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THE FEDERAL ANALOGY AND STATE
APPORTIONMENT STANDARDS*Robert B. McKay**

*Baker v. Carr*¹ appears at first impression to be a prime example in the American judicial tradition of deciding no more than is absolutely essential for disposition of the immediate case. It purported to decide only questions of jurisdiction, justiciability, and standing to sue² where a claim was made that state legislative apportionment in Tennessee arbitrarily impaired voting rights. But only the wilfully blind could fail to see an invitation, if not a command, to a reordering of state legislative apportionment laws and practices. Indeed, Mr. Justice Brennan, in a footnote to his opinion for the Court, almost gave the whole show away when he referred to "our holding that the complaint states a federal constitutional claim of violation of the Equal Protection Clause."³ Justice Douglas, in his separate concurring opinion, stated flatly that "if the allegations in the complaint can be sustained a case for relief is established."⁴ And Mr. Justice Clark was ready to decide the case on the merits. Because he found "that Tennessee's apportionment is a crazy quilt without rational basis,"⁵ he concluded that "the Tennessee apportionment statute offends the Equal Protection Clause. . . ."⁶ Although the majority more conservatively remanded the case to the three-judge district court where it had originated, the reaction in that court demonstrated that the Supreme Court opinions were read to foreclose continuance of the existing apportionment. By the time the case came back to the district court for reconsideration in light of *Baker*, the defendants had conceded the invalidity of the existing laws and the Tennessee legislature had enacted a new apportionment formula, which the three-judge court also

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1 369 U.S. 186 (1962).

2 So Mr. Justice Brennan said for the Court. *Id.* at 197-98. Mr. Justice Stewart stated that the Court decided these "three things and no more." *Id.* at 265 (concurring opinion).

3 *Id.* at 195 n.15. Perhaps he used the word "claim" in the sense of "allegation," rather than in the word-of-art sense of the Federal Rules of Civil Procedure.

4 *Id.* at 245.

5 *Id.* at 254 (concurring opinion).

6 *Id.* at 258.

promptly invalidated.⁷ The subsequent band wagon rush to adjudicate equal protection claims under other state apportionment provisions has been little short of phenomenal. Within the first year after the decision in *Baker* more than 50 cases were filed, and nearly that many decided, arising in at least 34 states.⁸

What the majority of the Supreme Court did not do in *Baker*, and wisely refrained from attempting, was to make even a tentative judgment as to what might be found to be appropriate standards required by the equal protection clause in apportionment cases. There are good reasons for the Court's reluctance to offer guidance at this early stage in the development of new constitutional doctrine.

It is the ordinary way of judicial wisdom to approach new definitions of constitutional dimension on a case-by-case basis as experience and facts developed through actual case records demonstrate the problem and suggest solutions. That cautious approach is of course especially appropriate here where the courts, state as well as federal, deal with the very composition of state legislatures, their sometime rivals for power. Indeed, the question is so delicate that until *Baker* many competent observers believed that the entire problem was outside the range of judicial competence because the issues were political rather than judicial.⁹ Although that somewhat mystical belief in legislative invulnerability to judicial scrutiny has now been clearly swept aside, it does not necessarily follow that the remaining questions as to the fixing of equal protection standards and the approving of remedial formulas are less than difficult. Moreover, as a result of past judicial reluctance to decide cases involving this aspect of the right of franchise, there is no significant body of Supreme Court jurisprudence to define what is meant by the right of franchise, which is clearly central to the now-crucial question as to what dilution of the vote, if any, might be permissible. It is true that in earlier cases the Court has dealt with impairment of the right to cast ballots.¹⁰ And of course these cases have some precedential value in this connection;¹¹ but the issue in the apportionment cases is also sufficiently different from that in the honest-vote-count cases that genuinely new analysis is necessary in developing an adequate set of principles.

Thus, it seems apparent that the Supreme Court is approaching gradually the task of defining the right of franchise. And if *Baker* may be regarded as the

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

8 For a summary of the cases through the end of 1962, see McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706-10 (1963).

9 For an illuminating discussion, see McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

10 See *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Mosley*, 238 U.S. 383 (1915); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880); cf. *Terry v. Adams*, 345 U.S. 461 (1953).

11 In *Gray v. Sanders*, 372 U.S. 368, 380 (1963), Mr. Justice Douglas cited the cases in general support of this proposition: "The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." But cf. Mr. Justice Harlan, dissenting, *id.* at 386.

setting of the stage, *Gray v. Sanders*¹² may be thought of as the dress rehearsal, while the main drama is yet to be played out.

Sanders was not strictly an apportionment case, as the majority and concurring opinions spelled out with almost overanxious meticulousness,¹³ yet the central issue was not unrelated to the issues raised in apportionment cases. The case involved an alleged impairment of the vote in a situation never before passed upon by the federal courts; the dispute was between a claimed right to equal representation for all similarly situated voters against a contention that rural voters could be favored over urban voters as a matter of legislative preference. Thus, appellants contended with remarkable candor that the county unit system at issue was designed "to achieve a reasonable balance as between urban and rural electoral power."¹⁴

That the Supreme Court should select *Sanders* for its first decision after *Baker* is itself an interesting example of docket control and orderly progression in the development of a constitutional principle. *Baker* was a good "first case" because, once the preliminary issues were disposed of to permit adjudication of the equal protection issue, the merits were relatively simple. The voter discriminations that had developed out of the Tennessee legislature's failure to reapportion were manifest, whether viewed vertically or horizontally or, presumably, even if the viewer stood on his head. For similar reasons *Sanders* was a good "second case" because, if ever the equal protection clause was to be applied in a meaningful way, the voter discrimination there demonstrated cried out for correction. Again, as in *Baker*, the risk of getting off to a premature or otherwise faulty start was minimal. The Court could say, as it did, that the decision was made without prejudice to later cases waiting in the wings for their entrance cues, all involving the fixing of appropriate equal protection standards for application to the more difficult apportionment cases.¹⁵ Despite this elaborate disavowal of prejudgment, however, there is no mistaking the fact that *Sanders* is highly relevant to at least some of the issues yet to be decided. The most important questions on which the Supreme Court must yet give guidance relate to (1) a definition of equal protection standards to be applied in the area of apportionment, and (2) an elaboration of what judicial remedies

12 372 U.S. 368 (1963).

13 "This case, unlike *Baker v. Carr*, *supra*, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." *Id.* at 376 (Douglas, J.). "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*, *supra*." *Id.* at 378 (Douglas J.). "This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present." *Id.* at 381-82 (Stewart, J., concurring).

14 *Id.* at 370.

15 On June 10, 1963, the Supreme Court noted jurisdiction, for argument in the October 1963 Term, of six cases raising equal protection questions in the context of state legislative apportionment and districting, 374 U.S. 802 (1963): *WMCA, Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962) (No. 460); Maryland Committee for Fair Representation v. Tawes, 229 Md. 406, 182 A.2d 877, 184 A.2d 715 (1962) (No. 554); *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962) (No. 797); *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *juris. noted sub nom.* *Reynolds v. Sims* (No. 508); *Vann v. Frink*, 208 F. Supp. 431 (M.D.

are available for the correction of apportionments that are found deficient when measured against the standards fixed by the Court. The balance of this paper will be devoted to an examination of the first of those two questions, the matter of defining appropriate standards,¹⁶ particularly in connection with the argument frequently advanced against judicial intervention based upon the so-called federal analogy. At its simplest, the contention is that to the extent that the federal electoral process in various respects results in impairment or dilution of the vote, similar practices in the states should be approved on the basis of that model. The examples principally relied upon are the federal electoral college, the choice of senators without regard to population, and the partially non-representative character even of the manner of selecting members of the House of Representatives.

Broadly speaking, the issue may be stated in terms of the popular and appealing phrase, "one man-one vote."¹⁷ That concept, which will here be called the equal-population principle, may be applied in connection with several different aspects of the state political process, possibly raising different issues at the various levels, as will be noted below.

The division of political power within each state is a matter for state determination. The United States Constitution has always been understood to be silent on the question of the extent to which, and the manner in which, state governmental powers are separated and distributed.¹⁸ Yet in every state the principal governmental powers are divided in some fashion between the governor as chief executive and the legislature, while the judiciary serves to some extent as a restraint upon both. Since in every state the governor and the legislators are elected, the equal-population principle could be held to affect the election of the governor and the choice of legislators in each house.¹⁹

Attention should thus be directed first to the question whether in state-wide

Ala. 1962) (No. 540); *McConnell v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962) (No. 610). The latter three (Alabama) cases, probable jurisdiction having been noted, were consolidated for argument.

The Supreme Court also noted jurisdiction of two cases challenging congressional districting, 374 (U.S.—1963); *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), *juris. noted sub nom.* *Wesberry v. Sanders* (No. 507); *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962) (No. 950).

The Oklahoma apportionment case was dismissed because not appealable under 28 U.S.C. § 1253 (1958), 374 U.S. 103 (1963); *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962), *appeal filed sub nom.* *Price v. Moss*, Oklahoma Farm Bureau v. Moss (Nos. 688 & 699).

16 The development of an appropriate meaning for equal protection in the apportionment context has not yet been carefully explored in many court opinions. But commentators apart from the courts have begun the inquiry. See *e.g.*, *THE POLITICS OF REAPPORTIONMENT* (Jewell ed. 1962); the following symposia: *The Electoral Process: Part II*, 27 L. & CONTEMP. PROB. No. 3 (1962); *The Problem of Malapportionment: A Symposium on Baker v. Carr*, 72 YALE L.J. 1 (1962); articles: Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV., 645 (1963); a good student note: *Baker v. Carr and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968 (1963). And of course the other articles in this symposium also deal with the question of standards. See also note 17 *infra*.

17 See the pamphlet by that name, containing a statement of basic principles of legislative apportionment as agreed upon at a 1962 conference of research scholars and political scientists held by the Twentieth Century Fund. The statement was prepared for publication by Anthony Lewis of the New York Times.

18 *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

19 Except in Nebraska which has a unicameral legislature.

election contests (including primary elections) any deviation is permissible from the standard of full voter equality. To this question, which was directly involved in *Sanders*, the Court gave the simple and direct answer that faithful adherence to the equal-population principle is required. The relevance of that holding is discussed more fully below.

A second question is then logically directed to a determination of the requirements to be imposed upon the selection of legislators in both houses of the state legislatures. With rare exceptions, state legislators are chosen from single-member districts fixed by state law along geographical lines dictated by considerations of area or the integrity of political units or both. To some extent the two houses may be given different powers and responsibilities; but more typically their functions differ principally in the fact that the legislators in the two houses represent different constituencies and usually serve different terms. Thus, both houses not only contribute jointly and indispensably to the political processes of state government, but as well serve as checks and restraints upon each other. The significance of this dual function in the apportionment context goes to the question whether the equal-population principle should be applied strictly in both houses of the state legislature or only in one.

The principal question which has been raised in this connection is whether the federal analogy is relevant to the state legislative process. That is, since in Congress members of the House of Representatives are chosen in reasonably close relation to population, while members of the Senate are selected without regard to population, is a similar plan permissible in state legislatures? Reasons will be suggested below for rejecting the analogy. But first it should be helpful to examine more carefully the facts and holdings in the Georgia county unit case, *Gray v. Sanders*.

Under Georgia law each county was given a specified number of representatives in the lower house of the general assembly. The county unit system, an issue in *Sanders*, applied as follows in state-wide primaries: A candidate for nomination who received the highest number of popular votes in a county was considered to have carried the county and to be entitled to two votes for each representative to which the county was entitled in the lower house of the general assembly. The majority of the county unit vote was required to nominate a United States senator or state governor, while a plurality was sufficient for nomination to other offices. Because the most populous county (Fulton with a population in 1960 of 556,326) had only six unit votes, while the least populous county (Echols with a population in 1960 of 1,876) had two unit votes, "one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County."²⁰ The three-judge district court before which the case was heard invalidated the county unit plan above described, and as amended by the state legislature on the same day as the hearing in the district court.²¹ But the district court did not hold that all

20 *Gray v. Sanders*, 372 U.S. 368, 371 (1963).

21 The amendment modified the mathematics of the county unit system, but did not change its essential features of weighted representation and allocation of all county unit votes in each county to the front-running candidate. For an explanation of the amendment, see 372 U.S. at 372.

weighted voting was outlawed. Rather the court sought to define the permissible deviations from equal representation that might be approved as not invidiously discriminatory. The district court would have permitted deviations from equality comparable to the distortions of the popular vote that may occur in the federal electoral college.²²

The Supreme Court, however, would have none of this. It disavowed the analogy to the electoral college and rejected the district court's view that some weighting is permissible. The reasons given are instructive. Analogies to the electoral college (along with other claimed analogies to districting and representation in state and federal legislatures) were found "inapposite":

The inclusion of the electoral college in the Constitution as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a state-wide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.²³

While conceding that states "can within limits specify the qualifications of voters both in state and federal elections," the Court denied that a state is entitled to weight the votes "once the geographical unit for which a representative is to be chosen is designated. . . ."²⁴ Accordingly, the Court concluded: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."²⁵ It is clear, then, that the fatal defect in the Georgia plan lay in the fact that votes were weighted on the basis of geography in recognition of a legislative preference for rural over urban voters.²⁶

The significance of the holding can best be appraised by viewing it from several perspectives, each of which deserves analysis.

(1) What lesson may be learned from examination of the alternative rulings which the Court necessarily considered and rejected? It is not without interest that the opinion of the Court did not even mention the several earlier *per curiam* opinions in which the Court had refused repeated invitations to

22 [A] unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the vote for electors of the party in the most recent presidential election; provided no discrimination is deemed to be invidious under such system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years. *Sanders v. Gray*, 203 F. Supp. 158, 170 (N.D. Ga. 1962).

23 372 U.S. at 378. (Footnote omitted.)

24 *Id.* at 379.

25 *Id.* at 381. See also the concurring opinion of Justices Stewart and Clark: "Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." *Id.* at 382.

26 Mr. Justice Douglas noted that the Georgia plan "weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Id.* at 379.

upset the Georgia county unit system of conducting primary elections.²⁷ While it is true that none of these cases had been decided on the merits,²⁸ the refusal of decision had led many to believe that the system was not vulnerable to constitutional attack. While *Baker v. Carr* necessarily dispelled the illusion of unassailability, it did not necessarily point in the direction of invalidation of any weighting whatsoever. Indeed, the district court, while entirely persuaded that the existing system must fail, nonetheless was able to find that a less discriminatory plan might be rational, and reasonable in its impact.²⁹ "Rational" the county unit system unquestionably was, at least in the sense of standing for an objective that was perfectly understandable: The "city" vote should not be allowed to control the choice of candidates for statewide office. But the demands of the equal protection clause are not satisfied by a plan that is rational only with respect to an improper legislative purpose. The system was an expression of confidence in the integrity of rural voters, the very voters who, under the Georgia legislative apportionment, were empowered until 1962 to select absolute majorities in both houses of the state legislature.³⁰ If the equal protection clause forbids any favoritism of rural over urban voters in statewide elections, as *Sanders* unquestionably held, it does not seem a very long step to conclude that any other electoral system which inescapably favors rural dominance in both houses of a state legislature is also suspect.

(2) What is the significance of the Court's rejection of the analogy sought to be drawn to the practice in the federal electoral college? The United States Constitution commands departure from the equal-population principle in the federal election process in three respects:

(a) The most extreme is the provision for choice of two senators from each state without regard to population, with the result that each senator from Alaska represents fewer than 120,000 constituents, while each senator from California represents more than 8,000,000. The resulting differential is thus more than sixty-five to one in terms of the relative influence of each voter. The fact that authority for this inequality of representation is found in the Constitution itself provides such justification as there is, in terms of that analogy to federal practice, for similar differentials within state legislatures. The matter is further discussed below.

(b) A much less extreme departure from the equal-population principle, as authorized by the Federal Constitution, inheres in the fact that each state is entitled to one representative in the House regardless of state population. Thus, in the House Alaska is again overrepresented, with one representative for its 1960 population of 226,167³¹ as compared with the 1960 apportion-

27 *Hartsfield v. Sloan*, 357 U.S. 916 (1958); *Cox v. Peters*, 342 U.S. 936 (1952); *South v. Peters*, 339 U.S. 276 (1950); *Cook v. Fortson*, 329 U.S. 675 (1946); *Turman v. Duckworth*, *ibid.*

28 *Baker v. Carr*, 369 U.S. 186, 234-37 (1962).

29 Cf. Professor Dixon's contrasting of "reasonableness" with "rationality," with respect to an apportionment plan, in *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAWYER 367 (1963).

30 See *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), holding the legislative apportionment in Georgia invidious and arbitrary.

31 U.S. DEPARTMENT OF COMMERCE, 1962 STATISTICAL ABSTRACT OF THE UNITED STATES 25.

ment ratio of 410,000 used as the basic figure for computing the apportionment of representatives to the States.³² Here the differential is more than two to one as compared with states that are somewhat underrepresented.³³ Disparities of this nature occur similarly in state legislatures where district lines are drawn in accordance with political lines; but the disparities in state legislatures thus occasioned are often vastly greater than those in the United States House of Representatives.³⁴

(c) In addition to the two constitutionally authorized deviations just described is a third that falls somewhere between the first two in severity of impact, because it is in part compounded of features of both. Section 1 of article II of the Constitution provides for the designation in each state of "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ." who thereafter cast votes for the President and Vice-President.³⁵

This last is the federal practice from which defendants in *Sanders* sought support for the county unit system as to statewide primary elections. Supplementing the specific provisions in the Constitution, there developed over the years the now almost invariable practice of all electors in each state being guided in their votes by the popular vote in their respective states. The combined effect of the constitutional provision and that practice has intensified the deviation from the equal-population principle, thus permitting the election of a President and Vice-President who do not secure the largest number of popular votes. One distortion arises out of the adding together of the number of representatives to which the state is entitled in both houses of Congress, thus cumulating the overrepresentation in each house enjoyed by some states. Taking Alaska once more as an example, the state is entitled to three electoral votes while New York (the most populous state at the time of the 1960 census) is entitled to 43 electoral votes, a difference of less than fifteen to one, despite a population differential substantially in excess of 100 to one. The other distortion arises out of the fact that, by custom at least, all electors in each state almost without fail cast their ballots in favor of the plurality winner in the state, thus leaving unrecorded any fraction of voters who voted for any other candidate in that state.

It is apparent that both these features of the federal electoral college were incorporated into the Georgia county unit system. In view of that federal precedent, however objectionable one may find the system, it is difficult to state that it is utterly devoid of rationality or reason. Accordingly, it becomes doubly significant that the Court should so readily reject the analogy as "inapposite." In a footnote explaining the nonrelevance today of the historical

32 *Id.* at 366.

33 *E.g.*, Maine and New Mexico. In 1960 each had a population of nearly 1,000,000, but was allotted only two representatives. Thus each representative in those states has between two and three times as many constituents as does Alaska's single representative.

34 The greater differential is occasioned by the fact that the differences in population between the largest and smallest counties in some states are vastly greater than the population differential between the largest and the smallest state.

35 The original procedure was somewhat revised by the specifics of the twelfth amendment.

motivations that prompted the adoption of the federal electoral system, Mr. Justice Douglas stated: "Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in state-wide elections."³⁶ The relevance of this remark to other analogies drawn from federal constitutional provisions is inescapable.

(3) How, if at all, does the holding in *Sanders* bear upon the equal-population principle of "one man, one vote"?³⁷ The most obvious point to be made is that the detractors from the concept of one man, one vote can find no comfort in the opinion; the emphatic holding is that equality of voter influence is required once the geographical unit of representation has been designated. At the very least this means that all members of the state executive branch who are elected on a statewide basis (as well as any state legislators or congressmen chosen at large) must be selected without impairment of vote based on geography, taxes paid, economic factors, or any other group interest. The important result is that the equal-population principle won a clear and apparently easy victory that at least frees the executive branch from domination by any minority interest group. The next question is to determine the extent to which this concept should now be carried forward as a matter of logic to one or both houses of the state legislatures. Although that problem was not before the Court, and there was accordingly no precise ruling on the question, the language comes very close to being language of decision on this matter as well: "We think the analogies to the electoral college, to districting and re-districting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite."³⁸ It is accordingly very difficult to read this language to mean anything other than that in the state legislative context the Supreme Court denies the relevance of any analogy that has so far been drawn from practices established by the United States Constitution for the conduct of federal elections.

Mr. Justice Douglas' reasons for rejecting the analogy derived from the federal electoral college apply with equal force — and for additional reasons as well — to the analogy sought to be derived from the fact that United States Senators are chosen without regard to population. The analogy should be

36 *Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963).

37 Variations in phrasing are interesting, but probably not important. Mr. Justice Douglas spoke of "one person, one vote" (372 U.S. at 381), while Mr. Justice Stewart referred to "one voter, one vote" (*id.* at 382). In *Sincock v. Duffy*, 215 F. Supp. 169, 175-76 (D. Del. 1963), the court took judicial notice of the nearly equal proportion of voters to residents in the various election districts in Delaware, and stated that the same was generally true of the other states of the Union.

38 372 U.S. at 378. Mr. Justice Douglas, in a footnote to this passage, observed that the Court did not reach "the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system." *Ibid.*, n.10. Where political decisions are made by a convention, the considerations are of course somewhat different because the basis for representation is differently conceived. Whatever equal protection problems are posed by the use of conventions for the selection of primary candidates — and there may be some — need not be decided in order to pass upon the validity of what purports to be a direct election system, as varied by the county unit method of counting votes.

rejected for reasons of history, constitutional command, and the logic that undergirds the American system of government.

If it be conceded, as now appears to be the consensus,³⁹ that at least one house of a state legislature should be apportioned as nearly as possible on a strict population basis,⁴⁰ the question arises as to whether population must be the exclusive, or at least the principal, factor in fixing the apportionment formula in the other house. For some the question has seemed easy in terms of an appeal to the constitutionally commanded apportionment practice in the federal Senate and House. Thus, for Mr. Justice Harlan, dissenting in *Baker*, the matter was clear: "It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that."⁴¹

In *Baker* the Court neither accepted nor rejected the Harlan insistence on the federal analogy, for it was not relevant to the narrow issues decided by the Court's majority. But in *Sanders*, where the claimed analogy to the federal electoral college was relevant to the issue there presented, the Court, as already noted, rejected that analogy and as well other analogies urged on the basis of the membership selection process in the Congress.

The appeal to history is not sound. While the argument has been more fully developed elsewhere,⁴² some observations are appropriate here. There can be little doubt that those gifted individuals who drafted the United States Constitution, and most of those who voted for its ratification in the various states, were committed to the democratic ideal of equality and even, perhaps more doubtfully, the concept of majority rule. Both ideas shine through the Declaration of Independence and the debates leading to the acceptance of the Constitution as transmitted to the states for ratification. And of course the writings of such men as Thomas Jefferson, and, in more restrained vein, the contributions to *The Federalist Papers*, demonstrate similar concern for equal treatment in a democratic, essentially majoritarian context. Thus, it is not surprising that the so-called Virginia Plan, out of which emerged the basic pattern of the Constitution during the Convention in 1787, originally provided for representation in accordance with population in both houses of Congress.⁴³ But the drafters of the Constitution were also practical men who recognized that insistence on that principle would make impossible the ratification by a suffi-

39 See McKay, *supra* note 8, at 689.

40 Precise mathematical equality can ordinarily not be achieved except at the price of severe gerrymandering that might make representation districts vulnerable to other criticism or even constitutional attack. If the principles of compactness and contiguity are preserved as normal objectives, some variation in the size of districts is inevitable.

41 369 U.S. at 333. See also Mr. Justice Harlan's dissent in *Sanders* where he objected to the majority acceptance of the egalitarian principle of one person, one vote, as to which he found "persuasive refutation in the Federal Electoral College whereby the President of the United States is chosen on principles wholly opposed to those now held constitutionally required in the electoral process for state-wide office." 372 U.S. at 384.

42 See e.g., *Gray v. Sanders*, 372 U.S. 368, 376-77 n.8 (1963); *Sincock v. Duffy*, 215 F. Supp. 169, 186-87 (D. Del. 1963); *Mann v. Davis*, 213 F. Supp. 577, 584-85 (E.D. Va. 1962); see also MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY (National Municipal League Pamphlet 1962).

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

cient number of states of any constitution containing such a proposal. So equalitarian principles were in part set aside in the so-called Great Compromise under which Congress still operates.

It must be noted, too, that other reasons besides sheer practical necessity also looked in the same direction. Many of those early leaders, believers in democracy though they were, at the same time were uneasy about placing too great power in the hands of "the people." In a number of respects, the original Constitution demonstrated confidence in control by the carefully chosen few rather than by the indiscriminating many. Not only were senators to be chosen without regard to population; more important, they were not even to be elected directly by the voters, but by state legislatures.⁴⁴ As already noted, the choice of President and Vice-President was not left to the people either, but to electors to be chosen "in such Manner as the Legislature thereof may direct. . . ."⁴⁵ And, in leaving to the states the fixing of the qualifications of voters for federal office, the drafters of the Constitution were of course aware that they were accepting such common state limitations on the right of franchise as disqualification of women, Negroes, and indeed the majority of white male citizens, often leaving the franchise securely and exclusively in the care of the small number of freeholders who alone were presumed to be worthy of trust in affairs of government.⁴⁶

Those attitudes and those restrictions have all been swept away with changed views of the nature of democratic government and an enlarged sense of responsibility of the general citizenry. The Constitution itself has been revised to reflect these changing views. The fifteenth, seventeenth and nineteenth amendments were specifically designed to enlarge the franchise; and we are now told quite simply and directly that the command of the equal protection clause in the fourteenth amendment must be similarly read.

In sum, however wise or unwise may have been the original decisions as to the method of apportionment to be applied in the two houses of Congress, the practice then given constitutional status at the federal level is irrelevant to state legislatures which are undeniably bound by the command of the equal protection clause. The equal protection clause must be read in light of contemporary experience, rather than with an over-the-shoulder glance at a different practice by a different sovereign whose action is required by the Constitution, without the restriction of an equal protection clause.

Even apart from the inappropriateness of reliance on the federal analogy for the reasons already stated, there is yet another reason for rejecting the analogy. The constitutional decision which established the Senate without reference to population was made by sovereign states in an act of consensual union. But counties, cities, towns, and other subdivisions of the states are not sovereign; they neither have nor need the perquisites of sovereignty. The power of altering local political lines rests with the parent state and not with the dependent units. Unlike the states, which are protected by the Constitution from boundary

44 Direct election of United States senators was not provided until the seventeenth amendment in 1913.

45 U.S. CONST. art. II, § 1.

46 See PADOVER, *TO SECURE THESE BLESSINGS* 239-49 (1962).

changes,⁴⁷ the lesser subdivisions within a state have no constitutional protection against state legislative decisions to reduce, enlarge, alter, or abolish them.⁴⁸

The argument is sometimes made that minority interests need and deserve special representation as a protection against the tyranny of the majority. And it is true that the Constitution recognizes the need to protect various groups against majority pressures that might otherwise make intolerable the situation of racial, religious, or politically unpopular minority groups. To endorse the desirability, and indeed necessity, of such special provisions, however, is not at all the same as to demand that some minority groups should be given the reins of political power whereby they could act as though they were in fact the majority. The proposition is untenable for at least two reasons. In the first place, any American majority is itself composed of various component minority groups that overlap and intersect, whether the perspective is race, religion, ethnic origin, economic interest, urban, rural, or other special interest group. There is no practical or defensible way of determining which minority interest is to be preferred over which majority interest and indeed over other minorities. In the second place, if it be suggested that a particular minority interest deserves protection today against some majority assumed to be antagonistic to that minority, there is no assurance of permanent security. That which the legislature can give it can also withdraw.

Support for favoritism toward minority interests is said to stem from an absolute right of the legislature to order the affairs of the state, including the composition of the state legislature, in ways that are rational. Reasons have been suggested above for believing that such a relaxed view of rationality is not enough to satisfy the imperatives of equal protection. Indeed, it may even be doubted that it would be a rational government that would permit minority interests, whether rural, religious, ethnic, or economic in character, to fix the legislative policy of the state. To justify departure from the equal-population principle on such a basis is to permit minority government in defiance of majority wishes and interests. That is not the way of democracy.

⁴⁷ U.S. CONST. art. IV, § 3.

⁴⁸ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). An exception to the above generalization would arise in the event of a state rearrangement of political units in such a way as to violate such constitutional specifics as the fifteenth amendment. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).