

Another view on the issue of apportionment.

Justice Harlan's dissent in **Wesberry v. Sanders 1964**

MR. JUSTICE HARLAN, dissenting.

I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today's decision. The Court's holding that the Constitution requires States to select Representatives either by elections at large or by elections in districts composed "as nearly as is practicable" of equal population places in jeopardy the seats of almost all the members of the present House of Representatives.

...Only a demonstration which could not be avoided would justify this Court in rendering a decision the effect of which, inescapably, as I see it, is to declare constitutionally defective the very composition of a coordinate branch of the Federal Government. The Court's opinion not only fails to make such a demonstration, it is unsound logically on its face, and demonstrably unsound historically.

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Before coming to grips with the reasoning that carries such extraordinary consequences, it is important to have firmly in mind the provisions of Article I of the Constitution which control this case:

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative. . . .

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . .

As will be shown, these constitutional provisions and their "historical context," *ante*, p. 7, establish:

1. that congressional Representatives are to be apportioned among the several States largely, but not entirely, according to population;
2. that the States have plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress; and
3. that the supervisory power of Congress is exclusive. [p24]

In short, in the absence of legislation providing for equal districts by the Georgia Legislature or by Congress, these appellants have no right to the judicial relief which they seek. It goes without saying that it is beyond the province of this Court to decide whether equally populated districts is the preferable method

