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NOTE

Baker v. Carr—Malapportionment in State Governments Becomes A Federal Constitutional Issue*

Since its enigmatic 1946 *Colegrove v. Green*¹ decision, the Supreme Court has not thought it necessary or wise to discuss extensively the federal questions involved in the "political thicket" of state malapportionment. Cases raising the issues in a variety of forms have been dismissed with brief per curiam opinions, usually containing only citation to authority.² The 1960 census figures,³ however, have recently emphasized the increasingly grotesque disparities in political strength between the citizens of the cities and those of the rural areas. City voters, unable to force the legislators to pass a reapportionment which would reflect this dynamic shift in population, have continued to seek some formula by which the allocation of state political power would be considered a federal constitutional question. Arguments that due process requires that each vote be counted equally in a democracy have made little headway. A more persuasive approach has been to attack an existing allocation indirectly by the claim that it discriminates against some citizens irrationally in violation of the equal protection clause. These efforts have won at least an opening skirmish and perhaps the entire battle. Although no less than six opinions and 158 pages were required to state the divergent views of the Justices, the Supreme Court has held that a reapportionment case arising from Tennessee presents a justiciable constitutional question to be heard on its merits by the federal district court.

Newspaper and television commentators have hailed this decision, *Baker v. Carr*,⁴ as a landmark case in the Court's history, certain to produce fundamental changes at least equal to those that followed the decision in

*Prepared in connection with the Seminar in Legal Problems of Regional Economic Development, Vanderbilt University School of Law, 1962.

1. 328 U.S. 549 (1946).

2. *Matthews v. Handley*, 361 U.S. 127 (1959); *Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Radford v. Gary*, 352 U.S. 991 (1957); *Kidd v. McCannless*, 352 U.S. 920 (1956); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Cox v. Peters*, 342 U.S. 936 (1952); *Remmey v. Smith*, 342 U.S. 916 (1952); *Tedesco v. Board of Supervisors*, 339 U.S. 940 (1950); *South v. Peters*, 339 U.S. 276 (1950); *MacDougall v. Green*, 335 U.S. 281 (1948); *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Cook v. Fortson*, 329 U.S. 675 (1947).

3. 1 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1960, at 44-12, table 6 (1961).

4. 369 U.S. 186 (1962).

Brown v. Board of Education.⁵ Such far reaching effects are potentially present, for malapportionment, unlike legal segregation, is a national rather than a regional problem, as involved in the politics of California or Connecticut as in those of Georgia. Further, the scope of the effects may well be broader, for apportionment goes to the very heart of any political organization and determines which of the myriad elements and interests in a society will have the controlling voice in deciding state objectives and policies. The cities now complain that state governments are not responsive to their needs, that problems such as public transportation, traffic congestion, recreation, community planning, juvenile delinquency, education and urban renewal receive unsympathetic consideration at the state level.⁶ As these problems have become more pressing, a new city-federal government rapport, of which President Kennedy's proposed Department of Urban Affairs was an outgrowth, has appeared on the political scene. If this new relationship continues to develop, the state governments will be increasingly by-passed in the solving of contemporary problems. An end to rural domination of the legislatures, however, could restore normal city-state relationships and enhance the state governments as political institutions. If, as some commentators seem to assume, the Supreme Court means to impose population equality as the only acceptable standard of apportionment, then radical changes in the functions and relationships of state governments may well be on the way.⁷

5. 347 U.S. 483 (1954).

6. "Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs, political representation in the majority of state legislatures is 50 or more years behind the times. Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

"As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population. These demands will become even greater by 1970 when some 150 million people will be living in urban areas.

"The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

"Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable underrepresentation of cities in the legislatures of most states." Brief for the National Institute of Municipal Law Officers as Amicus Curiae, pp. 2-3, *Baker v. Carr*, 369 U.S. 186 (1962).

7. Two excellent studies of the legal and related problems of malapportionment are Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958); *Symposium*, 17 LAW & CONTEMP. PROB. 253 (1952). Other useful works often cited, some of which deal with special aspects of malapportionment, are BAKER, *RURAL VERSUS URBAN POLITICAL POWER* (1955); GREENFIELD, *FORD &*

The Court, however, has not determined in *Baker v. Carr* that representation must be in direct proportion to population to avoid violating the fourteenth amendment. It has simply removed a widespread doubt that questions of malapportionment could be considered by the federal courts. What variations from a norm of equality between voters will eventually be permissible can be established only by further litigation. Some consideration of the factual background of the Tennessee apportionment situation and a review of the prior Supreme Court holdings in the tangled area of "political questions" are necessary to analysis of this case. Against this background, the opinions of most of the Justices show a continued reluctance to wade very deep into the Maelstrom of malapportionment.

I. MALAPPORTIONMENT IN TENNESSEE

A. Historical Development

Controversy over the apportionment of the legislature is not a new phenomenon in Tennessee politics. Three weeks of debate and horse trading were required before the Constitutional Convention of 1834 could agree upon a compromise for the apportionment provisions of the constitution.⁸ The character of the state was, of course, much different then than it now is,⁹ but many of the same arguments currently used were heard in the Convention debates.¹⁰ The populous and prosperous counties of Middle Tennessee demanded that representation in both houses be determined strictly by population. Any other system, they argued, was

EMERY, LEGISLATIVE REAPPORTIONMENT: CALIFORNIA IN NATIONAL PERSPECTIVE (1959); Aumann, *Rural Ohio Hangs On*, 46 NAT'L MUNIC. REV. 189 (1957); Baker, *One Vote, One Value*, 47 NAT'L MUNIC. REV. 16 (1958); Dauer & Kelsey, *Unrepresentative States*, 44 NAT'L MUNIC. REV. 571 (1955); Durfee, *Apportionment of Representation in the Legislature: A Study of State Constitutions*, 43 MICH. L. REV. 1091 (1945); Walter, *Reapportionment and Urban Representation*, 195 ANNALS OF THE AMERICAN ACAD. OF POLITICAL AND SOCIAL SCI. 11 (1938).

8. Eight resolutions on apportionment were proposed on May 27, 1834, the first day of Convention business, and not until June 14 was a compromise plan accepted (the Convention did carry on other work during this period). There were still disgruntled delegates to cast votes against the apportionment provisions when the formal voting on the constitution was conducted. JOURNAL OF THE CONVENTION OF THE STATE OF TENNESSEE CONVENED FOR THE PURPOSE OF REVISING AND AMENDING THE CONSTITUTION THEREOF (1834).

9. Population in Tennessee had risen to 681,902; exports were estimated at a value of \$8,140,000 of which cotton accounted for \$6,000,000; and although the state was still predominately agricultural, there was a developing iron industry and good prospects for exploiting the mineral resources of East Tennessee. Commerce had grown to the point that taxes on merchants equaled the revenue produced by the land tax. *Report of the Select Committee*, JOURNAL OF THE HOUSE OF REPRESENTATIVES 1833, at 355-60, quoted in 2 WHITE, MESSAGES OF THE GOVERNORS OF TENNESSEE 1821-1835, at 444-47 (1952).

10. The debates on apportionment during the Convention appear in the issues of the *Nashville Republican and State Gazette* or the *Nashville Banner and Daily Advertiser* of the period June 4 to July 23, 1834.

opposed to the basic concept of democracy and would impose taxation without representation. East Tennessee, fast losing its relative equality in numbers as settlers moved farther west, favored a single representative for each county regardless of population. The analogy of the United States Senate was invoked as a justification for giving the counties themselves political significance, while the avowed purpose of the plan was the protection of the distinct minority interests of the region. The western counties of the state were still relatively undeveloped but were rapidly filling up. The vote of delegates from this region seemed to divide by political expediency. Geographic representation would give the area an immediate increase in legislative strength, but if migration westward continued, a population basis would in the long run produce a greater share of legislators.¹¹ The solution eventually adopted for the Constitution of 1835 made population the basic standard for apportionment but gave some limited concessions to the concept of geographic representation. Elections were to be "free and equal" and an enumeration of "qualified voters" and a reapportionment was to be made every ten years. How to determine who were "qualified voters" and how many there were in each county did not seem to be a problem to the delegates. The number of representatives was fixed at a maximum of ninety-nine and there could be no more than thirty-three senators. Representatives were to be divided among the counties according to the number of voters, but any county having two-thirds of a ratio would receive a representative. Senators were also to be apportioned by number of voters, but with the provision that "the fraction that may be lost by any county or counties, in the apportionment of the . . . House . . . shall be made up to such county or counties in the Senate, as near as may be practicable."¹² Further limitations were contained in the prohibition against dividing any county and the requirement that only contiguous counties be joined in making up flatorial or senatorial districts.

Although this plan produced some bitterly partisan political battles, the Convention of 1870 adopted it for the constitution of that year, and it has remained as the fundamental scheme of apportionment since then.¹³ It was applied in 1881, 1891, and with minor modifications, in 1901, the Reapportionment Act¹⁴ of that year being the one challenged in *Baker v. Carr*.

11. For a good account of the conflicting economic interests and sectional bitterness that existed between the cotton culture of the middle region, the small independent farm semi-industrial society of the eastern region and the frontier settlements of the west state, see ABERNETHY, *FROM FRONTIER TO PLANTATION IN TENNESSEE: A STUDY IN FRONTIER DEMOCRACY* (1932).

12. TENN. CONST. OF 1835 art. II, §§ 5,6.

13. TENN. CONST. art. II, §§ 3-6.

14. Tenn. Pub. Acts 1901, ch. 122, now TENN. CODE ANN. §§ 3-101 to -109 (1956).

B. The Current Situation

Since the reapportionment of 1901, the population pattern of the state has undergone a radical change. Industrial development has simultaneously eliminated the need for much agricultural labor by mechanizing farming and created a labor demand in the factories of the cities. In Tennessee, this familiar process has worked out to produce four large metropolitan areas, Memphis, Nashville, Knoxville, and Chattanooga. The four counties containing these cities had 113,095 of a total voting population of 487,380 in 1900,¹⁵ or 23% of the voters. Taking the most favorable view of their share of legislators by counting flatorial representatives as though they were elected solely by these four counties, the metropolitan counties had 22 of the 99 representatives (22%) and 8 of the 33 senators (24%) in 1901. By 1950 the percentage in these four counties had risen to 40% of the total voting population (796,805 of 1,978,548 total voters) while their legislative representation remained unchanged. Regional distortions have also developed as the industrializing eastern counties have grown more rapidly in population than the still agricultural western area. It is indeed difficult to find any consistent pattern which the present apportionment and population will fit. Two to one disparities in representation exists between counties having a municipality of 10,000 and between counties not having a municipality of 10,000 population.¹⁶ Viewed in terms of the whole state, 37% of the voters elect 20 of the 33 senators while 40% of the voters elect 63 of the 99 representatives.¹⁷ However viewed, the present apportionment bears little relationship to the method required by the Tennessee constitution. To many minds, this change in relative representation constitutes an effective disenfranchisement of city voters, a revolution produced by inactivity.

C. Exhaustion of State Remedies

Repeated efforts have been made to pass a reapportionment bill through the General Assembly since 1911 when the 1901 act was supposed to be replaced.¹⁸ These bills have been defeated or at best referred to the Legislative Council for further study.¹⁹ There is no provision in the Tennessee constitution for popular initiative, and the method provided for constitutional amendment is under legislative control.²⁰ A convention

15. The following figures are drawn from 2 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1900, at 202-03, table 26 (1902) and 2 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1950, at 42-92, table 42 (1952). The 1950 rather than the 1960 figures are used here since these are the ones used in the instant case.

16. See the opinion of Justice Clark, concurring, 369 U.S. at 254-58 for these and other examples of disparities.

17. Brief for Appellants, p. 14, *Baker v. Carr*, 369 U.S. 186 (1962).

18. An excellent history of reapportionment in the state, prepared by the state historian, Dr. Robert H. White, is contained in the TENNESSEE SENATE JOURNAL 1959, at 909-60.

19. H.J. Res. 65, Tenn. Pub. Acts 1961, at 1114.

20. TENN. CONST. art. XI, § 3.

called to amend the constitution in 1953 was originally empowered to revise the apportionment provisions, but this power was deleted.²¹

Stymied in the political arena, city voters brought suit in a state court asking that elections under the 1901 act be enjoined. The chancellor denied any affirmative relief. In a declaratory judgment, however, he held the act unconstitutional but stated that the legislators could assemble as de facto officers to pass a new reapportionment. When, in 1957, this case, *Kidd v. McCannless*,²² reached the Supreme Court of Tennessee, the chancellor was reversed. Rejecting the de facto doctrine as applicable, the supreme court declared that "the ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself."²³ Appeal of this decision to the Supreme Court of the United States was dismissed.²⁴

D. *The Case in the District Court*

Suit in federal district court on a claimed deprivation of federal constitutional rights seemed to be the only alternative still open. Although the complaint in *Baker v. Carr* contains a count grounded on due process—that there is an inherent right that all votes be counted equally and that any system not following this standard violates fundamental fairness—its chief theme is that the legislators from the underpopulated counties have by inaction carried out a "purposeful and systematic plan to discriminate against a geographical class of persons,"²⁵ the city voters, and thus to deny them equal protection of the laws.

Statistical data were gathered by the City of Nashville²⁶ to add substance to both the due process and equal protection arguments. The study is designed to show the discrimination in the burden of taxation and the benefit of public expenditures allegedly resulting from malapportionment. It compares the twenty-three counties which, according to the 1950 voting population figures, are overrepresented under the state constitutional formula and the ten counties which are underrepresented. Tax funds collected for education²⁷ are distributed in such a way that the twenty-three overrepresented counties receive an average of \$152.25 per pupil while the underrepresented counties receive \$107.52. The average for all counties is \$129.90. In terms of total dollars, the overrepresented counties got \$2,069,643 or 17.2% more than they would have received under a formula

21. TENNESSEE HOUSE JOURNAL 1951, at 784.

22. 200 Tenn. 273, 292 S.W.2d 40 (1956).

23. *Id.* at 282, 292 S.W.2d at 44.

24. 352 U.S. 920 (1956).

25. Brief for Appellants, p. 6, *Baker v. Carr*, 369 U.S. 186 (1962).

26. Attached as exhibits to the Intervening Complaint of Ben West, Mayor, City of Nashville, Tennessee, *Baker v. Carr*, 369 U.S. 186 (1962).

27. Tenn. Pub. Acts 1959, ch. 14.

giving each pupil an equal amount. The underrepresented counties received \$7,126,829, or 20.8% less than a student equality formula would have given them. As an extreme example, Moore County's share was \$220.46 per pupil while Shelby County's share was \$95.85.

A more marked disproportion appears in the distribution of "County Aid Funds,"²⁸ representing two cents of the seven cent state gasoline tax devoted to the maintenance of roads. Half of this fund is distributed equally to the 95 counties; 25% goes to the counties on a basis of area; and 25% on a basis of population. Under this formula, the overrepresented counties receive an average of \$28.98 per registered motor vehicle, and the underrepresented counties \$6.10 per vehicle. The state average is \$15.84 per vehicle. Comparable figures for distribution per capita rather than per vehicle are: overrepresented counties, \$9.19; underrepresented counties, \$2.46; and state average, \$5.82. Compared with Shelby County's \$4.55 per vehicle is Moore County's \$68.13. Matching federal funds allocated to the maintenance of state roads are also distributed by this same formula.²⁹

Initially, Judge William E. Miller of the middle district of Tennessee refused to dismiss the complaint summarily, finding distinguishing features in this case "that may ultimately prove to be significant."³⁰ A three judge district court, however, felt compelled to dismiss on the grounds "that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type . . ."³¹ In a dictum to the merits, the court said, "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay."³²

II. MALAPPORTIONMENT IN THE SUPREME COURT

A. *The Colegrove Background*

The case law which the district court found compelling begins with the decision in *Colegrove v. Green*, a case in which citizens of Chicago challenged the constitutionality of the congressional districts of Illinois. Prior to *Colegrove*, the apportionment of congressional districts had been an issue before the Court but not in terms of the fourteenth amendment. In *Smiley v. Holm*,³³ a redistricting act which had failed to get the Governor's

28. TENN. CODE ANN. § 54-403 (1956).

29. TENN. CODE ANN. § 54-611 (Supp. 1961).

30. *Baker v. Carr*, 175 F. Supp. 649, 652 (M.D. Tenn. 1959).

31. *Baker v. Carr*, 179 F. Supp. 824, 826 (M.D. Tenn. 1959).

32. *Id.* at 828.

33. 285 U.S. 355 (1932).

approval as required by the state constitution was held to violate article 1, section 4 of the federal constitution. And only statutory construction was reached in another districting case, *Wood v. Broom*,³⁴ although four justices wanted to dismiss without a hearing on the merits on the ground of want of equity.

Justice Frankfurter, writing for three of the seven justices who heard *Colegrove*, found that the case could be decided on the statutory grounds used in the *Wood* opinion or on the want of equity grounds mentioned in that case. He went on, however, to enunciate the political question doctrine of reapportionment cases which has been a center of controversy since. The thrust of Justice Frankfurter's opinion is that apportionment problems, like those arising under the clause guaranteeing to the states a republican form of government, are not properly justiciable under our constitutional system. "[D]ue regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."³⁵ At least four distinct considerations seemed involved in this conclusion.

(1) The provisions of the federal constitution clearly gave Congress the right to control the election of its own members. For the Court to interfere would be a usurpation of a power delegated to another coequal branch of government in violation of the doctrine of separation which runs throughout the Constitution.

(2) A court lacks the necessary standards by which to determine the issues of apportionment. To reach a compromise between the competing policies of equality of voting and the protection of minority interests requires a weighing of an incredibly complex array of economic, social, religious, ethnic and party factors, a process which the narrowly constrained adversary system is inherently incapable of performing.

(3) For the courts to attempt such policy judgments would weaken rather than strengthen democracy. "It is hostile to a democratic system to involve the judiciary in the politics of the people."³⁶ The remedy must depend, "ultimately, on the vigilance of the people in exercising their political rights."³⁷

(4) The remedies which a court can employ are incapable of effecting a sure solution and might easily produce a worse situation than the one complained of. For the court to make an empty pronouncement of rights which it could not enforce would only weaken its power to perform its proper functions.

34. 287 U.S. 1 (1932).

35. 328 U.S. at 552.

36. *Id.* at 553, 554.

37. *Id.* at 556.

The dissenting opinion in *Colegrove* by Justices Black, Douglas and Murphy found jurisdiction, justiciability, a federal right in need of protection, and no valid reason for declining to use an equitable remedy. The decisive vote, however, was cast by Justice Rutledge who, while conceding jurisdiction and justiciability in the sense that the federal issues involved were amenable to the judicial process, nevertheless held that "the cause is of so delicate a character, . . . that the jurisdiction should be exercised only in the most compelling circumstances."³⁸ On the issues in *Colegrove* then the Court divided four to three in favor of jurisdiction and justiciability and four to three in favor of declining to exercise a discretionary, equitable power.

The *Colegrove* holding was summarized in the cursory per curiam opinion of *South v. Peters*: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."³⁹ And speaking precisely to the issue of geography as a criteria for reasonable distribution of political strength, the Court said in *MacDougall v. Green*:

It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.⁴⁰

The lower federal courts have interpreted these decisions to mean that reapportionment problems, both of congressional districts and state legislatures, were not to be entertained, and the Supreme Court has regularly sustained the dismissal with only a citation to authority.⁴¹

At least two of the district courts, however, have found enough discretion left to them by the *Colegrove* opinions to refuse to dismiss reapportionment cases. In *Magraw v. Donovan*,⁴² a Minnesota district court retained jurisdiction of the case long enough to allow the legislature to act. Its opinion strongly intimated that a failure by the legislature would produce a decree granting some form of affirmative relief. In a similar case involving a territorial apportionment, *Dyer v. Kazuhisa Abe*, the court

38. *Id.* at 565.

39. 339 U.S. 276, 277 (1950).

40. 335 U.S. 281, 284 (1948).

41. See note 2 *supra*.

42. 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).

stated that "any distinction between racial and geographic discrimination is artificial and unrealistic. . . . The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution."⁴³

B. The Racial Discrimination Cases

The most serious challenge to the philosophy of *Colegrove* has arisen from the increased scope and utilization of the equal protection clause to end racial discrimination. To the proponents of a new federal approach to reapportionment, an analogy to the racial voting and desegregation cases proved irresistably appealing. In them they saw not only an intent to give protection to a broader range of individual rights but also a willingness by the Court to inject its prestige and authority into unusually controversial social and political areas and to experiment with remedial devices less specific and final than the usual decree. The threads of racial discrimination and political questions became intertwined in *Gomillion v. Lightfoot*⁴⁴ when Alabama argued that *Colegrove* denied the Court's right to inquire into the use made of a traditional "political" power—the redistricting of a city—to exclude Negro voters. Seemingly reluctant to answer the equal protection issue, the Court cast its opinion in terms of denial of voting in violation of the fifteenth amendment. The otherwise valid exercise of the state power to redistrict was considered as only a colorable incident to this deprivation. The Court could not find, nor could Alabama suggest, any basis other than racial discrimination to justify the state action. *Colegrove* was further distinguished on the grounds, *inter alia*, that there had been only a failure to act there while in *Gomillion* there was positive action. For malapportionment cases, *Gomillion*, of course, can easily be distinguished since its decision was based on the fifteenth amendment, yet it is easy to read the case to mean that the setting of political boundaries by a state is not so sacrosanct a political function that the Court will be deterred by an equitable reticence from inquiring into legislative discretion in every case. From this premise, it is not too great a jump to think that the Court might inquire into the reasonableness of discrimination between groups of voters based on standards other than race.

III. THE OPINIONS

Against the background of *Colegrove* and its progeny, the opinions in *Baker v. Carr* are as significant for what they leave unsaid as for their actual pronouncements. Justice Stewart very precisely defines the extent of the agreement among the majority justices.

43. 138 F. Supp. 220, 236 (1956), *rev'd as moot*, 256 F.2d 728 (1958).

44. 364 U.S. 339 (1960).

The Court today decides three things and no more: "(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."⁴⁵

He would limit his commitment to these narrow points with the admonition that "the burden of establishing the unconstitutionality of a statute rests on him who assails it."⁴⁶ Justice Clark, at the other extreme of the majority, reached both merits and remedy. Accepting the uncontroverted population and representation figures of the appellants and applying to them both his own statistical analysis of relative representation and a method used by Justice Harlan in his dissent, Justice Clark found "that the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions, . . . a crazy quilt without rational basis."⁴⁷ Such "invidious discrimination" constitutes "a patent violation of the Equal Protection Clause" Significantly, it was the lack of rationality in the discrimination rather than any discernible pattern of favoring rural over urban areas which made the act unconstitutional to Justice Clark. In fact, he felt the *MacDougall* case, which recognized the rationality of discriminating on a geographic basis, was controlling, and he cited with apparent approval the Georgia county unit system.⁴⁸

Justice Douglas, by contrast, expressly rejected the *Colegrove*, *MacDougall* and *South v. Peters* opinions. His focus is on the nature of the right to vote, a right which he found, if not clearly derived from the federal constitution, is at least "inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution."⁴⁹ The state may not qualify this right by use of either race or sex as a standard. To some extent, the equal protection clause places a third limitation on state standards. The question in the case therefore, as Justice Douglas saw it, was, "may a State weight the vote of one county or one district more heavily than it weights the vote in another?" His answer is a definite "No," if the weighting produces an "invidious discrimination." How much a state may vary from equal weighting before its action becomes "invidious," he

45. 369 U.S. at 265. Justice Stewart was here quoting from the holding in Justice Brennan's opinion, 369 U.S. at 197-98.

46. *Id.* at 266.

47. *Id.* at 254. Justice Clark and Harlan differed on the weight to be assigned each county sharing a flatorial representative.

48. *Id.* at 253, 256 n.8.

49. *Id.* at 242. Justice Douglas would apparently be willing to consider cases involving the right to vote even if brought under article IV, section 4 (the clause guaranteeing to each state a republican form of government). While conceding that some of the rights under this article are exclusively for the President or for Congress, he would not abdicate all judicial power under the clause. To the extent that *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), was contrary to this conclusion, he seemingly would overrule it.

left unexplored. "[U]niversal equality is not the test; there is room for weighting."⁵⁰

The opinion by Justice Brennan, in which the Chief Justice and Justice Black joined, is an elaborate exposition of the points it seeks to cover, but its silence on the other perplexing issues involved in malapportionment causes one to sympathize with the words of Justice Frankfurter, that the case stands as a "brooding omnipresence in the sky."⁵¹ Jurisdiction, justiciability, equitable abstinence, and standing had all been so interwoven in *Colegrove* that Justice Brennan took pains carefully to distinguish each issue. He reiterated the well established rule that the only limitations on jurisdiction in the strict sense of power over the subject matter were those in article III of the Constitution, that there be a "case or controversy," "arising under" the Constitution and made remediable by Congress. Finding later in the opinion that the issues were justiciable, he established that this was a "case or controversy," and since the complaint was based on the fourteenth amendment and was not "so attenuated and unsubstantial as to be absolutely devoid of merit," he thought it clearly was one "arising under" the Constitution. The Civil Rights Act supplied any needed statutory grant of power, and Justice Brennan found nothing in *Colegrove* that foreclosed jurisdiction in this strict sense.

Standing—a sufficient personal interest in the suit—was also a simple hurdle for Justice Brennan to cross, for even if the veiled words of the plurality opinion in *Colegrove* were taken to mean that voters lacked standing to correct a "wrong suffered . . . as a polity," an actual majority of the Justices who heard the case had expressly held that standing existed.

Justice Brennan's approach to the crucial issue of the justiciability of malapportionment cases was somewhat oblique. Justice Frankfurter's opinion in *Colegrove* had cast that case within the broad, loosely defined area of judicial self restraint labelled as "political questions," an area in which jurisdiction existed but in which the courts for a variety of reasons have refused to exercise judicial power. Reviewing precedents involving subjects as widely removed from malapportionment as determining the end of hostilities or the status of an Indian tribe, Justice Brennan distilled six elements which had been decisive in all these cases in the finding of a nonjusticiable, "political question." These elements were:

[1] constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an

50. 369 U.S. at 244-45. Later in his opinion, Justice Douglas did suggest that the goal to be sought was "substantial equality." 369 U.S. at 250 n.5.

51. *Id.* at 268.

unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵²

According to the Brennan analysis, the presence of one of these elements in some cases, or a combination of them in others is what makes a nonjusticiable "political question" out of a case simply involving some political power. "The nonjusticiability of a political question is primarily a function of the separation of powers,"⁵³ but more important for this case "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.'"⁵⁴ Nor did Justice Brennan think that the class of "political questions" most closely analogous to the malapportionment cases—those arising under the clause guaranteeing to each state a republican form of government—presented any exception to the rule. "Guaranty Clause claims involve those [same] elements . . . and for that reason and no other, they are nonjusticiable. In particular, . . . the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization."⁵⁵ Measured by these elements, malapportionment cases fell outside the pale of nonjusticiability.

We have no question decided, or to be decided by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need appellants, in order to succeed in this action, ask the Court to enter upon policy determination for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it had been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.⁵⁶

Although the nonjusticiable "political question" of whether a particular allocation of power within a state makes it a republican government under the guaranty clause is necessarily similar to the problem of determining whether an apportionment creates an invidious discrimination for purposes of the equal protection clause, Justice Brennan felt the two issues could be distinguished.

Viewed in the literal phrasing of their holdings, the majority opinions

52. *Id.* at 217.

53. *Id.* at 210.

54. *Ibid.*

55. *Id.* at 218.

56. *Id.* at 226. Justice Brennan here was apparently discussing the first, sixth, and second of the elements of nonjusticiability which he had formulated. His third element—the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion—seems to be the element most nearly in point.

state little new law not contained in *Colegrove*. Jurisdiction, justiciability, and standing had all been reached and favorably decided there. But introduced in the Brennan opinion is a purely national definition of the "political question" doctrine which has important implications in a far broader field than malapportionment. His list of elements making for nonjusticiability contained no mention of a constitutional commitment of issues to state rather than federal determination. While some federal constitutional questions are so committed to Presidential or congressional resolution that the Court will not adjudge rights dependent on these questions, no such issues and no such rights are similarly so committed to exclusive state delineation that federal courts must forego inquiry into them.

As to other areas in which "political questions" are involved, Justice Brennan expressly limited his synthesis of the doctrine and emphasized the need for a case by case approach.⁵⁷ It seems likely, however, that this part of *Baker v. Carr* can not be ignored in any of the "political question" cases.

Limiting the doctrine of "political questions" even in such sweeping terms to the relationship of the branches of the federal government is but little help in coming to grips with the other, even more difficult problems of malapportionment. Although possible embarrassment of federal-state relationships is seemingly eliminated as a factor in justiciability, it may still remain an important guide for the exercise of equitable discretion by federal courts. But what other considerations should be important? Other than in peripheral issues such as failure to exhaust state remedies or lack of time, discretion can be intelligently applied only as guided by some policy. It seems obvious that the policy that has for fifteen years approved the dismissal of reapportionment suits is now changed; the boundaries of a new policy are yet to be worked out.

As Justices Clark and Harlan note,⁵⁸ the majority seems to hold sub silentio that unequal voting power in electing a state's legislature can violate the equal protection clause and that, if the facts alleged are established, the challenged Reapportionment Act of 1901 has done so in Tennessee. Why it has is far from clear. The standard repeatedly mentioned is that of "invidious discrimination." Apparently the Court means to require that at least *some* basis for the difference in treatment between voters must be articulated or discernible in the apportionment scheme. For this reason alone, the Tennessee apportionment which has grown up haphazardly over sixty years would appear arbitrary and capricious. But what other bases will be reasonable rather than arbitrary? Beyond the minimum level of some articulated policy the caustic observations of

57. *Id.* at 210.

58. *Id.* at 261, 331.

Justice Frankfurter graphically describe the difficult decisions which lie in the future.

Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there's the rub.⁵⁹

If it is conceded that the state has picked a basis reasonable in kind, what degree of discrimination will be allowable under it before becoming invidious? Georgia's county unit system stands as a special challenge. Not only does it limit the relative legislative strength of the most populous county (Fulton, population 556,326) to no more than three times the strength of the smallest county (Echols, population 1,876),⁶⁰ it also applies this three to one ratio to the election of the Governor and United States Senators in party primaries.⁶¹ Since only the Democratic primary has had any significance in the state since the Civil War, it is possible to have a Governor, and of course the legislature, elected by a distinct minority of the voters. This is geographic diffusion of political strength run riot. Certainly without overruling the *MacDougall* case and many of the state constitutions, the Supreme Court cannot deny that the use of geographic units is a reasonable basis for discriminating between voters for some purposes. It would seem, however, that a geographic diffusion which might be reasonable for choosing a legislature might be altogether irrational for the election of a single officer, such as the governor, who represents all of the people. But considering only the legislature, the relative weight of a vote of a citizen of Atlanta is much less than that of a citizen of any of the Tennessee cities. There is no question but that the county unit system is a clearly enunciated and consistently followed legislative policy decision in Georgia. Does the Court mean to require a reapportionment in Tennessee because of the lack of any rationally stated policy and to allow an even more disproportionate situation to continue in Georgia? It seems unlikely, but the majority opinions, with the possible exception of that of Justice Douglas, did not expressly foreclose this possibility.

Appropriately, a three judge federal court in Georgia⁶² has been among

59. *Id.* at 268-69.

60. 1 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1960, at 12-13, table 6 (1961).

61. GA. CODE ANN. §§ 34-3212 to -3218 (Supp. 1961).

62. *Sanders v. Gray*, Civil No. 7872, United States Dist. Ct., N.D. Ga., April 28, 1962.

the first to attempt to set standards under *Baker v. Carr*. Its action was limited to issuing a temporary restraining order forbidding the use of the county unit system in the Democratic primary, but its opinion has broader application. Recognizing that, "unlike per se invidiousness, springing from race, creed or color," the invidiousness of malapportionment is a matter of degree, the court considered as relevant factors the rationality of the state policy, the arbitrariness of the system, the genesis of the system, the availability of political remedy, the delicate relationship between the federal and state governments, and the place which the unit system has in the historical development of our political institutions.⁶³

The test is on the sum of these factors, and if the action—here the statute, complained of—*offends what are thought to be fundamental political concepts*, giving due regard to each factor and to the rights of plaintiff . . . as compared to the whole—the state, it must be stricken because of discrimination so excessive as to be invidious.⁶⁴

Although the court did not find the use of county units unconstitutional as such, it did find that the newly revised Georgia system "misses the mark in two respects: first in failing to accord the unit of plaintiff a reasonable proportion of the whole, and second in failing to accord the units representing a majority of the population a reasonable proportion of the whole."⁶⁵ Any system, according to the court, would be invidiously discriminatory,

if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the whole vote for electors of the party in a recent presidential election; provided that no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years.⁶⁶

Has this opinion by the Atlanta federal court correctly caught the drift of the Supreme Court's meaning? All of the factors it has used seem validly relevant, and the standard of invidiousness which these factors produced—state action is to be judged by "what are thought to be fundamental political concepts"—seems the inescapable criterion underlying the majority opinions in *Baker v. Carr*. Although it is nowhere expressed, the Supreme Court would apparently accept as one of these "fundamental political concepts" the idea that a "majority of the population [should have] a reasonable proportion of the whole [political strength]." There is less

63. *Id.* at 21-24.

64. *Id.* at 24. (Emphasis added.)

65. *Ibid.*

66. *Id.* at 25.

grounds for confidence that the precise lower limits for apportionment which the district court suggested will be upheld, especially if they were to be applied to the election of a state legislature rather than to a party primary. Even conceding that the apportionment of the electoral college and of representation in Congress are rational systems, they are national standards which might not be thought to allow enough flexibility in meeting the political exigencies of any given state.

Another, closely related question, is the significance of a state constitution in determining whether the kind or the degree of discrimination is invidious. The Georgia county unit system for apportioning the legislature is embedded in the constitution.⁶⁷ In Tennessee, the present apportionment is at odds with a constitutional plan which would use population as the basis for both houses of the General Assembly. Suppose the Tennessee legislature passed a reapportionment act somewhat similar to the county unit system or which based one house on population and the other on geographic units.⁶⁸ Would the fact that such an apportionment patently violated the Tennessee constitution have relevance or be determinative of invidious discrimination for purposes of protecting federal rights. To hold that it would implies that the state constitution is in this area at least a higher law than that passed by the state legislature and possibly approved by the state courts on the same subject. It could then at least be argued that any claimed variation between a state constitution and a state statute, *e.g.*, a local taxing measure, would present a federal question under equal protection of the laws. Such an absurd result could hardly be allowed. The relevance of the Tennessee constitution on federal rights under the fourteenth amendment was raised by appellants in the instant case but dismissed in Justice Harlan's words as "manifestly untenable."⁶⁹ All of the Justices seemingly agreed on this point through Justices Clark and Douglas would use the local constitution at least as a guideline in fashioning an equitable remedy.

The lack of judicial standards by which to determine an "invidious discrimination" is the central theme of the two dissenting opinions, Justice Frankfurter's being couched in terms of justiciability and Justice Harlan's in terms of no recognizable federal right. To these Justices it seemed impossible to say on the one hand that geographic diffusion of political strength was a reasonable, acceptable basis for discriminating between voters and on the other to hold that at some point this discrimination be-

67. GA. CONST. art. III, §§ 2, 3.

68. Governor Buford Ellington has proposed that the Tennessee General Assembly reapportion the lower house according to population (using the constitutional formula) but use geographic areas as the basis for apportioning the senate. This changed system would then be ratified by a constitutional convention. Nashville Tennessean, April 25, 1962, p. 1.

69. 369 U.S. at 332.

came unconstitutional. For judges to pick this point in the name of rationality would be in fact for them to make a choice "among competing theories of political philosophy . . ."⁷⁰ Justice Frankfurter's exhaustive historical study convincingly proves that the courts can find no help in past or current legislative practices. The choice among these theories, being determined not so much by any inherent worth they might contain as by the pull and haul of competing factions, is so much a legislative function that courts cannot and should not attempt to make it. To Justices Frankfurter and Harlan the separation of powers philosophy is valid at all levels of government; a legislative function is no less legislative for being at the state level rather than at the national level, and a court has no more business answering these kinds of questions for a state than it has answering them for the nation. To this criticism—truly the crux of the case—the majority has apparently decided that at this time no more comprehensive response need be made than that "invidious discrimination" can be judicially determined.

The final conundrum implicit in *Baker v. Carr* is the matter of remedy, a subject Justice Brennan dismissed by "noting that we have no cause at this stage to doubt the District Court will be able to fashion relief . . ."⁷¹ Justices Clark and Douglas, however, considered remedies and suggested that the "egregious injustices" might be removed by modifying the existing apportionment to take seats away from the overrepresented counties and award them to the underrepresented counties. Presumably, over and under representation would be determined by the formula of the Tennessee constitution, but if the state constitution is to be used as the guideline for remedy, it seems difficult to avoid the suspicion that it is also being used to determine the right. Further, this approach rests on the assumption that the organic law of the 1870 constitution is the proper choice between political philosophies for the 1960's and ignores the contemporary choice made by the legislature and at least not overturned by the Tennessee Supreme Court. In light of the broad range of discretion which the Court apparently recognizes in legislative apportionment, it would seem inconsistent rigidly to apply the terms of the 1870 constitution. If forced to take affirmative action, however, a court may well use the state constitution as a starting point simply for lack of a better one. In states such as Georgia, where some of the apportionment inequities have been written into the constitution, this approach to remedy would be useless.

An election at large is another, often suggested remedy which would at least have the virtues of simplicity and of assuring an expression of the will of the majority. But it goes too far and eliminates completely the valid protection of minority rights which geographic diffusion provides. In

70. *Id.* at 300.

71. *Id.* at 198.

an election at large, assuming that city voters could identify over a hundred "city" candidates from several hundred names on the ballot, the metropolitan areas would potentially control the entire legislature and not just their numerical share. It is doubtful that these city legislators would wield such complete power more fairly in dealing with rural problems than the present legislators have done in handling urban legislation. This remedy more than almost any other would open the courts to the Frankfurter-Harlan criticism of judicial legislation, and finally, an election at large would clearly violate the Tennessee constitution fully as much as the present apportionment does.

The amicus brief of the Solicitor General suggested that the problems of remedy, difficult as they are, will prove to be only academic. The possibility of a court reapportionment is a great incentive for the elements currently in control of the state legislatures to take action themselves to salvage as much of their control as possible. Although criticized as a "judicial bluff," this method of threatening action has recently been successful in Minnesota, Hawaii, and New Jersey⁷² and would probably work in the majority of malapportionment cases. The possibility of a recalcitrant legislature, however, is always lurking in the background. The great virtue of giving the legislature time to act under the spur of an impending court decree, whatever qualms one may have about its propriety as a normal juridical device, lies in the fact that it does return the problems of malapportionment to the political arena where all the forces, rational and irrational, of partisan politics can be exerted to hammer out a solution. Such a solution might give the present rural legislators an unfair bargaining advantage in forming a new, compromise apportionment, but it would do less violence to traditional democratic processes than would a court decree affirmatively dividing political strength.

IV. CONCLUSIONS

As valid as the arguments are in favor of protecting minority interests by a geographical diffusion of political power, no one can seriously justify the extent to which this protective device has been manipulated to give a minority absolute control of the legislative processes of many states. Freedom under the law may well mean a restricted freedom, but if a majority of the individuals restricted have had no voice in determining the content of the law, then this freedom is empty and illusory. The Court has waited a long time since *Colegrove* before correcting this abuse, apparently in the hope that the democratic process would work out its own solution. The logic of the doctrine of separation of powers has its limits.

72. *Magraw v. Donovan*, *supra* note 42; *Dyer v. Kazuhisa Abe*, *supra* note 43; *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960).

Certainly each branch of government must give to the others a very wide discretion in determining what limitations the constitution places upon the functions which are the peculiar province of each branch. Discretion, however, is not absolute; every action by executive, legislature, and court must have its justification within the constitution to be valid. When constitutional limitations have obviously been ignored by the legislature and its range of discretion has been exhausted, the courts must declare the legislative action unconstitutional regardless of the doctrine of separation. In no other way can a court remain true to its own oath to maintain the constitution.

The Court's decision in *Baker v. Carr* was properly cast in terms of protecting individual rights under the equal protection clause, for this issue can be distinguished and separately handled. It does seem inevitable, however, that the decisions which set standards by which to determine invidious discrimination will also by these standards delineate, at least in broad outline, one aspect of what will be considered an acceptable "republican" form of government guaranteed by the Constitution.

The Court has done no more than jog the frame of government back toward an alignment more consonant with democratic ideals. By its silence as to how much inequality will constitute an invidious discrimination, it has openly invited the legislatures to correct their own defects and become more representative bodies. The range of acceptable compromises seems purposefully broad and vague. If forced to predict what the minimum standard may eventually prove to be, one guess might be that a majority of the people must be in control of at least one house or that a choice be clearly made by a majority to abdicate such control. To the extent that these goals are achieved by the legislatures, the doctrine of separation is observed; to the extent that changes are the result of judicial mandate, any violation of this doctrine is compensated for by the re-opening of the channels of normal democratic processes and a renewed vitality of the state governments. Although it may prove difficult to fit the cases which must implement *Baker v. Carr* into established notions of separation of powers, the results are worth the price. One can easily agree with Justice Clark that "in my view the ultimate decision today is in the greatest tradition of this Court."⁷³

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73. 369 U.S. at 262.