

## *BAKER V. CARR* IN CONTEXT: 1946-1964

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### Introduction

Occasionally in all walks of life, law included, there are breakthroughs that have the quality of truth revealed. Not only do such ideas have overwhelming force, but they alter the world in which they operate. In the wake of such breakthroughs, it is difficult to imagine what existed before. Such is the American conception of constitutional democracy before and after the “Reapportionment Revolution” of the 1960s.

Although legislative redistricting today is not without its riddle of problems, it is difficult to imagine so bizarre an apportionment scheme as the way legislative power was rationed out in Tennessee, the setting for *Baker v. Carr*. Tennessee apportioned power through, in Justice Clark’s words, “a crazy quilt without rational basis.”<sup>2</sup> Indeed, forty years after *Baker*, with “one person, one vote” a fundamental principle of our democracy, it may be hard to imagine what all the constitutional fuss was about. Yet the decision in *Baker*, which had striking immediate impact, marked a profound transformation in American democracy. The man who presided over this transformation, Chief Justice Earl Warren, called *Baker* “the most important case of [his] tenure on the Court.”<sup>3</sup>

Perhaps the simplest way to understand the problem is to imagine the role of the legislator faced with the command to reapportion legislative districts after each decennial Census. Shifts in population mean that new areas of a state are likely to emerge as the dominant forces of a legislature. But what if the power to stem the tide were as simple as refusing to reapportion? It happened at the national level when Congress, realizing that the swelling tide of immigrant and industrial workers had moved power to the Northeast and the Midwest, simply refused to reapportion after the 1920 Census. And it happened throughout the U.S. for much of the 20<sup>th</sup> century as rural power blocs in the state legislature realized that reapportioning would yield power to the urban and suburban voters and remove incumbent politicians from their clubby sinecure.

When the original complaint in *Baker* was filed, in 1959, the Tennessee Legislature had been refusing for nearly 50 years to apportion the state legislative districts. This was despite the express requirement of the Tennessee State Constitution that each legislative district have the same number of qualified voters.<sup>4</sup> As a result, there existed an enormous disparity in the voting strength of individual voters. For example, south-central Moore County, with 2,340 voters, had one seat in each house of the state legislature, while Shelby County, covering the city of Memphis, had only seven seats for its 312,345 voters.<sup>5</sup> “Districts with 40 percent of the state’s voters could elect

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<sup>2</sup> *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring).

<sup>3</sup> Earl Warren, *The Memoirs of Earl Warren* 306 (1977) (quoted in Lucas A. Powe, Jr., *The Warren Court and American Politics* 200 (2000)).

<sup>4</sup> For the relevant provisions of the Tennessee Constitution, see *Baker*, 369 U.S. at 189.

<sup>5</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 200 (2000).

sixty-three of the ninety-nine members of the house, and districts with 37 percent of the voters could elect twenty of the thirty-three members of the senate.”<sup>6</sup>

This pattern of maldistribution of representatives, which existed across the country, resulted from the increasingly urban nature of American life through the twentieth century. As urban areas grew, the malapportionment of representatives increased. Between 1900 and 1960, the voting population of Tennessee grew from 487,380 to 2,092,891.<sup>7</sup> Accompanying this growth was a massive migration from the rural areas of the state to the cities of Memphis, Nashville, Knoxville, and Chattanooga. And while the Tennessee Constitution provided for legislative reapportionment on the basis of each decennial census, there was no way for the people of Tennessee to compel the legislature to reapportion. The state courts were unresponsive to the cause,<sup>8</sup> and Tennessee lacked any procedure of popular referendum or initiative. Because rural Tennessee legislators, like those in Georgia, Alabama, Florida, California and many other states, had everything to lose by reapportioning their legislative districts according to the population shift, they stood firm, decade after decade defying the mandate of their state constitution. And “when the movement toward [the cities] began, then swelled to floods at the end of World War II, the political power stayed behind on the cotton flats, the hills and the ridgeland farms.”<sup>9</sup> The only remedy for this profoundly lopsided version of democracy lay in the hands of the very legislators whose political lives depended upon its continued existence. In short, the majority of voters in Tennessee were “caught up in a legislative strait jacket.”<sup>10</sup>

Yet it was not until 1962, when the Supreme Court announced in *Baker* that challenging the constitutionality of a legislative apportionment “presents no nonjusticiable ‘political question,’”<sup>11</sup> that a cure for the disproportionate concentration of power in the hands of rural legislators was finally found. Why were the obstacles to judicial correction of legislative misapportionment so difficult to overcome?

## I. Before *Baker*

Tennessee was not alone in the first half of the twentieth century in its unwillingness to reapportion.<sup>12</sup> “[R]ural control of mid-century state legislatures was a political fact of life,”<sup>13</sup> as were disparities in voter strength in national congressional districts. The reason, in large part, was that pre-*Baker*, the leading Supreme Court case on the subject declared the federal judiciary powerless to intervene in reapportionment controversies.<sup>14</sup>

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<sup>6</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 200 (2000).

<sup>7</sup> *Baker*, 369 U.S. at 192.

<sup>8</sup> See *Kidd v. McCannless*, 292 S.W.2d 40 (Tenn. 1956).

<sup>9</sup> Gene Graham, *One Man, One Vote: Baker v. Carr and the American Levellers* 15 (1972).

<sup>10</sup> *Baker*, 369 U.S. at 259 (Clark, J., concurring).

<sup>11</sup> *Baker*, 369 U.S. at 209.

<sup>12</sup> For a list of Congressionally maldistricted states as of 1958 population figures, see Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 *Harv. L. Rev.* 1057, 1062 n.26 (1958).

<sup>13</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 200 (2000).

<sup>14</sup> *Colegrove v. Green*, 328 U.S. 549 (1946).

A. *Colegrove v. Green and Frankfurter's "political thicket"*

The dispute in *Colegrove v. Green*<sup>15</sup> arose over Illinois' failure to equitably apportion the state's Congressional districts. After establishing election districts in 1901, the Illinois Legislature refused to reapportion according to the huge urban population growth, as documented in the censuses of 1910, 1920, 1930 and 1940; this failure to reapportion led in turn to election districts ranging in population from 112,000 to more than 900,000.<sup>16</sup> As alleged in the complaint, "in one district, a voter ha[d] the voting strength of eight voters in another district."<sup>17</sup>

At the time *Colegrove* was decided, the injustice of the situation in Illinois was well recognized. The district court, dismissing the complaint in a per curiam decision, called it "disgraceful,"<sup>18</sup> finding that Supreme Court precedent "has resulted in our reaching a conclusion contrary to that which we would have reached but for that decision."<sup>19</sup> The court continued: "We are an inferior court. We are bound by the decision of the Supreme Court, even though we do not agree with the decision or the reasons which support it."<sup>20</sup> Justice Black, writing for three of the seven Justices who participated in the decision, dissented from the Supreme Court's subsequent rejection of the challenge on the grounds that the Illinois Apportionment Act of 1901 violated the Equal Protection Clause, the Privilege and Immunities Clause, and Article I of the Constitution.<sup>21</sup> Even Justice Rutledge, who in a special concurrence cast the deciding vote in favor of dismissing the complaint, agreed that "the case made by the complaint is strong."<sup>22</sup>

The opinion of Justice Frankfurter, however, which he wrote on behalf of three Justices (including himself), took a different view; and it is that view which became controlling for the next sixteen years. In spite of the seeming unfairness of rural legislators' refusal to reapportion in Illinois and, by extension, across the country, Frankfurter believed that the Court had no role to play in solving the problem. First, he believed that for the Court to intervene would be to enter a sphere of power reserved to the legislative branch, that to do so would "cut very deep into the very being of Congress."<sup>23</sup> Second, he had concerns about the institutional competence of the Court in redressing apportionment wrongs, the resolution of which "this Court has traditionally held aloof."<sup>24</sup> Third, Frankfurter thought the Court poorly positioned to fashion a remedy. "At best we could only declare the existing elector system invalid," he wrote. "The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first."<sup>25</sup>

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<sup>15</sup> 328 U.S. 549 (1946).

<sup>16</sup> *Colegrove*, 328 U.S. at 569 (Black, J., dissenting).

<sup>17</sup> *Colegrove v. Green*, 64 F.Supp. 632, 633 (N.D. Ill. 1946) (per curiam).

<sup>18</sup> *Colegrove*, 64 F.Supp. at 633.

<sup>19</sup> The court was here relying on *Wood v. Broom*, 287 U.S. 1 (1932).

<sup>20</sup> *Colegrove*, 64 F.Supp. at 634.

<sup>21</sup> *Colegrove*, 328 U.S. at 569, 570 (Black, J., dissenting).

<sup>22</sup> *Colegrove*, 328 U.S. at 565 (Rutledge, J., concurring).

<sup>23</sup> *Colegrove*, 328 U.S. at 556 (Opinion of Frankfurter, J.)

<sup>24</sup> *Colegrove*, 328 U.S. at 553 (Opinion of Frankfurter, J.)

<sup>25</sup> *Colegrove*, 328 U.S. at 553 (Opinion of Frankfurter, J.)

This view was echoed by Justice Rutledge, who voted to dismiss the complaint “for want of equity,” because “the cure sought may be worse than disease.”<sup>26</sup>

Finally, and at the heart of Frankfurter’s opinion, was the firm belief that the judiciary simply did not belong in the “peculiarly political” battles over reapportionment: “[D]ue regard for the effective working of our Government [has] revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.”<sup>27</sup> This application of the so-called “political question” doctrine reflected Frankfurter’s concerns, and those of Justices Reed and Burton, who joined the opinion, about the prudential limitations on the Court’s jurisdiction. In what is perhaps the most oft-quoted passage from the decision, Frankfurter declared: “Courts ought not to enter this political thicket.”<sup>28</sup>

And so they didn’t. Legislative reapportionment was left to the ordinary political process, which was effectively to doom it to failure. As Anthony Lewis recognized in 1958:

If [Frankfurter’s argument] is not a cynical resolution of the problem—and it surely is not so intended—its premise must be that there is a reasonable chance of action in the legislative branches. But the historical evidence indicates that there is no basis whatsoever for this premise.

Legislative fairness in districting is inhibited by factors built into our political structure. Once a group has the dominant position—as the rural legislators generally have—its overriding interest is to maintain that position. The motives of most individual legislators are just as selfish. Any substantial change in districts means that the members must face new constituents and deal with uncertainties—in short, undergo risks that few politicians would voluntarily put upon themselves. Voting for a fair apportionment bill would in many cases mean voting oneself out of office. That is too much to ask of most politicians. The result is that the state legislatures do not reapportion fairly, or, more commonly, do not reapportion at all.<sup>29</sup>

Not surprisingly, following the Supreme Court’s decision in *Colegrove*, legislative malapportionment remained “a political fact of life.”<sup>30</sup> With little incentive to reapportion, and no threat from the judiciary, rural state legislators were free to continue disregarding state constitutional requirements, thereby denying city-dwellers adequate representation in state legislatures and Congress. The result for the country’s rapidly growing cities was devastating. John F. Kennedy described the problem in a *New York Times Magazine* article he wrote while still a Senator. Calling unrepresentative state legislatures “the shame of the states,” Kennedy wrote:

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<sup>26</sup> *Colegrove*, 328 U.S. at 565, 566 (Rutledge, J., concurring).

<sup>27</sup> *Colegrove*, 328 U.S. at 552 (Opinion of Frankfurter, J.)

<sup>28</sup> *Colegrove*, 328 U.S. at 556 (Opinion of Frankfurter, J.)

<sup>29</sup> Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 *Harv. L. Rev.* 1057, 1091--92 (1958) (footnote omitted).

<sup>30</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 200 (2000).

[T]he urban majority is, politically, a minority and the rural minority dominates the polls. Of all the discriminations against urban areas, the most fundamental and the most blatant is political: the apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled. The failure of our governments to respond to the problems of the cities reflects this basic political discrimination.<sup>31</sup>

Yet as the Supreme Court confirmed in several cases after *Colegrove*,<sup>32</sup> the courts were powerless, or just unwilling, to intervene.

*B. A Crack in the Plaster: Gomillion v. Lightfoot*

The 1960 case of *Gomillion v. Lightfoot*,<sup>33</sup> however, cast a pall over the logic of *Colegrove*—in spite of Frankfurter’s having written the *Gomillion* opinion for a unanimous Court.

The challenge in *Gomillion* arose over Local Act No. 140 of the Alabama State Legislature, which, passed in 1957, redefined the boundaries of the City of Tuskegee in such a way as to exclude 99 percent of Tuskegee’s black voters from the municipality:

Prior to the passage of Act No. 140, the boundaries of the municipality . . . formed a square, and, according to the complaint . . . contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained 1,310 white persons, of whom approximately 600 were qualified voters in the municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a ‘sea dragon.’ The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters.<sup>34</sup>

The *Gomillion* plaintiffs, black citizens of Alabama who were residents of Tuskegee at the time of the redistricting, claimed that the Act redrawing the shape of their municipality so as to exclude them from it, discriminated against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and denied them the right to vote in violation of the Fifteenth Amendment.<sup>35</sup> While the district and circuit courts sustained the defendants’ motion to dismiss, the Supreme Court unanimously reversed, holding that “if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and

<sup>31</sup> John F. Kennedy, *The Shame of the States*, N.Y. Times Mag., May 18, 1958, at 12, 37.

<sup>32</sup> See, e.g., *Kidd v. McCannless*, 352 U.S. 920 (1956); *South v. Peters*, 338 U.S. 276 (1950); *MacDougall v. Green*, 335 U.S. 281 (1948).

<sup>33</sup> 364 U.S. 339 (1960).

<sup>34</sup> *Gomillion v. Lightfoot*, 167 F.Supp. 405, 407 (M.D. Ala. 1958).

<sup>35</sup> *Gomillion*, 364 U.S. at 340.

only colored citizens, of their theretofore enjoyed voting rights,”<sup>36</sup> in violation of the Fifteenth Amendment.

Frankfurter, as the author of the principal opinion in *Colegrove*, took pains to distinguish that case, arguing that because the Alabama Legislature was singling out a racial minority for special discriminatory treatment, in violation of the Fifteenth Amendment, the case was “wholly different” from *Colegrove*<sup>37</sup>: “Apart from all else,” he wrote, “these considerations lift this controversy out of the so-called ‘political’ arena and into the conventional sphere of constitutional litigation.”<sup>38</sup>

But as one commentator noted, “the Tuskegee case had put [Frankfurter] in a most distressing philosophical quandary. As a case involving districting by a state legislature in a voting situation, it ran across the grain of . . . labeling . . . such cases as political and beyond judicial remedy. But to deny remedy in this instance was to permit blatant racial discrimination of the sort that Frankfurter had never been willing to tolerate.”<sup>39</sup>

While the Fifteenth Amendment claim made in *Gomillion*, that the Alabama Legislature had denied plaintiffs the right to vote on the basis of race, did effectively distinguish the case from the situation in *Colegrove*, which involved the dilution of the urban vote, Frankfurter’s argument that the “peculiarly political nature” of districting removed it from the province of the courts was at least called into question. Frankfurter himself was compelled to note in *Gomillion* that to exalt the states’ political power “to establish, destroy, or reorganize . . . its political subdivisions . . . into an absolute is to misconceive the reach and rule of this Court’s decisions.”<sup>40</sup> He remarked further that “[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”<sup>41</sup>

After *Gomillion*, the logic of *Colegrove*, that the remedy for unfair legislative districting lay exclusively in the hands of the legislature, seemed considerably less compelling; and less than two years later it came undone.

## II. The Politics of Constitutional Litigation

Constitutional law’s traditional focus on the courts as the only relevant actors misses the dynamics of constitutional litigation. Particularly in the domain of the apportionment of political power, constitutional litigation is inevitably infused with a large dose of political struggle. The path to *Baker v. Carr* not only was no exception; it was almost the embodiment of this principle.

With continued urban population growth following World War II, malapportionment in state legislatures only worsened.<sup>42</sup> As a result, political pressures

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<sup>36</sup> *Gomillion*, 364 U.S. at 347.

<sup>37</sup> *Gomillion*, 364 U.S. at 346.

<sup>38</sup> *Gomillion*, 364 U.S. at 347.

<sup>39</sup> Gene Graham, *One Man, One Vote: Baker v. Carr and the American Levellers* 223 (1972).

<sup>40</sup> *Gomillion*, 364 U.S. at 342.

<sup>41</sup> *Gomillion*, 364 U.S. at 346–47.

<sup>42</sup> Paul T. David and Ralph Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-Term Trends in State Legislative Representation*. Bureau of Public Administration, University of Virginia. 1961, pages 7-16.

to change the districting process in the states intensified. The National Municipal League, the National Association of Governors, the National Association of Mayors, the League of Women Voters, the American Federation of Labor and other organizations interested in stronger urban legislative representation sought to change state legislative apportionment through the ballot, legislation, and legal action.<sup>43</sup> Occasionally these efforts yielded significant state court cases, but the state courts, citing Frankfurter's opinion in *Colegrove*, chose to stay out of the legislative process.<sup>44</sup> But even had state courts been willing to hear these challenges on the merits, judicially mandated reapportionment would not necessarily have resulted. There were other obstacles to equal population representation.

Three political obstacles proved nearly insurmountable during the 1950s. First, most states required constitutional revision. In 1962, thirty-five state constitutions contained provisions that inevitably produced unequal district populations.<sup>45</sup> The most common such requirement was a guarantee that every county or, in the New England states, town, receive at least one seat in the legislature. The Connecticut constitution, written in 1818, guaranteed all towns at least one state representative and no town more than two. Nothing short of a constitutional convention could have changed this arrangement. Holding a constitutional convention, however, may not have produced population-based districting. In 1902, Connecticut called a constitutional convention to address, among other matters, the basis of representation, but the compromise produced by that body was not acceptable to the electorate.<sup>46</sup> In other states, more recent conventions actually created the unequal representation, such as New York in 1894 and Ohio in 1903.<sup>47</sup>

Second, in many states, the electorate supported malapportionment. Between the *Colegrove* and *Baker* decisions, at least ten states voted on measures that sought to change the apportionment of legislative seats or to force the legislature to abide by existing requirements.<sup>48</sup> In some of these states, such as California and Florida, reapportionment was brought before the electorate several times between 1946 and 1962. In all but Washington state, initiatives to make representation based on population in both chambers failed. Initiatives in Arkansas and Michigan put new, permanent boundaries in place in the 1950s. Indeed, it was the initiative process that produced the most inequitable representation. For example, the California electorate approved of a "federal plan" in 1926 that replaced population based representation in the Senate with an apportionment that gave each county at most one seat in the Senate.<sup>49</sup>

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<sup>43</sup> Ward E. Y. Elliott, *The Rise of Guardian Democracy*. Harvard University Press: Cambridge, MA, 1974, pages 13-16.

<sup>44</sup> See Justice Harlan's dissent in *Reynolds*, page 71.

<sup>45</sup> Gordon Baker, *State Constitutions: Reapportionment*. National Municipal League, New York, 1960, pages 1-26 and pages 63-70. Robert McKay, *Reapportionment: The Law and Politics of Equal Representation*. The Twentieth Century Fund: New York, 1965, page 459-471.

<sup>46</sup> *Ibid*, pages 294-297.

<sup>47</sup> *Ibid*, pages 397-401 and pages 380-390.

<sup>48</sup> These are Arkansas, California, Colorado, Florida, Illinois, Michigan, Missouri, Oregon, Texas, Washington. Compiled by the authors.

<sup>49</sup> Stephen Ansolabehere, James M. Snyder, Jr., and Jonathan Woon, "Why the People of California Voted to Disfranchise Themselves." Paper presented at the Annual Meeting of the American Political Science Association, Atlanta, GA, September, 1999.

Third, state legislatures often failed to reapportion in line with population, even when it was their constitutional duty. In 1956, the voters of Washington State approved through the initiative a new state legislative district map that would have created equal population representation. The state legislature promptly amended the initiative to keep the boundaries substantially the same as before the initiative.<sup>50</sup> Twelve state legislatures in 1962 had significant malapportionment solely because they had failed or refused to comply with constitutional requirements of equal district populations at each decennial census.<sup>51</sup>

Such was the case in Tennessee. The 1890 Tennessee constitution required representation on the basis of population in both the Senate and the House, but by 1962 neither chamber had been reapportioned since 1901.

#### A. *Kidd v. McCanless*

The Tennessee legislature's refusal to reapportion in 50 years was symptomatic of broader sociological factors that affected all states and specific political factors at work in the state. As in many other states, the rapid growth of Tennessee's urban population at the end of the 19<sup>th</sup> Century prompted those in power to keep their positions by not reapportioning.<sup>52</sup>

Paradoxically, state politics in Tennessee were dominated not just by a rural faction, but also by a powerful urban machine that was led by a single individual. From 1932 to 1954, Edward Hull Crump controlled the sizable Memphis vote through political control of city and county jobs and by managing the African-American vote. He was then able to leverage that vote into the controlling share within the statewide Democratic primaries.<sup>53</sup> Within the legislature, Crump forged an alliance with eastern Tennessee Republicans and rural Democrats to block his rivals within the legislature from the other cities, Chattanooga, Knoxville, and, especially, Nashville. East Tennessee Republicans gained safe U.S. House seats in exchange for their support of this arrangement, and rural Democrats were given disproportionate power within the state legislature. Even though it was underrepresented, Memphis in this way was able to broker power within the legislature.

Legal challenges to malapportionment occurred as political reformers began to mobilize in the aftermath of the Memphis machine suffering twin setbacks in statewide elections. In 1948, Estes Kefauver defeated U.S. Senator Tom Stewart; then, four years later, Albert Gore, Sr., defeated U. S. Senator K.D. McKellar. Although Kefauver and Gore by no means controlled the state's politics, they served as prominent critics of the

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<sup>50</sup> McKay, *op cit.*, page 444.

<sup>51</sup> Alabama, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Oklahoma, Tennessee, Washington, Wisconsin, and Wyoming were noted by Robert McKay, *op cit.*, pages 460-475, for their failures to reapportion in line with state constitutional requirements. Minnesota had slight reapportionment in 1959 under court order, but not enough to create districts with equal populations.

<sup>52</sup> The phenomenon occurred in many other democracies as well, most notably England. See Charles Seymour, *Electoral Reform in England and Wales: The Development of the Parliamentary Franchise, 1832-1885*. New Haven, CT: Yale University Press, 1915. On California, see Stephen Ansolabehere, Jonathan Woon, and James M. Snyder, Jr., "Why did a majority of Californians disfranchise themselves?" Paper presented at the Annual Meeting of the American Political Science Association, Atlanta, GA, August, 1999.

<sup>53</sup> V. O. Key, *Southern Politics*, New York: Vintage, 1949, chapter 4.



state's Democratic establishment. While the Crump organization still brokered power within the state, it now had prominent rivals who held a different vision of civil and political rights. More than that, Kefauver and Gore were the inspiration for a new generation of reformers. That generational change accelerated, along with the disintegration of the political alignments within the state, when in October, 1954, Boss Crump died.

Reapportionment politics took a decided turn that year as well. In the fall of 1954, Haynes and Mayne Miller, brothers and partners in their own law firm in Johnson, Tennessee, decided to raise a legal challenge to the state's legislative apportionment. Mayne Miller had recently returned home from Nashville, where he had been employed as a lobbyist at the state legislature. Mayne had his sights set on a run for the U.S. House, but as a Democrat in East Tennessee, he found the path effectively blocked by Republican dominance of East Tennessee House elections.<sup>54</sup> At his brother's suggestion, Haynes Miller had set upon the reapportionment of the state legislature as a new "project" for their law practice, and, with Ella V. Ross, the dean of Women at East Tennessee State University, they formed an organization to bring suit against the state.<sup>55</sup>

Mayne Miller brought on board Tom Osborn, a personal friend and trial lawyer in Nashville. Osborn's participation in the case brought strong ties to the city of Nashville, as well as a talented lawyer. Miller and Osborn had met in law school in the summer of 1948 when they became fast friends. Osborn was a gifted orator and a rising star among trial lawyers in Nashville.<sup>56</sup> After two years as assistant U.S. Attorney, Osborn joined the firm of Armisted, Waller, Davis, and Lansden, which was closely tied to Senator McKellar and where Osborn developed a professional tie to the state's political establishment. His next position, though, would transform him. In 1953, Osborn left Armisted, Waller, Davis, and Lansden to become an attorney for the city of Nashville and its new mayor Ben West.

Tommy Osborn brought to his partnership with the Miller brothers and Ross a hard-nosed understanding of the effects of malapportionment, an understanding that shaped not only the present challenge, but the subsequent effort in *Baker v. Carr*. Speaking to Gene Graham, who wrote the definitive history of the Baker case, Osborn recounted:

Now, I knew of the existence of the problem prior to that [his service as city attorney], but I did not personally have any genuine interest until I had been exposed firsthand to the way in which the legislature divided the tax money. I realized there was inequitable apportionment but it meant nothing. As a matter of fact, prior to going to City Hall, if anything I approved it. I was more or less *status quo*. And it was not until I went over to City Hall and actually saw the abuse to which city dwellers were being subjected, moneywise, that I changed my feelings about it.<sup>57</sup>

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<sup>54</sup> Gene Graham, *One Man, One Vote: Baker v. Carr and the American Levellers*. Boston, MA: Atlantic, Little Brown, 1972, page 42.

<sup>55</sup> *Ibid*, page 44.

<sup>56</sup> Personal interview with Harris Gilbert, April 29, 2002.

<sup>57</sup> Quoted in Graham, *op cit.*, pages 48-49.

With Osborn's ties to Nashville, the group now spanned Eastern and Central Tennessee. The organization fell short of a truly statewide effort, however. Memphis was notably absent. Ella Ross and the Millers cultivated support from one of the state's most prominent political leaders, Memphis Congressman and mayor, Walter Chandler. They invited Chandler to bring the suit forward in February of 1955. Chandler courteously declined the honor.<sup>58</sup>

Shortly before the Millers began their crusade, another member of the new generation in Tennessee politics began his career and was to join the push for reapportionment, but this time in the legislature. Maclin Paschall Davis, Jr., a young attorney from a prominent legal family in Nashville ran for one of six seats for state representatives from Davidson County. Winning the Democratic primary at that time was tantamount to winning the election, and out of forty-six candidates on the Democratic party ballot in August, 1954, Maclin Davis came in sixth. 

As a freshman legislator in January, 1955, Davis received advice from many colleagues, especially the leaders of his party, that he "should be careful not to rock any boats" and above all "should be loyal to the Democratic party."<sup>59</sup> But the freshman from Nashville was driven by more than the instinct to "go along." Davidson County deserved nine seats in the Tennessee House of Representatives, not six, and the county deserved three seats in the state Senate, not two:

In spite of all of that advice, I knew it was my duty to represent the people of Davidson County and to do what I could to obtain for them the equal representation in the Legislature that they were guaranteed by the Constitution. Therefore, I devised a plan that I thought would result in increasing the representation of the under-represented counties and eventually result in the equal representation in the Legislature guaranteed by the Constitution. My plan was to introduce a bill to reapportion the House of Representatives by increasing the representation in the most under-represented counties by approximately one-third of the increase that would have given them equal representation and to apportion the House seats among the 99 new House districts in such a way that, if the Representatives from districts that would gain representation and the Representatives that would not be affected, would all vote for my reapportionment bill, the bill would receive affirmative votes of approximately 60% of the members of the House and Senate.<sup>60</sup>

Davis's confidence in the political self-interest of the affected areas proved misplaced. Not only did the proposed reapportionment fail, but the entire Shelby County delegation, the county that stood to gain the most, fell in line with the entrenched party bosses. By March of 1955, the legislative process for reapportioning the state legislature once again ended without bringing the districts in line with the state's constitution.

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<sup>58</sup> Graham, *op cit.*, pages 51-53.

<sup>59</sup> Personal communication of Maclin Davis, October 20, 2001, page 3.

<sup>60</sup> Personal communication of Maclin Davis, October 20, 2001, page 4.

Although his bill had died in the legislature, Davis found that his efforts had new life in the courts. Tom Osborn, Maclin Davis' friend from their years together at Armistead, Waller, Davis and Lansden, invited Davis to join the legal challenge to the state's reapportionment. The death of Davis' bill proved a very important legal point – the state legislature refused to abide by the state constitution. Given this fact, it was important to act against the current legislature, but by March 1955, time was running out on the legislative session.

Unable to entice Walter Chandler to join the suit, the Millers chose Gates Kidd, an automobile dealer from Washington County and chair of their organization's Finance Committee, to lead the list of plaintiffs.<sup>61</sup> They struck out widely against the state establishment. They sued the state Attorney General George F. McCanless, the secretary of state, three members of the state elections board, thirty-seven members of the Republican state Primary Election Commission, thirty-six members of the Democratic state Primary Election Commission, and county election commissioners in Washington, Carter, and Davidson counties. On March 10, 1955, the Millers filed *Kidd v. McCanless* in Davidson County Chancery Court.<sup>62</sup>

The case seemed star-crossed from the beginning. First, one of the defendants from the list of Republican primary committee members, Hobart Atkins, persuaded his party to sue Governor Frank G. Clement and the state legislature in a cross-action.<sup>63</sup> This added a clear partisan dimension to the suit, as well as putting the state legislature on both sides of the case. Atkins, though, would prove an invaluable part of the legal team that championed the cause of equal population representation in *Kidd* and later *Baker*. Second, the plaintiffs had chosen Davidson County Chancery court as a venue on the belief that veteran Chancellor Thomas A. Shriver, Sr., might be a receptive judge. But, three months before the case was to be heard, Shriver was elevated to the Tennessee Court of Appeals. Governor Frank Clement chose his replacement, 33-year old Thomas Wardlaw Steele. This looked like a particular bad turn of events. Not only had Governor Clement selected Steele after the case was filed, but Steele had served as a loyal member of the Tennessee House of Representatives in 1949 and 1950, representing a district that encompassed two agricultural counties, Tipton and Lauderdale.<sup>64</sup>

Surprisingly, however, Chancellor Steele ruled in favor of the plaintiffs. In a tightly reasoned, 53 page opinion, Steele disagreed with the Attorney General's contention that the court could not declare a legislative apportionment act void because it was unconstitutional. He dismissed the applicability of Frankfurter's opinion in *Colegrove* as just one opinion in a divided court, rather than a majority ruling. He challenged the justice of the existing apportionment. And he declared that any future elections held under the existing apportionment would be "without any legal authority whatever."<sup>65</sup> The victory, though, was short-lived. Upon appeal, the Tennessee Supreme Court reversed the chancellor's ruling, holding that the Court did not have

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<sup>61</sup> Graham, op cit., pages 53-54.

<sup>62</sup> Graham, op cit., page 57; personal communication with Maclin Davis October 20, 2001.

<sup>63</sup> Graham, op cit., pages 57-58; personal communication with Maclin Davis, October 20, 2001, page 5.

<sup>64</sup> Graham, op cit., page 60.

<sup>65</sup> Graham, op cit., pages 73-75; personal communication with Maclin Davis, October 20, 2001, page 6.

jurisdiction over legislative apportionment, and the U.S. Supreme Court denied the petition for a writ of certiorari.<sup>66</sup>

In the months that followed, the plaintiffs, their lawyers, and other supporters of the legal action considered filing a federal lawsuit, but in the end decided that their chances of success were poor. As strong states' rights advocates, Mayne Miller and Maclin Davis further objected to an end run around the state Supreme Court on principle. Indeed, only Tom Osborn and Hobart Atkins stuck with *Kidd v. McCanless* through its appeal to the U.S. Supreme Court. Despite their defeat in the appeals process, Steele's decision and the expertise that the Millers assembled provided the foundation for a nearly identical, but ultimately successful legal challenge two years later: *Baker v. Carr*.

### B. *Baker v. Carr*

Given the political history of Tennessee, it is significant that *Baker* originated not in Nashville or East Tennessee, but in Memphis. Two things had changed since 1954. First, following Crump's death, the political organization and alliances that he had constructed unraveled completely, and without them Shelby County's political influence within the state declined. Memphis now found itself in the same political position as its rival Nashville and that meant that Memphis also found that it now received nowhere near its fair share of state funds.

Second, Frankfurter's opinion in *Colegrove* had begun to lose its air of invincibility and had suffered its first setback, this time in federal court. Dan Magraw and Frank Farrell, residents of the sprawling 42<sup>nd</sup> House District in St. Paul, Minnesota, brought suit against Minnesota to reapportion the state legislature. Plaintiffs in *Magraw v. Donovan* attacked the political question doctrine directly with a mix of legal arguments based on the 14<sup>th</sup> Amendment and an analysis of the demographics of the state legislature developed by two political scientists. On July 10, 1958, a federal panel ruled that the courts did have jurisdiction over the apportionment of the Minnesota state legislature "because of the federal constitutional issue asserted."<sup>67</sup>

David Harsh, chairman of the Shelby County Commission, had followed the Minnesota case closely. He saw in it the prospect of relief for Memphis. Since *Brown v. Board of Education* the Court had embraced a broader interpretation of the 14<sup>th</sup> Amendment than that expressed in *Colegrove*, and the Minnesota litigation invited a revisiting of the constitutional challenge. Though *Kidd v. McCanless* was just two years past, the time seemed ripe to challenge the state's apportionment again.

The most significant change, however, was not so much legal as political. The telling indicator of the change in the state's politics was the change of heart of one of its leading citizens: Congressman and mayor Walter Chandler. When Harsh initiated legal action late in 1958, he retained Chandler to represent the County in its challenge to the state legislative apportionment, and in May, 1959, it was Walter Chandler who filed *Baker v. Carr*.

While the facts of *Baker* were not appreciably different from *Kidd*, the legal strategy was. From the beginning, the goal was to win a federal appeal. Given the


<sup>66</sup> *Kidd v. McCanless*, 292 S.W.2d 40 (Tenn 1956), cert. denied 352 US 920 (1956).

<sup>67</sup> *Magraw v. Donovan* 163 F. Supp. 184, 177 F. Supp. 803.

*Magraw* and *Kidd* decisions, Walter Chandler realized that any state decision would produce a conflict with existing legal rulings, which would virtually require a ruling by the federal courts, perhaps even the U.S. Supreme Court.<sup>68</sup> Chandler decided to construct the *Baker* case around the same group that brought *Kidd*. He invited the Millers, Maclin Davis, Tom Osborn, and Hobart Atkins to join the case. Osborn and Atkins jumped at the opportunity. With Chandler, Osborn and Atkins set out to build the constitutional case around the framework that Thomas Steele had laid out in his opinion.

They had to establish, first, that the state legislature refused to craft districts in compliance with the state constitution. Chandler persuaded the Shelby delegation in the state legislature to introduce an apportionment bill strikingly similar to that of Maclin Davis in 1955 and again in 1957. That bill and another apportionment bill were defeated in the Senate in 1959; the House never bothered to take them up.<sup>69</sup>

Chandler also brought in legal expertise for making the appeal. He retained noted lawyer Charles Rhyne to aid in the construction of the case and to take over the case once it reached the federal level. The choice of Rhyne had a political dimension. Rhyne was a close friend of Lee Rankin, Eisenhower's Solicitor General. Rhyne's ties to the administration, it was hoped, would improve the chances that the U.S. Attorney General would side with the plaintiffs.

The legal team took a page from the Minnesota case, too. *Magraw* and Farrell enlisted two political science professors from North Dakota State University to provide statistical and historical data regarding the discrepancies in district populations. Osborn enlisted the City of Nashville. Mayor Ben West had assigned the City Auditor and a young attorney, Harrison Gilbert, to compile a report on the discrepancies in district populations in the state.<sup>70</sup> The audit went much further and documented the corresponding discrepancies in the distribution of state money to county and local governments, especially for schools and highways. Harris Gilbert also assembled an analysis by the state historian showing a pattern of discrimination and speeches by James Cummings showing the intention to discriminate against urban areas.<sup>71</sup> Finally, West provided one other resource lacking in *Kidd*: money. At  request, the City Council authorized \$25,000 for the legal defense, enough to defray most of the costs of the challenge. With this commitment, Chattanooga and Knoxville joined the case as well.

The case proceeded quickly. In December, 1959, the U.S. District Court unsurprisingly held for the defendants in *Baker v. Carr*. An appeal to the U.S. Supreme Court was now set. Although the legal strategy in setting up the case fell into place in 1959, the case faced three political setbacks that served to undermine much of what the plaintiffs sought.

First, the state legislature of Minnesota agreed to draw new district boundaries that would accommodate in part the ruling in *Magraw v. Donovan*. That the legislature was willing to reapportion appeared to underscore Frankfurter's contention that these

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<sup>68</sup> Personal Interview Harris Gilbert, April 29, 2002.

<sup>69</sup> Graham, op cit., page 136.

<sup>70</sup> Personal interview with Harris Gilbert April 29 2002.

<sup>71</sup> Personal interview with Harris Gilbert April 29, 2002.

matters could be addressed in the legislatures.<sup>72</sup> Second, the morass of school integration cases following on *Brown v. Board of Education* also buttressed Frankfurter's view that the courts were ill equipped to deal with social problems. School integration throughout the country required extensive intervention and management by the courts. It was not a political thicket, but a thicket nonetheless. Chandler's team realized that for their case to be successful they would have to show that equal representation of population could be interpreted and enforced easily, and with a minimum of court oversight.<sup>73</sup> Third, Richard Nixon lost the presidential election in 1960, thus rendering Rhyne's ties to the Solicitor General of no value. Further it was unclear how the new Kennedy administration would view the case, but the prospects looked dim, considering that Baker was widely viewed as a matter of states' rights and was, thus, opposed in principle by many within the Democratic party.

Nonetheless, the Kennedy administration proved to be one of the case's strongest allies. Coming out of the 1960 campaign, the reform wing of the Tennessee Democratic party had two important voices in the office of Attorney General Robert F. Kennedy – John J. Hooker, Jr., and John Seigenthaler. Seigenthaler had met Robert Kennedy in 1957. Seigenthaler had been investigating a series of violent crimes against Teamsters for his paper, and he brought these to the attention of the chief counsel for the subcommittee headed by Senator John McClellan, Robert Kennedy. Slowly the two established a close and enduring friendship and in 1961, John Seigenthaler left the Nashville Tennessean to become Robert Kennedy's scheduler and press officer.<sup>74</sup>

On February 3, 1961, Tom Osborn, Harris Gilbert, and John J. Hooker came to the Justice Department to make their case to the administration and with the hope that the administration would join their suit. Seigenthaler arranged a meeting with Robert Kennedy and further arranged for the Tennessee lawyers to see the new Solicitor General, Archibald Cox, whom he had befriended during the 1960 presidential campaign. Although the meeting with the Attorney General did not occur, the meeting with Cox proved critical. As Harris Gilbert later recalled: "Cox really amazed us. He denied that he had any prior knowledge of our case, but he started immediately with questions that cut right to the core of the matter." The meeting went on late into the afternoon as Cox plumbed many of the angles of the case with Osborn and Gilbert. After the meeting the lawyers were unsure if the administration would support them, but they were satisfied that they had been given a full hearing.<sup>75</sup> Soon after that meeting, Cox met with Robert Kennedy about the case. Cox recalled that meeting:

I was in the Attorney General's office and remarked to him that his friend John Jay Hooker had been in and sent his regards. The Attorney General asked what he wanted, and I told him that he wanted us to file a brief in *Baker-Carr*. The Attorney General asked whether I was going to do it, and I said, well, I thought I would unless he saw some strong objections.

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<sup>72</sup> Personal interview with Harris Gilbert April 29, 2002.

<sup>73</sup> Personal interview with Harris Gilbert April 29, 2002.

<sup>74</sup> Personal interview with John Seigenthaler April 30, 2002.

<sup>75</sup> Personal interview with Harris Gilbert, April 29, 2002.

The Attorney General said, 'Well are you going to win?' I said 'No, I don't think so, but it would be a lot of fun anyway.'"<sup>76</sup>

### C. Before the Court

By custom, the U.S. Solicitor General would each year designate a case for his personal attention before the Court. Archibald Cox chose *Baker* and divided the argument time with the state lawyers. Cox's role was to address the constitutional issues directly, while Charles Rhyne and Tommy Osborn were to take on matters concerning state law and the actions of the state legislature. Two issues dominated the argument before the Court.

First, there was no apparent way in which the Court could rule for the Tennessee plaintiffs without repudiating *Colegrove*. Since *Colegrove* was a relatively recent case, and since the author of the opinion, Justice Frankfurter, was still on the Court, this was no small sticking point. The Court as an institution is leery about reversing its own pronouncements and Cox had the experience of the anguish surrounding the ultimate rejection of *Plessy v. Ferguson* in *Brown v. Board of Education*. Cox's approach was to directly confront the continued vitality of *Colegrove* after *Gomillion*. While *Gomillion* had carefully relied only on the Fifteenth Amendment, it had nonetheless pierced the political question doctrine that apparently shielded all political arrangements from judicial review. Using Frankfurter's own words from the majority opinion in *Gomillion*, Cox argued that the Court could not at once sustain the particular application of constitutional protections of the value of the franchise to one group, as in *Gomillion*, while denying an equivalent guarantee of the franchise to the broader group, the population as a whole.

Second, Cox believed, rightly, that *Gomillion* paved the way for overcoming the question of justiciability, but not that of remedy. The composition of the Court had changed substantially since *Colegrove*, but there remained important advocates of the line drawn in *Colegrove*, most notably Justices Frankfurter and Harlan. The question of remedy, indeed, was a sticking point throughout. Because of the experience with school integration, there was great reluctance to embrace a legal ruling and standard that would embroil the courts in the details of the districting process. Nor was the legal team prepared to propose a remedy. The lawyers were themselves split on the matter. Harris Gilbert, representing the City of Nashville, would have personally preferred a "federal plan," like that in California, in which one house represented population and the other area.<sup>77</sup> Even still, the plaintiffs' lawyers and Cox saw that they needed to convince the Justices that some remedy was needed and that the remedy would not embroil the courts in a political battle on par with segregation.

They began by arguing that the cities received less than their fair share of government expenditures because of rural domination of the legislature. The City Auditor's report along with the new 1960 Census figures were provided to each Justice during the argumentation – a highly unusual development, then as now. The Justices leafed through the data as the arguments proceeded, even though it wasn't introduced as evidence. Frankfurter jumped on the implication of the data for the decision. Surely,

<sup>76</sup> Quoted in Graham, op cit, pages 216-217.

<sup>77</sup> Personal interview with Harris Gilbert, April 29, 2002.

he demanded, the plaintiffs were not arguing that the courts must guarantee equality. Cox dodged, artfully. They had reached, he sensed, the boundary of what the Court would accept. Cox interpreted the public finance data as evidence not of the need for an egalitarian remedy but of the reason why the state legislature would not provide relief.<sup>78</sup> In the absence of an initiative process and facing a legislature that had strong incentives not to reapportion and a history of discrimination against urban areas, only the courts could provide relief, whatever form that might take.

Frankfurter and Osborn tangled over the same issue in the final rebuttal and Frankfurter lit into Osborn:

You're telling us that 33 percent of the Tennessee electorate elects 66 2/3 of the legislature and we should agree with your position that some way or another – with a magic wand probably – there will be some remedy worked out. So the court will agree to some alleviation. And the next year 40 per cent will be electing 60 per cent of the legislature. You'll be right back up here complaining about that, won't you?

And Osborn, with a twist of humor and a presage of things to come, replied: “Yessir. For a fee.”<sup>79</sup>

Thus, the principle of “one-man, one-vote” was vital for the success of the case even if it was still unstated. Unlike “integration,” population equality of legislative districts is a simple idea to grasp, both as an abstract principle and as a practical administrative matter. Equality itself was not stressed overly in the argument before the Court. Instead, Cox kept the argument focused on the fact that the plaintiffs lacked any mechanism for relief in their own state because of the reluctance of the state court to enter the issue, because of the absence of an initiative process, and because the legislature had no incentive to act – the very arguments that Justice Clark would take up in his concurrence. But one man, one vote (or, one-person, one-vote, as we now term it) lurked in the background. Had population equality not been an easy concept to define in practical, as well as abstract, terms, the case may not have succeeded.<sup>80</sup>

### III. The Decision

The Supreme Court noted probable jurisdiction in *Baker* in November 1960. There remained so much disagreement after oral argument in April 1961, however, that the Court took the extraordinary step of ordering reargument for the following October. Then, in March 1962, in a 6-2 decision, the Court “startled the nation,”<sup>81</sup> and issued what was perhaps the most profoundly destabilizing opinion in Supreme Court history. The majority opinion, written by Justice Brennan, was accompanied by three concurrences, from Justices Douglas, Clark, and Stewart, and two dissents, one from Justice Frankfurter, the other from Justice Harlan. Justice Clark was, according to Harris Gilbert, the biggest surprise. He had consistently voted with Frankfurter on matters like

<sup>78</sup> Personal interview with Harris Gilbert, April 29, 2002. Graham, *op cit*, pages 250-254.

<sup>79</sup> Graham, *op cit.*, page 254.

<sup>80</sup> Personal interview with Harris Gilbert, January 23, 2002.

<sup>81</sup> Robert G. McCloskey, *The Supreme Court 1961 Term—Foreword: The Reapportionment Case*, 76 *Harv. L. Rev.* 54, 54 (1962).



this, until *Baker*, but the other Justices voted as the legal team had hoped.<sup>82</sup> Brennan's opinion, coolly shattering decades of precedent, offered little guidance to the lower court for how to fashion its remedy, but it firmly established the court's entry into the political thicket, paving the way for the "reapportionment revolution."<sup>83</sup>

Justice Stewart emphasized in his concurrence that the Court in *Baker* held three things "and no more": (1) that the Court possessed jurisdiction over the subject matter; (2) that appellants had standing to challenge the Tennessee apportionment statutes; and (3) that a justiciable cause of action was stated upon which relief could be granted.<sup>84</sup> Let us address each in turn.

#### A. *Jurisdiction of the Subject Matter and Standing*

In the first part of his opinion, Justice Brennan disposed of the possible claims that the Court lacked subject matter jurisdiction and that the plaintiffs lacked standing to sue. First separating the issue of subject matter jurisdiction from that of justiciability, Brennan maintained that, pursuant to Article III, section 2 of the Constitution, "[i]t is clear that the cause of action is one which 'arises under' the Federal Constitution," and that, as such, the district court "should not have dismissed the complaint for want of jurisdiction of the subject matter."<sup>85</sup> Further, he disposed of the defendants' claim that *Colegrove* supported the contrary position, by arguing that a majority of the *Colegrove* Court believed the requirement for subject matter jurisdiction to be satisfied.<sup>86</sup>

As to the issue of standing, the Court held on the basis of precedent, including *Colegrove*, that because plaintiffs "seek relief in order to protect or vindicate an interest of their own, and of those similarly situated," they had standing to sue.<sup>87</sup>

#### B. *Justiciability*

The heart of the majority opinion, and the piece that generated the most controversy, was the section on justiciability, or the "political question" doctrine. Because *Colegrove* and a number of subsequent per curiam cases appeared to foreclose the possibility that the Court could adjudicate constitutional claims surrounding legislative reapportionment, Justice Brennan set out in *Baker* to distinguish that line of cases without explicitly overruling any precedents.<sup>88</sup> While the effect of the majority

<sup>82</sup> Personal interview with Harris Gilbert, April 29, 2002.

<sup>83</sup> For a fuller discussion of the "reapportionment revolution," see Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 141--216 (rev. 2d ed. 2002).

<sup>84</sup> *Baker v. Carr*, 369 U.S. 186, 265 (1962) (Stewart, J., concurring).

<sup>85</sup> *Baker*, 369 U.S. at 199.

<sup>86</sup> *Baker*, 369 U.S. at 202 ("Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter.")

<sup>87</sup> *Baker*, 369 U.S. at 206--08.

<sup>88</sup>

We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' The cited cases do not hold the contrary.

decision was of course to render these decisions obsolete, Brennan's method was to cast them as cases that had not conclusively ruled against judicial review of legislative apportionment.<sup>89</sup>

In so doing, Justice Brennan undertook what amounted to a wholesale redefinition of the political question doctrine,<sup>90</sup> by deriving a set of standards from an examination of the various fields in which the Court had traditionally declined to involve itself: (a) foreign relations; (b) dates of duration of hostilities; (c) validity of enactments; (d) the status of Indian tribes; and (e) Guaranty Clause<sup>91</sup> claims. Having already established that political questions involve separation-of-powers-based disputes rather than federalism-based ones,<sup>92</sup> Brennan announced the political question "test" in the following famous passage:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>93</sup>

By recasting the many and various political question cases as those meeting one or more of these criteria, the majority dispensed with the notion that any single category of cases is necessarily nonjusticiable.<sup>94</sup> In the context of *Baker*, this conclusion had most force

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*Baker*, 369 U.S. at 209.

<sup>89</sup> *Baker*, 369 U.S. at 234 (“[O]ur decisions in favor of justiciability...afford no support for the District Court’s conclusion that the subject matter of this controversy presents a political question. Indeed, the refusal to award relief in *Colegrove* resulted only from the controlling view of want of equity. Nor is anything contrary to be found in those per curiams that came after *Colegrove*.”).

<sup>90</sup> It is important to note that all Brennan purported to do in this section of the opinion was to “consider the contours” of the doctrine, 369 U.S. at 210, as though the standards he ultimately derived had existed all along.

<sup>91</sup> “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion.” U.S. Const. art IV, § 4.

<sup>92</sup> *Baker*, 369 U.S. at 210 (“[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’”); *id.* (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

<sup>93</sup> *Baker*, 369 U.S. at 217.

<sup>94</sup> Note, for example, the qualifying statements made in the discussions of each of the so-called “political question” categories. See *Baker*, 369 U.S. at 211--15, 218--29. Consider three examples: On foreign relations: “Yet is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” 369 U.S. at 211. On the validity of enactments: “But it is not true that courts will never delve into a legislature’s records upon such a quest [to inquire whether the legislature has complied with all requisite formalities] . . . . The political question doctrine, a tool for maintenance of

with respect to the Guaranty Clause issue, particularly because Justice Frankfurter argued in dissent that the Fourteenth Amendment claim made by the plaintiffs, “is, in effect, a Guarantee Clause claim masquerading under a different label.”<sup>95</sup> Historically, the Court had refused to hear cases based on the Guaranty Clause,<sup>96</sup> but under the majority’s theory the reason such claims were nonjusticiable was solely that they “involve those elements which define a ‘political question.’”<sup>97</sup> In other words, “the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.”<sup>98</sup>

From here, the majority’s remaining moves were few, though no less controversial. Applying the political question test to the facts of *Baker*, Brennan concluded that “none” of the characteristics typically associated with political question cases were present,<sup>99</sup> and that the historical nonjusticiability of Guaranty Clause claims had no effect on the actual Fourteenth Amendment claim made by the plaintiffs.<sup>100</sup> Next, the Court invoked *Gomillion* to support the conclusion that “[w]hen challenges to state action respecting matters of ‘the administration of the affairs of the State and the officers through whom they are conducted’ have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim.”<sup>101</sup> Finally, the Court distinguished *Colegrove* and the subsequent per curiam decisions, concluding that “the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.”<sup>102</sup>

#### IV. *After Baker*

Justice Frankfurter argued in dissent that the majority’s opinion in *Baker v. Carr* amounted to “a massive repudiation of the experience of our whole past,”<sup>103</sup> worrying, among other things, that the equal protection clause provided no clear guide for judicial examination of apportionment methods, and that as a result the courts were unable to fashion a reasonable remedy.<sup>104</sup> To some extent this worry was reflected in the majority’s opinion, precisely because the Court provided no guidance to the lower courts as to what a proper remedy might look like, concluding merely that “[j]udicial standards under the Equal Protection Clause are well developed and familiar,”<sup>105</sup> and that as a

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governmental order, will not be so applied as to promote only disorder.” *Id.* at 214--15. On the status of Indian tribes: “Yet, here too, there is no blanket rule.” *Id.* at 215.

<sup>95</sup> *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting).

<sup>96</sup> The primary example offered by both the majority and Frankfurter is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>97</sup> *Baker*, 369 U.S. at 218.

<sup>98</sup> *Baker*, 369 U.S. at 218.

<sup>99</sup> *Baker*, 369 U.S. at 226.

<sup>100</sup> *Baker*, 369 U.S. at 227.

<sup>101</sup> *Baker*, 369 U.S. at 229 (citing *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 183 (1892) (Field, J., dissenting)).

<sup>102</sup> *Baker*, 369 U.S. at 237.

<sup>103</sup> *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

<sup>104</sup> *Baker*, 369 U.S. at 269--70, 323 (Frankfurter, J., dissenting).

<sup>105</sup> *Baker*, 369 U.S. at 226.

result “it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.”<sup>106</sup>

Yet, whoever had the better argument on this point, the immediate reaction to the decision in *Baker* made one thing very clear: In 1962, the time was right for a “massive repudiation” of legislative misapportionment. Within nine months of the Court’s decision, litigation was underway in 34 states challenging the constitutionality of state legislative apportionment schemes.<sup>107</sup> Calling the short term response “nothing short of astonishing,” Robert McCloskey wrote in the *Harvard Law Review* six months after *Baker*:

It has been as if the decision catalyzed a new political synthesis that was already straining, so to speak, to come into being. Not only federal judges, but state judges as well, have taken the inch or so of encouragement offered by the Supreme Court and stretched it out to a mile. . . .

When a decision fails to strike a responsive cord in the public breast, the tendency is at best to abide by its minimum compulsions grudgingly interpreted. The tendency suggested by early reactions to the reapportionment decision seems very different from this, and it may warrant the conjecture that the Court here happened to hit upon what the students of public opinion might call a latent consensus.<sup>108</sup>

Driven by this consensus, the Court in the years following *Baker* greatly expanded the scope of the decision, first articulating the principle of “one person, one vote,” in the context of primary vote counting<sup>109</sup> and federal congressional elections,<sup>110</sup> then setting the actual standard for state legislative reapportionment,<sup>111</sup> which the Court had declined to do in *Baker*.

*Reynolds v. Sims*<sup>112</sup> was the most sweeping of the post-*Baker* decisions, holding, among other things, that “the Equal Protection Clause requires that seats in both houses of a bicameral legislature must be apportioned on a population basis,”<sup>113</sup> by which the

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<sup>106</sup> *Baker*, 369 U.S. at 198.

<sup>107</sup> *Reynolds v. Sims*, 377 U.S. 533, 556 n.30 (1964).

<sup>108</sup> Robert G. McCloskey, *The Supreme Court 1961 Term—Foreword: The Reapportionment Case*, 76 *Harv. L. Rev.* 54, 56--59 (1962) (footnotes omitted).

<sup>109</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (striking down Georgia’s “county-unit” system of counting votes and holding that “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote”; *id.* at 379 (“Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.”)).

<sup>110</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7--8 (1964) (concluding that “construed in its historical context, the command of [Article 1, section 2 of the Constitution], that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s” (footnotes omitted)).

<sup>111</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>112</sup> 377 U.S. 533 (1964).

<sup>113</sup> *Reynolds*, 377 U.S. at 568.

Court meant that a state must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”<sup>114</sup>

What Frankfurter feared the Court was doing in *Baker*, “choos[ing] . . . among competing theories of political philosophy,”<sup>115</sup> it seemed undeniably to do in *Reynolds*. “Logically,” wrote Chief Justice Warren,

in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. . . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. . . .

To the extent that a citizen’s right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen’s vote cannot be made to depend on where he lives.<sup>116</sup>

*Reynolds*, together with *Wesberry v. Sanders*,<sup>117</sup> was an earth-shattering decision, going well beyond what anyone could have anticipated from the Court’s holding in *Baker v. Carr*.<sup>118</sup> *Wesberry* called into question 90 percent of the districts in the House of Representatives, and *Reynolds* did the same for nearly every seat in the upper houses of state legislatures and most of the seats in the lower houses.<sup>119</sup> And while the “reapportionment revolution” continued well beyond the decision in *Reynolds*, it is perhaps that decision more than any other after *Baker* which signaled that the apportionment battle begun in that case had been won by the reformers. It was a less popular decision than *Baker*, but “as states came rapidly into compliance with *Reynolds*, there was neither a public outcry to return to the past nor a desire of the newly elected to return to private life. . . . *Reynolds* went from debatable in 1964 to unquestionable in 1968.”<sup>120</sup>

## V. Coda

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<sup>114</sup> *Reynolds*, 377 U.S. at 577.

<sup>115</sup> *Baker v. Carr*, 369 U.S. 186, 300 (Frankfurter, J., dissenting).

<sup>116</sup> *Reynolds*, 377 U.S. at 565--67 (footnotes omitted).

<sup>117</sup> 376 U.S. 1, 9 (1964). See *supra* note 69.

<sup>118</sup> For an illuminating discussion of *Reynolds* and its impact, see Lucas A. Powe, Jr., *The Warren Court and American Politics* 245--55 (2000).

<sup>119</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 252 (2000).

<sup>120</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* 255 (2000).

Mayne and Haynes Miller left Tennessee not long after the *Kidd* decision. Following the state Supreme Court decision in 1955, Haynes set off on a new project, working for the State Department in Laos. He died in a traffic accident in Paris in 1967 at age 41.<sup>121</sup> Mayne Miller ran for a Congressional seat from East Tennessee in 1958. He won the primary handily, but found himself an outcast within the Democratic party in the state. Unable to raise funds, he lost the November, 1958, general election. He moved to Wyoming not long thereafter.<sup>122</sup>

Tom Osborn returned to Nashville in 1962 a hero. Now widely recognized as one of the leading trial lawyers in the state, he had his pick of cases. He took on the defense of James Hoffa in the investigation of the Teamsters, which had originated with John Seigenthaler's investigative reporting for the *Nashville Tennessean*. As the trial proceeded though, however, Osborn was caught attempting to tamper with the jury. He was indicted in 1963 and sentenced to two years in prison. He was permanently disbarred in mid-January 1970. Ruined, he committed suicide two weeks later.<sup>123</sup>

Hobart Atkins ran for the State Senate following the Kidd decision and found himself embroiled in the politics of redistricting. After losing a bid for the state Senate in 1958, he won the state Senate seat in 1960 and represented Knoxville from 1961 to 1965.<sup>124</sup> After *Baker v. Carr*, he spearheaded the efforts to force the state legislature to comply with the law. In 1965, two weeks before his death, Hobart Atkins and Walter Chandler filed *Baker v. Clement*, the first of a series of cases implementing the one-man, one-vote standard in Tennessee.<sup>125</sup>

Harris Gilbert took on the role that Osborn and Atkins had served in the original Baker case, serving as lead counsel in the series of cases in Tennessee that were needed to force the legislature to implement the one-person, one-vote standard. After these victories, though, he left election law and politics behind and established his own law firm in Nashville, which recently merged with Wyatt, Tarrant, and Combs.<sup>126</sup>

Maclin Davis' struggles within the Democratic party did not end with *Kidd v. McCannless*. Eventually, in 1964, he broke with his party completely and became a Republican. He has since represented the Republican party in its legal struggles to get a fair redistricting plan out of a Democrat dominated legislature.<sup>127</sup>

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<sup>121</sup> Graham, page 308.

<sup>122</sup> Graham, page 306.

<sup>123</sup> Personal interview with John Seigenthaler, April 30, 2002. Graham, op cit, page 322.

<sup>124</sup> Secretary of State, *Tennessee Blue Book*, State of Tennessee, Nashville, TN, 1966, page 22.

<sup>125</sup> Graham, page 326.

<sup>126</sup> Personal interview with Harris Gilbert, April 29, 2002.

<sup>127</sup> Personal interview with Maclin Davis, August 15, 2002.