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PROPOSAL II AND THE NATIONAL INTEREST IN STATE LEGISLATIVE APPORTIONMENT

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Shortly after President Eisenhower asked Congress, in May, 1953, to permit the personal income tax cuts scheduled for January 1, 1954, to go into effect, I had occasion to lunch with Thurman Arnold. I asked Mr. Arnold what he thought of the impending tax cut and he replied, "Fine, we can enjoy it privately and kick like hell publicly." Remember, this was before we were told by President Kennedy and President Johnson that what we can do most for our country is to pay less taxes.

My initial reaction to the Supreme Court's decision in Baker v. Carr¹ was like Thurman Arnold's response to President Eisenhower's first venture into deficit financing. As a private citizen, suburbanite and member of the Democratic Party, I relished the result. But as a student of constitutional law, I agreed with Mr. Justice Frankfurter that legislative apportionment was none of the Supreme Court's business. I intended to kick about it publicly — at this symposium, in fact.

However, as I studied the three so-called states' rights amendments to which our symposium is devoted, I came to doubt my original conclusion that the Supreme Court had overstepped the bounds of its proper role in our democracy when it decided Baker v. Carr.

Provisions of Proposal II. For our immediate purpose, however, it is important to point out that even those who agree with Mr. Justice Frankfurter's dissenting opinion in Baker v. Carr have reason to oppose the constitutional amendment which purports to overrule the Court's decision in that case. For the proposal — which I shall refer to as Proposal II — goes far beyond its alleged purpose. Section 2 of Proposal II provides that:

The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature.²

This section, however, is ancillary to the basic aim of Proposal II set forth in Section 1, which provides that:

No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.³

Proposal II and the State Courts. If Proposal II contained only its second section and, thus limited, became part of the Constitution, the Supremacy Clause of Article VI would still obligate the state courts to decide apportion-

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1 369 U.S. 186 (1962).
2 The texts of the three states' rights amendments are set forth in State Government, Winter 1963, p. 10.
3 Ibid. Section 3 of Proposal II provides that the proposed amendment "shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission." Ibid.
ment cases in the light of the requirements of the federal Constitution. In all likelihood, then, the state courts would not interpret these requirements uniformly, with the anomalous result that the existence and vindication of federal constitutional guarantees would depend upon the immaterial circumstance of where the case was brought.

Granting, then, that the proposed limitation on the federal judicial power is justified, it makes sense to impose the same limitation upon the state courts - so far as the enforcement of federal constitutional guarantees is concerned. This may have been all that the draftsmen of section 1 of Proposal II intended. But as drafted, section 1 would accomplish a great deal more than even its supporters have not sought to defend.

Proposal II and Racial Discrimination. Dissenting in South v. Peters, Mr. Justice Douglas remarked: "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down." But if these shameful objectives were achieved under the guise of state laws apportioning representation in state legislatures, section 1 of Proposal II would not only bar the federal courts from striking the laws down, but would also bar the state courts from striking the laws down under the authority of the federal Constitution.

We are not dealing with a remote contingency. If Proposal II had been in effect, no court could have prevented the racial discrimination which the Alabama legislature tried to perpetrate in Gomillion v. Lightfoot. The Alabama courts would have been bound by state law. Speaking for the Court in Gomillion v. Lightfoot, Mr. Justice Frankfurter held that federal court intervention was warranted precisely because abstention "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions."

Clearly, then, Proposal II would abridge the national guarantees of equality imbedded in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. But surely we will not permit the long, historic, and increasingly successful struggle of the Negro citizen for the right to vote to culminate in districting and apportioning schemes which deprive him of the fruits of victory.

Proposal II and Congressional Power. Under Proposal II, the Congress of the United States would also be deprived of authority to take action against the kind of racial discrimination involved in Gomillion v. Lightfoot. Section 1 would strip Congress of its powers under the enforcement sections of the three Civil War Amendments whenever legislative districting or apportionment was used as the vehicle for discrimination.

Proposal II and Presidential Power. Proposal II is aimed at the President, as well as Congress. It would curtail the powers of the President and Congress under Article IV, Section 4 of the federal Constitution which requires that the "United States shall guarantee to every State in this Union a Republican form of government." I agree with Mr. Justice Frankfurter that the Tennessee

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6 Id. at 345.
citizens and voters who brought suit in *Baker v. Carr* were asserting "a Guarantee Clause claim." As Professor Willard Hurst has written:

No issue is more at the heart of "a Republican form of government" than the basis on which men and women are represented in their legislature. Indeed, fair representation in a freely elected legislature is what is meant by "a Republican form of government."8

On no other basis, I would add, is there government with the consent of the governed.

The apparent aim of the advocates of Proposal II, to preserve the past rulings of the Supreme Court that the Guarantee Clause is not judicially enforceable, does not justify the obliteration of Congressional and Presidential power to enforce the Clause. It is not inconceivable that in a time of strife, districting and apportionment of representation in a state legislature might become the instruments of totalitarian rule in a particular state. It is pointless to insist that this will never happen here, or that, if it does, the President and Congress will act anyway, with or without an amendment. Professor Hurst reminds us that:

> A constitution has no more important function than to provide an accepted, legitimate framework of values and procedures within which men may confront crisis. . . . In declaring that no agency of the federal government may concern itself with subversion of the key element of the republican form of government of a state of the Union, the proposed amendment would reverse a basic value judgment written into the Constitution of the United States. In doing so the proposal would depart from a wise conservatism.9

It is impossible to know whether the advocates of Proposal II really intend to write into the Constitution the principle that it shall never be the nation's business how a state apportions representation in its legislature. That many of its supporters intend precisely such a result is evidenced by the fact that they insist on describing the three proposals as states' rights amendments. By now, however, their intent is immaterial. As of June 17, 1963, Proposal II, as presently worded, passed both houses of thirteen state legislatures (Arkansas, Idaho, Kansas, Louisiana, Missouri, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Texas, Washington and Wyoming) and one house of two state legislatures (Colorado and Mississippi). It also passed the unicameral legislature of Nebraska but was vetoed by Governor Frank Morrison. Both houses of the Utah legislature adopted a resolution somewhat different in language from that of the standard Proposal II.

*Proposal II and States' Rights.* Is Proposal II a states' rights amendment? This depends upon how we define "states' rights." It is a fact, however, that the Advisory Commissions on Intergovernmental Relations under both the Eisenhower and Kennedy Administrations blamed malapportionment in large part for the relative decline of state governmental power. In 1955, the Kestnbaum Commission warned:

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7 369 U.S. at 289-97.
9 Ibid.
If states do not give cities their rightful allocation of seats in the legislature, the tendency will be toward direct Federal-municipal dealings. These began in earnest in the early days of the depression. There is only one way to avoid this in the future. It is for the states to take an interest in urban problems, in metropolitan government, in city needs. If they do not do this, the cities will find a path to Washington as they did before, and this time it may be permanent, with the ultimate result that there may be a new governmental arrangement that will break down the constitutional pattern which has worked so well up to now.

One result of State neglect of the reapportionment problem is that urban governments have bypassed the States and made direct cooperative arrangements with the National Government in such fields as housing and urban development, airports, and defense community facilities. Although necessary in some cases, the multiplication of National-local relationships tends to weaken the State's proper control over its own policies and its authority over its own political subdivisions.

Paradoxically enough, the interests of urban areas are often more effectively represented in the National legislature than in their own State legislatures.\(^\text{10}\)

The present Advisory Commission similarly fears the "eclipse of state government because the people will turn to a more broadly responsive National Government to obtain their needs" if "minority interests are permitted to control the legislative branch of State Government. . . ."\(^\text{11}\)

Yet those who raise the banner of states' rights to justify Proposal II are not eager to make state government stronger and more responsible so that it will be able and willing to cope with the problems which now receive either national attention or no attention at all. For them, states' rights is synonymous with state inaction. Their only complaint is that state inaction is not accompanied by federal inaction, which is their ultimate goal.

Enactment of Proposal II would assure continued state inaction. It would also have profound implications for our federal system, particularly if the proposed method of amending the Constitution is also adopted. As a first step, for example, the minorities controlling the state legislatures could reach out to alter the popular character of the Presidency by changing the composition of the Electoral College. Obviously, these so-called states' rights amendments impinge upon vital national interests.

Proposal II and the Presuppositions of Democratic Government. These proposals for constitutional change have more general and, for a constitutional lawyer, more absorbing implications. Mr. Chief Justice Hughes taught us that behind "the words of the constitutional provisions are postulates which limit and control."\(^\text{12}\) I have argued elsewhere that Article V of the Constitution postulates the illegitimacy of an amendment which would destroy the democratic character of our system of government — for example, an amend-

ment, even if supported by a majority of the people, which would establish
the framework for totalitarian dictatorship in the United States. Certainly
such an amendment would upset the basic system of government envisaged
in the Constitution at least as much as an amendment depriving the states,
without their consent, of their equal representation in the Senate — which
Article V prohibits expressly. That the federal government will remain repub-
lican in form is a postulate on which the whole Constitution is based; there
was no need to make it explicit.

I am not suggesting that the Supreme Court should undertake to declare
that certain amendments to the Constitution are unconstitutional. The Court
itself would probably not survive the kind of change in government I am sup-
posing. But the people would then have the moral right to overthrow the anti-
constitutional totalitarian government established by constitutional amendment.

What has all this to do with Proposal II? Let us see. Under Proposal II,
minority rule of state legislatures could be perpetuated. Congress, the President
and the federal courts could do nothing about it. Nor could the people remedy
the situation in any state in which the state Constitution may be amended only
at the initiative, or under the control, of the state legislature. Based on past ex-
perience, too, the state courts cannot be relied upon for assistance even in cases
in which minority state legislatures ignore state constitutional provisions govern-
ing state legislative apportionment.

The critics of Baker v. Carr may protest that I am assuming its correct-
ness and that a particular system of districting or apportionment can be said
to enthrone minority, rather than majority, rule. But surely some systems of
districting and apportionment can easily be imagined which, even the critics
of Baker v. Carr would have to agree, do impose minority rule. In any case,
the crucial point is that adoption of Proposal II, together with the proposal
to revise the method of amending the Constitution, would make it impossible
for those who think that each state legislator should represent an approximately
equal number of people from ever having their way. No matter how large a
majority of the people they might win to their view, the path of further con-
stitutional amendment could be closed to them by the minority legislatures
of no more than thirteen states. It is inconsistent with the presuppositions of
democratic government to make the possibility of peaceful change depend ex-
clusively on the ability of the majority to persuade the minority to abdicate its
power.

How then can the advocates of Proposal II ever win by constitutional
means? They can not and should not win, if we adhere to democratic principles.
Every principle of democracy is flouted if a minority of the people effectuates
constitutional change in a manner which perpetuates its rule.

A Look at Baker v. Carr. Would there be more to say for Proposal II if

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14 It should be recalled that the proposal to revise the method of amending the Constitution would abolish the alternative now provided by Article V of submitting amendments pro-
posed by two-thirds of each house of Congress for ratification by conventions in three-fourths of
the states.
it had left intact the power of Congress and the President to act under the Guarantee Clause and Congress' power to enforce the Civil War Amendments? The answer to this question brings us closer to the merits of *Baker v. Carr* and to Mr. Justice Jackson's question as "to what extent Supreme Court interpretations of the Constitution will or can preserve the free government of which the Court is a part.?15

Before considering these questions briefly, I should say — in partial sympathy with the draftsmen of Proposal II — that it is difficult to draft a constitutional amendment overruling *Baker v. Carr* which would not have undesirable side effects. An editorial in the Journal of the American Judicature Society highlights one of the inevitable bad effects:

> [T]here is something very wrong in a movement to remove a court's jurisdiction to speak simply because of dissatisfaction with the way it has spoken. To do this is to attack not only the rule that was announced but also the court that announced it, and this is something we do not believe Americans really want to do.16

To this criticism, Dean Fordham adds:

> Were the approach freely used, the generality of the Constitution would be destroyed by a scattering of specific denials of power having no necessary sensitivity to the basic theory and design of the Constitution.17

While I approve these sentiments in general, I do not think they are pertinent here. The principled opposition to *Baker v. Carr* — voiced by Mr. Justice Frankfurter — is based on the argument that the issue of apportionment is not justiciable. From this standpoint, the principled purpose of a constitutional amendment overruling *Baker v. Carr* is to save the Court from itself. This purpose can be shared even by those who would like to see apportionment based exclusively on population. Such advocates of a constitutional amendment overruling *Baker v. Carr* would not necessarily be interested in writing into the federal Constitution any particular principle or rule for state legislative districting and apportionment. They would merely want to get the Supreme Court out of the "political thicket." How else can this objective be attained except by an amendment withdrawing the Court's jurisdiction over the kind of controversy involved in *Baker v. Carr*?

In judging the wisdom of the Court's involvement in apportionment issues, it must be remembered that the evils of malapportionment have been with us since the turn of the century. For more than 60 years, they have been ignored by a good many state legislatures and by the Congress of the United States. In *Baker v. Carr*, the Court pointed out, the Tennessee legislature, since 1901, had ignored the requirements of the State constitution that both houses of the legislature, with minor modifications, should be apportioned according to population. There was no provision for popular initiative and referendum to impose a new districting and apportionment plan. And the state courts had declined to afford any relief. Resort to the federal courts was the last

hope of the Tennessee citizens and voters who sought to revitalize the democratic process in Tennessee. In *Baker v. Carr*, the Supreme Court made itself and the lower federal courts available for this purpose. Mr. Justice Frankfurter, on the other hand, would have acknowledged that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."

No case was more likely to draw a sharp and bitter line between the "judicial activists" and the advocates of "judicial self-restraint" — and it did. So it is not surprising that Professor Emerson, representing the judicial-activist wing of the Yale Law School, should hail *Baker v. Carr* as "indeed a 'massive repudiation' of the school of thought of which Mr. Justice Frankfurter has been the intellectual and spiritual leader." Professor Bickel, representing those at Yale who extol the Court's "passive virtues," retorts: "It is an irony . . . that the super-democrats should look to the unrepresentative courts for an arbitrary decision that they resent when it is made by a faulty representative legislature, acting in concert with a majoritarian governor."

I do not find my views compatible with those of Professor Emerson or Professor Bickel. I agree with Mr. Justice Frankfurter that our system of judicial review "is a deliberate check upon democracy through an organ of government not subject to popular control." I am also a majoritarian — so long, I should again add, that no existing majority seeks to close the avenues of peaceful change to all future majorities. But I agree with Professor Hook that the "dictatorship of the majority" is a "bugaboo which haunts the books of political theorists but has never been found in the flesh in modern history." Consequently, I do not think that a Supreme Court declaration of constitutionality is needed to confer legitimacy upon an act of the legislature. Furthermore, it is positively baneful to assume that because the Supreme Court has upheld the constitutionality of a legislative act, it must be a good or wise measure. The legislature in a democracy should be able to make a fool of itself and still be accountable for its foolishness only to the people.

Nor do I look exclusively to the Supreme Court to be "the pronouncer and guardian" of the "enduring values" of our society. As I reflect upon our history, I must conclude that the enduring values of our society have been embodied more in the acts of our legislatures than in the decisions of the Supreme Court declaring some of these acts unconstitutional. Let us not forget

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21 FRANKFURTER, *OF LAW AND MEN* 17 (Elman ed. 1956).
25 For the values reflected in legislation, see Auerbach, *Law and Social Change in the United States*, 6 U.C.L.A. L. Rev. 516 (1959). Professor Bickel seems to assume, quite erroneously in my opinion, that because legislatures are guided by interest and expediency, their acts cannot also embody enduring values. This assumption leads him to justify the Supreme Court as "an institution which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle." Bickel, *op. cit. supra* note 24, at 25. But I do not know any "principle" which does not emerge from the "clash of interests." I also find it difficult to accept the enunciation and application of "enduring basic values" by 5-4 votes.
that in the first three decades of this century, the Supreme Court upheld the sanctity of private property against the claims of a majority of the people which the legislatures sought to satisfy. While no one should underestimate the historic significance of the Court's role in the current struggle for racial equality, let us also not forget that the Court held basic Civil Rights Acts of the Reconstruction Period to be unconstitutional in 1883,26 upheld the separate-but-equal doctrine in 189627 and as late as 1935 ruled, unanimously, that political parties were purely private organizations entitled to bar Negroes from voting in their primaries.28

Bickel's jibe at Emerson is warranted, but he fails to appreciate its full significance. Although Emerson thinks Baker v. Carr "moves broadly in the direction of developing and supporting procedures necessary for the effective operation of a modern democratic system,"29 he is not a "super-democrat." He proves this by preceding his praise of the Court for Baker v. Carr with an aside criticizing the Court for its decisions in the Smith and McCarran Act cases which he thinks "have no future in the democratic process."30 While Emerson professes to see the Court "as an institution for supporting and vitalizing the mechanisms of the democratic process without undertaking to supervise the results reached by that process,"31 it is a fair guess that he would not approve the decisions in the Smith Act and McCarran Act cases even if these acts had unanimously passed a Congress elected from districts of strictly equal population and had been signed enthusiastically by a President elected by an overwhelming majority of the popular vote.

But there is also paradox in the position of the champions of judicial self-restraint on the apportionment issue. Restraint is called for because of majoritarian assumptions — that the Court is reviewing the acts of representatives who are elected by a majority of the people and who can be turned out of office if their acts are disapproved by a majority of the people. But when malapportionment frustrates the possibility of majority rule, the case for judicial restraint is weakened considerably. Judicial intervention under these circumstances is not nearly as intolerable as the self-perpetuation of minority rule. No more suitable role for the Court can be envisaged than to make it possible for majority rule to function because, without it, the whole idea of self-government is debased. And past experience gives us every reason to think that the scope of freedom — including the protection of minority rights — will expand progressively as the electoral base of our representative institutions becomes broader and more democratic. Those who share Mr. Justice Frankfurter's intellectual outlook do him a disservice by disparaging the underlying assumptions of democratic self-government in order to discredit Baker v. Carr.

26 Civil Rights Cases, 109 U.S. 3 (1883).
27 Plessy v. Ferguson, 163 U.S. 537 (1896).
29 Emerson, supra note 19, at 64.
31 Id. at 68.