

THE DURABILITY OF COLEGROVE v. GREEN

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A certain tendency to animism affects lawyers when they talk about cases, and they communicate it to interested laymen. Animated cases rise, struggle, and conquer, or are vanquished by, other cases. And so *Baker v. Carr*¹ is thought to have vanquished *Colegrove v. Green*.² But caution is advisable. The millenium has not arrived for urban voters. A crack in the judicial gate that should not have been closed in *Colegrove v. Green* has now been pried open, but the gate has not swung on its hinges. Urban voters will be snatching defeat from the jaws of victory if they now concentrate all their energies on law suits and focus their hopes of ultimate success on the judiciary.

Baker v. Carr has made clear what the decision in *Colegrove v. Green* was not, and should never have been thought to be. *Colegrove* did not hold that the Court may never interfere with the election process, or that there are no judicially enforceable constitutional principles that apply to elections. For the Court has interfered consistently for some fifty years to enforce the fifteenth amendment's guarantee that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."³ Nor—though a passage in Mr. Justice Frankfurter's opinion does tend in this direction⁴—can *Colegrove* rest on the proposition that the Constitution, properly interpreted, confides to Congress exclusive authority to regulate congressional elections. For plainly the fifteenth amendment cuts across any such exclusive authority, and as a matter of textual interpretation, there is no readily apparent reason why the fourteenth amendment's guarantee of the equal protection of the laws should not similarly cut across and similarly authorize judicial intervention. To be sure, the Constitution specifically empowers Congress to make or alter regulations about the times, places, and manner of holding elections for Senators and Representatives, and it confers upon Congress the duty to apportion representatives among the States "according to their respective Numbers," and to "be the Judge of the Elections, Returns and Qualifications of its own Members." But there is no textual reason why these duties and functions of Congress

This comment is adapted from a section of my book, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS*, which will be published by The Bobbs-Merrill Company in November, 1962.

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1. 369 U.S. 186 (1962).
2. 328 U.S. 549 (1946).
3. See, e.g., *Myers v. Anderson*, 238 U.S. 368 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).
4. 328 U.S. at 554.

should be deemed proof against judicial intervention, any more than the language of the commerce clause, which provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," is read to foreclose judicial review. Again, *Colegrove* is in no sense a standing case. The disadvantaged voters in *Colegrove* were injured, their claim had all the desirable immediacy, and no more suitable plaintiffs are imaginable. Finally, the decisive factor in *Colegrove* could not well have been the difficulty or uncertainty that might attend enforcement of a judicial decree. A judicial system that swallowed *Brown v. Board of Education*⁵ and *Cooper v. Aaron*⁶ would hardly strain at *Colegrove v. Green* or *Baker v. Carr*.

So much is now clear, as it should have been all along. Mr. Justice Brennan rather suggests further that *Colegrove* did not hold legislative apportionment to involve "policy determinations for which judicially manageable standards are lacking."⁷ The prevailing opinion in *Colegrove*, however, most assuredly did hold something of this sort. One can only say that *Colegrove* did not necessarily collect a majority of the then sitting Court for this proposition, and that, in any event, a majority of the present Court does not adhere to it in the form in which it was rather flatly and generally stated by Mr. Justice Frankfurter. But if, taking a closer view of the matter, we restate the *Colegrove* holding a bit more narrowly and precisely, it becomes quite unclear what the present Supreme Court majority does and does not adhere to. The question—to borrow an excellent formulation of Mr. Jaffe's—is really whether legislative apportionment is a matter of the sort for which we have no rules, and as to which we "believe that the job is better done without rules," or whether it is of the sort to which rules are applicable, though they "should be only among the numerous relevant considerations."⁸ There is nothing in our political and legal traditions to support the first proposition; there is everything to affirm the second, and this is what *Colegrove* may be read to have done. The principle of equal representation of qualified voters is surely an aspiration of American democracy,⁹ and yet consistently throughout our history, the political institutions have treated it as only one "among the numerous relevant considerations." They have most often been led to modify the principle, and to represent not only people, but interests, groups, and regions.¹⁰ In a diverse, federated country, extending over a continent, organized as a representative, not a town-meeting, democracy, we strive not only for responsive but also for truly representative government, which reflects the electorate and is at the same time stable and effective.

5. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

6. 358 U.S. 1 (1958).

7. 369 U.S. at 226.

8. See Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961).

9. Cf. Lewis, *Legislative Apportionment and The Federal Courts*, 71 HARV. L. REV. 1057 (1958).

10. See HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS* 39-45 (1950).

All would be relatively simple if one could assert with moral certainty that inequality of individual representation in whatever form is intolerable on principle, as inequality in the legal status or treatment of the races is wrong in all its forms. But, however it may seem to the inhabitants of Memphis, Atlanta, New York, or New Haven, that is simply not a tenable position in present circumstances. The principle of the *School Segregation Cases* is one that judges may hold and proclaim with present certainty, although pragmatic compromises may remain necessary for a time. But one cannot¹¹ with like moral confidence proclaim the principle of equal individual representation, holding everything else to be a temporary if necessary evil. Experience and reflection on the country as it is in fact force the conclusion that the principle of equality of individual representation can be only a partial guide to solution of the apportionment problem. And neither the Supreme Court nor any one else, least of all the many lower federal courts that have lately attacked the problem, has succeeded in evolving something more malleable and yet still principled which might be proclaimed as the governing rule, although present conditions might not allow for its sudden and complete execution. It remains in large part, perhaps unfortunately, a task of pragmatic trial and error to construct representative, deliberative institutions that are responsive to the views, the interests and the aspirations of heterogeneous total constituencies, and that are yet not so fragmented or finely balanced as to be incapable of decisive action; that are capable of decisive action, yet identified with the people, and so containing within themselves the people's diversity as to be able to generate consent. Equality of representation is one goal, and only one among many. It must be accommodated to the others, and no principled way of doing so has as yet been discovered. Who, after all, remembering the Weimar Republic, or the Fourth of the French, favors proportional representation? As Mr. Wechsler has written in a classic essay on the federal arrangement—and the same thing is true on the smaller scale of the States—the need is for “government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.”¹²

The need is met, imperfectly no doubt, not by one but by a troika of institutions, each answering to a differently weighted constituency, with the executive's normally being the most straight-out majoritarian. (The only partial exceptions appear to be unicameral Nebraska and unit-vote Georgia.) And the institutions sometimes trade constituencies. The federal Senate used to be

11. Perhaps I ought not to say “cannot,” but merely “should not.” On March 29, 1962, commenting on the apportionment problem in the States, as exemplified in *Baker v. Carr*, and forgetting perhaps where once he sat, President Kennedy remarked: “Quite obviously, the right to fair representation that each vote count equally is, it seems to me, basic to the successful operation of a democracy. . . . There is no sense of a Senator representing 5,000,000 people sitting next to a Senator representing 10,000. . . .” See N.Y. Times, March 30, 1962, p. 12, col. 3, question 12 (city ed.).

12. See Wechsler, *The Political Safeguards of Federalism*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 49, 50 (1961).

the redoubt of localism, but owing to the seventeenth amendment and the rise of the city, it is now much less so. The role has been largely assumed by the more fragmented (but also more disciplined) House, in which many isolated or obsolescent interests now find representation and some power. It should be added that power in American government has for generations gravitated steadily to executives, who are, of course, a significant part of the legislative process, exercising functions both of initiative and approval. Still another consideration is the stability and vitality of a two-party system, and it may well be that a degree of malapportionment is the price that has to be paid for that. Again, cities have substantial functions of self-government, and their elective heads are themselves influential forces in the State and even in the federal legislative process—a condition that may well be thought to compensate for some measure of underrepresentation. Finally, in the present American system, the influence of the individual vote is not all that counts in government or even in elections; command of wealth and the means of communication and persuasion go for much, and most groups exercising such command are urban.

All this is to say that in the present state of the art, the Court cannot undertake to lay down rules of legislative apportionment. To do so would remain "hostile to a democratic system" and would "involve the judiciary in the politics of the people,"¹³ for apportionment is a very high percentage of politics with a very small admixture of definable principle. "Apportionment," said Mr. Justice Frankfurter, dissenting in *Baker v. Carr*, involves "considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others."¹⁴ To this, the only answer essayed by the majority was stated by Mr. Justice Brennan: "[I]t has 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."¹⁵

So it has been, and this is sufficient to explain *Gomillion v. Lightfoot*.¹⁶ For that was an extraordinary case. As Mr. Bernard Taper has well said, the Alabama legislature, in going to the finical and vulnerable extreme of the Tuskegee gerrymander statute, was "like a child throwing a temper tantrum."¹⁷ Putting aside the purpose to deprive Negro voters of a previously held franchise and to create an all-white city electorate, the Alabama legislature could have had

13. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946).

14. 369 U.S. at 323.

15. 369 U.S. at 226.

16. 364 U.S. 339 (1960); for a discussion of the limitations of the decision, see J. D. Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194 (Kurland ed.).

17. See TAPER, *GOMILLION VERSUS LIGHTFOOT* 96 (1962).

no rational—meaning, no intelligible—end in view. Its sole actual purpose may have been rational, but it was neither acknowledged nor constitutionally permissible. It is a species of temper tantrum also, though in a somewhat different sense, to leave unchanged an ancient and obsolete apportionment, and as I shall suggest further, this can explain *Baker v. Carr*, for Tennessee was last malapportioned in 1901. Conceivably, a different result in *Colegrove v. Green* might have been justified in like fashion, for the last time an Illinois congressional apportionment took effect before the decision in *Colegrove* was also in 1901. But how can more recent and deliberate malapportionments be found to reflect *no* policy? Why, only if the considerations to which I have alluded and those recited by Mr. Justice Frankfurter are ignored or are held not to constitute purposes that a legislature will be allowed to pursue.

Is it irrational and does it represent *no* policy to wish to maintain two-party balance in a State of predominantly Democratic registration by ensuring Republican control of one house of the legislature? Is it irrational to wish to ensure the election of one Republican representative from Manhattan? Is it irrational or otherwise forbidden so to gerrymander districts that a solid Negro or Puerto Rican vote is ensured, thus making certain that legislative bodies will contain members of these minority groups? The Democratic leadership in Harlem does not appear to think that pursuit of such an end should be foreclosed, and they are far from deeming it irrational.¹⁸ Of course, statistics, which may not always lie but which do not always voluntarily tell the truth, can prove that an apportionment might result in control of the legislature by eight or twelve per cent of the total electorate.¹⁹ Government by eight or twelve per cent, one may readily grant, is an extremity that the Court would be justified in viewing as arbitrary—yet another form of tantrum, another sort of arrangement whose only intelligible purpose is unacknowledged and inadmissible. But this is an adding machine's nightmare. Does it ever actually happen? Such dryly logical conclusions have little relation to an actual government in actual operation; they are uncontaminated by reality and not fit to shape the law of the Constitution.

The Court in *Baker v. Carr*, quite like the Court in *Colegrove*, was unable to formulate a dominant principle applicable to legislative apportionment. Rationality—the presence of *some* policy, the absence of “simply arbitrary and capricious action”—sounds good, but aside from temper tantrums, it chases its own tail. Most apportionments represent the rational pursuit of a policy if the Court is willing to allow the policy to be pursued. And so *Baker v. Carr* does not hold that the Court is a fit body to take over from the political institutions—or from an inscrutable Providence that has surely also had a hand in the matter, as many an ironic turn in the nature and role of those institutions

18. See N.Y. Times, Aug. 9, 1962, p. 1, col. 6 (city ed.) (“Democrats Split Over Districting—Harlem Chiefs Score Party Suit Charging G.O.P. With Negro-Puerto Rican Bias”); N.Y. Times, Aug. 10, 1962, p. 1, col. 2 (city ed.) (“Harlem Leaders Join District Suit—Powell-Jones Group Moves to Upset Party’s Case on House Seats Here”).

19. See, e.g., N.Y. Times, March 28, 1962, p. 22, col. 1 (city ed.).

demonstrates—the pragmatic management of the complex and often curious adjustments that have made us a democracy and maintained us as such. That would have been too much like playing de Gaulle to the American Republic, and we are not so distracted as all that. The point decided in *Baker v. Carr* was not what function the Court is to perform in legislative apportionment, and certainly not whether it is to take over full management, but whether it can play any role at all. The Court flirted with the notion that its function might be to impose a requirement of rationality. But it gave no answer to the prior question of the purposes by which rationality is to be judged; indeed, it omitted to ask it. The decision may thus be read as holding no more than that the situation in Tennessee (it was last malapportioned sixty years ago) is the result not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and the abdication of political responsibility. This, in its way, may also be thought of as a species of arbitrariness. The Tennessee legislature, to be sure, could not be accused of pursuing no intelligible end save only an unacknowledged and impermissible one. It could be charged, however, with a refusal to act affirmatively. The temper tantrum in this instance was an orgy of inactivity. Now to say that the apportionment problem cannot, just at present, be resolved by judges is not to argue that it ought to be allowed to go unresolved. If the Court must defer to political judgment, it is entitled to ask for a political judgment to defer to. So it did—on issues that in the end also pose essentially political questions—in *Watkins v. United States*²⁰ and *Kent v. Dulles*²¹ and *Greene v. McElroy*.²² And so it did in *Baker v. Carr*.

This is not an inconsequential decision. But it does not affirm the essence of what was denied in *Colegrove v. Green*. Undoubtedly, the situation in Tennessee is not singular. Moreover, we have been seeing and may yet see not a few instances of constitutional experimentation by lower federal and by State courts, some of which the Supreme Court, in the exercise of a politic discretion, may elect to ignore. Finally, even the Supreme Court itself may enter the "political thicket" in States where no branch of government, not even the executive, rests on the majoritarian principle. All of which is meaningful, but hardly apocalyptic.

There is a danger, however, whose spectre rises, not so much from the result as from the Court's opinion in *Baker v. Carr*. It is one thing to fail to find a dominant principle applicable to apportionments, and quite another to bless the expedient arrangements that legislatures will make. The Court in *Colegrove* did not undertake to anoint what it declined to strike down. There was no judicial review in *Colegrove*, no checking of political action, and no legitimation. The danger now is that in some future case²³—perhaps in order to cor-

20. 354 U.S. 178 (1957).

21. 357 U.S. 116 (1958).

22. 360 U.S. 474 (1959); cf. *Greene v. McElroy*, 254 F.2d 944, 953-54 (D.C. Cir. 1958).

23. A likely candidate is *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960), in which a strictly territorial apportionment of the Michigan Senate was first upheld by the Michigan Supreme Court (well before the decision in *Baker v. Carr*). After it had decided

rect misreadings by lower federal courts of its present somewhat enigmatic pronouncement—the Supreme Court may see its function not merely to let an apportionment be, but to legitimate it. This, as I have argued elsewhere,²⁴ would be a grave error. If one may use proper nouns to name judicial errors, as is sometimes done with diseases, we should call this Plessy v. Ferguson's Error, after the case that legitimated segregation in 1896.

Baker v. Carr, the United States Supreme Court vacated this Michigan judgment and remanded for reconsideration, 369 U.S. 429 (1962). This action changed a vote on the Michigan court, which, living on the razor's edge, consequently proceeded to reverse itself on July 18, 1962, 31 U.S.L. WEEK 2059 (1962). Mr. Justice Stewart stayed this judgment, pending the filing of a petition for certiorari. See N.Y. Times, July 28, 1962, p. 9, col. 5 (city ed.). It is probably too much to hope that certiorari will be denied. If it takes the case, it is not unlikely that the Court will reverse. Certainly no inference to the contrary is to be drawn from the initial remand. Compare *Watkins v. United States*, 354 U.S. 178 (1957), with *Barenblatt v. United States*, 240 F.2d 875 (D.C. Cir. 1957), remanded for reconsideration in light of *Watkins v. United States*, 354 U.S. 930 (1957), and *Barenblatt v. United States*, 360 U.S. 109 (1959).

24. See Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).