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BAKER v. CARR AND MINORITY GOVERNMENT IN THE UNITED STATES

JOSEPH M. CORMACK*

1. Minority Rule Through Unequal Voting Districts Abolished.

*Baker v. Carr*¹ effects a fundamental change in our state and federal governmental systems. It will bring genuine democracy to the states in place of rural oligarchy, and will change the relation of the states to the federal government. The urban majority of the people of the states will be able to get greater sympathy, justice and effective help from their legislatures, and will feel less necessity to turn to the Washington government for the solution of their problems.

This historic case, decided by the United States Supreme Court March 26, 1962, holds that under the equal protection clause of the fourteenth amendment a citizen of a state is entitled to vote, not just by dropping a piece of paper in a box, but by having his vote given reasonably equal weight with that of other citizens. The "political questions" doctrine,² that such matters can not be passed upon judicially, is as dead as the concept of "matrimonial domicile"³ in divorce law,⁴ and its demise here should be equally unlamented.

The principles of the decision mean, specifically, that districts for the election of members of state legislatures and Congress are required to be reasonably equal in size as to population, and that divergencies in population will have to be upon a legally justifiable basis, not simply a desire to have the state governed by a minority of rural voters rather than by a ma-

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¹ 82 Sup. Ct. 691 (1962).

² See, e.g. *Colegrove v. Green*, 328 U.S. 549 (1946).

³ Based on *Haddock v. Haddock*, 201 U.S. 562 (1906).

⁴ *Williams v. North Carolina*, 317 U.S. 287 (1942) and 325 U.S. 226 (1945).

majority of the voters as a whole. While the use of criteria other than population is not prohibited, it may be confidently predicted that the permitted total force of factors other than population will be relatively minor.

How the requirement of reasonably equal districts is to be carried out, and how far districts will be permitted to vary, are not passed upon (the case is simply remanded to the district court). These, however, are simply matters of mechanics, and should create no difficulty. Particularly is this true when a simple remedy is available—*weighted* voting. A court should order that until such time as a reasonable system of apportionment is established each member of the offending body (Congressional districts being handled upon a state-by-state basis) shall cast a vote weighted in accordance with the number of those represented by him, preferably the number voting at the last general election. The member representing the smallest number will cast one vote, each of the others a vote proportionately higher, (carried out to two decimal points). In this scientific age it is a simple matter to have an electrical machine tabulate the totals almost instantaneously.

Such a system will give perfect democratic government in this respect, and it is to be hoped that once such a system has been established no state (or the federal government) will desire to depart from it. The rural and isolated areas can then be given all the spokesmen they need (the loss of spokesmen having been used as an argument against reapportionment by population), without turning the state into a rural oligarchy. Setting up such a system will be simple for both the court and the legislature (or Congress), and will be relatively painless for the members already elected, in that no member will lose his seat. This possibility has been at least a subconscious factor preventing redistricting.

A great principle is involved. It seems unnecessary to do more than state that we believe in democracy, that democratic government consists of rule by the majority of the people, and that in order to completely have such rule voters must be given votes of reasonably equal value. Any departure from equality is that much of a loss from the standpoint of

achieving perfect democratic representation. The device of weighted voting would make *any* departure unnecessary.

The nature, extent and seriousness of the problem of unequal districts are matters of common knowledge, discussed in innumerable newspaper and magazine articles. It seems unnecessary to present statistics here. They are to be found in the opinions in the case.

Mr. Justice Brennan wrote the opinion of the court, joined by five others, Mr. Justice Whittaker, presumably because of illness, not participating in the decision. Three other members of the majority, Mr. Justices Douglas, Clark and Stewart, wrote concurring opinions. The other members of the majority were Mr. Chief Justice Warren and Mr. Justice Black. Justices Black and Douglas have long been in favor of judicial action against unequal apportionment. Justice Clark in his concurring opinion⁵ joins them in this emphatically.

Justice Brennan, in a painstaking opinion, speaking for the majority, discusses separately that the subject matter of the suit is within the jurisdiction of the federal courts,⁶ that the parties plaintiff have standing to sue,⁷ and, finally, that "this challenge to an apportionment presents no nonjusticiable 'political question'".⁸ Technically the decision is limited to holding that "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision".⁹ However, as it is necessary, in order to state a cause of action, that facts be alleged which if established will cause relief to be granted, this is a decision on the merits in favor of the principle of equal protection.

Justice Brennan takes great pains to limit the decision to rights under the equal protection clause, and to reject any pos-

⁵ *Baker v. Carr*, 82 Sup. Ct. 691, 733 (1962).

⁶ *Id.* at 700.

⁷ *Id.* at 703.

⁸ *Id.* at 705.

⁹ *Id.* at 720.

sible claims under the guaranty of a republican form of government in Article 4, Section 4, of the Constitution.¹⁰ He feels that such claims by their nature involve nonjusticiable political questions.¹¹ While it does not seem to make any practical difference upon which constitutional provision the result is based, it is difficult to agree with him in this. Since a republican form of government requires general representation of the people, rather than the government of professors suggested by Plato, any distinction between the two constitutional provisions would seem to be a distinction without a difference. This is indicated by Justice Douglas.¹² By his line of reasoning Justice Brennan is able to avoid overruling *Colegrove v. Green*,¹³ the leading "political question" case, but it might have been better frankly to do so, regardless of differences in the pleadings in the two cases. At any rate that seems to be its practical position.

Mr. Justice Frankfurter, speaking for himself and for Mr. Justice Harlan, dissented. He feels that the case "is, in effect, a Guaranty Clause claim masquerading under a different label",¹⁴ and it is difficult to contradict him on this. He advances the time-honored "political question" reasoning. He is appalled by the difficulties of framing relief,¹⁵ and the possibilities of "friction and tension in federal-state relations".¹⁶

Justice Harlan added a dissenting opinion in which Justice Frankfurter joined. He feels that the problem of apportionment is by its nature wholly legislative, and he even takes the extreme position that it would be constitutional for a state to maintain "an electoral imbalance between its rural and urban population . . . to protect the state's agricultural interests from the sheer weight of numbers of those residing in its cities".¹⁷ Such a

¹⁰ *Id.* at 706 and 715.

¹¹ *Id.* at 710.

¹² *Id.* at 723.

¹³ *Colegrove v. Green*, 328 U.S. 549 (1946).

¹⁴ *Baker v. Carr*, 82 Sup. Ct. 691, 754 (1962).

¹⁵ *Id.* at 767.

¹⁶ *Id.* at 768.

¹⁷ *Id.* at 774.

position may be characterized as endorsement of a permanent legally irremediable rural oligarchy. He concludes with the observation that "continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication".¹⁸

In conclusion, this great decision will in all probability result in the removal of a great obstacle to the achievement of effective democratic government. This obstacle would not otherwise be susceptible to removal by legal means, in view of the general refusal of state legislatures and executives to reapportion and in general what has been the failure of the courts to compel them to do so.

This is a fitting time to examine our governmental processes in general, and see what obstacles to the achievement of truly democratic government will still persist. In the course of our future history all of these should eventually be removed.

2. Separation of Powers and Checks and Balances—Minority Rule Through Preventing Action.

When a majority of the people for any reason is unable to take action which it desires, the minority opposed to change are governing¹⁹. Thus minority rule is more often negative than positive, election of the members of legislative bodies through unequal districts being an example of the latter. Either way, democratic government is not achieved.

Throughout the history of this country the overwhelming majority of Americans have believed in democratic government, that is, majority rule. Its merits will be assumed, and not argued here.

In our governmental systems, federal and state, checks and balances, designed to prevent hasty action, are a primary source of minority government. The traditional American separation of powers between the executive, legislative and

¹⁸ *Id.* at 776.

¹⁹ For a more comprehensive discussion see ELLIOTT, AMERICAN GOVERNMENT AND MAJORITY RULE (1916).

judicial branches is the most important factor in establishing checks and balances.

The objection to separation of powers, from the present standpoint, relates to that between the executive and the legislative. The judicial branch should be independent, and it never prevents the majority from taking action, except in the sense that compliance with the forms of procedure which have been set up is required. The exception includes the courts' application of constitutional limitations, which can be removed through amendment.

Separation of powers arose out of the fear of kings, who those establishing this country had good reason to fear would arise here. The ideas of Aristotle and later thinkers, and unhappy experiences with colonial governors and legislatures, were contributing factors. It was therefore natural that the founders of our country should provide for separation of powers. One would feel that it was inevitable, but for the fact that four times during their deliberations they voted to have the President elected by the Congress, eventually reversing themselves. The states, with less reason, followed the example of separation set before them by the federal government.

Our problems now are different, and obstacles to action by government are simply shackles upon ourselves. Another factor enters in to increase the importance of this, in that life and government then were infinitely more simple, and the times were correspondingly slow-moving. Dangers from delay did not occur to our forefathers.

The separation is not complete, there are, for example, powers of veto and impeachment, and the supplying of money to the executive by the legislative, but these limitations do not change the basic situation.

Today checks and balances have developed into a danger which should be removed. Caution is a fine quality, but is overdone when it invites paralysis. Now the executive head of a government should be elected by and responsible to the legislative branch. It is true that in general there have been no catastrophic results from the separation of powers in our

national government, although it is arguable that if President Wilson and Congress had cooperated after World War I the League of Nations would not have failed and Germany would not have been able to bring on World War II. In any event, it is undeniable that governmental paralysis through checks and balances has appalling possibilities, and they should not be permitted to develop into actualities.

Alexander Hamilton, this country's greatest constitutional writer, foresaw the danger from checks and balances:

In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of greatest importance, there is commonly a necessity for action. If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it, *the majority*, in order that something may be done, *must conform to the views of the minority* . . . (emphasis added)²⁰.

William B. Munro has observed:

The idea that there can be no liberty without checks and balances is one that naturally found favor in an age when Newton's mechanistic philosophy held sway over the minds of men; but in this twentieth century, with our new outlook upon the universe around us, it is far from commanding general acceptance. Checks and balances keep a government safe; but they also impede its endeavors to move forward. They serve the cause of *order* but not of *progress* . . . There are many thoughtful Americans who now believe that the theory of checks and balances is a delusion and a snare, that it has made for confusion in the actual work of government, that it divides responsibility, encourages friction, and has balked constructive legislation on numberless occasions.²¹

Arthur C. Millspaugh has pointed out:

Our governmental organization produces an excess of compromise. It makes bargaining a primary procedure and

²⁰ THE FEDERALIST NO. 22, at 106 (Beloff ed. 1948) (Hamilton).

²¹ THE GOVERNMENT OF THE UNITED STATES 77 (3rd ed. 1933).

a political habit. The causes, it would seem, lie in the separation of authorities and in their check on one another, in our too numerous assemblies, and in the sectional and localistic basis of representation. In many cases too *it is the minority, rather than the majority, that actually rules* (Emphasis added)²².

Cities have shown the way, with a city manager selected by and responsible to the council or commission, no other officials being elected. And what would we think of a private corporation endeavoring to operate under a system of checks and balances? Every corporation is an economic nation, some far from small ones, and its principles of efficiency should be applied to governments.

In some states checks and balances are multiplied, through having *several* state officials elected.

A legislative body with a Senate and a lower house is an important form of checks and balances. Adding the President or Governor, there is a three-way system set up. There are always great possibilities of non-cooperation and obstruction so that nothing can be accomplished. Here again cities and private corporations have set a good example, being governed by a single body, and the nation and the states should achieve their efficiency. One state, Nebraska, has already done so, and reports indicate that the single chamber has worked well.

If the United States Senate were to be abolished, it is logical to expect that the constitutional provision for two Senators to each state would fall of its own weight and not be an obstacle, upon the ground that there was nothing left to which it could apply.

If any state will establish a legislature of a single body, called the Senate, and have fifteen Senators each paid \$15,000, and giving all his time to his duties (or, better still, a twenty-five twenty-five system), it will develop the greatest statesmen of any state, and have the best set of laws.

²² TOWARD EFFICIENT DEMOCRACY 232 (1949).

3. Constitutions Difficult to Amend—Minority Rule Through the Dead Hand of the Past.

A constitutional provision which the majority of the people no longer believe in, but which they can not change through amendment, constitutes minority rule through the dead hand of the past. What was the will of the majority, as expressed in the provision, has become the will of the minority.

The stringent requirements for amendment of the United States Constitution²³ (many of the states require only a majority of the voters) were placed there as a compromise after terrific struggle and as a result of fear of the new government. The limitations on amendment were necessary to get the new government going, but now they amount to a self-imposed partial paralysis which the country should outgrow. A people should not declare themselves incompetent to handle their affairs. Thomas Jefferson, with this sort of thing in mind, exclaimed, "The earth belongs to the living, not to the dead".²⁴ He said, further:

"We may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."²⁵

Carrying his idea forward, Jefferson in the same passage rather whimsically made use of life expectancy tables, and figured out that at the expiration of eighteen years and eight months from the establishment of a constitution, over one half of the adults living at the time of the enactment will have died. Therefore, he reasoned, a constitution should contain a provision for its revision every nineteen years. In another famous passage he said:

I am not an advocate for frequent changes in laws and con-

²³ U. S. CONST. art. V: Submission by a two-thirds vote in both the Senate and the House of Representatives, with ratification by the legislatures of three-fourths of the states (there is a never-used provision that two-thirds of the states could require the calling of a national constitutional convention to propose amendments).

²⁴ Letter to J. W. Eppes, 1813.

²⁵ *Ibid.*

stitutions. But laws and institutions must go hand in hand with progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.²⁶

Alexander Hamilton said:

When the concurrence of a large number is required by the constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering that which it is necessary to do, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.²⁷

Robert M. McIver presented the matter thus:

. . . Where the constitution itself makes amendment difficult, by requiring, say, a two-thirds or three-fourths majority vote as a condition, a peculiar problem is raised. It may be argued that what the constitution does is to insure that public opinion is very definitely in favour of any proposed change before it can be translated into law. But it does more than this. It gives a *veto power against change to a minority*. If then all government rests on the will of the people, on what will does a system rest which confers on the minority a right to veto the will of the majority? It may be that the majority will acquiesce in, or even approve of, a limitation of this kind, but how can we be *sure* when by a past act it is deprived of present power? Does not a constitution of so rigorous a character bind the living will of the present? If we say with Austin that the sovereign in the United States is a three-fourths majority of the states, are we not really saying that a one-

²⁶ Letter to Thomas Kercheval, 1816.

²⁷ THE FEDERALIST No. 22 (Beloff ed. 1948) (Hamilton).

fourth minority is supreme? Have we not here an example of what happens wherever men try to assure a more-than-majority will? The endeavor ends in their *enthroning a minority will . . .*" (Emphasis added)²⁸

A government should have a written constitution, but its purpose, apart from providing for the structure of the government, should be limited to enshrining and preserving the basic principles which the people believe in, protecting them against violation and against change except by the vote of the people themselves. The constitution should not be permitted to become an instrument for defeating the will of the majority.

There is always danger to the stability of a government when there is no legal way to give effect to the desires of the majority of the people. If the matter is serious enough, there will be revolution. Much more serious examples could be imagined, but how would the American people feel if the Twenty-first Amendment, repealing the prohibition Eighteenth, had been ratified by the thirty-five most populous states, but never by another? At the very least there would have been widespread disrespect for law and disobedience of law, far beyond anything experienced during the period of prohibition.

Undue *delay* presents the same danger, in lesser degree. In the nature of things, under a system of law and order, a considerable amount of time will be consumed in effecting a change in the constitution of a nation (or of a state). This period will insure against hasty or ill-considered action, eliminating that objection to removing the extreme requirements which we now have. As Charles F. Emrick put it: "The constitution as it stands makes for obstructive delay in the righting of grievances, and pens up the ferment of society until it sometimes threatens the social order."²⁹

There is an old saying in the law, based upon observation of unforeseen eventualities, that "the dead hand is a clumsy hand". Let us remove it from control over our national life!

²⁸ THE MODERN STATE 376 (1926).

²⁹ THE COURTS AND PROPERTY (1914), reprinted in ORTH, READINGS ON THE RELATIONS OF GOVERNMENT TO PROPERTY AND INDUSTRY 82 (1915).

As to what *should* be required for national constitutional change, I would suggest that an amendment be proposed by a one-fifth vote of either the Senate or the House, or by ten Legislatures, with ratification by a majority of the voters in a national referendum. All other constitutional provisions for votes by Congress should be placed upon a majority basis.

4. Two votes to each State in the Senate—Minority Rule Preserved.

The Constitution provides that each state shall have two United States Senators,³⁰ an aggravated form of unequal districts. This provision constitutes an exception to the statement earlier made that *Baker v. Carr* abolished minority rule through unequal voting districts. This provision is protected in the Constitution in a special way by the stipulation that "no state shall, without its consent, be deprived of its equal representation in the Senate."³¹ Even this latter provision should not lead us helplessly to conclude that such a denial of democratic government must continue forever. The provision for two Senators may well be interpreted to apply only to the original thirteen states, as the others (with the exception of Texas) did not surrender any pre-existing sovereignty when admitted to the union; and the people of the thirteen states should be fair-minded enough not to wish to continue their unfair advantage throughout all future history. The rural voters of Oregon showed in a referendum that they did not desire an unfair advantage in state voting districts.³² The disparity between the populations of the states becomes greater continuously, and this process is certain to continue.

The effect of the equal number of votes in the Senate is magnified by the constitutional provision that in the Electoral College each state shall have a number of Electors equal to the number of Senators and Representatives to which it is entitled³³ and by all the special provisions for action by the Senate. Further, the Twelfth Amendment provides that in case no

³⁰ U. S. CONST., art. 1, § 3.

³¹ U. S. CONST., art. V.

³² NEUBERGER, ADVENTURES IN POLITICS 118, 123, 127, 129 (1954).

³³ U. S. CONST., art II, § 1.

candidate for President receives a majority of the votes in the Electoral College each state shall cast one vote in the House of Representatives. In time the Electoral College should give way to direct election of the President by the voters, and there should be national primaries. Selection of the President by Congress would of course eliminate the Electoral College.

Originally the provision for two Senators for each state was unavoidable, to get the new nation formed, just as the United Nations could not operate on votes cast according to population. The former colonies, due to their history of separate charters from the Crown, and separate Governors and legislative bodies, to say nothing of their equal votes under the Articles of Confederation in the Continental Congress, thought of themselves, when free, as independent nations. In no other way would they have united to form a new nation. However, in spirit we have long since passed from a union of nations to a single nation, and this unjust relic from our historic past must not continue forever.

Without waiting for the Constitution to be changed, the Senators could remove this unfairness through establishing the tradition that whenever a measure has been passed by a majority of votes in the Senate cast by Senators representing a minority of the people, a member of the majority will move to make the vote unanimous against the measure in order to conform to the will of the majority of the people. The procedure would be the same in reverse if a measure supported by Senators representing the majority of the people lost.

Incidentally, to the shame of the Senate, its rules permit filibusterers to set themselves up as minority rulers. If the Senate is to continue this absurd practice, it should if necessary stay in session twenty-four hours a day every day in the year in order to at least make an effort to get its work done. Along the same line, minority rule results when committees of a legislative body are given excessive powers.

5. A Revolution Narrowly Averted.

As long as majority rule is not legally possible the danger of revolution, peaceable or violent, will exist. If we believe in

the right of the people to govern themselves we must believe that the fundamental sovereignty of the people can not be destroyed, so as to prevent them for a thousand years from governing themselves by majority rule. If there is no legal way for them to proceed, and the situation is serious enough, they will have the same justification as Washington and Jefferson to take other steps. This is not being advocated, and it is to be devoutly hoped that the necessity will never arise. If the ideas set forth in this article are carried out it never will. (Any minority rule is to that extent taxation without representation.)

It is interesting to note that the Articles of Confederation preceding the Constitution provided that they could be changed only by consent of all the members of the Confederation.³⁴ This, however, did not prevent them from setting up the Constitution, which went into effect without waiting for all the former colonies to join.

Professor William Y. Elliott of Harvard said:

It does not require gifts of Pythian prophecy to foresee what will happen if the constitutional system is not reshaped to modern needs. If it remains unaltered legally it will be pulled down piece-meal by force of circumstances. An unworkable legislative system of checks and balances will be superseded in times of crisis by executive authority more and more Caesarian in character.³⁵

James MacGregor Burns wrote:

... Congress and the President [will go on living together]. But in the absence of party unity, wedlock would continue to be unhappy and unfruitful. It would not yield the teamwork in government that we sorely need. Rather we could expect recurrent periods of deadlock as Congress and the President wrestled for supremacy, ending in shift to presidential rule as the people in time of crisis called for action—any action. Could our democracy stand the strain?³⁶

³⁴ MILLSPAUGH, TOWARD EFFICIENT DEMOCRACY 266 (1949).

³⁵ THE NEED FOR CONSTITUTIONAL REFORM 206 (1935).

³⁶ CONGRESS ON TRIAL 211 (1949).

Mr. Thomas K. Finletter gave this warning:

If there is to be a move from the representative system in this country, it may be sudden or it may be gradual. If we run into extremely difficult conditions in our domestic economy and the people get the conviction that the quarreling between the Executive and Congress is incurable, they may throw over the whole attempt at self-rule with one stroke and authorize government by executive decree.

The gradual destruction of Congress is also possible. It could take the form of an increased use of executive orders instead of legislation in domestic affairs and of executive agreements instead of treaties in foreign matters, and of other devices to by-pass Congress. The condition might become so bad that public opinion would sanction the use of executive orders to the exclusion of congressional legislation. If that became the settled practice, whether all at once or by gradual steps, it would mark the death of representative government and the end of the attempt of the American people to govern themselves [beyond election of the President].³⁷

An incident in the presidential career of Franklin D. Roosevelt, largely unnoticed at the time and since, shows how close we have already come to a technical revolution. The occurrence is thus described by James MacGregor Burns:

Mr. Roosevelt's most sensational assertion of presidential power came nine months after Pearl Harbor. It had become clear during 1942 that the Emergency Price Control Act, passed by Congress early that year, could not hold the price line . . . In a Labor Day address on September 7 the President demanded that Congress repeal this provision. Mr. Roosevelt said bluntly: 'I ask the Congress to take this action by the first of October . . . In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and *I will act*.'³⁸

Congress passed the necessary legislation before the time limit set.

³⁷ *Can Representative Government Do the Job?* 20 (1945).

³⁸ CONGRESS ON TRIAL 180 (1949).

Roosevelt's contemplated action would have been a technical revolution and a most distressing precedent. It is true that there would have been no protest from the public, but throughout the world democratic government has often died with general approval, as seems to have been the case in France in recent years (written in April, 1962). Much has been written about steps taken by presidents in time of war in excess of their legal authority, but none of those actions, though showing the defects of checks and balances, involved a deliberate formal assumption of authority contrary to the constitutional system.

6. Thomas Wilson Dorr—A Revolution to Attain Majority Rule Attempted.

A unique episode in American history, the Dorr War, or Dorr Rebellion, as it is more commonly called, involved a miniature civil war in Rhode Island, representing an effort to free the state from an oligarchy entrenched behind an unamendable constitution. Thomas Wilson Dorr, who should be immortal, sacrificed his health and his life to establish democratic government. Like Nathaniel Bacon he suffered because he was a hundred years ahead of the times. The story is told in a great historical work, Arthur May Mowry's "The Dorr War".³⁹

Mowry commences his book:

A little more than fifty years ago [writing in 1900] the State of Rhode Island passed through a struggle which not only led to civil war within the State itself but also aroused great interest in other parts of the country. The contest was unique; in its causes it finds no parallel in the annals of any state of the Union; history records few civil wars in which the antagonism of parties was so intense, few which collapsed so completely and so suddenly, and yet few which accomplished a more definite result [the termination of the oligarchy]. It would be worthy of study, even were the causes less significant; but the causes illustrate, as almost no other episode of this [nineteenth] century, the development of democratic government.

³⁹ Published in 1901, by Preston & Rounds Co., Providence, R. I.

The noted historian Albert Bushnell Hart, in his highly commendatory Introduction to Mowry, says: "Perhaps the main lesson of the whole controversy, and the lesson to which Mr. Mowry especially addresses himself, is the power of strong, moderately phrased, and continuous public protest, and its superiority to forcible revolution." A purpose of this article is by treating basic causes, to assist in preventing the development of any occasion for another such chapter in our history.

Rhode Island in 1840 was still operating under the original Charter of the Colony granted by Charles II in 1663 (the other twelve original states had adopted constitutions). The Charter created the Colony as a corporation, the members, corresponding to stockholders, being the "freemen", which came to mean the citizens, of the various towns. The Charter contained no provision for amendment (though there was an unused provision that the General Assembly, the governing body, could make "new forms of government").

The Charter contained two features which gradually aroused intense hostile public opinion—restriction of the right to vote to certain property owners, so that only a minority could vote; and a fixed permanent apportionment of members of the Assembly to the various towns in a way which was fair under the original conditions, but which gradually became very unfair as the cities developed (the same evil dealt with by *Baker v. Carr.*)

Some leaders finally decided that something must be done. The ruling oligarchy showed no disposition to yield its privileged position, and under the Charter there was no legal way to correct conditions (in the earlier stages of the controversy President Tyler, appealed to by both sides, declined to exercise any initiative).

Under the leadership of Dorr, a Providence lawyer, the State Suffrage Committee sent pamphlets to the people of the towns, asking them to elect delegates to a convention, entirely apart from the government of the state, to frame a new Constitution. Amid increasing tension the convention met October 4th, 1841, and on November 18th voted to submit the Constitution which it had adopted to the voters in un-

official elections, to go into effect if approved by a majority of all the voters of the state. It was claimed by the Dorr group that the votes cast for the Constitution did represent a majority of all the voters, and it seems probable that this was true, although the claim was contested by the supporters of the old state government. The new government commenced operation, and elected Dorr Governor. He was inaugurated May 3rd, 1842, and before the New General Assembly delivered one of the great speeches of American history.⁴⁰

The pre-existing General Assembly had also called a "Freemen's" constitutional convention, and in 1842 it adopted a Constitution which was more liberal than the Charter, but which was rejected by the voters.

The state got to the verge of civil war. May 17th, 1842, Dorr, with a force of some two hundred men, made a bloodless and unsuccessful effort to capture the state Arsenal at Providence. Later he assembled a force of possibly five hundred armed men, who camped at Acote's Hill. The opposing Governor called out the militia, and again appealed to President Tyler. Tyler made it known that he would support the previously existing government. He did not pass upon the merits of the dispute, but took the position that he would support the established government until informed that another had taken its place (this action is said to have injured the Whig Party nationally).

This was the beginning of the end for Dorr. His followers began to rapidly desert him, and he fled the state June 27th, 1842, calling upon his adherents to disperse (the casualties were one killed and two wounded, all across the Massachusetts line). Dorr was later tried for treason against the state, and sentenced to life imprisonment. After having been held in jail several months awaiting trial, he spent a year in the penitentiary before he was pardoned by the General Assembly. Six years later, by which time he was a broken-hearted man, he was restored to his civil rights.

⁴⁰ A portion of it is to be found in MARK AND SCHWAB, *THE FAITH OF OUR FATHERS* 61 (1952).

After three more years the Assembly reversed the judgment of the Rhode Island Supreme Court that Dorr had been guilty of treason. Mowry states that now Dorr is "worn out in mind and body, without spirit or energy, grown old before his time". He died ten months later at the age of forty-nine, a martyr to his devotion to the principles upon which this country was founded. Doctor Hart says that "the Dorr Rebellion is one of the most distinct and striking incidents of the long American struggle for manhood suffrage".

In 1842, the year of Acote's Hill, the old General Assembly adopted a better Constitution to replace the one it had previously submitted to the voters, and which had been rejected by them. The new one was approved by the voters. While far from perfect, on the whole the new Constitution represented a victory for Dorr's ideas. It improved the apportionment of members of the General Assembly. Most writers feel that Dorr deserves the credit for this result. The Dorr struggle attracted intense national attention, and caused a great deal of discussion in Congress, but the debates went off on party lines, and nothing came of them (except weakening of the Whig Party).

On June 25th, 1842, the old, or Freeman's (anti-Dorr), government declared martial law. It was in full force for forty days, and was enforced with great harshness. Hundreds were arrested and held in confinement, and hundreds of houses were searched for hidden weapons or men. Sixteen persons were confined for three days in a cell twelve feet by nine feet.

Out of the martial law period arose the most famous "political questions" case in the history of the country prior to *Baker v. Carr*: *Luther v. Borden*, decided in 1849.⁴¹ While Luther, a moderator at a town meeting under the auspices of the Dorr group, was away from home, nine men, headed by Borden, broke into his home to arrest him. He sued for damages for this trespass, raising the question which of the two governments was the lawful one. The United States Supreme Court, Chief Justice Taney writing the opinion, held that it could not go into this—that when Congress continued to

⁴¹ 48 U. S. (7 How.) 1 (1849).

admit the Senators and Representatives from the old (anti-Dorr) government, its authority and its republican character were recognized "by the proper constitutional authority", and that the decision of Congress "could not be questioned in a judicial tribunal". In view of the physical condition which had existed and the action of Congress, it seems that the court acted properly in ruling that the question was "political" and not "judicial". The later error of the court has been in applying the doctrine to cases which it *could* handle.

The verdict of history, influenced by Mowry, is that Dorr was not justified in resorting to force, or in attempting even a peaceful revolution. Nevertheless, Mowry concludes the chapter on his personality and character:

Of whatever failings Thomas Wilson Dorr may be accused, his virtues clearly outrank them. Whatever he did to lose the esteem of his contemporaries is more than offset by the truth of the cause in which he was engaged. His trial and conviction were unnecessary, and his early death might have been postponed. If we call him a rebel, we must call him an honest rebel and one who sought only what seemed to him the true welfare of the people. If we condemn him for what he did, we must praise him for what he meant to do. And, after all, Thomas Wilson Dorr, though he never realized it, did bring a people's government to the people of Rhode Island.

It was more than a coincidence that in Rhode Island Thomas Wilson Dorr found oligarchy and left democracy.