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This article is based on the auther's address before the Vanderbilt University School of Law in connection with the school's 1962 Law Day ceremonies. In it, Mr. Katzenbach examines the positions of the various opinions in Baker v. Carr, the significance of the case both for Tennessee and the country as a whole, and the various alternatives open to the district courts for implementing the decision.

Law Day—USA, in 1962, is an occasion for special celebration in Tennessee, particularly in Nashville, the home of this great university, and in the other important population centers of the state.

Under, and because of, the rule of law, I believe we are about to witness the peaceful restoration of the equal voting rights of thousands of citizens of Tennessee, whose voices and representation in guiding the legislative affairs of the state have been reduced to a mere fraction of their rightful worth over the past sixty years.

The case of *Baker v. Carr*,[1] decided just one month ago by the United States Supreme Court, concerns Tennessee directly. Indirectly, it may affect voting rights and legislative representation in every other state where entrenched minorities have succeeded in diluting the right of franchise of the majority.

The historic decision is both a reward and a tribute, earned by the perseverance and dedication of a bipartisan band of citizens, comprising plaintiffs and counsel, among them Mayor Ben West of Nashville, Walter Chandler of Memphis, and Hobart F. Atkins of Knoxville. The unwavering faith of this group, that law would prevail over lawlessness, made its impression on the high court where others before them, from Tennessee and elsewhere, unluckily had not succeeded.

What has *Baker v. Carr* decided? Actually it is but a first, and seemingly simple, step in the whole and ultimate process of reapportionment.

The majority of the Court, speaking through Mr. Justice Brennan, held that the Tennessee plaintiffs had set forth a justiciable cause of action, within the reach of judicial protection under the fourteenth amendment, and that the federal district court, which had dismissed the complaint on a pretrial motion, should hear and decide the claim. Plaintiffs' claim is that the 1901 state statnte, for apportioning membership in the Tennessee legislature among the several districts and counties, has effected a gross

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

disproportion of representation to voting population and a consequent gross dilution of voting rights of the unfavored voters. This, plaintiffs say, is arbitrary and capricious state action, offensive to the equal protection clause of the fourteenth amendment in the irrational disregard of the standard of apportionment prescribed by the state's constitution or of any standard. The injury asserted is that the arbitrary classification reduces the worth of votes by voters in certain counties and places them in a position of constitutionally unjustifiable inequality with voters in the favored counties.

Plaintiffs, said the Court, have stated a cognizable federal constitutional cause of action. They assert a plain, direct, and adequate interest in maintaining the effectiveness of their votes. On this they are entitled to a hearing and to the district court's decision, for the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

The deep significance of, and the torment which preceded, this seemingly inescapable, elemental decision is revealed in the fully documented dissents of Mr. Justice Frankfurter and Mr. Justice Harlan. The main course of federal decisions hitherto had been to treat differently the disparities between voting population and legislative representation as contrasted with impairment of voting rights because of race or color. From its earliest opinions, the Supreme Court had recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. While generally labeled "political questions," the dominant consideration, said Mr. Justice Frankfurter, is the lack of satisfactory criteria for a judicial determination. To this category of cases, the earlier decisions[2] of the Supreme Court had apparently consigned the voter representation cases. The reason, said Mr. Justice Frankfurter, was to avoid federal judicial involvement in devising judicial as opposed to legislative standards for judging the part numerical equality among voters should play as a criterion for the allocation of political power. Also, he said, in dealing with relief, there was reason to avoid the political issue of resolving the relative merits of at-large elections versus elections held in districts of unequal population.

In the minority view, these considerations equated the Tennessee voting rights case with the cases held nonjusticiable by the Court which have arisen under article IV, section 4 of the Constitution, by which the United States guarantees to each of the states a republican form of government. In the minority view, the Teunessee case is an article IV guarantee claim masquerading under a fourteenth amendment voting rights label. The Court, says Mr. Justice Frankfurter, is asked to choose among competing

2. South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Green, 328 U.S. 549 (1946). There have heen more recent cases following these decisions involving reapportionment but in none of them until Baker v. Carr has the Court written an opinion.

bases of representation—or competing theories of political philosophy—in order to establish an appropriate frame of government for Tennessee and thereby for all states of the Union. And why? Because, he says, for a court to determine what "equal protection" protects there must first be determined the republican-form issue, that is, what frame of government is allowed. Hence, equal protection cannot be divorced from republican form, and equal protection supplies no clearer guide for judicial examination of apportionment methods than the republican-form guarantee.

Reviewing the English and American systems of representation, past and present, the minority concludes that it is simply not true that representation proportioned to the geographic spread of population is universally accepted as a necessary element of equality between man and man, and must therefore be taken to be the standard of a political equality preserved by the fourteenth amendment. Such equality, however desirable, has not been generally practiced; and because of the manifold social, economic, and political factors which are combined in decisions which determine representation and apportionment, and because of the party conflicts which are engendered, in the view of the minority the federal judiciary ought not become embroiled. The issue, said the minority, is unfit for federal judicial action.

Thus, in the reflected light of the minority opinions, the true size of the seemingly simple majority step becomes apparent. Duly mindful of the criticism of the minority, the majority of the Court took great pains to distinguish the judicial action it was authorizing from the alleged embroilment in state political questions.

First, the majority holds that plaintiffs' claim neither rests upon nor implicates the republican form of government guarantee of the Constitution. Plaintiffs make a justiciable claim that they are denied equal protection. If the discrimination is sufficiently shown, says the Court, their right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.

Second, the kind of so-called "political question" with which the federal judiciary will not deal, under the decided cases, is not present in this controversy. Those cases, whether they arose under the republican-form guarantee clause or otherwise, were concerned with the relationship between the federal judiciary and the coordinate branches of the federal government, and not the federal judiciary's relationship to the states, as here.

Here, the question is the consistency of state action with the federal constitution, which is not a question to be decided by a political branch of government coequal with the Supreme Court. For the plaintiffs to succeed in their challenge of the state action, it is not necessary for the Court to enter upon policy determinations for which judicially manageable

standards are lacking. On the contrary, judicial standards under the equal protection clause are well developed and familiar. It is open to the courts to determine on the facts that a discrimination reflects no policy but simply arbitrary and capricious action. Specifically, says the Court majority, claims arising under the equal protection clause are not held nonjusticiable because they touch matters of state governmental organization.

Such is the setting in which *Baker v. Carr* is returned to the three-judge district court in Tennessee for further action. And, indirectly, such is the setting for a number of other three-judge district courts considering, or about to consider, reapportionment questions in Alabama,[3] Georgia,[4] Maryland,[5] New York,[6] Oklahoma,[7] and Virginia[8] (and for the Michigan Supreme Court, which was directed on April 23, 1962,[9] to give further consideration in the light of *Baker v. Carr* to its decision denying reapportioument of the Michigan Senate).

Where does the Supreme Court authorization take the district courts and are there guidelines or aids to them? What assistance does the Court's opinion provide for the states themselves?

For the states, acting through their legislatures and other elected officers, it is important to recognize and use the tremendous lift, for the strengthening and preserving of our federal-state system, which this modest decision offers. Its very open-endedness is the key.

The history of federal-state relations in more recent times has been marked by increasing direct federal-local relationships where state legislatures have not been truly representative, and responsive to the needs, of growing urban and suburban populations. The opportunity, if not the necessity, for the states to take the initiative in slowing down this process of centralism, and restoring the strength of federalism, is immediately and initially in the hands of existing state governments. The Supreme Court has not attempted to define what are the inequities of representation or to prescribe remedies. It has issued merely a call for action.

The Supreme Court has not said that the courts are the only appropriate instruments to reform electoral inequities. It has merely said that the legislatures are no longer free to maintain such inequities. If they continue

3. Sims v. Frink, 30 U.S.L. WEEK 2512 (M.D. Ala. April 14, 1962).

4. Sanders v. Gray, 203 F. Supp. 158, *review granted* 30 U.S.L. WEEK 3389 (N.D. Ga. June 18, 1962); Toombs v. Fortson, 30 U.S.L. WEEK 2605 (N.D. Ga. May 25, 1962); Wesberry v. Vandiver, Civil No. 7889, N.D. Ga., 1962.

5. Price v. General Assembly, Civil No. 13694, D. Md., 1962, but the major activity has been in the state courts of Maryland. See Maryland Comm'n for Fair Representation v. Tawes, 180 A.2d 656 (Md. Ct. App. 1962).

6. WMCA v. Simon, Civil No. 61-1559, S.D.N.Y., 1962; Honeywood v. Rockefeller, Civil No. 63-423, E.D.N.Y., 1962.

7. Moss v. Burkhardt, Civil No. 9130, W.D. Okla., 1962.

8. Mann v. Davis, Civil No. 2604, E.D. Va., 1962.

9. Scholle v. Hare, 369 U.S. 429 (1962).

to do so, the courts can step in. The opinion should therefore be regarded by the legislatures as an invitation to deal equitably with this problem, so long neglected.

In Tennessee, corrective legislative action could be a comparatively simple matter, whereas in other states, it may require more complex action, such as revision of the state organic law. The point is, given the will to seize the current opportunity, the initiative can remain with the states, until a satisfactory solution is achieved.

If this will is lacking, the majority opinion in *Baker v. Carr* tells the Tennessee district court that plaintiffs are entitled to a trial on their complaint and to a decision. The Court does no more than note that it has no reason to doubt that the district court will be able to fashion relief if violations of constitutional rights are found. At this stage of the case the Court says only that it is improper to consider what remedy would be most appropriate if plaintiffs prevail at the trial. In the matter of standards by which to determine that there is a violation of plaintiffs' constitutional rights, the majority opinion offers no details. It says only that judicial standards under the equal protection clause are well developed and familiar, and that it is open to the courts to determine that a discrimination reflects no policy but simply arbitrary and capricious action.

On this matter of standards by which to judge a violation of voting rights, the background of *Baker v. Carr* suggests that judging the violation may not be too great a problem in the existing circumstances in Tennessee, where the pattern of representation, which has departed so clearly from the rational pattern of near equality under the state constitution, is without rational justification. Indeed, as Mr. Justice Clark points out in his opinion, concurring with the majority, the case had proceeded to the point where the three-judge district court was able to find a clear violation of the state constitution and of the federal rights of the plaintiffs. For this, he says, the state's representatives offered no rational explanation, in fact indicated that none is known. Others of the Supreme Court majority apparently were not willing at this juncture to treat the district court statements as dispositive of the merits without further action in that court. The majority opinion cautiously points out that plaintiffs' federal constitutional cause of action does not rest on rights guaranteed by the Tennessee constitution, which rights may go further but which the court does not consider let alone enforce.

In other states, where the background differs, where possible rational explanations for deliberate imbalance in voting rights and representation may be proffered, the problem of judging a violation of federal constitutional right may be more difficult. The Supreme Court has yet to say whether "equal protection" permits sharp or even mild departures from equality of representation in either or both houses of a state legislature, if

the departure rests upon a reasonable or rational basis. For example, there may be a rational basis for balancing representation of population by reasonable geographical considerations. Conversely, the Court has yet to say that "equal protection" assures equality of representation in both houses of a legislature. For the present, the details of the "equal protection" standard are not clear to the view.

Mr. Justice Clark said the decision in *Baker v. Carr* supports the proposition that "to be fully conformable to the principle of right, the form of government must be representative." In judging that this is so, as cases arise state-by-state, the Congress might wish to consider assisting the courts as well as the states by providing certain objective standards.

In this connection, both the Congress and the states might take note of the criticism and advice of Thomas Jefferson respecting the status of representation in the Virginia legislature in 1816, and perhaps thought might be given to invoking the congressional powers to enforce the fourteenth amendment and the powers of Congress under article IV to guarantee to every state a republican form of government. Jefferson wrote:

> For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself, and responsible to him at short periods, and let us bring to the test of this canon every branch of our constitution . . . . The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management. Try by this, as a tally, every provision of our constitution, and see if it hangs directly on the will of the people.[10]

In the matter of remedies to be applied by district courts to this newly emerging type of voting right, since the Supreme Court has done no more than declare its confidence in the ability of the courts to fashion relief if violations are found, we must presently look to the claims and suggestions of the parties to appraise the future course.

Preliminarily, it has been suggested that once the district court has taken jurisdiction of the cause on the merits, it would probably not become necessary for it to enter a decree specifically prescribing the means of relief. Looking at some past history, plaintiffs told the Supreme Court that the assertion and retention of jurisdiction by the district court would provide the necessary spur to corrective legislation in Tennessee. The Solicitor General of the United States, as amicus curiae, predicted that a ruling sustaining the judicial power to adjudicate the constitutionality of an apportionment on the merits would stimulate legislative action not only in Tennessee but elsewhere.

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10. Letter to Samuel Kercheval, 10 WRITINGS OF THOMAS JEFFERSON 38-39 (Ford ed. 1899).

This is precisely what happened in Minnesota[11] and Hawaii.[12] There the district courts took jurisdiction (in cases that preceded *Baker v. Carr*) and deferred further court action to allow full opportunity for legislative action, which was forthcoming. A similar result was recently achieved in New Jersey in 1961 by prodding[13] the legislature without a direct remedial decree by the New Jersey Supreme Court.

Recognizing, however, that the district court must be prepared to enter a fair and effective decree if the legislature does not act, the parties have come forward with a number of proposals. In each case, the remedy is directed at future elections and does not impeach the validity, or ability to act, of the incumbent legislature. Because the Tennessee constitution provides precise guidelines, in particular for apportioning both houses of the legislature according to voter population (which has been ignored by the legislature for the past sixty years) and for using counties or adjacent counties as districts, one suggestion has been that the district court itself could eliminate the major disparities by an order combining several of the adjacent overrepresented counties or districts. This would not involve re-mapping of Tennessee and would eliminate the glaring inequities.

Another suggestion is the direction of an election at large, which follows the course used in a number of earlier precedents in federal[14] and state[15] cases where there were faulty reapportionments.

Under still another suggestion, the district court would order the weighting of the votes of senators and representatives in the legislature to offset overrepresentation and compensate for underrepresentation. Thus, the legislators from the overrepresented counties or districts would have fractional rather than full votes, and the votes of legislators from the underrepresented counties or districts would be valued at greater than one vote each.

These, and certain other possibilities, are remedies which could generally be applied on an interlocutory basis, without the necessity of entering a final decree. Implicit would be the recognition that these are temporary measures, which look toward ultimate legislative rather than judicial provision for fair representation and the ending of voter inequities.

It is no doubt true, as Mr. Justice Frankfurter observed, that we have not in fact reached the status where representation proportioned to the

11. Magraw v. Donovan, 159 F. Supp. 901 (D. Minn.) (motion to dismiss denied), *jurisdiction retained until legislature had an opportunity to act,* 163 F. Supp. 184 (D. Minn. 1958), *case dismissed on plaintiffs' motion,* 177 F. Supp. 803 (D. Minn. 1959), *motion to intervene denied,* 288 F.2d 840 (8th Cir. 1961).

12. Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956), *rev'd as moot,* 256 F.2d 728 (9th Cir. 1958).

13. Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960). The legislature passed a reapportionment act Feb. 1, 1961.

14. See, *e.g.,* Smiley v. Holm, 285 U.S. 355 (1932).

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

geographic spread of population is universally accepted as a necessary element of equality between man and man. But as a standard for action and achievement, the concept has been part of the American heritage and development from Jefferson to modern times, and the way is now open for obtaining judicial assistance in securing that equality in representation.

The decision in *Baker v. Carr* is, as I said at the outset, a great example of the rule of law in our society. But I would emphasize that a free society depends not merely upon the integrity and wisdom of its courts, but far more importantly upon the voluntary acceptance of the law as interpreted and discharged by the judiciary.

We do know that we live as a society under the rule of law when we accept with good will the pronouncements of our courts, and particularly our highest court. I do not anticipate that many of the problems which I have discussed today with respect to what a court might do if legislatures did not act will ever arise. I have great confidence that, the Supreme Court having declared the constitutional right, legislatures will act within the decision and within its spirit. For that voluntary acceptance by society is the mark of freedom and the mark of a society which lives under law.