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POLITICAL THICKETS AND CRAZY QUILTS: REAPPORTIONMENT AND EQUAL PROTECTION

*Robert B. McKay**

IF asked to identify the two most important cases decided by the Supreme Court of the United States in the twentieth century, informed observers would be likely to name, in whichever order, *Brown v. Board of Education*¹ and *Baker v. Carr*.² Both foretold the reordering of fundamental concepts of social or political life in large sectors of the nation, *Brown* with its condemnation of state-sanctioned segregation, and *Baker* with its invitation to judicial invalidation of state legislative apportionment districts. In another sense both cases are curious choices for so high a ranking. Neither decision required any litigant before the Court or any other person to adopt or refrain from any specific course of action. In both instances the Court opened up the question before it for extended debate in the forum of state and lower federal courts and for the public discussion that inevitably followed. But only the willfully blind could fail to see in *Brown* that segregation in public life was thenceforth doomed, however quickly or slowly might come its demise. Similarly, in *Baker*, even though the Court scarcely hinted whether the allegations of the complaint in that case stated a violation of constitutional rights, it would be a bold prognosticator indeed who would find in the decision no more than a jurisdictional rule.

The public readily grasped the wider implications of both cases. The import of *Brown* was so immediately apparent that in the areas most deeply committed to segregation as a way of life the decision day, Monday, May 17, 1954, was immediately dubbed as "Black Monday," and only gradually was there a noticeable shift from that attitude to reluctant acceptance, at least in many parts of the South. The reaction to *Baker*, however, was quite different. Instead of resistance or at best begrudging acceptance of a clearly stated principle, as had been the case with *Brown*, the apportionment decision induced an immediate, widespread, indeed eager, rush toward legislative and judicial implementation of a principle that may have been implicit, but was certainly not

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¹ 347 U.S. 483 (1954).

² 369 U.S. 186 (1962).

articulated. Before the end of 1962 at least a dozen legislatures had met in regular or special session to propose constitutional change where necessary and to enact statutory modification where permissible within the local framework; more than sixty lawsuits had been initiated in state and federal courts challenging existing apportionment formulas in at least thirty-five states; and public acceptance of the decision continued on the whole to be enthusiastic.³ Near the end of 1962, doubts began to be expressed about the wisdom, propriety, and technical competence of the decision in *Baker*, a development which might have been anticipated in the light of similar experience following *Brown*.⁴ The voice of the "yes—but" critics began to be heard throughout the land.⁵ Apart from the niggling negativism of a few, the criticisms that have been expressed are seriously and earnestly advanced and deserve rejoinder in that spirit. An attempt will here be made to formulate an answer. To explain why the stated fears seem to this writer in part exaggerated and in part groundless, it is necessary to review briefly what *Baker v. Carr* was—and what it was not.

I. BAKER V. CARR: THE NARROW HOLDING

The Tennessee constitution has required, since 1870, that the number of representatives and the number of senators in the two houses of the General Assembly shall each "be apportioned

³ For a more detailed analysis of these developments, state by state, see Appendix *infra*.

⁴ The *Brown* decision was protested not only by those who disapproved of the result, but was criticized as well even by some opponents of segregation who feared usurpation of its proper role by the Court. Two aspects of the "friendly" criticism deserve notice: (1) The earliest reaction was from some who found in the decision merely judicial acceptance of data from social psychologists and other social scientists as to the harms of segregation without sanction in the Constitution. For an example of the claims of the social scientists that led to these charges, see Clark, *Desegregation: An Appraisal of the Evidence*, 9 SOCIAL ISSUES No. 4, at 3 (1953). Reply was not long in coming. For the best answer, see Cahn, *Jurisprudence*, 1954 ANNUAL SURVEY AM. L. 809 (1955), and 1955 *id.* 655 (1956). (2) Several years later a different kind of challenge was made on the ground that the Court had failed, in *Brown* and elsewhere, to articulate "neutral principles that satisfy the mind." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959). Again appropriate answers were soon made. See, e.g., Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Black, *The Lawfulness of the School Segregation Decisions*, 69 YALE L.J. 421 (1960). Professor Black stated the matter with commendable simplicity: "What the fourteenth amendment, in its historical setting, must be read to say is that the Negro is to enjoy equal protection of the laws, and that the fact of his being a Negro is not to be taken to be a good reason for denying him this equality, however 'reasonable' that might seem to some people. All possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment." *Id.* at 423.

⁵ By the end of 1962 at least the following nay-sayers and narrow constructionists,

among the several counties or districts, according to the number of qualified electors in each”⁶ Thus, as the Court stated, “Tennessee’s standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications.”⁷

Between 1901 and 1961, however, despite a requirement for decennial reapportionment in accordance with the required population standard,⁸ the legislature had taken no action. Moreover, the complaint in *Baker* alleged that the 1901 statute itself failed to conform to the state constitutional mandate, “but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever.”⁹ Meanwhile, the number of persons eligible to vote more than quadrupled, while there was at the same time a substantial shift in the centers of population, particularly from rural to urban areas. And so it was “primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population” that gave rise to the controversy.¹⁰

The action was brought under sections 1983 and 1988 of 42 U.S.C. to redress alleged deprivation of federal constitutional rights, specifically claiming that plaintiffs, as eligible voters in urban areas, had been denied the equal protection of the laws “by virtue of the debasement of their votes.”¹¹ This ultimate question of substance was not decided. Instead, as Mr. Justice Brennan summarized the opinion which he wrote for the majority, the holding was narrow:

“In light of the District Court’s treatment of the case we hold today only (a) that the court possessed jurisdiction of

sophisticated critics all, had expressed their reservations about the substance or the technique of the decision in *Baker*. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39 (1962); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REV. 252. The carefully-wrought contribution of Professor Lucas in this symposium issue should also be included in this category: *Legislative Reapportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963).

⁶ TENN. CONST. art. II, §§ 5, 6. In the house of representatives it is further provided that the number “shall never exceed ninety-nine” (§ 5), while in the senate the number “shall not exceed one-third the number of representatives” (§ 6).

⁷ 369 U.S. at 189.

⁸ TENN. CONST. art. II, § 4.

⁹ 369 U.S. at 192.

¹⁰ *Ibid.*

¹¹ *Id.* at 188.

the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."¹²

Despite the Court's careful—and proper—limitation of the reach of its decision, the reader of the opinion is scarcely required to suspend belief that there is more. To suggest that a majority of the Court found no fault with the Tennessee apportionment structure would strain credulity. There were arguably two constitutional defects in the Tennessee scheme: (1) There was a severe imbalance between qualified electors and representation in both houses of the General Assembly;¹³ and (2) even apart from population disparities, the Tennessee apportionment was, in the words of Mr. Justice Clark, "a crazy quilt without rational basis."¹⁴ That the two issues may raise problems of differing seriousness is foretold by the fact that Mr. Justice Clark suggested that in his view even substantial disparity of population among voting districts "might not on its face be an 'invidious discrimination,'"¹⁵ thus perhaps finding no constitutional barrier to a favoring of rural districts over urban. But where there is not even *that* rationality in the allocation of representation, Mr. Justice Clark specifically found, and presumably all others of the majority would find, violation of equal protection. So at least the opinions were read by the Tennessee legislature and the three-judge federal district court to which the Supreme Court remanded *Baker*; both concluded without great difficulty that the original apportionment plan was defective.¹⁶

¹² *Id.* at 197-98. In his concurring opinion Mr. Justice Stewart, quoting portions of the above passage, emphasized that the Court "today decides three things and no more" *Id.* at 265.

¹³ The record showed that 37% of the voters of Tennessee elected 20 of the 33 senators, while 40% of the voters elected 63 of the 99 members of the house. 369 U.S. at 253 (Clark, J., concurring).

¹⁴ *Id.* at 254.

¹⁵ *Id.* at 253.

¹⁶ Pursuant to the call of the Governor of Tennessee, the General Assembly convened in extraordinary session on May 29, 1962, and enacted two separate reapportionment acts. Public Chapters Numbers 1 and 3, June 6, both approved by the Governor June 7, 1962. Both acts, despite some improvements from the 1901 statute, were found to be constitutionally defective by the three-judge court on remand. *Baker v. Carr*, 206 F. Supp. 341

Ultimately, then, *Baker v. Carr* involved two issues, one of jurisdiction and one of substance. The problem might be characterized simply, yet not inaccurately, as *whether* the federal courts can and should take jurisdiction of claims that state apportionment schemes violate constitutional guarantees and, if so, *how* the courts should determine and apply relevant standards for judgment. Before *Baker* the first question, whether federal courts can exercise jurisdiction in state apportionment cases, had been made to appear difficult, both by the Court and commentators. Now that the Court has given to this question an understandable answer that cuts through doctrinal confusion, some commentators concentrate on re-fighting that settled issue without facing the admittedly difficult second question, that of fixing relevant standards. On this second question the Court gave no hint of an ultimate answer (and has been criticized accordingly¹⁷) beyond the placid observation that "we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found" ¹⁸ Behind this confident assertion lurk the two hard questions: (1) How shall "violations of constitutional rights" be judged? Clearly the Court did not intend final disposition of the question in telling the lower courts that they are empowered to act when they find "arbitrary and capricious" state action resulting in voter discrimination,¹⁹ or action that results in "invidious discrimination,"²⁰ or action that is "without any possible justification in rationality."²¹ (2) How shall the lower courts "fashion relief"? Mr. Justice Frankfurter gave solemn warning of the problems that he believed would be encountered in the fulfillment of the task by-passed by the majority.

"Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles

(M.D. Tenn. 1962). It is interesting to note that the merits of the 1901 statute were never passed on by the court. In a pre-trial conference before the new legislation was enacted, the defendants stated that they would not attempt to defend the 1901 law. *Id.* at 345.

¹⁷ See, e.g., McCloskey, *supra* note 5, at 62-64.

¹⁸ 369 U.S. at 198.

¹⁹ *Id.* at 226.

²⁰ *Id.* at 253 (Clark, J., concurring).

²¹ *Id.* at 265 (Stewart, J., concurring).

is to attribute, however flatteringly, omnicompetence to judges."²²

The answer will be suggested here that solution of these problems is not beyond judicial competence and that postponement of decision of these questions was not only permissible, but born of the wisdom of judicial experience. Once it is conceded, as it must be, that the decision of justiciability thrust the Court into a previously untested arena of judgment, it becomes inevitably clear that discretion and valor become one in postponing immediate formulation of criteria for future judgment. Nor is there anything novel in announcing for the first time a new proposition of constitutional doctrine and leaving its implementation for future development on a case-by-case basis.²³

In another sense the two questions suggested above, whether the courts should intervene to right apportionment wrongs, and how they should do so, amount to a single question only: whether the equal protection clause is sturdy enough to support a superstructure of judicial inquiry into legislative processes heretofore described as "political," and correction thereof to the extent found constitutionally deficient. It is this issue which prompts disagreement between the majority and the dissenters. It should be frankly recognized that the framing of issues in terms of jurisdiction, justiciability, and standing serves only to mask the basic disagreement on whether courts can act profitably in the review of legislative arrangements. The issue is not whether the equal protection clause is applicable, but whether sufficient meaning can be extracted from its imprecise command to serve as a basis for remedial action within judicial competence. The only conceivable reasons, to put it bluntly, for refusing the courts even the power of examination would be a belief either that even the grossest malapportionment is within the unrestrained power of state constitutions and legislatures, or that the price of seeking judicial remedy involves too great a distortion of the judicial process. To deny recognition to fundamental constitutional issues and to retreat from correction of wrongs discovered by inquiry

²² *Id.* at 268. See also *id.* at 269-70, 329-30; *id.* at 337 (Harlan, J., dissenting).

²³ To cite only recent examples, see *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Raines*, 362 U.S. 17, 21 (1960); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Each was criticized initially for its failure to answer future questions of application, but the principle announced in each case is still being tested in new situations, some of which could not have been anticipated when the decision was announced.

would be a sad confession of judicial inability. That admission of impotence should not be made without first exploring all possibilities and finding them unavailing. This is written in the confident belief that the command of the equal protection clause can be vindicated within the framework and traditions of the judicial process.

Those who doubt judicial power seem to say: No matter how great the inequities, the courts are not suited to the corrective process. Professor Louis Pollak has effectively answered this contention:

"Does not the answer lie elsewhere than in a quest for standards of justiciability? Does not the answer lie in the dissenters' apparent view that *on the merits*, taking their complaint at full value, the appellants in *Baker v. Carr* should not prevail? Were not the dissenters really resolving the justiciability question by reference to the Court's prior reading of the equal protection clause as a concept which did not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses . . .?'"²⁴

There is considerable justification for reading both the Frankfurter and Harlan dissents for the proposition that *no* malapportionment, however severe, should be held to violate the equal protection clause.²⁵ If that reading is correct, would it not be preferable to encourage argument on that issue of substance rather than on artful avoidance of the ultimate question as to whether constitutional rights are involved and whether they are in fact in jeopardy?

Perhaps it is still premature to argue that the majority were right in allowing the debate to progress to the merits. No one who respects legal history can ignore the substantial body of judicial folklore which suggests that courts that would enter the "political thicket"²⁶ may find all exits barred by nettles.

The question is fundamental. Inescapably involved are questions of judicial power and obligation. To what extent must federal courts decide questions properly presented to them, and in what narrowly circumscribed circumstances may they properly

²⁴ Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 85 (1962).

²⁵ 369 U.S. at 266, 330.

²⁶ The expressive phrase is of course taken from Mr. Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

avoid decision when it is difficult, or likely to be unpopular, or when it might lead to frictions that the Constitution was intended to avoid?

II. THE OBLIGATION TO DECIDE

The starting point seems clear. When there is presented to a federal court in proper form a question "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,"²⁷ the federal court to which the question is presented is obligated to decide the case except in narrowly confined instances. Mr. Chief Justice Marshall stated, or perhaps overstated, the proposition in 1821:

"It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."²⁸

The statement, like many others of the Chief Justice, makes with telling force a still-valid central point, but leaves little room for the qualifications now ordinarily accepted on its generality. Without meaning to state those exceptions comprehensively, the following enumeration will illustrate the point that the fact of judicial power does not always insure its exercise. Then it will be possible to search out common denominators that justify self-restraint in some instances, while demonstrating the impropriety of withholding judgment in other circumstances.²⁹

²⁷ U.S. CONST. art. III, § 2.

²⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

²⁹ The exceptional classes listed in the text do not include those suits which do not present a "case or controversy" as required by article III of the Constitution. In the absence thereof, whether for mootness, because an advisory opinion is sought, or for other reason showing absence of a case or controversy, not only is there no mandate for federal judicial decision, but it is in fact forbidden. Nor does the present listing include instances in which by statute the federal courts are restricted in particular instances from exercising jurisdiction that would otherwise be within federal judicial power. See, e.g., 28 U.S.C. §§ 1341-42, 2283 (1958): § 1341 (restriction on interference with state taxing power);

1. The "political question" doctrine. Until the decision in *Baker* this was possibly the largest and certainly the most unconfin-
ed of the exceptional bases for withholding jurisdiction.

2. The requirement of standing.³⁰

3. Avoidance of decision on constitutional questions where
decision can be based on other grounds. The Court has "developed,
for its own governance in the cases confessedly within its jurisdic-
tion, a series of rules under which it has avoided passing upon a
large part of all the constitutional questions pressed upon it for
decision."³¹

4. The doctrine of equitable abstention.³²

5. The doctrine of *forum non conveniens*.³³

6. The exercise of discretion in granting or withholding de-
claratory relief.³⁴

7. Refusal of jurisdiction for lack of competence in matters
of probate³⁵ and domestic relations.³⁶

Each of the foregoing enumerated bases for restricting federal
jurisdiction is designed to promote efficiency of judicial admin-
istration or to avoid federal-state conflict. And each undoubtedly
serves one of those purposes to some extent when sparingly em-
ployed. Yet it must always be remembered that they are in every
instance devices that limit the exercise of the power of decision
vested in the federal courts pursuant to the constitutional grant
of power to Congress, and as specifically conferred on the courts
by Congress. Where Congress has made no exception to its grant,
the fair inference is that the federal courts should—or must—act
in the absence of especially compelling reasons for refusing to do

§ 1342 (restriction on interference with rate orders of state agencies); and § 2283 (restriction on stay of state court proceedings). See also Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958) (restricting issuance of injunctions in labor disputes).

³⁰ See, e.g., *Poe v. Ullman*, 367 U.S. 497 (1961); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

³¹ *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). See also *United States v. Lovett*, 328 U.S. 303, 320 (1946).

³² See, e.g., *Martin v. Creasy*, 360 U.S. 219 (1959); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Harrison v. NAACP*, 360 U.S. 167 (1959); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Thompson v. Magnolia Petroleum Corp.*, 309 U.S. 478 (1940).

³³ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Cf. 28 U.S.C. § 1404(a) (1958); *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

³⁴ See, e.g., *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952).

³⁵ See, e.g., *Sutton v. English*, 246 U.S. 199 (1918).

³⁶ See, e.g., *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858). See also HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1013-18 (1953).

so. It is in this light that nearly all judicially created exceptions to the congressional mandate have provoked controversy and division within the Court and criticism outside. Of none is this more true than in relation to the "political question" doctrine.

In *Baker* the complaint plainly alleged a substantial federal question, decision of which could be avoided, in the framework of established exceptions to the exercise of federal judicial power, only if the question presented for decision should be deemed a "political question." Whatever else the decision may be, it clearly answers that question in the negative, and thus the matter requires decision on the merits. Having lost on that ground, those who nonetheless favor judicial abstention in the area of apportionment raise the spectre of damage to the Court's authority which, as Mr. Justice Frankfurter puts it, "ultimately rests on sustained public confidence in its moral sanction."³⁷ Professor Robert McCloskey has expressed the same concern: "If the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt."³⁸ These are solemn warnings; but should not the Court equally be concerned about loss of public confidence for failure to decide where decision is called for? Failure of action where the duty to act is mandatory is at least as grave as a too-ready willingness to act where artful avoidance is possible. Once again, it is apparent that the matter comes down to a question whether appropriate standards can be devised. If so, no one defends failure to decide.

A. "Political Questions" and Political Thickets

Only one observation could be made with complete confidence concerning the so-called "political question" cases before the decision in *Baker*, and that was that no way had been discovered of reconciling all the holdings and opinions dealing with the subject. One of the incidental doctrinal benefits in *Baker* is that Mr. Justice Brennan for the Court has assembled the cases with a new orderliness of doctrine that could never have been done by any off-Court commentator lacking the fiat of a majority of Supreme Court Justices.³⁹ It is easy for those with no affirmative obligation to rationalize a decision, whether as dissenters on the Court⁴⁰ or as

³⁷ 369 U.S. at 267 (Frankfurter, J., dissenting).

³⁸ McCloskey, *supra* note 5, at 67.

³⁹ 369 U.S. at 210.

⁴⁰ 369 U.S. at 277-80 (Frankfurter, J., dissenting).

commentators,⁴¹ to complain that force-molding of some cases is the price of producing a pattern for the future out of what had before been chaos. But this is to disregard the fact that synthesis has never before been apparent either in Supreme Court decisions or commentary by scholars of the Court. The simple truth is that the cases, particularly the per curiam decisions,⁴² simply could not be arranged into a meaningful whole. To concede that, in order to find that patterned order, it was necessary to "explain" some cases to fit the enunciated principle is not in derogation of the new orderliness—far from it. Rather, it is simply to recognize that coherent synthesis would not otherwise have been cogently possible. Mr. Justice Brennan, while avoiding the opposite difficulty of outright overrulings, nevertheless seems to have recognized, even for the record, the problem he faced, when he said:

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness."⁴³

The Court's systematization of the "political question" cases was of course not an end in itself. It was undertaken with the specific objective of determining whether earlier decisions could on any comprehensive and fair reading be taken as an obstacle to decision of the *Baker* case. As already indicated, this inquiry produced as an incidental benefit the most comprehensive and orderly analysis of the "political question" doctrine that has yet been undertaken in any Supreme Court opinion. Equally, it appears to be at least as careful and thorough as any recent analysis by a non-Court commentator, who could not in any event catalogue cases with equivalent authority. Mr. Justice Brennan's opinion on the "political question" issue has been approved by some⁴⁴ and

⁴¹ Neal, *supra* note 5, at 255-59. Cf. Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUPREME COURT REV. 194, 215-31.

⁴² *Matthews v. Handley*, 361 U.S. 127 (1959); *Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Radford v. Gary*, 352 U.S. 991 (1957); *Kidd v. McCannless*, 352 U.S. 920 (1956); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Cox v. Peters*, 342 U.S. 936 (1952); *Remey v. Smith*, 342 U.S. 916 (1952); *Tedesco v. Board of Supervisors*, 339 U.S. 940 (1950); *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Cook v. Fortson*, 329 U.S. 675 (1946). For Mr. Justice Brennan's handling of these cases, see 369 U.S. at 234-37.

⁴³ 369 U.S. at 210.

⁴⁴ Although warning of potential dangers in future litigation, Professor McCloskey appears to approve the fact that "the political question doctrine has been considerably narrowed." McCloskey, *supra* note 5, at 61. See also Pollak, *supra* note 24.

criticized by others.⁴⁵ No matter. The important thing, the useful thing, which he accomplished was the bringing of order out of chaos. And that, undeniably, he did. At the risk of oversimplifying a still-complex question, it is fair to say that he began with the central proposition that "the non-justiciability of a political question is primarily a function of the separation of powers."⁴⁶ To constitute a "political question" within this frame there must be

"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁴⁷

On the basis of that analysis—and the cases support it remarkably well—there emerge two central justifications for judicial non-interference on "political question" grounds. First, any matter calling for decision by a parallel and co-equal branch of the national government, Congress or the executive; and, second, any matter where "judicially discoverable and manageable standards" are lacking. Clearly, as to the first, decision of state apportionment questions does not impinge upon the tripartite separation of powers at the national level, so the only relevant question on this score is whether adequate standards of judgment can be devised. It has already been noted that the Court so stated, at the level of simple assertion, that standards are not lacking. If that proposition is in fact true, as claimed, then this aspect of the "political question" problem vanishes.

One further inquiry remains in connection with "political questions." This is the too-much debated question of the relevancy of *Colegrove v. Green*.⁴⁸ There can no longer be any doubt that *Colegrove* did not hold that jurisdiction was lacking to decide the

⁴⁵ See, e.g., Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329 (1962); Lucas, *supra* note 5. See materials cited in note 41 *supra*.

⁴⁶ 369 U.S. at 210.

⁴⁷ *Id.* at 217.

⁴⁸ 328 U.S. 549 (1946).

claim that the disparity of population among the Illinois congressional districts was an unconstitutional infringement of plaintiff's right of franchise. Even Mr. Justice Frankfurter, who spoke for three of the four-Justice majority, has acknowledged that the refusal to take the case on the merits was "not in the strict sense a want of power."⁴⁹ Rather, it was a ruling that in the particular circumstances "a federal court should not entertain" the action.⁵⁰

Whatever doubts might have been entertained about the holding in *Colegrove* should surely have been dispelled by the Court's review on the merits of later cases involving related questions. In *MacDougall v. Green*,⁵¹ for example, the Court reviewed the merits and found no constitutional defect in an Illinois election law requirement of 200 signatures from each of at least fifty counties for an effective nominating petition.

On the question of jurisdiction, in the sense of judicial competence to examine questions of alleged deprivation of equal protection of the laws, there can be no doubt that the Court acted within permissible limits in permitting lower courts to reach the merits in *Baker* and other cases raising related issues. The fact that the Court has in the past frequently avoided decision in cases that directly or indirectly raised challenges to various apportionment formulas of course does not mean that reluctance to deal with difficult questions must remain the norm. As already noted, Mr. Justice Brennan provides a satisfactory legal handle for the proposition that the Court has never really refused decision of apportionment cases even on "political question" grounds, there having always been some other basis for refusal of decision.⁵² But even if this is not persuasive to some, as it was not to Justices Frankfurter and Harlan,⁵³ it is now of little moment. Since the Court admittedly has the power of decision, the only relevant question is whether the matter is "meet for judicial determination."⁵⁴ If so, that is, if "judicially manageable standards" can be devised, all agree that federal courts should inquire into allegations of constitutional wrong and take appropriate action.

⁴⁹ 369 U.S. at 277.

⁵⁰ *Ibid.* Mr. Justice Rutledge, whose vote was necessary to the result in *Colegrove*, concluded only that "the bill should be dismissed for want of equity." 328 U.S. at 565. He did not at all deny jurisdiction.

⁵¹ 335 U.S. 281 (1948).

⁵² 369 U.S. at 232-37. See also note 42 *supra*.

⁵³ *Id.* at 277-80 (Frankfurter, J., dissenting).

⁵⁴ *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

B. "Republican Form of Government"

Apparently the disapprovers do not take any particular exception thus far (although doubtful as to whether standards for judgment can be found). Instead, the point of difference has now been narrowed to an inquiry whether the constitutional guarantee in article IV, section 4, of a republican form of government presents a "political question" barrier to consideration of apportionment cases.⁵⁵ Mr. Justice Brennan for the majority, agreeing that the guarantee clause cases do present "political questions" not appropriate for federal judicial consideration, concluded that the apportionment cases do not raise these issues because "the non-justiciability of such claims has nothing to do with their touching upon matters of state governmental organization."⁵⁶ But here the dissenters took issue, particularly Mr. Justice Frankfurter, who said that "to divorce 'equal protection' from 'Republican Form' is to talk about half a question."⁵⁷ And again, "The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label."⁵⁸ Mr. Justice Brennan, however, took a close look at all the precedents and concluded that the instant case lacked the characteristics common to the guarantee clause cases that had made them non-justiciable.

"The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar"⁵⁹

⁵⁵ See Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962).

⁵⁶ 369 U.S. at 218.

⁵⁷ *Id.* at 301.

⁵⁸ *Id.* at 297.

⁵⁹ *Id.* at 226. Some have suggested that in *Baker* and earlier cases the Court has read too much into the guarantee clause cases by way of a finding of non-justiciability. The suggestion is made that, however appropriate may have been the application of the equal protection clause in a case of *de facto* malapportionment such as *Baker*, the guarantee clause should be utilized in cases of *de jure* malapportionment (as in Michigan,

And so we have come full circle. The soundness of the defense of judicial intervention and the objections thereto ultimately differ only as to whether there are judicially manageable standards. If so, under either analysis the "political question" problem largely dissolves, whether conceived in general terms or in terms of the greater particularity of the guarantee clause. There is, then, no escaping the crucial nature of the search for standards.

III. THE SEARCH FOR STANDARDS

Remarkably few of the already substantial number of critics who pronounce their disenchantment with the decision in *Baker v. Carr* have objected on the ground that malapportionment of state legislative districts should not be thought to violate the Constitution of the United States. Rather, they have suggested the *inappropriateness* of judicial intervention or, alternatively, that this particular decision does not deal adequately with the question as to whether workable standards can be devised and successfully imposed. It has already been suggested that these expressed doubts about judicial power and function—or claimed judicial "omni-competence," as Mr. Justice Frankfurter would have it⁶⁰—may well be but the external mask for an unstated, or at best obliquely hinted, conviction that the Constitution does not extend—and cannot be stretched—so far. Both the stated and the implicit arguments are important and deserve reply. The case to be made, then, and which will here be attempted, can be caught up in a simple proposition: Irrational malapportionment of state legislatures does violate the fourteenth amendment; satisfactory judicial standards can be formulated to test the matter; and adequate judicial remedies are available for correction.

It is striking how little these imagined difficulties with standards and remedies have troubled the lower federal courts and state courts where the issues have so far been tried out. No federal court has expressed reluctance to accept jurisdiction and to decide the merits; and state courts, though not bound by the jurisdictional issues decided in *Baker*, have also uniformly accepted jurisdiction

where the voters themselves had recently approved the complained-against apportionment). See Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962). See also Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 66-68 (1962). One may wonder, however, whether the command of the guarantee clause is indeed more informative than that of equal protection.

⁶⁰ 369 U.S. at 268.

of apportionment cases. Even on the question of standards, on the difficulties of which the critics place their principal reliance for rejecting judicial solution, the federal district courts and state trial and appellate courts have suggested thoughtful answers; and there is even evidence of an emerging consensus, as will be noted later. It is not too much to say that these courts have manifested an almost surprising enthusiasm for the task of setting in constitutional order the legislative houses over which they have new-found jurisdiction. Unlike the situation following *Brown v. Board of Education*, there is no evidence of judicial foot-dragging about the necessity of prompt implementation, no talk of abstention in federal courts to await decision in state courts (and, conversely, no hesitance by state courts to act when the matter is presented to them⁶¹), and almost no expressed doubt as to the workability of remedies within the traditional judicial competence. Only a very strong showing of the absence of judicial power where the courts themselves express no doubt would now be sufficient to overcome this pattern of judicial momentum. The truth is, however, that not only can that kind of showing not be made, but rather that available evidence points to formulation of entirely serviceable standards and remedies within accepted notions of judicial competence.

A. *Equal Protection in History*⁶²

Writing in 1949, Professors Tussman and tenBroek were more accurately prophetic than even they could have anticipated when they stated:

"The equal protection clause of the Fourteenth Amendment appears thus to be entering the most fruitful and significant period of its career. Virtually strangled in infancy by post-civil-war judicial reactionism, long frustrated by judicial neglect, the theory of equal protection may yet take its rightful place in the unfinished Constitutional struggle for democracy."⁶³

Their prophecy of a new role for the equal protection clause

⁶¹ *But cf.* *Sweeney v. Notte*, 183 A.2d 296, 303 (R.I. 1962), expressing doubt as to the propriety of a state court order to a state legislature, but no doubt as to the power of a federal court to issue such an order.

⁶² See generally HARRIS, *THE QUEST FOR EQUALITY* (1960); Antieau, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362 (1952); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950).

⁶³ Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949).

would have been amply fulfilled by *Brown v. Board of Education* (which must have been what they had in mind); and surely their prophetic cup runneth over with *Baker v. Carr*. The basis for their prediction and the proper contemporary meaning of the equal protection clause will be subsequently examined; but first the amenities require a brief detour into the historic origins of the clause, and its judicial development over the nearly one hundred years of its existence.

It can scarcely be doubted that the primary thrust of the equal protection clause when the fourteenth amendment was ratified in 1868 was to assure equal, or at least more nearly equal, rights of citizenship to Negroes, both the newly freed and those who had never been slaves.⁶⁴ The Supreme Court, in fact, without adequate investigation into the historical sources, early concluded that the equal protection clause dealt exclusively with protection against racial discrimination. Speaking of the clause in *The Slaughter-House Cases*, Mr. Justice Miller said in 1873:

"We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."⁶⁵

Although the Court, and Mr. Justice Miller himself, soon retreated from that narrow and non-literal reading of the clause to provide shelter for business interests,⁶⁶ it was at least true that there had been "no contemporary understanding of the relation of equal protection to business regulation."⁶⁷ That, however, was to come soon enough.⁶⁸

Two years after *The Slaughter-House Cases* the Court remained faithful to its conviction that the fourteenth amendment was race-related only and thus offered no protection from limitations on the right of franchise based on sex. In 1875 Mr. Chief Justice Waite ruled confidently in *Minor v. Happersett* that "the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the

⁶⁴ Frank & Munro, *supra* note 62, at 167-69.

⁶⁵ 83 U.S. (16 Wall.) 36, 81 (1873).

⁶⁶ See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 186-87 (1939).

⁶⁷ Frank & Munro, *supra* note 62, at 143.

⁶⁸ See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). See also *The Granger Cases*, 94 U.S. 155, 164, 179, 180 (1877).

several States which commit that important trust to men alone are not necessarily void"⁶⁹ The Court discussed the issue, however, only in terms of the privileges and immunities clause of the fourteenth amendment, without any reference to the equal protection clause. The petitioner may well have regarded an appeal to equal protection as futile in view of *The Slaughter-House Cases*; and presumably in 1875 that argument would have been no more successful than one based on the privileges and immunities clause. Classification to the voting disadvantage of women was not further tested in the Supreme Court and was finally overcome by the specifics of the nineteenth amendment almost half a century later.

Had the issue not been stamped with the imprimatur of stare decisis at a time when both the privileges and immunities and equal protection clauses were subject to restrictive interpretation, hindsight suggests that limitation of franchise rights on grounds of sex might well have yielded to the importunities of equal protection when the Court made it clear that the clause had a reach far beyond the more restrictive confines of racial discrimination. But even under the narrower interpretation of the 1870's, *Minor v. Happersett* suggests nothing contrary to the implications of *Baker*. It was simply a determination that the state could fix voter qualifications by class. However unlikely a similar result would be today, even without the nineteenth amendment,⁷⁰ the ruling is not to be taken as a holding that a state may authorize a weighting of the votes of persons otherwise entitled to cast ballots. As will be noted subsequently, that specific question has never been ruled on by the Supreme Court, although even before *Baker* the most nearly analogous cases strongly suggest disapproval of the dilution of voter strength.⁷¹

After the *Slaughter-House* and *Happersett* decisions, the equal protection clause served in the nineteenth century as a brake on various gross racially discriminatory practices, as might have been anticipated from the principal aims of the drafters as noted in those early cases.⁷² That the clause did not serve by any means to eliminate what would now be regarded as severely discriminatory

⁶⁹ 88 U.S. (21 Wall.) 162, 178 (1875).

⁷⁰ Cf. *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). Both invalidated devices under direct or indirect state sponsorship designed to deny participation in party primaries to Negro citizens otherwise entitled to vote.

⁷¹ See text at notes 146-51 *infra*.

⁷² *Neal v. Delaware*, 103 U.S. 370 (1881); *Ex parte Virginia*, 100 U.S. 339 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880).

state-supported practices, particularly the segregation imposed by the Black Codes,⁷³ is not here the point. All that doctrine has now given way under the irresistibly egalitarian pressures implicit in the text of the equal protection clause, as construed by the Supreme Court in *Brown* and its progeny. That the struggle for desegregation is not yet wholly won does not detract from the importance of the doctrinal point. Few not emotionally committed to the practice of segregation now doubt the correctness of the Court's absolutist reading of the equal protection clause on this point. Regardless of whether segregation in public schools was intended to be forbidden by the fourteenth amendment at the time of its adoption, which is at best doubtful,⁷⁴ later research has demonstrated that the words of the equal protection clause were deliberately chosen, resulting in a formulation that "had both sweep and the appearance of a careful enumeration of rights, and it had a ring to echo in the national memory of libertarian beginnings."⁷⁵ Specifically, the phrase "equal protection of the laws," selected primarily in reference to matters of racial discrimination, also carried with it the broadness of phrasing characteristic of organic law not intended for frequent or easy amendment. The lesson taught by the commerce clause as to the easy adaptability to contemporary necessities of a broadly phrased power, and by the convenient flexibility of a generalized restriction such as that in the privileges and immunities clause of article IV, could not have been lost upon the draftsmen who chose "equal protection of the laws" in preference to an earlier version that would have limited the equal protection guarantee to the rights of life, liberty, and property, supplemented by a necessary and proper clause.⁷⁶

Certainly this was the vantage point of the ruling in *Brown* when the Court candidly stated that "in approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."⁷⁷

⁷³ *Plessy v. Ferguson*, 163 U.S. 537 (1896). For a good account of the re-establishment of segregation after Reconstruction, see WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

⁷⁴ Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Frank & Munro, *supra* note 62, at 153-62.

⁷⁵ Bickel, *supra* note 74, at 62.

⁷⁶ *Id.* at 60.

⁷⁷ *Brown v. Board of Educ.*, 347 U.S. 483, 492-93 (1954).

Of course it is proper to observe that, bold as the Court's action may have seemed in outlawing the long-established segregation mores through the device of the equal protection clause, yet segregation was a matter at least *related* to the central purpose of providing discrimination-free citizenship for Negroes. Candor requires concession that the right of franchise, also not explicitly within the intended reach of the drafters, does not relate at all to discrimination based on race or color or previous condition of servitude.⁷⁸

Yet there is nothing novel in this. The very essence of constitutional litigation is the application of existing constitutional text to novel situations. The test is not whether the particular application was contemplated by the drafters, ratifiers, and other participants in the process of constitutional formulation. So long as the new application was not forbidden and is consistent with the general framework of constitutional purpose, the rest can be left to judicial craftsmanship. Perhaps the ultimate test is, to use Mr. Justice Holmes' words from a different context, "the power of the thought to get itself accepted in the competition of the market"⁷⁹ *Brown* and *Baker* alike have amply satisfied the test of general public acceptance of the principles announced—and apparently as well of the broader implications.

Apart from the due process clause, scarcely any other clause in the Constitution has proved itself more adaptable to the temper of the times than the equal protection clause. After all, as already observed, it appears as a broadly phrased limitation on the states, as categorical or as flexible as one might wish to read it. There are, of course, other specific requirements of equal, or at least non-discriminatory, treatment in the Constitution, such as the privileges and immunities clause of article IV, and the thirteenth, fifteenth, and nineteenth amendments.⁸⁰ It is no longer surprising to find equal protection overtones in the due process clauses of the fifth⁸¹ and fourteenth amendments,⁸² and even in the first amendment and the commerce clause.⁸³ It follows that the equal protection clause in the fourteenth amendment should be re-

⁷⁸ Except, of course, in the case not here at issue where a Negro is denied the vote because of his race (see note 70 *supra*), or in the exceptional case of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

⁷⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁸⁰ See *Antieau*, *supra* note 62.

⁸¹ See especially *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁸² *Antieau*, *supra* note 62, at 362-66.

⁸³ *Id.* at 366-68, 370-72.

garded simply as a general catchall provision to ensure that any discriminatory action indulged in by a state or with state approval, not elsewhere specifically forbidden, may fall within the general prohibition.

So at least the Court has always used the clause. However clear it may have been that matters of economic regulation and social welfare legislation were not within the "original understanding," nonetheless the clause was early and long used for just those purposes. Professor Robert Harris, after analysis of 554 decisions of the Supreme Court in which the equal protection clause was invoked, found that "426, or 76.9 per cent, dealt with legislation affecting economic interests. In turn, 255 of these decisions dealt with regulation, and 171 with taxation."⁸⁴ The influx of these cases began in significant numbers with the casual pronouncement by Mr. Chief Justice Waite in 1886 that the Court did not wish to hear argument on the question whether the equal protection clause applied to corporations. "We are all of the opinion that it does."⁸⁵ Subsequent developments in the history of the clause as a regulation of economic interests are well summarized by Professor Harris:

"Throughout its constitutional history the equal protection clause has undergone alternative periods of simultaneous judicial expansion and contraction. From 1873, when cases involving economic interests alone began coming to the Court, until 1937 there was a judicial expansion of the clause to protect interests of business and property against discriminatory state action. Simultaneously, the Court contracted the privileges and immunities clause and a short time later considerably restricted the scope of equal protection with respect to discriminations based upon race. Then in 1937 it began to restrict equal protection as a shield of economic interests and to continue an expansion of the clause begun two years earlier in the area of racial discrimination."⁸⁶

B. *The Two Sides of Equal Protection*

What has gone before suggests, at least preliminarily, the point now sought to be made. The equal protection clause, in

⁸⁴ HARRIS, *op. cit. supra* note 62, at 59.

⁸⁵ The case was *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). The remarks of the Chief Justice from the bench, quoted above, were said in the presence of and apparently with the silent acquiescence of Mr. Justice Miller, who had in 1873 denied the likely application of equal protection concepts to anything except matters of racial discrimination. See CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 1143 (1953).

⁸⁶ HARRIS, *op. cit. supra* note 62, at 58.

serving its function of general restraint upon unreasonable classifications imposed by state authority, has been invoked in a number of diverse contexts. Analytically, however, the cases may be grouped into two principal categories, each of which has generated a remarkably different application of the equal protection concept. So different is the doctrinal base for the two that one might almost say there are two equal protection clauses, or, at least, since some kinds of discriminatory classification are more readily forbidden than others, that there is something akin to a scale of preferences within the equal protection clause itself.

The scheme of classification internal to the equal protection clause may be stated first as a general proposition, and then explained in more detail. Where the state, in its police power capacity to regulate health, morals, and general welfare, imposes a classification scheme intended to regulate economic or social welfare matters, the coverage of "reasonableness" is comfortably loose, and there rests upon him who would challenge the classification a heavy burden in seeking to overcome the presumption of constitutionality. But where the classification impinges upon the "basic civil rights of man,"⁸⁷ the latent libertarianism that always lies close to the surface of equal protection emerges either to forbid all classification, because none is permissible, as in segregation cases, or at the least to overcome the presumption of constitutionality and to demand rigorous examination of the standards set.

Before more particular examination is made of this suggested classificatory scheme within a clause which itself makes classification suspect except for good motive and to promote reasonable ends, this caveat should be entered. The two sides of equal protection here suggested have not been separately identified by the Court as a whole, or even clearly articulated by individual members. Rather, the common practice has been, when equal protection is invoked and the claim is destined for rejection, to deal with the question in the loosest possible generalization, fortified by a string of now-familiar citations dealing with classification in the regulation of economic interests. To recite only recent examples, in *McGowan v. Maryland*⁸⁸ Mr. Chief Justice Warren stated the commonly accepted formula for these cases when he said: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."⁸⁹ Similarly, in *Baker*, two of the

⁸⁷ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁸⁸ 366 U.S. 420 (1961).

⁸⁹ *Id.* at 426.

Justices who concurred in the invocation of the equal protection clause in connection with state legislative apportionment nonetheless used as their definitional touchstone the standard of "invidious discrimination,"⁹⁰ a phrase drawn from *Williamson v. Lee Optical Co.*⁹¹ in which a clearly unequal classification of economic interests was sustained for lack of a showing of "invidious discrimination."

Examination of cases decided under the equal protection clause reveals, however, a more orderly pattern in the equal protection cases than the imprecise generalizations quoted above would indicate. Mr. Justice Brennan, writing the opinion of the Court in *Baker*, did not lend the force of the majority opinion to any suggestion that the standards which he described as "well-developed and familiar" are to be found in the line of cases dealing with regulation of economic matters. It is the aim of the following discussion to analyze the two lines of equal protection cases and suggest that the standards appropriate for application in state legislative apportionment litigation are those developed in connection with cases raising questions involving the "basic civil rights of man."

1. *Regulation of Economic Interests.* The course of the equal protection clause has not been fundamentally different from that of the due process clause. As the Reconstruction period drew to a close both due process and equal protection became chiefly identified with substantive rights, and particularly with judicially imposed limitations on the power of states to regulate economic affairs. Both aspects of that story have been well chronicled⁹² and will not be repeated. It is sufficient here to note that since the mid-thirties the Court has regularly disavowed any significant judicial authority to pass upon the validity of state economic regulation under either the due process or the equal protection clause. Due process claims appear to be altogether unavailing in this area,⁹³

⁹⁰ 369 U.S. at 245 (Douglas, J., concurring); 369 U.S. at 253 (Clark, J., concurring).

⁹¹ 348 U.S. 483, 489 (1955).

⁹² Due Process: FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT app. (1938). For a more recent statement, see Lewis, *A Newspaperman's View: The Role of the Supreme Court*, 45 A.B.A.J. 911 (1959). For the somewhat different regard which many state courts have for due process provisions in their own constitutions, see Carpenter, *Our Constitutional Heritage: Economic Due Process and the State Courts*, 45 A.B.A.J. 1027 (1959); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950).

Equal Protection: HARRIS, *op. cit. supra* note 62.

⁹³ Since *Nebbia v. New York*, 291 U.S. 502 (1934), substantive due process has been applied mainly in connection with claims of individual liberty, such as those involving first

and equal protection claims in the area of economic regulation have been successful only rarely.⁹⁴

That resort to equal protection should ever upset a state regulatory scheme is testimony not to the vitality of the concept of judicial supervision of the state regulatory process, but that the very words "equal protection of the laws" can scarcely be ignored in some few situations where the economic hurt is severe and without any conceivable justification in state policy. Thus, in *Morey v. Doud*,⁹⁵ involving the only important application of equal protection in recent years to invalidate state legislation regulating economic activity, the act created a closed class by exempting money orders issued by American Express Company from regulations applicable to all other issuers of like orders. For such a statutory discrimination to be sustained, Mr. Justice Burton said, it "must be based on differences that are reasonably related to the purposes of the Act in which it is found."⁹⁶ In this case no such relationship was found, but only a special exemption in behalf of one favored company. Even on that premise the decision evoked three dissents, one by Mr. Justice Black, and one subscribed to by both Justices Frankfurter and Harlan. Mr. Justice Frankfurter feared in this a return to a discarded past and stated his view of the equal protection clause in these words:

"Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation; the Equal Protection Clause has not forbidden it. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic."⁹⁷

Mr. Justice Black, dissenting separately, expressed the same idea in objecting "to the use of general provisions of the Constitution to restrict narrowly state power over state domestic affairs."⁹⁸ But

amendment claims. See also *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁹⁴ *Morey v. Doud*, 354 U.S. 457 (1957); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) [distinguished in *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 526-30 (1959)]; *Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Hartford Co. v. Harrison*, 301 U.S. 459 (1937); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936).

⁹⁵ 354 U.S. 457 (1957).

⁹⁶ *Id.* at 465.

⁹⁷ *Id.* at 472.

⁹⁸ *Id.* at 471.

then, noting the separate uses to which equal protection, like due process, may be put, he continued:

"I think state regulation should be viewed quite differently where it touches or involves freedom of speech, press, religion, petition, assembly, or other specific safeguards of the Bill of Rights. It is the duty of this Court to be alert to see that these constitutionally preferred rights are not abridged."⁹⁹

Whether *Morey v. Doud* and its few companions are regarded as rare examples of invidious discrimination unsupported by any legislative purpose, or whether merely as judicial sports, it is clear at least that they are very exceptional. The volume and variety of cases in which state economic regulation has been upheld against an equal protection challenge is impressive in size and in the summary nature of the judicial response to the issue.¹⁰⁰

2. *Regulation of "Basic Civil Rights of Man."* Equal protection and due process alike got off to a slow start as defenders of individual liberty. But just as surely as the restraining power of these clauses upon state economic regulation has declined almost to zero, substantive content on the side of individual liberty has been poured into them at an accelerating rate. Now is not the time to recount this aspect of the development of the due process clause, nor is more necessary than a reminder of the role that the due process clause has played in the absorption of the fundamental human rights of the Bill of Rights into the fourteenth amendment as a limitation upon the states.¹⁰¹ The parallel develop-

⁹⁹ *Ibid.*

¹⁰⁰ Recent cases include the following: *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1962); *Gallagher v. Crown Koshier Mkt.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Salsburg v. Maryland*, 346 U.S. 545 (1954); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *AFL v. American Sash Co.*, 335 U.S. 538 (1948); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947). Earlier decisions that remain leading cases for statement of still-controlling doctrine include the following: *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940); *Tigner v. Texas*, 310 U.S. 141 (1940); *Semler v. Dental Examiners*, 294 U.S. 608 (1935); *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

¹⁰¹ First Amendment: *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (freedom of assembly); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of association); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (freedom of religion); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (separation of church and state).

Fourth Amendment: *Mapp v. Ohio*, 367 U.S. 643 (1961).

Sixth Amendment: *Gideon v. Wainwright*, 31 U.S.L. WEEK 4291 (U.S. March 18, 1963) overruling *Betts v. Brady*, 316 U.S. 455 (1942), which had held that counsel was required only in capital cases and in other cases where absence of counsel would deny due process. See also *Powell v. Alabama*, 287 U.S. 45 (1932).

ment of the equal protection clause as a guardian of individual liberties was, until recent years, less dramatic, but nonetheless significant. With decision of the series of cases that have finally eradicated "separate but equal" as an excuse for segregation, and the series of cases prompted by *Baker*, the equal protection clause moves strikingly into the forefront of the contest for the advancement of individual liberty. Significant cases in this nearly century-long development are enumerated in the footnote below,¹⁰² and the historical highlights are discussed in the remainder of this section.

Classifications forbidden by the equal protection clause may be grouped into three categories. First are those in which no purpose at all is demonstrated or, as Mr. Justice Brennan phrased the same idea in *Baker*, where "a discrimination reflects *no* policy, but simply arbitrary and capricious action."¹⁰³ In the same case Mr. Justice Clark concluded that the Tennessee apportionment at issue was so devoid of rational policy that he could describe it as "a topsy-turvical of gigantic proportions" or as "a crazy quilt without rational basis."¹⁰⁴ As will be noted, a number of state

Eighth Amendment: *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (cruel and unusual punishment).

¹⁰² Malapportionment: *Baker v. Carr*, 369 U.S. 186 (1962).

Obligation of state to provide indigents with transcript necessary for appeal: *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956). *Cf.* *Dowd v. United States*, 340 U.S. 206, 208 (1951) (prevention of timely appeal); *Cochran v. Kansas*, 316 U.S. 255, 257 (1942) (discriminatory denial of right of appeal).

Segregation: *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Mayor & City Council v. Dawson*, 350 U.S. 877 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Restrictive covenants: *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Jury service: *Shepherd v. Florida*, 341 U.S. 50 (1951); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Akins v. Texas*, 325 U.S. 398 (1945); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Neal v. Delaware*, 103 U.S. 370 (1881); *Virginia v. Rives*, 100 U.S. 313 (1880).

Other forms of racial discrimination: *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racially motivated gerrymandering); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (limitation of livelihood); *Oyama v. California*, 332 U.S. 633 (1948) (limitation of land ownership); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (limitation of livelihood). See also *Truax v. Raich*, 239 U.S. 33 (1915) (discrimination against aliens). *But cf. Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Sterilization of "habitual criminals": *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁰³ 369 U.S. at 226.

¹⁰⁴ *Id.* at 254.

legislative apportionments are defective in this sense of failing to supply any logically discernible standard. Apportionment formulas which produce discriminations of this kind appear to be highly vulnerable.

A second classification which may fall under the ban of equal protection is that in which the class lines are drawn in a way which is on its face rational, but which nonetheless proves on closer examination to include within a single classification individual members not like others in the same group, or fails to include some that are like those in the group selected for favored or disfavored treatment. This is the problem of over-inclusion and under-inclusion.¹⁰⁵ These are not cases of forbidden classification, strictly speaking, but instances in which the means selected are defective. On the whole, the Court has not insisted upon rigorous conformity to this standard in passing upon state action in regulation of economic interests. The presumption of constitutionality has proved a convenient carpet under which to sweep irregularities of classification. But where the presumption of constitutionality is reversed,¹⁰⁶ as here suggested to be proper in franchise cases, apportionments that result in gross disparities in the weighting of votes will of course be difficult to justify.

A third classification is the one most clearly condemned by the equal protection clause. This is legislative classification of subject matter where there are *no* permissible bases for classification. The outstanding examples previously adjudicated are, of course, classifications by race, now forbidden out of hand, and classifications on grounds of alienage which, in some areas, such as opportunity to earn a livelihood, are also beyond the reach of a state's classificatory power.¹⁰⁷

The developing significance of the equal protection clause as a guardian of individual liberty has been demonstrated most comprehensively and dramatically in the gradual case-by-case erection of a total barrier to state-approved racial discrimination. In the early years following the adoption of the fourteenth amendment

¹⁰⁵ See Tussman & tenBroek, *supra* note 63.

¹⁰⁶ See *Lisco v. McNichols*, 208 F. Supp. 471, 477-78 (D. Colo. 1962); *Moss v. Burkhardt*, 207 F. Supp. 885, 891 (W.D. Okla. 1962). Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 543-45 (1942) (Stone, C. J., concurring); Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 369 (1962); Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1086 (1958). See also text at notes 115-44 *infra*. But cf. *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368, 373 (S.D.N.Y. 1962).

¹⁰⁷ See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915). Cf. *Oyama v. California*, 332 U.S. 633 (1948).

the Court saw little in the clause save a limitation on discrimination in the selection of jurors. Originally, even here, it was only overt discrimination by statute or judicial participation in juror selection that was condemned.¹⁰⁸ By the middle of the twentieth century forbidden discrimination was found, even apart from explicit exclusion on grounds of race, in long-standing patterns of jury composition which did not in fact include Negroes.¹⁰⁹

The developing role of the equal protection clause in connection with segregation is similar. While the clause was being used increasingly to strike down economic classifications, segregation was considered to be a rational classification so long as the facilities provided, although "separate," were "equal."¹¹⁰ Although the doctrine was not destined to survive, its demise was, to say the least, lingering. Hints along the way, ever stronger, were offered in 1917,¹¹¹ 1938,¹¹² and 1950;¹¹³ finally the turnabout came in 1954.¹¹⁴ Now, however, there can be no mistaking that any classification on grounds of race is forbidden.

The equal protection concept has had a similarly expansionist history in relation to state action whose hostile thrust was aimed at non-citizens because of the fact of alienage, as often further distorted by racial bias as well. The earliest of these cases, and still the doctrinal base for most that have followed, is *Yick Wo v. Hopkins*.¹¹⁵ The San Francisco ordinance involved in that case, apparently fair on its face, required the licensing of all laundries within the corporate limits of the city and county except those built of brick or stone. Presumptively the ordinance was designed as a police measure to reduce the hazard of fires in wooden, perhaps ramshackle, laundry structures. Yet the undisputed facts were that, although permission to continue operation in wooden buildings was denied to petitioners and 200 others, "all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions."¹¹⁶ Mr. Justice Matthews, writing for a unanimous Court,

¹⁰⁸ *Neal v. Delaware*, 103 U.S. 370 (1881); *Ex parte Virginia*, 100 U.S. 339 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880).

¹⁰⁹ See, e.g., *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Akins v. Texas*, 325 U.S. 398 (1945); *Hill v. Texas*, 316 U.S. 400 (1942).

¹¹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹¹ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹¹² *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹¹³ *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹¹⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹¹⁵ 118 U.S. 356 (1886).

¹¹⁶ *Id.* at 374.

concluded that no reason for this unequal treatment existed "except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."¹¹⁷ In short, the facts provided vivid testimony of the administration of a law, however fair on its face, "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws" which is secured by the fourteenth amendment.¹¹⁸ Two things about the case should be observed for their relevance today. First, the Court looked at the pattern of administration under the ordinance and unhesitatingly found in that performance sufficient evidence of discriminatory purpose to invoke equal protection. Second, upon a demonstration of the fact of unequal administration of the ordinance, any presumptive validity that might otherwise have attached disappeared; and the failure of the city to offer justification apart from racial hostility required invalidation of the ordinance.

A further matter of special interest about *Yick Wo* is a dictum of great relevance to the current apportionment cases. Emphasizing that a person's right to earn a livelihood should not be held "at the mere will of another," Mr. Justice Matthews analogized from a related proposition which he apparently believed was beyond contest.

"There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by a society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."¹¹⁹

Later cases have confirmed and strengthened the proposition that state legislation which displays, on its face or in its administration, a hostility to aliens as a class is at least subject to "strict scrutiny of the classification"¹²⁰ and, if racial hostility is present, to the probability of invalidation. *Truax v. Raich*¹²¹ involved an attack upon an Arizona law which required all Arizona employers of more than five workers to hire not less than eighty percent

¹¹⁷ *Ibid.*

¹¹⁸ *Id.* at 373.

¹¹⁹ *Id.* at 370.

¹²⁰ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹²¹ 239 U.S. 33 (1915).

qualified electors or native-born citizens of the United States. Raich, an alien who worked as a cook in a restaurant which had more than five employees, was about to lose his job solely because of the state law's coercive effect on his employer. The Court invalidated the law and declared that Raich, as a lawfully admitted alien, had a federal privilege to enter and abide in any state and thereafter a right to enjoy the equal protection of the laws where he resided. Accordingly, the state could not restrict the right of all lawfully resident aliens to engage in otherwise lawful employment. Although the Court conceded that in some respects the state could treat aliens differently than citizens,¹²² special justification was required in each such case. Here that burden had not been met:

"[U]nderlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded."¹²³

The most recent of the restriction-on-employment cases, *Takahashi v. Fish and Game Comm'n*,¹²⁴ held invalid a California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship," a classification which included resident-alien Japanese and precluded such persons from earning a living as commercial fishermen in the California coastal waters. The Court held that the State of California had failed to show, as required in *Truax*, a "special public interest with respect to any particular business . . . that could possibly be deemed to support the enactment"¹²⁵ Thus, Mr. Justice Black, for the majority, found it unnecessary to examine petitioner's contention that the measure was enacted as a result of "racial antagonism directed solely against the Japanese."¹²⁶ Mr. Justice Murphy, concurring, went further to develop at some length compelling evidence in support of the proposition that the statute was "designed solely to discriminate against such persons in a manner incon-

¹²² *Patson v. Pennsylvania*, 232 U.S. 138 (1914); *McCready v. Virginia*, 94 U.S. 391 (1877). See also *Ohio ex rel. Clarke v. Deckerbach*, 274 U.S. 392 (1927); *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 174 (1915).

¹²³ *Truax v. Raich*, 239 U.S. at 43.

¹²⁴ 334 U.S. 410 (1948).

¹²⁵ *Truax v. Raich*, 239 U.S. at 43.

¹²⁶ 334 U.S. at 418.

sistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality."¹²⁷

The other principal class of cases in which discrimination on grounds of race or alienage is said to be involved relates to laws restricting ownership or occupancy of land to citizens. The root case was *Terrace v. Thompson*,¹²⁸ in which the Court upheld a classification restricting ownership of land in the state of Washington to citizens and aliens eligible for citizenship who had in good faith made the declaration of intent to become citizens required by the naturalization laws. *Truax v. Raich* was distinguished, the Court concluding that the requisite showing of the state's special interest was sustained by the fact that "the quality and allegiance of those who own, occupy and use the farmlands within its borders are matters of highest importance and affect the safety and power of the State itself."¹²⁹ That case, however, was sharply limited in *Oyama v. California*¹³⁰ and *Takahashi v. Fish and Game Comm'n.* The California Alien Land Law construed in *Oyama* in effect forbade aliens ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land. In a proceeding by the state to escheat two parcels of land said to have been acquired in violation of the statute, the Court recognized the potentiality for discrimination in the statute and that such discrimination could be sustained only if there was "compelling justification."¹³¹ But under the facts no justification was shown where the escheat, if permitted, would take away land recorded in the name of an American citizen, a minor, solely because the land had been paid for by his father, a Japanese alien ineligible for naturalization. So the Court could only conclude that "the discrimination is based solely on his parents' country of origin . . ."¹³² Although *Terrace v. Thompson* was not specifically overruled, state courts have interpreted the later decisions in *Oyama* and *Takahashi* as repudiating the doctrine that ownership of land could be limited to citizens and aliens eligible for citizenship.¹³³

¹²⁷ *Id.* at 422.

¹²⁸ 263 U.S. 197 (1923). See also *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923).

¹²⁹ 263 U.S. at 221.

¹³⁰ 332 U.S. 633 (1948). Four members of the Court would have overruled *Terrace v. Thompson* outright. *Id.* at 649, 672.

¹³¹ 332 U.S. at 640.

¹³² *Ibid.*

¹³³ See *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952); *Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569 (1949).

*Skinner v. Oklahoma*¹³⁴ involved a very different kind of situation, but again one in which the Court recognized that legislation is on its face suspect when it involves limitation on "one of the basic civil rights of man,"¹³⁵ and is accordingly subject to "strict scrutiny."¹³⁶ At issue was the validity of Oklahoma's Habitual Criminal Sterilization Act, which defined habitual criminals to include any person convicted two or more times of felonies involving moral turpitude and thereafter convicted and sentenced in Oklahoma for such a crime. Although this definition included larceny, embezzlement was specifically exempted by statute, and in this the Court found "a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks."¹³⁷ One may doubt whether any classification would survive which contemplated sterilization of some habitual criminals but not of others,¹³⁸ but the Court was not required to reach that ultimate proposition where, as in this case,

"We have not the slightest basis for inferring that that line [between larceny by fraud and embezzlement] has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between these two offenses."¹³⁹

In 1956 still another facet of equal protection was uncovered. In *Griffin v. Illinois*¹⁴⁰ the Court ruled that in a criminal case a state may not administer its law "so as to deny adequate appellate review to the poor while granting such review to all others."¹⁴¹ That case involved the furnishing without cost to an indigent defendant of the transcript of the trial proceedings necessary under state law for appellate review; failure to make provision for such transcript was held, interestingly enough, to violate both due process and equal protection. Since that time comparable state practices have been found similarly vulnerable in a series of cases expounding the basic proposition announced in *Griffin*, and

¹³⁴ 316 U.S. 535 (1942).

¹³⁵ *Id.* at 541.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *But cf.* *Buck v. Bell*, 274 U.S. 200 (1927).

¹³⁹ 316 U.S. at 542.

¹⁴⁰ 351 U.S. 12 (1956).

¹⁴¹ *Id.* at 13.

making clear that its reach was retroactive as well as prospective.¹⁴² Principal reliance on equal protection seems also to follow from the later cases. In *Burns v. Ohio*,¹⁴³ for example, Mr. Chief Justice Warren stated that "the imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

While it may seem that there is little logical identity among the matters thus far discussed, freedom from discrimination on grounds of race or alienage, the right to have offspring, the right to an appeal in a criminal case free of the handicap of poverty, and the right not to have one's vote diluted by malapportionment, yet there is also a strong kinship in each as "one of the basic civil rights of man." In this is found the rationalizing principle in explanation of the two sides of equal protection. Where the matter subject to regulation is economic in nature or pertains to social welfare, the presumption of constitutionality will outride all but the most exigent claims of legislative discrimination. But where the preferred freedoms are involved, upon challenge the presumption is reversed; and the state's rationale for any unequal treatment, subjected to "strict scrutiny," will be sustained only upon a showing of "compelling justification."

There can scarcely be doubt that the right of franchise is one of those basic rights. As the Court long ago stated in *Yick Wo v. Hopkins*, the political franchise "is regarded as a fundamental political right, because preservative of all rights."¹⁴⁴

C. *Equal Protection: A Contemporary Meaning*

With the decisions in *Brown* and *Baker* the libertarian side of the equal protection clause has fully matured. As a shield against limitation of individual liberties at the hands of state governments, it must be ranked second in importance only to the due process clause; and of course the close relationship between the two is very marked.¹⁴⁵ Neither clause any longer has much to say about

¹⁴² *Smith v. Bennett*, 365 U.S. 708 (1961); *McCrary v. Indiana*, 364 U.S. 277 (1960); *Douglas v. Green*, 363 U.S. 192 (1960); *Burns v. Ohio*, 360 U.S. 252 (1959); *Ross v. Schneckloth*, 357 U.S. 575 (1958); *Eskridge v. Washington State Prison Bd.*, 357 U.S. 214 (1958).

¹⁴³ 360 U.S. 252, 258 (1959).

¹⁴⁴ 118 U.S. 356, 370 (1886).

¹⁴⁵ For example, the possibility has been noted that, to the extent that the equal protection clause of its own force prohibits discrimination in the selection of jurors, such discrimination would mean that any resulting trial would violate due process. *Fay v. New York*, 332 U.S. 261, 284 n.27 (1947). See also *Griffin v. Illinois*, 351 U.S. 12, 13 (1956).

the state's power to regulate economic activities, even in almost irrational ways, so long as any mischief could be imagined on which the legislative policy might be thought to bear. On the other hand, both clauses are strongly partisan in their interest in protecting the preferred freedoms relating to individual liberty. The due process clause sometimes speaks through portions of the Bill of Rights and sometimes of its own force, while the equal protection clause speaks always in its own name, to forbid segregation, to require equality in rights of appeal in criminal cases, to limit eugenic experiments in limitation of the right of procreation—and now, to forbid irrational arrangements of voters into election districts. On the basis of this analysis the applicability of the equal protection clause to voting discriminations is perfectly apparent, indeed cries out for application, if only exercise of the right of franchise is recognized as a “basic civil right of man.”

Of this there can surely be no doubt. In a constitutional democracy, where the power of decision is vested in representative government, the right of franchise is all-important. The individual member of the body politic has no opportunity to participate in the governing process except through the ballot. This simple truth has always been recognized by the Supreme Court in the context of challenges to the power of Congress to protect the integrity of the ballot for members of Congress. In *United States v. Classic*¹⁴⁶ the Court recognized the importance of the right of franchise in these terms: “The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.”¹⁴⁷ This means that Congress may protect against intimidation of voters,¹⁴⁸ failure to count votes honestly,¹⁴⁹ and ballot-box stuffing.¹⁵⁰ So important is the free exercise of the right of franchise at all relevant stages of the election process that the party primary has also been included within the above enumeration of protections surrounding the election itself, as well as within the protection of the fifteenth amendment,¹⁵¹ and presumably the fourteenth to the extent that

¹⁴⁶ 313 U.S. 299 (1941).

¹⁴⁷ *Id.* at 314.

¹⁴⁸ *Ex parte Yarbrough*, 110 U.S. 651 (1884).

¹⁴⁹ *United States v. Mosley*, 238 U.S. 383 (1915).

¹⁵⁰ *United States v. Saylor*, 322 U.S. 385 (1944); *Ex parte Siebold*, 100 U.S. 371 (1880).

¹⁵¹ *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

the equal protection clause is a guarantor against discrimination in the free exercise of the ballot.

Presumably, then, it is not anywhere denied that the right to vote is a fundamental right deserving of whatever special protections are afforded by the Constitution. The at-best faint denial of this proposition is advanced on the ground that, whatever the importance of these rights, they are subject to "reasonable" classifications, and that the Supreme Court has so held in two principal cases, *MacDougall v. Green*¹⁵² and *South v. Peters*,¹⁵³ and several related cases more or less dependent on the same principle.¹⁵⁴

The first thing that should be said is that detractors from judicial intervention in behalf of equalizing state legislative districts cannot have it both ways. These cases, plus the ubiquitous *Colegrove v. Green*, have sometimes been cited for the proposition that federal courts should not entertain actions for declaratory or injunctive relief against claimed malapportionment in state or congressional election districts.¹⁵⁵ To use some or all of the same cases for a *holding* that the equal protection clause does not forbid the districting at issue is to ask too much of judicial pronouncement. Putting aside this somewhat querulous point, however, something should be said at least of *MacDougall v. Green* and *South v. Peters*.

MacDougall is not apposite. The object of the action in that case was to enjoin enforcement of an Illinois law requiring that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 qualified voters, including at least 200 from each of at least fifty counties within the state. Two sentences of the Court's per curiam opinion have been read to deny the applicability of equal protection concepts to apportionment generally. They are:

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the

¹⁵² 335 U.S. 281 (1948).

¹⁵³ 339 U.S. 276 (1950).

¹⁵⁴ See *Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Radford v. Gary*, 352 U.S. 991 (1957); *Kidd v. McCanless*, 352 U.S. 920 (1956); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Remmey v. Smith*, 342 U.S. 916 (1952); *Cox v. Peters*, 342 U.S. 936, *rehearing denied*, 343 U.S. 921 (1952); *Colegrove v. Barrett*, 330 U.S. 804 (1947).

¹⁵⁵ See, e.g., *Baker v. Carr*, 369 U.S. at 277-80 (Frankfurter, J., dissenting).

power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former."¹⁵⁶

Putting aside the fact that this case, unlike *Baker*, involved a congressional election, which in truth seems not a very important distinction,¹⁵⁷ the real difference inheres in the purpose which the Illinois statute was intended to serve. However wise or unwise the legislation, its aim was simply to insure that any political party, as a condition of initial access to the ballot, should have at least a minimal base of support (200 signatures) in at least fifty counties (fewer than half) in the state. It is quite a different thing to permit disproportionate weighting of the votes of qualified voters in every primary and general election, to the continuing advantage of some and the continuing disadvantage of others. To say that the state is not obligated to allow every aspiring political party, including irresponsible ones, to participate in the official election process is very different from saying that it has no obligation to treat all registered voters equally. The quoted portions of the *MacDougall* opinion, however valid in the context of that case, should not be carried over as dictum to influence future decisions involving the very different question of malapportionment.

Nor should *South v. Peters* be relied on as precedent in support of continued malapportionment. Although the Court there refused to set aside the so-called county unit system in Georgia, despite severe population disparities in the representation formula,¹⁵⁸ the two-paragraph per curiam opinion is not reasoned; and, brief though it is, it is so ambiguous on the question here relevant that it is not clear what the holding is. The three-judge district court had dismissed the petition, presumably on the merits,¹⁵⁹ so the Supreme Court's affirmance can be read as a decision on the merits. However, the only reason given was that "federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical dis-

¹⁵⁶ 335 U.S. at 283-84.

¹⁵⁷ See Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13 (1962); Comment, *Challenges to Congressional Districting: After Baker v. Carr Does Colegrove v. Green Endure?*, 63 COLUM. L. REV. 98 (1963).

¹⁵⁸ Cf. *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), *vacated and remanded*, 31 U.S.L. WEEK 4285 (U.S. March 18, 1963).

¹⁵⁹ *South v. Peters*, 89 F. Supp. 672 (N.D. Ga. 1950).

tribution of electoral strength among its political subdivisions.”¹⁰⁰ This is scarcely the language of decision on the merits, but rather of withdrawal from decision on equitable grounds. The uncertainty of meaning is further compounded by the fact that, of the three Supreme Court decisions cited in presumed support of the above-mentioned statement, one was a decision on the merits (*MacDougall v. Green*), but on a different matter, as already noted; one was a decision distinctly not on the merits (*Colegrove v. Green*); and the third involved interpretation of an act of Congress (*Wood v. Broom*¹⁰¹). Now that the Court has decided in *Baker* that questions such as those presented in *South v. Peters* are justiciable and should be decided on the merits, those cases should come to the Court unembarrassed by the uncertainties of *South v. Peters*.

IV. EQUAL PROTECTION AND REAPPORTIONMENT

The thesis has been offered previously that the modern, libertarian interpretation of equal protection when fundamental human rights are involved should prove adequate to the task yet to be accomplished of defining the standards by which equal protection is to be applied to reapportionment. The forum for testing this question is, and will continue to be, as the Supreme Court intended, in state and lower federal courts; and considerable wisdom emerges from their separate encounters with the almost infinite variety of individual apportionment formulas.

A. *The Impermissible Classifications*

There can no longer be doubt that equal protection is sometimes to be read with the imperatives of an absolute, altogether forbidding some grounds of classification. Race is, of course, the clearest example, and religion would presumably be another if the first amendment were not available to serve the same function directly of its own force. The argument is strongly pressed that the weighting of votes by apportionment-induced inequities should also be categorically forbidden. It is a forceful argument, stemming from the democratic premise of guaranteed equality in the exercise of the franchise. The hypothesis is certainly no less compelling, and perhaps more so, in light of the representative character of the government prescribed by the American Constitution. The constant movement in American democracy has been away

¹⁰⁰ 339 U.S. at 277.

¹⁰¹ 287 U.S. 1, 8 (1932).

from the early restrictions on the right of suffrage. Qualifications on the right of franchise based on property ownership and on sex have disappeared, as has the original practice of indirect election of Senators, and as have most other impediments to free exercise of the ballot. The nearly complete triumph of the democratic ideal in these respects is scarcely flawed save by persistent, and worsening, disadvantages imposed on some groups of voters occasioned solely by the fact of residence at one place within a state rather than another.¹⁶²

The democratic equalitarian argument against voter classification other than on the basis of population is extremely attractive and has gained considerable support under the banner of "one man-one vote."¹⁶³ Supporters of the principle of representation in accordance with population make it clear that they intend application of that standard to both houses of every bicameral state legislature,¹⁶⁴ but would ordinarily allow some flexibility where precise mathematical equality is not feasible except at the expense of other distortion, such as gerrymandering.¹⁶⁵ Conceptually appealing as this position is, it is striking that at least in this absolute form it has attracted almost no judicial support. None of the Supreme Court opinions in *Baker* endorsed the proposition that all weighting is forbidden. Although the majority opinion does not deal explicitly with the question, the concurring and dissenting opinions demonstrate that the problem of standards had been much thought about. Mr. Justice Douglas, concurring, came closest to the "one man-one vote" proposition when he said that "the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?"¹⁶⁶ As phrased, a negative answer might have been anticipated. However, invoking the test of "invidious discrimination," he continued: "Universal equality is not the test; there is room for weighting."¹⁶⁷ Mr. Justice Clark was equally explicit in stating that "no one . . . contends

¹⁶² It is no answer to suggest that the voter discrimination among state districts is similar to that against voters of different states in voting for senators. Reasons will be advanced *infra* for the proposition that the so-called "federal analogy" is in reality not relevant at all.

¹⁶³ Under that title, The Twentieth Century Fund in 1962 published a statement of the consensus of a conference of political scientists, research scholars, and others with particular experience and interest in apportionment. The text was prepared by Mr. Anthony Lewis, who served as reporter.

¹⁶⁴ See statement referred to in note 163 *supra*, at 8-12.

¹⁶⁵ See Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 114-24 (1962).

¹⁶⁶ 369 U.S. at 244.

¹⁶⁷ *Id.* at 244-45.

that mathematical equality among voters is required by the Equal Protection Clause."¹⁶⁸ Mr. Justice Stewart, concurring, rejected the concept of absolute, or even approximate, equality.¹⁶⁹ And of course Justices Frankfurter and Harlan, in their dissenting opinions, denied that the equal protection clause carries such a command. Indeed, Mr. Justice Frankfurter asserted that the Court "shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts."¹⁷⁰ While he probably underestimated the consensus of the majority toward remedial action in cases of severe disparity, certainly no voice has yet been heard on the Supreme Court in favor of full equality of population in all state voting districts.

In state and lower federal courts the answer has not been different on this point, even though very substantial reordering of state legislative apportionment was effectuated before the November 1962 general election, the first after the decision in *Baker*. By the end of 1962 reapportionment in both houses of a bicameral legislature in accordance with population had been ordered by state or federal courts in five states; but in no one of them did the court rule categorically that mathematical equality of population was required for each election district (even permitting minor variations as a practical matter).

The decision which looks most strongly in the direction of near-mathematical equality in both houses is *Scholle v. Hare*,¹⁷¹ in which the majority of the Michigan Supreme Court held invalid provisions of the 1952 amendments to the state constitution creating senatorial voting districts that were "arbitrary, discriminatory, and without reasonable or just relation or relevance to the electoral process."¹⁷² Justice Kavanagh, for himself and Justice Black, suggested a rule in these terms:

"When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is constitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed."¹⁷³

¹⁶⁸ *Id.* at 258.

¹⁶⁹ *Id.* at 265-66.

¹⁷⁰ *Id.* at 268-69.

¹⁷¹ 367 Mich. 176, 116 N.W.2d 350 (1962), *petition for certiorari filed sub nom. Beadle v. Scholle*, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).

¹⁷² *Id.* at 186, 116 N.W.2d at 354.

¹⁷³ *Id.* at 188-89, 116 N.W.2d at 355.

In the same case, without suggesting possible limits of permissible variation, Justice Souris, for himself and Justice Smith, made a strong plea for population-based election districts:

"Beyond the objective of affording to citizens effective representation in the legislature, it is difficult for me to conceive of any other legitimate State purpose for classification of citizens in their participation in the electoral process, a process inherently the equal right of each individual citizen."¹⁷⁴

The latter formulation is weakened, not only by the fact that the statement was made for only two of the seven participating justices, but as well since stated in general terms; and Justice Souris himself admits the possibility, however unlikely, that there might be "other legitimate objectives of classification which would constitutionally justify State denial of the Citizen's right to a free and undiluted ballot"¹⁷⁵ Justice Kavanagh, on the other hand, proposed a specific enough formula, but also spoke for only two justices. In addition, although his remarks have been widely quoted both by supporters and detractors of the equal-population principle, too little notice has been given to the fact that the principle was drawn from earlier Michigan cases¹⁷⁶ dealing primarily with state constitutional questions, and from a dissenting opinion in the United States Supreme Court.¹⁷⁷ No member of the Michigan Supreme Court held invalid the provisions of the 1908 state constitution which would become operative on invalidation of the 1952 amendments. But those provisions¹⁷⁸ forbid division of counties in fixing the senatorial districts except where a single county is entitled on the basis of population to two or more senators. Under such restrictions only the most approximate equality would be possible, probably not even within the two-to-one limits mandated by Justice Kavanagh.

Moreover, the statements quoted above from the majority opinion in *Scholle v. Hare* may be no more than strong dictum. The case was apparently decided on the ground that the long failure of effective reapportionment in the state senate had de-

¹⁷⁴ *Id.* at 243, 116 N.W.2d at 381.

¹⁷⁵ *Id.* at 243, 116 N.W.2d at 381-82.

¹⁷⁶ *Williams v. Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906); *Giddings v. Secretary of State*, 93 Mich. 1, 52 N.W. 944 (1892).

¹⁷⁷ In *MacDougall v. Green*, 335 U.S. 281, 288 (1948), Justices Douglas, Black, and Murphy, in dissenting, stated: "None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack the equality which the Fourteenth Amendment guarantees."

¹⁷⁸ MICH. CONST. art. 5, §§ 2, 4.

prived the constitutionally prescribed districts of *all* rationality, as was the situation in *Baker*, a matter discussed later.¹⁷⁹ The Michigan case can be described as a general endorsement of the equal-population principle, but probably not as an explicit holding to that effect.

However far the decision in the Michigan case may be thought to go in support of the equal-population principle, courts which sweepingly invalidated existing apportionments in other states gave more modest reasons for their action. In *Baker v. Carr*, the defendants conceded before the three-judge district court on remand of the case that the still-controlling 1901 act (the legislature having failed to reapportion in the meanwhile) "fell far short of the standards of the equal protection clause."¹⁸⁰ The court had for decision then only the validity of the reapportionment statute enacted at the extraordinary session of the legislature convened in 1962. But the court was critical of the new plan for both houses, particularly the proposal for the senate which was characterized as "inexplicable either in terms of geography or demography."¹⁸¹ The total lack of rationality was demonstrated in that "not only are there wide discrepancies between rural areas of comparable character but disparities also exist as between urban areas."¹⁸² In short, the Tennessee plan remained a "crazy quilt" without rational foundation, void under even the most undemanding standard of equal protection. However, a "rational" plan, even one permitting unequal representation, was not forbidden: "We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units."¹⁸³

In the Virginia case, *Mann v. Davis*,¹⁸⁴ the three-judge court concluded that implementation of the 1962 apportionment act should be enjoined as to both houses of the General Assembly.

¹⁷⁹ See also Brief in Opposition to Petition for Certiorari, pp. 8-14, *Beadle v. Scholle*, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).

¹⁸⁰ *Baker v. Carr*, 206 F. Supp. 341, 345 (M.D. Tenn. 1962).

¹⁸¹ *Id.* at 347.

¹⁸² *Ibid.*

¹⁸³ *Id.* at 346.

¹⁸⁴ Civil No. 2604, E.D. Va., Nov. 28, 1962. The injunction against proceeding under the 1962 acts was stayed until January 31, 1963, to permit convening the legislature or appeal to the Supreme Court. This action was further stayed by Mr. Chief Justice Warren on December 15, 1962, presumably on the ground that the legislature should not be required to act prematurely, without an opportunity for defendant state officials to be heard before the Supreme Court. Appeal was filed with the Supreme Court on Feb. 2, 1963. 31 U.S.L. WEEK 3284 (U.S. Feb. 2, 1963) (No. 797).

Yet the possibility of legislative consideration of other factors was acknowledged.

"While predominant, population is not in our opinion the sole or definitive measure of districts when taken by the Equal Protection Clause. Compactness and contiguity of the territory, community of interests of the people, observance of natural lines, and conformity to historical divisions, such as county lines, for example, are all to be noticed in assaying the justness of the apportionment."¹⁸⁵

Three-judge courts in Alabama¹⁸⁶ and Oklahoma¹⁸⁷ invalidated apportionments in both houses of each state, but without squarely holding in either case that the equal-population principle must be satisfied in both houses. In the Alabama case, *Sims v. Frink*, the court suggested only that "representation according to population to some extent must be required in both Houses if invidious discrimination in the legislative systems as a whole is to be avoided."¹⁸⁸ But the cryptic words "to some extent" were not defined. In the Oklahoma case, *Moss v. Burkhardt*, the court concluded that unconstitutionality could not be demonstrated "by merely showing a disparity in voting strength of the various electoral districts,"¹⁸⁹ although "a disparity of ten to one in the voting strength between electoral districts makes out a prima facie case for invidious discrimination, and calls for strict justification."¹⁹⁰

As will more particularly appear below, other courts have rejected, in varying degrees, the equal-population principle as a necessary postulate in both houses. Some have said that representation in at least one house must be closely related to population,¹⁹¹ while others have suggested that population is but one factor—albeit primary—of several that may permissibly be taken into account,¹⁹² and a few have concluded that the legislature is largely

¹⁸⁵ *Id.* at 10.

¹⁸⁶ *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962).

¹⁸⁷ *Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962).

¹⁸⁸ 208 F. Supp. at 439.

¹⁸⁹ 207 F. Supp. at 891.

¹⁹⁰ *Ibid.*

¹⁹¹ See *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962); *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962); *Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962); *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 180 A.2d 656 (per curiam), explanation of *per curiam* order, 184 A.2d 715 (1962); *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

¹⁹² See *Lisco v. McNichols*, 208 F. Supp. 471, 476, 478 (D. Colo. 1962) (*semble*) [cf. *In the Matter of Legislative Reapportionment*, 374 P.2d 66 (Colo. 1962)]; *Sobel v. Adams*, 208 F. Supp. 316, 321-22 (S.D. Fla. 1962); *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368, 374-80 (S.D.N.Y. 1962); *Sweeney v. Notte*, 183 A.2d 296, 301 (R.I. 1962); *Baker v. Carr*, 206 F. Supp. 341, 349 (M.D. Tenn. 1962).

free to select whatever factors it chooses in the composition of election districts, so long as they are "rational."¹⁹³ A number of courts, regardless of their views on standards, have retained jurisdiction pending anticipated legislative action, meanwhile offering cautious advice as to what might be disapproved and, still more tentatively, even as to what might be approved.¹⁹⁴

B. "Crazy-Quilt" Inequality

In the absence of some guidance from the Supreme Court as to appropriate standards in relation to state legislative apportionment, it should scarcely be expected that a state or lower federal court would unhesitatingly demand compliance with a relatively rigid equal-population principle to be made applicable at once in both houses of a state legislature that has historically operated from a different base. The law simply does not develop new areas so boldly, but moves more tentatively and exploringly, endeavoring meanwhile to insure community acceptance of the law's seeming demands. Such has been the experience following *Baker v. Carr*. As revealed in the preceding subsection, courts confronted with apportionment problems have uniformly accepted jurisdiction and acknowledged the obligation of decision. In some cases decision was easy because gross malapportionment was apparent or perhaps not even denied. But more often the courts retained jurisdiction pending opportunity for corrective action without necessity of judicial intervention. The cautious prodding of legislative action by the Vermont Supreme Court is representative: "The legislative branch has, as yet, failed to act. So long as time remains for performance, we cannot presume that once their duty has been called to their attention they will fail to carry it out."¹⁹⁵ However, as the Wisconsin Supreme Court warned, "if the legislature neglects or refuses to make a fair, equitable and constitutional apportionment within a reasonable time after the 1963 legislature has been in session, then plaintiffs or others should

¹⁹³ *Caesar v. Williams*, 371 P.2d 241 (Idaho 1962) (one senator for each county and at least one representative for each county); *Levitt v. Maynard*, 104 N.H. 243, 182 A.2d 897 (1962); *Levitt v. Attorney General*, 104 N.H. 100, 179 A.2d 286 (1962).

¹⁹⁴ In the Matter of Legislative Reapportionment, 374 P.2d 66 (Colo. 1962); *Sincock v. Terry*, 207 F. Supp. 205, *motion to dismiss denied*, 210 F. Supp. 395, 396 (D. Del. 1962); *League of Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962); *Lein v. Sathre*, 205 F. Supp. 536 (D.N.D. 1962); *Mikell v. Rousseau*, 183 A.2d 817 (Vt. 1962); *Wisconsin v. Zimmerman*, 205 F. Supp. 673, *dismissed without prejudice*, 209 F. Supp. 183 (W.D. Wis. 1962).

¹⁹⁵ *Mikell v. Rousseau*, *supra* note 194, at 823.

not be prejudiced or prevented, by the decision in this case, from appealing to a federal court for redress."¹⁹⁶

The truth is, and it is not unsurprising, that without explicit Supreme Court guidance the courts to which these matters have been presented have acted promptly and with considerable boldness to eliminate some of the most virulent forms of malapportionment. The easiest cases have been those, like *Baker* itself, in which the apportionments were "crazy quilts" without benefit of any defensible plan, rational or otherwise. Mr. Justice Clark demonstrated effectively that, no matter how the apportionment in that case was examined, inequities appeared on the basis of any comparison that could be made.¹⁹⁷ Not only were urban areas in general disadvantaged, but as well there were sharp inequalities even among rural counties of similar population and among urban counties of nearly equal size. The reason is not hard to find. Take an unequal apportionment fixed by statute in 1901, as was the case in Tennessee, quadruple the voting population over sixty years, and tilt the population balance from rural to urban while leaving the apportionment unchanged. Perhaps worst of all, the resulting malapportionment cements control of the very processes of change in the hands of those who have most to lose—often their very political life—from any change. It is hardly surprising that the courts should intervene to protect the integrity of the political process.

This is, of course, exactly what has happened. Courts troubled by the apparent rigidities of the equal-population principle have often used as a more convenient handle the kind of gross disparities described above, continually compounded by population shifts, and often uncorrectible unless by judicial action. By the time *Baker* came back to the three-judge district court on remand, the defendants had conceded the invalidity of the 1901 statute, and the legislature had enacted new laws. But the court concluded that the "crazy quilt" inequities were still present and so in effect sent the matter back once more for legislative correction, meanwhile retaining jurisdiction.¹⁹⁸ Similar aggravations to worsen malapportionment occur in a number of other states where legislative districts are prescribed by state constitution without provision for change with population shifts, and where state legislatures have failed to reapportion, often in violation of state constitutional obli-

¹⁹⁶ *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 188 (W.D. Wis. 1962).

¹⁹⁷ 369 U.S. at 253-64.

¹⁹⁸ *Baker v. Carr*, 206 F. Supp. 341, 349-51 (M.D. Tenn. 1962).

gation. These are the clearest, and perhaps the most devastatingly dangerous, forms of malapportionment. Even where there might once have been a rational—even an equal-population—basis for apportionment, but which has been outdated by population shifts, no semblance of rationality remains. Invocation of the equal protection clause as a corrective in at least these cases, and they are numerous,¹⁹⁹ is an imperative hard to refuse. If *Baker v. Carr* should at last come to no more than a righting of these egregious wrongs, it would have served well. The prospects are, however, that it will mean more, that the equal protection ideal will prove hardy enough to strike down further apportionment excesses, as suggested subsequently.

C. *The Equal-Population Principle and the "Federal Analogy"*

The applicability of the equal protection clause to the totally irrational inequities described above is apparent. Another consequence of *Baker*, perhaps less obvious, is the near unanimity with which courts have concluded that population must be the sole, or at least the strongly dominant, factor in fixing election districts in at least one house of a bicameral state legislature.²⁰⁰ This development is greatly significant both as a practical matter and from a conceptual standpoint.

If the proposition gains general acceptance, as apparently it has, that equal protection requires that the election districts for at least one house of a bicameral legislature be fixed in accordance with the equal-population principle, adjustment will be necessary (or has already been made) in the dozen or more states in which before 1962 neither house of the legislature was apportioned on a predominantly population base.²⁰¹ In response to litigation ini-

¹⁹⁹ *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962); *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962); *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962) [for later history, see note 158 *supra*]; *Scholle v. Hare*, 367 Mich. 167, 116 N.W.2d 350 (1962); *League of Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962); *Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962); *Sweeney v. Notte*, 183 A.2d 296 (R.I. 1962); *Mikell v. Rousseau*, 183 A.2d 817 (Vt. 1962); *Mann v. Davis*, Civil No. 2604, E.D. Va., Nov. 28, 1962; *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962).

²⁰⁰ *Sims v. Frink*, *supra* note 199 (both houses); *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962); *Sincock v. Terry*, 207 F. Supp. 205 (D. Del. 1962) (*semble*); *Sobel v. Adams*, *supra* note 199; *Toombs v. Fortson*, 205 F. Supp. 248, 257 (N.D. Ga. 1962); *Maryland Comm. for Fair Representation v. Tawes*, 184 A.2d 715, 718-21 (Md. 1962); *Scholle v. Hare*, *supra* note 199 (both houses); *League of Municipalities v. Marsh*, *supra* note 199 (unicameral); *Moss v. Burkhardt*, *supra* note 199 (both houses); *Sweeney v. Notte*, *supra* note 199; *Baker v. Carr*, 206 F. Supp. 341, 349 (M.D. Tenn. 1962); *Mikell v. Rousseau*, *supra* note 199; *Mann v. Davis*, *supra* note 199 (both houses); *Wisconsin v. Zimmerman*, *supra* note 199 (*semble*).

²⁰¹ BOYD, PATTERNS OF APPORTIONMENT 3 (National Municipal League pamphlet 1962);

tiated in state and lower federal courts after the decision in *Baker*, several state legislatures began the corrective process in 1962, and others will act in 1963, including several in which courts retained jurisdiction over suits alleging invalid standards until legislative correction could be sought.²⁰²

An important aspect of the developing consensus in favor of apportioning at least one house on a strict population basis is the remarkable fact that state and lower federal courts could so soon reach agreement on this minimum requirement of equal protection, an agreement reached despite absence of any Supreme Court guidance on the subject. Even as a preliminary decision, however, the matter is not free of difficulty. It is one thing to say that the democratic-equalitarian aspirations voiced by the equal protection clause necessitate a strict population formula in one house. But it is quite another thing to justify what some courts have accepted as a corollary proposition, that population need not be a factor at all in the second house. For a few it has been sufficient to cite the so-called "federal analogy" and say, as did Mr. Justice Harlan, dissenting in *Baker*:

"It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that."²⁰³

But the answer is not that simple. The claimed analogy between the representation formula in Congress and in the states does not withstand analysis, whether examined from the standpoint of history, constitutional command, or logic.²⁰⁴

Thomas Jefferson, writing in 1816, stated with characteristic eloquence the democratic ideal of fairness in political representation when he said: "For let it be agreed that a government is republican in proportion as every member composing it has his

Goldberg, *The Statistics of Reapportionment*, 72 YALE L.J. 90, 91 app. A (1962). See also NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (1962).

²⁰² Changes in apportionment to provide additional weight to population were effected by legislative act in 1962 in the following states: Alabama, Delaware, Florida (later invalidated), Georgia (later invalidated), Maryland (house only), Mississippi (but voted down), Tennessee (later invalidated), Vermont, and Wisconsin (governor vetoed). Rhyne, *The Death Knell of Minority Government* 3 (mimeographed speech delivered at New York University, Nov. 17, 1962).

²⁰³ 369 U.S. at 333.

²⁰⁴ For a more complete analysis, see MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY (National Municipal League pamphlet 1962).

equal voice in the direction of its concerns . . . by representatives chosen by himself. . . ."²⁰⁵ In so speaking he was emphasizing anew the equalitarian principle that had been emphatically asserted in the Declaration of Independence and at the Constitutional Convention in 1787. Although in the Constitution itself the principle of equal representation was rejected in the Senate, it is important to realize the reasons for that result. Indeed, the principle of representation proportional to population in both houses won out in the original voting in the Constitutional Convention, when the Virginia Plan was under consideration.²⁰⁶ Soon enough, however, it became obvious that the smaller states would demand a larger voice in the Congress than population alone would justify. It was clear that if any government acceptable to a large enough number of states was to be agreed upon, a different formula must be worked out for at least one house. And so was born the "Great Compromise"²⁰⁷ whereby population would be the primary factor in the apportionment of representatives in the House, while population should be entirely disregarded in the allocation of two Senators to each state.

Whether the final solution was less desirable than the earlier proposal by which population would have determined representation in both houses is not here the point. The political situation in 1787, particularly the tenuous authority of the Constitutional Convention even to propose a wholly new Constitution, made it clear that no change from the Articles of Confederation could be effected without the concurrence of all, or substantially all, of the sovereign states. The most important factor to be weighed in effecting a compromise ultimately acceptable to all was of course the fact that the existing states were all conceived to be sovereign and independent. Nor did the proposed Constitution contemplate any change in the retained sovereignty (soon to be further assured by the tenth amendment). Rather it was a consensual union of sovereign states by which they agreed to relinquish to the national government only those enumerated powers thought essential to the successful functioning of a national government, but reserving all powers not given over. And of course there was no power external to the Constitution itself which could on any basis be urged as requiring adoption of the equal-population principle in both houses of Congress.

²⁰⁵ Letter to Samuel Kercheval, 10 WRITINGS OF THOMAS JEFFERSON 38 (Ford ed. 1899). See also letter to John Taylor, *id.* at 29, 31; letter to Baron von Humboldt, *id.* at 89.

²⁰⁶ FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 74-75 (1913).

²⁰⁷ *Id.* at 105.

Individual states, in devising their own legislative structures, are very differently situated. Where the national government was founded by the states and was thus their creature, the relationship between the states and their political subdivisions is exactly the opposite. The local governmental units, the counties, cities, towns, and villages, were created by or under the authority of the state in which located. In the absence of any claim of sovereignty, such local units can be enlarged, reduced, or even eliminated at the almost uncontrolled discretion of the parent state. Congress of course has no such freedom to alter state boundaries. Typical, if somewhat too sweeping, generalization of the extent of state power over local governmental units is the Court's statement in *Hunter v. City of Pittsburgh*:²⁰⁸ "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." Even the unstated exception to the Court's all-embracing assertion is instructive. The freedom to rearrange political subdivisions does not extend to cases in which the state legislative action intrudes upon specific constitutional prohibitions such as that in the fifteenth amendment against depriving a citizen of his vote because of race.²⁰⁹ Similarly, it is perfectly plain that the fourteenth amendment's proscriptions, to the extent relevant, are equally applicable as limitations on state action. Accordingly, once it is made clear that state legislative apportionment is to be tested against the standard of equal protection, there can be no claim of analogy in the congressional system of apportionment, prescribed as it is by the Constitution itself as part of a reluctant but necessary compromise.

D. *The Equal-Population Principle and the Second House
in State Legislatures*

Unfortunately, rejection of the "federal analogy" does not solve all the problems that arise in seeking to apply the equal-population principle to state legislative apportionment. An alternative formula must still be sought within the logical confines of the idea of equality in political representation. Conceptually, much the neatest solution would be to conclude that if equal protection requires equality of representation in one house of a bicameral legislature, it should also require equality of representa-

²⁰⁸ 207 U.S. 161, 178 (1907).

²⁰⁹ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

tion in the other house. There is more to be said in support of such a conclusion than the neatly logical, but sometimes barren, rule of symmetry. If dilution of the vote is the mischief at which equal protection is aimed, there is considerable force in an argument that the vote should not be diluted or weighted in either branch of a legislature. And so the question becomes one of determining whether legislative apportionment is comparable to racial segregation, in which the command of the equal protection clause is absolute in forbidding classification altogether. The initial, but overwhelming, answer of the state and lower federal courts rejects the notion that classification is altogether forbidden.²¹⁰ Moreover, it should be remembered that, no matter how attractive in the abstract may be the notion of absolute population equality in both houses of a state legislature, there is little, if any, indication that the Supreme Court will accept that absolutist standard.²¹¹ However, alternative solutions, attempting to reconcile a requirement of strict application of the equal-population principle in one house with a more permissive application of population standards in the second house, have for the most part been mere statements of result, devoid of articulated reasons. It is important, therefore, to determine whether reasons exist to support results that are in fact being reached.

One proposition at least seems logically supportable. Even when the equal-population principle is satisfied in one house, population cannot be altogether disregarded in the other house. To permit a state to choose an apportionment formula in the second house entirely without regard to population would allow frustration of the equal-population principle in the other house. The state could, for example, so redistribute the meaningful aspects of legislative power that the population-based house would be stripped of any significant share in the decisional process while the non-population-based house would be left in effective control. Surely equal protection is not thus to be ousted of meaning. That being the case, it appears to follow that population must to some extent be a factor in both houses. Solicitor General Archibald Cox emphasized this point when he predicted in the summer of 1962:

“[I]t would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the

²¹⁰ See text at notes 171-94 *supra*.

²¹¹ See text at notes 166-70 *supra*.

allocation of seats in the upper branch may recognize historical, political and geographical subdivisions *provided that the departure from equal representation in proportion to the population is not too extreme.*"²¹²

Like the courts and other commentators, the Solicitor General provided no answer to the critical questions: Why must population be taken into account at all in the second house if it has already been employed as the sole factor in the other house and, conversely, what is the justification under the equal protection clause for allowing any significant departure from the equal-population principle? Then, too, what sense can be made of permitting departure from equal representation in proportion to population if "not too extreme"?

A reason has already been suggested for requiring that population be significantly employed in fixing representation in both houses, so that the equal-population principle in one house not be frustrated by manipulation designed to deprive that house of any real role in the legislative process. Conceding, then, the relevance of population in both houses, the question remains as to why population should be less than the sole factor in both and how much deviation from the population norm should be tolerated as "not too extreme." It is suggested here that the latter half of the question, the defining of "not too extreme," can await the event of experience in decided cases once the principle is accepted that under the equal protection clause some departure from the equal-population principle is in fact justifiable.

Answer to the basic question demands inquiry into the nature of the equal protection command. If, as already suggested,²¹³ the clause should be read as a vindicator of political democracy in a representative government, then the essential end to be served is an assurance that each person will have, as nearly as may be, an equal opportunity to share in the political process through which the persons charged with the legislative function are chosen. If equal protection requires that persons similarly situated be similarly treated, does it follow that all qualified voters within a state are similarly situated and must therefore be treated exactly alike?²¹⁴ An affirmative answer, requiring full application of the

²¹² Cox, *Current Constitutional Issues*, 48 A.B.A.J. 711, 712 (1962).

²¹³ See text at notes 205-09 *supra*.

²¹⁴ The term "qualified voter" itself suggests a classificatory scheme by which determination is made of eligibility to vote. There is no intention here to cast doubt on the

equal-population principle in every legislative body, readily suggests itself; but on reflection that answer appears almost too facile. That which deserves protection is the right of every citizen to exert his full measure of influence in state elections. The question cannot be avoided as to whether that full measure of representation is still possible even if the equal-population principle is departed from in one house to a limited extent.

The answer is here suggested that some kinds of limited deviations should not be forbidden by the equal protection clause so long as it can be shown that they do not interfere with full and equal participation in the democratic electoral process. It becomes necessary then to determine what factors, if any, satisfy such a test.

E. Factors Justifying Some Deviation From the Equal-Population Principle

The factors which have been advanced as a basis for disregarding, in whole or in part, the command of representation in accordance with population, include the following: geography, history, political unit lines, and even the amount of direct taxes paid. First, it should be observed, as by now must be evident, that none of these, alone or in combination, should be deemed acceptable as an alternative to representation in accordance with population. Thus, the only question is which of these, if any, might be employed in one house only to supplement a formula calling for primary reliance on the equal-population principle. Even so viewed, however, most of the commonly accepted standards appear defective when measured against the suggested constitutional test.

1. Geography as a factor has been favorably considered in the New York case, *W. M. C. A., Inc. v. Simon*,²¹⁵ where the court suggested that it was not irrational for a state to deny representation in strict accordance with population to districts including more than half the population, but comprising only three percent of the land area of the state. On that basis the court justified substantial departures from population of nearly two to one in the New York senate and in excess of six to one in the assembly.²¹⁶ The dissenters

power of the state to impose reasonable restrictions on the right of franchise based on age, residence, ability to read and write the English language, or even the payment of a poll tax. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277 (1937), upholding the exaction of a poll tax, and exemptions of women, the aged, and minors. See also *Williams v. Mississippi*, 170 U.S. 213 (1898). The proposed twenty-fourth amendment, if ratified by three-fourths of the states, would outlaw the poll tax.

²¹⁵ 208 F. Supp. 368 (S.D.N.Y. 1962).

²¹⁶ Appellants' Jurisdictional Statement, p. 7, *W.M.C.A., Inc. v. Simon*, 31 U.S.L. WEEK 3132 (U.S. Sept. 26, 1962) (No. 460). Over the nation as a whole it is estimated that 70%

in *Scholle v. Hare*²¹⁷ made a similar point in denying that voters from Detroit should be entitled to the same representation on a population basis as that accorded to voters from rural areas. Even conceding that it may be rational—in the sense of understandable—for a state legislature to weight representation on the basis of area considerations, it seems much more doubtful that this could satisfy the demands of equal protection. If the right protected by the clause is the right of individuals, as is assuredly the case, it seems not permissible to measure—and restrict—the right of franchise in terms of factors not related to the individual. The happenstance of residence on a farm, in a small community, or a large city should be irrelevant in determining the value of the franchise. Neither acres, nor trees, nor cows are entitled to vote, and their owners should not be favored in the legislative councils because of the fact of ownership. Geography as such does not merit protection from outlawry by the equal protection clause.

2. The amount of direct taxes paid is a factor only in the New Hampshire senate, but one which the New Hampshire Supreme Court has upheld as not irrational and not forbidden by the equal protection clause.²¹⁸ Apparently, justification is found in the conclusion that in one house of the legislature the landed interests should be permitted weighted representation, presumably in order to fend off any ill-considered legislation that might otherwise be adopted by landless voters. The fact that in the particular case no serious imbalance in urban-rural representation has resulted is not the point. This is of course not the way of democracy. Here, perhaps even more clearly than in the case of utilizing geography as a factor, the amount of direct taxes paid should not be permitted as a partial, let alone an exclusive, determinant of the proportion of representation to which a district might be entitled.

3. For similar reasons there does not appear to be justification for special recognition in weighted votes to economic or ethnic interests. Neither labor nor management, neither dairy farming

of the people now live on about 1% of the land. Schattschneider, *Urbanization and Reapportionment*, 72 YALE L.J. 7 (1962).

²¹⁷ 367 Mich. 176, 116 N.W.2d 350, 357, 358 (1962). It is interesting to note that the apportionment formula suggested by the Michigan Constitutional Convention in the proposed new state constitution would, in the senate, accord population a factor of four and area a factor of one (art. IV, § 2). Under this formula, Keweenaw County, with 2,417 people and 27,500 acres of inland water and 348,200 acres of land, would have a representation equivalent to 22,141 people. Tyler, *What Is Representative Government?*, The New Republic, July 16, 1962, pp. 15, 16.

²¹⁸ *Levitt v. Maynard*, 182 A.2d 897 (N.H. 1962). Interestingly enough, the three largest cities are slightly over-represented. *Id.* at 898.

nor shipping, neither racial nor religious minorities should be entitled as such to a weighted voice in the legislative forum. To do so is to tilt the democratic process dangerously and impermissibly. "If the State has the power arbitrarily to enhance the voting power of one group, it has equal power to repress the same group or any other."²¹⁹

4. History without more scarcely seems deserving of recognition as a factor permitting distortion of voter representation away from the norm of equality. The equal protection clause should be read in the present tense, as the Court observed in *Brown v. Board of Education* when it refused to "turn the clock back" ²²⁰ The fact that a legislature has historically disregarded or minimized the element of population in fixing its legislative apportionment can scarcely mean that when inequities are revealed, they should be allowed to persist without change. The only way in which history might be thought to play a more acceptable part would be to say that what is meant by an appeal to history is a plea for recognition of some special significance in long-established and traditional local governmental divisions such as the counties and towns. History in the sense of established governmental patterns speaks with a different and more rational voice, as will be noted later.

5. Political subdivisions, counties or towns in most instances, are a part of the history and of the modern political apparatus of every state. In nearly all states representation in one or both houses of the state legislature is affected to some extent by the existence of these local units of government. Modern malapportionment is often attributable to the fact of continuing adherence to these units as a basis for representation, without adjustment for intervening population changes that make original units anachronistic in the modern political world. In Connecticut, for example, when towns were originally selected as the basis for representation, with some adjustments among them to reflect population differentials, no one predicted the ultimate differences in rate of growth that would give Union with 383 inhabitants the same number of representatives as Hartford with its 162,178 inhabitants.²²¹ Such examples of changing population leading to ever-worsening malapportionment are of course repeated in nearly all states. Striking

²¹⁹ Brief for United States as Amicus Curiae, pp. 18-19, *Gray v. Sanders*, 31 U.S.L. WEEK 3012 (U.S. May 11, 1962) (No. 112).

²²⁰ 347 U.S. at 492.

²²¹ *Boyd, op. cit. supra* note 201, at 10.

examples from various regions of the country would include California, where a vote in the smallest senate district is worth 422 times a vote in Los Angeles County;²²² Georgia, where the county-unit system gave six state electoral votes to Fulton County with more than half a million population and two electoral votes to Echols County with a population of less than two thousand;²²³ and Rhode Island, which permits horizontal and vertical inequities by giving each city or town one representative plus one additional member for every 25,000 population, resulting in differentials of more than four to one.²²⁴

It is easy to multiply examples of severe malapportionment attributable to state legislative districting done in accordance with county and township lines. The problem is to determine whether some or all of the apportionments based on political unit lines should be deemed vulnerable to challenge on equal protection grounds. Supporters of the "one man-one vote" ideal would presumably reject any standard which takes into account factors extraneous to population. That it is not possible to preserve intact the equal-population principle when consideration is given to representation by governmental units is readily understandable. The ways in which political units are fitted into state apportionments are varied, but ordinarily include one or both of the following principles, each of which involves more or less substantial departures from representation in accordance with population.

(a) Each county (or town) may be authorized to elect at least one senator (or representative). In the eight legislative bodies in which, before *Baker*, equal representation was granted to each unit regardless of population,²²⁵ the distortion is at its maximum since population counts for nothing. The views here suggested would require invalidation of such formulas. Much more common, however, is a requirement that each county or town be entitled to one representative and that additional representatives be allotted on the basis of population up to the full number of seats in the legislature. While such a formula can never satisfy fully the equal-population principle, it can provide at least rough approximations if two conditions are met: (1) If the number of seats in the legislative branch is several times larger than the number of political

²²² *Id.* at 15.

²²³ *Sanders v. Gray*, 203 F. Supp. 158, 160 (N.D. Ga. 1962) [for later history, see note 158 *supra*].

²²⁴ *Sweeney v. Notte*, 183 A.2d 296, 301 (R.I. 1962).

²²⁵ *Boyd, op. cit. supra* note 201, at 3.

units entitled to one representative each, the chance for population to play a dominant role is good. But if the number of counties to be represented approaches the number of legislators to be elected, the population principle is necessarily submerged.²²⁶

(2) If the population spread from the least populous to the most populous county is not large, the opportunity for adjustment to approximate population standards is increased. But where the population spread is great, as is the case in states with one or more large population centers (which means nearly all states), population cannot be adequately represented short of a legislative body of many hundreds of members. The inescapable conclusion is that continued provision for at least one representative from each local political unit is nearly always inconsistent with the equal-population principle. Other formulas should be preferred.

(b) States often provide that no county (or town) can be divided in fixing election districts except where such a unit is entitled to more than one representative. In recognition of the practical difficulties and inequities of assuring individual representation to every county, provision is thus allowed for the joining of two or more thinly populated counties to make a single election district. This permits considerable progress toward equalization among the various election districts. But the provision against division of counties makes complete equality unlikely; and the practicalities make its realization impossible. After all, counties scattered about a state cannot be joined into a single election district to effect equality with mathematical nicety. Even in the absence of a provision for compact election districts, common sense would dictate that they must at least be contiguous.

Despite the difficulties suggested above, this proposition should not necessarily be thought to violate equal protection. The Michigan Supreme Court, for example, might well approve such a plan in Michigan if none of the resulting representation ratios exceeded two to one.²²⁷ There is, moreover, considerable affirmative justification for allowing this much latitude to accommodate permitted differences in state political structures. In varying degrees the states

²²⁶ See, e.g., the Florida house of representatives, composed of 135 members to be elected from sixty-seven counties ranging in population from 2,868 (Gilchrist) to 935,047 (Dade). Through 1962, Dade County was allotted three representatives and Gilchrist County one representative. For discussion of this and of amendments proposed in 1962 (later defeated), see *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962). The 125 Kansas representatives are elected from 105 counties. NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (Kansas) (1962).

²²⁷ See text at notes 171-79 *supra*.

have committed to their counties and towns some or many of the elements of governmental power. As a consequence many of the general and special acts of state legislatures directly affect the local governmental units, the counties, cities, towns, and villages.²²⁸ The provision against division of counties in the creation of election districts is one way of recognizing the need for such units to have at least a voice in the legislature. That it need not preponderate unduly can be assured by provision for adding counties together for the choice of a single legislator (and by the equal protection clause). Whether the system of state and local governments reflected in these provisions is wise or unwise, efficient or inefficient, is not the issue. Unless the states are to be denied the right to choose forms of local government believed suitable to their separate exigencies, these governmental units should not be rendered totally impotent in the only forums in which they can be effectively heard—the state legislatures. Equal protection of persons seems not unduly muted if modest accommodation is permitted in one house of a state legislature for representation of these local government interests, always of course assuming that population remains the strongly dominant factor.

V. THE AVAILABLE REMEDIES

Baker v. Carr has been widely thought to contain two mysteries, one the question of judicially manageable standards, and the other the question of remedies traditionally available to the judiciary. If, as suggested earlier, the standards under the equal protection clause are not so elusive as some have feared, the question of remedies at once becomes more ponderable. Upon removal of the fear and uncertainty of unknown standards for decision, solution of the more limited problem of implementation becomes less difficult. Moreover, as already observed in another context, the most striking fact about the *Baker* decision is the enthusiastic reception it received and the rush to implement it. Mr. Justice Brennan, speaking for the Court in words that must have been carefully weighed, offered calm assurance that the problem of remedies will not prove insurmountable. He said:

“Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional right are found, it is improper now to con-

²²⁸ See the discussion of this point in *Sobel v. Adams*, 208 F. Supp. 316, 321-22 (S.D. Fla. 1962).

sider what remedy would be most appropriate if appellants prevail at the trial."²²⁹

In making this confident prediction Mr. Justice Brennan may well have had in mind the very substantial number of cases before *Baker* in which both state and federal courts had taken jurisdiction of various apportionment disputes and, through one device or another, had effected workable solutions.²³⁰ Indeed, the Supreme Court itself has not hesitated, once jurisdiction was agreed upon and the existing apportionment was found defective, to suggest the election at large of congressional representatives. *Smiley v. Holm*,²³¹ decided by a unanimous Court in 1932, was just such a case. Minnesota's governor had vetoed a bill creating new congressional districts after the state delegation had been reduced pursuant to the 1930 census. The legislature, denying the governor's right of participation, declared the new districts effective despite the veto. When the Minnesota courts denied relief at the suit of a qualified voter and taxpayer against the secretary of state, the United States Supreme Court reversed; the injunction was issued; and the election was held at large.²³²

Concern about the adequacy of judicial remedies to correct state malapportionment appears to consist in part of fears lest the judiciary overreach its proper function either in dealing with its co-equal branches of government or in dealing with other sovereign components of a federal structure. In part the concern seems also to issue from awareness of the powerless position of the judiciary and consequent worry that potential disregard of the judicial command would damage irreparably public confidence in the judicial institution as a voice of ultimate authority. Answer to both aspects of this concern about the potential futility of judicial intervention is found in the wealth of cases decided before *Baker* in which that danger did not materialize, and in the emerging pattern of cases decided since *Baker* which suggest a similarly happy augury for the future.

²²⁹ 369 U.S. at 198.

²³⁰ For an instructive review, see Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1066-70, 1087-90 (1958). For a post-*Baker* review of similar materials, see Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 699-702 (1962).

²³¹ 285 U.S. 355 (1932).

²³² 77 CONG. REC. 71 (1933). In two cases decided the same day, the Court reached the same result, with the effect of requiring election at large of Missouri's thirteen representatives [*Carroll v. Becker*, 285 U.S. 380 (1932)], and of two New York representatives [*Koenig v. Flynn*, 285 U.S. 375 (1932)].

Legislative reaction to judicial condemnations of state and congressional apportionments should be vastly encouraging to those who fear for the respect in which American courts, state and federal, are held. Despite judicial lack of power over "purse and sword," no instance of legislative defiance of judicial pronouncement has been discovered in the area of apportionment. Courts have of course proceeded cautiously and no more rapidly or drastically than seemed inescapably necessary. But it is remarkable in how many instances, even before *Baker*, legislatures responded to judicial determination of the invalidity of an apportionment scheme, even without remedial implementation.²³³ The same technique has been employed with similar success in the state and lower federal courts since *Baker*.²³⁴ Certainly, there is nothing novel in a federal court's refusal to approve matters committed to its review without specifying what action must be taken to satisfy constitutional or legislative command. Sufficient example is found in the review of federal administrative action by which the Court simply explains the legal error and remands to the agency for further action.²³⁵ If any complaint is to be made of the usefulness of the in-effect reference back to the state legislature for appropriate action, it can only be that the lower courts and legislatures alike have so far been handicapped by their inability to know for certain what would be the ultimate standard adopted in definition of equal protection. As this matter is resolved, the reference-back technique should prove fully sufficient in nearly all cases.

Encouraging though it is to be able to predict that nearly all

²³³ See *Magraw v. Donovan*, 159 F. Supp. 901 (D. Minn. 1958); *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956); *Shaw v. Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941); *Armstrong v. Mitten*, 95 Colo. 425, 37 P.2d 757 (1934); *Moran v. Bowley*, 347 Ill. 148, 179 N.E. 526 (1932); *Brooks v. State*, 162 Ind. 568, 70 N.E. 980 (1904); *Denney v. State*, 144 Ind. 503, 42 N.E. 929 (1896); *Parker v. State*, 133 Ind. 178, 32 N.E. 836, *rehearing denied*, 133 Ind. 212, 33 N.E. 119 (1892); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315 (1931); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *Merrill v. Mitchell*, 257 Mass. 184, 153 N.E. 562 (1926); *Donovan v. Suffolk County Apportionment Comm'rs*, 225 Mass. 55, 113 N.E. 740 (1916); *Attorney General v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916); *Williams v. Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906); *Board of Supervisors v. Blacker*, 92 Mich. 638, 52 N.W. 951 (1892); *Giddings v. Blacker*, 93 Mich. 1, 52 N.W. 944 (1892); *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912); *Rogers v. Morgan*, 127 Neb. 456, 256 N.W. 1 (1934); *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960); *In re Sherill*, 188 N.Y. 185, 81 N.E. 124 (1907); *People ex rel. Baird v. Board of Supervisors*, 138 N.Y. 95, 33 N.E. 827 (1893); *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564 (1943); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892); *State v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). See also *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932); *Annot.*, 2 A.L.R. 1337 (1919).

²³⁴ See notes 194, 202 *supra*.

²³⁵ See also *Lewis*, *supra* note 230, at 1087.

apportionment cases can thus be handled smoothly without raising the troublesome questions of potential court-legislature conflict, still the problems of those harder cases, however few, must be faced up to. Indeed, one of the principal reasons for which the reference-back technique has ordinarily proved successful is that courts have customarily stated their willingness to act if legislatures do not; and, significantly, courts have retained jurisdiction pending such action. It has also been common practice to fix a period of time within which the legislature must act on pain of having the matter reopened before the courts.

A. *Redistricting by the Court*

The spectre most commonly raised by those who fear judicial impotence to devise and enforce remedies is that of a court actually redrawing the election district lines itself. But that is exactly what Mr. Justice Clark favored as at least a temporary expedient in *Baker*,²³⁶ a suggestion similar to one which had been advanced to the Court in the amicus brief for the United States in that case.²³⁷ Although the majority of the Court did not act on the suggestion, and the three-judge court on remand also found it unnecessary because of concession of the invalidity of the Tennessee apportionment,²³⁸ the possibility remains.

One court, confronted with new legislation that failed to eliminate the complained-of malapportionment, put together a new plan and ordered it into effect for the general election in November 1962. And the sky did not fall. This occurred in the Alabama case, *Sims v. Frink*,²³⁹ in which the three-judge district court studied portions of various legislative proposals, accepting the best and rejecting the worst features, and thus arrived at a concededly temporary and imperfect plan. The court stated: "The duty to reapportion rests on the Legislature. This Court acts in the matter reluctantly because of the long-continued default and total inability of the Legislature to reapportion itself."²⁴⁰

B. *Injunctions*

A recurring pattern in cases following *Baker* has been to seek injunctive relief against various state officials connected with the electoral process to restrain them from conducting a forthcoming

²³⁶ 369 U.S. at 253-64.

²³⁷ Brief for the United States as Amicus Curiae on Reargument, pp. 74-78.

²³⁸ 206 F. Supp. 341, 345 (W.D. Tenn. 1962).

²³⁹ 208 F. Supp. 431 (M.D. Ala. 1962).

²⁴⁰ *Id.* at 441. See also *Fortner v. Barnett*, No. 59965, Ch. Ct. of First Judicial Dist. of Hinds County, Miss., reported in Appendix *infra*.

primary or general election absent correction of alleged unconstitutionally ordained election districts. Ordinarily the courts have avoided an injunction, usually by the device of according to the legislature an opportunity for corrective action. However, in the Georgia county unit case, *Sanders v. Gray*,²⁴¹ an injunction was issued to restrain state election officials from using that system where it fell short of a standard already stated by the court.²⁴²

C. *Mandamus*

Perhaps the most drastic remedy, and the one least likely to be used with any frequency, is the writ of mandamus. There are special difficulties in the use of mandamus against a legislature that make it unlikely that it will serve any important function in apportionment cases;²⁴³ but the possibility of utilizing such a remedy is not foreclosed.²⁴⁴ Interestingly enough, in the Rhode Island case, *Sweeney v. Notte*,²⁴⁵ the state supreme court doubted its authority to supervise reapportionment in the state legislature because it "would be in the nature of mandamus by duress."²⁴⁶ But it offered the opinion that if the legislature failed to act within a reasonable time, a federal court, presumably not restricted as would be a state court by the respect between two co-equal

²⁴¹ 203 F. Supp. 158 (N.D. Ga. 1962) [for later history, see note 158 *supra*]. In *Mann v. Davis*, Civil No. 2604, E.D. Va., Nov. 28, 1962, the court issued an injunction against conducting elections on the basis of the existing apportionment, but stayed its effective date until January 31, 1963, to permit legislative consideration. This in turn was stayed by Mr. Chief Justice Warren on December 15, 1962. See note 184 *supra*. See also *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), in which on July 17, 1962, Mr. Justice Stewart stayed the mandatory injunction issued in that case.

²⁴² "[A] unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the whole vote for electors of the party in a recent presidential election; provided no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years. This is a 'judicially manageable standard' contemplated in *Baker v. Carr*." 203 F. Supp. at 170.

The suggested standard has been criticized for being rigidly mathematical and for its unfortunate link with the hard-to-predict vagaries of the electoral college. Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 373-75 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REV. 252, 318-19. Appropriately, the Supreme Court rejected this standard as too narrowly restrictive, instead emphasizing in this context (statewide primary elections) that the principle of "one person, one vote" should control. *Gray v. Sanders*, 31 U.S.L. WEEK 4285, 4288 (U.S. March 18, 1963).

²⁴³ See Friedelbaum, *supra* note 230, at 699.

²⁴⁴ *Virginia v. West Virginia*, 246 U.S. 565 (1918).

²⁴⁵ 183 A.2d 296 (R.I. 1962).

²⁴⁶ *Id.* at 303.

branches of government, would probably reapportion or order the legislature to do so.

D. *Ordering Election at Large*

Few if any legislators relish the physical and financial hardships, as well as the increased uncertainties, involved in a statewide election at large. Accordingly, the fear of a judicial order for an at-large election has in the past proved an effective prod to induce an otherwise reluctant legislature to make essential apportionment changes.²⁴⁷ Judicial intimation of such an order is particularly likely to be effective in inducing legislative action, in view of the fact that elections at large of members of congressional delegations have in fact resulted from Supreme Court decisions,²⁴⁸ lower federal court decisions,²⁴⁹ and from state court decisions.²⁵⁰ The fact that this fairly drastic remedy was not immediately utilized by any court following *Baker* does not necessarily mean that it cannot be applied in the state reapportionment cases. But it is true that there are potentially significant differences between congressional and state districting in this respect. Whether a federal court could successfully impose an at-large election upon a state whose election laws do not contemplate such may raise difficulties which the federal courts will prefer to avoid;²⁵¹ and there may be hazards surrounding the always doubtful area of *de jure* and *de facto* legislative authority.²⁵² But perhaps these problems are too special and certainly do not apply everywhere. Serious consideration should be given to the further use of the at-large election device.

CONCLUSION

Baker v. Carr marks the full maturation of the libertarian aspects of the equal protection clause and provides the courts, federal and state alike, with an opportunity to vindicate as a constitutionally protected right the assurance to all persons of an opportunity to full and equal participation in the principal rite of the democratic process, the exercise of the franchise. As state legislatures become more fully responsive to the electorate whom they serve there should be renewed opportunity for the states to

²⁴⁷ See Lewis, *supra* note 230, at 1088-89; see also cases cited in note 233 *supra*.

²⁴⁸ Carroll v. Becker, 285 U.S. 380 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Smiley v. Holm, 285 U.S. 355 (1932).

²⁴⁹ Hume v. Mahan, 1 F. Supp. 142 (E.D. Ky. 1932).

²⁵⁰ Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932).

²⁵¹ See Friedelbaum, *supra* note 230, at 700.

²⁵² For a thoughtful analysis of state cases predating *Baker*, see Note, 15 RUTGERS L. REV. 82, 86-90 (1960). See also Neal, *supra* note 242, at 303-04, 306-08.

demonstrate the wisdom of reserving to the states those powers not committed to the national government.²⁵³ The plea of states' rights can become again the dignified and meaningful claim to separate sovereign rights and obligations that it should always have been, rather than the strident and prideful cry it has sometimes seemed.

²⁵³ "[T]here is a strong national interest in encouraging vigorous and responsible State and local government." House Comm. on Gov't Operations, *Federal-State-Local Relations: Federal Grants-In-Aid*, H.R. REP. NO. 2533, 85th Cong., 2d Sess. 47 (1958). See also THE EDITORS OF FORTUNE, *THE EXPLODING METROPOLIS* 1 (1957); U.S. COMM'N ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT 3, 38, 40 (1955).

APPENDIX

A Summary of Significant Reapportionment Litigation Initiated During 1962

Alabama

Sims v. Frink, 205 F. Supp. 245, *temporary injunction continued*, 208 F. Supp. 431 (M.D. Ala. 1962), *appeal pending sub nom. Reynolds v. Sims*, 31 U.S.L. WEEK 3147 (U.S. Oct. 12, 1962) (No. 508). The court invalidated the apportionment of both houses which had been adopted by the legislature in July 1962, and drew up its own plan, adopting portions of various legislative proposals, for use in the 1962 elections, but cautioned the legislature to take further corrective action in 1963 or face additional court action.

Alsup v. Mayhall, 208 F. Supp. 713 (S.D. Ala. 1962). In a suit to restrain enforcement of a law providing for election of eight congressional candidates from nine former districts (one seat having been lost as a result of apportionment after 1960 census), the court recognized the applicability of *Baker v. Carr*, but dismissed for lack of a showing of inequality.

California

Silver v. Jordan, Civil No. 62-953-MC, S.D. Cal. 1962. In an action seeking additional representation for Los Angeles County (but not full equality), the court denied a preliminary injunction in August 1962. In September, a stipulation was entered by the parties that the action would be dismissed by plaintiff if California Initiative No. 23 (to increase the Senate from forty to fifty, with the largest gain in new seats for Los Angeles County) should be approved November 6, 1962, while plaintiff could petition for a hearing on the merits if the initiative proposal should be defeated (which it was).

Yorty v. Anderson, petition for writ of mandate in California Supreme Court filed December 28, 1962. Petitioners seek reapportionment of the state into forty senatorial districts "as nearly equal in population as may be," as required by § 6 of article IV of the constitution of 1879, and invalidation of subsequent amendments providing that no county shall contain more than one senatorial district.

Colorado

Lisco v. McNichols, 208 F. Supp. 471 (D. Colo. 1962). Although the court concluded that disparities shown made a prima facie case for correction, the case was held for hearing until after the November 6, 1962, election, at which a population plan for both houses was defeated and a so-called "federal" plan was approved.

In the Matter of Legislative Reapportionment, 374 P.2d 66 (Colo. 1962). In an original proceeding in the Colorado Supreme Court for the issuance of a prerogative writ, the court retained jurisdiction until after the election described above, and indicated willingness to act if necessary despite the problems contemplated.

Connecticut

Valenti v. Dempsey, Civil No. 9544, D. Conn. 1962. In a suit to attack apportionment of both houses of the Connecticut General Assembly, the court, on December 20, 1962, denied an application for a preliminary injunction to restrain state officials from convening the 1963 assembly and to command them to reconvene the 1961 assembly to take action on the senate alone (allegedly only the 1961 assembly can reapportion on the basis

of 1960 census figures). The denial was based in part on the fact that plaintiff was from an *over-represented* senate district; but jurisdiction was retained over the entire proceeding.

Delaware

Sincock v. Terry, 207 F. Supp. 205 (D. Del. 1962). The court withheld action until August 7, 1962, pending legislative action. The legislature proposed a constitutional amendment, which would become effective in 1963, reapportioning the house on population and the senate on geography. The court denied motions to dismiss and ordered trial on the constitutional provisions, including the proposed amendment. *Sincock v. Terry*, 210 F. Supp. 395, 396 (D. Del. 1962).

Florida

Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962). The court held existing reapportionment laws invidiously discriminatory, as well as the first 1962 legislative attempt at correction. At a special session in August 1962, the legislature withdrew the earlier-proposed amendment and offered another which the court indicated would be acceptable if approved by the voters on November 6, 1962. Jurisdiction was retained; the amendment was defeated; and a further session of the legislature adjourned without agreeing on another proposal.

Lund v. Mathas, 145 So. 2d 871 (Fla. 1962). This was a suit filed in Circuit Court for Volusia County, Florida, challenging the congressional districting within the state. On October 24, 1962, the Supreme Court of Florida rejected the claim, holding *Colegrove v. Green* still controlling as to congressional districting.

Georgia

Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962), *vacated and remanded*, 31 U.S.L. WEEK 4285 (U.S. March 18, 1963). The lower court enjoined the use in primary elections of the so-called "county unit" plan (even as amended one day before judgment) in voting for statewide offices, and the Supreme Court remanded to the district court for a decree consistent with the principle of "one person, one vote." The Court avoided, however, any expression of opinion as to permissible deviations, if any, in legislative districting cases.

Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962). Although refusing an injunction until the legislature could act, the court held the existing state legislative apportionment invidious and arbitrary, and stated that at least one house of the General Assembly must reflect population. Thereafter the state senate was redistricted on a population basis.

Wesberry v. Vandiver, 260 F. Supp. 276 (N.D. Ga. 1962). Although the court cited *Baker v. Carr* in holding that it had jurisdiction over a suit challenging congressional districting, it also cited *Colegrove v. Green* in dismissing for want of equity and other reasons, including delicacy of the question and possibility of state or congressional legislative remedy. Chief Judge Elbert Tuttle dissented, favoring retention of jurisdiction pending opportunity for legislative correction.

Idaho

Caesar v. Williams, 371 P.2d 241 (Idaho 1962). The Idaho Supreme Court, over two dissents, dismissed an action challenging state apportionment providing for one senator from each county and at least one representative from each county.

Hearne v. Smylie, D. Idaho, filed Oct. 31, 1962. The action requests convening of a three-judge court to retain supervisory jurisdiction until the 1963 legislature has an opportunity to correct the alleged state legislative malapportionment.

Indiana

Stout v. Hendricks, Civil No. IP 61-C-236, S.D. Ind. 1962. Plaintiffs suggest various alternative forms of relief from alleged state legislative malapportionment, including injunctive relief to restrain operation of apportionment statutes, an election at large, or an election based on districts fixed by the court until the legislature acts to establish new districts.

Grills v. Anderson, Cause No. S 59-600, Super. Ct. of Marion County, Ind., 1962. The court denied a motion for summary injunction to restrain election of November 6, 1962, for members of the General Assembly.

Iowa

Davis v. Synhorst, Civil No. 5-1289, S.D. Iowa 1962. In a suit challenging both the present state apportionment and that of a proposed constitutional amendment, the court, on October 20, 1962, denied defendants' motion to dismiss.

Kansas

Harris v. Shanahan, No. 90476, Dist Ct. of Shawnee County, Kan., 1962. Decision of the trial court that state legislative apportionment is repugnant to the due process clause was in effect stayed pending appeal to the Kansas Supreme Court.

Kentucky

Schmied v. Combs, Civil No. 4380, W.D. Ky. 1962. The suit challenges state legislative apportionment and seeks to compel the governor to call a special legislative session.

Combs v. Matthews, 31 U.S.L. WEEK 2395 (Ky. Ct. App. Jan. 31, 1963), holding that redistricting of the lower house to include more than two counties in a single district is not barred by the state constitution.

Maryland

Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (per curiam), *explanation of per curiam order*, 184 A.2d 715 (1962), *appeal pending*, 31 U.S.L. WEEK 3173 (U.S. Oct. 24, 1962) (No. 554). Pursuant to court of appeals directions in April 1962, a trial court found invidious discrimination in the composition of the House of Delegates. Thereafter, at a special legislative session, nineteen delegates were added as a "stop-gap" measure, and a proposed constitutional amendment was defeated. In a four-three decision, the court of appeals in September 1962 upheld the county-based apportionment formula in the senate.

Michigan

Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960), *remanded*, 369 U.S. 429, *on remand*, 367 Mich. 176, 116 N.W.2d 350 (1962), *petition for certiorari filed sub nom.* Beadle v. Scholle, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517). The Michigan Supreme Court, on reconsideration in light of *Baker v. Carr*, as ordered by the United States Supreme Court, held, four to three, that both houses must be apportioned in relation to population and that the senate apportionment was on that basis invalid, requiring legislative reapportionment within thirty days or election of senate candidates at large on November 6, 1962. On July 17, 1962, Mr. Justice Stewart granted a stay of that order.

Minnesota

Minnesota *ex rel.* LaRose v. Tahash, 115 N.W.2d 687 (Minn. 1962). The Minnesota Supreme Court upheld validity of a statute prohibiting operation of motor vehicles without the owner's permission, even though the statute had been enacted after changes in population resulting in claimed inequality of representation following the last reapportionment.

Hedlund v. Hansen, Civil No. 4-62, No. 122, D. Minn. 1962. The action challenges apportionment as to the Board of County Commissioners of Hennepin County, Minnesota.

Mississippi

Fortner v. Barnett, No. 59965, Ch. Ct. of First Judicial Dist. of Hinds County, Miss., 1962. The state trial court held the existing apportionment law invalid and prescribed the districts it would order into effect if the legislature did not act. The legislature thereafter reapportioned itself, but its proposal was defeated at the election of November 6, 1962.

Missouri

Preisler v. Hearn, No. 49370, decided by Missouri Supreme Court en banc on Dec. 11, 1962. The Court accepted *Baker v. Carr* as analogous, but rejected a challenge to congressional districting where the variation from smallest to largest districts was from 378,486 to 506,854. 31 U.S.L. WEEK 2304 (1962).

Nebraska

League of Municipalities v. Marsh, 209 F. Supp. 189 (D. Neb. 1962). The court found substantial disparities among election districts, but refused to enjoin voting on a proposed constitutional amendment which would give areas some weight in apportionment, and denied other relief until after the 1963 legislative session.

Nevada

Paley v. Sawyer, Civil No. 1593, D. Nev. 1962. The case attacks present state legislative apportionment.

New Hampshire

Levitt v. Maynard, 104 N.H. 243, 182 A.2d 897 (N.H. 1962); Levitt v. Attorney General, 104 N.H. 100, 179 A.2d 286 (N.H. 1962). The New Hampshire Supreme Court upheld as rational the method of fixing state senatorial districts based on equalized valuation of direct taxes paid.

New Jersey

Jackman v. Bodine, Docket No. C-2293-61, Super. Ct. of N.J. (Ch.), Hudson County, 1962. The suit challenges the existing apportionment in both houses of the New Jersey legislature and, in the absence of legislative remedy, requests an order limiting the value of the vote of senators and assemblymen on a weighted-ratio basis and for the holding of elections at large.

New Mexico

Cargo v. Mechem, filed in Dist. Ct., County of Santa Fe, N.M., 1962. The suit, challenging apportionment in the New Mexico house of representatives, asks that the governor be ordered to convene a special session of the legislature and that the conduct of the next general election in 1964 be enjoined unless correction is made.

New York

W.M.C.A., Inc. v. Simon, 202 F. Supp. 741, *remanded*, 370 U.S. 190, *on remand*, 208 F. Supp. 368 (S.D.N.Y. 1962), *appeal pending*, 31 U.S.L. WEEK 3132 (U.S. Sept. 26, 1962) (No. 460). The district court, on remand for reconsideration in light of *Baker v. Carr*, rejected the challenge made to both houses of New York legislature, finding the existing apportionment rational.

Honeywood v. Rockefeller, Civil No. 62-0423, E.D.N.Y., *aff'd per curiam*, 371 U.S. 1 (1962). The district court denied the grant of a preliminary injunction before trial on a claim that state election officials had discriminatorily excluded Negroes from a newly proposed congressional district.

Wright v. Rockefeller, Civil No. 62-2601, S.D.N.Y. 1962. On November 26, 1962, the court rejected a challenge to congressional districting in New York City, which had alleged that lines had been drawn to exclude non-white citizens and citizens of Puerto Rican origin from one district and to include them in three others.

North Dakota

Lein v. Sathre, 201 F. Supp. 535, *later decision subsequent to state court action*, 205 F. Supp. 536 (D.N.D. 1962). The district court first deferred decision for the North Dakota Supreme Court to pass on the question. That court did so [113 N.W.2d 679 (N.D. 1962)], holding the existing state apportionment invalid, but denied injunctive relief against the holding of 1962 general election without reapportionment. Thereafter, the federal district court, considering itself bound by the state court's further determination that the authority of the apportioning group within the house of representatives had expired, and having no reason to believe that the legislature would not act in 1963, declined relief, but retained jurisdiction until thirty days after the conclusion of the 1963 legislative session.

Ohio

Nolan v. DiSalle, Civil No. 6082, S.D. Ohio 1962. The suit challenges the existing apportionment in the Ohio house of representatives.

Sive v. Ellis, Civil No. 6491, S.D. Ohio 1962. Same as Nolan v. DiSalle, *supra*.

Ohio *ex rel.* Scott v. Masterson, 173 Ohio St. 402, 183 N.E.2d 376 (1962). In an original mandamus proceeding the Ohio Supreme Court ordered the Cleveland City Council to comply with mandatory provisions of the city charter for periodic reapportionment of voting districts in the city.

Oklahoma

Moss v. Burkhart, 207 F. Supp. 885 (W.D. Okla. 1962). The court held the existing apportionment in both houses invalid, retaining jurisdiction until the 1963 legislature should have a chance to act, in accordance with a standard of "substantial numerical equality" in both houses. Meanwhile, the Oklahoma Supreme Court had refused to set

aside a 1961 apportionment because, although invalid under the state constitution, it was superior to the earlier act. *Jones v. Winters*, 369 P.2d 135 (Okla. 1961). On November 6, 1962, the voters approved a proposal for a three-man reapportionment commission.

Pennsylvania

Butcher v. Trimarchi, No. 2531, Equity Docket and No. 151, Commonwealth Docket; *Seidman v. Trimarchi*, No. 2532, Equity Docket and No. 153, Commonwealth Docket; *Driscoll v. Trimarchi*, No. 2533, Equity Docket and No. 154, Commonwealth Docket, C.P. Ct. of Dauphin County, Pa., 1962. The court, although accepting the relevance of *Baker v. Carr* for state court proceedings, refused to upset the election machinery for November 6, 1962, and therefore declined judgment on the pleadings, pending legislative action in the next session of the General Assembly.

Rhode Island

Sweeney v. Notte, 183 A.2d 296 (R.I. 1962). The Rhode Island Supreme Court concluded that the existing state legislative apportionment was invalid, but declined to intervene because of the mandatory obligation of the General Assembly to act. The court predicted that if that body should fail to act within a reasonable time, a federal court, not bound by the state court's deference to a co-equal partner, would probably act.

Tennessee

Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), *remanded*, 369 U.S. 186 (1962), *on remand*, 206 F. Supp. 341 (M.D. Tenn. 1962). On remand from the United States Supreme Court the invalidity of the original apportionment was conceded, and the district court held invalid further legislative acts of 1962. Jurisdiction was retained until June 1963 to give the Tennessee legislature further opportunity to correct apportionment inequities.

Vermont

Mikell v. Rousseau, 183 A.2d 817 (Vt. 1962). The Vermont Supreme Court cautioned the legislature to act promptly to correct malapportionment. The legislature responded by enacting a one-year reapportionment plan for the state senate, providing in the meanwhile for a study of apportionment in both houses.

Virginia

Mann v. Davis, Civil No. 2604, E.D. Va., Nov. 28, 1962, *appeal pending*, 31 U.S.L. WEEK 3284 (U.S. Feb. 2, 1963) (No. 797). The court held invalid existing apportionment in both houses of the Virginia General Assembly. The resulting injunction to restrain state officials from acting under these laws was stayed by the court until January 31, 1963, to permit legislative action or appeal to the Supreme Court. Mr. Chief Justice Warren granted a further stay on December 15, 1962.

Washington

Thigpen v. Meyers, Civil No. 5597, W.D. Wash., Dec. 13, 1962 (31 U.S.L. WEEK 2305). The court declined to interfere with congressional districting where the vote of a person in the least populous district is worth 1.5 times the vote of a person in the most populous district. The same court concluded that the existing state legislative apportionment was invidiously discriminatory and refused to decline jurisdiction because of the defeat of an initiative reapportionment measure at the election of November 6, 1962. The court retained jurisdiction pending opportunity for legislative correction in 1963.

Wisconsin

Wisconsin v. Zimmerman, 205 F. Supp. 673, *dismissed without prejudice*, 209 F. Supp. 183 (W.D. Wis. 1962). The court declined to enjoin conduct of the 1962 election on the basis of the existing apportionment (the legislature's further partial reapportionment had been vetoed by the governor). Believing the 1963 legislature should be given a reasonable time for corrective action, the court dismissed without prejudice.

Wyoming

Wyoming ex rel. Whitehead v. Gage, Civil Docket 53, No. 161, Appeal No. 3143, Wyo. Sup. Ct., 1962. The suit challenges existing state legislative apportionment, seeking mandamus against the secretary of state.