Volume 65 | Issue 2 Article 4

February 1963

Legislative Reapportionment: Baker v. Carr

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West Virginia Law Review

Published by the College of Law of West Virginia University. Official publication of The West Virginia Bar Association.

STUDENT NOTES

Legislative Reapportionment: Baker v. Carr

After the War for American Independence, the founders of our nation met in Philadelphia in 1787 to revise the Articles of Confederation. The product of that convention was the Constitution of the United States, the organic law upon which our country is founded. Although the Revolutionary War had been fought to gain liberty and justice for all, the new government, as contemplated by the framers, was anything but democratic. Rather the emphasis in our fundamental law was on a republican form of government as it was popularly conceived in that day. However, the Constitution, being the result of compromise, was not completely devoid of democratic principles. At least, in the House of Representatives the people had a direct and generally equal voice. But this was offset by a Senate elected by the states through their respective legislatures, and by an

executive branch chosen by the Electoral College. To be sure the people selected both the state legislators and the members of the Electoral College, but neither group was constitutionally bound by the majority will. Finally, even the Supreme Court of the United States was composed of appointees of the President with the advice and consent of the Senate.

Since the founding of our nation, startling changes have occurred in our organic scheme, for the republic has been steadily transformed into a democracy. In the Jacksonian era, state constitutions were amended to broaden the franchise. In 1865, the fifteenth amendment secured the vote for the Negro and other minority groups. In 1913, the seventeenth amendment provided for the direct election of the Senate. Finally, in 1919 the nineteenth amendment gave the vote to women. But the principle of government by the chosen few still persists, and lawmakers elected by a minority of the people govern many states today. The federal judiciary, heretofore, has been reluctant to follow this trend of departure from republican principles, especially in those areas dealing with what the Supreme Court deemed judicially unenforceable political questions. Recently, however, in *Baker v. Carr,*[1] a case originating in Tennessee, the Supreme Court took up the gauntlet by upholding a federal right to democratic rule grounded in the equal protection clause of the fourteenth amendment, thus, laying to rest the political question doctrine as it applied to the states.

The Tennessee Constitution prescribes in some detail the method of apportioning legislative seats in the state Senate and House of Representatives.[2] Generally, that constitution requires that representation be based proportionally on the number of qualified voters in the state.[3] Suit was instituted in a federal district court against the governor and other state officials to force legislative reapportionment.[4] The complaint alleged in substance that the General Assembly had consistently failed to reapportion since 1901;[5] that direct action by the electorate through constitutional amendment or convention had been effectively blocked by legislative control;[6]

[1] 368 U. S. 186 (1962).
[2] TENN. CONST. art. II, §§ 3-6.
[3] TENN. CONST. art. II §§ 5 & 6.
[4] Baker v. Carr, 179 F. Supp. 834 (M.D. Tenn. 1959).
[5] TENN. S. JOUR. 909-930 (1957).
[6] The power of initiative is unavailable in Tennessee, and the General Assembly provides the plan of representation for a Constitutional Convention. TENN. CONST. art. XI, § 3.

that the Supreme Court of Tennessee had declined jurisdiction in a similar case;[7] and that, therefore, the plaintiffs were denied the equal protection of the laws guaranteed by the fourteenth amendment. A panel of three judges,[8] sitting as a district court, dismissed the action, first, on the ground that the complaint failed to state a claim upon which relief could be granted, and second, because the district court lacked jurisdiction of the subject matter. On direct appeal to the Supreme Court of the United States, held, reversed.[9] The district court possessed jurisdiction of the subject matter; a justiciable claim was stated which, if proven, entitled plaintiffs to relief; and the plaintiffs had standing to sue.

The brunt of the majority opinion by Mr. Justice Brennan was preoccupied with the evasive issue of justiciability.[10] That issue was raised by the defendants, who contended that the only constitutional right an apportionment case involved was the judicially unenforceable guaranty of a republican form of government;[11] moreover, that the Court was bound by a series of similar reapportionment cases beginning with *Colegrove v. Green,*[12] wherein the fourteenth amendment[13] was unsuccessfully asserted as a ground for relief. Under these circumstances, the majority was compelled to consider first the "contours of the political question doctrine."

Mr. Justice Brennan gleaned the following reasons from prior decisions as to why the Court should refuse to entertain jurisdiction in a given case:

(1) The issue was constitutionally committeed to another branch of federal government;
(2) No judicially discoverable and manageable standards were available to the Court;
(3) The Court could not decide the issue, and at the same time show due respect for a coordinate branch of federal government;

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[7] Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (1956), *aff'd per curiam,* 352 U.S. 520 (1957).

[8] Whenever state action is alleged to be contrary to federal law, a three judge court is convened to hear the case. 28 U.S.C. § 2281 (1958).

[9] Baker v. Carr, 368 U.S. 186 (1962).

[10] Justiciability is whether the issue presented is suitable for judicial determination.

[11] "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

[12] 328 U.S. 549 (1946).

[13] "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

(4) The decision necessarily involved potential embarrassment arising from conflicting opinions among the branches of federal government;
(5) The need to attach finality to a decision already made by a coordinate branch of federal government.

The opinion concluded that it was the relationship between the federal judiciary and the other branches of federal government, not a concern with federal-state conflict, which gave life to the political question doctrine. In this manner, the majority of the court distinguished both the guaranty clause and prior reapportionment decisions from *Baker v. Carr.*

In order to clarify the majority position, Mr. Justice Brennan reviewed a series of Supreme Court cases invoking the guaranty clause, beginning with the classic attempt of *Luther v. Borden.*[14] That case arose out of Rhode Island, where in 1842 the organic law limited suffrage to freeholders. After futile attempts to extend the franchise by other means, dissident citizens called a convention, which adopted a constitution allegedly ratified by a majority of male citizens over twenty-one and by a majority of freeholders. Separate governments, martial, law, and insurrection resulted. *Luther v. Borden,*[15] an action in trespass, ultimately posed the issue of the legality of the competing governments. Substantially, the Supreme Court held that the enforcement of the guaranty clause was a function of the executive and legislative branches of federal government; that it was the duty of the President to either recognize or disavow the established government, the duty of Congress to decide conflicting claims to Congressional seats; and that, in any event, no judically manageable yardstick was available for the Court to apply. In *Taylor v. Becham,*[16] the Supreme Court was faced with a situation similar to the *Borden* case in that competing claims for the office of governor of Kentucky were presented. The Court declined to exercise jurisdiction in the Kentucky case because the question was one for the political departments and not a proper subject for judicial determination. The Court adopted an argument asserted by Daniel Webster in *Luther v. Borden*[17] that the Federal Constitution only guaranteed lawful and orderly procedure by state governments. The

[14] 48 U.S. 1 (1849).
[15] *Id.*
[16] 178 U.S. 548 (1899).
[17] 48 U.S. 1 (1849).

Supreme Court continued to refuse to apply the guaranty clause in cases of successive challenges to a state constitutional amendment adopting the initiative and referendum;[18] to state constitutional amendment procedure;[19] to legislative authority to delegate a ministerial function to a court;[20] to referendum of apportionment legislation;[21] to state appellate procedure in affirming judgements of intermediate courts;[22] and to delegation of legislative powers.[23]

These cases covered a period of one hundred years, but side by side this judicial refusal to apply the guaranty clause, the equal protection clause was mounting in importance. In 1880, the statutory exclusion from a panel of jurymen of persons of the same race as defendant was held a denial of equal protection of the laws.[24] In 1928, a Texas statute which prohibited Negro participation in a Democratic primary was held a denial of franchise in violation of the equal protection clause.[25] In 1938, the failure to provide Negroes with legal training within the jurisdiction of the state, where such a privilege was accorded a white person, was a discriminatory violation of the equal protection clause.[26] In 1954, the separate, but equal facilities provided Negro school children inherently instilled a feeling of inferiority and denied equal protection of the laws.[27] This growing preoccupation with the protection of civil liberties and the preservation of human rights against state action did not extend to the issue of equal representation until 1962. In fact, in 1946 the Supreme Court failed to grant relief in *Colegrove v. Green,*[28] which was a suit based on the equal protection clause. That case came to be the foremost stumbling block to federal judicial intervention in state legislative reapportionment.

In *Colegrove v. Green,*[29] suit was brought in a federal district court in Illinois to restrain a primary certifying board from further proceeding toward setting up an election, because the state legislature had failed to reapportion Congressional districts. The Supreme Court,

[18] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1911).
[19] Marshall v. Dye, 231 U.S. 250 (1913).
[20] O'Neill v. Leamer, 239 U.S. 234 (1915).
[21] Davis v. Ohio, 241 U.S. 565 (1915).
[22] Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1929).
[23] Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1936).
[24] Strauder v. West Virginia, 100 U.S. 339 (1880).
[25] Nixon v. Herndon, 273 U.S. 536 (1927).
[26] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[27] Brown v. Board of Education, 347 U.S. 483 (1954).
[28] 328 U.S. 549 (1946).
[29] *Id.*

seven members sitting, refused to entertain the merits. Mr. Justice Frankfurter in dissent in *Baker v. Carr* construed *Colegrove v. Green*[30] as a refusal to decide a political question, whereas Mr. Justice Brennan viewed the decision as a dismissal for want of equity. As it happened, three Justices concurred in one opinion, while three Justices dissented. Mr. Justice Rutledge held the balance of power. In a separate opinion, he agreed on the one hand with the dissenters that the Court had judisdiction of the subject matter, while on the other hand he held with the "majority" that the appeal should be dismissed for want of equity. The Justice reasoned that the question was nearly moot; moreover, although the Constitution possibly conferred a right of equality, such right was diluted by vesting enforcement in the political departments of federal government. Whatever the ground for distinguishing *Golegrove v. Green*[31] from *Baker v. Carr,* it is clear that the Supreme Court in the former case could well have been concerned with its relationship with the Congress rather than with federal-state conflict; thus, the political question doctrine was applicable. Mr. Justice Black in his dissent in *Colegrove v. Green*[32] felt that the district court had jurisdiction of the subject matter; that the claim was justiciable; and that the plaintiffs had standing to sue. It is important to note that this was the precise holding in *Baker v. Carr,* but the Court went no further because the defendants had not yet formally answered.

Two concurring opinions, however, did reach the merits in *Baker v. Carr.* In one of the opinions, Mr. Justice Douglas admitted that states may impose qualifications on the right to vote, but certain constitutional amendments clearly prohibited state restriction of the franchise solely on the basis of race, color, creed, previous condition of servitude or sex. The fourteenth amendment imposed a further restriction: state law must not be so arbitrary as to amount to invidious discrimination. This was substantially the view of Mr. Justice Black in *Colegrove v. Green.*[33] In a second concurring opinion in *Baker v. Carr,* Mr. Justice Clark took the law of the case from *MacDougall v. Green.*[34] In that case, members and nominees of a minor party attacked an Illinois statute, which required signatures from 50 counties before the party candidates could be placed on the ballot. At the time, 87% of the state population resided in 49 of

[30] *Id.*
[31] *Id.*
[32] *Id.* at 566.
[33] *Id.*
[34] 335 U.S. 281 (1948).

the most populas counties. In declining jurisdiction without regard to the political question doctrine, the Supreme Court reasoned that numbers alone do not constitute political power, and that a rational state policy might require that voting power of a political party be evenly distributed. Plainly, Mr. Justice Clark felt that unless it appeared prima facie that a state agency had indulged in invidious discrimination as to the voting franchise, the equal protection clause was not violated. The Justice relied on two cases. First, in *Williamson v. Lee Optical,*[35] opticians were required by Oklahoma statute to fit old lens to new frames or grind new lens only when a prescription from a licensed specialist was received. However, ready made glasses were exempted from compliance with the statute. The Supreme Court held this classification to be a proper measure to insure the health of state citizens. Second, in *McGowan v. Maryland,*[36] a challenge to Sunday blue laws, the Court concluded that a statute will not be set aside if a state of facts may be reasonably conceived to justify it. Under the views of these concurring opinions, illustrative reapportionment cases before and after *Baker v. Carr* will be examined.

After *Colegrove v. Green,*[37] succeeding Supreme Court per curiam opinions affirmed federal and state decisions denying relief against malapportionment.[38] But not all courts followed this path. In Minnesota in 1958, a federal district court granted jurisdiction under the equal protection clause, but withheld relief to afford the legislature an opportunity to act.[39] The legislature met in extraordinary session, enacted a reapportionment act, and, thereupon, plaintiffs were granted a dismissal without prejudice.[40] In 1960, the New Jersey Supreme Court held reapportionment a justiciable issue, rejecting an argument, based on the theory of separation of powers, that the judiciary was encroaching on a coordinate branch.[41] The New Jersey court felt that legislative inaction was just as much a denial of voting rights as was legislative action, and that probably such inaction amounted to a denial of the federal right to equal

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[35] 348 U.S. 483 (1955).
[36] 366 U.S. 420 (1961).
[37] 328 U.S. 549 (1945).
[38] Matthews v. Handley, 361 U.S. 127 (1959); Radford v. Gary, 352 U.S. 991 (1957); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); Turman v. Duckworth, 329 U.S. 675 (1946); Cook v. Fortson, 329 U.S. 675 (1946).
[39] Magraw v. Donovan, 163 F. Supp. 184 (D. Minn. 1958).
[40] Magraw v. Donovan, 177 F. Supp. 803 (D. Minn. 1959).
[41] Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960).

protection of the laws. Again relief was held in abeyance to afford an opportunity for legislative action.

Several other decisions worthy of note involved the Georgia County Unit System, which is roughly comparable to the presidential electoral system. The Unit System applies in congressional, gubernatorial, and state legislative elections in Georgia. Suppose that counties X, Y, and Z, composing one congressional district, have a population of 500,000, 250,000, and 100,000 respectively. Both X and Y are allotted 6 unit votes each, while Z is accorded 2. If a candidate carries county X, but not Y or Z, he loses the election, although he may have received a substantial majority of the popular vote. So it was in *Cook v. Fortson,*[42] where a federal district court denied relief to a congressional candidate on the ground that any inequity resulting from the County Unit System was a matter for the Georgia legislature and Congress to resolve. In a companion case, *Turman v. Duckworth,*[43] instituted by a defeated gubernatorial candidate with a majority of the popular vote, the district court discussed the merits. The court agreed with what was later the view of Mr. Justice Douglas in *Baker v. Carr,* that the Constitution proscribed against arbitrary discrimination in elections on the basis of race, color or sex. However, unlike the Justice, the district court was skeptical as to the application of the equal protection clause. The court noted that equality of voting was never demanded in the federal system; that the electoral college possessed similar inequities; and that the residents of the District of Columbia were (at that time) deprived of all voting franchise. Further, assuming that the equal protection clause guaranteed a right of equality, for a classification to be declared unconstitutional, it must be irrational, and the prevention of urban domination in elections is arguably good. In a later Georgia case for damages, it was alleged that certification of nominees of the Democratic Party under the County Unit System debased the vote of plaintiff.[44] The theory of plaintiff's case was that equal voting was contemplated by the state constitution, and that such right was further guaranteed by the Federal Constitution. Justices Frankfurter and Harlan reject this theory in *Baker v. Carr,* because a state constitution and statute stand on the same footing when a

[42] 68 F. Supp. 624 (N.D. Ga. 1946), *aff'd per curiam,* 329 U.S. 675 (1946).
[43] 68 F. Supp. 744 (N.D. Ga. 1946), *aff'd per curiam,* 329 U.S. 675 (1946).
[44] Cox v. Peters, 208 Ga. 498, 67 S.E.2d 579 (1951), *aff'd per curiam,* 342 U.S. 936 (1952).

federal question is raised, and it is the unjustness of the statute, not the justness of the state constitution, which controls. The Supreme Court of Georgia evaded a decision on the merits by holding that a party primary was not an election in contemplation of the Georgia Constitution.

After the decision in *Baker v. Carr,* Georgia citizens renewed their attack on the County Unit System.[45] Suit was brought in federal district court seeking reapportionment of the General Assembly of Georgia. The court found that the complaint sufficiently alleged a case of invidious discrimination, but that five interrelated approaches had to be analyzed before relief could be considered:

(1) The rationality of state franchise policy;
(2) The arbitrariness of the County Unit System;
(3) The historical basis of the Unit System in political institutions;
(4) The possibility of other existing remedy;
(5) The probability that plaintiff's federal right was violated.

The court concluded that no policy existed to support the County Unit System; that it was, in fact, arbitrarily discriminatory; that perhaps when devised, the Unit System was not arbitrary, yet its long standing provided no reason for continued existence; that the remedy of initiative and referendum was unavailable in Georgia nor was there any evidence that the legislature would voluntarily disturb the balance of power; and lastly, that *Baker v. Carr* plainly demonstrated the violation of a federal right similar to the plaintiff's. Jurisdiction was retained to afford the legislature a last opportunity to act; meanwhile, the court indicated guidelines as to what were minimum requirements. First, the practice of rotating state senate seats among counties within the same senatorial district was improper. Second, at least one of the two legislative houses must be apportioned according to population.

Not all courts are in agreement with this last mentioned view of the minimum requirements under the fourteenth amendment. In the recent decision of *Scholle v. Hare,*[46] the Supreme Court of Michigan held that representation in the Michigan senate must be based on population as was the Michigan lower house. This result was not

[45] Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962).
[46] 116 N.W.2d 350 (Mich. 1962).

reached, however, without protracted litigation. In 1960, a mandamus action was instituted, which attacked a 1952 amendment to the Michigan Constitution fixing senatorial districts without regard to population.[47] Relying on *Colegrove v. Green*,[48] and companion cases, the Supreme Court of Michigan dismissed the writ. The court felt that principles of pure democracy fly in the face of history, and that at the time of decision, law in a majority of states still prescribed inequality in one legislative house. One dissent read the federal decisions to infer that it was the duty of state courts to consider reapportionment on the merits. The Supreme Court of the United States reversed this decision in light of *Baker v. Carr*. On remand, the Michigan court held that the plaintiff was deprived of equal protection of the laws by the amended provisions of the Michigan Constitution, following the dissent in *Colegrove v. Green*[49] and the concurring opinion of Mr. Justice Douglas in *Baker v. Carr*, that equal protection implies that all votes be substantially equal in weight. Realizing that some weighting was necessary, the Michigan court held that a senatorial district with twice the population per senator as another district was bad and that a district with less a disparity may not be good. Mr. Chief Justice Carr in dissent questioned the irrationality of a plan to prevent urban domination, since diffusion of political power was a permissable state policy, and numbers are not the only criteria.

In *Maryland Comm. for Fair Representation v. Tawes*,[50] a Maryland circuit court reached the same result as the minority in *Scholle v. Hare*.[51] In the Maryland case, plaintiffs were seeking reapportionment of the Maryland Senate and demonstrated that a state senator from one district represented 33 constitutents for every constituent represented by a senator from another district. The court pointed out that a far greater disparity existed in the United States Senate where the maximum dilution is 75 to 1. In fact, the Maryland Senate predated its national counterpart and was its model. The court felt that a system which disregards the population factor protects the minority and prevents hasty, but popular legislation, and that the Maryland Senate, as constructed, is in the best tradition of the

[47] Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960), *rev'd per curiam*, 369 U.S. 429 (1962).
[48] 328 U.S. 549 (1946).
[49] *Id.*
[50] Maryland Comm. for Fair Representation v. Tawes, 31 U.S.L. Week 2017 (Cir. Ct. Md. July 10, 1962).
[51] 116 N.W.2d 350 (Mich. 1962).

theory of checks and balances and a republican form of government. On appeal, the Court of Appeals of Maryland upheld the senate's basis for representation after a historical analysis.[52]

Following its decision in *Baker v. Carr,* the Supreme Court remanded to the district court for further proceedings.[53] Meanwhile, the governor of Tennessee convened the General Assembly to pass an apportionment act. Thereupon, the complaint was amended to permit consideration of the new legislation. The Tennessee Constitution allows one delegate to counties with two-thirds of the minimum population requirement. The district court held that to afford this measure of protection to less populous counties was neither irrational nor arbitrary; moreover, it was not invidious discrimination for the General Assembly to extend this principle to floterial districts, even though by so doing the state constitution was violated. However, the district court viewed with disfavor legislative favoritism of some counties in the House. For example, a county with less than the two-thirds minimum ratio was allocated a direct representative, while another county, also with less than the two-thirds minimum ratio, but more population than the former county, was placed in a floterial district. The court felt that such arbitrary apportionment violated the equal protection guarantee. As to the state Senate, the court could discover no rational basis whatever for its apportionment. Thus, it was forced to instruct the General Assembly as to minimum federal standards. First, if the House utilized the two-thirds ratio permitted by the Tennessee Constitution, the Senate could not. Second, either the House or Senate must be apportioned only according to population.

Like the Tennessee Constitution, the West Virginia Constitution bases legislative representation on population,[54] but as to the House of Delegates, if a county has three-fifths (two-thirds in Tennessee) of the minimum required population, the West Virginia Constitution grants that county one delegate.[55] Any county with less than the three-fifths ratio must be aligned with a contiguous county in a delegate district. The ratio is determined by dividing the number of

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[52] Maryland Comm. for Fair Representation v. Tawes, 184 A.2d 715 (Md. 1962).

[53] 206 F. Supp. 341 (M.D. Tenn. 1962).

[54] "Every citizen shall be entitled to equal representation in the government, and, in all apportionment of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." W. VA. CONST. art. II, § 4.

[55] W. VA. CONST. art. VI § 6.

members of the House into the most recent decennial census figures, rejecting the fractional unit. The number of members per county is then determined by dividing the ratio into the population of each county or delegate district, rejecting the fractional unit. Those counties with the largest fractional remainders are entitled to additional delegates until the total number of the House is allocated.[56] Under the present plan of the legislature, each county has at least one delegate. Thirteen counties have a population less than the ratio,[57] and, constitutionally, ought to be aligned with contiguous counties in delegate districts. Is failure to so align invidious discrimination? Justices Clark and Stewart in *Baker v. Carr* state that some diffusion of political power is a proper state function. Under the present legislative plan, representatives of not less than 40% of the population of West Virginia hold a controlling majority vote in the House. Is this the proper allowance for weighting of which Mr. Justice Douglas admits? The federal courts in Georgia and Tennessee apparently require that only one legislative house be based on population. Thus, if the West Virginia Legislature were required to redistrict the Senate, could the House remain at its present status? These are some of the problems which could arise on the issue of reapportionment in West Virginia.

West Virginia case law provides no ready answer to these problems, but one case indicates that reapportionment is a justiciable issue. In *Harmison v. Ballot Comm'rs,*[58] it appeared that a delegate district in the eastern panhandle was altered three years before the oncoming census, although the West Virginia Constitution directs that reapportionment shall occur only every ten years. In a mandamus action, the West Virginia Supreme Court of Appeals held that "the constitutionality of apportionment acts is a subject of judicial inquiry, not merely political. . . . There is no room here to construe and doubt. We must simply obey the Constitution." It would seem that if it is mandatory not to change representation until after the next census, it would be equally mandatory to reapportion after each census. A more recent case, however, perhaps casts some doubt on the weight to be accorded the prior decision. In *State ex rel. Armbrecht v. Thornburg,*[59] plaintiff, a resident of Ohio County, sued Ohio

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[56] W. VA. CONST. art. VI § 7.
[57] ROSS, HOUSE OF DELEGATES APPORTIONMENT IN WEST VIRGINIA vii (1961).
[58] 45 W. Va. 179, 31 S.E. 394 (1898).
[59] 137 W. Va. 60, 70 S.E.2d 73 (1952).

County ballot commissioners to have the ballot show that votes could be legally cast for four rather than three delegates. Following the constitutional plan, Ohio County was entitled to four delegates, but the legislature had allotted only three. Plaintiff contended that the act by which delegates were allocated among the counties was passed after the legislative adjournment hour, and was, therefore, void. The West Virginia court devoted most of its opinion toward rejecting this argument. As to the plaintiff's alternate contention that in any event the Legislature ignored the plain language of the constitution, the court held that it would be presumed that the Legislature considered the population of each county, absent acceptable evidence to the contrary. The writ was refused, and the court apparently justified the result because every county had had one delegate for fifty years, and that seemingly it was too late to complain.

In 1962, voters soundly rejected a constitutional amendment which would have ratified the current legislative policy of allotting at least one delegate to all counties. Recently, the County Court of Kanawha County instituted suit in federal district court in southern West Virginia joining the governor and other state officials. The complaint calls for an answer twenty days after the 1963 adjournment of the West Virginia Legislature. Apparently, this is to have a prodding effect on the Legislature with a view toward prompt settlement.

Nationally, however, the issue of reapportionment is far from settled. The virtual wave of cases since *Baker v. Carr,* of which the cases herein discussed are only representative, bear out this conclusion. Perplexing problems have arisen as for example in Maryland, where its senate predated the Union; in Michigan, where in 1952, voters expressed a desire for representation on the basis of geography; and even in West Virginia, where not only legislative action is brought into focus, but the three-fifths ratio requirement of the constitution itself. It is even arguable that the energy of the proponents of equal apportionment is ill-spent. One must inevitably conclude that their purpose is to bring good government to the states. There is, however, respectable opinion to the contrary that equal representation does not necessarily mean good government. In the words of Edmund Burke,

> Parliament is not a congress of ambassadors from different and hostile interests. . .but parliament is a deliberate assembly of one nation, with one interest, that of the whole;

> where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.[60]

Burke did not believe that equality of representation was the fountainhead of good government. For "local prejudices" are spawned not only in rural areas. Burke did believe that good government flows from the moral fiber of the legislator and from the efficient operation of political institutions. Preoccupation with mathamatical exactitude may only cloud the true malady. Or in other words, it is not who sends the legislators to the capitol, but which prospective legislators are sent.

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[60] 3 BURKE, THE PARLIAMENTARY HISTORY OF ENGLAND 20.