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> Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.[1]
>
> Mr. Justice Felix Frankfurter
>
> It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.[2]
>
> Judge John J. Francis

Within the "political thicket" the dragon-like gerrymander has prospered. Thus harbored from the judicial arena it has flourished to such an extent as to deny citizens equal protection under the law.[3] The discrimination spoken of has mainly arisen from the failure of state legislatures to reapportion legislative districts effectively while vast shifts of population have occurred in the past two decades. The result has been a gradual widening of the gap between representation and population. The numerical worth of one's vote has thus been diluted so as to allow one citizen's vote to weigh disproportionately more than another's in a neighboring district.[4]

The relationship of the Supreme Court to the reapportionment issue has historically been one of abstention, the matter having been treated as a nonjusticiable political question. In adopting this approach, the Court has mainly relied upon three decisions. In *Colegrove v. Green*[5] citizen voters of Illinois petitioned the Court to enjoin state officers from conducting a congressional election under a 1901 state law which, it was alleged, unfairly divided the state into congressional districts. It was contended that the law violated the guaranty of a republican form of government contained in the federal constitution. Relief was denied on the grounds that districting was a political question into which the Court would not inquire.

Writing for the majority, Mr. Justice Frankfurter placed the "political thicket" epitaph on the cause for reapportionment. The Court's refusal in *Colegrove* to involve itself in the politics of the people led to a number of per curiam decisions which forced petitioners to seek their remedy through state forums.[6] In *MacDougal v.*

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[1] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[2] Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960).

[3] A distinction should be drawn between the historical concept of the gerrymander, which is *affirmative* manipulation of legislative districts to gain political advantage, and the problem presented here, which is in the nature of *omission* to reapportion effectively. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 15-22 (1907). However, the distinction is often academic, for the results can be equally discriminatory. See Asbury Park Press, Inc. v. Woolley, *supra* note 2, at ———, 161 A.2d at 710.

[4] Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892). See Lewis, *Legislative Apportionment And The Federal Courts,* 71 HARV. L. REV. 1057, 1058 (1958).

[5] *Supra* note 1. The landmark case of *Colegrove* drew its precedent from *Wood v. Broom,* 287 U.S. 1 (1932), which held that where the Congressional Reapportionment Act did not contain a requirement as to compactness and quantity of population, the state legislatures in forming congressional districts, did not have to take this factor into consideration.

[6] Cook v. Fortson, 329 U.S. 675 (1946) (per curiam); Remmey v. Smith, 342 U.S. 916 (1952) (per curiam); Anderson v. Jordan, 343 U.S. 912 (1952) (per curiam); Radford v. Gary, 352 U.S. 991 (1957) (per curiam).

Greene[7] the Court was asked to review a state law which established requirements for legal recognition of political parties based on the distribution of population throughout the state, a system which petitioner claimed resulted in discrimination. Applying the rationale of *Colgrove,* the Court refused to take jurisdiction. Again in *South v. Peters*[8] the Court summarily dismissed petitioner's claim that the Georgia county-unit system favored the larger counties:

> Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.[9]

Thus the Court despite the possible existence of discrimination, had stamped the reapportionment issue as a political question and set a clear precedent for denying relief.[10]

While the Court designated reapportionment as nonjusticiable it was not reluctant to protect the right to vote in a primary,[11] to have one's vote counted,[12] and the right to protection against having one's vote actively diluted by "stuffing the ballot-box."[13] In *Gomillion v. Lightfoot*[14] the Court found that the Alabama Legislature had violated the fifteenth amendment by redistricting the city of Tuskegee so as to exclude the heavy concentration of Negro population. The Court was able to distinguish *Gomillion* from *Colegrove* by labeling the discrimination in *Gomillion* as an "unequivocal withdrawal of the vote solely from colored citizens" in violation of the fifteenth amendment,[15] whereas *Colegrove* was said to be a "dilution of the strength of . . . votes as a result of legislative inaction over a course of many years."[16] After Mr. Justice Frankfurter's opinion in *Gomillion,* a number of commentators began to speculate that the Court might eventually reconsider the reapportionment issue in a new vein.[17]

Although effective reapportionment has not been achieved in the majority of states,[18] several state judiciaries have entered the "political thicket"[19] and have, at times, achieved favorable results in their efforts to bring about an equitable reapportionment.[20] The lower federal courts in

[7] 335 U.S. 281 (1948).

[8] 339 U.S. 276 (1950). See Cook v. Fortson, 329 U.S. 675 (1946), which, like *South,* involved the Georgia county-unit system. See also N.Y. Times, June 19, 1962, p. 1, col. 2.

[9] South v. Peters, 339 U.S. 276, 277 (1950).

[10] Although *Colegrove* dealt with congressional apportionment, it was equally applicable to petitioners who sought to invoke the Court's equity powers for the purpose of reviewing *state* apportionment statutes. See Silva, *Apportionment in New York,* 30 FORDHAM L. REV. 581, 584 (1962).

[11] Nixon v. Herndon, 273 U.S. 536 (1927).

[12] United States v. Classic, 313 U.S. 299 (1941).

[13] United States v. Saylor, 322 U.S. 385 (1944).

[14] 364 U.S. 339 (1960).

[15] *Id.* at 346.

[16] *Ibid.*

[17] See Lucas, *Dragon In The Thicket: A Perusal of Gomillion v. Lightfoot,* SUPREME COURT REV. 194 (1961); 40 N.C.L. REV. 136 (1961).

[18] Bone, *States Attempting To Comply With Reapportionment Requirements,* 17 LAW & CONTEMP. PROB. 387 (1952); Lewis, *Legislative Apportionment And The Federal Courts,* 71 HARV. L. REV. 1057-58 (1958); Lucas, *supra* note 17, at 227; Short, *States That Have Not Met Their Constitutional Requirements,* 17 LAW & CONTEMP. PROB. 377 (1952).

[19] Parker v. Powell, 133 Ind. 178, 32 N.E. 836 (1892); Selzer v. Synhorst, —— Iowa ——, 113 N.W.2d 724 (1962); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960). See Lewis, *supra* note 18, at 1066.

[20] Attorney Gen. v. Suffolk County Apportionment Comm'rs, 224 Mass. 55, 133 N.E. 581 (1916); Brown v. Saunders, 159 Va. 28, 166

two instances have also exercised jurisdiction, despite *Colegrove v. Green.*[21] In one of these cases the United States District Court of Hawaii openly criticized the Supreme Court's approach to the problem:

> The time has come . . . when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. . . . It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired.[22]

The fine distinctions that had to be drawn between *Gomillion* and *Colgrove,* coupled with the statement by Mr. Justice Whittaker in *Gomillion* that the case could have well been decided under the equal protection clause,[23] the state and lower federal courts' entrance into the "thicket," and the fact that the Supreme Court never expressly said it was without jurisdiction to review reapportionment cases, all foreshadowed, it would seem, that the *Colegrove* precedent would perish. Perhaps Mr. Justice Rutledge's concurring statement in *Colegrove* was indicative of the Court's mere postponement of the reapportionment issue; ". . . jurisdiction should be exercised only in the *most* compelling circumstances."[24] In any case, the circumstances had become "most compelling" in Tennessee. The state legislature had failed to reapportion since 1901,[25] and when the Supreme Court of Tennessee was petitioned to declare the 1901 Tennessee reapportionment statute[26] unconstitutional because of obsolescence the case was dismissed:

> The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself.[27]

The Supreme Court dismissed the appeal on the basis of *Colegrove v. Green.*[28]

Three years later in *Baker v. Carr* (The Tennessee Case) citizens of Tennessee instituted an action in a federal district court, claiming the 1901 Tennessee reapportionment statute violated the equal protection and due process clauses of the fourteenth amendment by debasement of voting rights.[29] Judge Miller, writing for the majority, noted that there had been no unanimity of opinion among the justices of the Supreme Court, and that "the [district] Court is not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration."[30] When the court convened the case was dismissed in a per curiam decision on the grounds

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S.E. 105 (1932). But some courts have feared chaos if existing apportionment statutes were declared unconstitutional, Brown v. State Election Board, 369 P.2d 140 (Okla. 1962). Others have shown judicial unwillingness to review reapportionment laws, Smith v. Holm, 220 Minn. 486, 19 N.W.2d 914 (1945). Generally, the state courts have shown weakness in formulating remedies, Lewis, *supra* note 18, at 1069. Some state constitutions call for review of reapportionment by the courts, N.Y. CONST. art. III, § 5.

[21] Magraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1958); Dyer v. Abe, 138 F. Supp. 220 (D. Hawaii 1956).

[22] Dyer v. Abe, *supra* note 21, at 236.

[23] 364 U.S. 339, 349 (1960).

[24] 328 U.S. 549, 565 (1946) (emphasis added).

[25] Williams, *Legislative Apportionment In Tennessee,* 20 TENN. L. REV. 235 (1948).

[26] TENN. CODE ANN. §§ 3-101 to 3-107 (1901).

[27] Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40, *aff'd per curiam,* 352 U.S. 920 (1956).

[28] 352 U.S. 920 (1956) (per curiam).

[29] 175 F. Supp. 649 (M.D. Tenn. 1959).

[30] *Id.* at 651.

(1) that the court lacked jurisdiction of the subject matter and (2) that no claim was stated upon which relief could be granted.[31] The court deemed itself bound by the precedent of *Colegrove* and associated decisions: "in view of this array of decisions by our highest court, charting the unmistakable course which this court must pursue . . . it is unnecessary to consider decisions by lower federal courts."[32]

On appeal, the Supreme Court, by a 6 to 2 vote re-evaluated its long established precedents and reversed the district court.[33] In recognizing petitioner's claim that the Tennessee apportionment statute might deprive citizens of equal protection of the law in violation of the fourteenth amendment, the Court limited its holding to the following: "(a) that the [district] court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes."[34] Writing for the majority, Mr. Justice Brennan remanded the case "for further proceedings consistent with this opinion,"[35] but avoided the substantive merits of the claim by withholding comment on possible remedies and whether or not the Tennessee statute was unconstitutional:

> [W]e have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.[36]

The Court offered no standard by which the district court could judge the Tennessee apportionment statute, except for the statement that violation of the fourteenth amendment "reflects *no* policy, but simply arbitrary and capricious action."[37]

In holding that the district court possessed *jurisdiction* over the subject matter, Mr. Justice Brennan noted that an "unbroken line of our precedents [including *Colegrove, MacDougal* and *South*] sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature."[38]

As part of the tripartite holding the majority found that "the appellants do have *standing* to maintain this suit."[39] It noted that *Colgrove* and associated cases squarely held "voters who allege facts showing disadvantage to themselves as individuals have standing to sue."[40]

Lastly, Mr. Justice Brennan concluded that a *justiciable* constitutional cause of action was presented, and "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[41] The district court had misinterpreted *Colegrove* and companion cases upon which it relied because those cases asserted rights under the "guaranty of a republican form of government" clause,[42] rather than the right to equal protection of the law asserted in the present case. Contrary to the district court's findings, a suit challenging legislative apportionment does

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[31] 179 F. Supp. 824 (M.D. Tenn. 1959).

[32] *Id.* at 826.

[33] 369 U.S. 186 (1962).

[34] *Id.* at 197-98.

[35] *Id.* at 237.

[36] *Id.* at 198.

[37] *Id.* at 226.

[38] *Id.* at 201.

[39] *Id.* at 206.

[40] *Ibid.*

[41] *Id.* at 209.

[42] U.S. CONST. art. II, § 4.

not present a "political question." It is the involvement of the guaranty clause that renders the apportionment issue "political."

Mr. Justice Douglas delivered a separate concurring opinion in which he expressed no doubt that the Court had jurisdiction and felt "strongly that many of the cases cited by the Court and involving so-called 'political' questions were wrongly decided."[43]

Mr. Justice Clark's concurring opinion classified the Tennessee apportionment pattern as a "crazy quilt"[44] and noted that "voters have been caught up in a legislative strait jacket."[45] However, he petitioned the other members of the majority to go to the merits and indicate guidelines for granting relief.

Mr. Justice Stewart carefully limited his position to the narrow holding of the majority and confirmed the Court's wisdom in refusing to proceed to the merits of the case.

Both Mr. Justice Frankfurter and Mr. Justice Harlan dissented. The former accused the majority of reversing "a uniform course of decision. . . ."[46] and, by doing so, "[empowering] the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. . . . In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[47] He felt that *Colegrove* was "on all fours,"[48] and would have adhered to its precedent by not entertaining the action. With an historical survey of the apportionment issue he concluded that there prevailed in this country a "geographic inequality in relation to the population standard."[49] Therefore, he doubted equal protection of the law includes a right to a population-based apportionment, and, he added, for that reason the equal protection clause is no clearer guide for examination by the courts than the guaranty clause itself. "[T]he case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action."[50]

Mr. Justice Harlan's dissent reflected serious doubt that the majority's decision would prompt malapportioned states to respond. He thought it "more an adventure in judicial experimentation than a solid piece of constitutional adjudication."[51]

Upon remand of the principal case to the district court there immediately arose speculation as to what the remedy be, if any.[52] Two months later its judicial stimulus prompted the Tennessee Legislature in a special session to reform its existing system of apportionment. However, the district court found the revision discriminatory and held the case could be reopened by the parties or the court itself if the situation was not corrected by June 3, 1963.[53]

Thus the district court's action appears to be well within precedent long estab-

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[43] Baker v. Carr, *supra* note 33, at 241 n.1 (Douglas, J., concurring).

[44] *Id.* at 254 (Clark, J., concurring).

[45] *Id.* at 259.

[46] *Id.* at 266 (Frankfurter, J., dissenting).

[47] *Id.* at 269-70.

[48] *Id.* at 280.

[49] *Id.* at 321.

[50] *Id.* at 330.

[51] *Id.* at 339 (Harlan, J., dissenting).

[52] Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581, 591 (1962). See also Nutting, *Legislative Implications of the Reapportionment Decision*, 48 A.B.A.J. 581 (1962).

[53] N.Y. Times, June 23, 1962, p. 23, col. 1.

lished in both the federal and state courts. The remedy of judicial stimulus has worked effectively for both the federal and state judiciaries,[54] and is most appropriate due to the delicate balance of functions and powers involved. However, in the event that future legislatures are not prompted to reapportion, it is apparent that federal courts could employ mandamus and injunction to the same extent as they have been used by state courts.[55]

Baker v. Carr was long in its gestation. Its true impact may not be realized for several decades. Some have likened its importance to *Marbury v. Madison* and foresee great effect upon governmental structure through a liberal shift of power to the urban voters.[56] The decision has been assailed as a continuation of the "Court's alarming assault against the long reserved rights of the States."[57] Others have acquiesced in the view that Mr. Justice Frankfurter's position is no longer tenable to the extent of entirely divorcing the judiciary from the field.[58] Some of the apprehension of judicial embarrassment has been removed due to the compliance of the Tennessee Legislature, but on the other hand, there necessarily must be conjecture as to how far the courts will become engulfed in the "mathematical quagmire"[59] of apportionment and to what extent state legislatures will be spurred into action.

The salient question still remains — to what degree must apportionment be "arbitrary and capricious" to be held in violation of the equal protection clause of the fourteenth amendment? One state court has already been faced with this issue.[60] If lower courts are unable to evolve a satisfactory answer, the Supreme Court may be compelled to furnish guidelines. Recent interpretations of the principal case by the Supreme Court of Idaho and the Supreme Court of New Hampshire still recognize the wide discretion vested in the legislatures.[61] In still another recent case, the Maryland Court of Appeals, in light of *Baker v. Carr*, declared two sections of the Maryland constitution which dealt with apportionment to be in violation of the equal protection clause of the fourteenth amendment to the

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[54] Silva, *supra* note 52. See also Lewis, *Legislative Apportionment And The Federal Courts*, 71 HARV. L. REV. 1057 (1958).

[55] Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962); Silva, *supra* note 52. See also N.Y. Times, June 19, 1962, p. 22, col. 3.

[56] Silva, *supra* note 52.

[57] THE VIRGINIA COMMISSION ON CONSTITUTIONAL LAW, THE TENNESSEE REAPPORTIONMENT CASE, (1962).

[58] See Nutting, *supra* note 52.

[59] Baker v. Carr, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting). An illuminating indication of possible future reaction is a decision rendered by a federal court just prior to *Baker v. Carr*. Upon a complaint alleging New York's legislative apportionment to be unconstitutionally favoring rural areas over the more populous urban centers, a three-judge district court accepted jurisdiction and found the apportionment to be valid on the merits. W.M.C.A., Inc. v. Simon, 202 F. Supp. 741 (S.D.N.Y.), *vacated and remanded* 370 U.S. 190 (1962). Two judges chose to delve into the "quagmire." One, relying on historical and statistical data, found no merit in petitioner's contention; the other, although admitting a geographical discrimination existed, found no infringement upon any racial or religious group. The third member of the court expressed no view on the merits, concluding that the action did not present a justiciable issue. On appeal, the Supreme Court, in a per curiam opinion, vacated the judgment and remanded for further consideration in the light of *Baker v. Carr*.

[60] Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63, *rev'd per curiam*, —— U.S. ——, 82 Sup. Ct. 910 (1962).

[61] Caesar v. Williams, 371 P.2d 241 (Idaho 1962); Levitt v. Attorney General, 104 N.H. 100, 180 A.2d 827 (1962).

federal constitution.[62] The Maryland court, while maintaining jurisdiction of the case so that injunctive relief could be given and mandamus issue, allowed the legislature to redraft the offending sections of the Maryland constitution. The extent of the role that the judicial branch must play in reapportionment still remains to be seen. It is now certain that *both* state and federal courts must take a part in redressing discrimination where it exists. The wisdom of placing the judiciary within the "political thicket" can best be justified by the statement of Mr. Justice Clark:

> It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges.[63]

[62] Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962).

[63] Baker v. Carr, *supra* note 59, at 262 (Clark, J., concurring).