

Reapportionment and Judicial Responsibilities

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The question with which I should like to worry you for a few minutes this evening is this: As lawyers and as citizens (but not as Republicans or Democrats, city dwellers or suburbanites) what are we to think of the role the courts are playing or are trying to play in the reapportionment of the state legislatures? Should we applaud or should we deplore? May we accept it as a new and proper phase in the fulfillment of the historic role of courts in our system, or must we receive such benefits as it may produce with misgivings if not with alarm? As to whether it is useful or important for us to consider this question I say nothing. I suggest only that it is an interesting question.

I hesitate to state the issue more precisely than I have done because it is the kind of problem which can hardly be reduced to a narrow proposition and in the end calls more for intuition than for analysis. It is possible, however, to frame the area of uncertainty by recalling some competing social insights which wise and eloquent masters in our field have given us. We might start, for example, with Justice Frankfurter's admonition in *Baker v. Carr* itself, in his dissenting opinion: "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." And alongside this we might put Judge Learned Hand's similar declaration of belief, uttered in a different but surely not irrelevant context: "... This much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish."

Bu then on the other edge of the same field of vision we must admit the possible force of Professor Freund's gentle rejoinder to Judge Hand's proposition: "The question is not whether courts can do everything but whether they can do something." And although we may doubt that Mr. Justice Holmes would have favored judicial intervention in legislative apportionment, we must bear in mind the possible relevance of his observation that "the felt necessities of the time" have had much to do with the course the law has taken, and that "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." Finally, I find at least somewhat arresting the remark made to me by a distinguished lawyer who has himself had more than a small role in the current reapportionment controversy. Commenting on a piece of mine which criticized the Supreme Court's position in *Baker v. Carr*, he said: "Much of the academic world seems to me to have far too little appreciation of the depth and force of the currents on which the Court is riding. . . . I am inclined to believe that many of the problems we now regard as conventional were once even more baffling than these."

It is the depth and force of the currents, perhaps, that give this particular question of judicial responsibility whatever special importance and interest it may have. How should a court respond to strong currents?

It will also help mark out the contours and dimensions of our question, I think, to see just what the problem of reapportionment is, leaving aside the question of the appropriate means to achieve it. The inability to compel representatives of thinly populated districts to surrender their powers over state legislatures amounts to nothing less than the breakdown of the existing foundations of government. What it means is that the built-in mech-

anisms for adjusting the distribution of political power have failed. If resort to judicial help is really necessary—if neither legislative act nor popular initiative nor constitutional amendment nor constitutional convention is possible because of the rural hold on key parts of the machinery—then the existing constitution has failed. The transfer of political power must be accomplished outside the established processes. In short, the government must be reconstituted.

The term "revolution" is too strongly associated with violence to be appropriate here, I suppose, but it has other implications that are relevant. We really have no word for the peaceful substitution of a new frame of government for an old, by procedures not provided for in the old. In dealing with the southern states after the Civil War we called it reconstruction. What was it when the men of Philadelphia in 1789, departing from their mandate, decided to substitute a new constitution for the Articles of Confederation and when that new constitution went into effect by the ratification process prescribed in the document itself? Is it not that kind of transition which the courts are being asked to bridge in the current reapportionment litigation?

I do not overlook the point that, as the case is put, it is the Federal Constitution which provides the continuity, support and command. I mean only to stress the fundamental nature of the function which the courts are being called upon to perform. Should they respond?

Certainly there are strong reasons on the side of saying they should not. Mention of two must suffice, though there are others. The first is that there is no body of law which points the way toward how a state legislature should be reconstructed, and little likelihood that any satisfactory body of law can emerge from the present litigation. The often-asserted principle of "one man, one vote" gives no recognition to the equally important principle of adequate representation for minority interests, furnishes no guidance on such crucial problems as the size of the legislative body and the drawing of district boundaries, and is capable of producing quite arbitrary restrictions on the framing of state political processes. We would not think of espousing it, for example, as the controlling rule for determining representation in the United Nations.

No other principles which a court might declare have been suggested or seem likely to be. It is true that the Supreme Court might find the problem easier for itself than I have indicated. It might, for example, limit itself to deciding that a state's representation scheme was "unfair," and avoid the difficult question of what would be a fair plan by remanding to the lower court with that convenient directive, "for further proceedings not inconsistent with this opinion." But the problems will not seem that simple to the lower courts.

And this brings me to a second reason against judicial

attempts to deal with reapportionment. As a practical matter, what can a court do?

It cannot, I assume, compel a legislature to enact, a constitutional convention to propose, or the people to initiate a new plan of representation. Its choices seem limited to admonishing the existing legislature or arranging for the election of a new one. Unless the threat of the second is genuine, the first seems likely to be futile or to produce only the mildest kind of self-correction. The ultimate power which the courts are necessarily invoking (and have in some instances already exercised) is the power to create a new legislature, not merely the power to invalidate a law. So drastic an assertion of judicial supremacy would perhaps seem less offensive to democratic principles if the judicial plan of reapportionment could at least be submitted to ratification by the people, as would a new plan of representation framed by, let us say, a constitutional convention. But to condition a judicial decree on popular approval would, of course, be offensive to our notions of the independence of courts and the integrity of the judicial function. Is there not a lesson, perhaps, in this dilemma? Does it not suggest that there may be more importance in the concept of separation of powers than it is fashionable these days to believe?

This issue of principle aside, courts concerned with the vitality of the judicial function must give at least some heed to the possibility that what they command may in the end have to be enforced. I have not so far seen signs of serious resistance to judicial orders in apportionment cases, and I think we should hope there will be none. But must we not recognize as a possibility that somewhere, sometime, one of these cases may result in a contest for control of a legislative chamber between a group of representatives elected under federal court order and a group elected under the laws of the state? Unlikely as that may be, I think it is not irrelevant to consider whether in such an event we would expect to see the proceedings dictated by federal marshals armed with contempt citations, or entrance to the statehouse controlled by federal soldiers armed with bayonets. Judicial power is at its strongest where it brings the force of the entire community behind a judgment of individual right or individual wrong based on recognizable legal principles which in turn have the sanction of community ethics. It is at its weakest, surely, when it seeks to resolve the conflicting interests of large groups in the community by enforcing mass compliance with a judgment not based on established legal rules or a great moral principle. It is hard not to believe that if judicial power in apportionment cases were ever put to the ultimate test it would end in judicial defeat.

So much for the negative side of the question. There is of course another side, as I tried to indicate at the outset. Perhaps the most appealing point to be made in favor of judicial intervention in reapportionment, and I have no doubt the consideration most influential with the Supreme

Court, was the argument of necessity. No matter how difficult or novel the task, and despite some rather nebulous risks or costs to the purity of the judicial function (the argument implied), courts should act because all other avenues were closed. Judicial action was necessary to unlock the situation and release the pent-up democratic energies which would then take over the process of reform. A second point which should now be made, I suppose, is that it is difficult to argue with success. There can be no doubt that the Supreme Court's decision in *Baker v. Carr* has touched off a wave of activity and brought about, or is in the process of bringing about, legislative revision on a broad front. I do not think we know how substantial this will turn out to be, but for the moment there is certainly reason to believe that *Baker v. Carr* will indeed prove to have shifted materially the basis of power in our state legislatures.

It is about at this point that analysis must give way and let intuition take over. How shall we appraise these arguments in favor of judicial reapportionment and how shall we weigh them against the vague and impalpable costs? Whatever one says must rest largely on speculation. As to the impossibility of reapportionment without judicial help, my own speculation is that the obstacles to reform were exaggerated. I am sceptical that a determined and organized political majority can indefinitely be denied its proper voice in the state legislature. In Illinois, of course, the reapportionment of 1954 came about shortly after the courts had *rejected* efforts to obtain judicial help. My examination of the record in *Baker v. Carr* does not convince me that the failure to reapportion in Tennessee represented more than the rather easy rejection of desultory efforts to obtain new legislation.

I suspect that in general the rural domination of state legislatures has continued not in the face of the kind of "aroused popular conscience" of which Justice Frankfurter spoke, but in the face of the same sort of apathy that permits corrupt machines to dominate city politics and inefficiency to dominate the administration of government. Indeed, it is possible to read the success of *Baker v. Carr* as confirmation of this point of view. To the extent that reapportionment has already occurred, it is hard to account for in terms of the coercive power of the courts, although uncertainty about what that coercive power might turn out to be has no doubt had some part in the process. Is it not likely, however, that the most important contribution of *Baker v. Carr* has been its polemic force? It has focused attention on the problem, brought into the open a widespread consensus as to the need for reform, and helped create a momentum for change which legislators find hard to deny—in short, it has itself helped generate the "aroused popular conscience which sears the conscience of the people's representatives."

In the end, perhaps, one's views of *Baker v. Carr* must turn on whether one believes that arousing the popular

conscience is a proper responsibility of courts, independent of their function of deciding cases. I may conclude by echoing, with variations, some themes suggested earlier: If the currents of reform are deep enough and strong enough, a court need not ride them but need only divert them into their proper channel; but if a court chooses to ride them, or perhaps to generate them, we must hope that it will have vision to see that there may be rocks and shoals ahead. We must also hope that by enjoying the heady satisfactions of riding these currents the court is not encouraging the people to surrender their democratic responsibilities to officials appointed for life.