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Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation

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COMMENTS ON THE REAPPORTIONMENT
CONTROVERSY

REAPPORTIONMENT IN THE SUPREME COURT
AND CONGRESS: CONSTITUTIONAL
STRUGGLE FOR FAIR
REPRESENTATION*

Robert G. Dixon, Jr.†

"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."—Chief Justice Warren, *Reynolds v. Sims*

"But legislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests."—Justice Stewart, *Lucas v. 44th General Assembly, Colorado*

THE Supreme Court's *Reapportionment Decisions*¹ of June 15, 1964, rank as one of the most far-reaching series of decisions in the history of American constitutionalism. Under the new equal population district standard, at least one house of the legislature in virtually every state, and in most instances both houses, are putatively unconstitutional, whether or not formally so declared.

The pathway to these decisions, which seem destined to re-make the political map of America, was opened in the spring of 1962 by

* Part I of this article was adapted from an address to the Conference of Chief Justices, New York City, August 6, 1964.

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1. The cases decided with full opinions after oral argument were the Alabama cases, *Reynolds v. Sims*, *Vann v. Baggett*, *McConnell v. Baggett*, 377 U.S. 533 (1964); the New York case, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); the Maryland case, *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); the Virginia case, *Davis v. Mann*, 377 U.S. 678 (1964); the Delaware case, *Roman v. Sincok*, 377 U.S. 695 (1964); and the Colorado case, *Lucas v. 44th Gen. Assembly of Colo.*, 377 U.S. 713 (1964).

The following week the Court, using the same principles, disposed of reapportionment cases from the following states in memorandum decisions: The Michigan cases, *Beadle v. Scholle*, 377 U.S. 990 (1964), and *Marshall v. Hare*, 378 U.S. 561 (1964); the Washington case, *Meyers v. Thigpen*, 378 U.S. 554 (1964); the Oklahoma case, *Williams v. Moss*, 378 U.S. 558 (1964); the Illinois case, *Germano v. Kerner*, 378 U.S. 560 (1964); the Idaho case, *Hearne v. Smylie*, 378 U.S. 563 (1964); the Connecticut case, *Pinney v. Butterworth*, 378 U.S. 564 (1964); the Florida case, *Swann v. Adams*, 378 U.S. 553 (1964); the Ohio case, *Nolan v. Rhodes*, 378 U.S. 556 (1964); the Iowa case, *Hill v. Davis*, 378 U.S. 565 (1964).

Baker v. Carr,² the Tennessee state legislative reapportionment case, in which the Supreme Court overturned well-established precedent and authorized federal court review under the fourteenth amendment of the apportionments and districts that determine the composition of state legislatures. For decades, reapportionment, like Pandora's box, was felt to be so full of intricate political factors that courts, particularly federal courts, should sit on the lid and never look inside. As Mr. Justice Frankfurter had said in an early congressional districting suit, courts should not enter the "political thicket" because it is "hostile to a democratic system to involve the judiciary in the politics of the people."³ In a series of cases this thought had become the touchstone also for state legislative apportionment. But the Frankfurter touchstone is now an epitaph. Courts not only have entered the thicket, they occupy it.

Fair representation is the ultimate goal. At the time of the *Reapportionment Decisions*, much change was overdue in some states, and at least some change was overdue in most states. We are a democratic people and our institutions presuppose according population a dominant role in formulas of representation. However, by its exclusive focus on bare numbers, the Court may have transformed one of the most intricate, fascinating, and elusive problems of democracy into a simple exercise of applying elementary arithmetic to census data. In so doing, the Court may have disabled itself from effectively considering the more subtle issues of representation. Reapportionment is a political power struggle, but one looks in vain in the controlling opinions in the *Reapportionment Decisions* for an awareness and concern regarding the group dynamics of American politics.

I. THE DECISIONS AND THEIR IMPLICATIONS

Unlike *Baker v. Carr*, whose extensive opinions called for and merited intensive analysis,⁴ the series of opinions in the *Reappor-*

2. 369 U.S. 186 (1962).

3. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946).

4. See, e.g., DE GRAZIA, *APPORTIONMENT AND REPRESENTATIVE GOVERNMENT* (1963); McKay, *Reapportionment and the Federal Analogy*, Nat'l Municipal League Pamphlet, August 1962; Bickel, Black, Emerson, Goldberg, O'Brien, Pollak, Schattsneider & Sindler, *A Symposium on Baker v. Carr*, 72 YALE L.J. 7 (1962); Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329 (1962); Dixon, *Representation Goals*, 52 NAT'L CIV. REV. 543 (1963); Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367 (1963); Hagan, *The Bicameral Principle in State Legislatures*, 11 J. PUB. L. 310 (1962); Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962); Israel, *Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment*, 38 NOTRE DAME LAW. 499 (1963); Lucas, *Legislative Apportionment and*

tionment Decisions proceed from simple premises and can be summarized rather readily. The principal opinion of the Court was delivered by Mr. Chief Justice Warren in the Alabama case, with brief but consistent elaborations in separate opinions in the other five cases. As a basic test, the Court espoused an equal population district system for both houses of a bicameral legislature. This was variously expressed in such phrases as "substantial equality of population among the various districts"⁵ and "as nearly of equal population as is practicable."⁶ The Court added, as a secondary test (perhaps to garner the votes of Justices Clark and Stewart for some of the cases), a prohibition on "crazy quilts, completely lacking in rationality."⁷

There were two interesting and potentially inconsistent statements in the Chief Justice's principal opinion that will bear watching in the future. He spoke forcefully of the need for "fair and effective representation of all citizens,"⁸ which could point in the direction of representing people and viewpoints in proportion to their strength in the state as a whole. But later he turned about and seemed to reject the group dynamics of American politics by saying that neither "economic or other sorts of group interests" are relevant factors in devising a representation system.⁹

Mr. Justice Stewart, who produced the principal dissent, was the only Justice to try to come to grips with the philosophic and practical complexity of the concept of representation in a large, polycentric society. Not willing to have the Court try to do everything, but not wanting the Court to do nothing, he agreed with the *decision* in three of the six cases (Alabama, Delaware and Virginia), but with the *rationale* in none. He would have remanded the Maryland case and would have approved the existing apportionments in the Colo-

Representative Government: The Meaning of Baker v. Carr, 61 MICH. L. REV. 711 (1963); McCloskey, *The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487 (1963); Neal, "Baker v. Carr: Politics in Search of Law," 1962 SUP. CT. REV. 252.

5. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

6. *Id.* at 577.

7. *Id.* at 568. Because one's past always rises to haunt him, it was to be expected that the Chief Justice would be reminded in the public press and on the floor of Congress of this statement he made as Governor of California in 1958: "Many California counties are far more important in the life of the State than their population of the State. It is for this reason that I have never been in favor of restricting the representation in the senate to a strictly population basis." U.S. News and World Report, June 6, 1964, p. 34; 110 CONG. REC. 15516 (daily ed. July 8, 1964).

8. 377 U.S. at 565.

9. *Id.* at 579-80.

rado and New York cases. His vote to remand the Maryland case explains well his two guiding principles. His narrower principle, and the easier to apply, is that crazy quilts, *i.e.*, patterns of apportionment defying rational explanation, are bad. Because the Maryland Senate was based on a fairly consistent political subdivision principle, it passed muster for Mr. Justice Stewart under this crazy-quilt test. But, because of a lack of sufficient data, the constitutionality of the Maryland Senate was not then determinable under Mr. Justice Stewart's broader and more difficult principle; *i.e.*, apportionments that systematically "prevent ultimate effective majority rule"¹⁰ are unconstitutional. It may be noted in passing that both of these tests find their juristic home more naturally under the due process clause than under the equal protection clause, which has come to dominate and confuse the Court's handling of apportionment matters.¹¹

Mr. Justice Harlan wrote a fitting epilogue to Mr. Justice Frankfurter's monumental dissenting opinion in *Baker* and would go back to pre-*Baker* times by dismissing all of the cases as "an experiment in venturesome constitutionalism."¹² His historical and textual argument is overpowering, all the more so because not rebutted by Mr. Chief Justice Warren's opinions for the Court. But, like the history he used, his opinion seems destined to become history, unless it has some influence in the current discussions of constitutional amendments either to take federal courts out of the reapportionment business or specifically to authorize use of non-population factors in reapportioning one house of the legislature.¹³ Mr. Justice Clark, beyond joining in the basic opinion of Mr. Justice Stewart in the New York and Colorado cases, adhered to his "crazy-quilt" theory as expressed in his *Baker* opinion. He would accept non-population factors in one house if the other were based substantially on population. Therefore, in terms of basic rationale, the Court split six-two-one. There were six for a tight equal population district system; two, Justices Stewart and Clark, for more flexible standards, with preservation of majority rule and avoidance of crazy-quilts as outer

10. Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 677 (1964).

11. It is now too late in the day to oust the equal protection clause from its charismatic role in reapportionment litigation; but for a critique on this question, compare Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 360-66 (1962), and Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 376-86 (1963), with McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 665-81 (1963).

12. Reynolds v. Sims, 377 U.S. 533, 625 (1964).

13. See text *infra* at note 62 et seq.

boundaries; and one, Mr. Justice Harlan, for a complete hands-off approach.

The Colorado case has attracted special attention and raises deeper philosophic issues than any of the others in the packet of fifteen reapportionment cases decided last June. It presented an apportionment plan placing one house on a straight population basis and the other on a modified population basis, which had been approved by every county in Colorado in a popular referendum, 305,700 to 172,725. In the same "one man-one vote" statewide referendum, an alternative plan placing both houses on a straight population basis had been resoundingly rejected, 149,892 to 311,749. None of the other five cases decided on June 15—Alabama, Delaware, Maryland, New York, Virginia—nor the nine additional apportionment cases disposed of briefly a week later, involved this popular referendum feature.

How did we get ourselves so quickly to these decisions? Why is it that the important questions about representation that should engage our attention are not treated in the opinions and now stand unresolved—or resolved *sub silentio* upon inadequate premises? Why, with so much on the record in the law reviews,¹⁴ did so little show up in oral argument and in the opinions of the Court? In these *Reapportionment Decisions*, Justices Stewart and Clark, who dissented from the Court's results in some of the cases and from the Court's reasoning in all of the cases, have strong foundation in the law review analyses of the problem. But the Court majority has strong foundation in the oral argument.

To those who sat through the Supreme Court oral arguments in all of the cases, as I did, the imbalance in the oral argument was at first annoying, then frightening, and finally, just pathetic. The imbalance was caused not so much by the admitted competence of the plaintiffs and the Solicitor General of the United States as "co-counsel," but by the inadequacy on the defendants' side—the inadequacy, to be precise, in the way many state attorneys general's offices handled these cases. Too many of the defendants' counsel wasted many of their precious hours of oral argument. They dwelt on the varied topography and geography of their states, sounding like a misplaced chamber of commerce commercial; or, they stressed history, which, to a Court that had decided the desegregation case¹⁵

14. See references cited note 4 *supra*.

15. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in which Mr. Chief Justice Warren had written: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted. . . . We must consider public education in the light of its full development and its present place in American life throughout the

on broad principles of developing constitutionalism, was like trying to get Bertrand Russell to take Holy Communion; or, they simply fell into the trap Mr. Justice Clark had constructed more neatly than he knew in *Baker*,¹⁶ by trying to establish how *every* inter-district population disparity could be shown to be the result of some clear and "rational" formula, which is almost always an impossibility.

A. *The Representation Issue*

Few of the counsel and none of the opinions, except Mr. Justice Stewart's, showed an adequate awareness of the complexity of representative government—the complexity involved in trying to achieve *fair* representation in a multi-membered body chosen from geographic districts of the many interests and groupings and shades of opinion in our pluralistic society. As Mr. Justice Stewart has said: "[L]egislators do not represent faceless numbers. They represent people, or, more accurately, *a majority of the voters in their districts . . .*"¹⁷ The phrase "*majority of the voters*" is crucial, with stress on the word "majority." As Mr. Justice Stewart also pointed out, even with districts of equal population, twenty-six per cent of the electorate (a bare majority of the voters in a bare majority of the districts) can, using the same kind of theoretical mathematics that the Court majority used in these cases, elect a majority of the legislators.¹⁸

For the majority of the Justices in these cases, two kinds of mathematical data seemed to be crucial. One was the "population-variance-ratio," computed by comparing the population of the smallest district and the largest district, disregarding the possible atypicality of the largest and the smallest district and the possibility that much of a state's population may be in districts having a population reasonably close to the average. On this basis, ratios ranging from a two-to-one disparity up to ten-to-one, or twenty-to-one, or even higher can be obtained. The other measure was a commonly used scale device, sometimes called the Dauer-Kelsay Scale, to indicate the minimum population that theoretically could control a majority

Nation." *Id.* at 492-93. This was one of the decisions that invoked Professor Wechsler's, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), and Professor Pollak's rebuttal, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

16. *Baker v. Carr*, 369 U.S. 186, 254-58 (1962).

17. *Lucas v. 44th Assembly of Colo.*, 377 U.S. 713, 750 (1964). (Emphasis added.)

18. On the problem of measuring malapportionment, see DAVID & EISENBERG, *EVALUATION OF THE URBAN AND SUBURBAN VOTE* (1961); Clem, *Measuring Legislative Malapportionment: In Search of a Better Yardstick*, 7 MIDWEST J. POL. SCI. 125 (1963); Schubert & Press, *Measuring Malapportionment*, 58 AM. POL. SCI. REV. 302 (1964).

of seats in the respective houses of the legislature. The percentage figure is obtained by ranking the legislative districts in order of population and then accumulating population from the least populous districts upward until a majority of legislative seats has been reached. The actual division of the population along political party lines is ignored. It is important to note that on this scale a perfect score for any one house of a legislature is not one hundred per cent, but fifty per cent. Also, in a large legislature, even with relatively equal population districts, the minimum population that could control a majority of seats under this theoretical measure is only about thirty-seven and one-half per cent if a twenty-five per cent deviation from strict equality is allowed in arranging districts, and about forty-three and seven-tenths per cent if the allowable deviation is reduced to fifteen per cent.¹⁹ And yet, the scale figures of the percentage of the population that theoretically could control the legislatures in some of the cases decided last June were close to or above thirty-eight per cent. For example:

<i>State</i>	<i>Senate</i>	<i>House</i>
Virginia	41.1%	40.5%
New York	41.8	34.7
Colorado	33.2	45.1
Ohio	41.0	30.3

(Note: See more complete table in Appendix *infra*.)

What scale figures such as these prove is uncertain. These computations treat each district as a unified entity, whereas in real life all districts are split internally by various partisan and interest alignments.

Traditionally, American legislators have been elected, not under a statewide party list system or a proportional representation system, but instead from geographic districts, either single-member or multi-member. And yet, our real concerns, our partisanship and our interests, are not spread evenly through these geographic districts. Nor are they grouped in balanced fashion in competing sets of districts. Herein lies the crux of the apportionment-districting problem—the true challenge to constitution-making. Casually drawn districts or

19. These figures are obtained by assuming a state legislative house of one hundred single-member districts, each of which would have a population of ten thousand under "ideal" districting. A twenty-five percent deviation would yield fifty districts of 12,500 population and fifty districts of 7,500 population. The latter fifty districts, plus one of the larger districts, yield the minimum population that theoretically could elect a majority of the senators. The figure is 387,500 or 38.75% of the total state population.

Of course, if there were a tiny legislature based only on four single-member districts, each of which would have ten thousand population under "ideal" districting, the percentage computations would be radically different.

carefully drawn districts, whether of equal population or not, may seriously under-represent or seriously over-represent identifiable interests such as political parties, organized labor, farmers, etc.

Actual examples of the complexity of representation and the insufficiency of a simple "equal population" formula are not hard to find. For example, a few days after the equal population rule for congressional districts was announced in the *Wesberry*²⁰ case last February, Maryland's old-line legislative leaders, acting under judicial pressure, provoked howls of shock and anguish by unveiling a plan for new, arithmetically equal districts that actually would have worsened the position of the under-represented suburbs that had brought the redistricting suit.²¹ The plan, subsequently passed by one house of the legislature but defeated in the second, carved and regrouped the populous counties without regard to community of interest in order to yield equal population districts that fully preserved the preexisting power structure.

As another example, we can assume a populous urban-suburban area into which we are to put ten single-member districts. If the larger political party had a fifty-five to forty-five per cent edge over the smaller party and party strength were fairly evenly spread, it would be a simple matter to draw mathematically equal districts under which the party with forty-five per cent support would never elect a single man.²² And, it would not even be necessary to engage in gerrymandering in the sense of odd-shaped districts. The inequities in these examples are caused by what can be designated as the "wild card" factor of party member location, plus some gerrymandering.

But there are other possible causes of gross inequities, even under an equal population standard. A second cause is the familiar

20. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

21. N.Y. Times, March 8, 1964, p. 86, col. 4. In the case that impelled the action, the federal district court subsequently voided the original districts but allowed their use for the 1964 election. Maryland Citizens Comm. for Fair Congressional Redistricting v. Tawes, 226 F. Supp. 80, 228 F. Supp. 956 (D. Md. 1964).

22. For another example, consider the following diagram:

	Party X	Party Y	Total Population	Seats Before Reappor- tionment	Seats After "Equalizing" Reappor- tionment
County A	5,000	20,000	25,000	1	1
County B	55,000	45,000	100,000	1	4

Before reapportionment: Each party, one seat. Party votes split 60,000 to 65,000.

After reapportionment: Party X, 60,000 votes, four seats;

Party Y, 65,000 votes, one seat.

Source: This chart is taken from Dixon, *Representation Goals*, *supra* note 4, at 545.

balance of power factor. A significant interest group over-representation can occur when a minority religious, racial, or dogmatic interest group holds the balance of power in a series of districts. The Prohibitionists proved this by going all the way and even obtaining a constitutional amendment. Fear of this balance of power factor may be one explanation for the Colorado popular referendum in 1962. The voters there *rejected* a straight equal population principle for both houses and *approved* a plan placing one house on something less than an equal population principle. Why? One reasonably plausible explanation would be that some urban and suburban voters may have voted for under-representation in one house in order to better protect interests they shared with others in the state—and which may be dominant interests when the state is taken as a whole. But, a majority of the United States Supreme Court Justices, without discussing this point, were singularly unimpressed with the referendum and nullified the voter-selected apportionment plan in last June's packet of reapportionment cases.²³

A third cause of gross inequities, even under an equal population standard, may be the possible operation of multi-member districts. The populous urban-suburban centers in the South provide interesting examples of this in regard to two minorities—the Republicans and the Negroes. If single-member districts are used, the housing patterns in some populous areas will produce some Republican seats and some Negro seats. But, if the legislators are chosen in large, plural-member districts, the Negroes and the Republicans will be swamped despite their substantial numbers.²⁴ These are the kinds of things that can happen if courts simply flush uncontrolled action out of the political thicket. In short, a one man-one vote principle guarantees change; taken alone, it may not always guarantee fair representation, which should be the ultimate goal.

Numbers are easy to play with so long as they remain mere numbers. If, as Aristotle said, "Law is reason unaffected by desire," the reapportionment opinions of Mr. Chief Justice Warren show up well as an ideal prescription for a theoretical society. But if what the Founding Fathers called "factionalism" rears its ugly head, and if, as Justice Holmes said, "The life of the law has not been logic; it has been experience," then the Warren opinions are inadequate.

Why are all these interesting, perplexing, realistic, and troublesome matters simply swept under the rug in the majority opinions

23. *Lucas v. 44th Gen. Assembly of Colo.*, 377 U.S. 713 (1964).

24. For further discussion and examples, see Jewell, *State Legislatures in Southern Politics*, 26 J. OF POL. 177 (1964).

in the reapportionment cases? The answer may be found in the way the Court has characterized the basic nature of a reapportionment case. The Court views all these cases as simply being civil rights cases, involving the personalized right of the individual voter to cast a vote that will have "equal weight" with the votes of all other voters. (And the Court does this even though the basic data used is population data, not voting pattern data.)²⁵ In one sense, of course, these cases do involve voting. But, by this exclusive characterization, the Court ignores the crucial point that in apportionment cases the personal civil right of the voter is intertwined with large, overriding questions concerning representation—*i.e.*, concerning political philosophies and practices of representation in a dynamically democratic public order, in which groups are as relevant as individuals. Indeed, groups and parties are the building blocks of political power. Because apportionment involves the creation and control of political power, the group dynamics of American politics cannot be ignored forever in reapportionment litigation, although it has received little attention in this "first round" of reapportionment cases.

Moreover, even as a civil rights case, the Court's formulation of an arithmetic absolute of equal population districts is a marked departure from previous constructions of the equal protection clause. Except in regard to race, where we have sought to erect—and I think properly—a concept of a color-blind Constitution, judicial interpretations of the equal protection clause have stressed respect for legislative discretion and a flexible approach toward legislative classifications. *McGowan v. Maryland*²⁶ and the other Sunday closing cases illustrate this well.

Further, if the goal, however arrived at in terms of constitutional source, be to weigh each voter's vote equally and thereby to give each voter an equally effective vote, this is a deceptive concept, impossible to achieve in practice, as the previous illustrations demonstrate. In any election in any district system, there is a minority that is weighted at zero and a majority who elects its man or its slate and so is weighted, at least until the next election, at one hundred

25. Some persons have suggested that the proper data to examine in apportionment-malapportionment studies is not population data but data on the number of potential voters, or of registered voters, or of actual voters. Wholly apart from the question of theoretical merit, attempts to use indices more refined than the readily available census data, or to work out a political participation index as an apportionment factor, have normally been rejected because of the additional effort involved. See Silva, *Legislative Representation—With Special Reference to New York*, 27 *LAW & CONTEMP. PROB.* 408 (1962); Silva, *Making Votes Count*, 52 *NAT'L CIV. REV.* 489 (1963).

26. 366 U.S. 420, 426 (1961). In this case, Mr. Chief Justice Warren said: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426.

per cent. Some vote weighting necessarily is involved in any system for the election of a multi-membered body from separate districts. How these one hundred per cent majorities and zero minorities add up across a state is the important issue in assessing the fairness of the system and its effectiveness in representing the various organized and unorganized interests that make up the body politic. Semantics have helped to impede clarity of thought in this field. For example, "equal population" is an objective term with clear meaning; but, the terms "equal representation" and "equal vote-weighting," which are sometimes used as substitutes, are subjective terms that have no clear meaning. These latter terms describe problems; they do not label anything. Judicial creation of equal population districts, without more, cannot be counted on to produce either "equally weighted" votes or "equally effective" votes.

B. Implications of "One Man-One Vote"

Let us now take the goal of "one man-one vote" or "equal vote weighting" at face value and inquire into its implications. If we are serious about "one man-one vote," we will want to maximize the prospects for it being an *effective* vote. The question then naturally arises whether the one man-one vote principle includes a right to have a large area divided into single-member districts, so that a sizable cluster of like-minded people will not be submerged as a permanent minority in a large multi-member district. Mr. Chief Justice Warren, in what I think was a rather casual dictum since the point was not before him, intimated in his opinion for the Court in the Alabama case, *Reynolds v. Sims*,²⁷ that a state could elect to use single-member districts, multi-member districts, or floterial districts,²⁸ as long as there was substantial equality of population among the various districts. In regard to multi-member districts, he did suggest some practical problems, such as length of ballot and burden on the voter, but he gave no hint of constitutional restraint.

Two lower federal courts, however, already have suggested that the equal protection clause may require breaking up multi-member districts into single-member districts. Under a statute voided by a federal district court in Georgia last March,²⁹ some voters had their

27. 377 U.S. 533 (1964).

28. 377 U.S. at 577-83, 686 n.2. A "floterial district" is one that includes within its boundaries several separate districts or political subdivisions that independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned.

29. *Dorsey v. Fortson*, 228 F. Supp. 259 (N.D. Ga.), *prob. juris. noted*, 33 U.S.L. WEEK 3127 (U.S. Oct. 5, 1964).

own state senator in a single-member district. Other voters who were located in populous counties having more than one senator were under a system whereby each senator was chosen at large in the county even though assigned, for representation purposes, to a sub-district in the county where he also had to have his residence. The court held that there was unconstitutional discrimination between the single-member district voters, who "owned their man" so to speak, and the voters in the sub-districts in the plural member counties, who might be represented by a man elected by the county at large but disfavored by the very sub-district he represented. It doesn't take much imagination to see that this system could operate, and perhaps was designed to operate, to overcome sub-district majorities that vote contrary to the county-wide majority.

In Pennsylvania, a federal district court last April held that both political philosophy and constitutional law prohibited the use of multi-member districts along with single-member districts.³⁰ The court said "one man-one vote" means that each voter must vote for the same number of legislators. Otherwise, some voters would have only one legislator looking out for their interest; others would have two, three, or four, although, of course, their districts might be two, three, or four times larger. The court added the more respectable rationale that "minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in the smaller single-member district in which they may live."³¹

I am not prepared to say that the Georgia decision, or even the Pennsylvania decision, is wholly wrong, despite the Warren dictum. Indeed, if "fair representation" is the true, but unarticulated, goal in all of these apportionment matters, then I rather like these decisions. But I would find it highly amusing—if it were not so indicative of how little we have thought through this critical problem—to compare these lower federal court decisions, which suggest that equal protection requires the formation of single-member voting districts, with comments by both Justices Stewart³² and Harlan³³ in the recent reapportionment cases that state-wide election at large of all legislators could be the ultimate outcome of the one man-one vote principle espoused by the Court majority. Lately we have heard much of the merit of "neutral principles," *i.e.*, precise and

30. *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964), *appeal docketed*, 32 U.S.L. WEEK 3449 (U.S. June 19, 1964) (No. 1237); for subsequent history, see asterisk footnote on page 242.

31. *Id.* at 327.

32. 377 U.S. 713, 731 n.21 (1964).

33. 377 U.S. 533, 622 n.82 (1964).

consistent principles, for constitutional adjudication. Apparently, the one man-one vote principle is better than a mere neutral principle; it is a chameleon principle which can yield opposite conclusions.

If in the next year or two the Supreme Court should act on a case of this sort, I would expect the plea for a constitutional right to sub-districting to receive respectful consideration. Indeed, if the first case were one brought by a racial minority, I would be inclined to expect the Court to require sub-districting as a further offshoot of equal protection. As I see it, the New York City congressional districts case, *Wright v. Rockefeller*,³⁴ which the plaintiffs lost, is a different case and would not stand in the way. And, if the Court ordered sub-districting for an impacted and unrepresented racial minority, I do not see how they could refuse to do so for an impacted political party minority. The basic democratic interest in each case would be the same—to achieve at least some representation of a particular viewpoint in a multi-membered deliberative body.

One more very recent case on the "frontier of equal protection" should be noted. In South Carolina, as in a few other states, there is a requirement that, in at-large voting in plural member districts, each voter, in order to have his votes counted, must vote for *all* offices even though his own party has nominated only one or two men. In a case filed last June before a federal district court in South Carolina,³⁵ it is being contended that this provision is unconstitutional under the equal protection clause as applied to the election of ten members of the state legislature from Richland County. The Democrats nominated a full slate of ten men, but the Republicans nominated only two men. The gist of the complaint is that this system can be mathematically shown to endanger and possibly frus-

34. 376 U.S. 52 (1964).

35. *Boineau v. Thornton*, Civ. No. AC-1465, E.D.S.C., Aug. 10, 1964 (complaint dismissed), *aff'd per curiam*, 33 U.S.L. WEEK 3141 (U.S. Oct. 19, 1964), petition for rehearing filed, Oct. 30, 1964.

The petition for rehearing filed in the Supreme Court in *Boineau*, *supra*, stresses very properly the anomaly of the Court's action in affirming the South Carolina case without oral argument at a time when oral argument had been scheduled in the Georgia case, *Fortson v. Dorsey* (see note 29 *supra*), and a request for review and oral argument was pending in the Pennsylvania case, *Drew v. Scranton* (see note 30 *supra*). All three of these cases raise interrelated aspects of one central problem, *i.e.*, the relation of the new "one man-one vote" philosophy to multi-member district systems, to the subtleties of gerrymandering which may be associated with such systems, and to voting arrangements within multi-member districts.

For the Court to stop now, or to continue to make major reapportionment decisions on the basis of inadequate briefs and argument, would be most unfortunate. If well handled, full dress argument in *Dorsey*, *Drew*, and *Boineau* could illuminate, for the first time, the political realities and deeper philosophic issues of representation that have been ignored so far in most reapportionment litigation.

trate equal vote-weighting and majority rule. For example, let us assume, as in South Carolina, that with ten men to be elected at large in a county to a given class of office such as state legislator, Party *A* puts up only two men and Party *B* puts up a full slate of ten. If the per cent of total voters who favor Party *A*'s two men are a majority and if they cast their "other" votes for the same *B* Party men, then this group of voters will elect *all* its choices (2A, 8B). However, if this same majority of total voters who favor Party *A*'s two men should happen to evenly spread their "other" votes over the full ten-man slate of Party *B*, then the men nominated by Party *A* will lose unless they have the support of more than seventy-two per cent of the total number of voters. Between these two mathematical extremes lie the actual voting patterns. But, the crucial point is that, even with support of a majority of the voters, Party *A*'s two men may lose if their supporters spread their remaining votes at random over the Party *B* slate. To this extent, the South Carolina law leaves majority rule to chance, which seems contrary both to the spirit and to the language of the majority opinions in the *Reapportionment Decisions*.

C. *Reapportionment and the Vigor of State Government*

Seeing in *Baker v. Carr* the "death knell of minority state government,"³⁶ many commentators have predicted that reapportionment would lead to a great resurgence of state government, a heightened concern for urban problems at state capitals, and a lessened need for direct federal-local relations to solve urban problems. These thoughts have been common in social science and popular literature for decades. The Kestnbaum Commission on intergovernmental relations highlighted these same thoughts in its 1955 report.³⁷ They are repeated in a report on apportionment issued by the United States Advisory Commission on Intergovernmental Relations.³⁸

There undoubtedly is some foundation for these observations, although there is precious little proof of actual minority rule. However, data compiled by the U.S. Advisory Commission on Intergovernmental Relations in another study provides some sobering sta-

36. Address by Charles Rhyne, past president of the American Bar Association, general counsel of the National Institute of Municipal Law Officers, and one of the counsel in *Baker v. Carr*, delivered before the New York University Alumni Association a few months after *Baker v. Carr*.

37. COMMISSION ON INTERGOVERNMENTAL RELATIONS (KESTNBAUM COMMISSION), REPORT TO THE PRESIDENT (1955).

38. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, APPORTIONMENT OF STATE LEGISLATURES (1962).

tistics.³⁹ The study surveys the relatively dismal record of attempts in the years 1950-1961 to achieve city-consolidation or other major governmental integration in eighteen metropolitan areas. Enhanced ability to serve urban needs was a major purpose of the plans. But ten of the eighteen failed to pass the popular referendum hurdle, even though the vote was not state-wide, but rather was confined to the metropolitan area. In almost every instance, the specter of higher taxes, whether real or fancied, was a major argument of the opponents and presumably a major factor in the defeats. The commentators on the St. Louis experience said: "Taxpayers are strangely immune to arguments [explaining tax provisions] and many voters were convinced that adoption of the district would mean a substantial tax increase."⁴⁰ Another major difficulty was voter *apathy*—people are not concerned enough to favor increased local action on metropolitan problems.

Looking to the future, whatever reapportionment may accomplish, it does not seem to be well-adapted as a remedy for voter apathy and tax fears. In order to bring state government into its place in the sun as a major vehicle for solving urban problems and restraining the power flow to Washington, reapportioned legislatures are going to have to vote higher taxes. The needs for service and control in such matters as transportation and transit, housing, slum clearance and renewal, health, welfare, employment, and the like are expensive. Even under reapportionment, continued reliance upon federal programs and funds may seem to be the path of political wisdom for state and local politicians. Census Bureau and Budget Bureau reports on state and local government finances reveal a fairly heavy reliance upon federal funds.⁴¹

Another common idea that was seriously questioned by the Advisory Commission study of "metro plan" defeats is that reorganization plans carry in urban areas but fail to get a concurrent majority—where that is also required—in the outer reaches of the proposed new district. "Of the 18 proposals surveyed," according to the report,

39. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *FACTORS AFFECTING VOTER REACTIONS TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS* (1962).

40. *Id.* at 21.

41. Annual federal grants-in-aid to state and local governments have risen from three billion to 7.5 billion dollars in the period from 1955 to 1962, and the trend continues. Bureau of the Budget figures, reported in U.S. ADVISORY COMMISSION, *PERIODIC CONGRESSIONAL REASSESSMENT OF FEDERAL GRANTS-IN-AID TO STATE AND LOCAL GOVERNMENTS* 67 (1961). Although federal payments *directly* to local governments provided less than two per cent of local general revenues in 1960, new federal legislation in 1961 is expected to increase these amounts significantly during the next several years. Bureau of the Census figures, reported in U.S. ADVISORY COMMISSION, *LOCAL NON-PROPERTY TAXES AND THE COORDINATING ROLE OF THE STATE* 18 (1961).

"only 2 of the 10 which failed of adoption owed their defeat directly to the demand for concurrent majorities. . . ." ⁴² Two that passed would have failed if a concurrent majority had been required. The Commission also noted that, in twelve of the eighteen, "pluralities ran parallel in the central and the outlying parts of the area concerned, favorably in six instances and unfavorably in the other six." ⁴³

The tiny handful of empirical studies of urban-rural conflict in the actual operation of state legislatures likewise provides no basis for supposing that reapportionment will be a panacea for the ills of urbanized society. Separate studies of the Illinois and Missouri legislatures conducted a few years ago by Professors George D. Young and David R. Derge indicated that "the city's bitterest opponents in the legislature are political enemies from within its own walls, and those camped in the adjoining suburban areas." The research supported these findings: ⁴⁴

- "1. Non-metropolitan legislators seldom vote together with high cohesion against metropolitan legislators.
- "2. Metropolitan legislators usually do not vote together with high cohesion.
- "3. Metropolitan legislators are usually on the prevailing side when they do vote together with high cohesion."

A separate study by Professors Steiner and Gove of the effects of the 1955 reapportionment on the Illinois legislature concluded that there were "no profound changes," but that Republican suburban politics had become more competitive. ⁴⁵

D. *Remaining Problems*

Characterization. Looking to the future, I see a number of remaining problems and a number of creative possibilities. The first need, I think, is to characterize correctly what these cases are all about and the effect the court orders unavoidably will have. In reapportionment cases, courts sit in judgment on the structure of political power; they even effect a judicial transfer of political power. Thus, to speak in terms of distribution of political power is to talk not of legislative acts and not of judicial acts in the previously ac-

42. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *op. cit. supra* note 39, at 27.

43. *Ibid.*

44. Derge, *Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations*, 52 AM. POL. SCI. REV. 1065 (1958), incorporating findings of George D. Young, The 1958 Special Session of the Missouri General Assembly, Missouri Political Science Association Newsletter, No. 3 (1958).

45. STEINER & GOVE, LEGISLATIVE POLITICS IN ILLINOIS 132 (1960).

cepted concept of judicial review, but rather to talk of *constitutive* acts. Reapportionment re-structures government at the core. In taking on this task, the courts have assumed the function of a state constitutional convention. To an extent, of course, such a function is implicit in much judicial review under the federal supremacy principle that is derived from the supreme law of the land clause. But the task is especially grave in a reapportionment case because of the delicacy and intricacy of the policy issues involved and the superficiality of all "quickie" formulas.

Significantly, of all the vital compromises at the Constitutional Convention of 1787, only the one concerning the basis of representation is entitled to be called the Great Compromise. Apportionment and districting decisions are determinative of the quality of representative democracy. From popular suffrage derives the majoritarian principle of democracy. From apportionment and districting derive the representation features that temper majoritarianism with requirements of deliberation and consensus.

Perception of the true nature of reapportionment litigation should help clear up the semantical bog of "one man-one vote" and "equal representation." It should eliminate the misconception that the cases involve only a sharply pin-pointed issue of civil rights. It also should open the way to a fresh dialogue—long overdue—about the character and function of representation in a twentieth century mass democracy.

Political Data. Although the judiciary is well launched on a stormy sea of reapportionment litigation, there is not nearly enough information available for intelligent decision-making. Apart from the overt act of casting a ballot, little is known about the manner in which political feelings are translated into action, the actual effect of malapportionment, or the identity of the beneficiaries of reapportionment. One recent study of the lower house of Congress, in which congressmen's votes on four issues were weighted by the population of their districts and recomputed, rather surprisingly suggests that the "liberals" benefit from such congressional maldistricting as now exists.⁴⁶ A weighted vote recomputation of all roll call votes in the current session of Congress (lower house) that I have under way so far shows little change in the totals. A study of twenty-two roll call votes in two sessions of the Texas legislature, using this same technique of recomputing legislators' votes according to the population of their districts, indicates that the outcome would have differed

46. HACKER, CONGRESSIONAL DISTRICTING 90 (1963).

on only one measure.⁴⁷ This then is an area where political science, unfortunately, has let us down rather badly. We know very little about the actual operation of legislatures and the relationships between legislators and their constituencies.

Effective Representation. The matter of standards will need perpetual refinement as legislators develop new patterns of apportionment under which some identifiable group is disproportionately represented. It is demonstrably impossible to arrange districts of equal population under which no groups or political parties are specially advantaged or disadvantaged. The problem I speak of here is far more delicate, and probably far more important, than the abstract one of ascertaining how much district inequality may be tolerated under the Court's mandate for "an honest and good faith effort" to achieve districts "as nearly of equal population as is practicable." That could be a meaningless fight over percentage points. The more critical problem is to put real meaning into the language found in another part of Mr. Chief Justice Warren's opinion, where he characterized the goal as being "full and effective participation by all citizens in state government."⁴⁸ A few lines farther on he stated even more clearly that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."⁴⁹

To achieve this goal, I suggest that the Court will have to move forward in two directions beyond the equal population principle. In one direction, it will have to join Mr. Justice Stewart in his con-

47. McDonald, Legislative Malapportionment and Roll Call Voting in Texas: 1960-1963, M.A. Thesis, Univ. of Tex., 1964. Studies of this sort necessarily ignore the differences in nominations, campaigns, and elections that might have resulted from reapportionment or redistricting.

The technique of weighting each legislator's vote by the actual popular population of his district has also been suggested as a species of *remedy* for malapportionment. The New Mexico Legislature, under strong judicial pressure to reapportion, approved in 1963 a weighted vote system as a way of achieving "one man-one vote" apportionment. The plan was nullified by a state court because it was thought to be inconsistent with state constitutional clauses providing that for various purposes various percentages of "members" shall cast votes. *Cargo v. Campbell*, Santa Fe County Dist. Ct., N.M., Jan. 8, 1964. The Court did not discuss the possible overriding force of the fourteenth amendment. Documents and press clippings concerning the "weighted voting" battle in New Mexico are collected in Irion, Apportionment of the New Mexico Legislature, Univ. of N.M. Dep't of Gov't Research Report, 1964.

This past July a district court in Washington, after declaring the existing legislature invalid, suggested a weighted voting scheme as the most appropriate form of relief. *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964). However, because all parties felt the plan was unworkable, e.g., committee assignments, the court reconsidered and deleted this relief in its October 5 decree and allowed continued use of the "invalid" districts for one year.

48. 377 U.S. 533, 565 (1944).

49. *Ibid.*

cern for "ultimate effective majority rule."⁵⁰ It will have to be disposed to act against gerrymander devices, whereby a political party spreads its voters over enough districts to control a majority of seats, even though it is a minority party in the state as a whole. In the opposite direction, it should be disposed to act against gross and continued under-representation of a minority party or group that finds itself so distributed and "locked into" a district system that its votes, though substantial, always achieve zero representation.

Hearing from the Minority. I would venture the prediction that, as we move into a new era of equal population districts, we will see a renewed interest in various governmental devices to "hear from the minority." Students of government have known for years that the single-member district system has a strong tendency to over-represent the majority party. I think this well-known tendency may be enhanced, rather than lessened, by the equal population requirement. Indeed, one of the few respectable functions of the old "rotten borough system" was occasionally to give the minority party exaggerated representation from some districts in order to offset their total loss in other areas where they were a sizable, but perpetually submerged, minority. If this hunch is correct, we soon may see a renewed interest in such "hear from the minority" devices as proportional representation,⁵¹ cumulative voting (which has been practiced in Illinois for years),⁵² and limited voting. For example, a limited voting system was recently put into effect in New York City in order to improve political party balance in the city council. Its constitutionality was sustained in state litigation, and the United States Supreme Court denied review.⁵³

50. Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 677 (1964).

51. Under proportional representation no single-member districts are used. All candidates run at large, and all voters rank the candidates in order of their preferences or vote for party lists. The aim is to have each group represented in the legislature in direct proportion to its numerical strength. In this country, much opposition to proportional representation stems from the fear that it would encourage each minority to run a few candidates, and thus break down the two-party system and lead to unstable, coalition governments. See HERMENS, *DEMOCRACY OR ANARCHY? A STUDY OF PROPORTIONAL REPRESENTATION* (1941); LAKEMAN, *VOTING IN DEMOCRACIES: A STUDY OF MAJORITY AND PROPORTIONAL ELECTORAL SYSTEMS* (1955); Laughlin, *Proportional Representation: It Can Cure Our Apportionment Ills*, 49 A.B.A.J. 1065 (1963).

52. The Illinois cumulative voting system, which is not being used this year because of the special election at large, has in the past ensured minority party representation in the lower house of the Illinois legislature. Representatives are elected from plural member districts each having three legislators; each voter has three votes which he can allocate all to one man, divide between two men, or spread evenly among three candidates. See ILL. CONST. art. 4, § 7; Snowden v. Hughes, 321 U.S. 1 (1944); LAKEMAN, *op. cit. supra* note 41. See also BLAIR, *CUMULATIVE VOTING: AN EFFECTIVE ELECTORAL DEVICE IN ILLINOIS POLITICS* (1960); Blair, *The Case for Cumulative Voting in Illinois*, 47 Nw. U.L. Rev. 344 (1952).

53. Some minority party representation is guaranteed in New York's City Council

Remedies. Lastly, I would like to add a word concerning remedies, about which the Court said little in the recent decisions. There has been much loose talk about the device of an election at large, including statements to the effect that it squarely accords with the one man-one vote principle. In a literal sense, the at-large election does yield one man-one vote. But, in a functional sense, it does not provide fair representation, yielding instead only a winner-take-all majoritarianism. The battle cry has been "one man-one vote," but what the plaintiffs really have been complaining about is lack of weight in the legislature commensurate with their numbers. An election at large, therefore, is not a *remedy* in the sense of being an alternative and better representation system. From the standpoint of representation, it creates more problems than it solves. Rather, it is a *sanction* to compel change and, hopefully, improvement in the representation system.

A judicial order in the nature of an actual reapportionment would be an ultimate remedy in the true sense of the term. At least three of the handful of examples so far of direct judicial reapportionment have involved judicial choice and designation from among prefabricated proposals originating in the legislature, as in Alabama;⁵⁴ or from plans emanating from a state-sponsored research bureau, as in Oklahoma;⁵⁵ or from a special legislative apportionment commission, as in Michigan.⁵⁶ To ensure that the court will have available this kind of advice and assistance, both at the remedies stage and earlier, it would be advisable to develop a practice of intervention by political party chairmen in reapportionment suits, as was allowed in Connecticut.⁵⁷ When courts must act politically, they at least should not act blindly.

In devising remedies, the courts also should guard against undue

by the new provision that enlarges the Council by adding two members at large for each borough, but that allows each party to nominate only one at-large candidate in each borough and each voter to cast only one vote for the office. The provision was sustained in *Blaikie v. Power*, 13 N.Y.2d 134, 243 N.Y.S.2d 185, 193 N.E.2d 55 (1963), *appeal dismissed*, 375 U.S. 439 (1964). See MACKENZIE, *FREE ELECTIONS* 55-56 (1958).

54. *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *aff'd sub nom. Reynolds v. Sims*, 377 U.S. 533 (1964).

55. *Moss v. Burkhardt*, 220 F. Supp. 149 (N.D. Okla. 1963), *aff'd sub nom. Williams v. Moss*, 378 U.S. 558 (1964).

56. *In re Apportionment of Legislature*, 372 Mich. 418, 126 N.W.2d 731 (1964) and subsequent opinions and order filed June 22 and 24, 1964. Contrast *State v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 and 128 N.W.2d 16 (Wis. 1964).

57. *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn. 1964), *aff'd sub nom. Pinney v. Butterworth*, 378 U.S. 564 (1964). In this case, and in a later filed suit concerning Connecticut congressional districts, both the Republican and Democratic state chairmen intervened. N.Y. Times, Feb. 23, 1964, p. 49, col. 1; *id.* March 8, 1964, p. 75, cols. 2-4.

haste, because they are dealing with eggs that, once scrambled, cannot be put back in the shell. How anomalous it is to contrast the "hell-bent for election" speed with which some courts approach reapportionment with the lengthy delay and procrastination in desegregation of public education. Desegregation is conceptually far more simple than legislative apportionment and, unlike reapportionment, is almost exclusively a matter of vindicating a personalized civil right. And yet, in desegregation we have had "all deliberate speed" over a ten-year period, whereas in reapportionment we have been treated to the spectacle of courts pressuring and threatening legislators and fixing exact deadlines measured in months, or even weeks.

The initial order entered by the federal district court in Connecticut seemed to be an unprecedented example of judicial regulation of the political process.⁵⁸ In that order the court set up a timetable for three special elections within a ten-month period and called for an immediate special session of the legislature to set up the mechanics for a constitutional convention. It also said that the legislature elected under the old apportionment formula in November 1964 should conduct no public business other than implementing constitutional changes made by the constitutional convention. At this point the Governor remonstrated and the court accepted a modified, but still speedy, plan. Under it, a special session of the legislature was to meet on September 10, 1964, to perform the two-fold task of itself reapportioning the state in time for the November 1964 election and arranging for a constitutional convention to make a permanent apportionment. When the special session failed to reapportion the districts in accordance with directions, the court cancelled the November elections for a new legislature. It then ruled that the 1963 legislature can continue to legislate provided it reapportions within ninety days. The court will appoint a special master to operate concurrently with a new special legislative session. He will hold public hearings and will be empowered to use electronic computers to establish a new apportionment. If the legislature fails to create a reapportionment schedule by January 30, 1965, the special master's plan will be imposed on the state.⁵⁹ Judicial pressure

58. N.Y. Times, July 24, 1964, p. 28, col. 3; *id.* July 28, 1964, p. 30, col. 3.

Following the failure of the special legislative session to agree on an acceptable redistricting plan, the district court took the apparently unprecedented step of cancelling the Nov. 3, 1964, election and requesting counsel to draw up a new timetable to include an early special election, a special legislative session to reapportion temporarily, and a constitutional convention to reapportion the state permanently. N.Y. Times, Sept. 25, 1964, p. 1, cols. 7-8.

59. *Id.*, Oct. 30, 1964, p. 26, col. 8.

to force an immediate reapportionment on the eve of the November 1964 election (*e.g.*, Michigan, Oklahoma), or to limit the life or powers of the legislatures to be elected in November 1964 under unmodified apportionment plans (*e.g.*, Vermont), or to schedule special elections (*e.g.*, New York) has been common in many states.⁶⁰

E. Conclusion

In reapportionment there are no "easy outs." I cannot reject *Baker v. Carr* out of hand and join Mr. Justice Harlan on the Olympian heights of judicial detachment, even though I must admit that his opinions are challenging. On his side he has constitutional text, history, and logic.

There seem to be times, however, despite the instinctive preference for "neutral principles," when judicial *review* becomes judicial *prescription*. Such times must be rare, else there can be no judicial "review." But, when they do occur, perhaps the best one can do is to revert to these lines of Mr. Chief Justice John Marshall—so wonderfully useful because so semantically meaningless: "We must never forget that it is a constitution we are expounding." The highest commitment is to the viability of the system and to the maintenance of popular faith in it. With political avenues for redress of malapportionment blocked in many states and with protest mounting, the Court has concluded that some judicial participation in the politics of the people is a pre-condition to there *being* any effective politics of the people. However, at the same time I fear that the Court, having entered the fray, will find its simple one man-one vote standard to be more like a set of Emperor's clothes than a shining suit of democratic armor.

The questions raised in this paper do not demonstrate the invalidity of the equal population district principle. They may demonstrate its insufficiency as an exclusive guide to *fair representation*. A representative democracy may be sufficiently majoritarian to guarantee majority, rather than minority, rule; but, an excess of the majoritarian principle may rob the system of its representative character and may yield action without accommodation.⁶¹

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60. For a round-up story, see U.S. News & World Report, Aug. 24, 1964, pp. 40-41. The New York order (N.Y. Times, July 28, 1964, p. 1, col. 1) was promptly appealed to the United States Supreme Court, N.Y. Times, Aug. 26, 1964, p. 27, col. 1. In late August, Mr. Justice White denied a stay of the Oklahoma federal district court's order nullifying a May 1964 primary and ordering a new primary for Sept. 29, 1964. N.Y. Times, Aug. 27, 1964, p. 25, col. 6.

61. For further elaboration of this thought, see BUCHANAN & TULLOCK, *THE CALCULUS OF CONSENT* (1962); Dixon, *Representation Goals*, 52 NAT'L CIV. REV. 543 (1963).

II. NOTES ON CONGRESSIONAL POWER OVER JUDICIAL REVIEW OF LEGISLATIVE APPORTIONMENT⁶²

Judicial rulings impelling drastic political changes can be expected to induce sharp political reactions, and the Supreme Court's *Reapportionment Decisions* of June 15, 1964, nullifying both houses of most state legislatures in the nation, was no exception. By mid-August the House Judiciary Committee under Chairman Emanuel Celler had held eight days of hearings on a package of more than 130 bills introduced by 99 members, but he did not report out a bill. At this point, Congressman William M. Tuck of Virginia by-passed the Celler Committee. With the aid of the Rules Committee headed by his fellow Virginian, Howard W. Smith, he brought to the House floor a bill to strip the federal courts of all power over state legislative apportionment. After amendment to extend its prohibition to pending cases, the bill was passed on August 19 by a vote of 218-175.⁶³

Meanwhile, on the Senate side, a measure introduced by Senator Dirksen as a rider to the Foreign Aid bill had been undergoing revision in consultation with Majority Leader Mike Mansfield, Deputy Attorney General Nicholas deB. Katzenbach, and Solicitor General Archibald Cox. As initially proposed on August 3, the rider was an attempt to impose on the courts a temporary moratorium on further apportionment litigation. The revised version created a presumption in favor of some delay, but left the courts free to proceed if they felt the public interest required it.⁶⁴ The margin by which the Tuck bill passed the House was thought by many observers to be a move to place the modified Dirksen-Mansfield "breathing spell" measure in the position of being an acceptable compromise.

Lost in the shuffle, as the weeks went by, was a proposed constitutional amendment by Congressman McCulloch which had attracted major attention in early July. If initiated by a two-thirds vote in both houses of Congress and ratified by the legislatures of three-

62. More extensive discussion, particularly of the legal basis for attempts to tamper by statute with the original jurisdiction of the federal district courts, the original jurisdiction of the Supreme Court, and the appellate jurisdiction of the Supreme Court can be found in the statement attached to my testimony in *Hearings on Legislative Apportionment and Federal Court Jurisdiction Before a Subcommittee of the House Committee on the Judiciary*, 88th Cong., 2d Sess. (1964).

63. H.R. 11625, 88th Cong., 2d Sess. (1964), renumbered 11926 as modified and passed by the House of Representatives. 110 CONG. REC. 19580-19667 (daily ed. Aug. 19, 1964).

64. 110 CONG. REC. 17138 (daily ed. Aug. 3, 1964), 110 CONG. REC. 18567-68 (daily ed. Aug. 12, 1964).

fourths of the states, it would permit a state to apportion one house of its legislature on factors other than population, *provided* such deviation in one house from the Supreme Court's equal population district rule was approved by the people in a popular referendum.⁶⁵

One's reaction to these proposed measures will depend in part upon how one assesses congressional power in the premises and in part upon how one views the nature of the reapportionment issue. There has been much extravagant talk, by normally responsible people, of how "one man-one vote" will usher in a millenium of wisdom, justice, social welfare, and revitalized state and local government. "One man-one vote" has become a political "Lydia Pinkham." But if political facts and not census formulas are to prevail and if "fair and effective representation" is to be the goal as analyzed in detail in Part I of this article, then the *Reapportionment Decisions*, and particularly the decision in the Colorado case, appear as something less than the last word in America's quest for the democratic ideal.

Constitutional Amendment. It is implicit in the foregoing detailed analysis of the *Reapportionment Decisions* that the constitutional amendment proposed by Congressman McCulloch should not be condemned out of hand. It is rather narrowly designed to reverse the Colorado case in which the Court prevented Colorado from experimenting with a plan—approved by popular referendum and subject to modification by further popular referenda—in which one house of the legislature was based substantially on population and the other deviated from a pure population standard.

Despite questioning by some of the power of a "malapportioned" legislature to ratify a constitutional amendment, the McCulloch Amendment probably would be constitutional. This conclusion finds support in the most recent constitutional amendment case, in which Mr. Justice Black, joined by three other Justices including Mr. Justice Douglas, commented that the amending process is "'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."⁶⁶

But apart from constitutionality, many would question the

65. H.R.J. Res. 1055, 88th Cong., 2d Sess. (1964).

66. *Coleman v. Miller*, 307 U.S. 433, 459 (1939). This case involved the power of Kansas to ratify the proposed child labor amendment after first rejecting it, and after a lapse of fifteen years from the date of initiation by Congress. Two other Justices, although falling short of the view that the Court had no jurisdiction at all regarding constitutional amendments, felt that these issues at least were "political" and not subject to judicial review.

political wisdom and the political feasibility of adding to the Constitution an amendment that might bear even a slight taint of being a minority imposition upon the American people. A corollary objection to the McCulloch Amendment, as it was introduced, is that to condition departures from the strict "one man-one vote" principle upon only an initial popular referendum is insufficient. A one-shot referendum in a state that did not have local provisions for regular referenda could lead to a recurrence of the problem of a political freeze on reapportionment that has so long plagued us in this field. These problems could be eased by making the following changes in the McCulloch Amendment: (1) addition of a provision for ratification of the amendment by ratifying conventions in three-fourths of the states, rather than by state legislatures; and (2) addition of a provision to require popular referenda every ten years upon reapportionment plans that deviate from the population principle for one house of the legislature.

As thus modified, to condemn the McCulloch Amendment would be to express fear of state-wide popular referenda, and that comes close to being afraid of majority rule. How can the people act more clearly or more directly than through a statewide "one man-one vote" referendum, uninfluenced by sub-district majorities and balance of power deals by cohesive minorities? Of course, where personal civil liberties and racial equality are concerned, majority rule should be opposed whole-heartedly. But, a minority should have no civil right to impose its *political* will upon a majority. What has happened to the Justice Holmes tradition, so recently championed by Mr. Justice Frankfurter, of letting a democratic people profit from experience and gain strength and assurance through their own trial and error? Of course, initiative and referendum processes are not perfect; there are problems both in phrasing measures for the ballot and in political education; and there are equally serious problems in placing complete faith in "representative leadership." However, as former President Truman indicated, "the buck" must stop somewhere, and in a democracy the ultimate stopping place must be the people.

Withdrawal of Court Jurisdiction. The bill introduced by Congressman Tuck, as modified and passed by the House of Representatives, would strip the federal courts of all jurisdiction in state legislative apportionment litigation. This is a quite different matter. A complete withdrawal of jurisdiction would be anticonstitutional, if not unconstitutional. It would cut the heart out of the federal courts' central and vital power of constitutional adjudication. Its

constitutionality is subject to question, despite some favorable precedents dealing with congressional power to regulate by statute both federal district court jurisdiction and Supreme Court appellate jurisdiction.⁶⁷ Broad congressional power over federal district court jurisdiction is supported by precedents derived from the Norris-La Guardia Act⁶⁸ and the Emergency Price Control Act,⁶⁹ but the Portal-to-Portal Act litigation⁷⁰ may cast some doubt on power to withdraw jurisdiction over personal constitutional claims, particularly if retroactivity also is present.

Some commentators assert that the famous *Ex parte McCordle* case⁷¹ would justify such a broad exercise of congressional power over Supreme Court appellate jurisdiction. In *McCordle*, the Supreme Court for the third time⁷² avoided the issue of the constitutionality of Reconstruction legislation by acquiescing in a habeas corpus repeal statute that had the effect of withdrawing from the Court jurisdiction over a case already argued and awaiting final decision. *McCordle* could be viewed as a war-related political question case, although, to be sure, the opinion of Mr. Chief Justice Chase does not read that way. However, taking *McCordle* at face value, it may be simply wrong. The argument would be that the "exceptions" clause in article III of the Constitution only gives Congress some power of tidying up and easing the Supreme Court's burden on inconsequential matters; the clause does not give Congress a power to upset the separation of powers system by impeding or blocking the Court's central power of constitutional adjudication.

In view of the special setting of the *McCordle* case and the fact that its short opinion discusses none of the larger issues, it seems reasonable to suggest that the Supreme Court has not definitively resolved the apparent conflict between the "exceptions" clause of article III and the spirit of the rest of the article, as developed in our tradition of judicial review. The most recent Supreme Court reference to the matter suggests as much. In *Glidden Co. v. Zdanok*,

67. For general references, see HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* (1963); Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

68. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938).

69. *Lockerty v. Phillips*, 319 U.S. 182 (1943).

70. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

71. 74 U.S. (7 Wall.) 506, 516 (1868).

72. Two earlier unsuccessful attempts were *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

there is a dictum in the opinion of the Court written by Mr. Justice Harlan that seemingly accepts the *McCardle* precedent.⁷³ To this, Mr. Justice Douglas, in dissent, reacted by saying: "There is a serious question whether the *McCardle* case could command a majority view today."⁷⁴ Mr. Justice Harlan himself went on to note that, despite the *McCardle* precedent, the Court refused to apply a withdrawal of jurisdiction statute "to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case."⁷⁵ He cited *United States v. Klein*.⁷⁶

Congressional power over the Supreme Court's original jurisdiction seems to be nonexistent. The Constitution clearly specifies two headings of original jurisdiction for the Supreme Court, and there are no qualifying phrases or authorizations to Congress to make an exception. This apparent lack of congressional power is immaterial to our inquiry, however, because analysis produces at least three reasons why reapportionment does not fall within the Supreme Court's original jurisdiction. First, if viewed as suits against states by the states' own citizens, they would be barred by the eleventh amendment as broadly construed by the Supreme Court. Second, if by virtue of the *Ex parte Young* doctrine,⁷⁷ they are not viewed as being suits against a "state" within the meaning of the eleventh amendment, then, by analogy, the suits should not be viewed as suits involving a "state" as a "party" within the meaning of those terms as used in the Supreme Court's original jurisdiction clause in article III, section 2, paragraph 2. Third, wholly apart from the eleventh amendment, both the text and the interpretations of article III indicate that the original jurisdiction of the Supreme Court extends only to a limited category of suits in which a state is a party and can not be stretched to cover a state legislative reapportionment suit that is brought by the state's own citizens.⁷⁸

Moratorium on Court Exercise of Jurisdiction. A step removed from Congressman Tuck's frontal assault upon federal court jurisdiction to entertain constitutional controversies was Senator Dirksen's proposal for a temporary moratorium on exercise of federal court

73. 370 U.S. 530, 567 (1962).

74. *Id.* at 605, n.11.

75. *Id.* at 568.

76. 80 U.S. (13 Wall.) 128 (1872).

77. 209 U.S. 123 (1908).

78. HART & WECHSLER, *op. cit. supra* note 53, at 225-27.

jurisdiction over state legislative apportionment and districting.⁷⁹ As a mandatory order to delay action on constitutional litigation, the Dirksen proposal, as initially introduced on August 3, 1964, seemed to be subject to the same reservations concerning its constitutionality and the same objections on policy grounds as apply to the Tuck bill. For Congress by statute to tamper with federal court jurisdiction over federal constitutional issues would be to shift from a system of separation of powers to a system of legislative supremacy.

However, as revised in conferences with Deputy Attorney General Katzenbach and Solicitor General Cox and co-sponsored by Senator Mansfield, the Dirksen-Mansfield "rider" or amendment to the Foreign Aid Bill was quasi-advisory and in the nature of a "stay."⁸⁰ Upon application of any interested party, courts were to grant a stay, "in the absence of highly unusual circumstances." The stay would have permitted use until January 1, 1966, of unmodified apportionment provisions. It further would have allowed the legislature in regular session or the people by state constitutional amendment process a reasonable opportunity to reapportion after a state's apportionment provisions have been declared unconstitutional. The revised "rider" also endorsed, in principle, federal court action on state legislative apportionment by authorizing federal district courts to apportion a state in the event the state fails to reapportion during the period of the stay.

If one can rise above the emotionalism the controversy has aroused and eschew over-simplified appeals in terms of rural sinners and urban saints in favor of a concern for fair representation, the revised Dirksen-Mansfield proposal may be seen to have presented a special case. The separation of powers doctrine might still be asserted. But apparently, Justice Department officials were persuaded that the revised language could rest on congressional power under section 5 of the fourteenth amendment, which authorizes legislation implementing the substantive provisions of section 1⁸¹—a power particularly relevant when massive restructuring of government is at issue rather than mere vindication of a simple, personal civil right. On policy grounds, it could have been argued that the Dirksen-Mansfield "rider" would have done no more than urge the courts to grant at least a short grace period for the conceptually difficult area of legislative apportionment, a grace period comparable to the longer period

79. 110 CONG. REC. 17138 (daily ed. Aug. 3, 1964) (introduced); 110 CONG. REC. 17482 (daily ed. Aug. 5, 1964) (reported by Judiciary Committee).

80. 110 CONG. REC. 18567-68 (daily ed. Aug. 12, 1964); and see N.Y. Times, Aug. 13, 1964, p. 19, cols. 1-2.

81. N.Y. Times, Aug. 16, 1964, § E, p. 3, col. 7.

already voluntarily granted by the courts in the conceptually simple area of desegregation of public education.

But, also on policy grounds, the Dirksen-Mansfield "rider" was too broad. It would have blocked *all* federal court apportionment action during the period of the stay, not merely action designed to put at least one house of a state legislature on a straight population basis. As such, it was not coterminous with the main line of discussion of the *Reapportionment Decisions* or with the proposed McCulloch constitutional amendment, which seeks to exempt only one house from the strict equal population district rule. The issue is not one of restoring Old Sarum-type rotten boroughs; rather, the issue is whether the complementary goals of majority rule and fair representation of parties and groups can adequately be attained by using a bicameral formula that considers only bare numbers.

* * *

The denouement of the Dirksen-Mansfield "rider" debate was passage by the Senate in a colorful session on September 24, 1964, of a weakened "sense of Congress" version introduced by Majority Leader Mansfield alone.⁸² This measure then died when the House failed to take further action before adjournment. One may speculate what might have resulted had the House on the eve of the Democratic National Convention in August passed the Dirksen-Mansfield compromise measure rather than the Tuck bill. Had this been done, the Congress might have come back from the Democratic National Convention with its business so arranged as to make almost certain the enactment of the Dirksen-Mansfield compromise. By September 1 the Congress might have been able to move on to the more important matter of the content of a possible constitutional amendment. Instead, the drastic Tuck bill produced an angry reaction and the Dirksen-Mansfield measure suffered a fatal loss of momentum.

Out of this welter of activity, however, a "sense of Congress" for some delay was clearly expressed by both houses. Its effect, or lack of effect, on the courts was signalled by the federal district court's action in the Virginia case in ordering reapportionment by December 15, 1964, and cutting in half the terms of certain senators,⁸³ and by Mr. Chief Justice Warren's denial of a stay.⁸⁴

Further action on a constitutional amendment of the type proposed by Congressman McCulloch is anticipated in the new congressional session beginning January 1965. However, the political

82. 110 CONG. REC. 22051 (daily ed. Sept. 24, 1964).

83. Washington Post, Oct. 1, 1964, p. B1, col. 2.

84. New York Times, Oct. 29, 1964, p. 1, col. 5.

map of America may be so extensively altered within a few months by the reapportionment suits already concluded or moving toward finality that it is doubtful that an amendment, even if approved, would have major impact. Refinements of the "one man-one vote" principle in regard to gerrymandering, multi-member district systems, and devices to achieve equitable minority representation may occupy the center of the stage.

APPENDIX

STATISTICAL MEASURES OF "MALAPPORTIONMENT" IN THE FIFTEEN STATE LEGISLATURES
HELD UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT,
JUNE 15 AND JUNE 22, 1964

State	Minimum population theoretically able to control a majority of the seats		Population variance ratio	
	Senate	House	Senate	House
<i>Alabama</i>				
Existing appt.	25.1%	25.7%	41-1	16-1
67 Senator Amendmt.	19.4%	43.0%	59-1	4.7-1
Crawford-Webb Act	27.6%	37.0%	20-1	5-1
<i>Colorado</i>				
Existing appt.				
(Amendmt. No. 7)	33.2%	45.1%	3.6-1	1.7-1
Prior appt.	29.8%	32.1%	8-1	8-1
<i>Delaware</i>				
Existing appt.				
(1963 Amendmt.)	21.0%	28.0%	15-1	12-1
Prior appt.	22.0%	18.5%	15-1	35-1
<i>Maryland</i>				
Existing appt.				
(1962 revision of lower house)	14.1%	35.6%	32-1	6-1
Prior appt.	14.1%	24.7%	32-1	12-1
<i>New York</i>				
Existing appt.	41.8%	34.7%	3.9-1	21-1
Projected appt. (under revision due by 1966 under state constit. standards.)	38.1%	37.5%	2.6-1	12.7-1
<i>Virginia</i>	41.1%	40.5%	2.65-1	4.36-1
<i>Connecticut</i>	32.0%	12.0%	8.1-1	424.6-1
<i>Florida</i>	14.1%	22.9%	38.1-1	23.3-1
<i>Idaho</i>	16.6%	32.7%	102.2-1	17.0-1
<i>Illinois</i>	28.7%	39.9%	10.6-1	4.9-1
<i>Iowa</i>	35.2%	26.9%	8.9-1	16.8-1
<i>Michigan</i>	29.0%	44.0%	12.4-1	3.9-1
<i>Ohio</i>	41.0%	30.3%	1.9-1	9.4-1
<i>Oklahoma</i>	24.5%	29.5%	26.4-1	13.9-1
<i>Washington</i>	33.9%	35.3%	7.3-1	4.6-1

Source: The figures for the first six states listed, Alabama through Virginia, are taken from the Supreme Court opinions as reported in 377 U.S. 533 et seq. (1964). The figures for the last nine states, Connecticut through Washington, are taken from Nat. Munic. League, *Compendium on Legislative Apportionment*, 1963 Supplemental Chart.

Note: The first six cases were decided with full opinions after oral argument. The last nine were noted as memorandum decisions without oral argument.

HISTORICAL APPENDIX

(APPORTIONMENT UNDER THE ORIGINAL CONSTITUTIONS OF THE FIFTY STATES)

In the majority opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964), the principal opinion in the *Reapportionment Decisions* of June 15, 1964, Mr. Chief Justice Warren, relying on the United States Advisory Commission on Intergovernmental Relations [Commission Report, Apportionment of State Legislatures, 10-11, 35, 69 (1962)] said: "The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population." The same comment has been made by others and figured prominently in the House Judiciary Committee hearings on legislative apportionment and court jurisdiction in July-August 1964. The implication is that the *Reapportionment Decisions* are not so much ground-breaking decisions as they are a return to the original understandings.

The tabulation of the U.S. Advisory Commission uses gross categories and is not detailed state by state. An independent analysis of the texts of the original constitutions of the fifty states, giving due regard to the numerous qualifications and provisos which were used to limit the pure population principle, yields somewhat different figures. Instead of thirty-six out of fifty in favor of a substantially unmodified population principle, it appears that thirty-two upper houses and twenty-six lower houses were based on a substantially unqualified population principle (totals given in parentheses in chart). To reach this total there would have to be a transfer to category IV of those states listed exclusively in category III (c) and not tied to III by appearing in III(a) or III(b). [III(d) can be ignored as far as totals are concerned because it is a wholly overlapping category.] These figures—thirty-two upper houses and twenty-six lower houses originally on a population basis—do not indicate the full extent of inflation in the Advisory Commission statement that *both houses* of thirty-six states originally were on a population basis. To derive the comparable figure from this chart requires ascertaining the states, *both houses* of which are in categories IV and V, as amplified by transfer of III(c). That figure is only twenty-one, not thirty-six. Complexities and ambiguities in the constitutional texts make full agreement on classification impossible and suggest, at the very least, the danger of placing much reliance on attempts to segregate the states into gross and overly simple categories of population states and non-population states. It is unfortunate that the Supreme Court, by referring to the data, implied that accurate and agreed-upon classification was a simple matter—or even possible.

Category III(c), which is the most difficult one to classify, has an apparent anti-gerrymandering spirit which is laudable but which also could make equality difficult to achieve because of the rule against dividing a county in forming a district. If category III(c) is counted as charted, as deviating materially from a relatively pure population principle, then the totals diverge even more sharply from the Advisory Commission figures: only fourteen upper houses and twenty lower houses would have been based upon a substantially unqualified population principle. Data on the actual implementation of these sometimes ambiguous state constitutional clauses has never been collected, but comments of historians—Thorpe, Nevins, Luce, Main—indicate that population disparities among representative districts have been an endemic feature of the American scene.

The details are shown in the accompanying chart, in the preparation of which the author is indebted to the Rockport Fund of George Washington University Law School and Miss Dulcey A. Brown, third-year student and member of the *Law Review* staff. For similar charts on the situation on the eve of *Baker v. Carr*, and after one year of reapportionment activity, see Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 387 (1962), and Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 498-400 (1963).

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FORMAL APPORTIONMENT FORMULAE OF STATE LEGISLATURES IN ORIGINAL CONSTITUTIONS
A. Political Subdivision or Mixed Population—Geographic Principle

<i>Basis of Representation</i>	<i>Upper House</i>		<i>Lower House</i>	
I. Representation Based on Geographic Units without Regard to Population	Arizona Connecticut Delaware Louisiana Montana	New Jersey North Carolina Rhode Island Virginia	Connecticut Delaware New Jersey North Carolina	
(a) Equal Representation for each County	Arizona Delaware Montana	New Jersey North Carolina	Delaware New Jersey North Carolina ^a	
(b) Representation Based on Geographic Units other than Counties (including districts initially devised according to population but fixed in Constitution)	Connecticut Louisiana Rhode Island Virginia		Connecticut North Carolina ^a	
II. Representation Based on Geographic Units with Minor Modification Based on Population ^b	Hawaii Maryland South Carolina		Georgia Maryland Vermont Virginia	
III. Representation Proportioned to Units Based on Population with Major Limitations to Achieve Geographic Diffusion which may Substantially Defeat Population Principle or to Keep Political Subdivisions Intact ^c	Alabama Arkansas California Colorado Florida Idaho Iowa Kentucky Maine Massachusetts	Michigan Mississippi Missouri North Dakota Oklahoma Oregon Tennessee Texas Utah West Virginia Wyoming	Alabama Arizona Arkansas California Colorado Florida Hawaii Idaho Iowa Kansas Maine Massachusetts	Michigan Mississippi Missouri Montana North Dakota Oklahoma Oregon Rhode Island Utah Wyoming

A. Political Subdivision or Mixed Population—Geographic Principle (cont.)

<i>Basis of Representation</i>	<i>Upper House</i>		<i>Lower House</i>	
(a) Minimum Limits, <i>e.g.</i> , rule that no unit may have less than one representative	Kentucky Wyoming		Alabama Arizona Arkansas Florida Hawaii Idaho Kansas Massachusetts	Michigan Mississippi Missouri Rhode Island Utah Wyoming
(b) Maximum Limits, <i>e.g.</i> , rule that no unit may have more than designated number of representatives	Massachusetts		Maine Oklahoma Rhode Island	
(c) Contiguity Requirements, <i>e.g.</i> , rule that counties constituting elective unit shall not be separated by county belonging to another elective unit and that no county shall be divided in forming such unit	Alabama Arkansas California Colorado Florida Idaho Iowa Maine Michigan	Mississippi Missouri North Dakota Oklahoma Oregon Tennessee Texas Utah West Virginia Wyoming	California Colorado Idaho Iowa Montana North Dakota Oregon Wyoming	
(d) Low Limit on Maximum Size of Legislature (in relation to number of counties) when combined with minimum diffusion rules	Kentucky		Alabama Arizona Arkansas Florida Hawaii Idaho Kansas	Michigan Mississippi Missouri Rhode Island Utah West Virginia
TOTALS	33c (154, excluding III(c))		30 (24, excluding III(c))	

FORMAL APPORTIONMENT FORMULAE OF STATE LEGISLATURES IN ORIGINAL CONSTITUTIONS (cont.)
B. Population Principle, Substantially Unqualified

<i>Basis of Representation</i>	<i>Upper House</i>		<i>Lower House</i>	
IV. Representation to be Apportioned on Population Basis with Apparently Minor Limitations	Alaska Minnesota Nebraska	New Hampshire Washington Wisconsin	Alaska Nebraska South Carolina West Virginia Wisconsin	
V. Representation Based on Population	Illinois Indiana Kansas Nevada	New Mexico New York Ohio South Dakota	Illinois Indiana Kentucky Louisiana Minnesota Nevada New Hampshire	New Mexico New York Ohio Pennsylvania South Dakota Tennessee Texas Washington
TOTALS	14 ^d (32, including III(c))		20 (26, including III(c))	

^a Two representatives for each county and one representative for each town.

^b Some states may be classified either to II or III, depending on the weight given to special constitutional formulae. The distinction may not be vital, however, because the primary thrust of both II and III is toward geographic diffusion, not representation strictly by population.

^c Some states charted in this category have special formulae not easily classifiable but weighted more to population principle than geographic diffusion.

^d Only forty-seven upper legislative houses (thirty-three in chart A and fourteen in chart B) are listed because the first constitutions of Georgia, Pennsylvania, and Vermont provided for unicameral legislatures.

SOURCE: THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, 7 VOLS. (1906); state codes.

* NOTE. ADDITION TO NOTE 30 *supra*: At page proof stage, the Supreme Court vacated and remanded *Scranton v. Drew*, 33 U.S.L. WEEK 3181 (Nov. 16, 1964) (No. 201). It noted that the Pennsylvania Supreme Court had invalidated a new reapportionment statute and assumed an active role. *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964). Because the Pennsylvania Supreme Court had suggested the unconstitutionality of multi-member districts in some situations, the issue remains alive. The concurring opinion of Chief Justice Bell said the United States Supreme Court, in its handling of the apportionment matter, had "overlooked the problem of adequate representation of minority groups." 203 A.2d at 573.