NOTES

RACIAL DISCRIMINATION AND *BAKER v. CARR*

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I. INTRODUCTION

Baker v. Carr[1] and the reapportionment cases that followed[2] reshaped representative government at the state level through the principle of "one voter, one vote." Some scholars have declared that *Baker*, the seminal case on reapportionment, has nothing to do with racial discrimination.[3] The case, they argue, regards only the representative imbalance between urban and rural areas.[4] This Note argues that such a viewpoint is overly narrow. At the time the Court was deliberating over *Baker*, malapportionment regularly entailed racially discriminatory effects, especially in the southeast.

Prior to *Baker*, a number of academics stressed the racial implications of malapportionment. Harvard professor of government, V.O. Key, wrote in 1950 that "by the overrepresentation of rural counties in State legislatures, the whites of the black belts gain an extremely disproportionate strength in State lawmaking."[5] Such overrepresentation gave excessive weight "to those areas in general the most conservative and in particular the most irreconcilable on the Negro issue."[6] C. Vann Woodward, a history professor at Yale and author of *The Strange Career of Jim Crow*,[7] observed that malapportionment encouraged southern intransigence to desegregation: "[Malapportionment has placed political control] in the hands of a small and often reactionary oligarchy," thereby "killing . . . needed social legislation" and promoting "interference with local public schools and their peaceful adjustment to Federal law."[8] Notwithstanding such statements, *Baker* too often gets categorized as a non-racial case. The imbalance in urban/rural representa-

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1. 369 U.S. 186 (1962).

2. Within a year of the *Baker* decision, seventy-five cases had been filed in state and federal courts seeking relief from malapportionment. *See* ROYCE HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 57 (1966).

3. *See, e.g.*, ROBERT G. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 142 (1968). In their dissenting opinions in *Baker*, Justices Frankfurter and Harlan both assert that race was not an issue. *See Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting); *see id.* at 335 (Harlan J., dissenting). Charles Rhyne, Baker's attorney, also declares at oral argument that race was not an issue. *See* 56 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 551 (1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

4. *See Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting); *see id.* at 335 (Harlan J., dissenting).

5. U.S. COMMISSION ON CIVIL RIGHTS: VOTING 114 (1961) (quoting V.O. KEY, SOUTHERN POLITICS 666 (1950)) [hereinafter U.S. COMMISSION ON CIVIL RIGHTS: VOTING].

6. *Id.*

7. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

8. U.S. COMMISSION ON CIVIL RIGHTS: VOTING, *supra* note 5, at 114.

tion entailed a racial question because legislative malapportionment sometimes masked state-sponsored racism.[9]

This Note begins in Part II with a brief overview of the history and holding of *Baker*. Part III analyzes the issue of malapportionment at the time the Supreme Court heard the case, particularly as it affected African Americans. This part reveals that a number of significant political leaders recognized the racial implications of malapportionment, indicating why reapportionment was an important issue for the voter registration movement. Part IV identifies *Baker's* placement within the broader civil rights movement and reveals that a few cases preceding *Baker* indicate that a number of Supreme Court justices were conscious of the racial implications of malapportionment. Part V then answers the objections of scholars who contend that *Baker* is not a race-based case. Part VI details Justice Frankfurter's views on why he believed *Baker* did not pose a racial question—a weighty consideration against the position of this Note given his historical advocacy of civil rights. Part VII looks into the aftermath of the *Baker* decision and infers that *Baker* contributed to the passage three years later of the Voter Rights Act of 1965, a federal law passed to improve African Americans' access to the ballot box.

II. BRIEF OVERVIEW OF *BAKER V. CARR*

Charles Baker and several other voters brought an action for declaratory judgment that Tennessee's 1901 Apportionment Act ("Act"), under which seats in the state legislature were apportioned, violated the Fourteenth Amendment's Equal Protection Clause.[10] The state constitution required government officials to enumerate qualified voters and reapportion accordingly every ten years so that each state legislator represented a similar number of constituents.[11] Baker argued that the Act violated the state and federal constitutions because state officials neglected to count voters immediately following the Act's ratification and to recount voters every ten years following the signing of the Act.[12] Owing to the significant growth in population in urban relative to rural areas, the plaintiffs argued that Tennessee's legislature unfairly favored rural over urban voters. This malapportionment resulted in roughly one-third of the state's voters controlling two-thirds of its representatives.[13] Although not mentioned in the appellant's brief to the Supreme Court, African American voters suffered disproportionately as a result of this malapportionment because of their migration from rural to urban districts during the previous sixty years.[14] The malapportionment in Tennessee manifested itself in state legislative proposals not just in the area of race relations but also, for example,

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9. *See* GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER AND THE SUPREME COURT 34–35 (1966) (indicating that Alabama, Georgia, and Mississippi possessed some of the most unbalanced legislatures in the country).

10. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

11. *See Baker*, 369 U.S. at 188–89.

12. *See id.* at 187–88.

13. *See id.* at 253 (Clark, J. concurring); *see also* HOWARD BALL, THE WARREN COURT'S CONCEPTIONS OF DEMOCRACY: AN EVALUATION OF THE SUPREME COURT'S APPORTIONMENT OPINIONS 93 (1971).

14. *See* David Johnson, *Important Cities in Black History*, *available at* http://www.infoplease.com/spot/bhmcities1.html.

in the refusal of the state legislature to repeal the prohibition against the teaching of evolution and its refusal to allow taverns in the counties.[15]

On appeal to the Supreme Court, the *Baker* case presented two issues: the first of jurisdiction and the second of the merits of the constitutional claim. The District Court of the United States for the Middle District of Tennessee dismissed the suit on the precedent set by *Colegrove v. Green*, a 1946 case from Illinois involving similar facts and claims for which Justice Frankfurter wrote the opinion and from which Justices Black and Douglas dissented.[16] *Colegrove* did not involve a question of racial discrimination. Justice Frankfurter justified affirming the lower court's dismissal in *Colegrove* on the basis that not doing so would embroil the Court in political controversy and compromise the integrity of the judiciary in the public eye. "The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility."[17] Justice Frankfurter then asserted, using language similar to that in his *Baker* dissent, "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[18] Accordingly, relief should come not from the courts but through the political process.

Justice Black's dissent in *Colegrove*, which Justice Douglas joined, foreshadowed the reasoning that would dominate Justice Brennan's majority opinion in *Baker*. Justice Black argued that the Equal Protection Clause of the Fourteenth Amendment prohibited voter discrimination on the basis of geography.[19] Justice Frankfurter did not address this question. Rather, he limited his plurality opinion solely to the political question doctrine because he believed the jurisdictional issue dispositive. In failing to respond to Justice Black's contention, Justice Frankfurter foreclosed an opportunity to narrow the scope of the Equal Protection Clause in a manner that might have stymied the majority's reasoning in *Baker*.

Records indicate that at the initial conference on *Baker*, Justices Warren, Black, Douglas, and Brennan favored holding that the Fourteenth Amendment authorized the lower courts both to assert jurisdiction and determine the remedy.[20] Ultimately, the majority opinion limited itself to the more narrow issue of jurisdiction as an accommodation to Justice Stewart, who declared that he would vote for reversal only if the majority so limited its decision.[21] Despite adopting this more narrow holding, Justice Brennan masterfully addressed the political question doctrine described in *Colegrove* so as to prevent the Court from dismissing future jurisdictional questions outside of matters touching on foreign relations, war, and the status of Indian tribes.

By holding that the district court possessed jurisdiction but not answering whether the lower court could provide a remedy, Justice Brennan, in the opinion of Justice Harlan, managed to decide the question of remedy "*sub silentio*."[22] In effect, Justice

15. *See* BALL, *supra* note 13, at 94.
16. Colegrove v. Green, 328 U.S. 549 (1946).
17. *Id.* at 554.
18. *Id.* at 556.
19. *See id.* at 569 (Black, J., dissenting)
20. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 412 (1983).
21. For an interesting history of the intra-Court politics on this point, see *id.* at 415–19.
22. *Baker*, 369 U.S. at 331 (Harlan J., dissenting).

Brennan subtly conflated the question of remedy with the Equal Protection Clause so as to suggest that every vote must be weighted similarly for voter apportionment to be constitutional. Justice Frankfurter agreed with Justice Harlan, arguing that "to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as 'a brooding omnipresence in the sky,' for it conveys no intimation of what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary."[23] Justice Frankfurter declared that in the history of the United States, "republicanism" has never implied an equal weighting of votes:

> The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellant's words "the basic principle of representative government"—is, to put it bluntly, not true.[24]

Even though Justice Brennan's holding ostensibly only touched upon jurisdiction without going so far as to assert that representative government means one voter, one vote, many failed to pick up on this subtle distinction. President Kennedy, in a press conference in which he discussed *Baker*, declared, "The right to fair representation and to have each vote count equally is, it seems to me, basic to the successful operation of a democracy."[25] Notwithstanding President Kennedy's distillation of the case, the Court did not declare the one voter, one vote doctrine until *Reynolds v. Sims*,[26] three years later.

III. THE ISSUE OF MALAPPORTIONMENT

Between 1900 and 1960, the urban population of the United States grew significantly. While only about 40% of Americans lived in urban areas in 1900, roughly 63% lived in urban areas in 1960.[27] Despite this migration, rurally-dominated state legislatures failed to reapportion themselves, often in contravention of their own state constitutions.[28] Although southern states exhibited some of the most egregious forms of representative imbalance,[29] malapportionment was by no means a southern phenomenon.[30] The problem affected state legislatures throughout the country.

A. African American Urban Migration

The African American community amplified the general population trend to the cities. In 1910, 89% of all blacks lived in the South, and 80% of these lived in rural ar-

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23. *Id.* at 268 (Frankfurter, J., dissenting).
24. *Id.* at 301 (Frankfurter, J., dissenting).
25. SCHWARTZ, *supra* note 20, at 425.
26. 377 U.S. 533 (1964).
27. *See* U.S. Census Bureau, Population: 1790 to 1990, *available at* http://www.census.gov/population/censusdata/table-4.pdf.
28. *See* BAKER, *supra* note 9, at 54–60.
29. *See id.* at 34–35. (indicating that Alabama, Georgia, and Mississippi possessed some of the most unbalanced legislatures in the country).
30. *See id.* at 32–33.

eas.[31] By 1960, 40% of all blacks lived outside the South, while 75% of all blacks lived in the cities.[32] In the decade between 1950 and 1960, all twenty-two American cities with a population greater than five hundred thousand showed an increase in the percentage of non-white residents. [33] Owing to "white flight" in response to desegregation, seven of these cities lost between 6.7% and 33.3% of their Caucasian population during this time.[34] Thus, by the time *Baker* reached the Court, the black population had transformed itself into an urban one, and American cities had become more heterogeneous. The general misrepresentation of urban voters relative to rural voters in many states translated to proportionately greater misrepresentation of blacks.[35] Discriminatory practices like poll taxes and literacy tests further aggravated this malapportionment by preventing African Americans from accessing the ballot box.[36]

Malapportionment in the South was used sometimes as a weapon to minimize the African American vote.[37] Its potency was enhanced by the fact that it was the intangible product of omission rather than overt discrimination, effectively shielding it from Fifteenth Amendment based claims.[38] The most seriously underrepresented central city counties were all in the South—the counties incorporating Atlanta, Miami, Houston, and Dallas.[39] Evidencing the imbalance in representation in Tennessee in 1950, the state at issue in *Baker*, Memphis possessed 312,000 voters and seven representatives in the state legislature. The twenty-four surrounding counties had an identical, total population and twenty-six representatives.[40] Blacks in Memphis represented 36% of the population in the 1950s.[41]

B. Public Recognition of the Problem

Many believed that improving representation of urban interests would enhance racial comity. Attorney General Robert Kennedy, for example, thought that "the long-term success of the civil rights movement depended more on gaining strength through elective power than through specific acts of desegregation."[42] While running for President in the late 1950s, Senator John F. Kennedy made reapportionment a campaign platform, although he did not make race an explicit issue in his position on apportionment.[43] In an article written in 1958, Senator Kennedy declared that "[t]he apportionment of

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31. *See* David Johnson, *Important Cities in Black History, available at* http://www.infoplease.com/spot/bhmcities1.html.

32. *Id.*

33. *See* BALL, *supra* note 13, at 61.

34. *Id.*

35. *Id.*

36. U.S. COMMISSION ON CIVIL RIGHTS: VOTING, *supra* note 5, at 135.

37. *See* South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting); LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 434 (1967).

38. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

39. *See* REPRESENTATION AND APPORTIONMENT: RESPONSE OF THE NATION TO THE SUPREME COURT'S LANDMARK DECISIONS ON STATE LEGISLATURE APPORTIONMENT AND CONGRESSIONAL REDISTRICTING 11 (1966).

40. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 379 (1997).

41. *See* GENE GRAHAM, ONE MAN ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS 18 (1972).

42. DAVID MICHAEL HUDSON, ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT 22 (1999).

43. *See* GRAHAM, *supra* note 41, at 217.

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 the voters that full and proportionate voice in government to which they are entitled."[44] Evidence also suggests that Chief Justice Warren believed that if African Americans in the South had been permitted proper representation in government, then democratic means might have solved many of the nation's racial problems.[45]

While the Court was deliberating over *Baker*, the Kennedy Administration on September 9, 1961 published the 1961 Commission on Civil Rights Report on Voting,[46] roughly five months after oral argument and six months before the Court released its decision.[47] This report described how malapportionment disproportionately affected regions consisting mostly of African Americans and other minorities. [48] The report asserted that outright discrimination and overt actions to prevent African Americans from voting produced or exaggerated the effects of malapportionment.[49] The coincident publication of this report with the Supreme Court's deliberations over *Baker* should not be underestimated. Reapportionment was an important issue for the Kennedy Administration, and the timing of this report's publication suggests that the Administration sought to use it to communicate its opinion on reapportionment to the judiciary.

C. Reapportionment as a Part of the Voter Registration Movement

Voter registration was a critical focus of the civil rights movement.[50] For example, between 1896 and 1900, African American registration in Louisiana declined from 130,334 to 5,320 owing to structural discrimination through literacy tests and gerrymandering.[51] By the early 1940s, African American voter registration in southern states remained woefully near where it had been since the beginning of the century, at approximately 2.4% of the black voting-age population.[52]

Due to aggressive efforts undertaken by the National Association for the Advancement of Colored People (NAACP) and other organizations, black voter registration began to rise in the middle of the twentieth century.[53] Black voter registration in the South continued rising from 12% in 1947 to 25% in 1956.[54] However, because of more than fifty years of legislative inaction in many states, particularly in the South, malapportionment mitigated the effects of improved voter registration.

The civil rights movement took note of the *Baker* decision. Only four months after the Court delivered its decision, *The Crisis*, the NAACP's monthly journal of activities in the Civil Rights movement, included an article discussing the significant improvement in voter registration among African Americans in Tennessee.[55] Also testifying to

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44. John F. Kennedy, *Shame of the States*, N.Y. TIMES (Magazine), May 18, 1958, at 12. This article does not explicitly mention race in its discussion of urban interests.
45. GRAHAM, *supra* note 41, at 22.
46. *See* BALL, *supra* note 13, at 64.
47. U.S. COMMISSION ON CIVIL RIGHTS: VOTING, *supra* note 5. *See also infra* Table I.
48. *See* BALL, *supra* note 13, at 64.
49. *See id.*
50. *See* HUDSON, *supra* note 42, at 53.
51. *See id.* at 17.
52. *See id.*
53. *See id.* at 19.
54. *See id.*
55. *See Tennessee Registration Drive*, THE CRISIS, August/September 1962, at 412. The article, however,

the impact on the civil rights movement of *Baker* and the Court's subsequent reapportionment decisions on the civil rights movement, a number of marchers during Martin Luther King, Jr.'s 1965 march in Selma to improve voter registration[56] wore ACLU buttons advertising "one man, one vote."[57] Although not a slogan originating in the *Baker* case, this slogan was a motto of the broader reapportionment movement. This slogan embodied the view of representative government that the Court ultimately adopted in *Reynolds v. Sims* in 1964.[58]

IV. *BAKER* IN HISTORICAL CONTEXT

As Table 1 indicates, the petitioners in *Baker* filed their appeal following a sequence of historic events within the civil rights movement. Three significant events occurred between when the appellants in *Baker* filed their petition and when the Court found probable jurisdiction. First, the nation elected John F. Kennedy president. Second, the Kennedy Administration published the 1961 Commission on Civil Rights Report on Voting while the Court was in the midst of deliberations over *Baker*.[59] Third, and perhaps most important for the outcome of *Baker*, the Court heard argument on *Gomillion v. Lightfoot*,[60] a case involving racially-motivated gerrymandering. Gerrymandering, as defined by the 1961 Commission on Civil Rights Report on Voting, is "political districting in which, although voting strength may be proportionate, district lines are drawn in such a way as to put particular groups of voters into, or out of, particular districts for the purpose of limiting the effectiveness of their votes."[61] *Baker*, unlike *Gomillion*, involved a case of malapportionment, which the Commission defined as "political districting in which one group of voters has disproportionate strength as against other groups of voters in the same election."[62] Both malapportionment and gerrymandering can be manipulated so as to effectuate racial discrimination.[63] The principal difference between *Gomillion* and *Baker* is that the claim in *Gomillion* alleged racism while the claim in *Baker* limited its allegations to geographical discrimination. The claim in *Baker* was broader insofar as it claimed that legislative inaction resulted in geographical discrimination favoring rural areas at the expense of urban areas. Nonetheless, a previous case, *South v. Peters*,[64] a case pre-dating *Baker* by twelve years, revealed to the Court how malapportionment could serve racist ends.

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does not expressly reference *Baker*.

56. *See* HUDSON, *supra* note 42, at 53. (Martin Luther King, Jr. targeted Selma because the local sheriff could be counted on to overreact to peaceful demonstrations and because only 156 of 7,500 African Americans in Selma, representing 56% of the town's population, were registered to vote).

57. *See* EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954–1965 (PBS video 1986).

58. 377 U.S. 533 (1964).

59. U.S. COMMISSION ON CIVIL RIGHTS: VOTING, *supra* note 5. This report was released on September 9, 1961.

60. 364 U.S. 339 (1960).

61. U.S. COMMISSION ON CIVIL RIGHTS: VOTING, *supra* note 5, at 113.

62. *Id.*

63. *See, e.g.*, South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting); KATCHER, *supra* note 37, at 434.

64. 339 U.S. 276 (1950).

Table 1 – *Baker v. Carr* Timeline[65]

	Date	Event
1954-'55	5/17/54	Brown v. Board of Education I - Holding prohibiting segregation
	5/31/55	Brown v. Board of Education II - "All Deliberate Speed" Decided
	8/28/55	Emmett Till kidnapped and murdered
	12/5/55	Montgomery bus boycott begins, led by MLK, Jr.
1956	3/12/56	Southern manifesto from Congress pledging to overrule Brown
	9/29/56	Brennan appointed
	12/3/56	**Kidd v. McCanless denied certiorari**
1957	9/3/57	First day of classes at Central High School, Little Rock, AR
	9/9/57	Civil Rights Act of 1957 (first since Reconstruction), creates Civil Rights Commission
	9/24/57	Federal troops to Little Rock
1958	9/1/58	Public Schools in Little Rock closed for a year
	9/12/58	Cooper v. Aaron decided
1960	**1/30/60**	**Gomillion v. Lightfoot notice of appeal filed**
	2/1/60	Sit-ins begin in Greensboro, NC
	3/21/60	Petition for certiorari in Gomillion v. Lightfoot granted
	4/1/60	SNCC formed, Raleigh, NC
	5/4/60	Freedom Riders leave Washington, DC by bus
	5/6/60	Eisenhower signs Civil Rights Act
	5/14/60	Freedom Riders assaulted in Anniston, AL
	5/26/60	**Baker v. Carr appellants file notice of appeal**
	10/18/60	Gomillion v. Lightfoot argued
	11/8/60	Kennedy elected president
	11/14/60	**Gomillion v. Lightfoot decided**
	11/21/60	**Baker v. Carr - Court finds probable jurisdiction**
1961-'62	4/19/61	Baker v. Carr argued
	9/9/61	**Publication of 1961 Commission on Civil Rights Report on Voting**
	3/26/62	Baker v. Carr decided

A. *South v. Peters*—Justice Douglas' Early Recognition of the Racial Implications of Malapportionment

Justice Douglas' dissent in *South v. Peters* indicates his awareness that malapportionment could mask state-sponsored racial discrimination.[66] This 1950 case challenged the county unit system in Georgia—a system that based legislative representation on counties rather than population.[67] This system resulted in a vote from some rural counties being worth more than 120 times a vote from Fulton County, the location of Atlanta.[68] The Court, in a per curiam opinion, cited *Colegrove* in dismissing the appellant's claim for not presenting a justiciable issue.[69]

Justice Douglas, however, believed that the Equal Protection Clause of the Fourteenth Amendment made the matter justiciable.[70] He also argued that the rurally dominated Georgia legislature used the county unit system to deprive African Americans of their voting power.

65. Case information taken from Court records.

66. *See Peters*, 339 U.S. at 277 (Douglas, J., dissenting). Justice Black concurred with Justice Douglas' dissenting opinion. *Id.*

67. 339 U.S. at 277 (per curiam).

68. 339 U.S. at 278 (Douglas, J., dissenting).

69. *Id.* at 277.

70. *Id.* at 277 (Douglas, J., dissenting).

> Population figures show that there is a heavy Negro population in the large cities. There is testimony in the record that only in those areas have Negroes been able to vote in important numbers. Yet the County Unit System heavily disenfranchises that urban Negro population. The County Unit System has indeed been called the "last loophole" around our decisions holding that there must be no discrimination because of race in primary as well as in general elections. The racial angle of the case only emphasizes the bite of the decision which sustains the County Unit System of voting.[71]

The record, to which Justice Douglas refers, provides impressive evidence that Georgia officials sought to disenfranchise black voters through malapportionment. While *South v. Peters* was at trial, then Governor Eugene Talmadge declared that "[t]his Master Plan crowd [those seeking to make representation based on population rather than on geography] seeks to destroy our traditional Democratic White Primary and our County Unit System of voting. Destruction of one, they know will make the death of the other an easy matter for them."[72] A few months later, Governor Talmadge declared during a radio interview, "There is more behind this suit [*South v. Peters*] than meets the eye. It is part of a master plan—to disfranchise the white people in rural areas and enfranchise the great horde of bloc voters in urban areas."[73] A footnote provided in the Court's record mentions that the term "bloc voters" was a well-understood and notorious euphemism for African American voters.[74]

Indicating the degree to which the general public recognized the county unit system as an instrument of racial disenfranchisement, the appellants in *South v. Peters* cite a contemporary regional newspaper article in a motion to the Court stating that:

> The County Unit System thus "heavily disfranchises the Negro population. Almost half of Georgia's Negroes live in the most populous counties. Here the Negro vote has been large. But the County Unit System cancels the Negro vote in these counties—the only counties where the Negroes have been able to vote in important numbers. In small counties, where any single vote is at a premium, Negroes generally have been denied the franchise."[75]

It would therefore seem that much of the public, many politicians, and at least some members of the Supreme Court of the United States recognized the racial implications of malapportionment as early as 1950.

Thirteen years following *South v. Peters*, shortly after the Court had decided *Baker*, a new suit challenging Georgia's county unit system appeared before the Court. *Gray v. Sanders* was filed in the Northern District of Georgia literally within hours of the *Baker* decision.[76] Reaching the Supreme Court in 1963, Justice Douglas wrote an almost

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71. *Id.* at 278 (Douglas, J., dissenting).

72. Brief for Appellant on Petition for Rehearing at 13 n.11, South v. Peters, 339 U.S. 276 (1950) (quoting The Statesman (Editor: The People; Associate Editor: Eugene Talmadge) December 19, 1946).

73. *Id.*

74. *Id.* (explaining Talmadge's terminology).

75. Motion to Advance and Expedite Hearing and Disposition of Case and Brief in Support Thereof for Appellant at 14, South v. Peters 339 U.S. 276 (1950) (quoting New South (Southern Regional Council, Atlanta, GA), Vol. 4, Nos. 5&6, 1949)).

76. Gray v. Sanders, 372 U.S. 368 (1963). *See* CRAY, *supra* note 40, at 384.

unanimous majority opinion that overturned *South v. Peters*.[77] In *Toombs v. Fortson*, a similar case filed contemporaneously with *Gray v. Sanders*, the Northern District of Georgia held that the state senate's distribution of members unconstitutional.[78] The legislature reapportioned itself in response, resulting in the election of the first African American senator in Georgia since Reconstruction.[79]

B. *Kidd v. McCanless*—The Decision to Find Probable Jurisdiction in *Baker*

Justice Frankfurter began his dramatic dissent in *Baker* by declaring, "The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago."[80] Justice Frankfurter neither supports this striking statement with a footnote nor mentions this case by name. A little research indicates that the case to which he refers is *Kidd v. McCanless*.[81] A comparison of *Kidd* and *Baker* reveals almost identical facts. The differences between the two are mostly procedural. One significant difference is that while the plaintiffs in *Baker* initiated their suit in a federal district court,[82] the plaintiffs in *Kidd* brought their claim in a Tennessee court.[83] Also, unlike the district court that dismissed the *Baker* suit for want of jurisdiction and failure to state a claim, the lower court in *Kidd* ordered the state legislature to reapportion its districts on the basis that the 1901 Act in question had expired.[84] On appeal, the Supreme Court of Tennessee in *Kidd* reversed the lower court on the theory that declaring the expiration of the 1901 Act meant that the state legislature operated unconstitutionally.[85] Because an unconstitutionally-formed legislature could not theoretically reappropriate itself in a constitutional manner, the Supreme Court of Tennessee reversed the decision.[86]

The Court that denied certiorari on *Kidd* was largely the same as the one that found probable jurisdiction in *Baker* only five years later. Within this timeframe, only two justices had been replaced. Justice Stewart replaced Justice Burton and Justice Whittaker replaced Justice Reed. Interestingly, a review of the denial of certiorari indicates that the Court justified its decision on Justice Frankfurter's opinion in *Colegrove*.[87] One would think that Justices Black and Douglas might have dissented in the decision to deny certiorari to *Kidd* given their dissents in *Colegrove* and *South v. Peters*. Nevertheless, the denial in *Kidd* was unanimous,[88] implying perhaps that the Court in 1956 viewed Justice Frankfurter's plurality opinion regarding voter apportionment as uncontroversial. Another possibility is that the more liberal wing of the Court believed the placement of *Kidd* in a Tennessee court, with its claims based more on the state constitu-

77. Justice Harlan dissented. *See Gray*, 372 U.S. at 382 (Harlan, J., dissenting).
78. 205 F. Supp. 248 (N.D. Ga. 1962).
79. *See* HANSON, *supra* note 2, at 58.
80. 369 U.S. at 266–67 (Frankfurter, J., dissenting).
81. 352 U.S. 920 (1956).
82. 369 U.S. at 188.
83. 292 S.W.2d 40, 41 (Tenn. 1956).
84. *Id.*
85. *Id.* at 44.
86. *Id.*
87. 352 U.S. at 920.
88. Justice Frankfurter refers to the decision as unanimous in his dissenting opinion. *Baker*, 369 U.S. at 266–67 (Frankfurter, J., dissenting). The actual decision dismissing the petition, however, is a *per curiam* opinion that does not expressly state whether it was unanimous. 352 U.S. 920 (1956).

tion than on the federal constitution, made the justification of federal jurisdiction on such a political issue too difficult. Perhaps the more liberal wing, therefore, decided to bide its time for a better opportunity to shelve the political question doctrine of *Colegrove* and to extend a broader interpretation of the Equal Protection Clause.

A number of significant historical events in the civil rights movement also occurred between when the Court denied certiorari in *Kidd* and when it found probable jurisdiction in *Baker*, as Table 1 illustrates. Just to name a few, the nation witnessed the riots in Little Rock in response to school desegregation, the beginning of sit-in protests, and the assault on the Freedom Riders. These events very well could have influenced the justices and made them more receptive to *Baker's* claim than they were to *Kidd's* claim five years earlier. Following the Court's decision in *Gomillion v. Lightfoot*,[89] the majority of the Court also possessed a strong enough legal foundation to challenge *Colegrove's* political question doctrine and declare apportionment questions justiciable.

C. *Gomillion v. Lightfoot*—The Warren Court Becomes Aware of the Problem

A week prior to the Supreme Court's finding probable jurisdiction in *Baker v. Carr*,[90] the Court held unanimously in *Gomillion v. Lightfoot* that redistricting so as to discriminate against African Americans violated the Fifteenth Amendment.[91] The timing of *Baker* with respect to *Gomillion* suggests an association by the majority of the Court between racially-animated voter discrimination and the broader topic of urban/rural discrimination. At least one author has gone so far as to suggest that *Gomillion* opened Chief Justice Warren's eyes as to how legislative apportionment could effect state-sponsored racial discrimination and encouraged the Court to find probable jurisdiction in *Baker*.[92]

The petitioners in *Gomillion* were African American residents of the City of Tuskegee, Alabama. They brought an action in the United States District Court for the Middle District of Alabama, seeking a declaratory judgment that the legislature's redistricting of Tuskegee from a square to a twenty-eight-sided figure denied them equal protection under the Fourteenth Amendment and the right to vote under the Fifteenth Amendment.[93] The redistricting resulted in the removal from the city of all but four or five of its 400 black voters while not removing a single white voter or resident.[94] The district court dismissed the complaint for failure to state a claim upon which relief could be granted.[95] The court of appeals subsequently affirmed.[96]

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89. 364 U.S. 339 (1960).

90. Court documents indicate that the appellants in *Baker v. Carr* filed their petition on May 26, 1960. The Court heard argument on *Gomillion* on October 18, 1960. The Court decided *Gomillion* on November 14, 1960 and found probable jurisdiction on *Baker* on November 21, 1960.

91. *See Gomillion*, 364 U.S. at 348.

92. *See* CRAY, *supra* note 40, at 381. Although it is certainly plausible that *Gomillion* awakened Chief Justice Warren to how malapportionment could disguise racial policies, Cray bases this statement upon an apparent speculation.

93. U.S. CONST. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

94. *See Gomillion*, 364 U.S. at 341.

95. 167 F. Supp. 405 (D.C. Ala. 1958).

96. 270 F.2d 594 (5th Cir. 1959).

Chief Justice Warren, as a testament to his oft-touted genius in assigning opinions,[97] delegated responsibility for the opinion to Justice Frankfurter, thereby giving the author of *Colegrove* an opportunity to distinguish the two cases and to comment on how the Constitution addressed the facts of *Gomillion*. In his opinion, Justice Frankfurter provided a more nuanced analysis of the political question doctrine he crafted in *Colegrove*. Above all else, Justice Frankfurter wanted to ensure that the Court's record on civil rights remained unblemished.[98] To do so, he had to hold that the political question doctrine could not completely shield state legislative conduct from judicial review. Justice Frankfurter wrote, "[T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."[99] In so holding, though, Justice Frankfurter implied that the political question doctrine did not provide an absolute shield for state legislative conduct. With this concession, Justice Frankfurter also undermined the principal barrier to the Court's hearing of *Baker*.

Justice Frankfurter apparently sought to cushion this blow to the political question doctrine by emphasizing that because of the racial implications in *Gomillion*, the Fifteenth Amendment provided the jurisdiction and remedy. He was notably silent as to the relevance of the Fourteenth Amendment, the basis of the claim in *Baker*. While Justice Douglas signed on to Justice Frankfurter's opinion, he adhered to his dissent in *Colegrove* that the Fourteenth Amendment constitutes constitutional authority for hearing claims regarding voter apportionment.[100] In the only concurring opinion in *Gomillion*, Justice Whittaker also contended that the Equal Protection Clause provides sufficient authority for district courts to find jurisdiction over such claims, thereby making the majority's insistence on the Fifteenth Amendment redundant.[101]

By implying that the political question doctrine was not an absolute shield and not clarifying his opinion as to the application of the Equal Protection Clause to non-racial apportionment claims, Justice Frankfurter provided the more activist wing of the Court with sufficient grounds to challenge *Colegrove's* ability to dispose of *Baker*. Much to Justice Frankfurter's chagrin, Justices Warren, Brennan, Douglas, and Black all voted to find probable jurisdiction in *Baker* a week after the Court released its opinion on *Gomillion*, with the remaining justices justifying their contrary vote on the precedent of *Colegrove*.[102]

V. THE ARGUMENT FOR WHY *BAKER* HAS NOTHING TO DO WITH RACE

The best argument for why race is not an issue in *Baker* is because neither the various briefs nor the majority opinion address it. Moreover, at oral argument, Justice Douglas asked Charles Rhyne, Baker's attorney, "This [case] is not an inequality based upon racial discrimination, is it?"[103] In answer, Rhyne declared that the case had noth-

97. *See* SCHWARTZ, *supra* note 20, at 418.
98. *See* GRAHAM, *supra* note 41, at 223.
99. *Gomillion*, 364 U.S. at 344–45.
100. *See id.* at 348.
101. *See id.* at 349.
102. *See* SCHWARTZ, *supra* note 20, at 411–12.
103. *See* 56 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 3, at 551.

ing to do with racial discrimination.[104] At first glance, given the Court's recent holding in *Gomillion*, it would seem that Mr. Rhyne underestimated the Court's responsiveness to race-based claims. However, had Rhyne argued that the case presented a race issue, he risked having the Court either affirm the district court's dismissal for failure to state a claim or provide a narrower holding on the Fifteenth Amendment that would bar a general recovery to urban voters. To obtain the appropriate recovery, Rhyne needed a holding based on the Equal Protection Clause of the Fourteenth Amendment not tied exclusively to any specific minority group.

That Justice Douglas asked Rhyne about the possibility of *Baker* presenting a race-based issue is significant insofar as he dissented in *South v. Peters* by arguing that malapportionment in Georgia masked state-sponsored racial discrimination.[105] Justice Douglas recognized the racial implications of the legislative imbalance between urban and rural districts. His position on the power of the Fourteenth Amendment to address claims of apportionment also had been consistent, at least since he had joined Justice Black's dissent to *Colegrove v. Green* in 1946. In this dissent, Justice Black argued that the Fourteenth Amendment empowered the Court to find jurisdiction over questions of legislative apportionment at the state level.[106]

Despite Rhyne's unwillingness to make a race-based argument, Rhyne's choice of words in his brief and at oral argument evinced an awareness of the Court's sensitivity to racial matters. His brief included a section entitled "[G]eographic discrimination and racial discrimination are equally onerous."[107] This section addressed the artificiality of any distinction between racial and geographic discrimination and cited cases using the Fourteenth Amendment rather than the Fifteenth Amendment to strike down discriminatory laws.[108] At oral argument, Rhyne was even more direct:

> I think it is a fair summary of the facts to say, as Mr. Chandler has said so many times, that the real question here is whether or not you are going to have two classes of citizenship in Tennessee, half slave and half free, or at least one-third free and two-thirds slave, because there is no way that you can get out of this illegal strait-jacket without some federal assistance.[109]

Archibald Cox, the Solicitor General for the United States who participated as an *amicus curiae* on behalf of Baker, employed similar rhetoric at oral argument when distinguishing *Gomillion*: "It is unsound to distinguish *Gomillion* from the present case on the ground that it arose under the Fifteenth Amendment. The Fourteenth Amendment protects the right to vote . . . and arbitrary geographical distinctions are scarcely less invidious than discriminations based upon race."[110]

Although both Cox and Rhyne kept race-based arguments to a minimum, they both appealed to race-based rhetoric to equate geographical discrimination with racial discrimination. While this point alone does not prove that the Court believed malappor-

104. *Id.*
105. *Peters*, 339 U.S. at 278 (Douglas, J., dissenting).
106. Colegrove v. Green, 328 U.S. 549, 570 (1946) (Black, J., dissenting).
107. Brief for Appellant at 30, Baker v. Carr, 369 U.S. 186 (1962).
108. *Id.*
109. *See* 56 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 3, at 559.
110. GRAHAM, *supra* note 41, at 251.

tionment fostered state-sponsored discrimination, Cox's and Rhyne's statements indicate their belief that such rhetoric would resonate with the Court after its unanimous decision in *Gomillion*.

VI. JUSTICE FRANKFURTER BELIEVED *BAKER* CONFLATED RACIAL AND GEOGRAPHICAL DISCRIMINATION

Justice Frankfurter unleashed a *tour de force* in dissent.[111] He believed the majority opinion compromised the Court's apolitical reputation by illegitimately applying group discrimination law to a strictly political issue relegated to the states.[112] His outrage at the Court's departure from *Colegrove* stemmed from his belief that the Court was miring the judiciary in a "mathematical quagmire"[113] of redistricting that would undermine "public confidence in its moral sanction."[114]

Justice Frankfurter accused the majority of conflating racial and geographic discrimination.[115] He emphasized in a footnote that the case is not a North/South issue;[116] rather, it concerns an apportionment issue affecting states throughout the country. Later, he asserted, "This is not a case in which a State has . . . denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. What Tennessee illustrates is an old and widespread method of representation—representation by local geographical division."[117]

Justice Frankfurter accused the majority of intervening in state political matters on the false presumption that geographical discrimination was somehow equivalent to racial discrimination. In a memo written to Justice Stewart during deliberations, Justice Frankfurter argued that the type of discrimination confronted in *Baker* involved "circumstances different 'in kind'" from either racism or discrimination based on other factors.[118] "Disallowing all Christian Scientists or Jews to vote, or to reduce votes in any county that has Christian Scientists or Jews," he argued "would present circumstances different 'in kind.'"[119] Justice Stewart was concerned that not extending the reasoning of *Gomillion* to *Baker* could foster other forms of discrimination not touching directly upon race.[120] The fact that Justice Frankfurter could only distinguish these more pernicious forms of discrimination from geographic discrimination by characterizing it as "different in kind," however, proved unpersuasive for Justice Stewart. If the Court could authorize jurisdiction in more controversial areas like desegregation, Justice Stewart probably figured that it could do so in an arguably less controversial area of discrimination that was harming a majority of voters, i.e., urban residents.

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111. *See Baker*, 369 U.S. at 266 (Frankfurter, J., dissenting).
112. *Id.* at 267 (Frankfurter, J., dissenting). ("The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex.").
113. *Id.* at 268 (Frankfurter, J., dissenting).
114. *Id.* at 267 (Frankfurter, J., dissenting).
115. *See id.* at 300 (Frankfurter, J., dissenting).
116. *Id.* at 269 n."*" (Frankfurter, J., dissenting).
117. *Id.* at 300 (Frankfurter, J., dissenting).
118. SCHWARTZ, *supra* note 20, at 415.
119. *Id.* (footnotes omitted).
120. *See id.*

The other justices ultimately did not share Justice Frankfurter's faith in his version of the political question doctrine. The fact that the federal district and appellate courts in *Gomillion* used *Colegrove* to uphold racially discriminatory districting indicated how *Colegrove* could shield racist state officials from judicial review. Justice Frankfurter's doctrine also provided little guidance as to when courts possessed jurisdiction over discrimination. This confusion and the recognition that legislatures could use *Colegrove* to perpetrate racially-charged policies with impunity appear to have been the deciding factors underlying the majority opinion in *Baker*. Some members of the Court may have been more interested in reshaping representative government than in the question of whether racial discrimination was implicit in *Baker*. However, the Court's decision to find probable jurisdiction in *Baker* only a week after deciding *Gomillion*, Justice Douglas' questions about racial discrimination at oral argument, and the racial insinuations made by Charles Rhyne and the Solicitor General suggest that race was an implicit issue in *Baker*.

VII. AFTERMATH OF *BAKER*

By 1964, congressional opposition to the Supreme Court's reapportionment decisions took two forms: (1) an effort to amend the Constitution; and (2) jurisdiction stripping.[121] The House passed a bill for jurisdiction stripping by a vote of 218 to 175, with most support coming from Republicans and Southern Democrats.[122] The Senate, however, proved less adamant in seeking to restrict jurisdiction and did not pass the House bill. A key argument against the proposed amendment to the Constitution was that such an amendment would empower states to dilute the rising strength of the African American vote.[123] The Senate vote failed with fifty-seven voting in favor of the amendment and thirty-nine against, seven votes shy of the necessary two-thirds.[124]

Congressional opposition to apportionment did not prove overwhelming, as evidenced by the successful passage of the Voter Rights Act of 1965. Congress passed the Act three years after *Baker* to improve African Americans' ability to vote, especially in the South. Interestingly, Charles Rhyne seems to have predicted such a legislative response during oral argument in *Baker*. Rhyne argued that the Supreme Court did not need to go so far as to decide that there was a violation of the Fourteenth Amendment.[125] Rhyne asserted that the Court only needed to hold that federal courts possessed jurisdiction over questions regarding legislative apportionment.[126] It would then be up to the district courts to determine whether *Baker* in fact stated a cause of action.[127] In so doing, he hoped that the Tennessee legislature, under pressure from the judiciary, would reapportion as had the legislatures in New Jersey and Minnesota after their respective state courts asserted jurisdiction over claims of apportionment.[128] Rhyne's prediction turned out to be true insofar as state legislatures in general began responding once the

121. *See* BAKER, *supra* note 9, at 135.
122. *Id.*
123. *Id.* at 137.
124. *Id.*
125. 56 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 3, at 563.
126. *Id.*
127. *Id.* at 565.
128. *Id.* at 564.

Supreme Court declared that federal courts possessed jurisdiction over apportionment.[129] The Voter Rights Act of 1965 embodied the federal government's response to the issue of malapportionment and other restrictive means employed by the states to deny the vote to African Americans.

The Voter Rights Act sought to combat the institutional denial of the vote to blacks. It also became a means by which to promote the election of black officials.[130] The Supreme Court's presence in the area of representation expanded rapidly after the passage of the Voting Rights Act in 1965. Following passage of the Act, new statutory causes of action proved less cumbersome and more effective than constitutional claims.[131] In response to passage of the Voter Rights Act, Chief Justice Warren declared, "Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."[132] Within five years of its signing, registration of blacks in the South nearly doubled, from 29% to 56%.[133]

VIII. CONCLUSION

In a broadcast interview two days after his retirement in 1968, Chief Justice Warren asserted, "I think the reapportionment, not only of State legislatures, but of representative government in this country is perhaps the most important issue we have had before the Supreme Court."[134] This comment is significant in light of the fact that Chief Justice Warren, as governor of California, oversaw one of the most malapportioned states in the country and strongly resisted an effort to reapportion the state legislature in 1948.[135] While serving on the Supreme Court, he admitted to his clerks that he had been wrong on the issue when he was governor.[136] Perhaps he had changed his mind after acknowledging that malapportionment impeded representation of racial minorities and urban majorities. This Note has argued that the civil rights movement, the intransigence of state officials in effecting desegregation following *Brown v. Board of Education*,[137] and the leadership of the Kennedy Administration indicated to Chief Justice Warren and the other justices of the need to remedy malapportionment. Although race might not have been the deciding factor in *Baker*, a review of the events surrounding the case indicates that the Court was aware that malapportionment could be as much a racial issue as a matter of urban/rural politics.

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129. *See* DIXON, *supra* note 3, at 139.

130. *See* CHRISTOPHER M. BURKE, THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT 85 (1999).

131. *Id.*

132. HUDSON, *supra* note 42, at 67.

133. *Id.* at 1.

134. SCHWARTZ, *supra* note 20, at 410 (internal quotations omitted).

135. *Id.* at 411.

136. *Id.*

137. 347 U.S. 483 (1954); 349 U.S. 294 (1955).