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## APPORTIONMENT STANDARDS AND JUDICIAL POWER

Robert G. Dixon, Jr.\*

*Judicial standards under the Equal Protection Clause are well developed and familiar.* —Justice Brennan, Opinion of the Court, *Baker v. Carr*.

*The traditional test under the Equal Protection Clause has been whether a State has made an "invidious discrimination."* —Justice Douglas, concurring, *Baker v. Carr*.

*I give up. Now I realize fully what Mark Twain meant when he said, "The more you explain it, the more I don't understand it."* —Justice Jackson, dissenting, *SEC v. Chenery Corp.*

## A. INTRODUCTION

Historians delight in telling us that there is nothing new under the sun; only new currents in old tides of human events. But *Baker v. Carr*<sup>1</sup> was a radical departure from established patterns of judicial review, as we have known them from 1803 to 1962. *Baker* represents neither the familiar pattern of judicial review and occasional negation of particular governmental policies,<sup>2</sup>

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<sup>1</sup> 369 U.S. 186 (1962).

<sup>2</sup> *E.g.*, invalidation of the division of the West into free states and slave states by the Missouri Compromise, *Dred Scott v. Sandford*, 19 How. 393 (1856); the invalidation of numerous state laws regulating business and employment in the heyday of substantive due process, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; and the invalidation of numerous New Deal measures in the 1930's by a restrictive reading of congressional powers generally, the most famous being *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act), and *United States v. Butler*, 297 U.S. 1 (1936).

nor the newer pattern in desegregation cases of imposition of duties to act, rather than duties to desist.<sup>3</sup> Both of these patterns have this much in common: they leave essentially intact the distribution and possession of political power.<sup>4</sup> By contrast, *Baker* is an invitation to courts to sit in judgment on the structure of political power; even to effect a judicial transfer of political power.

Novel as this is, in the factual setting of the Tennessee legislature as presented to the Court in *Baker*, the decision can be rationalized, under a principle of democratic necessity, as a high political-judicial act — really, a constitutive act. To inversely paraphrase Lincoln's famous question, are all the laws to be enforced save one, and that the basic rule of democratic operation? A substantial numerical majority had effective voice in neither house in Tennessee. All other modes of modifying the legislature had proven futile. In such a situation some judicial participation in the politics of the people may be a precondition to there being any effective politics.<sup>5</sup> But the course of events in some lower courts since then, in states with factual settings quite dissimilar from Tennessee, has raised large questions concerning the permissible scope of judicial reconstruction of political majoritarianism.<sup>6</sup>

My theses may be simply stated. First, in the state legislative apportion-

3 Some of the desegregation cases set a standard of constitutional validity so at variance with existing practice, particularly in regard to schools, as to require major adjustments in government finances, programs, and administration in order to achieve compliance. See *Hall v. School Board*, 197 F. Supp. 649 (E.D. La. 1961), 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam* 368 U.S. 515 (1962); *Jeffers v. Whitley*, 309 F.2d 621 (4th Cir. 1962); *Wheller v. Board of Educ.*, 309 F.2d 630 (4th Cir. 1962); *Allen v. County School Bd.*, 207 F. Supp. 349 (1962); *Taylor v. Bd. of Educ.*, 191 F. Supp. 181 (S.D.N.Y. 1961), 195 F. Supp. 231 (S.D.N.Y. 1961), 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961). See 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT, EDUCATION (Book 2), chs. 2-5; U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.—PUBLIC SCHOOLS SOUTHERN STATES (1962); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.—PUBLIC SCHOOLS CITIES IN THE NORTH AND WEST (1962).

For a detailed discussion of continuing de facto segregation and resulting legal questions in areas officially desegregated since *Brown v. Board of Education* (or areas never officially desegregated) see Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS U.L.J. 228 (1963). See also Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962).

4 The Negro voting cases may become an exception to this statement, but only a partial exception, because the effect is slight as yet, and the problem is regional. See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT, VOTING (Book 1).

5 Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 347 (1962).

6 Within a year after the *Baker* decision federal or state courts in 19 states had held apportionments of one or both houses invalid, and in 15 states some actual reapportionment had occurred. 21 CONG. QUART. WEEKLY REP. 424-31 (1963). The literature has not lagged far behind. Discussions highlighting the conceptual difficulties in representation theory and the political problems and pitfalls inherent in apportionment litigation include the following: DEGRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1963); Dixon, *supra* note 5; Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252; Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963). See also *Symposium on Baker v. Carr*, 72 YALE L. J. 7 (1962) (Contributors: Bickel, Black, Emerson, Goldberg, O'Brien, Pollak, Schattschneider, Sindler).

For a more optimistic view of equal protection and one man-one vote see McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963). See also Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59 (1963); Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 AM. U. L. REV. 51 (1963).

ment field the basic question is not whether a plaintiff should seek direct rather than indirect judicial relief — terms which are themselves not free from uncertainty — but whether, in a given case the court, and especially the federal court, should grant any relief. The Supreme Court in *Baker* brought forth a roaring mouse of justiciability. Some lower courts, responsively, have jumped into quick, even extreme, action.<sup>7</sup> But as Justice Stewart aptly pointed out,<sup>8</sup> the *Baker* decision left a little mountain of uncertainty about the judicial role regarding political philosophies and political practices of representation in an evolving, dynamically democratic public order.

Second, the large questions are the ones concerning possible federal constitutional standards of fairness in apportionment and districting of multimembered legislative bodies. These questions are complicated further by our heritage of bicameralism.<sup>9</sup> The Supreme Court, apart from the possibly pregnant silences in the *Baker* decision itself, and the remand in the Michigan case,<sup>10</sup> has withheld enlightenment. The recently decided Georgia county unit case, *Gray v. Sanders*,<sup>11</sup> involved the quite different issue of election of state-wide officers from a single constituency — the entire state. In 1963 it would be most difficult to rationalize any other standard for a single constituency election than the one man-one vote principle. But as Justice Douglas for the Court inferred, and as Justices Stewart and Clark expressly stated in their concurrence, *Gray v. Sanders* is not a representation case.

Third, the political thicket has become no less political because the courts have entered. Encompassing all philosophies of representative government, rationalizations for bicameralism, particular apportionment and gerrymandering plans and practices — encompassing and informing them all — is the ever-flowing lifeblood we call politics. Briefs may ignore this factor, court opinions may ignore it, even many commentators may minimize it, but apportionment is politics, and in politics no one is neutral. The Michigan Supreme Court's difficulty, despite nonpartisan election, in juxtaposing political feelings with judicial temperament, as Dean Neal has observed, is a major example but hardly unique.<sup>12</sup> Courts are now handling apportionment and districting cases

7 See notes 126-37 *infra* and accompanying text.

8 *Baker v. Carr*, 369 U.S. 186, 265 (1962) (concurring opinion).

9 For a brief post-*Baker* comment see Hagan, *The Bicameral Principle in State Legislatures*, 11 J. OF PUB. LAW 310 (1962).

10 *Scholle v. Hare*, 369 U.S. 429 (1962).

11 372 U.S. 368 (1963). For a very unusual interpretation of this county unit case, suggesting that it created the guideline of "one person, one vote" for apportionment of the lower house of state legislatures, and postponed this question regarding state senates, see column of Arthur Krock, N.Y. Times, April 2, 1963, p. 46, col. 4. In the Georgia county unit case Justice Douglas for the Court did make this comment, when comparing it to *Baker*: "Nor does it [county unit case] present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population." 372 U.S. at 376. But he immediately preceded this comment by stressing the point that the case did not involve state policy regarding choice of "representatives," and subsequently added this statement: "Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in *Baker v. Carr* . . ." *Id.* at 378.

12 See the opinions in full, *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960), *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), and comment on Michigan and Oklahoma in Neal, *supra* note 6, at 305 n.155.

Professor Israel has made this comment with reference to the Michigan case: "The unfortunate result may be direct judicial entry into the arena of political debate, as was the

not because they present no political questions, but despite the fact that they do present political questions. Both standards and remedies, direct or indirect, must be conditioned by this elemental fact.

Fourth, *standards* to govern the merits of a claim and *remedies* to effect relief are inextricably intertwined. We need not swallow all of positivist jurisprudence to agree with Bentham<sup>13</sup> and Austin,<sup>14</sup> and Professor Hohfeld,<sup>15</sup> on this point. Benthamites stress the weakness of right, or law, absent adequate sanctions, citing international "law" as an example. The reverse is likewise true. Inexactness of right or standard necessarily produces uncertainty as to remedy.

Apportionment is one of those fields where it is easier to identify *unfair* or *unequal* methods than to articulate a *fair* method. Conceptually, much more is involved here than just opposite sides of one coin. It is instructive to draw an analogy to the Federal Trade Commission and the ill-fated National Recovery Administration. The FTC polices "unfair methods of competition" and the courts have had no difficulty sustaining delegation of power phrased in these terms.<sup>16</sup> But the NIRA's mission to prepare "codes of fair competition" was nullified 9-0.<sup>17</sup> Justice Cardozo commented that this was "delegation running riot."<sup>18</sup> The crucial, and proper, distinction is that the FTC proceeds retrospectively, case by case, to lop off competitive excesses after a careful fact-finding process. By contrast, the NIRA's attempted mission was to define, prospectively, those practices deemed "fair," and to order them into existence. The scope of discretion, the breadth of policy making, and the resulting residuum of private choice, is vastly different when government switches from the negative to the affirmative approach. It comes close to being the difference between a *regulated* and a *planned* society.<sup>19</sup> Similarly, it is one thing to review apportionments and nullify grossly "unreasonable" ones, although the reasons may be as elusive as the basis for *Lochner v. New York*<sup>20</sup> and other substantive due process decisions. It is quite different to specify detailed guidelines for the legislature to follow in devising a "fair" apportionment-districting plan, or by direct judicial action to devise and promulgate a new apportionment pattern itself.

Let me now unravel some of these thoughts and put some flesh on the bones.

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case in *Scholle*. There the various opinions were sprinkled with injudicious comments directed at political opponents, including a scarcely-veiled warning that the majority opinion might go by the wayside if the 'wrong' judges were chosen in the upcoming election." Israel, *supra* note 6, at 146.

13 BENTHAM, A FRAGMENT ON GOVERNMENT (1776).

14 AUSTIN, LECTURES ON JURISPRUDENCE (1832).

15 Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), 26 YALE L.J. 710 (1917).

16 FTC v. Keppel & Bro., 291 U.S. 304 (1934); FTC v. Raladam Co., 283 U.S. 643 (1931); FTC v. Gratz, 253 U.S. 421 (1920). Cf. SEC v. Chenery Corp., 313 U.S. 80 (1943), 332 U.S. 194 (1947). For a general discussion see 1 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 2 (1958); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 358 (1947).

17 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

18 *Id.* at 553.

19 See ROSTOW, PLANNING FOR FREEDOM (1959).

20 198 U.S. 45 (1905). See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

B. SOME UNRESOLVED QUESTIONS CONCERNING STANDING, JUSTICIABILITY,  
AND FEDERAL ABSTENTION

Despite *Baker v. Carr*'s explicit focus on jurisdiction, standing to sue, and justiciability, some lingering problems remain in this area, except for jurisdiction. By its holding, *Baker* did terminate jurisdictional questions concerning state legislative apportionment suits.<sup>21</sup> By its dictum<sup>22</sup> it terminated any doubts derived from Justice Frankfurter's opinion in *Colegrove v Green*<sup>23</sup> concerning jurisdiction over congressional districting suits.<sup>24</sup>

Since *Baker*, some questions have been raised in the lower courts concerning standing to sue, and necessary and proper parties, but the issues have not been insurmountable. The federal district court in Wisconsin held that the state, in its sovereign capacity, could not be an apportionment plaintiff.<sup>25</sup> But private plaintiffs were allowed to intervene, thus enabling the state to acquire *parens patriae* status.<sup>26</sup> The state Attorney General continued to dominate the plaintiffs' side of the case both as state representative and as counsel for the private plaintiffs.<sup>27</sup> The defendant was the Secretary of State. The federal district court in Nebraska denied standing to the League of Municipalities, the AFL-CIO, and mayors in their official capacity, but accorded standing to mayors as individuals.<sup>28</sup> The federal district court in Connecticut expressed concern regarding standing because the plaintiff was overrepresented in the state senate, which was the subject of the suit, and underrepresented only in the house.<sup>29</sup> But the court noted that in any event additional parties could easily be added. Questions whether state governors are necessary or proper defendants, in addition to the

21 *Baker v. Carr*, 369 U.S. 186, 198-204 (1962).

22 *Id.* at 202.

23 328 U.S. 549, 554 (1946). In one line of his *Colegrove* opinion Justice Frankfurter kept alive the idea which the Court had alluded to earlier in *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932), that article one, section four of the Constitution confers a plenary and exclusive power on Congress over congressional districts, thus posing a constitutional barrier to judicial jurisdiction. But he also talked of the inadvisability of judicial entry into the "political thicket," which seems to concede jurisdiction but oppose justiciability. *Id.* at 556.

24 On the separable question of whether congressional district suits should be dismissed on nonjusticiability—want of equity grounds (as distinct from lack of "jurisdiction")—there has been no authoritative ruling. The tenor of Justice Brennan's opinion for the Court in *Baker* discounts the idea that the *Colegrove* precedent has even this much life left in it. Further, the failure of congressional district suits in recent months in federal courts in New York, Georgia, Washington, and Wisconsin, and in state supreme courts in Florida and Missouri, was commonly rested on the facts rather than on lack of jurisdiction or nonjusticiability, with the possible exception of the Georgia case. *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 950); *Lund v. Mathas*, 145 So. 2d 871 (Fla. 1962); *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 507); *Thigpen v. Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962); *State of Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wisc. 1962); *Preisler v. Hearnese*, 362 S.W.2d 552 (Mo. 1962). The Georgia case is discussed at length in a comment: *Challenges to Congressional Districting: After Baker v. Carr Does Colegrove v. Green Endure?*, 63 COLUM. L. REV. 98 (1963).

25 *State of Wisconsin v. Zimmerman*, 205 F. Supp. 673 (W.D. Wisc. 1962). The court said the matter could not be litigated "unless two or more individual Wisconsin electors are named as parties plaintiff." *Id.* at 676.

26 After five electors were joined as coplaintiffs the court denied a motion to dismiss the state as party plaintiff on the ground that the state now had the basis for assuming the role of *parens patriae*. See *State of Wisconsin v. Zimmerman*, C.A. 3540, Findings and Order, Aug. 22, 1962, as published in 3 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON LEGISLATIVE APPORTIONMENT (1962).

27 *State of Wisconsin v. Zimmerman*, 209 F. Supp. 183, 184 (W.D. Wisc. 1962).

28 *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962).

29 *Valenti v. Dempsey*, 211 F. Supp. 911 (D. Conn. 1962).

defendant election officials, have been raised in Oklahoma<sup>30</sup> and Virginia.<sup>31</sup>

A more interesting question, but one seldom discussed in the briefs or opinions, is whether a doctrine of federal abstention should operate, at least temporarily, in those states, unlike Tennessee,<sup>32</sup> where initiative process is available or where interpretation and relief have not been sought from the state judiciary in the period since the Supreme Court removed doubts about justiciability. Such hesitancy has not been forthcoming, however, and the few cases to touch on the point have concluded in favor of acting and against abstention.<sup>33</sup> The courts have tended to see in apportionment suits only a personalized civil right, thus ignoring the complexity of a voting right intertwined inextricably with broad questions of bicameral representative government. On this faulty premise it has not been hard to brush aside pleas for prior resort to the state courts.

### *Breakdown of the Adversary Method*

At least one major new dimension has arisen under the broad rubric of justiciability, and it relates to the traditional common law requirement of adversity. We seem to be witnessing a breakdown of the adversary method in some of the apportionment cases. The primary defendants in these cases are executive branch officials who conduct elections and the minimum relief sought is a declaration of invalidity of the apportionment statutes and an injunction against their continued use. But in some states, such as Oklahoma, where Governor (now Senator) Edmundson has repeatedly campaigned for reapportionment, the executive branch defendants already favored reapportionment;<sup>34</sup>

30 See three-judge federal district court hearing on new legislative apportionment enacted in response to previous judicial direction, *Moss v. Burkhart*, 207 F. Supp. 885, 898 (W.D. Okla. 1962), as reported in *Oklahoma City Times*, March 8, 1963, p. 1, col. 7.

31 *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962) (governor and attorney general dismissed because they had no "special relation" to the elections in suit). The abstention issue is discussed at length in Judge Hoffman's dissenting opinion, 213 F. Supp. at 589-90, and in Appellants' Jurisdictional Statement, *Davis v. Mann*, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797).

32 *Baker v. Carr* was an end-of-the-line case. Relief had been sought unsuccessfully in the state court (*Kidd v. McCannless*, 200 Tenn. 273, 292 S.W.2d 40 (1956), *appeal dismissed*, 352 U.S. 920 (1956)) before suit was filed in federal district court, and Tennessee had no provision for popular initiative of statutes or constitutional amendments.

33 *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962); *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797). One of the questions presented in the current appeal to the Supreme Court is whether the federal district court should have declined jurisdiction conformably with the doctrine of abstention.

A late development in the Oklahoma litigation prompted a special appeal to the United States Supreme Court in 1963. State senators who felt that the federal district court had misread the state constitution in the course of its order for reapportionment, *Moss v. Burkhart*, 207 F. Supp. 885, 898-99 (W.D. Okla. 1962), *appeal dismissed sub nom. Price v. Moss*, 31 U.S.L. WEEK 3407 (U.S. June 10, 1963) (No. 688), sought from the state supreme court a bill *quia timet* for a redetermination of the requirements of the Oklahoma Constitution. The federal district court then enjoined the proceedings in the state Supreme Court, January 15, 1963, and an appeal was taken to the United States Supreme Court citing *inter alia* such federal abstention cases as *Harrison v. NAACP*, 360 U.S. 167 (1959), *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Government Employees v. Windsor*, 353 U.S. 364 (1957). The Supreme Court dismissed the appeal, *Baldwin v. Moss*, 31 U.S.L. WEEK 3407 (U.S. June 10, 1963) (No. 864).

34 *Moss v. Burkhart*, 207 F. Supp. 885, 888-90 (W.D. Okla. 1962). For an illuminating discussion of the parties, their positions, and judicial attitude see Jurisdictional Statement of the Interveners (state senators and Oklahomans for Local Government), *Price v. Moss*,

or, as in Michigan, began to argue *for* reapportionment as soon as the issue of justiciability was removed.<sup>35</sup> In effect this yields two sets of "plaintiffs" asserting the unconstitutionality of the state apportionment system. The defense is left to such additional defendants as may have been allowed to intervene earlier in the litigation,<sup>36</sup> or who may be allowed to intervene at the last minute<sup>37</sup> when it becomes apparent that the nominal defendants in the executive branch are going to be complaisant. Surprisingly enough, the federal district court in Oklahoma last spring only begrudgingly allowed some state senators to intervene,<sup>38</sup> even though without them a major and exceptionally murky federal constitutional issue would have been decided without opportunity for argument, in an essentially *ex parte* proceeding.<sup>39</sup>

The time may come when judges who are alert to avoid imposition on judicial process by friendly parties may have to give fresh consideration to the problem of adequately informing the court. The problem is not novel but has been aggravated both by heightened judicial awareness of the polycentric nature of legal problems and by steady proliferation of social complexities resulting from advances in technology. There are broad areas of law, particularly public law, where a litigant's problems and conceptions are not coterminous, except fortuitously, with the public policy dimensions of the issue.<sup>40</sup>

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Supreme Court of the United States (No. 688, 1962 Term). A Motion to Stay and Supersede was denied by Justice White, *Oklahoma City Times*, March 7, 1963, p. 1, col. 8.

35 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), following remand from United States Supreme Court, 369 U.S. 429 (1962). See Brief for James M. Hare, Secretary of State of the State of Michigan, Respondent, in Opposition, p. 13, *Beadle v. Scholle and Hare*, Supreme Court of the United States (No. 517, 1962 Term), where the Michigan attorney general explained his "higher duty to defend the Constitution of the United States when its provisions came in conflict with the provisions of the Michigan Constitution. . . ."

36 In the Michigan case certain state senators and citizens had intervened as early as 1960, *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960).

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

38 *Ibid.*

39 In the Delaware litigation the adversary process was cramped because certain defendants who were members of the Boards of Canvass and also judges in the state court system felt that "as judicial officers serving in ministerial capacities" it would be "inappropriate to take a position on the merits of this lawsuit. . . ." *Sincock v. Terry*, 210 F. Supp. 396, 399 n. 1 (D. Del. 1962).

This eventuality further illustrates the extreme inadvisability of imposing nonjudicial responsibilities on judges. But judicial prestige exercises a steady pull in that direction. See VANDERBILT, *THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* (1953); DIXON, *The Doctrine of Separation of Powers*, 23 *Geo. Wash. L. Rev.* 501, 636-39 (1955).

40 *Cf.* the recent request of the Interstate Commerce Commission to Congress for money to staff an eight-man bureau of lawyers and economists to represent the "public interest" in key cases. *Washington Post*, February 11, 1963, p. 8, col. 1. Also see ICG testimony in *Hearings on Independent Office Appropriations for 1963 Before a Subcommittee of the House Committee on Appropriations*, 87th Cong., 2d Sess. 499 (1962).

The problem of representation of "public interest" in administrative proceedings was discussed by the Attorney General's Committee on Administrative Procedure in its monograph on the ICC. 1941 ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, MEMORANDUM No. 24 at 28. Several administrative and regulatory agencies have employed "public counsel" to represent the interests of the using or consuming public. See, *e.g.*, Department of Commerce, 46 C.F.R. § 201.42 (1958); Civil Aeronautics Board (designated as "Bureau Counsel"), 14 C.F.R. § 302.9 (1962); Federal Communications Commission ("the appropriate Bureau Chiefs"), 47 C.F.R. § 1.21 (b) (1958). A "Public Counsel Section" was established in the Antitrust Division of the Department of Justice in 1961 to "represent the public interest in competition and in preservation of a free competitive economy." Antitrust Division, Department of Justice, Directive No. 17, Nov. 2, 1961. For a negative view on



Public intervenor statutes,<sup>41</sup> designed for situations where public laws are under limited private attack, by their nature offer no solution in those apportionment cases where the government is in effect attacking itself. The equitable device of appointing a master may be better adapted to problems requiring extensive value-weighting along with detailed "fact" finding.<sup>42</sup> The master device has the virtues of close relationship to the court and adaptability to research techniques. The amicus curiae device has acquired great flexibility but often rests on private initiative. More recently, it has undergone a transformation from advisor to advocate, and this transformation has affected also the role of the federal Solicitor General.<sup>43</sup> Both in *Baker v. Carr* and in *Gray v. Sanders* the Solicitor was essentially a vigorous coplaintiff, and not above wrapping precedent to the desired end, in traditional appellate advocacy style.<sup>44</sup> Awareness, or concern, regarding the nonadversary nature of some apportionment litigation may be minimal in states following the tradition of popular election of judges, whether on partisan or nominally nonpartisan tickets.

Equally distressing is the unsatisfactory quality in some apportionment

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the need for independent "public counsel" see Miller, *The Use of Public Counsel by Federal Regulatory Agencies*, 6 FED. B. NEWS 211 (1959).

Apart from the relatively precise concept of "public counsel" in the regulatory process, there has been steady pressure for more "consumer" representation in governmental affairs generally. Senator Kefauver and a bipartisan group of 21 other senators introduced a bill in 1961 to create a Department of Consumers to secure more effective federal representation of economic interests of consumers and to coordinate the administration of consumer services now scattered through the Department of Health, Education, and Welfare and the Department of Labor.

Following a Presidential Message to Congress on March 15, 1962, a Consumer Advisory Council was created informally in the Council of Economic Advisors. It functions under the chairmanship of Dean Helen G. Canoyer of the State College of Home Economics, Cornell University, with the liaison officers in the departments, regulatory commissions, and independent agencies. See Presidential Message, H.R. Doc. No. 364, 87th Cong., 2d Sess. (1962); White House Press Release for July 18, 1962; Council of Economic Advisors Press Releases for September 14, 1962, January 31, 1963, March 20, 1963, and March 25, 1963.

In this regard the American Society for Political and Legal Philosophy's recent collection of essays, *THE PUBLIC INTEREST* (Friedrich ed. 1962), is a promising failure. None of the essayists purport to deal with anything so mundane—or so practical and relevant to human experience—as the actual state of "public interest" (or consumer) representation in the administrative law making and decisional process, or in public administration generally. For other theoretical discussions see SMITH, *DEMOCRACY AND THE PUBLIC INTEREST* (1960), a helpful discussion of functional, proportional, and geographic representation; CASSINELLI, *THE POLITICS OF FREEDOM: AN ANALYSIS OF THE MODERN DEMOCRATIC STATE* (1961); LEYS & PERRY, *PHILOSOPHY AND THE PUBLIC INTEREST* (1959); SCHUBERT, *THE PUBLIC INTEREST* (1960).

41 *E.g.*, 28 U.S.C. § 2403 (1958).

42 See *Ex parte Peterson*, 253 U.S. 300 (1920), concerning the inherent power of a federal court to direct a reference to a master, and the discussion of Rule 53 of the Federal Rules of Civil Procedure in Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958).

43 Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963).

44 See, *e.g.*, Brief for the United States as Amicus Curiae on Reargument, pp. 52, 54, *Baker v. Carr*, 369 U.S. 186 (1962). The brief treats *Smiley v. Holm*, 285 U.S. 355 (1932), so as to create in the mind of one unfamiliar with the facts of the case the misleading impressions that the Court had held that substantive federal standards on congressional districting by state legislatures were justiciable, and that the Court had ordered an election at large. This misleading impression is copied and magnified in 1961 UNITED STATES COMM'N ON CIVIL RIGHTS REPORT, VOTING (Book 1) 123, 128. For full discussion of *Smiley* see Dixon, *supra* note 5, at 340-43.

As Harry D. Nims has observed, "The adversary system is a sort of legal personification of the principle that all is fair in love and war." Nims, *The Cost of Justice*, 28 CONN. B.J. 1, 2 (1954).

briefs and apportionment opinions since *Baker*, attributable in part to intrinsic complexities in apportionment, in part to deficiencies in the adversary method for this kind of litigation, and in part to the unpaid status of counsel.<sup>45</sup> Unless further judicial ingenuity is forthcoming to solve the problem the organized bar should deem it its responsibility, in league with informed social scientists, to devise means for more effectively canvassing the full range of possibilities and considerations, legal, social, political, economic, historic, which mesh in an apportionment case.

### C. THE PROBLEM OF "STANDARDS": AN ELEMENT IN CALCULATING APPROPRIATE RELIEF

In approaching the question of higher-law standards to fix the outer boundaries of permissible political experimentation with democratic forms, the popular understandings of acceptable apportionment formulae, as evidenced by the formal apportionment formulae in state organic law, are certainly relevant, even if not controlling. Whatever the figures reveal — and there certainly are some careless and questionable summations<sup>46</sup> — they do *not* reveal a primary reliance on the simple population principle of one man-one vote and equal district population. On the eve of *Baker v. Carr*, 30 state constitutions departed materially from a pure population standard for the upper house, and 34 for the lower house.<sup>47</sup> The current figures, as nearly as can be ascertained from reports on changes in some states since *Baker v. Carr*, are substantially unchanged, so far as formal apportionment formulae are concerned, even though in some states the population factor now plays a larger role either in formula or in practice than formerly. At present 29 state apportionment formulae depart materially from a pure population standard for the upper house, and 34 for the lower house. [See Chart I] In making these analyses it is vital to take into

45 Both plaintiffs' and defendants' counsel, including some whose briefs bear the marks of careful workmanship, have indicated in letters to this writer that they were not personally satisfied with their briefs, a factor to be attributed in some instances to their status as unpaid counsel. As humorously put by the plaintiff's attorney in the Washington case, Thigpen v. Meyers, 211 F. Supp. 826 (W.D. Wash. 1962):

It does not appear that the legislature will be able to come up with a plan which will satisfy the Federal Court, and I am afraid that this may turn out to be a career from the point of view of the plaintiff's attorney. Unfortunately, our \$1.00 contingency fee has been paid, and we are trying to dream up some way of either charging the state or taking our time off income as a charitable contribution.

Letter to author from M.L. Borawick of Midway, Washington, March 22, 1963.

46. *E.g.*, the annual tabulations in the BOOK OF THE STATES, which is the starting point for many counts by other writers. In several instances states are listed as having a "population" formula even though the same state constitutional section adds qualifications which materially impair the population principle such as minimum or maximum limits on the number of representatives per county, coupled with a fixed ceiling on the size of the legislature, and other special provisos. See, *e.g.*, BOOK OF THE STATES 58 (1962-63), and BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT 64 (1960), both of which list the California lower house as resting on a simple population formula. However, the California Constitution art. IV, § 6, in addition to specifying "as nearly equal in population as may be," also provides that in forming lower house districts (a maximum of 80 for 54 counties) no part of any county shall be united with any other county, no matter how sparse the population. The most accurate and painstaking descriptions are found in NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (1962). See also the tabulation as of January, 1962, forthcoming in READINGS ON REAPPORTIONMENT (Schubert ed. 1963, in press).

47 See Chart III in Dixon, *supra* note 5, at 387.

account the extent to which what appears at first glance to be a population standard is materially transformed into a geographic distribution standard. The transformation is accomplished by such qualifying provisos as the guarantee of one seat per county, or a limit on the number of seats allocable to any county regardless of population, or a low ceiling on the total size of the house or senate, and by numerous other combinations of provisos.<sup>48</sup>

Failure to notice and adequately consider such provisos embedded in the basic apportionment formulae account for some of the inaccurate counts which one sees reported. A recent document of the United States Advisory Commission on Intergovernmental Relations states at several places, without supporting documentation, that the original constitutional provisions of 36 states contained apportionment provisions based completely or substantially on population.<sup>49</sup> The accuracy of this statement may be doubted in the light of the frequency from the earliest days of the kinds of provisos mentioned above. The constitutions in 1790 of the 13 original states did not fit this mold, nor their constitutions a century later in the Civil War period.<sup>50</sup>

The past understandings of the states on apportionment formulae, which of course can be separated from the actual apportionments made or allowed to continue under such formulae, take on added meaning in relation to the vagueness of the constitutional clauses under which courts review apportionments. The constitutional clauses primarily relevant to apportionment matters — the guarantee of a “republican form of government,” the substantive side of “due process,” and “equal protection” — are woefully vague and have not taken on intelligible coloration through the process of judicial review. Basically, as Justice Frankfurter noted, apportionment cases are really “republican form of government” cases masquerading as equal protection cases.<sup>51</sup> But even if the guaranty clause be laid aside and the apportionment cases be approached under the equal protection clause, neither this clause nor its past interpretations provide guidance for judicial restructuring of the composition of American legislatures.

### *The Ambiguity of Equal Protection*

In the field of race problems, which of course gave rise to the equal protection clause in the first place, we have shaped a constitutional absolute. Governmental action must be color blind. But apart from racial matters the most striking things about pre-*Baker v. Carr* equal protection cases are the inexactness of the principles articulated by the courts, and the major stress on a presumption of constitutionality.<sup>52</sup> Indeed, the cases are handled in substantially the same fashion as substantive due process cases, under a reasonableness-basic liberty analysis.

A recent example is *McGowan v. Maryland*,<sup>53</sup> and the packet of Sunday

48 For further elaboration see Israel, *Non-Population Factors Relevant to an Acceptable Standard of Apportionment*, forthcoming in August 1963 issue of NOTRE DAME LAWYER.

49 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, APPORTIONMENT OF STATE LEGISLATURES 10, 11, 14, 35 (1962).

50 See Charts I and II in Dixon, *supra* note 5, at 385, 386.

51 *Baker v. Carr*, 369 U.S. 186, 297 (1962) (dissenting opinion).

52 HARRIS, *THE QUEST FOR EQUALITY* (1960).

53 366 U.S. 420 (1961). See also *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961); *Braunfeld*

Closing cases decided with it, in which equal protection was one of the featured issues. Exemptions of certain kinds of business and commodities from the Sunday Closing rule were challenged as constituting invidiously discriminatory classifications in violation of the equal protection clause. But the classifications were upheld on the basis of the purposes of avoiding interruption of health service, or promoting the recreational atmosphere of the day. But whether health and/or recreation were valid legislative purposes was simply assumed without discussion. Although health may be conceded as an obviously valid legislative purpose, only a small fraction of the exemptions could be sustained on that ground. To be honest about it, what we have in the Sunday Closing laws is a legislative "assist" to what Professor Kauper refers to as the "transformation of Sunday from a religious into a civil holiday"<sup>54</sup> for rest and relaxation. In using *McGowan* and other nonapportionment equal protection cases as precedents in the *apportionment* field, the unfilled part of the equation is the identification of the valid legislative purposes to which the particularized and detailed apportionment rules are relevant.

If the underlying purposes in the apportionment cases are not self-apparent, as are health and recreation, who has the burden of proving their existence or nonexistence? And who has the burden of showing that the classifications are themselves reasonable, and reasonably related to the underlying reasonable purposes? Chief Justice Warren's opinion in *McGowan*, like the statements in other cases cited by him, goes on to speak of a *presumption* that the legislatures have acted within their constitutional power. If followed in the apportionment cases this would seem to place upon the challenger of the existing apportionment system the burden of showing that the particular rules could not be relevant to any conceivable valid legislative purpose. As Chief Justice Warren phrased it: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . ."<sup>55</sup>

In the light of the *McGowan* precedent, let us look at the Michigan apportionment case, and for present discussion purposes lay aside the fact that the recently adopted Michigan constitution<sup>56</sup> may moot the case, or materially alter it. In his brief in the United States Supreme Court, in the current appeal<sup>57</sup> from the Michigan Supreme Court's invalidation of the state senate last summer,<sup>58</sup> following the remand<sup>59</sup> after *Baker v. Carr*, the Michigan attorney general asserted the unconstitutionality of his state constitution's then applicable senate apportionment formula.<sup>60</sup> He properly stated that a statute whose discriminations are so unreasonable that no conceivable fact situation could justify them

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v. Brown, 366 U.S. 599 (1961). In all four cases the challengers of the Sunday Closing laws, whether or not their own religion was revealed, were found to have standing to raise both the equal protection issue and the first amendment establishment of religion issue.

54 KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 22 (1962).

55 *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

56 Approved in a popular referendum April 1, 1963, N.Y. Times, April 3, 1963, p. 24, col. 3.

57 *Beadle v. Scholle and Hare*, *petition for cert. filed*, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).

58 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

59 *Scholle v. Hare*, 369 U.S. 429 (1962).

60 Brief for James M. Hare, Secretary of State of the State of Michigan, Respondent, In Opposition, p. 13, *Beadle v. Scholle and Hare*, No. 517.

will be nullified. He also stated the corollary rule that in all other instances the burden is on the challenger "to affirmatively demonstrate that in the actual state of facts which surround its operation"<sup>61</sup> the classification is unreasonable. He then asserted that Michigan's senate apportionment fell in the first category, that it was so "patently without reason"<sup>62</sup> that the matter of burden of proof and presumption of constitutionality was of no significance. For this last proposition he relied on Justice Frankfurter's concurring opinion in *McGowan*.

### *Equal Protection and "Reasonableness - Rationality"*

This approach is a mischaracterization of Justice Frankfurter's position, as revealed by Frankfurter's actual *decision* in the Sunday Closing cases, and it brings us right to the heart of the problem of equal protection as a constitutional standard in apportionment cases. The Sunday Closing laws were sustained despite obvious illogical differences in the exemption formulae,<sup>63</sup> and the differential impact on substantially similar commodities and types of business. They were sustained also even though, like the apportionment cases, they border on civil rights, and thus are not readily allocable to the line of business regulation-equal protection cases in which the Court has looked kindly on legislative experimentation in economic affairs.<sup>64</sup> The essence of Justice Frankfurter's position, which amplified but did not conflict with Chief Justice Warren's opinion for the Court in *McGowan*, is that "neither the Due Process nor the Equal Protection Clause demands *logical tidiness*. . . . It is enough to satisfy the Constitution that in drawing [lines of distinction] the *principle of reason* has not been disregarded."<sup>65</sup> With such elusiveness of principle, he also felt that evidence of divergent state practice is quite relevant in deciding where to draw the line of constitutional reasonableness.<sup>66</sup>

Where the Michigan attorney general goes astray — and in this he has much company in the briefs and lower court apportionment opinions<sup>67</sup> since *Baker v. Carr*, and in Justice Clark's concurring opinion in *Baker* itself<sup>68</sup> — is in confusing the concept of *rationality* with the principle of *reasonableness*. To be sure, Justice Frankfurter in his *McGowan* opinion switches back and forth between the ideas of "reasonableness" and of "rationality."<sup>69</sup> But if one

61 *Id.* at 21.

62 *Id.* at 28.

63 *McGowan v. Maryland*, 366 U.S. at 535-42.

64 HARRIS, *op. cit. supra* note 52, at 57-81. Cf. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial* 1962 SUPREME COURT REVIEW 34, and especially his penetrating critique of the supposed distinction and differential priority between "economic rights" and "civil rights."

65 *McGowan v. Maryland*, 366 U.S. at 524. (Emphasis added.)

66 *Id.* at 536.

67 *E.g.*, *Baker v. Carr*, 206 F. Supp. 341, 345, 348 (M.D. Tenn. 1962); *Moss v. Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962); *Thigpen v. Meyers*, 211 F. Supp. 826, 831 (W.D. Wash. 1962).

68 *Baker v. Carr*, 369 U.S. 186, 254, 260 (1962) (concurring opinion).

69 For example, he says:

But the very diversity of judicial opinion as to what is a *reasonable* classification — like the conflicting views on what is such "necessity" as will justify Sunday operations — testifies that the question of inclusion with regard to Sunday bans is one where judgments *rationally* differ, and hence where a State's determinations must be given every fair presumption of a reasonable support in fact. The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause . . . is of

pushes beyond semantics to the core of meaning it is obvious that he is 'talking about reasonableness of impact, not strict logical or rational consistency in the legislative distinctions and classifications.

Indeed, an "irrational plan," *i.e.*, illogical, unprincipled, possessed of internal inconsistencies, may have a reasonable effect, and that is all the Constitution requires at the level of judicial review of public choice. This distinction between constitutional reasonableness and logical rationality is vital to an understanding of the judicial handling of cases like the Sunday Closing law cases. It is equally relevant to the far greater factual and conceptual difficulties involved in the theory and practice of representative government, which is really what "apportionment" is all about.<sup>70</sup>

Failure to make this distinction has led some courts since *Baker* to make "quickie" judgments against the constitutionality of legislatures. Where the underrepresentation of people is gross, the end result may be applauded, but the formulary process used approaches gimmickry.<sup>71</sup> The court accepts mathematical proof in the nature of arithmetic abstractions which shows major numerical disparities in size of districts and allocation of representatives, and it states in conclusionary fashion that "invidious discrimination" exists. Next, and this is a very critical point, the court shifts the burden of proof to the defenders to show a "rational plan." By "rational plan" is meant a plan which is internally consistent and proceeds logically from a set of identifiable and clear principles. But how can there be a rational plan for the highly political process of compromise and adjustment regarding apportionment and districting, or indeed, regarding legislation generally? Judicial insistence on rational plans of apportionment confuses the reasoned process of adjudication with the intricate process of multilaterally negotiated settlements which characterizes the political-legislative arena.<sup>72</sup> By thus shifting the burden of proof after finding that population dis-

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long standing. . . . The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without *reason* that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack *rationality*. *McGowan v. Maryland*, 366 U.S. at 532-35. (Emphasis added.)

70 See DE GRAZIA, APPOINTMENT AND REPRESENTATIVE GOVERNMENT 9 (1963): "The system called democratic representative government is probably the most complicated political structure ever deliberately employed by man." See also DE GRAZIA, PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA (1951); DE GRAZIA, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROB. 256 (1952); SMITH, *op. cit. supra* note 40.

71 See, *e.g.*, the Oklahoma and Washington cases cited *supra* note 67. See also Mann v. Davis, 213 F. Supp. 577, 584 (E.D. Va. 1962); Lisco v. McNichols, 208 F. Supp. 471 (D. Colo. 1962); Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962); Sincock v. Duffy, 215 F. Supp. 169 (D. Del. 1963), but the Delaware federal court did discuss at length the possible "rationality" of giving "some weight" to nonpopulation factors in the apportionment formula for one house.

Other courts, whether or not reaching correct decisions, have eschewed the simple population disparity-burden of proof-rational plan gimmick, *e.g.*, *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962); *Lund v. Mathas*, 145 So. 2d 871 (Fla. 1962) (congressional districts); *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962); *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A.2d 656 (1962).

72 Cf. EISENSTEIN, THE IDEOLOGIES OF TAXATION (1961) and tax legislation in general where, as in apportionment, there is a mathematical basis and a desire for "equal treatment." In the hammering out of exemptions and exceptions the political weight of the proponent may be more important than the intrinsic "rationality" of the proposed exemption.

parities alone make out a prima facie case of invidious discrimination, the courts are really skirting the basic constitutional issue of what constitutes a fair apportionment.

### *Burden of Proof and Civil Liberties*

On the question of shifting the burden of proof, it is sometimes stated, as in the challengers' briefs in the Michigan case,<sup>73</sup> that the burden of proof shifts to the defendant in civil liberties and civil rights cases, by which is really meant a reversal of the presumption of constitutionality. Also it is assumed, sub silentio, that apportionment presents just one more civil liberties issue. Both the statement and the assumption are shaky. The voter's civil right or liberty is intertwined with the larger question of the nature of representative government, as already mentioned. And in any event the precedents are not at all clear in establishing a reversal of the presumption of constitutionality in civil liberties cases, even in the first amendment area. We have heard strong arguments for the "firstness of the First," and the results in some cases do seem slanted in that direction.<sup>74</sup> But these are cases where a distinctly and uniquely personal impact of state policy is at issue, rather than dilution of the mixed personal-political exercise of the franchise. For example, in *Bates v. Little Rock*,<sup>75</sup> concerning disclosure of NAACP membership lists, the Court said that where "there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."<sup>76</sup> And it concluded that "the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause."<sup>77</sup>

But this precedent is quite inapropos in relation to apportionment — equal protection. The basic constitutional right — freedom of association — which underlay *Bates* was already established,<sup>78</sup> and the fact of infringement or detrimental effect resulting from disclosure was taken as established by evidence submitted by the parties asserting the constitutional right. They showed that their membership was harassed, restrictive, or declining. Only then was it incumbent on the state to show justification.

In contrast, in the apportionment cases the basic constitutional right is not yet established, *i.e.*, the question of a right to numerical equality in either or both houses, or a right to a minimum relation of population to representation in at least one house, or a right to a formula which weighs population heavily in regard to both houses although not placing sole reliance on it for either house. Hence, it should remain with the plaintiff to articulate his theory of federal right, and to adduce proof in terms of his articulated theory. *NAACP v.*

73 Brief in Opposition of Respondent Scholle, p. 15, *Beadle v. Scholle and Hare*, Supreme Court of the United States (No. 517, 1962 Term).

74 KAUFER, *op. cit. supra* note 54, at 112; McKay, *The Preference for Freedom*, 34 *N.Y.U.L. Rev.* 1182 (1959).

75 361 U.S. 516 (1960).

76 *Id.* at 524.

77 *Id.* at 527.

78 *NAACP v. Alabama*, 357 U.S. 449 (1958).

*Alabama*,<sup>79</sup> the case which established the right of freedom of association which underlay the *Bates* case, lends itself to a similar analysis.

Plaintiffs' requests to shift the burden of proof could be made regardless of the constitutional clause used as the basis for apportionment litigation, but they are especially likely to be granted when equal protection is cited as the basis for the suit. The tendency is to translate "equal protection" into "equal population," without discussing the conceptual and practical complexities of representation, and then to switch the burden of proof as soon as the easily proven population disparities are shown. The act of registering and casting a ballot is a relatively simple matter. But the effectiveness of a vote in an indirect democracy, and the permissibility of apportionment-districting arrangements whose effect may be to require a broader consensus than 51 per cent to shape affirmative public policies, is not at all a simple matter.

### *Mathematics and Popular Will*

The mathematical evidence on which some courts have relied so heavily is also subject to major qualifications — it proves either far too much, or too little.<sup>80</sup> Urban-suburban population figures are contrasted with rural population figures. But do not cities and suburbs oppose each other vigorously?<sup>81</sup>

<sup>79</sup> *Id.* at 460, 462-63.

<sup>80</sup> See DE GRAZIA, *APPORTIONMENT AND REPRESENTATIVE GOVERNMENT* (1963). And in the New York case, in their motion to dismiss the appeal or affirm, p. 14, W.M.C.A., Inc. v. Simon, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 460), the appellees observed that under a strict population theory plaintiffs "would likewise succeed in making a prima facie case on the barest statistical showing in virtually every state of the union. . . . There is no reason to suspect unconstitutionality from a commonplace."

Professor Israel observes:

It is in the light of the requirement of a "republican" form of government that the essentiality of per capita equality of representation must be judged: If reasoned, non-population bases for apportioning state legislatures are considered "irrational," it is only because the concept of republican form of government, possibly as supplemented by historical practice and other parts of the Constitution, requires a representative democracy based upon complete political equality of the individual. Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 135 (1962).

See also Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963); Krastin, *The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549 (1963).

For a more uncritical acceptance of "one man-one vote" and a simple majoritarianism, and an exclusive reliance on equal protection as the relevant constitutional clause, see McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963); TWENTIETH CENTURY FUND, *ONE MAN-ONE VOTE* (Conference Pamphlet 1962); and see McKay, *The Federal Analogy and State Apportionment Standards*, forthcoming in August 1963 issue of NOTRE DAME LAWYER.

Among the petitions and briefs one of the more sophisticated critiques of exclusive reliance on mathematical evidence is found in Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan, *Beadle v. Scholle, petition for cert. filed*, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517), (prepared by Edmund E. Shepherd). Mr. Alfred L. Scanlan, attorney for the plaintiffs in Maryland Committee for Fair Representation v. Tawes calls for an equally sophisticated approach on the plaintiffs' side of the issue, recognizing the need to go beyond mathematical proof to a "Brandeis brief" approach, putting mathematics in the setting of actual operation of the legislature on particular issues. See Scanlan, *Problems of Pleading, Proof and Persuasion in a Reapportionment Case, infra*, at 415, 426-28.

<sup>81</sup> In the period from 1950-1961, 10 of 18 proposals for city-county consolidation or other governmental integration failed to pass the popular referendum hurdle. Only two of the 10 which failed of adoption owed their defeat directly to the demand for concurrent



Even within the city, is there an identity of interest? And how meaningful are figures showing that, theoretically, districts with a minority of the state's population can control a majority of seats in one or both houses?<sup>82</sup> Application of this latter abstraction to the United States Senate, using 1960 census data, yields the following figures. We find that 31 million people in the 26 least populous states, representing only 17 per cent of the population of the United States, have 52 per cent of the representatives in the United States Senate.<sup>83</sup> Yet it is obvious that the 52 senators from these 26 states do not vote as a bloc, disregarding party, economic, philosophic and other considerations.

The nation's apportionment problem is serious, but it is also far more complicated than many of the opinions indicate. Certainly a vital component of representation is people. Representation systems which perpetually deny large majorities any effective influence in both houses of a legislature are unreasonable under the fourteenth amendment. But they are unconstitutionally unreasonable not because they deviate from a simple one man-one vote principle, but because minority process is not due process. Additionally, such systems may be unconstitutional under the clause guaranteeing a "republican form of government."<sup>84</sup>

Among our most distinctive contributions to politics are our awkward checks and balances system, our decentralized political party system, and the relative freedom of legislators from party discipline. These things are not an

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majorities. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *FACTORS AFFECTING VOTER REACTIONS TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS* 21-22, 24, 27 (1962). See also GERGE, *Metropolitan and Outstate Alignments in Illinois and Missouri Legislature Delegations*, 52 *Am. Pol. Sci. Rev.* 1065 (1958); STEINER & GOVE, *LEGISLATIVE POLITICS IN ILLINOIS* (1960).

82 The figures are obtained by placing the legislative districts for each house in rank order of population, and by counting from the smallest population end of the list a sufficient distance to accumulate the minimum population which could elect a majority of the house in question. See Dauer & Kelsay, *Unrepresentative States*, 44 *NAT. MUNICIPAL REV.* 571 (1955).

This line of analysis, seeking to ascertain the minimum population minority that theoretically could control, is often virtually a meaningless abstraction as applied to a multimembered body (*i.e.*, legislature) because of the factors of political party alignments and interest representation. For example, although there are population disparities among some of the districts for the New York State legislature, the results in the 1962 election, cast in terms of party representation were reasonably equitable. For the state senate, a state-wide Republican legislative vote (as distinguished from the vote for Governor) of 2,704,786 captured 33 seats, and a state-wide Democratic legislative vote of 2,534,378 captured 25 seats. For the state assembly (lower house), the comparable figures were: Republican, 2,690,795 votes, 85 seats; Democratic, 2,567,115 votes, 65 seats. However, if all of the Liberal Party vote be added to the Democratic figure it becomes 2,821,293. Source: Data received from Election and Law Bureau, New York State Department of State.

The analysis may have greater utility as an index of fairness-unfairness as applied to election of a *single officer* under a vote weighting system such as the electoral college formula for electing a President, because the alignment factors cannot divide one man. See, *e.g.*, the observation by the Solicitor General in the Georgia County Unit case, Brief for the United States as Amicus Curiae, p. 45, *Gray v. Sanders*, 372 U.S. 368 (1963). The Solicitor noted that whereas a comparison solely of the weight of a vote for the presidency in the largest and smallest state shows great disparity, an analysis in terms of the least population that theoretically could elect a President under the electoral system shows that an electoral college majority (270 votes) could not be derived from less than the 40 least populous states, and these states do have 43.21 per cent of the population. This may be viewed as a respectable figure, even though falling short of strict population equality.

83 U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 10 (1962).

84 See Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 *CALIF. L. REV.* 245 (1962); Emerson, *Malapportionment and Judicial Power*, 72 *YALE L. J.* 64 (1962).

unmixed blessing, but they have given us a politics of consensus rather than a politics of majoritarianism.<sup>85</sup> Do we no longer fear the tyranny of the majority? Do we now want a simple majoritarianism?

"One man-one vote" is most closely achieved in state-wide popular referenda on such things as proposed constitutional amendments — including possible new apportionment formulae. Assuming a common desire for apportionment systems which will produce a representative expression of the popular will in such fashion as to approximate a direct expression of the popular will, these referenda would seem to have high evidentiary value, even if not dispositive of the constitutional issue.<sup>86</sup> But in states where such votes have occurred they have not always been viewed as weighty evidence in the decision of apportionment litigation. In 1952, Michigan voters were faced with two proposals regarding the state senate. They *rejected* the one to reapportion the senate under a population principle; they *approved* the one based on a geographic distribution principle.<sup>87</sup> Despite this background, the Michigan Supreme Court last summer invalidated the composition of the state senate.<sup>88</sup> Last month, the voters there approved a new state constitution which continues some recognition of area in the state senate.<sup>89</sup> It is too soon to predict the outcome, but a further invalidation of the state senate by Michigan's judiciary, chosen in elections somewhat humorously dubbed "nonpartisan," cannot be ruled out.

In the state of Washington, a federal district court last December invalidated the apportionment of the state legislature even though the voters, a month earlier, had rejected a new formula based more strictly on population alone.<sup>90</sup> Referring to the defeat of the initiative measure, the court said it had no way of knowing whether the people did not understand it, whether its opponents were better organized, whether the majority really did not desire reapportionment, or whether the majority did not approve the proposed method. But this line of speculation by the court turned out to be shadowboxing because, moving to a firm philosopher-king position, the court said: "It makes no difference. The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority."<sup>91</sup> By contrast, a federal district court in New York last summer, in refusing to hold unconstitutional the state legislature, placed considerable stress on the fact that reapportionment had been made

85 See BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR PARTY POLITICS IN AMERICA* (1963). Professor Jaffe has spoken of democracy as often being "perhaps naïvely, equated with formal majorities. Formal majorities register judgments only occasionally, and then as a rule not on specific issues but on total performance." Jaffe, *Standing in Public Actions*, 74 HARV. L. REV. 1265, 1286 (1961).

86 Of course, given a constitutional right such as the right against racial discrimination, which is clear and simple, which the right of "fair apportionment" by its nature never can be, a popular expression of preferences is immaterial. See, e.g., referendum against desegregation, *Hall v. School Board*, 197 F. Supp. 649 (E.D. La. 1961).

87 *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960); 367 Mich. 176, 116 N.W.2d 350 (1962); for more detail see *Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan*, pp. 3-6, *Beadle v. Scholle, petition for cert. filed*, 31 U.S.L. WEEK 3147 (U.S. Oct. 15, 1962) (No. 517).

88 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

89 N.Y. Times, April 3, 1963, p. 24, col. 3.

90 *Thigpen v. Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962).

91 *Id.* at 832.

a major issue by Governor Harriman in the unsuccessful 1957 referendum on the question of calling a constitutional convention.<sup>92</sup>

More recent popular referenda results in such other states as Tennessee, Colorado, California, Oregon and Nebraska are equally interesting. After the United States Supreme Court decision in *Baker*, the Tennessee legislature in special session made a tinker with the apportionment formula, which the federal district court then held inadequate and unconstitutional under the fourteenth amendment.<sup>93</sup> But the court gave the legislature a grace period to June 1963 to make a further modification. Concurrently, however, the legislature had put on the November 1962 ballot a proposal for a 1965 constitutional convention, delegates to be chosen on the same basis as legislators. The avowed aim was to have this convention propose a constitutional amendment to abolish the population formulae of the 1901 Tennessee Constitution (never implemented) and to substitute a "federal plan" of population emphasis in one house, political subdivision emphasis in the other house. The people approved the call of such a convention, 216,977-206,390.<sup>94</sup> Several interesting questions arise from this sequence: (1) Would it have been proper for the federal district court, if petitioned to, to have enjoined placing this measure on the ballot? (2) If a federal plan is proposed by the convention and approved in popular referendum, should it then be nullified by a state or federal court? (3) Would such a nullification be a nullification of majoritarianism under the banner of achieving majoritarianism? Regardless of the composition of the convention, the *call* of it and the *ratification* of its work would be majoritarian expressions on a one man-one vote basis.

Colorado voters on November 6, 1962, had a choice of two reapportionment initiative measures. By substantial margins they approved a "federal plan" reapportionment, 305,700-172,725, and rejected a plan basing both houses on a population basis, 149,822-311,749.<sup>95</sup> California voters on November 6, 1962, rejected an initiative measure to force more representation for Los Angeles and other heavily populated countries, 2,181,758-2,495,440.<sup>96</sup> Oregon has had a population formula for apportionment of both houses since a successful 1952 initiative measure. On November 6, 1962, voters rejected a new initiative measure, 197,322-352,182, which would have kept population as the sole standard for the senate but added area to the lower house apportionment formula.<sup>97</sup> In Nebraska, last fall the voters ratified a constitutional amendment which abandoned the pure population principle for the unicameral legislature and substituted a

92 *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962). For the 1962 state legislative election results, recast in terms of party representation achieved, see note 82 *supra*.

Chief Judge Brune, dissenting in the Maryland senate case, not only conceded the relevance of popular referenda but distinguished the Maryland case from the Michigan and New York cases on this ground. *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 184 A.2d 715, 723 (1962). Hence, Chief Judge Brune's position was that the Maryland senate apportionment formula, unsupported by any recent popular referendum, should be nullified even if the United States Supreme Court eventually should hold valid the area representation in the Michigan senate.

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

94 21 CONG. QUART. WEEKLY REP. 429 (1963).

95 *Id.* at 425. A federal court hearing is pending on the question whether the voter-approved "federal plan" violates the fourteenth amendment.

96 *Ibid.* The lower house was last reapportioned in 1961, but the senate has been weighted toward the northern lightly populated counties.

97 *Id.* at 427.

formula in which area is to be weighed a minimum of 20 per cent and a maximum of 80 per cent. Is there room in the republicanism concepts of American federalism under the federal constitution for multiple concepts of representation? Can there be a theory focused almost exclusively on population, as in Oregon, and coexisting, a "federal plan" theory focused at least partly on political subdivisions? The latter operates, of course, not so much to "diffuse political initiative," as oft-quoted from *McDougall v. Green*,<sup>98</sup> as to build in a partial minority veto, thus necessitating a broader base as a precondition of affirmative governmental action.

There have been manifold attempts to make equal protection and the corollary "one man-one vote" principle respectable as a constitutional guide to "fair" apportionments,<sup>99</sup> but the price is high. The costs include: first, ignoring almost entirely the political realities of the legislative process; second, citing "race" cases as being fungible with apportionment cases; third, ignoring or minimizing the very real difficulty of fairly implementing a one man-one vote principle even if attempted;<sup>100</sup> fourth, overruling "misguided popular majorities" as expressed in recent popular referenda in some states. How high can higher law get, nor lose the common touch?<sup>101</sup>

### *The Preferred Standard — Due Process or Equal Protection?*

In sum, it seems wrong to use equal protection as a basis for apportionment if that constitutional term is defined as requiring mathematical equality with the burden on the defenders to explain all deviations. Representation poses problems too complex to be intelligently settled in this fashion. But if the blinders be removed and equal protection be interpreted in this nonracial area as requiring a rule of reasonableness and avoidance of arbitrary action, it would be a quite acceptable constitutional standard. It would also then become virtually indistinguishable from substantive due process. For this reason, and to avoid the question begging that has occurred in the use of equal protection in some of the apportionment cases so far, the better approach would be to start di-

98 335 U.S. 281, 284 (1948).

99 McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963); and see McKay, *The Federal Analogy and State Apportionment Standards*, forthcoming in August 1963 issue of NOTRE DAME LAWYER; Krastin, *The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549 (1963). The latter mixes statistical and political sophistication and political unreality. For example Professor Krastin properly notes that legislative interest alignments are more complex than merely rural versus city (*Id.* at 561-62), and that politics is a power game. But in suggesting that the lobbyist may be most influential with small constituency legislators (*Id.* at 565), he ignores entirely the role of big city machine politics at the initial stage of the ballot box, e.g., in Chicago, particularly when the "chips are down" as they were in the presidential election of 1960. There also seems to be at least a hint that the frustrating complexities and interplay of preferences will be materially altered by a shift to a strict "equal population" principle. The most startling suggestion is that district lines be drawn at random so as to remove the human (political) element. *Id.* at 571. Cf. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

100 See text accompanying notes 106-09 *infra*. Also see DE GRAZIA, *op. cit. supra* note 80; Israel, *supra* note 80.

101 Cf. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252, 309, who asks whether the electorate may undo a judicially imposed apportionment. Are constitutional provisions permitting popular amendment of the basis of apportionment themselves constitutional? Are all requirements of extraordinary majorities to initiate or enact constitutional amendments or statutes constitutional?

rectly with due process, or with the guaranty clause if the latter can be revived. Cases would become no easier to solve, but the difficult questions concerning majoritarianism and representative democracy would be faced rather than skirted.

#### D. POLITICAL DIMENSIONS

A separate essay could be written on the political dimensions of *Baker v. Carr*, and would be just as relevant for courts and lawyers as what has been said so far. *Baker v. Carr* broke a political freeze, but the problem remains essentially political.<sup>102</sup> An intellectually sophisticated approach either to standards or remedies calls for a full rethinking of the purposes and bases of representation in a mass democracy. This rethinking must take into account the developed political party system, the jockeying of interest groups who sometimes attain a balance of power position,<sup>103</sup> the prevailing public opinion as murkily expressed in such actions as popular referenda, and the whole western tradition of representative government. As Justice Brandeis so wisely observed, "government is not an exact science,"<sup>104</sup> and the larger social arrangements are largely a matter of judgment. This is not the place for an extended discussion, but a few factors should at least be listed, in suggestive fashion, before we proceed to the question of remedies.

If the "one man-one vote" principle means an effective "one vote" would we not then be pointed in the direction of proportional representation on a state-wide basis so as to more exactly represent political party loyalties and issue orientations? The noncongruency between population spread and party member spread is a well-known factor, varying in different parts of the country but often producing serious "party-strength malapportionment."<sup>105</sup> But proportional or functional representation has its own problems, not the least of which is

102 *I.e.*, "political" in the broadest Graeco-Roman sense of the term, and wonderfully complicated as well. "States do not possess the quality of Miss Stein's roses," as two early post-*Baker* commentators perceptively observed. Wheeler and Bebout, *After Reapportionment*, 51 NAT. CIVIC REV. 246, 250 (1962). Some early post-*Baker* comment by political scientists has been hurried, and confined largely to the level of doctrinal exposition, *e.g.*, Wright, *The Rights of Majorities and of Minorities in the 1961 Term of the Supreme Court*, 57 AM. POL. SCI. REV. 98 (1963). The short treatment by DAVID & EISENBERG, *STATE LEGISLATIVE REDISTRICTING: MAJOR ISSUES IN THE WAKE OF JUDICIAL DECISION* (1962) falls short of its promise, but see the same authors' excellent, ground-breaking study, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE* (1961).

103 See the New York City congressional districting case, *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962), especially Judge Feinberg's concurring opinion. A policy of consciously including important percentages of nonwhites in all four Manhattan Island districts, so that they were major minorities in each, and perhaps a majority in none, might jeopardize the present "Negro-seat" held by Adam Clayton Powell. But such a policy might increase the total influence of the nonwhites (*i.e.*, Negro and Puerto Rican extraction) on all four seats. This end may have been the real aim of the plaintiffs in this suit, and thus viewed was a politically astute move, even though it was vigorously opposed by the Negro beneficiaries of the present system, including Congressman Powell. It may also be observed that redrawing lines with this purpose in mind might produce some odd-shaped districts if Harlem were carved up like pie and linked to other areas of the Island.

As a further example, a Roman Catholic legislator from a city district which is religiously divided 40% Roman Catholic, 30% Jewish, and 30% Protestant could have an electoral plurality of 60% or more. But on a public aid to parochial schools issue he might represent a minority of little more than 40%, whereas on a social welfare expenditure issue he might represent a 60% majority feeling.

104 *Truax v. Corrigan*, 257 U.S. 312, 357 (1921).

105 Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 YALE L. J. 23, 24 (1962).

getting a governing consensus and avoiding unstable coalitions of minority parties.

The single-member district system better assures retention of a two-party system and creation of clear majorities, but what kind of a "majority" is produced? To what extent can it be rigged? The possibilities for "creating" a majority through the process of careful arrangement of district lines, *i.e.*, gerrymandering, are well known.<sup>106</sup> But interesting possibilities exist in the process of apportionment even when existing county lines are used.

Consider the following example, based on two counties and making certain assumptions concerning population, political party division, representation before reapportionment, and representation after an "equalizing" reapportionment. Let us assume that County A has 25,000 voters and one seat in the legislature, which Party Y captures because it has a 20,000 to 5,000 edge over Party X in that county. Let us assume that County B has 100,000 voters and also has one seat in the legislature, which Party X captures because it has a 55,000 to 45,000 edge over Party Y in that county. As between the two counties, the 100,000 voters in County B seem underrepresented by a four to one ratio because they have only one seat and County A's 25,000 voters also have one seat. But looking at the political parties in this two-county area we see substantial equality. Party X has a combined total of 60,000 votes in the two counties and gets one seat; Party Y a combined total of 65,000 votes and one seat. If we now reapportion to eliminate the four to one disparity between the two counties by leaving County A with one seat and raising County B to four seats we achieve exact numerical equality. But the resultant impact on political party representation will be that Party X with 60,000 votes in this two-county area now has four seats, and Party Y with 65,000 votes has only one seat.

To pursue the matter further, if we are serious about majoritarianism how should we react to such additional restraints on the one man-one vote principle as provisions for extraordinary majorities in legislative bodies, the filibuster, the seniority rule in regard to committee chairmanships and the committee system in general, restraints on bringing bills to the floor, the tendency of the single-member district system to overrepresent the majority party, and the like?<sup>107</sup> Unfortunately, the light which existing political research throws on these questions is distressingly dim. We have known very little about the actual operation of legislatures, and the relationships between legislators and their constituencies.<sup>108</sup> In the studies which have been made, the focus has tended to be on the more

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106 Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 MD. L. REV. 277 (1956).

107 See Neal, *supra* note 101, at 281.

108 Recent collections or studies which contain much helpful material include LEGISLATIVE BEHAVIOR: A READER IN THEORY AND RESEARCH (Wahlke & Eulau ed. 1959), which includes contributions by a large number of scholars and should be a starting point for further research; THE POLITICS OF REAPPORTIONMENT (Jewell ed. 1962), a collection of state studies with a helpful introduction by the editor; JEWELL, THE STATE LEGISLATURE (1962), a descriptive treatment with an up-to-date bibliography; HAVARD & BETH, THE POLITICS OF MIS-REPRESENTATION IN THE FLORIDA LEGISLATURE (1962). See also, Miller and Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963); Froman, *Inter-Party Constituency Differences and Congressional Voting Behavior*, 57 AM. POL. SCI. REV. 57 (1963); Hacker, *Reapportionment: Who Will Benefit?*, CHALLENGE, Feb. 1963, p. 4. See also, Stokes, *Party Loyalty and the Likelihood of Deviating Elections*, 24 J. OF POL. 689 (1962).

obvious factors of party identification, party votes, and party shift. Although supported by the interview method and mathematical techniques, much of it may be characterized as objectified armchair research into the more gross and easily identified aspects of political behavior. There is a real danger that unless courts become more alert to these political factors they may paint themselves into a box of pseudomathematical exactness under a one man-one vote talisman. Such an approach could keep apportionment in perpetual turmoil and at the same time ignore the political impossibility of nonpolitically arranging districts of equal population so that no groups or parties will be specially advantaged, nor disadvantaged.<sup>109</sup>

#### E. JUDICIAL REMEDIES FOR MALAPPORTIONMENT

The judicial mission in apportionment has two facets: the familiar one of reviewing and negating legislative and political excesses; the unfamiliar one of galvanizing the political branches into more effective discharge of their political function of working out a "democratic" representation system. Even the first mission of reviewing existing apportionments is not as simple as it sounds. A negative conclusion raises problems which have few counterparts elsewhere in judicial review. It may put the courts in the position of saying that the state has no valid legislature, which immediately puts in question the validity of all acts done by the legislature. Or, in the alternative, it may put the courts in the position of saying that the current legislature remains validly operative for the duration of its term and of implying, whether or not an injunction be issued, that the next legislature will not be a legitimate body if elected under the same system. But the fears expressed that invalidation of the legislature would leave no valid government, so that not even a revised apportionment formula could be enacted, seem to be exaggerated.<sup>110</sup> This view denigrates both judicial creativity and the supremacy of the federal constitutional principles under which the review is being made. Retroactive impact of judicial nullification of current doctrine has been avoided in other fields, and such avoidance is nowhere needed more than in apportionment.<sup>111</sup> We have come a long way since Justice

109 For a detailed analysis of the political-mathematical complexities see Silva, *Legislative Apportionment — With Special Reference to New York*, 27 LAW & CONTEMP. PROB. 408 (1962); Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581 (1962). As an example in this area, see the new congressional districts in California.

110 *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (1956); *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 445, 180 A.2d 656, 674 (1962) (dissenting opinion); *Sincock v. Terry*, 207 F. Supp. 205, 207 (D. Del. 1962) (per curiam ruling before trial on merits). More sophisticated approaches to this question, building out on Justice Douglas's opinion regarding the creative powers of equity to effectuate federal rights and interests (*Baker v. Carr*, 369 U.S. at 250 & n. 5) are found in post-*Baker* opinions in Rhode Island and Tennessee. *Sweeney v. Notte*, 183 A.2d 296 (R.I. 1962); *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962).

111 Compare *People v. Graves*, 242 App. Div. 128, 273 N.Y.S. 582 (1934), with *James v. United States*, 366 U.S. 213 (1961), *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), 24 Ill. 2d 467, 182 N.E.2d 145 (1962); see *Spanel v. Mounds View School Dist.*, 118 N.W.2d 795 (1962). See Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947).

Field opined that an "unconstitutional statute is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed."<sup>112</sup>

The second judicial mission, that of galvanizing the political branches into action, is far more difficult. From what has been said earlier in this paper, it is apparent that direct judicial relief would be inappropriate in most instances. Decisions that a given apportionment system is "unfair," *i.e.*, constitutionally unreasonable, may be pricked out case by case.<sup>113</sup> But to decide which of several possible "fair" systems should be instituted is a straight policy judgment unilluminated by anything in federal constitutional law. Courts, if they are to remain courts, cannot and should not try to function as state constitutional conventions and discharge the high political responsibility of a constituent assembly. It would, indeed, be far easier, far less political, and far more illuminated by the racially oriented commands of the fourteenth amendment, for courts to revise boundaries of segregated school districts and to assess tax levies, than for courts to venture upon reapportionment. The policy statement issued by the Twentieth Century Fund conference espousing the deceptively simple one man-one vote theory seems to concede as much, for the conference statement also said: "Courts, and especially the Federal courts, wisely shy away from getting into the actual business of drawing district lines. The function of the court is rather to goad the political process into action on apportionment."<sup>114</sup>

But how can courts galvanize? How can they get only part way into the thicket? "Aye, there's the rub," as Justice Frankfurter has so aptly put it.<sup>115</sup> The short answer perhaps is that it is a logical impossibility. But need we start and stop with logic? Constitutional law, where great powers and great issues are at stake, is full of "what ifs." Judicial review of acts of Congress and the President is also a logical impossibility if judicial *authority* be viewed as limited by judicial *power*.<sup>116</sup> President Lincoln during the Civil War ignored Chief Justice Taney's habeas corpus writ on behalf of prisoner Merryman, and got by with it.<sup>117</sup> Perhaps a Civil War is *sui generis*. By contrast, President

112 Norton v. Shelby County, 118 U.S. 425, 442 (1886).

113 See text accompanying notes 16-20 *supra*.

114 TWENTIETH CENTURY FUND, ONE MAN-ONE VOTE 14 (Conference pamphlet 1962).

One plaintiff's attorney has suggested that more "goading" may be obtainable from a federal court than a state court:

In my judgment, the most important single appraisal made by plaintiffs' attorneys as well as those defending an existing apportionment, is the nature of the forum in which the suit is pending. In many instances, proper venue may be had in more than one Federal District or State Circuit. More rapid remedial results seem to have been reached in the Southern Federal Courts than in those of other sections. My personal belief is that the United States District Judges in the South, having been faced with cantankerous legislatures and general vilification since *Brown v. Board of Education*, seem less fearful of seemingly drastic remedies than do others. Many of the judges of the Fifth Judicial Circuit have had to fashion decrees with the knowledge that at least the United States Army would be necessary to carry them out.

Letter to author from Charles Morgan, Jr., Birmingham, Alabama, February 2, 1963.

115 Baker v. Carr, 369 U.S. at 269 (1962).

116 See Lucas, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases*, *infra* this issue, at 401.

117 *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9,487) (C.G.D. Md. 1861); discussed in SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 277-81 (1943).



Truman submitted to judicial review of his seizure of the steel mills during the Korean War, lost the case, and honored the Court's decision.<sup>118</sup> Apportionment cases are just one more area, in the tradition of the *Steel Seizure Case* which fortunately has been our dominant tradition, where judicial review must rely on the faith—the good faith—of the political officials who are the real defendants.

### *Possible Actions*

Bearing in mind the pitfalls, the perpetual absence of clear standards, and assuming also that the Supreme Court will reject the arithmetic abstraction approach and be sophisticated about the complexities of representation theory and practice for state legislatures, what actions may be appropriate? The short answer is, actions appropriate to the constitutional standard being used. And so I find I must make some further assumptions before I can proceed.

Much will depend on the nature of the legislature in question, and whether the supposed "invidious discrimination" relates to one or both houses. Representativeness is a function of the total legislature, not just one house. Bicameral representation theory cannot be understood or judged by looking at one house alone, any more than a marriage can be judged by confining attention to one spouse at a time. Also, because the constitution does not require mathematical exactness, some inexactness regarding one house may be permissible if counterbalanced by a higher degree of exactness in the other. With gross numerical inexactness in both houses, as was the case in Tennessee, the entire system may be constitutionally suspect. Also, beyond the question of numerical inexactness, if a system operates to deny to a sizable numerical majority effective control in both houses, the system would seem to be unreasonable per se, under the due process clause.<sup>119</sup>

By contrast, if a system rests on a relatively strict population formula for neither house, but at the same time does not depart very far from numerical equality for either house, it may be deemed reasonable. This, to me, is the New York case, and I approve it.<sup>120</sup>

As another alternative, if one house is composed more or less on a population basis, and the other house represents political subdivisions, the legislature is at worst only half unconstitutional, and perhaps not unconstitutional at all. This is the Michigan case,<sup>121</sup> and for the time being I would prefer the view that such a combination is constitutionally valid, whether or not politically wise.

118 *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

119 Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 362-63, 381-83; Neal, *supra* note 101, at 275, 285. See the Solicitor General's review of due process precedents culminating in the statement: "When a State arbitrarily and unreasonably apportions the legislature so as to deny the real meaning of the right to vote, i.e., effective participation in democratic government, both the equal protection and due process clauses are violated." Brief for U.S. on Rearg., p. 25, *Baker v. Carr*.

And see especially Justice Harlan's perceptive discussion of "equal protection" as contrasted with "due process" which he began in *Griffin v. Illinois*, 351 U.S. 12, 29, 34-36 (1956), and continues in *Douglas v. California*, 372 U.S. 353, 361 (1963).

120 *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962).

121 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

My reasons for withholding the ban of unconstitutionality from this so-called "federal plan" of population representation in one house and political subdivision representation in the other, are not based on any analogy to the national government and the federal senate. They are based on an independent analysis of representation theory, and may be outlined as follows. Group representation means little if it is not effective representation. The way to achieve effective representation of population minorities who nevertheless have an identifiable interest, *e.g.*, agriculture, is not by going all the way to straight minority government as in Tennessee. The solution is to use the bicameral system to give functional or area or political unit minorities a special voice in one house. Indeed, representation of each county in the legislature may be a practical necessity in those states such as Florida<sup>122</sup> and Maryland<sup>123</sup> where there is a custom of handling local governmental matters by "special" legislation (more properly called public-local legislation) rather than by public-general legislation or county home rule.

Fears that this may operate to create an impassable veto are exaggerated. Insofar as the veto possibility exists at all, it often can be effectively countered by counterveto and counterpressure from the other house and from the governor — both based on numerical majorities.<sup>124</sup> Have we forgotten that "compromise" is the key word in the whole lexicon of democracy? With this analysis in mind, the outer boundary of any judicial activism should be to tinker one house into a "numerical majority" framework — and this only as a rare judicial act. To go further, without more evidence than we now have that more is needed, would be a gross judicial usurpation. It would be to make of our judges a new priesthood of democratic orthodoxy.

Given these assumptions regarding the constitutional base lines from which courts should proceed, at least until we have made a fresh analysis of democratic representation theory, the question of remedies can now be approached in context, rather than in the abstract.

### 1. *Declaration of Invalidity, Retention of Jurisdiction*

Declarations of invalidity, retention of jurisdiction, and express or implied deadlines for judicial reconsideration unless the legislature acts, should be the first reliance, and hopefully the sole reliance, in most cases. Such action would be in the *Steel Seizure Case* tradition of judicial faith in legislative good faith. There are a number of examples of use of this technique in the short period

122 Sobel v. Adams, 208 F. Supp. 316, 322 (S.D. Fla. 1962).

123 BELL, *THE LEGISLATIVE PROCESS IN MARYLAND* (1958).

124 Do we yet have evidence that such a "rationalized" bicameralism, unlike the "irrational" bicameralism of the Tennessee legislature before *Baker v. Carr*, will not work? Few studies illuminate this question. For references see Hagan, *The Bicameral Principle in State Legislatures*, 11 J. OF PUB. LAW 310 (1963), and references cited therein. After comparison of unicameralism and bicameralism, Professor Hagan concludes: "To anyone who has examined the justifications for change either way and compared them with the operating practices of existing legislative bodies, the justifications have little basis in substance or experience. It is also clear that there is a faith in the desirability of the bicameral legislature that transcends evidence of the kind that has been surveyed here." *Id.* at 327.

since *Baker v. Carr*.<sup>125</sup> In some states the legislature has already acted, in some the judicial deadline has not expired, and in some an appeal is pending.<sup>126</sup>

## 2. Injunctions Against Existing Statutes

Added pressure is produced if the further use of existing apportionment formulae is forthwith enjoined. This tactic has all the merits, and defects, of a shotgun wedding. Appropriateness of this action depends on the nearness of the next election. Because state legislative apportionment is far more complicated than congressional districting—which few courts seem to realize—an injunction is inadvisable on the eve of an election. On this issue, precedents since *Baker* go both ways.<sup>127</sup>

An added refinement would be to provide that the existing legislature should serve until their successors shall be elected under a revised apportionment formula. This added feature would avoid uncertainties of an interregnum, without materially reducing the pressure, because public opinion would not view kindly any prolonged extension of terms of office without a renewed popular mandate from the ballot box.

## 3. Judicial Choice of Plans Submitted by the Legislature

A third device, of limited utility because it rests on special circumstances, is for the court to construct an apportionment formula by using pieces of different plans enacted by the legislature. This is the Alabama case.<sup>128</sup> As worked out by the federal district court in that state, the order was more a King Solomon type judgment than an emanation from any clearly articulated theory of federal right.

<sup>125</sup> *E.g.*, Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962); Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962); Thigpen v. Meyers, 211 F. Supp. 826 (W.D. Wash. 1962). On remedies generally see Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59 (1963).

<sup>126</sup> See excellent state-by-state summary, 21 CONG. QUART. WEEKLY REP. 424-31 (1963). (Ohio "federal plan" was just approved, Nolan v. Rhodes, 31 U.S.L. WEEK 2641.)

<sup>127</sup> In *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), the Michigan Supreme Court nullified the senate apportionment formula and ordered an election at large, which Justice Stewart then stayed at a special hearing during his summer vacation, 20 CONG. QUART. WEEKLY REP. 1302 (1962).

But the more common approach is to deny an immediate injunction even if the existing apportionment formulae are invalidated or seriously questioned. See, *e.g.*, *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962); *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962); *Thigpen v. Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962); *Sweeney v. Noite*, 183 A.2d 296 (R.I. 1962). *But see Mann v. Davis*, 213 F. Supp. 577 (E.D. Va.), stayed by Chief Justice Warren on December 15, 1962, and motion to vacate stay denied, 31 U.S.L. WEEK 3298 (U.S. March 18, 1963), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797).

See also *Butcher v. Trimarchi*, Dauphin County Commonwealth Court (Pa.); 20 CONG. QUART. WEEKLY REP. 1071 (1962); reported in full in 1 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON LEGISLATIVE APPORTIONMENT (1962). The court did not enjoin, or even reach the merits, because election was near, but hinted strongly that the existing apportionment was constitutionally defective and that the legislature should take some action. The court said: "The Legislature is now informed, as it has not been heretofore, that constitutional apportionment is a matter that can be adjudicated if the Legislature fails to do so."

<sup>128</sup> *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *prob. juris. noted sub nom. Reynolds v. Sims*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 508); also, *Vann v. Frink*, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 540); also *McConnell v. Frink*, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 610).

#### 4. *Specific Directions to the Legislature*

Courts have split sharply on the question whether a declaration of invalidity, if made, should be accompanied by specific directions to the legislature. At least one state court, Vermont,<sup>129</sup> has expressed a feeling that detailed directions would be inappropriate. Several other courts have simply nullified apportionments and retained jurisdiction without discussing the appropriateness of advising the legislature.<sup>130</sup> But in several states the federal or state courts have given detailed guidelines. This last category includes federal courts in Delaware,<sup>131</sup> Georgia,<sup>132</sup> Oklahoma<sup>133</sup> and Tennessee,<sup>134</sup> and state courts in Michigan,<sup>135</sup> Mississippi,<sup>136</sup> and Rhode Island.<sup>137</sup> Limitations of space preclude an individual analysis of these cases, but it can be safely stated that here, as in the Alabama federal court's marriage of two legislative plans,<sup>138</sup> no clear theory of the dimensions of the federal constitutional right has emerged. However, only one court (Oklahoma) favored a "general principle of substantial numerical equality"<sup>139</sup> for both houses; another (Michigan — senate only) would use population as the basis but allow deviations up to 100 per cent, *i.e.*, 2-1 disparity;<sup>140</sup> a third (Delaware) would permit differential treatment of the two houses — straight population in one house, heaviest weight to population in other house but some weight to other factors; and the remaining four (Georgia, Tennessee, Mississippi, Rhode Island) would approve a straight or modified "federal plan," *i.e.*, a relatively strict population basis for one house and political subdivision representation in the other.

129 *Mikell v. Rousseau*, 183 A.2d 817 (Vt. 1962). The court also slapped the wrist of one of the nominal defendants, a county clerk, who had joined the plaintiffs' cause and moved for reargument on a technical point: "This is not a time for ingenuity; it is a time to be fair." *Id.* at 823. See discussion of the "adversity" problem in apportionment cases in text accompanying notes 34-39 *supra*.

The Solicitor General seems to share this view, because in the Georgia county unit case he recommended deletion of the district court's advisory provisions concerning permissibility of population disparities not in excess of those found in the electoral college system of electing a President and Vice President, saying: "to adjudicate the constitutionality of a specific plan that the legislature has not adopted would seem to run the risk of interference in the political process and to have many of the dangers of an advisory opinion." Brief for the United States as Amicus Curiae, p. 62, *Gray v. Sanders*, 372 U.S. 368 (1963).

130 See Maryland and Washington cases cited *supra* note 125 and Pennsylvania case cited *supra* note 127. See also *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962); *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962), where the court said, at 584: "While predominant, population is not in our opinion the sole or definitive measure of districts when taken by the Equal Protection Clause." *Cf. Lein v. Sathre*, 205 F. Supp. 536 (D.N.D. 1962).

131 *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963). The court directed the "one man-one vote" principle for the lower house, and said that in the senate apportionment formula population should have the "heaviest weight," with "some weight" to other factors.

132 *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962).

133 *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962).

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

135 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

136 *Fortner v. Barnett*, 20 CONG. QUART. WEEKLY REP. 1071 (Ch. Ct., 1st Judic. Dist. Miss. 1962), reported in full in 1 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON LEGISLATIVE APPORTIONMENT (1962).

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

138 *Sims v. Frink*, 207 F. Supp. 431 (M.D. Ala. 1962).

139 *Moss v. Burkhart*, 207 F. Supp. 885, 898 (W.D. Okla. 1962).

140 *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962). The less-than-lucid opinion of the court can be interpreted as resting the 2-1 ratio on a state law ground, after first holding the then existing formula invalid under the fourteenth amendment.

Detailed prescriptions for *apportionment* are not the business of the judiciary, even in states where advisory opinions are permitted. An advisory opinion is still a legal opinion, not a political act. But it follows from what I have said earlier that if adjudication of *malapportionment* is essential in some states to restore the rudiments of government by consent, then some minimal guidance to the legislature is unavoidable in the process of honestly trying to articulate the basis for declaring an existing apportionment system unconstitutional. In this category would fall such pronouncements as the statement that if one house is placed on an arithmetic equality basis the other house may represent political subdivisions—at least for the time being. But the freewheeling “advisory order” of the federal district court in Oklahoma does seem to exceed permissible bounds.<sup>141</sup>

### 5. *Partial Judicial Apportionment To Break the “Strangle Hold”*

Justice Clark suggested this device, as a temporary measure, in his concurrence in *Baker v. Carr*.<sup>142</sup> This is a last resort measure. It would at least be better by far than either of two other extreme measures suggested—election at large, or weighted voting. If done, perhaps with the aid of a master, it should be confined to one house and consist essentially of adding a “pack” of seats to existing districts to reduce the population disparity to something like the 2-1 ratio suggested by the Michigan Supreme Court. But the ratio picked is secondary; the primary rationalizing principle is to restore a popular majority to control of at least one house.

### 6. *Election at Large*

Those who champion elections at large of state legislatures have not thought through the problem of representative government. To shift to elections at large is to abandon any pretence of representation, at least where state legislatures are concerned. It would be tossing the representation baby out with the equal protection bath. Every legislator would have the same constituency as the governor, and a single large city, if there were one, could dominate. To counter by saying that it is only intended as a sanction, and would not really need to be carried through, is judicial blackmail with a vengeance, and beneath the level of serious discussion.

Explicit rejections of the election at large proposal have occurred in at least a half dozen states.<sup>143</sup> Only in Kansas (in a lower state court)<sup>144</sup> and

141 *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962). The court, *inter alia*, removed the constitutional ceiling of seven per county on lower house membership, and said Oklahoma and Tulsa counties would be entitled to 19 and 15 house seats respectively. But, without explaining why, it indicated it should respect the state constitution's limit on the size of the senate. See appendix re USDC order of 7/17/63, directly reapportioning Okla. legislature.

142 369 U.S. 186, 260 (1962).

143 A Mississippi court characterized the matter this way: “This Court would not consider a reapportionment which would require our senators and representatives to be elected by the State at large. Such a reapportionment would only cause chaos and confusion. It would defeat the very object of this suit and benefit no one. In fact, when we think of the chaos and confusion, we throw up our hands in utter despair.” *Fortner v. Barnett*, (Miss. 1962), reported in 1 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON REAPPORTIONMENT.

See also *In re Legislative Apportionment*, 374 P.2d 66 (Colo. 1962); *Opinion to the Governor*, 185 A.2d 111 (R.I. 1962); *State v. Gage*, 377 P.2d 299 (Wyo. 1963); *League*

Michigan<sup>145</sup> has it received serious consideration, and in the latter state the state Supreme Court may well have had its benevolent eye on Detroit. An election at large could even be adverse to the interest of an underrepresented urban section of the state if that section were not large or influential enough to control the election. The attorneys for the northern Virginia plaintiffs in the Virginia legislature case, now at the United States Supreme Court, backed away from election at large in their amended pleading. They feared the possibility that in an at large election northern Virginia would have not merely inadequate representation but no representation.<sup>146</sup>

Use of elections at large as a remedial device for state legislative malapportionment must be sharply distinguished from use of this device as a remedy for unequal congressional districts. Election at large of a state's congressional delegation is not nearly so objectionable, is authorized by Congress,<sup>147</sup> and has occurred in the past.<sup>148</sup> An important representation function would remain, for each state would be represented in Congress through its entire delegation. The more appropriate analogy at the national level, of electing a state legislature at large, would be to elect all congressmen at large in the nation, and not by states.

### 6. *Weighted Voting*

Although mentioned in passing in the opinion of the Maryland Court of Appeals,<sup>149</sup> the device of weighted voting, whereby a legislator casts a vote in proportion to the size of his constituency, will have more appeal to mathematicians and manufacturers of computers than to serious students of politics. Other courts which have discussed it have rejected it.<sup>150</sup>

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of Nebraska Municipalities v. Marsh, 209 F. Supp. 189 (D. Neb. 1962); Brown v. State Election Board, 369 P.2d 140 (Okla. 1962); Moss v. Burkhart, 207 F. Supp. 885, 891-92 (W.D. Okla. 1962).

144 Harris v. Shanahan, 20 CONG. QUART. WEEKLY REP. 1306 (Dist. Ct. of Shawnee County, Kansas, July 26, 1962), reported in full in 2 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON LEGISLATIVE APPOINTMENT (1962).

145 Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962).

146 Mann v. Davis, 213 F. Supp. 577 (E.D. Va. 1962). See Complaint, Plaintiffs' Trial Brief, pp. 2, 19, and letter to author from E. A. Prichard, Fairfax, Virginia (Plaintiffs' counsel, with Edmund D. Campbell, Washington, D.C.), March 6, 1963.

147 2 U.S.C. § 2(c)(5) (1958): "Until a State is redistricted . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

148 E.g., Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); Smiley v. Holm, 285 U.S. 355 (1932). See discussion of these and other cases in Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 330, 340-47 (1962); Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1087-90 (1958).

Regarding the post-Baker congressional district suits see note 24 *supra*.

149 Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962).

150 Fortner v. Barnett (Miss. 1962), reported in 1 NATIONAL MUNICIPAL LEAGUE, COURT DECISIONS ON REAPPORTIONMENT; Brown v. State Election Board, 369 P.2d 140 (Okla. 1962). One of the plaintiffs' attorneys in the Alabama litigation now before the Supreme Court, Vann v. Frink, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 540), has assessed weighted or fractional voting as follows:

We treated this remedy as another theoretical remedy because of the cumbersome nature of counting votes and the impossibility of producing effective committee participation for large counties on this basis. We also felt that it would be impractical to apply with respect to such parliamentary devices as extended debate, voice votes, and quorum calls.

Letter to author from David J. Vann, Birmingham, Alabama, Jan. 29, 1963.

### 7. *Federal Enforcement of State Constitutional Formulae*

At an early stage of the *Baker v. Carr* litigation, plaintiffs' counsel suggested, as a joint solution both for the standard and for the remedy problem, that the federal court simply enforce the long-ignored apportionment provisions of Tennessee's state constitution.<sup>151</sup> Dean Neal has ably discussed this idea and concluded that despite some logical appeal as an abstract proposition, the implications are too far-reaching to permit its serious consideration;<sup>152</sup> I agree. To derive from the equal protection clause a federal body of remedial law to redress state official departure from pre-existing state norms would be a far-reaching change in federal-state relations. It would go far toward substituting federal for state courts in application of state law to official indiscretions.<sup>153</sup>

Chief Judge Brune of the Maryland Court of Appeals, dissenting in the Maryland senate case, did seem to make this suggestion but on closer inspection it is seen that he was talking about something different.<sup>154</sup> He was assuming that an independent federal standard is to be applied to a state's actual practice whether or not in accord with the state constitution. He then suggests, but only at the level of *remedy*, that the apportionment formula in the state constitution be looked to as possibly embodying a state political choice already made, and which, if implemented, might fall within the federal standard. As he puts it: "Where compliance with State constitutional requirements will also vindicate the federal right shown to have been infringed, a decree in accordance with State constitutional provisions is an obviously desirable form of remedy and the otherwise possibly very difficult problem of determining an appropriate remedy (a problem not solved by *Baker*) may become relatively simple."<sup>155</sup>

151 Jurisdictional Statement, pp. 3, 9, 12-13, 14-16, *Baker v. Carr*, 369 U.S. 186 (1962). See also Brief for Appellants, pp. 4, 23-26, 28.

152 Neal, *supra* note 101, at 291-300.

153 See Frankfurter, J., dissenting, *Monroe v. Pape*, 365 U.S. 167, 242 (1961): inveighing against fourteenth amendment interpretations which would bring the federal government into the business of overseeing "the quotidian business" of "every city inspector or investigator . . . in this country."

154 *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 184 A.2d 715 (1962), *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 554).

155 *Id.* at 722.

## CONCLUSION

Proverbially, hard cases make bad law. Some cases are so hard they may make no "law" at all. Reapportionment may be an example. Representation, apportionment and districting go to the heart of democracy. They determine the structure of the democratic state. Structure conditions the process of politics which in turn determines the outcome of specific policy issues. On such matters as these there may be informed commentators but there are no experts, certainly no neutral experts.

In assessing the role of the courts, the large problem that remains and which will be with us for a long time is the problem of articulating constitutional *standards*, not the problem of shaping *remedies*. As a guide to meaningful standards which will be politically realistic, will minimize federal interference, and will allow some play in the joints and some state diversification in representation systems tailored to local conditions, the equal protection clause is woefully inappropriate. We must come to recognize, despite the trend of litigation in the past few months, that representation is *sui generis* so far as equal protection is concerned, and is not uniquely an equal protection issue.

The due process and republican form of government clauses are more appropriate conduits for apportionment litigation, not because they make the cases easier to solve but because they better lend themselves to analysis in terms of the central purposes of a system of representative government, and the permissible range of alternative means which will be reasonably consistent with these purposes. By their very indefiniteness they put the real questions, rather than conceal them. Courts must ever remember that the "political thicket" is not their natural habitat, and that it is no less political because the courts are in it. Rejuvenation of the political system, not direction of it, must be the aim.

A representation system under which a popular majority is excluded from effective voice in both houses is unreasonable because minority process is not due process. But to insist on "rational plans" of apportionment, or on arithmetic equality, without recognizing the inherent political choices, is to submerge substance in form. Justice should be blind, but not naïve.



## FORMAL APPORTIONMENT FORMULAE OF STATE LEGISLATURES AS OF APRIL 1, 1963

Political Subdivision or Mixed Basis of Representation	Population-Geographic Principle		
	Upper House	Lower House	
I. Representation Based On Geographic Unit Without Regard To Population:	Arizona		
(a) Equal Representation For Each County.	Idaho		
	Montana		
	Nevada		(0)
	New Jersey		
	New Mexico		
	South Carolina		
	(7)		
(b) Equal Representation Based On Geographic Units Other Than Counties (including districts initially devised according to population but fixed in constitution, e.g., Ark., N. D., Okla.).	Arkansas	Delaware	Vermont
	Delaware		(2)
	Illinois		
	North Dakota		
	Oklahoma		
	(5)		
II. Representation Based On Geographic Unit With <i>MINOR</i> Modifications Based On Population. <sup>a</sup>	Hawaii		
	Maryland		(0)
	Ohio		
	(3)		
III. Representation Proportioned To Units (county or district) On Basis Of Population but with <i>MAJOR</i> limitations to achieve geographic diffusion which may substantially defeat population principle: e.g., (1) Minimum limits, e.g., rule that no unit may have less than one representative, and/or, limitation on number of units which may be combined to approximate one quota; (2) Maximum limits, e.g., rule that no unit may have more than a designated number of representatives; and (3) Low limit (in relation to number of counties) on maximum size of legislature when combined with minimum diffusion rules. <sup>a</sup>	Alabama	Alabama	Nebraska
	California	Arizona	Nevada
	Colorado	Arkansas	New Jersey
	Connecticut	California	New Mexico
	Florida	Connecticut	New York
	Iowa	Florida	North Carolina
	Louisiana	Georgia	North Dakota
	Maine	Hawaii	Ohio
	Michigan	Idaho	Oklahoma
	Mississippi	Iowa	Pennsylvania
	Nebraska	Kansas	Rhode Island
	Rhode Island	Louisiana	South Carolina
	Texas	Maine	Texas
	Utah	Maryland	Utah
	Vermont	Mississippi	West Virginia
	Wyoming	Missouri	Wyoming
	(16)	Montana	(33)
TOTALS	31	35	

<sup>a</sup> Some states may be classified to either II or III, depending on the weight given to special constitutional provisos. The distinction may not be vital however, because the primary thrust of both II and III is toward geographic diffusion or political subdivision representation, not representation by an equal population principle.

<sup>b</sup> Some states charted in this category have special formulae not easily classifiable but weighted more to population principle than to geographic diffusion.

<sup>c</sup> Despite constitutional provisions apparently specifying apportionment by population, all states in categories IV and V had population disparities between largest and smallest district at least exceeding 25% on the eve of *Baker v. Carr*, and in most instances far exceeding that figure.

Sources: State Constitutions; NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (Boyd ed., 1962); correspondence with state officials. See also THE BOOK OF THE STATES (1962-63).

Comment: This chart initially appeared in Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 387 (1962), and has been updated and rearranged. Despite much judicial and legislative activity, and heightened recognition of the population principle, few states have changed their basic apportionment formulae sufficiently to change their position on this chart. States may increase the weight of the population principle considerably and still remain in Chart Category III if major geographic diffusion provisos are retained. The most difficult allocation is between Chart Categories III and IV, but, unless attempted, generalizations become oversimplified. States changing position on this revised Chart are: Colorado, senate, from V to III; Georgia, senate, from III to V; Michigan, senate, from I(b) to III; Mississippi, senate, from II to III; Nebraska, unicameral, from V to III.

See Appendix for special state comments.

FORMAL APPORTIONMENT FORMULAE OF STATE LEGISLATURES AS OF APRIL 1, 1963

Basis of Representation	Population Principle, Substantially Unqualified			
	Upper House		Lower House	
IV. Representation To Be Apportioned On Population Basis With Apparently MINOR Limitations. <sup>b, c</sup>	Alaska	Oregon	Alaska	Oregon
	Missouri	Pennsylvania	New Hampshire	South Dakota
	New Hampshire	South Dakota	(Tax basis; appears to avoid gross inequity.)	(4)
	New York	(7)		
V. Population. <sup>c</sup>	Georgia	Tennessee	Colorado	Minnesota
	Indiana	Virginia	Illinois	Tennessee
	Kansas	Washington	Indiana	Virginia
	Kentucky	West Virginia	Kentucky	Washington
	Massachusetts	Wisconsin	Massachusetts	Wisconsin
	Minnesota	(12)	Michigan	(11)
	North Carolina			
<b>TOTALS</b>		<b>19</b>		<b>15</b>

APPENDIX TO CHART ON FORMAL APPORTIONMENT FORMULAE OF STATE LEGISLATURES

Recent developments in the following states merit special comment. In addition to the sources listed on the chart, see also the summation in the *Congressional Quarterly Weekly Report* for March 22, 1963, pages 424-31.

*Alabama*

A federal district court decreed reapportionment of both houses, combining parts of two measures passed by the legislature. Guarantee of one representative per county was retained for lower house, and political subdivisions continue to play a major role in senate apportionment. Both houses remain in Category III despite heightened representation of population. See *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *prob. juris. noted sub nom. Reynolds v. Sims*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 508).

*Colorado*

The voters approved a "federal" plan initiative measure November 6, 1962. The lower house stays in Category V. The senate formula moves from Category V to Category III.

*Florida*

A 1963 session of the legislature reapportioned both houses of the legislature but retained a guarantee of one representative per county for the lower house, and weighted counties heavily in the senate. Both houses remain in Category III. The action was impelled by litigation. *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962).

*Georgia*

A special legislative session in October 1962 reapportioned the senate on a population basis. The senate moves from Category III to Category V. The action was impelled by a federal court order specifying a population basis for at least one house. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962).

*Kentucky*

Already classifiable to Category V according to its formal apportionment formula, although not fully honored in practice, Kentucky moved closer to compliance with the population principle through action in the 1963 legislative session.

*Idaho*

In response to a message from Governor Smylie the 1963 session of the legislature reapportioned the lower house but retained guarantee of at least one representative per county. Lower house remains in Category III. An earlier state case had been dismissed, *Caesar v. Williams*, 371 P.2d 241 (Idaho 1962), but a federal court case was pending, *Hearne v. Smylie*, D. Idaho, filed Oct. 31, 1962.

*Iowa*

A proposed constitutional amendment to be submitted to a special referendum election, December 3, 1963, would place the lower house on a political subdivision basis with one representative for each county, and the senate on a population basis with a maximum allowable deviation of 10%.

#### *Maryland*

A special legislative session in May 1962 added 19 lower house seats for urban areas, but retained minimum guarantee of two delegates per county. Lower house remains in Category III, although now more heavily weighted toward population. The session was impelled by court action, *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A.2d 656 (1962).

#### *Michigan*

The new Michigan Constitution ratified in April 1963 creates a senate apportionment formula keyed 80% to population and 20% to land area. The senate therefore moves from Category I(b) to Category III. A 20% area factor seems to modify the population principle too much to justify an allocation to Category IV.

#### *Mississippi*

A constitutional amendment approved in February 1963 allocates one house seat to each of 82 counties and distributes another 40 seats according to population. This new house formula apparently remains in Category III, despite the enhancement of population. The new senate apportionment gives each of 22 populous counties one seat and combines the smaller counties into 30 additional senatorial districts. This new senate formula seems to warrant a chart shift from Category II to Category III, although there is less population emphasis than in some other states classified to this category.

#### *Nebraska*

By a constitutional amendment ratified November 6, 1962, Nebraska modified her population principle for apportionment by providing that henceforth area should be weighted a minimum of 20% and a maximum of 30%. Nebraska's unicameral legislature thus moves from Category V to Category III.

#### *North Carolina*

Without being impelled by court action the voters ratified a constitutional amendment in November 1962 providing for automatic reapportionment of the lower house every ten years under a formula guaranteeing each of 100 counties one representative regardless of population and allocating an additional twenty seats by population. Lower house remains in Category III.

#### *Oklahoma*

Under pressure of a federal court order the 1963 legislative session reapportioned both houses. However, on July 17, 1963, the federal district court rejected this apportionment plan and itself apportioned both houses on a population basis, the first post-*Baker* court to take such action. *Oklahoma City Times*, July 17, 1963, p. 6, cols. 1-4. This decree would move both houses to Category V on the chart.

#### *Oregon*

The voters rejected an initiative measure, November 6, 1962, which would have added area to the apportionment formula for the lower house. Both houses stay in Category IV.

#### *Tennessee*

The Tennessee state constitution of 1901, although not honored in practice, specifies a population formula for both houses. After the Supreme Court decision in *Baker v. Carr* a special legislative session enacted an apportionment measure moving a little nearer the population principle. See *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962). But simultaneously the legislature placed on the November 6, 1962 general election ballot a proposal for a 1965 constitutional convention which is expected to recommend a "federal plan" to replace the present population formulae. The voters approved the call of a convention for this purpose, delegates to be chosen on same basis as present legislature.

#### *Utah*

The 1963 legislative session increased urban representation in both houses but both houses apparently continue in Category III according to present information. Each county is guaranteed at least one lower house seat.

#### *Vermont*

A special legislative session in August 1962 switched two senate seats without changing guarantee of a minimum of one senator per county. Senate stays in Category III. The session was impelled by a suit in which the court had admonished the legislature to do its duty, and had retained jurisdiction. *Mikell v. Rousseau*, 183 A.2d 817 (Vt. 1962). The session also created an apportionment study commission.