

# Scholle v Hare

## Judicial Power and Democracy (II)

367 Mich 176 (1962)

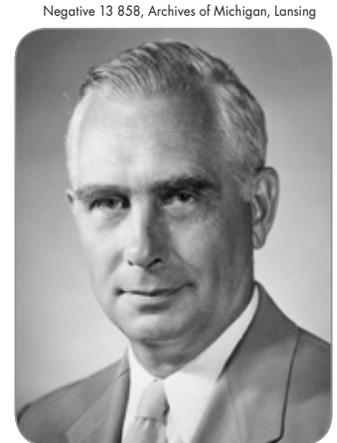
Ap art from racial equality, the most prominent issue of liberal reform in the 1950s–1960s was legislative reapportionment. Legislative bodies have always been slow to reapportion representation to keep up with shifts in population. The English Parliament, before the 1832 Reform Act, was dominated by “rotten boroughs” or “pocket boroughs,” old districts that had lost population but still sent members to the legislature while the new towns and cities went unrepresented. The most infamous boroughs were “Old Sarum,” which had 15 voters, and Dunwich, most of the land of which had eroded into the sea, but whose 32 voters chose two members of Parliament. At the same time, Manchester, a new city of about 60,000, chose none.

In the American colonies, the early, seaboard-dominated legislatures met protests from backcountry settlers to whom they grudgingly extended seats; in the twentieth century, city dwellers demanded proportional representation from rural-dominated legislatures. The disproportion was usually worse in the upper houses of state legislatures that often, like the United States Congress, adopted a “federal” scheme in which counties were represented. States also drew congressional district lines in unequal fashion. The extent of the problem was expressed in “variance ratios”—the difference between populations among districts. Vermont, for example, gave each town a seat in its senate regardless of population, and the most populous town in the state had 1,000 times the number of people as the least populous town. In the United States Senate, where each state elects two senators regardless of population, the variance ratio between California (35 million) and Wyoming (500,000) is 70:1. It is worth noting that Article V of the United States Constitution provides that no amendment can deprive a state of equal suffrage in the Senate without its consent, making this disproportion virtually eternal.

The political impact of malapportionment in Michigan in the 1950s was to increase the power of rural, and at this point, predominantly Republican and conservative voters, at the expense of urban, usually Democratic and liberal, voters. Often state legislatures flouted provisions in their own constitutions for periodic reapportionment. In 1960, 36 state constitutions required such re-districting, but 24 legislative houses had not been reapportioned for over 30 years.<sup>1</sup> Michigan reapportioned its legislature in 1952, but still permitted variance ratios of 2:1 in the House of Representatives and 10:1 in the Senate. A majority of the state’s voters approved a referendum (Proposition 3) that year that explicitly allowed Senate districts to be based on geographical area rather



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than population. At the same time, by an even wider margin, the voters rejected an amendment to require population-based representation in both houses of the legislature. A majority of the state seemed content to allow something other than simple majority rule in the upper house. In the Michigan Senate, the 12 Democratic state senators had been elected by 46,000 more votes than the 22 Republican senators. Democratic state representatives had won over twice as many votes as the Republican representatives, but the House was tied, 55-55.<sup>2</sup>

These systems had been repeatedly challenged in state and federal courts, without success. In 1946, the United States Supreme Court refused to declare that legislative malapportionment was a denial of the Fourteenth Amendment’s guarantee that no state shall deprive any person of the equal protection of the laws. “Courts ought not to enter this political thicket,” Justice Felix Frankfurter said, holding that the issue was a non-justiciable “political question.”<sup>3</sup> In Michigan, the campaign to have the state Supreme Court hold that the Michigan Constitution’s allowance of unequal apportionment violated the Fourteenth Amendment was led by Gus Scholle, president of the state AFL-CIO and long-time power in Michigan and national Democratic politics. As one historian notes, “From 1948 through 1968 Democratic presidential campaigns would start with the nominee speaking to large union rallies on Labor Day in Detroit’s Cadillac Square.”<sup>4</sup> In Michigan, “Clear it with Gus” was standard practice in the Democratic party.<sup>5</sup> The American Civil Liberties Union and Americans for Democratic Action, two other prominent liberal interest groups, joined organized labor in the litigation. They were confident that a majority of the Michigan Supreme Court would be sympathetic to their case.<sup>6</sup>

The Court rejected Scholle's appeal for an order to the secretary of state to withhold writs of election for the Michigan Senate. Two Democratic justices joined the three Republicans in upholding Proposition 3's provision for unequal senate districts. Justice George C. Edwards, Jr., wrote the principal majority opinion. Edwards had been a member of the law firm representing Scholle, and his decision against his former partners "ended up giving me all sorts of headaches," he later recalled.<sup>7</sup> Edwards devoted most of his opinion to showing the vast number of states that allowed representation based on factors other than population and which had ratified the Fourteenth Amendment, thus recounting that it was not their intent to impose proportional representation. "This Court does not determine the wisdom of the decisions made by the people of Michigan in adopting their constitution," he said. "By its terms, all political power is inherent in them, subject only, of course, to the United States Constitution." And the United States Supreme Court, the final arbiter of the meaning of the Constitution, did not hold unequal electoral districts to violate the Fourteenth Amendment. Edwards made it clear that he was not voting his political sympathies. "These are cold words with which to greet a plea for equality of voting rights which has at least a kinship with the Declaration of Independence," he concluded, and expressed hope that the future would change the law. "Nor do we believe that the final chapter has been written in the struggle between those who would fully embrace the principle of equality of man and those who would hold it in check."<sup>8</sup>

Justice Eugene F. Black wrote a concurring opinion based on the "paradoxical" fact that Scholle had a constitutional right, but no constitutional remedy. This arose from the United States Supreme Court's "political questions" doctrine: some constitutional rights were not justiciable, but depended on the political branches for their vindication. But Black believed that this doctrine would not long prevail. "Some day, inevitably, the [United States] Supreme Court will

authorize justiciable employment of the equality clause in cases of present political nature. But that day has not yet arrived."<sup>9</sup>

Justice Thomas M. Kavanagh, the "hard-driving, politically astute" Democrat known as "Thomas the Mighty" to distinguish him from Justice Thomas G. Kavanagh when the latter joined the Court in 1969, wrote a lengthy dissenting opinion.<sup>10</sup> He held Proposition 3 to be a violation of the Fourteenth Amendment. Kavanagh wrote, "I have searched in vain...for any reasonable or rational classification or criterion upon which [it] could be upheld."<sup>11</sup> "The only designations that can be given [it] are palpably arbitrary, discriminatory, and unreasonable, and as such it is class legislation which deprives [Scholle] and other citizens of Michigan of their rights in violation of the Fourteenth Amendment."<sup>12</sup> Democratic Justices Smith and Souris joined his dissenting opinion.

The decision produced an ugly political fallout. Justice Souris later recalled that Edwards "caught holy unshirted hell from his former colleagues in the UAW for it."<sup>13</sup> He attended the UAW convention on the day that the decision was announced, and Scholle, who was a close friend, treated him very badly, particularly for not informing him in advance of the decision.<sup>14</sup> "It was an unhappy period," Edwards said. "I think it probably strained more relationships than anything else in my judicial career. But I voted my conscience, and what the hell, I've got to live with it. I don't sleep with anything except my wife and my conscience."<sup>15</sup>

Scholle appealed the decision to the United States Supreme Court. And those who predicted that the Court would revisit its apportionment jurisprudence were soon vindicated. In March 1962 the Court announced its decision in *Baker v Carr*, a challenge to Tennessee's legislature, that apportionment was a justiciable question.<sup>16</sup> However, the Court did not specify any standards by which legislatures could comply with the equal protection standard. Thus in April it returned Scholle's case to the Michigan Supreme Court "for further consideration in the light of *Baker v Carr*."<sup>17</sup>

*Baker v Carr* produced a ferocious reaction in statehouses across the country as well as in Congress. Intense partisan passion was aggravated by the mystery of what the United States Supreme Court now required; many believed that upper legislative houses might still be apportioned on some basis other than strictly population. Some Michigan legislators even threatened to impeach the justices of the state Supreme Court if they should hold the senate apportionment unconstitutional.<sup>18</sup> This only added to the rancor of an already narrowly divided Supreme Court. By 1962, Justice Edwards, the author of the first *Scholle* decision, had resigned to become Detroit police commissioner. His replacement, Paul L. Adams, was a Democrat. Adams had been attorney general during the first round of litigation, and so did not take part in the decision. He subsequently lost the 1962 election to a Republican. Otis Smith had replaced Talbot Smith. Smith was the first African American to serve on the Michigan Supreme Court, and the second African American to serve on any state supreme court in all of American history. The second *Scholle* case was a perfectly partisan, 4-3 decision.

Justice T. M. Kavanagh began his opinion with a forceful statement of judicial independence, in words that appear to have been written by the equally proud Justice Black. "Each unmanageable

## Legislature Stands By To Thwart an Attack

HARDLY HAD the Michigan Senate ousted State AFL-CIO President August Scholle from the Conservation Commission when Attorney General Frank J. Kelley discerned that he had been all wrong about upholding the legality of the Senate's apportionment formula.

Up to that time he had been disposed to defend it, whereas Mr. Scholle not only disagreed with it, but had a lawsuit before the State Supreme Court which seeks a ruling in support of his view that the system is illegal.

According to Mr. Kelley, he was forced to change his mind by the United States Supreme Court's decision requiring Tennessee to rectify its legislative apportionment, and also by other recent decisions in lower Fed-



U.S. Constitution's 14th Amendment, which he says Michigan is defying in its Senate apportionment. The relationship is so attenuated that anybody's guess is as good as Mr. Kelley's as to whether there really is one.

What isn't attenuated, if the U.S. Constitution is to be dragged into the debate, is its provision that the U.S. Senate shall NOT be chosen on a population basis.

We would suppose that the U.S. Constitution thus would not frown at a state which chose Senators upon other than a population basis—to wit, Michigan.

Returning to the coincidence of Mr. Scholle's treatment by the Michigan Senate and Mr. Kelley's reversed view on Senate apportionment, it has to be a matter of opinion whether there was a connection. Our opinion is that there was.

Not that Mr. Scholle necessarily got Gov. Swainson on the telephone and told him to let his Attorney General in on

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Interestingly, the legislature's threat of impeachment was addressed by the justices in the opinion and its endnotes 1 and 2. The introductory paragraph of the opinion, written by Justice Thomas M. Kavanagh, begins:

*As we approach determination of the merits, following vacation by the supreme court (Scholle v Secretary of State, 369 US 429 [82 S Ct 910, 8 L ed 2d 1]), of the judgment entered here June 6, 1960 (360 Mich 1), each unmanageable member of the Court faces an arrogant and amply headlined threat of impeachment "if the senate districts are declared illegal."<sup>1</sup> This threat should neither hasten nor slow the judicial process.<sup>2</sup>*

Endnote 1 simply contains a citation of the headline that appeared on the front page of the *Detroit Free Press* on Friday, June 29, 1962: "Threaten to Impeach Top Court."

Endnote 2 compares the legislature's threat to a past situation faced by the United States Supreme Court. Endnote 2 reads:

*Today's effort to intimidate the Court finds its historic counterpart when, in Marshall's time, a "seethingly hostile" congress "closed down the supreme court for a year." That challenge of judicial independence, and the way it was handled ultimately by the Marshall court, is chronicled in Rodell's "Nine Men," pp 85-90 (Random House, New York 1955).*

By responding clearly and directly to the legislature's threat, the justices of the Michigan Supreme Court asserted and defended their judicial independence.

member of the Court faces an arrogant and amply headlined threat of impeachment 'if the senate districts are declared illegal,'" he said, referring to a *Detroit Free Press* story.<sup>19</sup> He continued, "Only an ignorant, a corrupt, or a dependent judge would cringe and pause before any such formidable threat." Kavanagh went on to reiterate what had been his dissenting opinion two years earlier. He permitted the current Michigan Senate to continue as a "de facto" body until the end of the year, whose principal task would be to draw new, equally proportioned Senate districts. If they failed to do so within a month, the Supreme Court would order an at-large election for the fall.<sup>20</sup>

Justice Souris concurred, writing that the 1952 Senate districting "was made without any discernible or conceivable basis, let alone upon any rational basis."<sup>21</sup> Justice Black wrote a separate concurring opinion, defending the Court against charges of "judicial activism." Rather, it was the failure of previous legislatures and courts to do their duty that forced this decision. "A liberal dose of activist catharsis will do Michigan's judicial process no harm and, in this instance, may provide for our state a healthy new start," he wrote. "I prefer 'judicial activism' over 'judicial obstructionism.'"<sup>22</sup> The Court's new member, Justice Smith, also concurred. "I said to myself in almost these exact words," he later recalled, "'When in doubt, vote with the people,' and I was in doubt, and I voted with the people, and all hell broke loose."<sup>23</sup>

Justice Carr dissented, emphasizing that the voters had explicitly approved the mixed area-and-population basis for Senate apportionment in 1952, whereas Tennessee, the state under review in *Baker v Carr*, did not give its voters a similar opportunity to approve unequal apportionment. "In the view of the record of the Michigan Legislature there would seem to be no basis for any possible argument that the State of Michigan has suffered, or that

any segment of its population has been prejudiced," Carr stated, and therefore, he claimed, no violation of equal protection had occurred.<sup>24</sup> He denied that the 1952 amendment was irrational, having "the proper purpose of protecting the rights of the people in the more sparsely settled sections" of the state.<sup>25</sup> He also averred that the majority's decision meant that Michigan had no valid Senate, and therefore no legislature. In Carr's view, the majority had declared itself capable of creating legislatures "by fiat."<sup>26</sup> The two other Republican justices, Dethmers and Harry Kelly, agreed with this dissent, but added their own opinions. Eventually, the eight Michigan reapportionment cases produced 39 separate opinions.<sup>27</sup>

The secretary of state scrambled to obtain an order from the United States Supreme Court to stay the state Supreme Court order. With the Court in summer recess, he tracked down Justice Potter Stewart at his New Hampshire vacation house and prevailed; the 1962 elections were conducted under the old system. "Stewart's stay...

probably saved my political hide," Justice Smith later reflected, removing the issue from his election campaign.<sup>28</sup>

In the meantime, the Michigan Constitutional Convention revamped the legislature's apportionment system.<sup>29</sup> The 1963 Constitution, ratified by only 7,000 votes in the statewide election, still allowed considerations of area, rather than strict population, in the Senate. (This was largely due to the fact that Republicans dominated the convention, whose delegates were chosen partly according to the unequal Senate districts.) It also established a bipartisan commission to settle the issue, with final resort to the Supreme Court if the commission should deadlock, as it did.<sup>30</sup> Scholle again sued to overturn the 1963 constitution's mixed scheme.<sup>31</sup> In Washington, the United States Supreme Court at last made clear what standard it expected under *Baker v Carr*. In several decisions in 1963 and 1964, the Court established that both legislative houses must be apportioned according to a "one-person, one-vote" formula.<sup>32</sup> Despite the dissent of Justice John Marshall Harlan that the decisions "fly in the face of history," the Court continued to require legislative districting on the basis of

Chief Justice Earl Warren later called the reapportionment cases the most important of his tenure. Despite their less-than-anticipated political effect, they did usher in a new era of bold judicial activism—the so-called "second Warren Court," when Arthur J. Goldberg became the fifth reliable liberal on the bench. Goldberg replaced Felix Frankfurter, whose judicial restraint had kept the Court out of the "political thicket" of apportionment, and whom *Baker v Carr* was said to have driven to his grave.<sup>1</sup>

1. Powe, *The Warren Court and American Politics* (Harvard Univ Press, 2000), p 212.

precise mathematical equality.<sup>33</sup> The House of Representatives went so far as to pass a bill allowing upper houses of state legislatures to be apportioned on bases other than population, and removed jurisdiction from the Supreme Court to hear appeals in such cases. In a wonderful stroke of irony, liberals filibustered it in the Senate, resorting to a minority-rule tactic that they had long lamented, in the only legislative body in the country that was permanently malapportioned.<sup>34</sup>

Thus Scholle, who initially lost his suit in federal district court, was vindicated by the United States Supreme Court. The Michigan Supreme Court, which initially ordered a Republican apportionment plan, imposed a one-person, one-vote system for the 1964 elections.<sup>35</sup> Michigan ended up with the most mathematically equal legislature in the country—the one with the smallest “variance ratio.”<sup>36</sup> In what was a landslide year for Democrats across the country, the party won control of both houses of the Michigan legislature for the first time since the 1930s, although Republican George Romney was reelected governor. Moreover, reapportionment did not secure liberal Democratic fortunes for very long, as the Republicans came back and won both houses in 1966 (the House was initially tied, but two Democrats died shortly after the election). Indeed, the impact of one-person, one-vote disappointed liberals across the country; the principal beneficiaries turned out to be moderate-to-conservative Republicans in the growing suburbs.<sup>37</sup> Nor did it end disputes over legislative apportionment. Soon complaints about partisan gerrymandering arose, as Michigan Republicans claimed that Democrats drew district lines to maximize the number of Democrats elected. Later, civil rights laws would add the problem of “racial gerrymandering” to the dockets.<sup>38</sup>

The desegregation and apportionment cases in Washington, and *Huff* and *Scholle* in Michigan, showed a powerful centralization of government power within and among the states. National standards were imposed on the states, and state standards were imposed on localities, with the judiciary playing a particularly strong role in this process.

The most significant aspect of the reapportionment cases was not the substantive effect of equalizing voting power. It was the abandonment of the “political questions” doctrine, an important limitation on the judiciary’s power. In like manner, in the 1960s judges liberalized access to courts, allowed class-action suits, and swept away old principles, like “ripeness”—that a controversy needed to be sufficiently concrete to be litigated. Federal and state courts became intimately involved in all sorts of issues that had previously been left to legislative bodies, such as the administration of schools, prisons, and asylums.<sup>39</sup> Rather than hailed for striking a blow for democracy, courts often found themselves accused of usurping democratic power and imposing their own policy preferences on the people. The courts increasingly became the forum of wide-ranging political, social, and cultural contention in the last third of the twentieth century.

## FOOTNOTES

1. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development*, 7th ed (New York: Norton, 1991), pp 614–619.

2. Dunbar & May, *Michigan: A History of the Wolverine State*, 3d ed (Grand Rapids: Eerdmans, 1995), pp 549–550; Adams, *Anticipated problems in legislative reapportionment: The Scholle decision*, 38 U Det LJ 234, 234–242 (1961).
3. *Colegrove v Green*, 328 US 549, 556; 66 S Ct 1198; 90 L Ed 1432 (1946).
4. Hamby, *High Tide: Roosevelt, Truman, and the Democratic Party, 1932–52*, in *The Achievement of American Liberalism: The New Deal and Its Legacies*, ed Chafe (New York: Columbia Univ), p 39.
5. *August Scholle, Labor Leader*, 67, New York Times, February 17, 1972, p 40.
6. Sachs, *Scholle v Hare—The beginnings of ‘one person—one vote’*, 33 Wayne L R 1609 (1987). This article is a very valuable memoir by Scholle’s attorney in the litigation.
7. *Id.* at 1614; Interview with Roger F. Lane, December 3–4, 1990.
8. *Scholle v Secretary of State*, 360 Mich 1, 37, 39; 104 NW2d 63 (1960).
9. *Id.* at 49, 113.
10. *Michigan Supreme Court Historical Society Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998), p 175, 187.
11. *Scholle v Secretary of State*, *supra* at 83.
12. *Id.* at 126.
13. Interview with Roger F. Lane, November 5, 1990.
14. *Id.*
15. Interview with Roger F. Lane, December 3–4, 1990.
16. *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).
17. *Scholle v Hare*, 369 US 429; 82 S Ct 910; 8 L Ed 2d 1 (1962); Lewis, *High Court Bids Michigan Review Its Apportioning*, New York Times, April 23, 1962, p 1.
18. Cohn, *A footnote to a footnote*, 75 Mich BJ 495 (1996).
19. *Scholle v Secretary of State*, 367 Mich 176, 180; 116 NW2d 350 (1962).
20. Cohn, *Footnote, supra*; *Scholle v Secretary of State, supra* at 181; *Michigan Is Told to Remap Senate*, New York Times, July 19, 1962, p 14.
21. *Scholle v Secretary of State, supra* at 243.
22. *Id.* at 255.
23. Interview with Roger F. Lane, October 25, 1990; Smith & Stolberg, *Looking Beyond Race: The Life of Otis Milton Smith* (Detroit: Wayne State Univ Press, 2000), p 158.
24. *Scholle v Secretary of State, supra* at 195.
25. *Id.* at 199.
26. *Id.* at 201, 207.
27. Barber, *Partisan values in the lower courts: Reapportionment in Ohio and Michigan*, 20 Case W Res L R 416 (1969).
28. Smith, *Looking Beyond Race, supra* at 159.
29. Sachs, *Scholle v Hare, supra* at 1621.
30. Const 1963, art IV, § 6.
31. Stetson, *Michigan Unionists File Suit to Upset New Apportionment*, New York Times, June 22, 1963, p 11.
32. Kelly, Harbison, & Belz, *The American Constitution, supra* at 614–619; *Gray v Sanders*, 372 US 368; 83 S Ct 801; 9 L Ed 2d 821 (1963); *Wesberry v Sanders*, 376 US 1; 84 S Ct 526; 11 L Ed 2d 481 (1964); *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); *Lucas v 44th General Assembly of Colorado*, 377 US 713; 84 S Ct 1459; 12 L Ed 2d 632 (1964); *Swann v Adams*, 385 US 440; 87 S Ct 569; 17 L Ed 2d 501 (1964).
33. *Gray v Sanders, supra*.
34. Powe, Jr, *The Warren Court and American Politics* (Cambridge: Harvard Univ Press, 2000), pp 251–255.
35. Scholle may have turned to the federal courts to take the heat off the Michigan Supreme Court, which was now divided evenly between Republicans and Democrats, and still facing legislative threats. Barber, *Partisan Values, supra* at 409–410. See also Parrish, *The Politics of State Legislative Apportionment in Michigan* (M.A. Thesis, Univ of Mass, 1967), pp 137–144. The pivotal case was *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964). See also Smith, *Looking Beyond Race, supra* at 160. Smith voted first for the Republican plan and then, after *Reynolds*, for the Democratic plan.
36. Barber, *Partisan values, supra* at 405.
37. Dunbar & May, *Michigan, supra* at 550, 576; Kelly, Harbison, & Belz, *The American Constitution, supra* at 619. Parrish, *Politics of State Legislative Apportionment, supra*, calculates that it was unlikely that the Democrats would have won control of the State Senate without the reapportionment.
38. Barber, *Partisan values, supra* at 418; Thernstrom & Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge: Harvard Univ Press, 1987).
39. Kelly, Harbison, & Belz, *The American Constitution, supra* at 703.