Science and the News

Brown vs. Baker: The Supreme Court Finds Itself in an Awkward Situation

Some Monday morning within the next few months, and more probably within the next few weeks, the Supreme Court will hand down its decision in the case of *Baker vs. Carr*. It is generally expected that the court will favor Baker, and, if so, the decision will be the most significant since *Brown vs. Board of Education*. Brown argued that segregation in the public schools was unconstitutional. Baker is arguing that the same "equal protection" clause of the 14th Amendment that makes school segregation unconstitutional should also be used to protect citizens in one part of a state from having their voting rights grossly diluted by citizens in another part of the state. In the case at hand, voters in some parts of Tennessee cast ballots that are worth 20 times as much as the ballots cast by voters in other parts of the state; statewide, one-third of the voters elect two-thirds of each house of the state legislature. Since the Tennessee situation is fairly typical of what exists in most states, a decision favoring Baker is expected to lead to a change in the balance of political power not only in Tennessee, but eventually in most other states. The readjustment will take a good deal of power away from rural voters and give it to city voters.

The rapid development of science and technology is close to the heart of the case. With the growth of modern technology the country has changed from a predominantly rural to a predominantly urban society. Problems of what is called "malapportionment" may have arisen in any case, but without the new technology and the development of concentrated population centers it fostered, the problem could not have been so widespread, and certainly it could not have been so gross. A good legal case can be made that any obviously unfair apportionment of seats in the state legislatures violates the constitutional rights of the people whose voting rights are diluted. But, for reasons that will be gone into later, it is most unlikely that the Supreme Court would involve itself in the question if the rise of the new technology and the resulting urbanized society had not made the problem a gross and widespread one. And it is doubtful that the court would be seriously considering intervening, even to correct gross and widespread malapportionment, if not for the fact that the advances in technology that helped increase the extent of the malapportionment problem also helped create problems of government that the malapportioned legislatures seem unable to deal with.

Not too surprisingly, the rural legislators have not been anxious to reapportion, that is, to vote themselves out of power. The worse the situation grows the more the rural legislators stand to lose and the less likely they are to reapportion. In Tennessee the state constitution says that a census must be taken and a reapportionment made every 10 years. The last time this was done was in 1901, which must have been a good year for reapportionment since a number of cases that have been brought to court in other states also look back to 1901 for the last reapportionment. The record for nonreapportionment goes to Vermont, which apportioned the state in 1793 and has let things slide ever since. As a result one rural vote in Vermont is worth as much as 600 city votes. Burlington (pop. 33,000) has one seat in the state senate; so does Victory (pop. 48).

The Baker case now before the Supreme Court is the sort that makes laymen suspect that much of the law is some kind of mad conspiracy among lawyers to confuse non-lawyers. From a non-lawyer's viewpoint, citizen Baker and his fellow city-dwelling Tennesseeans should have no trouble winning their case. The Tennessee legislature is, after all, obviously violating the state constitution in order to deprive some, indeed most, of its citizens of their proper voice in the state government. Also, Article IV of the federal constitution guarantees to every state a republican form of government, and Baker would seem to have a good chance of persuading the Supreme Court that a situation in which one-third of the state elects two-thirds of the legislators was not what the founding fathers had in mind when they wrote this guarantee into the constitution. From a lawyer's point of view, though, neither of these things has much to do with the case. Indeed it was the lawyers for Tennessee who, much to the discomfort of Baker's lawyers, kept insisting that the city folks were demanding a republican form of government, and the Justice Department, which came before the court to support Baker, was afraid the city folk had lessened their chances of winning the case by putting too much emphasis on the fact that the present apportionment violates the state constitution.

Lawyer's View

From a lawyer's point of view the violation of the state constitution is not the business of the federal courts. It is up to the state courts to interpret the state constitution. A couple of years ago the city dwellers asked the state courts to instruct the legislature to obey the state constitution. One state court thought this reasonable, but the state supreme court thought it unreasonable because to write such instructions would make the present apportionment unconstitutional, which, it reasoned, would leave the state with no legislature to make up a new apportionment, which, the court reasoned further, "would lead to the destruction of the state itself." The city dwellers found this reasoning specious and tried to tell the U.S. Supreme Court so, but the Supreme Court would have none of it and dismissed the case without a formal hearing, as it has done with all malapportionment cases since *Colgrove vs. Green* in 1946, when the majority (not really a majority, as will be seen) ruled that the courts "ought not to enter this political thicket." The city dwellers went back to Tennessee and filed a new suit, this time in the federal courts, charging their rights under the federal constitution were being violated. When the Supreme Court finally decided to take the case, a suspicion arose that it was getting ready to change its mind, since it

strained even a lawyer's imagination to find any important differences between the latest case and all the dozen or so previous ones that had been turned down peremptorily on the precedent of the Colgrove opinion.

The Colgrove case happened to involve congressional rather than state legislature malapportionment. In Illinois in 1946, when the case came up, the largest congressional district had nine times as many people as the smallest. Technically, the case, like other malapportionment cases, was not a case at "law" but at "equity." In informal terms, a law case is one where the courts have only to decide who is right; an equity case is one where the courts have to decide not only who is right, but go on to say what must be done. If Jones sues Smith a law suit will decide whether he is right and can collect damages. If the local authorities then refuse to help Jones collect his damages, you can have an equity case, where the courts have to decide not whether these local authorities have been behaving improperly, but, if so, to tell them what they must do. The courts have to decide law cases, but in equity cases they can decline to get involved. In the Colgrove case, and in all reapportionment cases since then, the courts *have* declined to get involved, principally on the grounds that legislative apportionment, like the guarantee of a republican form of government, is a political question, and that the courts should not get involved in deciding just what fair apportionment requires, or what constitutes a republican form of government. The court has taken the view that these are questions for Congress to decide.

In the Colgrove case the court decided not to intervene, but only three of the seven justices participating in the decision went along with the view that the court ought to refuse, as a matter of principle, to get involved in what Justice Frankfurter called "this political thicket." Three other justices took the opposite view, and voted to intervene. The deciding vote was cast by Rutledge, who voted against intervening, but on the ground that it was too close to the election for the court to prescribe an effective remedy, not on the grounds that the courts ought to refuse to take up such cases.

The Illinois legislature obviously interpreted this to mean that there would be a majority for intervention if a new suit were filed after the election in plenty of time for the court to work out a remedy before the next election. The legislature reapportioned the congressional districts the next year. But the Supreme Court itself has been acting as if a majority had voted in favor of nonintervention as a general principle, for it adopted the practice of simply citing Colgrove as authority for peremptorily turning down later reapportionment cases. The lawyers for Baker have tried to encourage the court to change its mind on intervening in apportionment cases by arguing that it never made its mind up, which is easy to argue if Colgrove is considered alone, but hard to argue if you look at what the court has done with all reapportionment cases since Colgrove.

What it all comes down to is that for all practical purposes the court has made up its mind, but that it had backed into the position, which will make it a bit easier for the court, if it chooses, to back out again. As a further practical matter, it will not be necessary for laymen to grasp all the fine points of the arguments to understand what the court is doing, since the decision, like other major decisions of the Supreme Court since George Washington's time, will be more understandable in terms of practical considerations than in terms of the fine points of law.

Earlier this year, the court did intervene in a redistricting case when the Alabama legislature changed the boundaries of Tuskegee from a square into a peculiar 28-sided figure which by coincidence happened to leave every Negro voter out of the city. The case was closely similar to the general run of reapportionment cases in that it did not deny the Negroes the right to vote, which would have been obviously unconstitutional, it only arranged things so that the right to vote would not be very valuable. This, of course, is essentially what is happening to the urban residents in Tennessee and so many other states.

The court unanimously ruled the Tuskegee gerrymander unconstitutional. It drew a number of distinctions to separate the case from the malapportionment cases, but as a practical matter it had entered the "political thicket" of reapportionment and gerrymandering, and for a very practical reason which did not appear in the court's written opinion: Negroes have been making painfully slow but, to segregationists, painfully clear, advances in asserting their voting rights in the South. If the Supreme Court refused to intervene at Tuskegee most of these gains would go down the drain, for segregationists would feel they had a free hand to keep Negroes from getting any real voice in the government so long as they did not actually prevent Negroes from casting ballots.

The Tennessee case is more difficult. Congress had made it comparatively easy for the Supreme Court to intervene in cases involving Negroes by passing a Civil Rights bill in 1957 with the plain purpose of making it easier for Negroes to get help through the courts. This did not really give the courts any more power than they already had. Its importance was that it indicated congressional approval for the federal courts to involve themselves in questions of discrimination in voting rights within the various states. But there was nothing to indicate that Congress was encouraging court intervention in the general run of malapportionment cases. So the problem for the Supreme Court is that if it intervenes in the Tennessee case it will be expanding its jurisdiction to an area that has so far been left to Congress, and it will be using (some will say abusing) the power of the Supreme Court to tell the states how to run their internal affairs. On the other side, if it refuses to intervene it will be leaving the city voters in many states with no way to assert their constitutional rights, since the legislatures are obviously not going to reform themselves; since most state courts, following the Supreme Court, refuse to intervene; and since there are enough Congressmen with a vested interest in malapportionment to make it nearly impossible for a bill encouraging the courts to act to become law.

This would not only deprive the city voters of an abstract right, but would leave the state legislatures permanently in the hands of the minority of rural voters, who have no particular interest in the educational, air- and water-pollution, and other problems that are most severe in the cities. The Court will also be putting itself in an awkward position for dealing with new segregationist malapportionment cases in the South, sure to arise, which may be harder to differentiate from the general run of such cases than was the Tuskegee gerrymander.

If the court finds for Baker, it will be deep in Frankfurter's "political thicket." New cases will come up where it will not be so clear as it is in

Tennessee that the legislature has no reasonable basis for refusing to reapportion, only a desire to keep a grossly disproportionate share of political power in the hands of the people who already hold it. If it refuses Baker's appeal, it will be dealing a hard blow to the efforts to find a remedy for what nearly everyone, even those who think the court should not intervene, feels is an increasingly unfair and unhealthy situation, and one that seems most unlikely to yield to any less awkward solution than court intervention.

The case has now been argued twice before the Supreme Court. It came up last spring, but the court came to no decision, and instead ordered another 3 hours of oral argument on the opening day of this year's session. Nothing much new came up in the re-argument, and it is supposed that the court ordered the re-argument primarily to give itself more time to consider the decision. So the justices have now had over 6 months to consider their decision, and it is a measure of the difficulty of the case that lawyers feel it is quite appropriate that the court should mull over the problem awhile.

When the decision comes, it will be based on a balacing of practical consequences, rather than a balancing of the fine points of the law. The suspicion here is that the court is going to intervene.—H.M.

Cooperation in Space: Soviet Scientists and Politicians Appear To Have Different Views

Western scientists have generally noted that their Soviet counterparts eagerly welcome East-West scientific cooperation. One of the areas, however, where virtually none has taken place is in the exploration and use of space. Last week there were indications that the exclusion of space from East-West cooperation is the subject of conflict between some Soviet scientists and their political chiefs.

The indications showed up in the chronology of events between acceptance and last-minute rejection of an American invitation for the Soviet Union to join in a first step toward international cooperation in satellite weather forecasting. The acceptance was the first departure from the U.S.S.R.'s rigid policy of rejecting U.S. attempts to develop cooperative space efforts. As such, it stirred considerable interest in the Administration, which, from its first days, has been seeking to interest the Soviets in joint space undertakings.

The first positive response to these U.S. efforts was the Soviet acceptance of an invitation to participate in the International Meteorological Satellite Workshop. This conference, sponsored by the U.S. Weather Bureau and the National Aeronautics and Space Administration, was held in Washington from 13 to 22 November. Its purpose was to familiarize other nations with the weather forecasting techniques derived from the American Tiros satellite system.

An invitation to the conference was extended in August to Andrei A. Zolotukhin, director of the main administration of the Soviet Hydro-Meteorological Service, by his American counterpart, Francis W. Reichelderfer, head of the Weather Bureau. On 20 October the Soviet official cabled that the meeting would be attended by two Soviet representatives, Victor A. Bugayev, director of the Central Forecasting Institute, and Sergey N. Losyakov, of the State Committee on Radio Electronics. The Soviet government applied for visas, and they were promptly issued.

The Polish Academy of Sciences responded, in a letter dated 31 August, that it would probably send representatives; the Czech Academy of Sciences cabled an acceptance on 7 November, less than a week before the conference opened. Neither the Czechs nor the Poles, however, applied for visas, and they showed no further interest in the conference.

There was no further communication from the Soviets until the day after the opening of the conference, when Reichelderfer was notified in a cable from Zolotukhin, "our representatives unable to attend. . . ." The cable requested "relevant papers if possible," but offered no explanation of the last-minute rejection of the invitation.

The incident is a provocative one for Kremlinologists seeking to divine the relationship between Soviet scientific and political circles. Barring bureaucratic muddle as an explanation—perhaps excluded too frequently in seeking explanations of mysterious occurrences in the Soviet Union—the incident conforms to Western observations that Soviet scientists and politicians appear to be at odds on the benefits to be derived from an East-West swap of space technology.

It has been reported that in private talks Soviet scientists have revealed an interest in cooperating in the establishment of a world-wide weather satellite system. On the political and propaganda fronts, however, the Soviet Union has remained rigidly aloof from joint space efforts and has denounced the weather satellite program as a screen for military reconnaissance. NASA and the Weather Bureau have strictly isolated their satellite efforts from the Air Force's Samos and Midas reconnaissance programs. But in the Soviet view of things, the oft-stated distinction between the United States' civilian and military programs is nothing but a transparent propaganda device. In denouncing the weather satellite program, the Soviets have made it plain that they regard it as nothing more than a successor to the U-2, which evokes in them memories of the most successful U.S. effort to get a look at their carefully guarded space establishment.

Although the most benign intentions have gone into the development of the Tiros weather satellite system, in design the satellite is a close cousin of the military reconnaissance satellites, and it merits no distinction in the view of Soviet military planners. These planners have made it clear that they see no Soviet purpose served by cooperation in the development of a device that can defy their efforts at secrecy.

The Weather Bureau says that it will respond to the Soviet request for the conference's scientific papers. In the existing Cold War chill, however, the traffic is likely to remain one way and limited, despite indications that some Soviet scientists do not share their leaders' views of who has most to gain from East-West cooperation in space. —D.S.G.

Educational Television: Setbacks in New York City and Boston

Adversity is no stranger to the promoters of educational television, but in recent weeks they have suffered two especially hard and unexpected blows.

The first occurred on 13 October, when fire destroyed the studios of WGBH–TV, the Boston educational station which had become a major link in a growing, nationwide educational network.

The second blow, delivered last week,