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Baker v. Carr - Two Aspects of Apportionment: An End and a Beginning

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Comment / *Baker v. Carr*

Two Aspects of Apportionment:

An End and a Beginning

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [might] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . .¹

THE STANDARD OF JUDICIAL REVIEW suggested by Justice Stone in his 1938 *Carolene* footnote was destined to lay open one of the most bitter and significant judicial battles in the recent history of the Supreme Court. This oft-quoted note has been cited as the initial expression of the “preferred-position” argument which has been the touchstone of the Court’s civil libertarians.² In the passage quoted above, Stone advances the theory that the Court should police the *processes* which lead to political decisions, for unless there is freedom of expression and unless the creative avenues of expression through our representative system are in good order, “there can be no confidence in its end-product.”³ In the past two decades the Court has been consistently concerned with the problems arising out of the guarantee of freedom of expres-

¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

² PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* 32-36 (1954); Lewis, *Legislative Apportionment*, 71 HARV. L. REV. 1057, 1096 (1958); SCHWARTZ, *THE SUPREME COURT* 234 (1957).

³ PRITCHETT, *supra* at 243. See JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 285 (1941).

⁴ *E.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Thornhill v. Alabama*, 310 U.S. 88 (1940). See generally EMERSON & HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1952).

sion,⁴ but has refused to consider the good order of our representative system. If free expression deserves special judicial consideration, there would seem to be greater need for judicial intervention when "the streams of legislation . . . become poisoned at the source."⁵

This refusal to explore the many problems of the process of representative government has been the product of Justice Frankfurter's doctrine of judicial restraint. This doctrine found expression in the voting cases from *Colegrove v. Green*⁶ to *South v. Peters*.⁷ In these cases the application of judicial restraint had the effect of requiring that the Court not insist that legislatures be elected in the fullest possible conformity with the principles of representative democracy. The Court has not attempted to keep the political processes pure and unimpeded.

The inequity in our electoral system, by which certain groups are permanently denied full participation in the political process, has resulted from the unwillingness of state legislatures to reapportion election districts to accord with the actual distribution of population. The voter in a district of rapid population growth will have a much smaller voice in elections than the voter from the district of steady or declining population. This "system" works to give rural areas having less than a majority of the population permanent control of the state legislature, or the state's congressional delegation, with the practical result of a proportionate disenfranchisement of urban majorities. Furthermore, the control over the legislature by the representatives of these modern 'rotten boroughs' not only perpetuates the situation but also prevents the normal political process from providing a corrective.⁸

In 1946 this condition was especially notorious in Illinois. Congressional districts had not been reapportioned since 1901. The largest district had nine times the population of the smallest. In *Colegrove v. Green*⁹ the disenfranchised voters finally challenged the Illinois "system." But no help was forthcoming from the Supreme Court. The issue facing the Court, Justice Frankfurter declared, was "of a peculiarly political nature and therefore not meet for judicial determination . . ." He continued:

From the determination of such issues the Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.¹⁰

⁴ Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1016 (1929).

⁵ 328 U.S. 549 (1946).

⁷ 339 U.S. 276 (1950).

⁸ MASON, *THE SUPREME COURT* 176 (1958).

⁹ 328 U.S. 549 (1946). Mr. Justice Frankfurter's prevailing opinion spoke for only three of the seven justices (C. J. Stone having died before the decision) and is not technically precedence. Justice Rutledge concurred specially. *Id.* at 564.

¹⁰ *Id.* at 552, 553-54.

This would seem to be strange language from a justice who, as a professor of law led his students to believe that "the cases before the Supreme Court . . . in essence . . . involve the stuff of politics,"¹¹ and from a student of the Court who in writing on the life of Justice Brandeis said:

[T]he Constitution has ample resources within itself to meet the changing needs of successive generations. The Constitution provided for the future partly by not forecasting it and partly by the generality of its language. The ambiguities and lacunae of the document left ample scope for the unfolding of life. If the Court, aided by the bar, has access to the facts and heeds them, the Constitution . . . is flexible enough to respond to the demands of modern society. . . . In essence, the Constitution is not a literary composition but a way of ordering society, *adequate for imaginative statesmanship, if judges have imagination for statesmanship*.¹² (Emphasis added.)

"The remedy ultimately," Frankfurter declared in *Colegrove*, "lies with the people. . . . The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."¹³ Such deference to the legislatures illustrates the logical inconsistency and practical impossibility of applying judicial self-restraint to apportionment cases. To say that the only remedy lies with the bodies that perpetuate the abuse is to admit that there is no remedy.¹⁴ To avoid the issue because it is a "political question" is, as Justice Holmes has pointed out, "a mere play upon words."¹⁵ It is to maintain that "courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot."¹⁶

The holding in *Colegrove v. Green* was applied in even more extreme circumstances in the 1950 case of *South v. Peters*, which involved an effort by voters to restrain adherence to the so-called county unit system prescribed by Georgia law.¹⁷ The disproportion here was, in fact, so great that petitioners, voters in Georgia's most populous county, were able to show that in one county a vote would be worth over 120 times each of their votes. To the Court, however, even if more extreme, this was essentially the same case as *Colegrove*, calling again for dismissal of the action as one involving a nonjusticiable political question.

¹¹ Frankfurter, *The Supreme Court and the Public*, THE FORUM, June 1930, p. 330.

¹² FRANKFURTER, MR. JUSTICE BRANDEIS 53 (1932).

¹³ *Colegrove v. Green*, *supra* note 9, at 556.

¹⁴ See Lewis, *supra* note 2, at 1091 ff. For an excellent study of legislative self-perpetuation of representative discrimination see Harvey, *Reapportionments of State Legislatures*, 17 *Law & Contemp. Prob.* 364 (1952).

¹⁵ *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

¹⁶ *Colegrove v. Green*, *supra* note 9, at 573.

¹⁷ 339 U.S. 376 (1950). See GA. CONST. (1877), ART. III, §2 (1-3), as amended; §3 (1-2). Each county is allowed a number of unit votes—six for the most populous counties to two for the smallest. The candidate winning a majority of the county receives all the unit votes of that county.

Out of these decisions came a constant policy of the Court of refusal to entertain suits which involved the apportionment of legislative seats.¹⁸ To many critics it seemed impossible to distinguish the dilution of votes in these cases from the vindication of Negro voting rights,¹⁹ or the gerrymandering of minority groups on the basis of race,²⁰ or the logical extreme, for example, "of a state law which reduced the votes of Catholics or Jews, so that each got only one-tenth of a vote."²¹ In reality, there would seem to be little difference between discriminating against a minority and discrimination aimed at the political rights of the urban majority. Under the Court's decisions, a leading critic noted, "out of judicial deference to the action of the two state legislatures, the equal protection clause faded out of the Constitution and with it fundamental rights of citizens of Georgia and Illinois."²²

However, as Justice Frankfurter has noted:

[I]mmortality does not inhere in Constitutional decisions. The Constitution owes its continuity to a continuous process of revivifying changes. . . . A ready and delicate sense of the need for alteration is perhaps the most precious talent required of the Supreme Court. Upon it depends the vitality of the Constitution as a vehicle for life.²³

This need for alteration finally expressed itself in the greatly anticipated decision of *Baker v. Carr*.²⁴ Plaintiffs, according to their complaint, "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly (of Tennessee)" ²⁵ The heart of the complaint was that the Tennessee constitution had been violated over a period of half a century, and that the plaintiffs were unable to obtain a remedy from the Tennessee courts, the Tennessee legislature, or by an election under the existing apportionment.

According to the Tennessee Constitution the General Assembly, at least every ten years, is to allocate the seats among the counties or districts "according to the number of qualified voters in each."²⁶ There has been no

¹⁸ *Per curiam* decisions in *Cook v. Fortson*, 329 U.S. 675 (1946); *Turman v. Duckworth*, *ibid.*; *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Kidd v. McCannless*, 352 U.S. 920 (1956); *Radford v. Gary*, 352 U.S. 991 (1952); *Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Matthews v. Handley*, 361 U.S. 127 (1959). See also *MacDougall v. Green*, 335 U.S. 281 (1948).

¹⁹ *E.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927); *Lane v. Wilson*, 307 U.S. 268 (1939); *Terry v. Adams*, 345 U.S. 461 (1953). See Lewis, *supra* note 2, 1082-83.

²⁰ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). For a discussion of the interrelation of this case and reapportionment, see Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUPREME COURT REVIEW 194, 214-234 (1961).

²¹ SCHWARTZ, *op. cit. supra* note 2, at 149.

²² VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 138 (1953).

²³ FRANKFURTER, *op. cit. supra* note 12, at 103.

²⁴ 82 S. Ct. 691 (1962).

²⁵ *Id.* at 741.

²⁶ TENN. CONST., ART II, §5.

reapportionment since 1901, the legislature rejecting all bills to carry out the mandate of the constitution requiring a reallocation every ten years. Fifty Representatives elected by one-third of the voters control the lower house; therefore, there is no remedy and the State is in the grip of a self-perpetuating rural minority. The plaintiffs, the complaint concluded, "and others similarly situated, are denied the equal protection of the laws accorded them by the fourteenth amendment of the Constitution of the United States by virtue of the debasement of their votes."

The complaint was dismissed by a three-judge court convened under 28 U.S.C. §2281 in the Middle District of Tennessee. The District Court relied on the series of decisions beginning with *Colegrove v. Green*.²⁷ The case was brought to the Supreme Court on appeal.²⁸ The Court, Mr. Justice Brennan writing the majority opinion in a 6-2 decision, held: "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes."²⁹

As Mr. Justice Stewart cautioned in his separate concurrence, it is important to note that the Court expresses no view on the merits of the claim.³⁰ However, it is also important to note what the Court *did* say. Mr. Justice Brennan in a careful and narrow opinion, probably aimed at securing maximum support from the bench, held that the jurisdiction of the subject matter arises under the Constitution and is within the Civil Rights Act.³¹ In doing so he noted that a majority of the Court in *Colegrove* had held that there was jurisdiction in that case, deciding it on other grounds.³² He also interpreted *Colegrove* as "squarely" holding "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue."³³

Finally, Mr. Justice Brennan dealt with the crucial question of justiciability. Here he came face to face with the so-called "political question"

²⁷ 179 F. Supp. 824 (1959).

²⁸ 364 U.S. 898 (1960).

²⁹ *Baker v. Carr supra*, note 24, at 699.

³⁰ *Id.* at 736.

³¹ 28 U.S.C. §1343 (3) gives federal courts authority to redress the deprivation "under color of any state law" of any "right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for equal rights of citizens. . . ." 28 U.S.C. §1343 (4) gives the federal courts authority to award damages or issue an injunction "to redress the violation of any Act of Congress providing for the protection of civil rights, including the right to vote."

³² Mr. Justice Rutledge concurred in the result in *Colegrove v. Green*, agreeing that the bill should be dismissed for want of equity because "the shortness of the time remaining [before forthcoming elections] makes it doubtful whether actions could, or would, be taken in time to secure for petitioners the effective relief they seek. . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise jurisdiction." 328 U.S. 549, 565, 566 (1946).

³³ *Baker v. Carr, supra* note 24, at 704.

problem which had been the battle ground on which the "preferred-position" justices entered the lists to engage the prevailing advocates of "judicial restraint." In an exhaustive exposition Brennan delimits the contours of the "political question" doctrine. Initially, he cautions:

"Our discussion . . . requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness . . .

that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable. . . . *That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."*³⁴ (Emphasis added.)

Mr. Justice Frankfurter here joins battle in a dissent which has been characterized as "brilliant and moving"³⁵ and one which "rang with deep feeling."³⁶

To find such a political conception [that the Court should be the arbiter of legislative representation controversies] legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. Certainly, "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." . . . To divorce "equal protection" from "Republican Form" is to talk about half a question.³⁷

He characterizes the Court's decision as a

" . . . massive repudiation of the experience of our whole past . . . asserting destructively novel judicial power . . .

* * *

There is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in other of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.³⁸

It is not the burden of this comment to enter the lists with the justices in the "political question" debate. To do so would be presumptive, for the

³⁴ *Id.* at 706.

³⁵ Lippmann, *Today and Tomorrow*, *The Washington Post*, March 30, 1962, p. A 19, col. 1.

³⁶ *N. Y. Times*, March 28, 1962, p. 1, col. 8.

³⁷ *Baker v. Carr*, *supra* note 24, at 755-756.

³⁸ *Id.* at 737, 739.

reader has at hand in the opinions of the Court and of the dissents an exhaustive disquisition in legal scholarship on the subject. Both poles of the question are definitively exposed. The massive collision between Justice Brennan and Justice Frankfurter on this doctrine should titillate the palate of legal scholars for years to come. Seldom has the Court afforded the jurist so revealing an entrance into the inner sanctum of the conference room or laid bare so much of the cognitive processes which gave rise to its decision.

What is important for our purposes, however, is the fact that the majority lifted, ever so carefully, the apportionment problem from the exclusionary realm of political questions where it had been consigned since *Colegrove v. Green*. In doing so six justices abandoned the security of the pall of judicial restraint which had kept the Court out of the intricacies of "this political thicket."⁸⁹ They opened the door a crack to let in cases which could conceivably lead to a vast reexamination by the Court of the foundations of our political processes. Implicit in the *effect* of the decision is an initial approach to Justice Stone's theory that the Court should police the processes which lead to political decisions and subject the good order of the representative system to judicial scrutiny. How exacting that scrutiny will be, how far the Court will go in examining the myriad questions which potentially arise out of malapportionment, or whether this case might be a springboard into other political question fields must await the cases which the Court invites by the *Baker* decision. Indeed, the decision opens a Pandora's box of speculations and projected consequences. An examination of these possibilities, while speculative, is, nevertheless, necessary and valuable both in the constitutional lawyer's theorizing about or "second guessing" the Court and in delineating the pragmatic problems which will face the lawyer in litigating and the judge in adjudicating an apportionment case.

Justice Frankfurter's "eloquent and impassioned" dissent might well be a terminal point in the application of his strict standard of judicial self-restraint. The case represented a head-on collision with his whole judicial philosophy, yet only Justice Harlan joined in his dissent. While he was able in 1946 to gather a majority for his position in *Colegrove* and expand and implement it in subsequent apportionment cases, he was plowed under by a decisive majority in *Baker v. Carr*. Justices Black and Douglas, who stood alone in the fifteen years of *Colegrove's* ascent, witnessed the philosophy of their dissenting opinions of the past prevail. One cannot help but feel that Justice Frankfurter's dissent is an eloquent final testament of protest delivered with the conviction of a man who hears the death knell for his conception of what the Court is. He saw the collision. He keenly felt the rejection. He candidly highlighted the "massive repudiation" of a philosophy which he,

⁸⁹ *Colegrove v. Green*, *supra* note 9, at 556.

with the skill of a master craftsman, played so important a part in fashioning. Thus viewed, *Baker v. Carr* could very well be a decisive crisis in the Court's agonizing introspection concerning the nature and scope of the judicial function.

II

If the decision in *Baker v. Carr* represents the end of the application of judicial restraint in apportionment cases, it also represents the beginning of a vast new area of federal law. Seldom, however, has a new area of law been so cautiously initiated. The *Baker* decision does not sweep with the broad stroke of *Brown v. Board of Education*.⁴⁰ As Professor Freund has noted, it "says as little as possible about the development of this new doctrine."⁴¹ The Court placed on the lower courts the burden of developing a body of law which will set the criteria for what is fair voting representation and what is not.

The Court did not rule out representation on the basis of geography rather than population, nor did it rule out unequal representation which has a "reasonable basis." In fact, as we have already noted, the majority decision did not go to the merits of the apportionment problem—it simply opened the federal courts to cases alleging Constitutional violations in representation systems. Nor did the Court indicate what remedies will be available once a Constitutional violation is found. Mr. Justice Brennan simply notes "we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found . . ."⁴²

Mr. Justice Frankfurter observed in his dissent that "[f]or this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety."⁴³ Nevertheless, in point of fact, the lawyer is now faced with the burden of aiding the courts in creating the necessary tests, standards, and remedies. This is perhaps the lawyer's most ennobling and challenging duty in his service of the law. Here is summoned the creative genius which has so marked the development of the common-law. The creative function of lawyer and judge is indeed the essence of the common-law.

If the strict holding in the *Baker* case does not delimit the scope of this "new doctrine" there are provided in the concurrences some illuminating

⁴⁰ 347 U.S. 438 (1954).

⁴¹ Newsweek, April 9, 1962, p. 32.

⁴² *Baker v. Carr*, *supra* note 24, at 699.

⁴³ *Id.* at 738.

hints. Nor in preparing an apportionment case will the lawyer be in a judicial vacuum for there are many state⁴⁴ and some federal⁴⁵ decisions which point the way. Lastly, there is an impressive body of legal and political research which can be utilized.⁴⁶

The test of what is or is not fair representation, in the view of Justices Clark and Douglas, is "invidious discrimination." This test has long been applied in "equal protection" cases.⁴⁷ Viewed positively it is enunciated as the "rational basis" test. Both phrases find their way into the concurrences.⁴⁸ Justice Douglas says: "Universal equality is not the test; there is room for weighting."⁴⁹ The touchstone of the rational basis test is that classifications made by the state must be "rooted in reason."

Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.⁵⁰

The standards used by the state courts in apportionment cases are remarkably similar to the test enunciated in the concurring opinions. They have not required mathematical equality but have spoken in general terms. They have used classical equity concepts in evaluating the fairness of apportionment plans.

It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of a State which an ordinary knowledge of its population and a sense of common justice would suggest.⁵¹

⁴⁴ *Asbury Park Press v. Wooly*, 33 N.J. 1, 161 A. 2d 705; for sequel see *Application of Lamb*, 67 N.J. Super 39, 67, 169 A. 2d 822 (1961); *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932); *Tedesco v. Board of Supervisors of Elections*, 43 So. 2d 514 (La. Ct. App. 1949), appeal dismissed 339 U.S. 940 (1950); *Donovan v. Suffolk County Apportionment Comm'rs*, 225 Mass. 55, 113 N.E. 740 (1916); *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 23 N.W. 2d 610 (1946); *Waid v. Post*, 225 Ala. 441, 51 So. 2d 869 (1951).

⁴⁵ *McGraw v. Donovan*, 159 F. Supp. 901 (1958). See 177 F. Supp. 803 (1959), where the case was dismissed as moot, the state legislature having reapportioned. *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (1956). See 256 F. 2d 728 (1958) in which the case was reversed and dismissed as moot, Congress having provided for apportionment.

⁴⁶ *E.g.*, Lewis, *supra* note 2; Chafee, *supra* note 5; Walter, *Reapportionment of State Legislative Districts*, 37 ILL. L. REV. 20 (1942); Durfee, *Apportionment of Representation in the Legislature: A Study of State Constitutions*, 43 MICH. L. REV. 1091 (1945); Dauer & Kelsay, *Unrepresentative States*, 44 NAT'L. MUNIC. REV. 571 (1955); Note, 32 IND. L. J. 489 (1957). The entire Spring 1952 issue of 17 LAW AND CONTEMP. PROB. 253 is devoted to apportionment, see particularly articles beginning at 314, 364, 377, 387, 417, 440, and *Selected Bibliography* at 385.

⁴⁷ *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). See generally EMERSON & HABER, *supra* note 4.

⁴⁸ *Baker v. Carr*, *supra* note 24, at 724, 725, 729, 730, 731, 733, 734.

⁴⁹ *Id.* at 724.

⁵⁰ *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954).

⁵¹ *Ragland v. Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869 (1907).

The state courts have looked at the motive of the legislatures⁵² in passing apportionment statutes and look for a bona fide effort to approach practicable equality.⁵³

Justice Clark's opinion in *Baker* is important in that he found an invidious discrimination factually present and set down his interpretation of the tests to be met.⁵⁴ His finding is that Tennessee's constitutional scheme is rational but has not been followed. There is not in the apportionment statute the "numerical equality" demanded by the constitution. He finds wide disparity of voting strength between large and small counties. The only justification would be a rural-urban political balance, yet (1) counties with municipalities over 10,000 of approximately the same population have substantial disparity ranging from two-to-one to three-to-one in weight, and (2) the same disparity is found among rural counties of approximately the same population. Therefore, Justice Clark concludes, the purpose is not a rural-urban political balance. He then finds that, conversely, counties of the same representation have gross differences in population. This represents, in toto, a "crazy quilt." He concludes: "No one . . . has come up with any rational basis for Tennessee's apportionment statute."⁵⁵

Using Justice Clark's formula, therefore, the lawyer would set out that areas substantially similar in population, interests, and make-up are treated unequally by the statute he is attacking. Discrimination between urban and rural counties would not be enough under this scheme; there would have to be discrimination between *rural* and *rural* counties and between *urban* and *urban* counties. This test, then, seems to be akin to the classical equity doctrine that equals of the same class must be treated equally. Discrimination within a class would, therefore, show the necessary invidious discrimination and lack of rational basis for apportionment.

A second avenue of approach is indicated by Justice Douglas. He emphasizes that the urban-rural balance results in *Baker* in a nineteen-to-one weighting. This would represent to him an invidious discrimination. The problem here becomes acute if viewed in the abstract, for the question becomes: what is the allowable disproportion—ten-to-one, three-to-one, two-to-one? But the test does not stop here; "rational" implies "intent" and "invidious" implies a "bad intent." Therefore, the legislature's purpose and rationale must be judged. If the inequality represents a justifiable state policy it will not be disturbed. The burden, however, would be on the state to prove such a policy. If no justifiable policy can be found, but only a capricious dilution of votes, then there is a constitutional violation.

⁵² *Brooks v. State ex rel. Singer*, 162 Ind. 568, 578, 70 N.E. 980, 983 (1904).

⁵³ *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105, 110 (1932).

⁵⁴ *Baker v. Carr*, *supra* note 24, at 734.

⁵⁵ *Id.* at 733.

Justice Frankfurter roundly criticizes the Court for not setting down a formula or guide-lines. He says: "The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guide-lines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States."⁵⁶ The Court has not, however, set down such definitive guide-lines in dealing with the equally "umbrageous" commerce clause, nor has it done so in other areas calling for application of the equal protection clause. As Justice Frankfurter himself has pointed out:

It is not for this Court to formulate with particularity the terms of a permit system (for street meetings) which would satisfy the Fourteenth Amendment. . . . But many a decision of this Court rests on some inarticulate major premise and is none the worse for it. A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate, just as doggerel may be felt not to be poetry without the need of writing an essay on what poetry is.⁵⁷

A second problem facing the lawyer in bringing his apportionment case to court will be whether or not other adequate remedies are available. The Court specifically pointed out that Tennessee had no initiative or referendum. Does this mean that if there is an initiative the courts should not interfere? If so, eighteen states would seem to be beyond the pale of the *Baker* case.⁵⁸ However, the most recent apportionment case to reach the Supreme Court⁵⁹ arose in Michigan, one of the States in which initiative is available as a potential remedy. The Michigan court had dismissed, but the Supreme Court remanded for reconsideration in the light of the *Baker* case. It would seem, therefore, that the availability of initiative is not a deterrent to judicial redress. In view of initiative's past history in the reapportionment area, this might be the chucking of an albatross. While it has been employed successfully in Colorado and Washington, the 1948 attempt in California, and to a lesser extent, the Oregon experience of 1950, indicate that its utility is minimal. Initiative has been characterized as "expensive and cumbersome and is likely to be successful *only* where there is a large, underrepresented urban population *which organizes itself* into a great citizen's movement for reapportionment."⁶⁰ (Emphasis added.) This is a highly unlikely possibility.

⁵⁶ *Id.* at 738.

⁵⁷ *Niemotko v. Maryland*, 340 U.S. 268, 285 (1951).

⁵⁸ Thirteen states have constitutional provisions for initiative: Ariz., Ark., Calif., Colo., Mass., Mich., Mo., Neb., Nev., Ohio, Okla., and Ore. Five have a statutory provision for initiative: Me., Mont., S.D., Utah, and Wash.

⁵⁹ *Scholle v. Secretary of State* 30 U.S.L. WEEK 3332 (April 23, 1962).

⁶⁰ Bone, *States Attempting to Comply With Reapportionment Requirements*, 17 LAW AND CONTEMP. PROB. 387, 410 (1952).

Another consideration is whether in those states where the legislatures do not have reapportioning powers the courts can force the agency responsible to reapportion. It has been held in Massachusetts⁶¹ and New York⁶² that the courts may compel county boards to redistrict through use of the writ of mandamus. Where courts are reluctant to mandamus a coordinate branch, *i.e.* the legislature, they may so compel a county board because of the obvious difference between the two. However, where the court uses as its ground for decision the nature of the function performed by the county board, it may well hold that the latter is exercising a legislative function and so is not subject to mandamus. Such was the view of the Indiana court.⁶³ In Illinois⁶⁴ and Missouri,⁶⁵ the legislature has been held immune to mandamus in apportionment cases, while in Ohio⁶⁶ the opposite result is indicated. The legislative immunity to mandamus has been removed by constitutional amendment in Arkansas.⁶⁷

There have been other lines of attack. It has been argued unsuccessfully that the acts of a legislature which has failed to reapportion itself are invalid.⁶⁸ There has been an attempt to bring quo warranto proceedings against the members of the legislature, but this also has failed.⁶⁹ Finally, an attempt was made to restrain payment of the salaries and expenses of the legislators; this too was doomed to failure.⁷⁰ These attempts have all been initiated in the courts of the states. *Baker* raises the question whether the federal courts may hear similar claims for relief. Assuming that a fourteenth amendment ground can be formulated, it would seem that they may do so.

The question also arises whether the possibility of a Constitutional Convention is a "practical opportunity under the law" within the *Baker* rationale. This might have been settled in the recent "follow up" decision by the Su-

⁶¹ *Mc Glue v. Essex County Commissioners*, 225 Mass. 59, 113 N.E. 742 (1916).

⁶² *People ex rel. Henderson v. Board of Supervisors of Westchester County*, 147 N.Y. 1, 41 N.E. 563 (1895).

⁶³ *Board of Commissioners of Marion County v. Jewett*, 184 Ind. 63, 110 N.E. 353 (1915).

⁶⁴ *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (1895). The Constitution now provides that a special board shall reapportion if the legislature does not. ILL. CONST. ART IV, §8.

⁶⁵ *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912). Since 1945 the task of reapportionment is no longer a legislative one. MO. CONST., ART III, §§2, 3, 7 and 8.

⁶⁶ *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 27 N.E. 884 (1891). In Ohio also, the Legislature has been relieved of the reapportionment function. OHIO CONST. ART. XI, §11. The Board which now has the task is subject to mandamus. *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 41 N.E. 2d 377 (1942).

⁶⁷ ARK. CONST., ART VIII, §5; also by Constitutional amendment, ARK. CONST. AMEND. 23, the reapportionment task has now been placed in a board, and the latter has been subjected to control by the courts. *Smith v. Board of Apportionment*, 219 Ark. 611, 243 S.W. 2d 755 (1951); *Pickens v. Board of Apportionment*, 220 Ark. 145; 246 S.W. 2d 556 (1952).

⁶⁸ *Sherrill v. O'Brien*, 188 N.Y. 185, 81 N.E. 124 (1907); *People v. Clardy*, 334 Ill. 160, 165 N.E. 638 (1929).

⁶⁹ *Fergus v. Blackwell*, 342 Ill. 223, 173 N.E. 750 (1930).

⁷⁰ *Fergus v. Kinney*, 333 Ill. 437, 164 N.E. 665 (1928), cert. denied, 279 U.S. 854 (1929).

preme Court in *Scholle v. Secretary of State*⁷¹ in which the Court remanded to the Michigan Supreme Court for further consideration, a contest of the validity under the due process and equal protection clauses, of a 1952 amendment to the Constitution of the State of Michigan, fixing permanently a geographical scheme for the apportionment of state senators. The Michigan Supreme Court had dismissed the petition in a five-to-three decision in which there were five written opinions.⁷² A Constitutional Convention is now meeting in Michigan and apportionment is one of the major problems on its agenda. This did not prevent the Supreme Court, however, from directing the Michigan court to reconsider its dismissal of the suit in the light of the *Baker* decision.

The lawyer must, therefore, not only be careful to show that there is "invidious discrimination" but, it would seem, be prepared to argue the inadequacy of other avenues of relief which might be open under his state laws.

The last major problem in formulating the apportionment case would be the prayer for relief. The petitioners in *Baker v. Carr* sought a declaratory judgment that the 1901 statute was unconstitutional and an injunction restraining the named state officers from acting to conduct any further elections under it. They also prayed "that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formula to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large." They also prayed "for such other and further relief as may be appropriate."⁷³ As we have noted, the Court did not indicate what relief would be appropriate but simply left the formulation of a remedy to the District Court.

Justice Clark suggested one remedy. "One plan," he states "might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination."⁷⁴ The first court which dealt with the apportionment problem in the light of the *Baker* decision called for the legislature to reapportion, and if they do not, then the court indicated it would follow Justice Clark's method and reapportion the state itself.⁷⁵

A second remedy is that used by at least one state court,⁷⁶ and specifically prayed for in *Baker*. The court would be asked to enjoin the conduct of elections under the present discriminatory law and have the legislature elected at-large. This course would seem to have two virtues. It would have what

⁷¹ *Scholle v. Secretary of State*, *supra* note 59.

⁷² *Scholle v. Hare*, 360 Mich. 1, 104 N.W. 2d 63 (1960).

⁷³ *Baker v. Carr*, *supra* note 24, at 698.

⁷⁴ *Id.* at 733.

⁷⁵ *Sims v. Frink*, 30 U.S.L. WEEK 2512 (U.S. April 14, 1962).

⁷⁶ *E.g.*, *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932).

Justice Douglas has characterized as a "prophylactic effect" in that politicians would move swiftly to reapportion rather than face the possibility of an at-large election. Actual experience in the use of this remedy confirms the fact that such a decree would be a spur to legislative action.⁷⁷ Justice Black in comment on such a remedy has pointed out that it also has the virtue of being constitutional when applied in Congressional elections for the House of Representatives.⁷⁸

Four times large states have been forced by court orders to elect their entire congressional delegations at large.⁷⁹ This use of judicial threat was also effective in recent cases in Hawaii,⁸⁰ New Jersey,⁸¹ and Minnesota.⁸² In all of these cases the courts indicated that if the legislatures did not act, they would. In each case the legislature acted and the case was subsequently dismissed as moot.

Such a remedy has been criticized as raw judicial blackmail.⁸³ It can also be criticized from the practical point of view, on consideration of what would happen if the "prophylactic effect" failed to materialize. To take extreme examples, the voter in New Hampshire would be faced with the necessity of voting for 400 house members and 24 senate members; in New York, 150 house members and 58 senators; in Rhode Island 100 house members and 44 senators. The task would be less difficult in Delaware where the electorate would be called upon to choose 35 for the house and 14 for the Senate.⁸⁴ In such potential chaos the candidate named Aardvark would have an immense advantage over one surnamed Zeno.

Other available methods would be to have the court reapportion the entire state by use of a master, or partially reapportion for the next forthcoming election and leave final apportionment to the proper state agency. The courts could also instruct the governor to set up a commission to reapportion the state, at least in those areas which allow mandamus, or direct the governor to call a special legislative session to reapportion as is provided by the Florida constitution.⁸⁵

As this general survey suggests, there is no easy solution to the apportionment tangle. What can be said, however, is that the Supreme Court intends that the federal judiciary enter the "political thicket" and do a general pruning job in spite of the thorns they might encounter.

⁷⁷ Lewis, *supra* note 2, at 1087.

⁷⁸ 328 U.S. 549, 574 (1946).

⁷⁹ Lewis, *supra* note 2, at 1087.

⁸⁰ Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii, 1956).

⁸¹ Asbury Park Press v. Wooly, *supra* note 44.

⁸² McGraw v. Donovan, *supra* note 45.

⁸³ Baker v. Carr, *supra* note 24, at 733.

⁸⁴ See 1960-61 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 37.

⁸⁵ FLA. CONST., ART. VII, §§3, 4.

POSTSCRIPT

In the month since *Baker v. Carr* was decided many cases have been begun in both state and federal courts. Three have been of particular interest. A three-judge Alabama federal court declared unequivocally that the House and Senate of that state must be redistricted before a new legislature is elected in November. The legislature has not been apportioned in sixty-one years in spite of a state constitutional mandate to reapportion on the basis of population every ten years. The court indicated that unless the outgoing legislature passes a reapportionment bill in special session this summer, the court will draw up its own plan and order it put into effect.⁸⁶ The court seems to have adopted the course suggested by Justice Clark in his concurrence in the *Baker* case.⁸⁷

There have been two state court cases which have reached opposite results. A voter seeking correction of malapportionment in Idaho was sustained by a lower court in a pre-*Baker* decision. However, the Idaho Supreme Court held that the apportionment statute under which 15.2 per cent of the population elects 35 per cent of the state's lower house is not unconstitutional since the state constitution neither permits nor requires equal apportionment. It specifically found that the unequal system had a rational basis within the meaning of *Baker v. Carr*.⁸⁸ Holding that the Supreme Court's decision in the Tennessee case is binding on state as well as federal courts, the Maryland Court of Appeals remanded an apportionment case to a county circuit with instructions not to issue the requested injunction until the legislature has a chance to reapportion in special session this summer. The court indicated, however, that if the legislature did not act, then the circuit court should proceed and apportion the state for the forthcoming November election, or issue an injunction preventing the certification of the election.⁸⁹ The Maryland court adopted the route suggested by Justice Douglas by attempting to force the legislature's hand, giving its order the so-called "prophylactic effect."

These cases, decided in the immediate wake of *Baker v. Carr* indicate that the state and federal courts are not going to "go slow" on apportionment. This could produce an ironic paradox. In the historic integration case the Court wrote in broad and unequivocal strokes, yet in the eight years since *Brown v. Board of Education*,⁹⁰ the lower courts have moved cautiously and the "compliance" has been slow and tortuous.⁹¹ In its equally historic de-

⁸⁶ *Sims v. Frink*, *supra* note 75.

⁸⁷ *Baker v. Carr*, *supra* note 24, at 733.

⁸⁸ *Caesar v. Williams*, 30 U.S.L. WEEK 2495 (April 17, 1962).

⁸⁹ Maryland Committee for Fair Representation v. Tawes (Court of Appeals, Md. April 25, 1962), in *Washington Post*, April 26, 1962, p. 1, Col. 1.

⁹⁰ 347 U.S. 438 (1954).

⁹¹ See UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, Book 2, EDUCATION (1961).

cision on apportionment the Court was careful, hesitant, and cautious. However, if the month of April 1962 is any indication of what the course of that holding will be in the lower courts, the implementation of what is "*sub silentio*" in the *Baker* case will be by swift and unequivocal use of the full judicial power.

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