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THE REAPPORTIONMENT CASES: COGNITIVE LAG, THE MALADY AND ITS CURE

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The reapportionment cases have been considered by many to be the product of a liberal, activist Court which is endeavoring to reshape America's political life according to its own views. The authors of this article assert that, to the contrary, the Court actually is reacting to the incontrovertible fact of the modern predominance of urban complexities which have rendered inappropriate our older political boundaries. In this sense, they consider the Court's decisions conservative rather than liberal—because the Court's purpose is to maintain a version of federalism along state boundaries which may have become outmoded even before the Court entered the arena.

"LET'S kill all the lawyers," suggested Dicke Butcher to Jack Cade.† This particular advice was not simply the call of the *Lumpenproletariat* crying out for vengeance against the flunkies of the then existent power-structure that had been exploiting them, but, to the contrary, was a philosophical insight of considerable proportion. That is, as that modern American high Tory James Gould Cozzens has already adumbrated it,[1] the law *is* order in modern society. Man being

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† SHAKESPEARE, THE SECOND PART OF HENRY THE SIXTH, Act IV, scene ii, lines 83-92 (Barnwell ed. 1913):

Dick [Dicke Butcher]. The first thing we do, let's kill all the lawyers.

Cade [Jack Cade, a rebel]. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? that parchment, being scribbl'd o'er, should undo a man? Some say the bee stings; but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since. *Id.* at 99-100.

1. See Cozzens, *Notes on a Difficulty of Law by One Unlearned in it*, 1 Bucks County L. Rept'r 302 (1952):

As an admiring lay observer, I have always considered that W. S. Gilberts' Lord

a symbol-functioning creature, to a large extent his behavioral patterns are not so much dictated by instinct as they are derived from the cultural matrix of the community wherein he resides.[2] Man may perforce exist in a physical world, but he lives in a symbolic one.[3] To a large extent, therefore, man exists in a world of his own creation so that Epictetus could rightly observe that what alarms man are not things but his opinions and fancies about them.[4] Destroy the manipulators of this verbal order, annihilate the rule-mongers, and order itself is destroyed. Thus it is that Butcher and Cade may have been the first efficient nihilists who recognized man's dependence upon language and verbal order and who concocted a sure-fire prescription to achieve total anarchy.

But if law is really a mental construct, a verbal set of directional signals regulating patterns of conduct within the society, the law at times ought to be analyzed in terms of how efficiently the current rule-matrix channels orderly development within a dynamic society. This

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Chancellor, when he declared that the law is the true embodiment of everything that's excellent, stated no more than the truth. If it has a single fault or flaw, I lay that to the unfortunate intrusion of the human element—a fallibility and unreasonableness of mankind that enters to disturb the law's own august order or right and reason. This, I think, the law itself feels. In its accumulated wisdom, work of the best minds of many centuries, the law moves—and not without recourse and dexterity—to minimize the damage men can do to its processes by being men.

See also Cushing & Roberts, *Law and Literature: The Contemporary Image of the Lawyer*, 6 VILL. L. REV. 451, 457-72 (1961).

2. See Berger & Kellner, *Arnold Gehlen and the Theory of Institutions*, 32 SOC. RESEARCH 110, 111-12 (1965):

Man is characterized by "instinctual deprivation" . . . . Unlike the animal, man has an "open world" . . . . Therefore, if human life is to attain any degree of stability, this must be provided by non-biological means. Man, finding himself in a state of rupture with his own biological constitution, must stabilize and specialize his activity through structures produced by himself. He must construct his own world. This world, which is culture, must aim at the firm structures which are lacking biologically . . . . Social institutions are the core of this process of cultural stabilization . . . . The basic instrumentality of institutionalization is language . . . . And only through language does this world have stability and continuity.

3. NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 108-112 (1959). Compare LEWIS, MIND AND WORLD ORDER 29-30 (Dover ed. 1956): "The world of experience is not given in experience: it is constructed by thought from the data of sense. This reality which everybody knows reflects the structure of human intelligence as much as it does the nature of the independently given sensory content"; MONTAGU, MAN IN PROCESS 83 (1961): "The law and order that man sees in Nature he introduces there, a fact of which he seems to have grown quite unconscious. Natural systems of classification work so well that, following an unconscious pragmatic principle, they are assumed to be true . . . ."

4. Lawyers, deeply involved in this phenomenon, have tended to ignore it. It is interesting to note that two otherwise practical insurance executives have been intellectual pioneers in the realm of language and order. WHORF, LANGUAGE, THOUGHT AND REALITY (1956) is a masterpiece. The other is the poet Wallace Stevens, particularly in his *The Idea Of Order at Key West*. WHICHER & AHNEBRINK, TWELVE AMERICAN POETS 100 (Oxford ed. 1961): "A final clue to Stevens . . . . The world we inhabit is one we 'half create'; we make the order we perceive."

much ought to be old hat.[5] The law also ought to be analyzed, however, in terms of how efficiently the law promulgators order the ordering process—that is, how the manipulators themselves manipulate the allocation of the decision-making process within the law hierarchy so that the hierarchy can efficiently discharge the rule-making function. Thus if a switch from negligence to strict liability is a rule affecting patterns of conduct within the society,[6] a decision that a question is "legal" rather than "political" is one affecting the allocation of authority to make rules pertaining to conduct. The law reviews thus far have on occasion elucidated some standards of criticism for surveying the first process.[7] The question is whether a system of criticism has been developed which is adequate to handle the second process. This is so because when dealing with the allocation of the decision-making process we are dealing with something which falls halfway between "law" and "political science." What follows, therefore, is an effort at having a go at this latter task with reference to the recent reapportionment cases.

I. The Law's Syntax

Shortly after World War II, a divided Supreme Court held in *Colegrove v. Green*[8] that a suit to restrain state officers from conducting a congressional election under state districting statutes then in force raised an issue beyond the "competence"[9] of the Court and that the

5. It is interesting to observe that even though Professor Calabresi illustrated that a great deal of the talk about strict liability in tort constituted economic nonsense, the trend continues. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961). One wonders whether there has not yet appeared a good article explaining the "why" behind the trend which does not take for granted *conclusions* such as "the defendant can better spread the risk of loss." It may be that Professor Rodell has a point about law reviews. Rodell, *Goodbye to Law Reviews—Revisited*, 48 Va. L. Rev. 279 (1962).

6. The "if" here is caused by the doubt whether strict liability is designed to encourage careful behavior or dole out welfare payments or both. See Roberts, *Negligence: Blackstone to Shaw? An Intellectual Escape in a Tory Vein*, 50 Cornell L.Q. 191, 215-16 (1965).

7. A masterpiece which every law student should read, and then read ten times over again, is Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 1, 257 (1959). To see how difficult it is to stop law professors' rule-worshiping, however, read between the lines of Rodell, for Clark, *A Brief and Belated but Fond Farewell*, 65 Colum. L. Rev. 1323 (1965).

8. 328 U.S. 549 (1946). Mr. Justice Frankfurter wrote the opinion in which Justices Reed and Burton concurred in the results but held that the complaint should be dismissed for want of equity. Mr. Justice Black wrote a dissenting opinion in which Justices Douglas and Murphy concurred. Mr. Justice Jackson did not participate. Thus Mr. Justice Frankfurter spoke for three members of the Supreme Court. Mr. Justice Rutledge wrote a concurring opinion. Mr. Chief Justice Stone died before this case was decided.

9. *Id.* at 552.

question was "of a peculiarly political nature and therefore not meet for judicial determination."[10] Refusing, then, "to enter this political thicket,"[11] the Court directed the petitioners either to "secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[12] Other cases followed, supporting the proposition that reapportionment was a political question.[13]

Disapproving the extravagance of its earlier declarations, the Court in 1962 announced that a "challenge to . . . apportionment presents no nonjusticiable 'political question.' "[14] Technically, *Baker v. Carr*[15] did not overrule *Colegrove v. Green*,[16] for the issue before the Court in *Baker* arose as a challenge to the sufficiency of a complaint challenging *state* legislative apportionment. Nonetheless, the political question bubble had been effectively burst and, notwithstanding technical refinements, the Court clearly was readying itself for a massive foray into the "thicket" it had avoided a decade earlier. Indeed, Mr. Justice Frankfurter, author of the *Colegrove v. Green* opinion, faced the issue squarely at the start and raised a magnificent clamor for judicial restraint lest the Court itself fall victim to the political quicksand hidden in the thicket:

> Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has [for] time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.[17]

10. *Ibid.* Justice Frankfurter gave a number of reasons. First, "this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof." *Id.* at 553. For, "it is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of law." *Id.* at 553-54. Second, "authority for dealing with such problems resides elsewhere," that is, in the state legislatures, in the House of Representatives, or, failing them, "the remedy ultimately lies with the people." *Id.* at 554.

11. *Id.* at 556.

12. *Ibid.*

13. Radford v. Gary, 352 U.S. 991 (1957); Remmey v. Smith, 242 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950) ("Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographic distribution of electorial strength among its political subdivisions." *Id.* at 277.); Colgrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946).

14. Baker v. Carr, 369 U.S. 186, 209 (1962).

15. 369 U.S. 186 (1962).

16. 328 U.S. 549 (1946).

17. Baker v. Carr, 369 U.S. 186, 267 (1962). Justice Frankfurter further termed the decision "a massive repudiation of the experience of our whole past in asserting destructively novel judicial power . . . ." *Ibid.*

* * *

> What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all States of the Union.[18]

Joining him in dissent, Mr. Justice Harlan relied in part upon stare decisis, mourning an "abrupt departure . . . from judicial history by putting the federal courts into this area of state concerns . . . ."[19]

Once having laid down the rule of justiciability, however, the Court marched on toward its portended goal. *Gray v. Sanders*,[20] decided the following year, widened the rule by holding substantively that Georgia's weighted voting system was unconstitutional. Mr. Justice Harlan, now sole spokesman for tradition, dissented.[21] Then, in 1964, the Court handed down a raft of decisions bearing on the issues of reapportionment. One of the most important of these cases was *Wesberry v. Sanders*,[22] in which the rule of *Baker v. Carr* was extended to cover the apportionment of congressional districts. Indeed, it was this case which marked the extinction of *Colegrove v. Green*. In *Reynolds v. Sims*,[23] an equally important decision, the Court declared that, under the equal protection clause of the fourteenth amendment, the almost uniform standard governing apportionment of both houses of a state legislature was "one person—one vote."[24] The other cases decided with

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18. *Id.* at 300.

19. *Ibid.* For reactions to *Baker* see, *inter alia*: DEGRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1963); Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39 (1962); Dixon, *Apportionment Standards and Judicial Power*, 38 Notre Dame Law. 367 (1963); Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329 (1962); Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 639 (1964); Freidelbaum, Baker v. Carr: *The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107 (1962); Israel, *Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment*, 38 NOTRE DAME LAW. 499 (1963); Lucas, *Legislative Apportionment and Representative Government: The Meaning of* Baker v. Carr, 61 MICH. L. REV. 711 (1963); McCloskey, *Deeds Without Doctrines: Civil Rights in the 1960 Term of the Supreme Court*, 56 AM. POL. SCI. REV. 71 (1962); McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUPREME COURT REV. 252; Comment, *Challenges to Congressional Districting: After* Baker v. Carr *Does* Colegrove v. Green *Endure?* 63 COLUM. L. REV. 98 (1963); Comment, *Baker v. Carr and Legislative Apportionment: A Problem of Standards*, 72 YALE L.J. 968 (1963).

20. 372 U.S. 368 (1963).

21. *Id.* at 382. Mr. Justice Frankfurter had by this time left the bench.

22. 376 U.S. 1 (1964).

23. 377 U.S. 533 (1964).

24. *Id.* at 568. See Wesberry v. Sanders, 376 U.S. at 18; Gray v. Sanders, 372 U.S. at 381. For the exceptions allowed, see Reynolds v. Sims, 377 U.S. at 577-80.

Reynolds followed and amplified this new axiom of political equality.[25] Throughout these decisions the majority modestly saw itself enunciating nothing more and nothing less than "fundamental ideas of democratic government . . . ."[26]

Again, in the 1964 cases, the dissent was raised.[27] Reacting to this new rash of opinions, Mr. Justice Stewart objected that "what the Court has done is to convert a particular political philosophy into a constitutional rule . . . ."[28] Mr. Justice Harlan objected again in *Wesberry v. Sanders*[29] that federalism was at stake:

> Today's decision has portents for our society and the Court itself which should be recognized. . . . The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process. . . .
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> The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short.
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> * * *
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> What is done today saps the political process.[30]

The sum and substance of the dissents, therefore, was that the Court was engaged in a very unjudicial crusade to remake the political infrastructure of the Republic. If the majority was tarred and feathered as

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25. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

26. 376 U.S. at 8.

27. To Wesberry v. Sanders, 376 U.S. 1 (1964), Justice Clark concurred in part and dissented in part and Justices Harlan and Stewart dissented; to Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964), and to WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964), Justices Clark, Harlan and Stewart dissented; to Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964), Justices Harlan and Stewart dissented; to Mann v. Davis, 377 U.S. 678 (1964), Roman v. Sincock, 377 U.S. 695 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964), only Justice Harlan dissented. The major dissenting opinions from the last six cases may be found as follows: Justice Clark, 377 U.S. 587 (1964); Justice Stewart, 377 U.S. 744 (1964); Justice Harlan, 377 U.S. 589 (1964).

28. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. at 748. Mr. Justice Stewart's language is reminiscent of Mr. Justice Holmes in his dissent to Lochner v. New York, 198 U.S. 45, 75 (1905):

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

29. 376 U.S. 1, 20 (1964).

30. *Id.* at 48.

so many "activists" bent upon implementing the current version of Spencer's *Social Statics*,[31] the dissenters seemed to view themselves as paragons of judicial restraint and devotees of the fabric of federalism. Granting for the purpose of argument that the dissenters did reflect the tradition of judicial restraint, one is tempted to smile sadly at the futility of their clamor in light of the Court's route march toward change. Is it possible, however, that, rather than smiling at the futility of it all, one should laugh loudly because, instead of standing for tradition, the dissenters were sub silentio announcing their willingness to preside benignly over the dissolution of the federal system? In short, is the dissenters' position fraught with paradox? Paradox upon paradox, could the dissenters be right when they insist upon standing pat on their position of stare decisis? That is, will future developments eradicate federalism in any event so that the majoritarian crusade is little more than mock heroics in face of the inevitable? It is our purpose here to examine these questions.

II. A Brandeis Brief

The stark fact underlying the reapportionment cases is the obvious urban environment in which the Court found itself in the 1960's. Jefferson's eloquence in behalf of the independent farmer, like Pericles' oration, had long been relegated to the history books by changing conditions which rendered its message irrelevant.[32] The same fact was also present when *Colegrove v. Green* was decided, but the myth of small town America still dominated the scene.[33] In the intervening years, however, the pace of urbanization has been gathering momentum, and the problems generated by the metropolis growing on each coast have served to shatter the myth. Contemporaneously, while the problems of crime in the cities, pockets of poverty and availability of medical care became common-place front-page news, there was heightened awareness of the failure of the several legislatures to revamp their electoral apparatus to reflect the needs of urban society.[34]

31. Spencer, Social Statics—With Man Against the State (1893).

32. See U.S. Bureau of the Census, Dep't of Commerce, Statistical Abstract of the United States for 1962, at 218, 608, 610; Lerner, America as a Civilization 139-55 (1957).

33. Readers who recall the motion pictures released just after the end of World War II will recall that the hero inevitably returned to a "typical American town." Similarly, James Gould Cozzens' *The Just and The Unjust* (1942) was set in a small town environment, and after the war, was recommended reading for neophyte Harvard Law School students. Note, 58 Harv. L. Rev. 589 (1945). Louis Auchincloss would seem more apropos today.

34. Brief for the United States as Amicus Curiae, pp. 41-42, Baker v. Carr, 369 U.S. 186 (1962) (footnote omitted): "Malapportionment of State legislatures not only subverts democratic principles generally, but it also has the effect of precluding States from meeting

Since *Colegrove*, the fact that most of the population live in urban areas had become not one bit more obvious, but it had become more obvious that the trend toward concentration was accelerating. The self-sufficient farm family able to care for its own geriatrics had been replaced by the highly mobile family which looked upon the elderly as a "social problem." The break-through from the industrial revolution era into the current service-society relegated increasing numbers of nonskilled workers permanently useless.[35] Race problems multiplied as the immigrants to the North multiplied the numbers of the unemployable in urban centers at a time that minorities world-wide were realizing that they, too, had "rights." Crime increased at the same time that rebellion in the cities became a real possibility. More important than all of these, the affluent suburbanites who had mushroomed since *Colegrove* found themselves trapped in poorly planned developments, victims of hopelessly inadequate public transportation, faced with increasingly expensive education for their children as the price of maintaining their status, and, most recently, threatened with a water shortage.[36]

Since *Colegrove*, moreover, would-be city problem-solvers tended to migrate toward Washington as the source of aid and comfort. Highways, housing, mortgage markets, panels to study crime and model planning laws all emanated from Washington, relegating the states to a back seat in critical affairs.[37] Hitherto, in the area of commerce, the economy had grown into an interstate affair subject to federal supervision, so that the inevitable laws of the market place had rendered the states irrelevant. A similar escalation of urban affairs into a purely federal concern, however, would eviscerate the several states of any significant *raison d'être* and would in time destroy the system of federalism itself.[38]

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burgeoning of needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban."

35. See N.Y. Times, June 28, 1965, p. 1, col. 4, revealing that more workers in this country are now engaged in providing services than in producing goods. Indeed, we are in the midst of a new industrial revolution in which two unique problems confront us: (1) What to do with our unskilled labor force; and (2) How to structure leisure for the employed.

36. For a magnificent compendium of woes, see GALBRAITH, THE AFFLUENT SOCIETY 251-53 (1958). It is an interesting study in its own right to observe how the hand-wringing about these problems has become commonplace. Thus, in 1964, *Fortune* turned its attention to the plight of the city. Whalen, *A City Destroying Itself*, Fortune, Sept. 1964. In April 1965, it was *Commentary's* turn. Gasis, *The Failure of Urban Renewal*, Commentary, April 1965. At last the problem arrived in the glossy pages of *Look* and *Time*. *Our Sick Cities*, Look, Sept. 21, 1965, p. 27; *Hydrology*, Time, Oct. 1, 1965, p. 30.

37. The trend is even evident in casebooks. See, *e.g.*, HAAR, LAND USE PLANNING ch. 9 (1959).

38. Adolph Berle summed up the situation succinctly:

Financial problems of metropolitan government are approaching a crisis phase.

III. An Exercise in the Judicial Process

A. *An Admixture of Realism and Cynical Acid*

The Supreme Court undoubtedly was influenced by this course of events. The individual members of the Court certainly had encountered and considered it in private life. Moreover, the complaint, the record, and the briefs in *Baker v. Carr* set forth and extrapolated these changes and problems. The Court could not insulate itself from the changes in the society generally and from the changes since *Colegrove* in particular. For example, when *Colegrove* was decided, the Court had available only the 1940 census figures relevant to the discussion of urbanization. The population then was 57,245,000 rural, as opposed to 74,424,000 urban. But when *Baker v. Carr* came before the Court, the 1960 census figures showed a rural population of 54,054,000 as opposed to 125,269,000 for the urban areas.[39] Further, many of the problems which in 1946 were only incipient, even nonexistent, had obviously grown to immense proportions during the ensuing years. Thus, underlying the Court's decision in *Baker v. Carr* was not only a recognition of a basic unfairness and violation of "democratic principles," but also concern over the changes in the society, the resulting problems, and the breakdown in the governmental process in the exchange of roles of responsiveness from state to federal level.

Indeed, talk of "democratic principles" does not carry the analyst of *Baker v. Carr* very far along the road of critical thinking, because the term is hopelessly inexact. It is manifest, at the very least, that the opinion does *not* presage an egalitarian revolution in the political infrastructure of the Republic. This is so because the opinion leaves untouched the work-a-day devices within the realm of the legislative branch which serve to restrain enthusiastic majorities, namely, the seniority rule, the committee system, the filibuster, and various parliamentary devices designed to keep bills off the floor. Within the context of the whole governmental structure, of course, the equally dampening effect of the separation of powers and the difficulty of amending constitutions coexist to stifle short-term majoritarian whimsies.[40] The fact

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> Since cities, towns and counties are created by and are legal dependencies of state governments, the problems arrive, crying for attention, in state capitals. There they were received as singularly unwelcome guests. Few, if any, states have really coped with them.

Berle, *Reflections on Financing Governmental Functions of the Metropolis*, 27 Acad. Pol. Sci., Proc. 66-67 (1960). More interesting still, Berle asserts that: "My thesis is that metropolitan areas are now an integral part of the national economy." *Id.* at 67.

39. Tyler, *Court Versus Legislature (The Socio-Politics of Malapportionment)*, 27 Law & Contemp. Prob. 390, 406 (1962).

40. "One man one vote doesn't add up to a democracy. Not when you've got great concentration of power . . . ." Edelman [M.P.], The Prime Minister's Daughter 111 (1965).

of the matter is that, while the *legislative process* itself remains as democratic or undemocratic as it ever was, the *legislatures*, apart from the United States Senate, must reflect the overwhelming voting power of the urban masses, and rural districts no longer can be used as electoral watered-stock to ameliorate the influence of the metropolis in twentieth-century politics.

B. *The Elusive Principles of Constitutional Litigation*

The traditional view of the Constitution is that it sets forth limited powers—what is not permitted is forbidden. In turn, the traditional view of the Supreme Court is that it is the final interpreter of the Constitution.[41] The political scientists have waxed eloquent evolving various theories about constitutional litigation, ranging from the Yardstick Method to the Adaptative Approach.[42] Whatever the merits of these various theories about the decisional process of the Court, one thing is clear in terms of practical empiricism about the function performed by the Court when it makes constitutional law decisions: The Court provides a device by which the Constitution is interpreted in light of each succeeding generation. Cases having become the means by which the otherwise fairly inflexible written Constitution has been injected with the requisite flexibility, it has been possible to alter the *grundnorms* therein piece-meal without, at the same time, destroying the apparent continuity of the whole fabric. The measure of the Court's work is that, apart from the Civil War, the same ideal of a government of laws maintains today in an urban industrialized society as did in a rural agricultural one over 170 years ago.

Having become, in Max Lerner's phrase, "the keepers of the covenant,"[43] the Court exercises tremendous power on the American scene. According to its decisions, the Congress may or may not regulate a particular activity, the executive may or may not do a particular act, and at the same time, the balance of federal and state authority is demarcated. Still, the Court is not free willy-nilly to reinterpret the Constitution at its whim; its authority does not exist in a vacuum. Without funds of its own, without the concrete means of enforcing its orders, its decisions in the ultimate analysis depend upon the national conscience and the esteem in which the Court is held.

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41. Marbury v. Madison, 4 U.S. (1 Cranch) 137 (1803); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

42. Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 655-71 (1926); VINOGRADOFF, COMMON SENSE IN LAW 134, 137 (2d ed. 1956).

43. LERNER, AMERICA AS A CIVILIZATION 442 (1957).

Thus, as Professor Carl Brent Swisher has observed:

> The Supreme Court is able to lead in constitutional development, then, only by virtue of the fact that its leadership is of such a character that the people and their representatives are willing to follow. To put the matter more simply, the Supreme Court succeeds in leading largely to the extent of its skill not merely as a leader but as a follower. Since the medium of its leadership is the law, or the decision of cases in terms of the law, we can go further and say that the effectiveness of the Court's leadership is measured by its ability to articulate deep convictions of need and deep patterns of desire on the part of the people in such a way that the people, who might not have been able to be similarly articulate, will recognize the judicial statement as essentially their own. The Court must sense the synthesis of desire for both continuity and change and make the desired synthesis the express pattern of each decision.
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> The function of the Court is to make articulate that body of idealism and demonstrate the capacity for the merging of the each in the all, to the extent of the performance of nine men selected for that purpose, of nine men out of millions who make up our total population.[44]

Yet Max Lerner had a point when he compared the Justices of the Court to a "sacerdotal group. . . . [T]hey alone are privy to the mysteries on which the destiny of the tribe depends."[45] As we have observed, the Court's authority ultimately is rooted in the esteem in which it is held by the electorate, yet it seems clear that its decisions are held in such esteem because the Court's interpretation of the Constitution appears to be law, not judicial legislation. Thus, the Court operates in a field of considerable friction, at once being a legislative device by which the Constitution is remolded in contemporary terms and at the same time not a legislature but a court discovering, according to hallowed principle, the law that always was. Professor McCloskey has demonstrated this phenomenon vividly:

> For the fascinating thing about the Supreme Court has been that it blends orthodox judicial functions with policy-making functions in a complex mixture. And the Court's power is accounted for by the fact that the mixture is maintained in nice balance; but the fact that [the mixture is] . . . maintained in . . . the Court's claim on the American mind derives from the myth of an impartial, judicious tribunal whose duty it is to preserve our

44. SWISHER, THE SUPREME COURT IN ITS MODERN ROLE 179-81 (1958).
45. LERNER, AMERICA AS A CIVILIZATION 442 (1957).

> sense of continuity with fundamental law. Because that law was initially stated in ambiguous terms, it has been the duty of the Court to make "policy decisions" about it, that is, to decide what it means in the circumstances existing when the question is presented. But though the judges do enter this realm of policy-making, they enter with their robes on, and they can never (or at any rate seldom) take them off; they are both empowered and restricted by their "courtly" attributes.[46]

Recognizing after all that Dr. Dooley did not represent the alpha and omega of wisdom, and tired, perhaps, of trying to pigeonhole the several Justices along ideological lines in terms of behavioral science,[47] there is some evidence that even the political scientists have come to see that there is something more than prejudice of the individual Justice involved in the law-making process. Thus, rather surprisingly, one reads recently that:

> While it is true that under our system the Court is an organ of government, and to that extent a political institution, we would do well to remember that it is after all a court of law as well. The Justices, as inheritors of the common law system, in which they were trained and by which their outlook was to some extent shaped, dwell in the mainstream of legal history and practice; their work is carried on in a legal context and within legal rules.[48]

Thus, just as first-year law students go through a stage when they believe that the judges are simply running amok behind an intellectual smokescreen of legal syntax, the political scientists have gone through the same experience and now are trying to come to terms with the realities of the Court as not merely a political organ but a court of law.

C. *A Note on the Mature Critique of Cases*

The practitioner does not dismiss "rules of law" as irrelevancies. At the same time, the particular facts may determine which of several rules apply, or they may incline a court to create a rule in a certain way where none existed before. But the whole thrust of law school education is designed to demonstrate that, like Gaul, the judicial

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46. McCLOSKEY, THE AMERICAN SUPREME COURT 20 (1966).

47. See LUCE & RAIFFA, GAMES AND DECISIONS (1957); Fisher, *The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods*, 52 AM. POL. SCI. REV. 321 (1958); Kort, *Reply to Fisher's Mathematical Analysis of Supreme Court Decisions*, 52 AM. POL. SCI. REV. 339 (1958); Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the 'Right to Counsel' Cases*, 51 AM. POL. SCI. REV. 1 (1957); Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958).

48. Landynski, *The Making of Constitutional Law*, 31 SOC. RESEARCH 23, 29 (1964).

process is a tripartite phenomenon: there are rules, facts of particular cases, and the environment in which the court finds itself. No case can be completely understood unless and until it has been dissected in these terms.

Professor Leon Green, one of the most articulate spokesmen of this view, has used *Rylands v. Fletcher*[49] as an example of this truth. First, in that case there was no rule necessarily controlling the situation. Second, the facts were clear because they were agreed upon below. Why, however, should the court have imposed strict liability upon the landowner?

> We do not know all the environmental facts that influenced the judges. But we do know that in England at this time a new and prosperous industry [such] as milling could well afford to bear the risks it imposed on the older and equally if not more important mining industry. Both were industrial land users. The surface industrialist alone could provide protection for the mine beneath. The mine owner could provide none. The mining industry was basic to the English economy and had been so for a long period. To hurt mining was to hurt England.[50]

The counterpoint provided by the early American refusal to follow the decision illustrates how similar facts, within the context of another environment, yield different results even when, in the main, similar "rules of law" exist in both jurisdictions.[51]

It might be objected that *Baker* disproves this thesis because, after all, the environment in which both *Colegrove* and *Baker* were decided was the same. This, however, is true only if environment is equated with concrete facts, which were changed only slightly. Environment in this context, however, means what people are thinking about the world around them; in short, the intellectual *Can't Help's* in which the world of experience is ordered into the commonplace beliefs of a particular era.[52] Here, while the *facts* about metropolis may have increased rather than changed, the *thinking about* metropolis was revolutionized between the two cases. Urban affairs, however viewed, has become a commonplace in today's intellectual milieu. Granting, therefore, the validity of the Green tripartite thesis, the felt necessity of the time to attack the urban problem, and the growing realization that the

49. L.R. 3 H.L. 330 (1868) (holding that conducting a dangerous activity on one's land gives rise to strict liability for injuries therefrom off the land).

50. Green, *Tort Law Public Law In Disguise*, 38 TEXAS L. REV. 1, 5 (1959).

51. *E.g.*, Brown v. Collins, 53 N.H. 442 (1873).

52. See, Roberts, *A Rule Is a Rule Because it Is the Rule: Intellectual Crisis in Conflict of Laws*, 9 VILL. L. REV. 200, 207 (1964).

urban majority was not able to attack the problem because the rural-oriented legislatures were exploiting *Colegrove* to maintain their own positions, the result in *Baker* was almost inevitable.

In analyzing *Rylands v. Fletcher*, we were able to create a mental construct counterposing the influence of rules, particular facts, and environment. If courses in adjective law are to be credited, however, the law deals with rules and facts. Indeed, facts not part of the record are subject to judicial notice only if common knowledge or available from sources of indisputable accuracy.[53] The illumination of the environment has, for the most part, been left to the law reviews which have, after the fact, extrapolated the background which explains why the judges behaved as they did. In *Baker*, however, the facts of the case blend into the environment because they raised, particularly in the amicus curiae briefs, the totality of issues broached by the urbanization phenomenon. At the same time, the judges were not merely reacting, as in *Rylands* where the judges may have been Whigs reacting against factory owners or behaving as disciples of *laissez-faire* protecting the power supply.[54] This is so because no simple bias to take the place of Spencer's *Social Statics* explains the majority's conduct.

Indeed, faced with a problem where the facts boiled over to create an environment which was confused because there were no self-evident answers or explanations on the issue of how to solve urban problems, both factions on the Court grasped elementary principles as tools with which to impose order on the environment in which the Court found itself. The minority relied on stare decisis. The majority found refuge in federalism.

The first question the case presented was whether the environment had changed so markedly that *Colegrove* was already an anachronism. The cities were more crowded, the problems more dire, and the states were not solving the problems. Since *Colegrove*, however, it had become conventional wisdom that the state legislatures had to respond and that cities, as the source of the bulk of the states' tax money, had to be freed from rural domination to tackle the situation. By itself, however, this might not have been any reason to restructure the constitutional matrix, at least when stare decisis had some meaning. The

53. McCORMICK, EVIDENCE § 329 (1954) illustrates the increasing awareness of this problem. Compare also the treatment of judicial notice in MORGAN, MAGUIRE & WEINSTEIN, EVIDENCE: CASES AND MATERIALS (4th ed. 1957) and MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, EVIDENCE: CASES AND MATERIALS (5th ed. 1965).

54. *Compare* Bohlen, *The Rule in Rylands v. Fetcher*, 59 U. PA. L. REV. 298, 373, 423 (1911), *with* Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365 (1940).

erosion, however, of the state as a source of answers to urban problems did raise a structural issue—the continued viability of federalism! Here was a fundamental fact calling for action which outweighed the inertia implicit in stare decisis.

If there is a consistent *Can't Help* which explains *Baker v. Carr*, it is not to be found in democratic dogma, but in the felt necessity to preserve intact the federal principle in light of an evolving environment which threatened to render federalism irrelevant. In this sense, the Court reflected the conscience of the community which probably believes that the several states can solve urban problems, and, in this sense, the decisions are conservative in that they preserve the traditional concept of the state functions.

IV. Paradox Compounded

When *Colegrove* was decided the common-sense concepts of the era considered the make-up of state legislatures to be a political matter, and the Court, reflecting the *Can't Help's* of the times, translated this predisposition into a rule of law. Facts did not change greatly since *Colegrove*, but problems were acerbated and thinking about urban America did change. Thus, to a very real extent, *Baker* simply confirmed the current conventional wisdom about urban problems and the need for state action. In short, the Court unleashed the urban majority so that, through control of the state capital, urban America could assault its own problems within the context of traditional federalism.

An astute observer at the time of *Colegrove*, looking at the problems already then current, might have predicted *Baker*. This was so because, while *Colegrove* reflected the conventional wisdom of the era—was controlled, in short, by the then environment—, the seeds of its downfall were already planted. Why would not urban conditions grow worse and what reason was there to expect that the rural-dominated legislatures would see the light?

Similarly, the notion of federalism inherent in the recent decisions presupposes that the urban majorities now in command of the vehicle of state government will be able to solve the urban problem. But, long before *Baker* the problems of the city had crossed state lines. New York City, properly understood, had spread through Connecticut, New York and New Jersey, and Philadelphia had grown into a similar tri-state metropolis.[55] It may be, therefore, that the states are already

55. For some interesting maps, see Connery & Leach, The Federal Government and Metropolitan Areas 201 (1960).

irrelevant to the solution of the problems of modern day America and have become mere county-like units in a national polity.

Thus, just as *Colegrove* reflected an intellectual approach already obsolete when promulgated, *Baker* may have been a distillation of obsolete predispositions on the day it was handed down. This is so because, while the parties argued in terms of the urban situation and the problem was posed in the context of the several states, the real issue may have been whether the question ought to be set in a national context. But this overlooks the fact that *Baker* arose out of the contemporary context of urban efforts to readjust their position within the political spectrum of the state structure—it was not the Court's business to indulge in utopian flights but to decide the case actually before it and to propound an answer to the issue presented to it in terms of the contemporary intellectual environment.

The real difficulty, however, in analyzing contemporary constitutional cases is that, unlike *Rylands v. Fletcher*, the critic is the prisoner of the same environment as the Court. Two courses are most readily accessible. First, the critic can illustrate how the new decision overruled, modified, or avoided prior holdings. Second, the critic can examine the court's syntax, criticizing phrases such as "one man—one vote" or pointing out the latent ambiguity in ideas such as that article I, section 2, requires that the House be apportioned equitably. The difficulty in going further is that there is no real critical appreciation of the environment in which the decision was made because the requisite detachment is lacking. The only thing the critic can do by way of a frame of reference, therefore, is to evaluate whether the decision reflects the current environment as he can view it—is it a reasonable effort to channel society in terms of the current *Can't Helps*?

Thus, the terms "activist" and other shibboleths in the contemporary reviews are of little help. Instead, the question is whether the Court has readjusted the Constitution to meet current problems—in short, whether it has not only modified the black letter rules of constitutional law but has at the same time "conserved" the fundamental concept upon which that matrix is based. In this sense, then, because the Court has attempted to provide a means whereby the urban majority can attempt to solve the urban problems in the context of the state legislatures, the Court has "conserved" the federal notion. The question becomes, however, whether this conservation is really relevant in light of the problems inherent in the environment. But, since the Court must adjudicate concrete cases and the situation raising that issue is not yet foreseeable, by the very nature of things, the Court is relegated to its conservatory function.

Thus, the decision reflects a paradox to anyone used to describing the Court in terms like "activist." The activists, the majority, conserved federalism. The dissenters, the judges who insisted upon stare decisis, seem in reality to have rejected any realignment which would conserve federalism. Still, granting the increasing awareness of urban problems and the urge to attack them, the very inaction of the minority would encourage the demise of states as meaningful units in the governmental hierarchy. Accordingly, it is true that the majority were reading into this constitutional law case their own "philosophies," but, unlike courts of another era, this is not a philosophy of a particular brand of economics, but rather a particular understanding of the Constitution itself—that is, a philosophy that federalism is fundamental. By default, arguing that the question is political, the dissenters were willing to let the political process proceed, even though it arguably would hasten the demise of the states and bring an end to federalism as a meaningful concept.

Arguably, therefore, the majority were "actively" engaged in conserving federalism and willing to pay the price of entering into an area hitherto labelled political in order to preserve it. At the same time, the dissenters were willing to let federalism survive or fall as a political question, seemingly regarding the structure of government as not important enough to overrule past decisions. Paradox upon paradox, if the majority's conservation efforts do reflect a conventional wisdom already out of date, the dissenters may have been right in insisting upon treating the question as political, reserving their decision until a generation or two hence when new political proposals are put forth to realign the federal-state structure in the context of the urban nation-state.

V. A Radical Postscript

Beyond giving the urban masses control over several state legislatures, these decisions leave the "urban problem" pretty much where it was in the first place. First, even with control over the state budget, it is unlikely that the funds necessary to solve these problems can be raised at state level.[56] Second, the problem having already spread across

56. See lecture by Senator Clark of Pennsylvania, delivered at George Washington University, March 28, 1960, published as *Toward National Federalism*, 106 Cong. Rec. A 3007, A 3008 (1960). The thrust of his thesis is that while local budgets are in part inadequate because of an unwillingness to tax, ultimately they must remain inadequate because of inadequate resources available to tax. The real money for governmental activity on a grand scale, of course, is derived from corporate taxes. Indeed, it ought to be evident that we live in a mixed economy where the national government manipulates the economy to maintain optimum business conditions, in exchange for which the corporations split their income on a nearly 50/50 basis with that government. See, *e.g.*, Berle, *Property, Production and Revolution*, 65 Colum. L. Rev. 1 (1965).

state lines, the decisions do absolutely nothing to expedite the solution to the enigma of how structurally distinct urban masses ensconced in the several state houses attack an essentially interstate problem.[57] In point of fact, the decisions accomplish an entirely different purpose: They reform state political maps so that if solutions to the urban problem do materialize in the future, the urban masses will be able to accept or reject them at state level.

Ultimately, however, the very fact that the Court removed reapportionment from the political thicket and reconstituted it a legal problem may hinder the search for a lasting solution to the urban problem. This is so because, for the time being, political thinking on a grand scale may atrophy in an excess of enthusiasm over these decisions. Imaginative thinking might call for a radical overhaul of the infrastructure of the Republic in which the current states were abolished and a new vector system instituted in their place based upon actual urban configurations. For example, silly as it sounds, a new New York arcing into Connecticut and northern New Jersey is not outside the realm of practical reason, southern New Jersey and Delaware being annexed to Pennsylvania at the same time that the western part of that state was incorporated into some larger unit based upon the Great Lakes. Acting when it did, the Court put an end to such thoughts for the time being simply by removing the pressure of urban discontent. The ultimate paradox, therefore, may be that centuries hence the majority may be seen to have opted for half-way measures in the name of an outdated federalism and thereby be seen to have actually delayed the soul searching that must someday come when it is recognized that urban America has outgrown the matrix of 1789.

Granted the principle of a federal system, if one were interested in

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57. See, *e.g.*, CONNERY & LEACH, THE FEDERAL GOVERNMENT AND METROPOLITAN AREAS 202 (1960), where the authors conclude that since the political parties are organized on a state by state basis, there is little liklihood of forming any meaningful inter-state governing body on a cooperative basis, because such an "interstate agency would have no real political base and no political constituency." This, of course, is a political judgment, but it is worth pondering. It might be borne in mind, at the same time, that constitutional law as taught in the law schools is totally absurd because the study of the party systems and the actual functioning of government is not included. Consider this proposition: "It should be stated flatly at the outset that this volume is devoted to the thesis that the political parties created democracy and that modern democracy is unthinkable save in terms of the parties." SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942). "The truth of the matter is that the American public has never understood the Constitution nor has it ever really believed in it, in spite of the verbal tradition of constitutionalism. . . . By a popular political interpretation of the Constitution, more important than any interpretation ever made by the Supreme Court, the president is made responsible for the initiation, adoption, and execution of the policies by a mandate that merely ignores every known principle of the separation of powers and federalism." *Id.* at 53.

thinking ahead it could seriously be argued that the next chance to realign the states into larger units which might be economically and politically viable in their own right may come if Canada collapses as a federation.[58] This eventuality would allow for re-thinking of unit lines on both sides of the border since an amalgamation must give rise to some restructuring, either by way of a constitutional amendment or even more intriguingly, through the clever exploitation of the treaty-making power.[59] The trouble with constitutional law, however, is that 99 44/100 of the recent thinking done in this area is ex post facto —when, arguably, thinking along the lines of a constitutional master plan ought to replace the *ad hoc* case by case approach. The common-law system restricts the Court itself, no matter how activist its majority may be, to deciding concrete cases and not involving itself in such an adventure. At the same time, some thinking in an organized way about the future constitutional structure of the Republic may be just the prescription needed.

Some years ago Mr. Justice Cardozo dreamt of a Ministry of Justice which could mediate between the courts "with powers of innovation cabined and confined" and the legislatures, "its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be viewed both steadily and whole."[60] An analogous institution established within the new Department of Urban Affairs, dealing with prospective constitutional law insofar as it touches upon the urban problem, might serve to focus on these issues before they arise. Indeed, if the present decisions are but a stop-gap in the steady story of the erosion of the federal system, such an institution might provide us with the matrix for a new federal structure suitable to a megalopolis of the not-too-distant future. "The time," after all, "is ripe for betterment."[61]

Thus, having reduced the reapportionment cases to a minor niche in the continuing pageant of constitutional growth, we have also sug-

58. This should not come as a shock to anyone who is following affairs to the north. See, *e.g.*, *Can Canada Survive as a Nation?* The Times (London), Dec. 20, 1965, p. 9, cols. 6-7: "Indeed, it is remarkable how Canada has kept together as a nation for 98 years. . . . In economic terms the United States controls well over 55 per cent of manufacturing and mining industries in Canada—in the oil business the proportion is much higher. The cultural impact is perhaps even greater, particularly in terms of magazines, radio, television and other mass communications media. It is difficult to see how Canadians can turn back the flood." While most Americans may not have noticed this possibility, the source of this quote should reveal that others have.

59. See Missouri v. Holland, 252 U.S. 416 (1920).

60. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114-15 (1921).

61. *Id.* at 126.

gested that in order to appreciate their dethronement one must take the long view. Here is precisely the point at which critical constitutional analysis is at its weakest, simply because, inured to holdings and cases, it tends to operate retrospectively. To function prospectively, however, will require that the constitutionalists immerse themselves in politics, economics, and sociology as they try to construct a model of things to come. In short, constitutional law studies must be recast as a creative activity as opposed to a historical discipline. If a page of history is worth a volume of logic, it may very well be equally true that a paragraph of constitutional projection will someday be worth a page of history.