included in the court's general definition.

The Minnehaha County experience is reminiscent of the situation in Marion County, Indiana. In the 1964 contests for Marion County members in the Indiana House of Representatives, 15 Democrats and no Republicans were elected, in spite of the fact that the median Democratic vote getter received 151,360 votes while the median Republican vote getter received 143,810 votes, less than 8,000 votes fewer. The top Democratic vote getter in Marion County received 151,822 votes, and bottom Democratic vote getter received 150,797 votes. On the other hand, the top Republican vote getter received 144,336 votes; the bottom, 143,369 votes. Thus, the Republicans won about 49 percent of the county vote for the Indiana House of Representatives, but received none of the Marion County seats in that body.

The non-white population of South Dakota in 1970 consisted of 35,174 persons, or 5.28 percent of the total. By far the largest minority group was Indian; the black population was only 1,627. Ten counties had non-white populations in excess of 10 percent, and five counties contained an Indian population larger than the non-Indian population.

If the Indians had an equitable proportion of the 105 members of the state legislature, they would have at least five legislators. As far as can be determined, no Indian from a reservation has served in

the legislature. This has been true in part because of their widespread distribution. Nevertheless, the highest counts of non-whites are in Shannon County with 7,091 and Todd with 4,611. Since the "ideal" population of a House district is 9,518, it is clear that if Shannon County were left as a unit within a voting district, the Indian population would control one seat for certain, and in Todd County the Indians could control the balance of power.

There are two obvious methods of diminishing the voting power of ethnic groups: (1) breaking up the "Indian" counties so as to weaken the concentration of voting strength by attaching parts of the county to areas with lower proportions of Indian voters, or (2) resort to the multi-member district system so that the impact of the minority voters would be "diluted." Either way constitutes an effective discrimination against minority voters. Indeed, so long as the strong Indian concentrations of voting strength are not adjacent to each other, any combination of multi-member districts in South Dakota can be argued to be, ipso facto, a method whereby discrimination is perpetuated against the non-white population.

Multi-member districts have been established as a convenient way to comply with constitutional mandates, statutes or court orders requiring equitable legislator-citizen ratios. But multi-member districts inherently discriminate against political or ethnic minorities where their numbers are sufficient to qualify for one or more legislators but insufficient to elect their proportionate share of legislators when such districts are established.

A preferable apportionment system for South Dakota would seem to be to convert all Senate districts to single-member constituencies. Going one step further, each Senate district could then be divided into two House districts. The threat of gerrymandering for personal or partisan advantage could be reduced by establishing a bipartisan apportionment authority; this would free a good deal of the legislature's limited time, and would not call forth unreasonable expectations as to the legislators' selflessness and generality of viewpoint.

An alternative to universal single-member districts is the "place" or "slot" system mentioned in the introductory section. This would make the representative system more responsible and responsive by forcing candidates into visible contests for single seats, rather than having as many as 20 candidates running for 10 seats in the same large constituency.

The attitude of the courts toward multi-member districts has continued to be one of adherence to the principle that use of such districts should not result in discrimination against political or ethnic minorities. In practice, however, the US Supreme Court has

shown a growing reluctance to interfere with local decision making, and it has not said that multi-member districts per se are unconstitutional. Hence the question of their use appears at this time to be more a matter of public policy to be determined in the legislative branch than a matter of constitutional law to be determined in the judiciary. Thus it may be said that relief from the discriminatory effects of multi-member districts, if it is to come, is more likely to come from the state legislatures than from the federal courts.

EDITORIAL COMMENT

(Continued from page 234)

Recommendation regarding constitutional amendments: Because of the desirability of keeping constitutions as short and uncomplicated as feasible, a more rigorous procedure is suggested for consideration by those states considering making possible constitutional amendment by initiative.

The procedure would be exactly the same as that for indirect legislation, with the following exceptions:

(1) The Attorney General's opinion would state (a) any conflict between the proposed amendment and the federal Constitution and (b) what effect it might have on other provisions of the state constitution.

(2) The sponsoring committee must obtain signatures equal in number to 10 percent of the total vote for governor in the last preceding general election.

(3) The Legislature shall consider the proposed amendment in just the way it would any other amendment to the constitution of the state, including requirements for extraordinary majorities for approval in the houses of the legislature, existing requirements for reapproval by succeeding legislative sessions, etc.

(4) If the Legislature rejects the proposed amendment and the sponsoring committee pursues the matter, obtaining the extra 1 percent signatures and placing the amendment on the ballot, an affirmative vote of all persons voting in that election (not just those voting on the amendment in question) shall be required for passage.

(5) There shall be no more limitation on subject matter than there would be limitation on a constitutional amendment passed by the Legislature and referred to the people.

(6) If conflicting proposed amendments appear on the ballot dealing with the same subject matter, that amendment (whether legislatively submitted or by petition) which receives the most votes shall become part of the constitution.