AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Judicial Power and Constitutional Authority

Parker v. the State, ex rel. Powell, 133 Ind. 178 (1892)

The constitutional draftsmen in Indiana, as in many other states in the nineteenth century, well understood the danger of gerrymandered legislative districts. Since legislatures drew the political maps laying out the electoral districts that the legislators themselves would represent, there were clear conflicts of interest between the politicians and the citizenry of the state. Incumbent legislators who wished to retain office had an interest in drawing district maps that would make it easier for them to win reelection. The political interests that currently dominated the legislature had an interest in preserving their influence into the future, despite demographic and economic changes in the state. The political party that held a majority of the legislative seats at the time of reapportionment had an incentive to draw district boundaries in a way that would empower their partisan allies and freeze out their partisan foes. The "gerrymander," named after Jeffersonian Massachusetts governor Elbridge Gerry, was a creatively drawn legislative district that might weave through a state (creating the appearance of a salamander) to pick up the right mix of voters to maximize electoral gains of those drawing the districts. Although the gerrymander might be in the best interest of those politicians and interests who controlled reapportionment, it made the legislature less responsive to the changing desires of the people of the state as a whole.

The Indiana state constitution of 1851 (as amended) was typical in taking several steps to make the apportionment process reasonably fair. The constitution set the number of senators at fifty and mandated that the General Assembly would take a census of the male population over the age of twenty-one in the state every six years (the U.S. Constitution requires a new census every ten years). The fifty senate seats would then be apportioned by the legislature among the counties of the state based on its share of the voting-age male population. A single county could, depending on its share of the population, be entitled to more than one senate seat, but if a county was entitled to less than one senate seat then an electoral district would be drawn "composed of contiguous counties" and with no county being split into multiple electoral districts. These requirements at least limited the discretion of those drawing the electoral maps and encouraged some equality of representation.

Indiana was closely contested by the Democrats and Republicans in the late nineteenth century, and when the Democrats found themselves in control of the state legislature in 1891 they drew up a plan for legislative apportionment that favored themselves. The Republicans calculated that they would do better under the apportionment act of 1879, and arranged a suit by Simon T. Powell, a retired business and Republican Party activist, against Benjamin S. Parker, an elected county clerk and also a Republican, seeking a court order preventing Parker from administering the election of 1892 under either the new apportionment act or its predecessor of 1885. Although a Republican state supreme court, the justices were unwilling to go all the way back to the 1879 but instead reinstituted the Democrats' apportionment law of 1885. This proved to be the first of a series of court challenges to gerrymandered districting in Indiana.

JUSTICE COFFEY, delivered the opinion of the Court.

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. . . . [T]he contention is that the suit involves a political question, over which the courts have no jurisdiction. If this contention can be sustained, that is the end of the controversy, for this court will not attempt an adjudication in a matter over which it has no jurisdiction.

A political question is one over which the courts decline to take cognizance, in view of the line of demarcation between the judicial branch of the government, on one hand, and the executive and legislative branches, on the other. *American and English Encyclopedia of Law*, title, "Political Questions."

Such questions most generally arise when there is an attempt made to prevent the incumbents of either the legislative or executive departments of the government from the performance of some act which such incumbent claims the right to perform by virtue of his office, or to compel him to perform some act which he declines or refuses to perform.

Many illustrations of the rules by which such questions are governed are to be found in the adjudicated cases, among which are the cases of *Mississippi* v. *Johnson, President* (1867); *Georgia* v. *Stanton* (1868). . . .

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But in cases like the one now under consideration, where there is no effort to control, in any manner, the action of either of the other departments of the government, and where it is sought simply to determine the validity of an act of the legislative department, the decided weight of authority is, we think, to the effect that the question presented is not political but judicial, and that the courts have jurisdiction. This question has been so fully discussed and decided by the Supreme Court of Wisconsin, in the recent case of *State, ex rel. Lamb,* v. *Cunningham,* 83 Wis. 90 (1892), and in the case of *State, ex rel. Attorney General,* v. *Cunningham,* 81 Wis. 440 (1892), and in the case of *Giddings* v. *Blacker,* 93 Mich. 1 (1892), . . . that it would seem unnecessary to review it. It was determined in these several cases, which were all actions calling in question the validity of apportionment acts, that the question presented was a judicial question, of which the courts had jurisdiction; and such acts were adjudged by the courts to be invalid by reason of being in conflict with the Constitutions, under which the Legislature attempted to apportion the State for legislative purposes. In holding that the court had jurisdiction, the courts did nothing more than follow a long line of precedents to their logical results, as shown by the authorities cited in support of their opinions.

It has always been held by this court that it is its bounden duty, in all proper cases, to pass upon the validity of the acts of the General Assembly and to declare them void when in conflict with the Constitution of the State. Thus, as early as the case of *Rice* v. *State,* 7 Ind. 332 (1855), Justice Perkins said: "There are some propositions that may be regarded, we think, at this day, as being settled; * * * among them are these: that the Constitution of the State, relative to the acts of the Legislature, is the paramount or supreme law; that when the two conflict the acts of the Legislature must yield as utterly void; that it is the duty of the courts, in every case arising before them for decision, to decide and declare the law governing the case. * * * The duty of the courts to give construction to laws, and to declare void, or disregard because not laws, those legislative acts in conflict with the Constitution, grows, of necessity, out of this other duty of declaring what the law is."

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. . . . The Constitution forbids the formation of senatorial or representative districts of counties not contiguous. It is conceded that an act which violates this provision would be declared void for that reason, and that the courts would have jurisdiction, in a proper case, to adjudicate the matter. If the General Assembly should district the State in such a manner as to apportion to the south half ninety representatives, and to the north half ten only, no one would doubt that this would be as plain a violation of the Constitution as where it forms districts of counties not contiguous. What good reason can be given for holding that the courts may take jurisdiction in the one case and denying such jurisdiction in the other? It will not do to say that the courts have no jurisdiction in the latter case, because the General Assembly has a discretion in the matter of districting the State, for it can not be successfully maintained that the incumbents of any department of the government have a discretion to disregard the Constitution of the State. . . . We do not mean by this to be understood as holding that the courts have the power to interfere in any matter confided to the discretion of either the legislative or executive department of the government. . . .

But it is safe to say that when the acts of either of the three departments are in violation of the Constitution of the State, such acts are not within the discretion confided to that department. That the General Assembly has some discretion in the matter of districting the State for legislative purposes there can be no doubt, and there can be as little doubt that where it acts within this discretion the courts have no power to interfere. . . . If this were a case in which the appellee sought to compel the General Assembly to district the State in a particular manner, or even to act at all in any manner whatever, then

this line of authorities would be applicable; and, by reason of the independence of the several departments of the State government, we would hold, without hesitation, that we had no jurisdiction over the matter. The courts have no power to district the State for legislative purposes. That duty belongs to another department. The most the courts can do is, in a proper case, to pass upon the validity of a law enacted for that purpose, and, if such law is found to be in conflict with the Constitution of the State, declare it invalid, leaving the Legislature free to enact one that does conform to the Constitution. This is quite a different thing, we think, from undertaking to control legislative action or discretion.

Our opinion is that the question presented by the record in this case is judicial and not political.

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We approach the other questions in the case with much reluctance, and with a full sense of their gravity. Courts always approach questions involving the validity of statutes reluctantly, and out of this reluctance has grown two well known rules: *first,* that the court will never decide a question involving the constitutionality of a statute, if the merits of the case in which it is involved can be determined without such decision; and, *second,* the court will never declare a statute unconstitutional where there is any doubt upon the subject. To doubt the validity of a statute is to resolve in favor of its constitutionality. *Warren* v. *Britton,* 84 Ind. 14. . . .

. . . . The question is presented in the same manner as the question was presented in the case of *Giddings* v. *Blacker* and in the case of *People, ex rel. Carter,* v. *Rice, Secretary of State.* The case of *Giddings* v. *Blacker* was an action to enjoin the secretary of State, of the State of Michigan, from taking the necessary steps to hold an election for State senators, under an apportionment act approved in the year 1891, upon the ground that such act was unconstitutional, and to compel him, by *mandamus,* to proceed under an apportionment act approved in the year 1885. The case of *People, ex rel. Carter,* v. *Rice* was an action to enjoin the proper officers of the State of New York from proceeding to the election of senators and representatives, under an apportionment act approved in the year 1892, upon the ground that such apportionment act was unconstitutional, and to compel them, by *mandamus,* to proceed to such election under an apportionment act approved in the year 1879. . . .

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. . . . The cardinal principle of free representative government, that the electors shall have equal weight in exercising the right of suffrage is recognized and secured. Representation according to population is the rule fixed by these several provisions of our Constitution, and the General Assembly has no more discretion, in our opinion, to disregard this rule than it has to disregard any other plain provision found in that instrument. The enumeration, at the short periods of six years, was intended to secure a readjustment and correction of the inequalities that might arise from the growth or shifting of the population within that period.

In argument, it seems to be agreed that it was the intention to provide that, in making an apportionment among the several counties for legislative purposes, the integrity of the counties, when possible, should be preserved. This, we think, is true; and when that is done, it is plain that exact equality cannot be secured. But, because exact equality is not possible, the General Assembly is not excused from making such an apportionment as will approximate that equality required by the organic law of the State.

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It is said, however, that as to the fractions of the representative unit, the Constitution is silent, and that, therefore, the General Assembly has a discretion to provide for the representation of such fractions or to leave them unrepresented.

. . . . That the General Assembly has much discretion in the disposition of the fractions of the unit of representation cannot be doubted, but it is not a discretion beyond control. In so far as the Constitution secures equality in representation, it is not silent as to the disposition of fractions, and the Legislature must dispose of them with a view of securing that end, otherwise an apportionment could be made which would give to one portion of the State nearly double the representation given to other portions. Constitutional provisions are seldom, if ever, to be construed as merely directory.

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With these constitutional rules constantly in mind, we proceed to test the act of the Legislature under immediate consideration by them, with a view of determining its constitutionality. It is alleged in the complaint, and admitted to be true by the demurrer, that under the apportionment for legislative

purposes, as fixed by this act, forty-three counties of the State are formed in twenty-two districts, to each of which one senator is apportioned. Eleven of these districts, composed of twenty-three counties, contain, by the enumeration of 1889, 148,496 male inhabitants over the age of twenty-one years, while the other eleven, composed of twenty counties, contain only 99,609 such inhabitants.

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. . . . At the time our Constitution was framed, the convention had before it the history of the famous apportionment law of Massachusetts, passed on the 11th day of February, 1812, from which the word "gerrymander" originated. It is fair to presume that they had learned of the evils resulting from such a law, and that "the death and burial of this monster, in the year 1814, was celebrated throughout the country in prose and verse." By the provisions of our Constitution, prohibiting the division of counties in the formation of senatorial districts and requiring equality in representation, it is plain, we think, that the convention intended to put it beyond the power of the General Assembly to form districts upon the principle contained in the Massachusetts law. . . .

Under this law the unit for a representative is 5,510. Jay county, as shown by the enumeration of 1889, has 5,823 male inhabitants over the age of twenty-one years. It is denied a separate representative. As we have seen, it is agreed, in argument, that the constitutional provisions, above set out, were intended to secure the integrity of the counties. Jay county, having more than the representative unit, was, we think, entitled to a separate representative, and it was not within the power of the General Assembly to deprive it of such representative. This would seem to be too plain for argument.

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Our conclusion is that the act of the General Assembly, passed on the 5th day of March, 1891, notwithstanding the Governor's veto, purporting to redistrict the State for legislative purposes, is in conflict with the Constitution of the State, and is for that reason void.

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It seems to be well settled that one who is elected or appointed to an office under an unconstitutional statute, before it is adjudged to be so, is an officer *de facto.* Throop *Public Officers*, sections 628-637; Mechem's *Public Offices and Officers*, section 318; *State* v. *Carroll,* 38 Conn. 449 . . .

The rule that the acts of an officer *de facto,* performed before ouster, are, as to the public, as valid as the acts of an officer *de jure,* is too familiar to the profession to need the citation of authority. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all. *Case* v. *State,* 69 Ind. 46 . . .

If, at the next ensuing election, the State is without a valid law creating senatorial and representative districts under the enumeration of 1889, the responsibility must rest with the Legislature and not with the judicial department of the State government.

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Judgment reversed, with directions to the Circuit Court to sustain the demurrer of the appellants to the alternative writ of mandate.

JUSTICE ELLIOT, concurring

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. . . . The great men who framed our constitutional system knew and provided against the dangers of legislative usurpation of power, and the wisest among them united in devising checks upon it. The declarations of Madison and Washington are strong and clear, and no reader of history can misunderstand their meaning nor doubt their purpose. Jefferson thus expressed his conviction: "An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but one in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one should transcend their legal limits without being effectually checked and restrained by others." To preserve these checks, said a greater thinker than Jefferson, "must be as necessary as to institute them." [Washington's Farewell Address.] The assertion of the power of the judiciary, in the principal opinion, is not, as I believe, too strong; for I do not doubt the power or the duty of the court to preserve these checks by standing immovably against legislative encroachment, nor do I doubt that the duty is as clear where apportionment acts are involved as in cases concerning other acts.

To me it seems that the duty is, if possible, higher and sterner in such cases than in any others, for if unconstitutional apportionment acts are conceded to be beyond the domain of the judiciary, then the legislative power is absolutely unlimited and unfettered, and a legislative body would be at full and unrestrained liberty to enact measures perpetuating its own existence and augmenting its own power. Constitutional limitations are imposed to prevent unrestrained legislative action, and are intended to guard against legislative usurpation. They operate upon all subjects of legislation, except subjects of which the legislative department is expressly, or by clear implication, given exclusive control. . . .

In affirming, as I do, quite as fully and strongly as is done in the principal opinion, the power and duty of the court to entertain jurisdiction of questions affecting the validity of apportionment acts, when duly presented and absolutely necessary to a decision of the particular case, I do not, by any means, concede that such questions can be considered where they are not properly presented by a party having a right to present them. . . .

JUSTICE OLDS, concurring.

I concur in the principal opinion in this case. In my opinion it properly and legitimately expresses an opinion on the question of the constitutionality of the two acts of the Legislature, viz., the acts of 1879 and 1891. To decide the case it is absolutely necessary to determine the constitutionality of these acts, or at least one of them. While it is true the appellee must fail whether the acts are valid and constitutional or unconstitutional and void, yet to dispose of the case, the court must determine whether these acts are valid or void, and being compelled to determine the question as to their validity, the court should, in all fairness, express an opinion disclosing upon what theory the opinion rests; whether upon the grounds that the acts, or either one, or both of them, are valid or void.