Changes throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Frankfurter
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart

From: Douglas, J.

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SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. | On Appeal From the United States District Court for the Middle District of Tennessee.

[March —, 1962.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court and, like the Court, do not reach the merits, a word of explanation is necessary.[1] I put to one side the problems of the "political" question involving the distribution of power between this Court, the Congress, and the Chief Executive. We have here a phase of the recurring problem of the relation of the federal courts to state agencies. More particularly, the question is the extent to which a State may weigh one person's vote more heavily than it does another's.

So far as voting rights are concerned, there are large gaps in the Constitution. Yet the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution. The House—and now the Senate—are chosen by the people. The time, manner, and place of elections of Senators and Representatives are left to the States (Article I, Section 4) subject to the regulatory power of Congress. A "republican form" of government is guaranteed each State by Article IV, Section 4, and each is likewise promised pro-

[1] I feel strongly that many of the cases cited by the Court and involving so-called "political" questions were wrongly decided.

In joining the opinion, I do not approve those decisions but only construe the Court's opinion in this case as stating an accurate historical account of what the prior cases have held.

tection against invation.[2] *Ibid.* That the States may specify the qualifications for voters is implicit in Article I, Section 2, cl. 1, which provides that the House of Representatives shall be chosen by the people and that "the

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[2] The statements in *Luther* v. *Borden*, 7 How. 1, 42, that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is "the Judge of the Elections, Returns, and Qualifications of its own Members." Article I, Section 5. But the abdication of all judicial functions respecting voting rights (7 How., at 41), however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr's Rebellion, states no general principle. It indeed is contrary to the cases discussed in the body of this opinion—the modern decisions of the Court that give the full panoply of protection to voting rights. Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote of those "to whom it is denied by the written and established constitution and laws of the State." *Ibid.*

Moreover, the Court's refusal to examine into the legality of the regime of martial law which had been laid upon Rhode Island (*id.*, at 45–46) is indefensible, as Mr. Justice Woodbury maintained in his dissent. *Id.*, at 59 *et seq.* Today we would ask with him: ". . . who could hold for a moment, when the writ of habeas corpus cannot be suspended by the legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency?" *Id.*, at 67.

Justice Woodbury went on to say:

"It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to

Electors (voters) in each State shall have the qualifications requisite for Electors (voters) of the most numerous branch of the State Legislature." The same provision, contained in the Seventeenth Amendment, governs the election of Senators. Within limits those qualifications may be fixed by state law. See *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, 50–51. Yet, as stated in *Ex parte Yarbrough*, 110 U. S. 651, 663–664, those who vote for members of Congress do not "owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively upon the law of the State." The power of Congress to prescribe the qualifications for voters and thus override state law is not in issue here. It is, however, clear that by reason of the commands of the Constitution there are several qualifications that a State may not require.

Race, color, or previous condition of servitude are impermissible standards by reason of the Fifteenth

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allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet.

"No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men.

"Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however the Assembly of Rhode Island, under the exigency, may have hastily supposed that such a measure in this instance was constitutional. It is but a branch of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law." *Id.*, at 69–70.

What he wrote was later to become the tradition, as expressed by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 401, "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

Amendment, and that alone is sufficient to explain *Gomillion* v. *Lightfoot*, 364 U. S. 339. See Taper, Gomillion versus Lightfoot (1962), pp. 12–17.

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See *Skinner* v. *Oklahoma*, 316 U. S. 535, 541. Universal equality is not the test; there is room for weighting. As we stated in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester is worth nearly eight times a single vote in Shelby or Knox Counties. The opportunity to prove that an "invidious discrimination" exists should therefore be given the appellants.

It is said that the decision in cases of this kind is beyond the competence of courts. Some make the same point as regards the problem of equal protection in cases involving racial segregation. The legality of claims and conduct is a traditional subject for judicial determination. Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be

seen in the decree apportioning water among the several States. *Nebraska* v. *Wyoming*, 325 U. S. 589, 665. The constitutional guide is often vague, as the decisions under the Due Process and Commerce Clauses show. The problem under the Equal Protection Clause is no more intricate. See Lewis, Legislation Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1083–1084.

There are, of course, some questions beyond judicial competence. Where the performance of a "duty" is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other (*Kentucky* v. *Dennison*, 24 How. 66, 109), for to do so would be to take over the office. Cf. *Federal Communications Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 145.

Where the Constitution assigns a particular function wholly and indivisibly [3] to another department, the federal

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[3] The category of the "political" question is in my view narrower than the decided cases indicate. "Even the English courts have held that a resolution of one House of Parliament does not change the law (*Stockdale* v. *Hansard*, [1839] 9A & E 1; and *Bowles* v. *Bank of England* (No. 2), [1913] 1 ch. 57), and these decisions imply that the House of Commons acting alone does not constitute the 'Parliament' recognized by the English courts." 103 Sol. Jour. 995, 996. The Court in *Bowles* v. *Bank of England*, *supra*, pp. 84–85, stated: "By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown

judiciary does not intervene. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. None of those cases is relevant here.

There is no doubt that the federal courts have jurisdiction of controversies concerning voting rights. The Civil Rights Act gives them authority to redress the deprivation "under color of any state law" of any "right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . ." 28 U. S. C. § 1343 (3). And 28 U. S. C. § 1343 (4) gives the federal courts authority to award damages or issue an injunction "under any Act of Congress providing for the protection of civil rights, including the *right to vote.*" (Italics added.) The element of state action covers a wide range. For as stated in *United States* v. *Classic*, 313 U. S. 299, 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is

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in levying a tax before such tax is actually imposed by Act of Parliament."

In *The Pocket Veto Case*, 279 U. S. 655, the Court undertook a review of the veto provisions of the Constitution and concluded that the measure in litigation had not become a law. Cf. *Coleman* v. *Miller*, 307 U. S. 433.

Georgia v. *Stanton*, 6 Wall. 50, involved the application of the Reconstruction Acts to Georgia—laws which destroyed by force the internal regime of that State. Yet the Court refused to take jurisdiction. That action was no more "political" than a host of others we have entertained. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Alabama* v. *Texas*, 347 U. S. 272.

Today would this Court hold nonjusticiable or "political" a suit to enjoin a Governor who like Fidel Castro takes everything into his own hands and suspends all election laws?

Georgia v. *Stanton*, *supra*, expresses a philosophy at war with *Ex parte Milligan*, 4 Wall. 2, and *Duncan* v. *Kahanamoku*, 327 U. S. 304. The dominance of the civilian authority has been expressed from the beginning. See *Wise* v. *Withers*, 3 Cranch 331, 337; *Sterling* v. *Constantin*, *supra*, note 2.

> clothed with the authority of state law, is action taken 'under color of' state law." And see *Monroe* v. *Pape*, 365 U. S. 167.

The right to vote in both federal and state elections was protected by the judiciary long before that right received the explicit protection it is now accorded by § 1343 (4). Discrimination against a voter on the basis of race has been penalized (*Ex parte Yarbrough*, 110 U. S. 651) or struck down. *Nixon* v. *Herndon*, 273 U. S. 536; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461. Fraudulent acts that dilute the votes of some have long been within judicial cognizance. *Ex parte Siebold*, 100 U. S. 371. The "right to have one's vote counted" whatever his race or nationality or creed was held in *United States* v. *Morley*, 238 U. S. 383, 386, to be "as open to protection by Congress as the right to put a ballot in a box." See also *United States* v. *Classic*, *supra*, 324–325; *United States* v. *Saylor*, 322 U. S. 385.

Chief Justice Holt stated in *Ashby* v. *White*, 2 Ld. Raym. 938, 956 (a suit in which damages were awarded against an election official for not accepting the plaintiff's vote, 3 Ld. Raym. 320) that:

> "To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation."

The same prophylactic effect will be produced here, as entrenched political regimes make other relief as illusory in this case as a petition to Parliament in *Ashby* v. *White* would have been.[4]

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[4] We are told by the National Institute of Municipal Law Offices in an *amicus* brief:

"Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over

Intrusion of the Federal Government into the election machinery of the States has taken numerous forms—investigations (*Hannah* v. *Larche*, 363 U. S. 420); criminal proceedings (*Ex parte Siebold, supra; Ex parte Yarbrough, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra*); collection of penalties (*Smith* v. *Allwright, supra*); suits for declaratory relief and for an injunction (*Terry* v. *Adams, supra*); suits by the United States under the Civil Rights Act to enjoin discriminatory practices. *United States* v. *Raines*, 362 U. S. 17.

As stated by Judge McLaughlin in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 236 (an apportionment case in Hawaii which was reversed and dismissed as moot, 256 F. 2d 728):

> "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to

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two-thirds of the population now lives in cities or suburbs, political representation in the majority of state legislatures is 50 or more years behind the times. Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

"As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population. These demands will become even greater by 1970 when some 150 million people will be living in urban areas.

"The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

"Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states."

> preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

With the exceptions of *Colegrove* v. *Green*, 328 U. S. 549; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276, and the decisions they spawned, the Court has never thought that protection of voting rights was beyond judicial cognizance. Today's treatment of those cases removes the only impediment for judicial cognizance of the claims stated in the present complaint.

The justiciability of the present claim being established, any relief accorded can be fashioned in light of well-known principles of equity.[5]

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[5] The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (*Cedar Rapids* v. *Cox*, — Iowa —; 108 N. W. 2d 253, 262–263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct.

There need be no fear of a more disastrous collision between federal and state agencies here than where a federal court enjoins gerrymandering based on racial lines. See *Gomillion* v. *Lightfoot*, *supra*.

The District Court need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality merely by directing respondent to eliminate the egregious injustices. Or its conclusion that reapportionment should be made may in itself stimulate legislative action. That was the result of *Asbury Park Press* v. *Woolley*, 33 N. J. 1, 161 A. 2d 705, where the state court ruled it had jurisdiction.

"If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The law-making body

Footnote 5—Continued.

cannot by inaction alter the constitutional system under which it has its own existence." The court withheld its decision on the merits in order that the legislature might have an opportunity to consider adoption of a reapportionment act. 33 N. J., at 14; 169 A. 2d, at —. For the sequel see *Application of Lamb*, — N. J. —, 169 A. 2d 822, 825–826.

It was also the result in *Magraw* v. *Donovan*, 159 F. Supp. 901, where a Federal three-judge District Court took jurisdiction, saying, 163 F. Supp. 184, 187:

"Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. . . . Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been present to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.'"

See 177 F. Supp. 803, which the case as moot, the State Legislature having acted.