OXFORD
UNIVERSITY PRESS

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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

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Fergus v. Marks, 321 Ill. 510 (1926)

The Illinois constitution of 1870 provided that "The General Assembly shall apportion the State every ten years . . . by dividing the population of the State, as ascertained by the Federal census, by the number fifty-one, and the quotient shall be the ratio of representation in the senate. The State shall be divided into fifty-one senatorial districts . . . formed of contiguous and compact territory, bounded by county lines, and contain, as nearly as practicable, an equal number of inhabitants." By 1926, when this case was decided, the Illinois state legislature had not drawn new district boundaries for the state senate in twenty-five years. As a result of differences in population growth, the old senatorial districts were no longer even close to equal. The most important political effect of the refusal to reapportion was the underrepresentation of the residents of the city of Chicago in the state legislature. Between the adoption of the 1870 constitution and the apportionment of 1901, Chicago's Cook County had doubled in size, both in population and in the size of its senate delegation, and politicians in the rest of the state could see where things were headed and simply stopped redrawing the map. By 1920, half the population of Illinois lived in Chicago, but less than 40 percent of the legislators represented voters from that city. Urban and rural interests were often sharply at odds on issues ranging from state economic policy to alcohol prohibition, and reapportionment was understood to have important policy implications. At the same time, legislators were well aware that reapportionment would eliminate the seats of many of the incumbent senators.

Illinois was not alone. In the nineteenth century, legislatures reapportioned districts frequently, sometimes more often than once every ten years. Complaints about reapportionment in the nineteenth century were primarily about how legislative seats had been distributed. Legislatures were frequently accused of gerrymandering legislative districts for the sake of partisan advantage in the next election, and courts were sometimes willing to intervene to undo what the legislature had done. By contrast, the problem of the first half of the twentieth century was legislative inaction, as legislators defaulted on their constitutional responsibility to update district boundaries over time. In a period of rapid urbanization, many states, like Illinois, proved unwilling or unable to redraw the political map and shift legislative power from rural voters and politicians to urban voters and politicians. The situation in Illinois was by no means extreme. By 1960, for example, only 10 percent of the voters controlled a majority of the senate seats in California, and in Florida a similar percentage controlled a majority of both houses of the state legislature.

Fergus v. Marks *was the first, and most direct, of a series of cases brought in the Illinois state courts designed to force the legislature to reapportion (later litigants suggested, for example, that all laws passed by malapportioned legislatures were unconstitutional). All were unsuccessful as the state supreme court repeatedly indicated that the only remedy was a political one in the legislature itself, and* Fergus v. Marks *proved to be a landmark case that influenced state courts across the country that heard similar challenges to their own state legislatures. In Illinois and elsewhere, judges were highly conscious of the possibility that the legislature would fail to comply with any judicial order mandating reapportionment and the most obvious option of attempting to jail state legislators for contempt of court was hardly an attractive one. Striking down an unconstitutional law after the legislature had acted was one thing, but ordering a legislature to take a particular action was quite another. To the judges, the prospect of ordering unwilling legislators to pass a law seemed a fool's errand. The state legislature was eventually reapportioned in 1955 after a political compromise orchestrated by the governor secured a rural majority in the state senate in exchange for an urban majority in the state house, with future redistricting to be done by an independent commission if the legislature failed to adopt on schedule a plan of its own. That compromise was later undone by the U.S. Supreme Court's actions in* Baker v. Carr *(1962).*

JUSTICE HEARD delivered the opinion of the court.

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In accordance with this provision [of the Illinois constitution] the General Assembly in 1901 passed an apportionment act dividing the State into fifty-one senatorial districts, since which time it has failed or neglected to comply with this constitutional provision to pass an apportionment bill, and its members are still elected and function under the act of 1901. The petitioner, by leave of this court, has filed his petition herein asking this court to issue the people's writ of *mandamus* to compel the respondents, who comprise the membership of the General Assembly, to meet and apportion the State in accordance with this constitutional provision. . . .

Petitioner contends that the duty imposed by the people upon the General Assembly to apportion the State after each Federal census is clear and unmistakable and the provisions of the constitution are mandatory in this respect. The right which the petitioner sets up as the basis for the relief sought is the right of representation, which by the Declaration of Independence is said to be a right inestimable to the people and formidable only to tyrants.

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. . . . The legislative department determines what the law shall be, the executive department executes or administers the law, and the judicial department construes and applies the law. Neither one of these departments can arrogate to itself any control over either one of the other departments in matters which have been solely confided by the constitution to such other department. The power to enact statutes is, clearly, solely a legislative power confided by the constitution to the legislature. The power to construe statutes is confided to the judiciary. In *Rockhold* v. *Canton Masonic Mutual Benevolent Society,* 129 Ill. 440 (1889), it is said: "The legislature cannot instruct the judiciary how to construe certain statutes, any more than the judiciary can instruct the legislature what statutes it shall enact. . . ."

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"The court has never attempted to exercise any compulsory power over the legislative department. The constitution enjoins upon that department the duty to enact certain laws, such as liberal homestead and exemption laws, laws necessary for the protection of operative miners, and laws to give full effect to article 13, relating to warehouses; and the court has not only never attempted to determine whether the laws enacted for those purposes were such as were necessary or proper, but if the legislature had neglected or refused to pass any such laws no one would think for a moment of asking the court to enforce the performance of the duties so specifically enjoined upon the legislature. These are commands of the people to the legislature, but they can not be enforced by the courts." . . .

This court, from its organization to the present term, has observed with sedulous care the principles announced in the cases above cited and has consistently declined to encroach upon the powers granted by the constitution to the legislature, and has never arrogated to itself the right to pass upon the wisdom or propriety of legislative acts within such powers. The duty to re-apportion the State is a specific legislative duty imposed by the constitution solely upon the legislative department of the State, and it, alone, is responsible to the people for a failure to perform that duty.

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This court being debarred by the constitutional division of governmental functions from compelling by *mandamus* the performance of a duty by the legislative department of the State, the relief prayed for by the petitioner in this case cannot be granted, and the writ is denied.