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.

Circulated: 2/12/62

Recirculated:

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.

[February —, 1962.]

Mr. Justice Douglas, concurring.

We can put to one side the problems of the "political" [1] question that involve questions of 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 whether 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 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 by Article IV, Section 4. That the States may specify the qualifications for voters is implicit in Article I, Section 2, which provides that the House of Representatives shall be chosen by the people and that in those elections "the Electors (voters) in each State

[1] I feel strongly that many of the cases cited by the Court and involving the so-called "political" question were wrongly decided. So, in joining the opinion, I do not approve any of the cited decisions but only construe those portions of the opinion as stating an accurate historical account of what the Court has done.

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 Yarborough,* 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." Whatever may be the power of Congress to prescribe the qualifications for voters and thus override state law is not present 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 Amendment and that alone is sufficient to explain *Gomillion* v. *Lightfoot,* 364 U. S. 339.

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 "as invidious discrimination" as it does when it selects "a particular race or nationality for oppressive treatment." *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."

The opportunity to prove that an "invidious discrimination" exists should be given the appellants. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart County or in Chester County is worth nearly eight time a single vote in Shelby County or Knox County. If these facts can be established, it would seem than an "invidious discrimination" has been established.

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 the traditional standard for judicial determination. Judicial adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be seen from the decree apportioning water among the several States. *Nebraska* v. *Wyoming*, 325 U. S. 589. The constitutional guide is often vague, as the decisions under the Due Process Clause and under the Commerce Clause show. The problem of the Equal Protection Clause is no more intricate.

As stated in Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1083–1084:

> "A slight difference in population among districts would not render them invalid. But how is a court to determine when the disparity passes the allowable limits? The view has been expressed that such a judgment is not the normal judicial task and should not be undertaken unless the legislature lays down fixed mathematical standards. . . .
>
> "Of course the judicial function would be simplified in many cases if Congress laid down explicit criteria. But in the area of commerce, for example, Congress has refused to do so despite virtual urging by the Supreme Court, and the Court has continued to weigh such imponderables as the burden of state

taxation on interstate commerce. It is fair to say that it is a central duty of the Supreme Court—indeed, of all courts—to decide cases in which precise standards are not, perhaps cannot, be fixed."

Even so, there are 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 the discretion one way or the other (*Kentucky* v. *Dennison*, 24 How. 66, 109), for to do so would be to take over the office.

Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. None of the cases holding that the federal courts will not adjudicate a "political" question [2] is relevant here.

There is no doubt that the federal courts have jurisdiction of controversies concerning voting rights. The 1957 Civil Rights Act gives them authority to redress the

[2] *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. Chief Justice Hughes, writing in *Sterling* v. *Constantin*, 387 U. S. 378, 401, said "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

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 injunction "under any Act of Congress providing for the protection of civil rights, including the *right to vote.*" (Italics added.) As stated in *United States* v. *Classic, supra,* p. 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is 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 has been long protected by the judiciary before that right received the explicit protection it is now accorded by § 1343 (4). Discrimination on the basis of race has been penalized (*Ex parte Yarborough,* 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. 391. 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." *United States* v. *Classic,* 313 U. S. 299, 324–325; *United States* v. *Saylor,* 332 U. S. 379.

Chief Justice Holt stated in *Ashby* v. *White,* 2 Ld. Raym. 938, 956 (a suit in which damages were awarded 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.[3]

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 Yarborough, supra; United States* v. *Mosley, supra; United*

[3] We are told by the National Institute of Municipal Law Officers:

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

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 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 other decisions they spawned, the Court has never thought that protection of voting rights was beyond judicial cognizance. Those cases, disapproved today, remove the only impediment for judicial protection of equality of voting rights implicit in our constitutional scheme.

Courts are not expected to do the impossible or the impracticable. The justiciability of the present claim being established, any relief accorded can be fashioned in light of well-known principles of equity.[4]

---

[4] 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*, 108 N. W. 2d 253, 262–263, cf. *Kidd* v. *McCanless*, 200 Tenn. 273) is plainly correct.

The District Court need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality

I put this gloss on the opinion of the Court not in an endeavor to rewrite it but to explain what I think it does and does not mean. With this understanding, I join the opinion.

---

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, 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 voters 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 cannot by inaction alter the constitutional system under which it has its own existence."

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.'"

And see 177 F. Supp. 803, dismissing the case as moot, the State Legislature having acted.

Equity is versatile; and there is 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*.