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Alaska State Legislature

House of Representatives

Official Business

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*[377 US 533]

*B. A. REYNOLDS, etc., et al., Appellants,

v

M. O. SIMS et al. (No. 23)

DAVID J. VANN and Robert S. Vance, Appellants,

v

AGNES BAGGETT, Secretary of State of Alabama, et al. (No. 27)

JOHN W. McCONNELL, JR., et al., Appellants,

v

AGNES BAGGETT, Secretary of State of Alabama, et al. (No. 41)

377 US 533, 12 L ed 2d 506, 84 S Ct 1362

[Nos. 23, 27 and 41]

Argued November 13, 1963. Decided June 15, 1964.

SUMMARY

Taxpayers and registered voters of two urban Alabama counties brought suit in the United States District Court for the Middle District of Alabama, challenging the validity of (1) the existing apportionment provisions for the Alabama legislature, which created a 35-member state senate elected from 35 districts varying in population from 15,417 to 634,864, and a 106-member state house of representatives with population-per-representative variances from 6,731 to 104,767; (2) a proposed state constitutional amendment creating a 67-member state senate with one senator per county, the counties varying in population from 10,726 to 634,864, and a 106-member state house of representatives with population-per-representative variances from 10,726 to 42,303; and (3) a "standby" statutory measure creating a 35-member state senate elected from 35 districts varying in population from 31,175 to 634,864, and a 106-member state house of representatives with population-per-representative variances from under 20,000 to over 52,000. The three-judge court held that, considered as a whole, all three apportionment schemes were unconstitutional, but in order to "break the strangle hold" of the rural counties on the legislature so that it could reapportion itself, the court ordered a temporary reapportionment following the proposed amendment's provisions with respect to the state house of representatives and the "standby" statutory measure's provisions with respect to the state senate. (208 F Supp 431.)

On direct appeals, the Supreme Court of the United States affirmed. In an opinion by WARREN, Ch. J., expressing the views of six members of the

Court, it was held that (1) as a basic constitutional requirement, the equal protection clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis; (2) some deviations from the equal-population principle are constitutionally permissible with respect to either or both houses of a state legislature so long as such deviations are based on legitimate considerations incident to the effectuation of a rational state policy; (3) under these principles, the three plans in question were unconstitutional as a whole and in their separate parts relating to the respective houses of the legislature; and (4) the District Court acted properly in ordering temporary reapportionment.

CLARK, J., concurring in the affirmance, stated that the Court need only have ruled that each plan revealed invidious discrimination violative of the equal protection clause.

STEWART, J., expressed the view that the Alabama apportionment scheme violated the equal protection clause because it was irrational and arbitrary.

HARLAN, J., dissented on the ground that state legislative apportionments are wholly free of constitutional limitations except the guaranty to each state of a republican form of government, which cannot be the foundation for judicial relief.

SUBJECT OF ANNOTATION

Beginning on page 1282, infra

Inequalities in population of election districts or voting units as rendering apportionment unconstitutional

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Elections § 3 — right to vote — state and federal elections

1. The Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.

Elections §§ 15, 19 — altering ballots — stuffing ballot boxes

2. The constitutionally protected right of qualified citizens to vote and to have their votes counted cannot be denied outright, destroyed by alteration of ballots, or diluted by ballot-box stuffing.

Elections § 3 — right to vote

3. The Constitution of the United States secures the right of qualified voters within a state to cast their ballots and have them counted.

Elections § 3 — right to vote — nature

4. The right to vote is personal.

Elections § 15 — right to vote — infringement

5. Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Pleading § 191 — constitutional claim — right to vote

6. A constitutional claim is asserted by an allegation that certain otherwise qualified voters were entirely pro-

ANNOTATION REFERENCES

1. Fourteenth Amendment as applied by federal courts to questions affecting nomination for, or election to, state offices. 88 L ed 509.

2. Inequalities in population of election districts or voting units as giving rise to a constitutional question. 93 L ed 11, 94 L ed 839.

3. Inequality of population or lack of compactness of territory as invalidating apportionment of representatives. 2 ALR 1337.

4. Race discrimination. 94 L ed 1121, 96 L ed 1291, 98 L ed 882, 100 L ed 488, 3 L ed 2d 1556, 6 L ed 2d 1302, 10 L ed 2d 1105.

hibited from voting for members of their state legislature.

Elections § 3 — weighting votes — constitutionality

7. A state law that in counting votes for legislators, the votes of citizens in one part of the state will be multiplied by two, five, or ten, while the votes of persons in another area will be counted only at face value, is not constitutionally sustainable.

[*See annotation reference* 1]

Constitutional Law § 316 — discrimination

8. The Federal Constitution forbids sophisticated as well as simple-minded modes of discrimination.

Citizenship § 2 — legislative bodies — participation

9. Each and every citizen has an inalienable right to full and effective participation in the political processes of his state's legislative bodies.

Elections § 3 — legislature — equality of votes

10. The Federal Constitution demands that each citizen have an equally effective voice in the election of members of his state legislature.

Elections § 1 — voters — relationship

11. With respect to the allocation of legislative representation, all voters, as citizens of a state, stand in the same relation, regardless of where they live.

Elections § 3 — legislative apportionment — discrimination

12. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment.

[*See annotation reference* 1]

Constitutional Law § 334 — equal protection — right to vote.

13. The equal protection clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

[*See annotation reference* 1]

Constitutional Law § 334 — weight of votes — place of residence

14. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

[*See annotation references* 1–4 *and annotation p.* 1282, *infra*]

Courts § 7; Supreme Court of the United States § 3 — constitutional rights — judicial protection

15. A denial of constitutionally protected rights demands judicial protection; the oath and office of Justice of the Supreme Court of the United States require no less of that court.

Courts § 92.3; States § 18 — state and federal power

16. When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Constitutional Law § 334 — malapportionment

17. However and whenever legislative malapportionment runs, it is constitutionally impermissible under the equal protection clause.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — legislative apportionment — population

18. Population is the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Civil Rights § 5; Constitutional Law § 334 — legislative representation

19. The equal protection clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

[*See annotation references* 1–4 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — bicameral legislature — apportionment

20. As a basic constitutional requirement, the equal protection clause

requires that the seats in both houses of a bicameral state legislature be apportioned substantially on a population basis.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Elections § 3 — state legislators — diluting vote

21. An individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — bicameral legislatures

22. The constitutional requirement that both houses of a bicameral state legislature must be apportioned on a population basis is not met by (1) currently effective provisions relating to the Alabama legislature, creating a 35-member state senate elected from 35 districts varying in population from 15,417 to 634,864, and a 106-member state house of representatives with population-per-representative variances from 6,731 to 104,767; or (2) a proposed state constitutional amendment creating a 67-member state senate with one senator per county, the counties varying in population from 10,726 to 634,864, and a 106-member state house of representatives with population-per-representative variances from 10,726 to 42,303; or (3) a "standby" statutory measure creating a 35-member state senate elected from 35 districts varying in population from 31,715 to 634,864, and a 106-member state house of representatives with population-per-representative variances from under 20,000 to over 52,000.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — rationality

23. The constitutional requirement of rationality in legislative apportionment is not met by (1) currently effective provisions relating to the Alabama legislature, creating a 35-member state senate elected from 35 districts varying in population from 15,417 to 634,864, and a 106-member state house of representatives with population-per-representative variances from 6,731 to 104,767, or (2) a "standby" statutory measure creating a 35-member state senate elected from 35 districts varying in population from 31,715 to 634,864, and a 106-member state house of representatives with population-per-representative variances from under 20,000 to over 52,000.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — lower house

24. While mathematical nicety is not a constitutional requisite, a state house of representatives is not apportioned sufficiently on a population basis to be sustainable under the equal protection clause where the population-per-representative disparities range from 10,726 to 42,303, and 43 percent of the state's population comprises districts which can elect a majority of the house.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Statutes § 25 — constitutionality — time of challenge

25. In a reapportionment case challenging the constitutionality of currently effective apportionment provisions relating to a state legislature, a federal district court properly considers the validity of two proposed apportionment plans even though neither is to become effective until a subsequent election and one of the plans is scheduled to be submitted to the state's voters, in a forthcoming election.

Constitutional Law § 334 — apportionment — federal analogy

26. In determining whether state legislative districting schemes are valid under the equal protection clause of the Federal Constitution, the analogy between the apportionment of seats in a state legislature and the apportionment of seats in the Congress of the United States is inapposite and irrelevant.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment— political subdivisions

27. A state legislative apportionment plan which grants equal representation in one legislative house to each political subdivision of the state is impermissible under the equal protection clause, since it results, in virtually every case, in submergence of the equal-population principle in at least one house of the state legislature.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — degree of equality of population

28. The constitutional principle that both houses of a bicameral state legislature must be apportioned on a population basis requires that a state make an honest and good-faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable, even though it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — following political lines

29. In the apportionment of seats in a state legislature it is constitutionally permissible to follow political subdivision lines in establishing legislative districts so long as the resulting apportionment is one based substantially on population and the equal-population principle is not diluted in any significant way.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — inequality of population

30. Some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature so long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — equal population — disparity — justifications

31. Deviations from the equal-population principle in legislative apportionment are not justified by history alone, by economic or other sorts of group interests, or by considerations of area alone.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — apportionment — factors justifying unequal districts

32. As long as the basic standard of equality in population among legislative districts is maintained, claims that a state can rationally consider according political subdivisions some independent representation in at least one body of the state legislature are not insubstantial where much of the state legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions, or it is desirable to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Legislature § 1 — size — state's discretion

33. Determining the size of its legislative bodies is a matter within the discretion of each individual state.

Constitutional Law § 334 — apportionment — one seat per county

34. The apportionment scheme of giving at least one seat to each political subdivision (for example, to each county) is constitutionally impermissible where it results in a total subversion of the equal-population principle in a legislative body, as in a state where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334 — legislative apportionment — political subdivisions

35. The right of a state's citizens to cast an effective and adequately weighted vote is unconstitutionally impaired where population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, even though this is a result of a clearly rational state policy of according some legislative representation to political subdivisions.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 334; States § 119 — apportionment plan — approval at time of admission to Union

36. Despite congressional approval of a state legislative apportionment plan at the time of the state's admission into the Union, the plan can later be held unconstitutional under the equal-population principle of the equal protection clause.

[*See annotation references* 1–3 *and annotation p.* 1282, *infra*]

Constitutional Law § 942 — apportionment — guaranty clause

37. A legislative apportionment scheme in which both houses are based on population satisfies Article 4, § 4, of the Federal Constitution, which guarantees to every state a republican form of government.

States § 119 — admission to Union — validity of state government

38. Congress presumably does not assume, in admitting states into the Union, to pass on all constitutional questions relating to the character of state governmental organization.

Legislature § 5 — apportionment — congressional approval

39. Congressional approval, however well-considered, does not validate an unconstitutional state legislative apportionment system.

[*See annotation p.* 1282, *infra*]

United States § 17 — congressional power — unconstitutional state acts

40. Congress lacks the constitutional power to insulate states from attack with respect to alleged deprivations of individual constitutional rights.

Legislature § 6 — apportionment — periodic revision

41. States may adopt some reasonable plan for periodic revision of their apportionment schemes.

Constitutional Law § 334 — legislative apportionment — frequency of revision

42. The equal protection clause does not require daily, monthly, annual, or biennial legislative apportionment so long as a state has a reasonably conceived plan for periodic adjustment of legislative representation.

[*See annotation references* 1–3]

Legislature § 6 — decennial reapportionment

43. Decennial reapportionment meets the minimal requirements for maintaining a reasonably current scheme of legislative representation.

[*See annotation references* 1–3]

Constitutional Law § 12 — state constitution — validity

44. State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights cannot otherwise be protected and effectuated.

Legislature § 6 — apportionment cases — relief

45. Insofar as possible, courts should attempt to accommodate the relief ordered in apportionment cases to the apportionment provisions of state constitutions.

[*See annotation references* 1–3]

Legislature § 5 — apportionment — state constitution

46. A state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements.

[*See annotation references* 1–3]

Constitutional Law § 35 — supremacy clause — conflict between state and federal constitutions

47. When there is an unavoidable

conflict between the federal and a state constitution, the supremacy clause applies.

Legislature § 6 — misapportionment — withholding relief

48. Where an existing state legislative apportionment scheme is found invalid, a court is not usually justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan, but equitable considerations may justify a court in withholding immediately effective relief, such as where an impending election is imminent and a state's election machinery is already in progress.

[*See annotation references* 1–3]

Legislature § 6 — apportionment cases — relief

49. In awarding or withholding immediate relief in an apportionment case, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely on general equitable principles.

[*See annotation references* 1–3]

Legislature § 6 — apportionment cases — timing of relief

50. With respect to the timing of relief in an apportionment case, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a state in adjusting to the requirements of the court's decree.

[*See annotation references* 1–3]

Legislature § 6 — reapportionment — judicial relief

51. Legislative reapportionment is primarily a matter for legislative consideration and determination; judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requirements in a timely fashion after having had an adequate opportunity to do so.

[*See annotation references* 1–3]

Legislature § 6 — apportionment cases — relief

52. In a legislative reapportionment case involving an invalid state apportionment scheme and two invalid proposed reapportionment plans, a federal district court acts properly in (1) declining to stay an impending primary election, (2) refraining from further action until the state legislature has been given an opportunity to remedy the existing scheme, (3) stating some of its views to provide guide lines for legislative action, (4) upon the legislature's failure to act effectively to remedy the existing scheme, ordering its own temporary reapportionment plan into effect by using the best parts of the two invalid proposed plans, and (5) retaining jurisdiction while deferring a hearing on the issuance of a final judgment, so as to give the provisionally reapportioned legislature an opportunity to act effectively.

[*See annotation references* 1–3]

APPEARANCES OF COUNSEL

W. McLean Pitts argued the cause for appellants in No. 23.

David J. Vann argued the cause for appellants in No. 27.

John W. McConnell, Jr., argued the cause for appellants in No. 41.

Charles Morgan, Jr., argued the cause for appellees in No. 23.

Richmond M. Flowers argued the cause for appellee, Richmond M. Flowers.

W. McLean Pitts argued the cause for appellees in Nos. 27 and 41.

Solicitor General Archibald Cox argued the cause for the United States, amicus curiae, by special leave of Court.

Briefs of Counsel, p 1279, infra.

OPINION OF THE COURT

*[377 US 536]
*Mr. Chief Justice Warren delivered the opinion of the Court.

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of
*[377 US 537]
Alabama holding invalid, under *the Equal Protection Clause of the Federal Constitution, the existing and two legislatively proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures.[1]

I

On August 26, 1961, the original plaintiffs (appellees in No. 23), residents, taxpayers and voters of Jefferson County, Alabama, filed a complaint in the United States District Court for the Middle District of Alabama, in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama Legislature. Defendants below (appellants in No. 23), sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections.[2] The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 USC §§ 1983, 1988, as well as under 28 USC § 1343(3).

The complaint stated that the Alabama Legislature was composed of a Senate of 35 members and a House of Representatives of 106 members. It set out relevant portions of the 1901 Alabama Constitution, which prescribe the number of members of the two bodies of the
*[377 US 538]
*State Legislature and the method of apportioning the seats among the State's 67 counties, and provide as follows:

Art. IV, Sec. 50. "The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative."

Art. IX, Sec. 197. "The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives."

Art. IX, Sec. 198. "The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the

1. Sims v Frink, 208 F Supp 431 (DCMD Ala 1962). All decisions of the District Court in this litigation are reported sub nom Sims v Frink.

2. Included among the defendants were the Secretary of State and the Attorney General of Alabama, the Chairmen and Secretaries of the Alabama State Democratic Executive Committee and the State Republican Executive Committee, and three Judges of Probate of three counties, as representatives of all the probate judges of Alabama.

house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken."

Art. IX, Sec. 199. "It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them,

*[377 US 539]

respectively; provided, that *each county shall be entitled to at least one representative."

Art. IX, Sec. 200. "It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other."

Art. XVIII, Sec. 284. ". . . Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

The maximum size of the Alabama House was increased from 105 to 106 with the creation of a new county in 1903, pursuant to the constitutional provision which states that, in addition to the prescribed 105 House seats, each county thereafter created shall be entitled to one representative. Article IX, §§ 202 and 203, of the Alabama Constitution established precisely the boundaries of the State's senatorial and representative districts until the enactment of a new reapportionment plan by the legislature. These 1901 constitutional provisions, specifically describing the composition of the

*[377 US 540]

senatorial *districts and detailing the number of House seats allocated to each county, were periodically enacted as statutory measures by the Alabama Legislature, as modified only by the creation of an additional county in 1903, and provided the plan of legislative apportionment existing at the time this litigation was commenced.[3]

Plaintiffs below alleged that the last apportionment of the Alabama

3. Provisions virtually identical to those contained in Art IX, §§ 202 and 203, were enacted into the Alabama Codes of 1907 and 1923, and were most recently reenacted as statutory provisions in §§ 1 and 2 of Tit 32 of the 1940 Alabama Code (as recompiled in 1958).

Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied "equal suffrage in free and equal elections . . . and the equal protection of the laws" in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution. The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which "clearly demonstrates that no reapportionment . . . shall be effected"; that representation at any future constitutional convention would be established by the legislature, making it unlikely that the membership of any such convention would be fairly representative; and that, while the Alabama Supreme Court had found that the legislature had not complied with the State Constitution in failing to reappor-

*[377 US 541]

tion according *to population decennially,[4] that court had nevertheless indicated that it would not interfere with matters of legislative reapportionment.[5]

Plaintiffs requested that a three-judge District Court be convened.[6] With respect to relief, they sought a declaration that the existing constitutional and statutory provisions, establishing the present apportionment of seats in the Alabama Legislature, were unconstitutional under the Alabama and Federal Constitutions, and an injunction against the holding of future elections for legislators until the legislature reapportioned itself in accordance with the State Constitution. They further requested the issuance of a mandatory injunction, effective until such time as the legislature properly reapportioned, requiring the conducting of the 1962 election for legislators at large over the entire State, and any other relief which "may seem just, equitable and proper."

A three-judge District Court was convened, and three groups of voters, taxpayers and residents of Jefferson, Mobile, and Etowah Coun-

*[377 US 542]

ties were permitted to intervene *in the action as intervenor-plaintiffs. Two of the groups are cross-appel-

4. See Opinion of the Justices, 263 Ala 158, 164, 81 So 2d 881, 887 (1955), and Opinion of the Justices, 254 Ala 185, 187, 47 So 2d 714, 717 (1950), referred to by the District Court in its preliminary opinion, 205 F Supp 245, 247.

5. See Ex parte Rice, 273 Ala 712, 143 So 2d 848 (1962), where the Alabama Supreme Court, on May 9, 1962, subsequent to the District Court's preliminary order in the instant litigation as well as our decision in Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691, refused to review a denial of injunctive relief sought against the conducting of the 1962 primary election until after reapportionment of the Alabama Legislature, stating that "this matter is a legislative function, and . . . the Court has no jurisdiction. . . ." And in Wald v Pool, 255 Ala 441, 51 So 2d 869 (1951), the Alabama Supreme Court, in a similar suit, had stated that the lower court had properly refused to grant injunctive relief because "appellants . . . are seeking interference by the judicial department of the state in respect to matters committed by the constitution to the legislative department." 255 Ala, at 442, 51 So 2d, at 870.

6. Under 28 USC §§ 2281 and 2284.

lants in Nos. 27 and 41. With minor exceptions, all of the intervenors adopted the allegations of and sought the same relief as the original plaintiffs.

On March 29, 1962, just three days after this Court had decided Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691, plaintiffs moved for a preliminary injunction requiring defendants to conduct at large the May 1962 Democratic primary election and the November 1962 general election for members of the Alabama Legislature. The District Court set the motion for hearing in an order stating its tentative views that an injunction was not required before the May 1962 primary election to protect plaintiffs' constitutional rights, and that the Court should take no action which was not "absolutely essential" for the protection of the asserted constitutional rights before the Alabama Legislature had had a "further reasonable but prompt opportunity to comply with its duty" under the Alabama Constitution.

On April 14, 1962, the District Court, after reiterating the views expressed in its earlier order, reset the case for hearing on July 16, noting that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. 205 F Supp 245. Relying on our decision in Baker v Carr, the Court found jurisdiction, justiciability and standing. It stated that it was taking judicial notice of the facts that there had been population changes in Alabama's counties since 1901, that the present representation in the State Legislature was not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution.[7] Continuing, the

*[377 US 543]

Court stated *that if the legislature complied with the Alabama constitutional provision requiring legislative representation to be based on population there could be no objection on federal constitutional grounds to such an apportionment. The Court further indicated that, if the legislature failed to act, or if its actions did not meet constitutional standards, it would be under a "clear duty" to take some action on the matter prior to the November 1962 general election. The District Court stated that its "present thinking" was to follow an approach suggested by Mr. Justice Clark in his concurring opinion in Baker v Carr[8]— awarding seats released by the consolidation or revamping of existing districts to counties suffering "the most egregious discrimination," thereby releasing the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan, and allowing eventual dismissal of the case. Subsequently, plaintiffs were permitted to amend their complaint by adding a further prayer for relief, which asked the District Court to reapportion the Alabama Legislature provisionally so that the rural strangle hold would be relaxed enough to permit it to reapportion itself.

On July 12, 1962, an extraordinary session of the Alabama Legis-

7. During the over 60 years since the last substantial reapportionment in Alabama, the State's population increased from 1,828,697 to 3,244,286. Virtually all of the population gain occurred in urban counties, and many of the rural counties incurred sizable losses in population.

8. See 369 US, at 260, 7 L ed 2d at 710 (Clark, J., concurring).

lature adopted two reapportionment plans to take effect for the 1966 elections. One was a proposed constitutional amendment, referred to as the "67-Senator Amendment."[9] It provided for a House of Representatives consisting of 106 mem-

*[377 US 544]

bers, apportioned by giving *one seat to each of Alabama's 67 counties and distributing the others according to population by the "equal proportions" method.[10] Using this formula, the constitutional amendment specified the number of representatives allotted to each county until a new apportionment could be made on the basis of the 1970 census. The Senate was to be composed of 67 members, one from each county. The legislation provided that the proposed amendment should be submitted to the voters for ratification at the November 1962 general election.

The other reapportionment plan was embodied in a statutory measure adopted by the legislature and signed into law by the Alabama Governor, and was referred to as the "Crawford-Webb Act."[11] It was enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should fail of passage by a majority of the State's voters, or should the federal courts refuse to accept the proposed amendment (though not rejected by the voters) as effective action in compliance with the requirements of the Fourteenth Amendment. The act provided for a Senate consisting of 35 members, representing 35 senatorial districts established along county lines, and altered only a few of the former districts. In apportioning the 106 seats in the Alabama House of Representatives, the statutory measure gave each county one seat, and apportioned the remaining 39 on a rough population basis, under a formula requiring increasingly more population for a county to be

*[377 US 545]

accorded *additional seats. The Crawford-Webb Act also provided that it would be effective "until the legislature is reapportioned according to law," but provided no standards for such a reapportionment. Future apportionments would presumably be based on the existing provisions of the Alabama Constitution which the statute, unlike the proposed constitutional amendment, would not affect.

The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census, and the number of representatives allocated to each county under each of the three plans at issue in the litigation—the existing apportionment (under the 1901 constitutional provisions and the current statutory measures substantially reenacting the same plan), the proposed 67-Senator constitutional amendment, and the Crawford-Webb Act. Under all three plans, each senatorial district

9. Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Act No. 93, Acts of Alabama, Special Session, 1962, p. 124. The text of the proposed amendment is set out as Appendix B to the lower court's opinion. 208 F Supp, at 443–444.

10. For a discussion of this method of apportionment, used in distributing seats in the Federal House of Representatives among the States, and other commonly used apportionment methods, see Schmeckebier, The Method of Equal Proportions, 17 Law & Contemp Prob 302 (1952).

11. Alabama Reapportionment Act of 1962, Alabama House Bill No. 59, Act No. 91, Acts of Alabama, Special Session, 1962, p. 121. The text of the act is reproduced as Appendix C to the lower court's opinion. 208 F Supp, at 445–446.

would be represented by only one senator.

On July 21, 1962, the District Court held that the inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been "generally conceded" by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. 208 F Supp 431. Under the existing provisions, applying 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two

*[377 US 546]

seats *in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives.[12] With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county,[13] Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people.[14]

The Court then considered both the proposed constitutional amendment and the Crawford-Webb Act to

*[377 US 547]

ascertain *whether the legislature had taken effective action to remedy the unconstitutional aspects of the existing apportionment. In initially summarizing the result which it had reached, the Court stated:

"This Court has reached the conclusion that neither the '67-Senator Amendment' nor the 'Crawford-Webb Act' meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so

12. A comprehensive chart showing the representation by counties in the Alabama House of Representatives under the existing apportionment provisions is set out as Appendix D to the lower court's opinion. 208 F Supp, at 447–449. This chart includes the number of House seats given to each county, and the populations of the 67 Alabama counties under the 1900, 1950, and 1960 censuses.

13. Although cross-appellants in No. 27 assert that the Alabama Constitution forbids the division of a county, informing senatorial districts, only when one or both places will be joined with another county to form a multicounty district, this view appears to be contrary to the language of Art IX, § 200, of the Alabama Constitution and the practice under it. Cross-appellants contend that counties entitled by population to two or more senators can be split into the appropriate number of districts, and argue that prior to the adoption of the 1901 provisions the Alabama Constitution so provided and there is no reason to believe that the language of the present provision was intended to effect any change. However, the only apportionments under the 1901 Alabama Constitution—the 1901 provisions and the Crawford-Webb Act—gave no more than one seat to a county even though by population several counties would have been entitled to additional senatorial representation.

14. A chart showing the composition, by counties, of the 35 senatorial districts provided for under the existing apportionment, and the population of each according to the 1900, 1950, and 1960 censuses, is reproduced as Appendix E to the lower court's opinion. 208 F Supp, at 450.

obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the [federal constitutional] test."[15]

The Court stated that the apportionment of one senator to each county, under the proposed constitutional amendment, would "make the discrimination in the Senate even more invidious than at present." Under the 67-Senator Amendment, as pointed out by the court below, "[t]he present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State," the 34 smallest counties, with a total population of less than that of Jefferson County, would have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution (since a vote of two-fifths of the members of one house can defeat a proposal to amend the Alabama Constitution). Noting that the "only conceivable rationalization" of the senatorial apportionment scheme is that it was based on equal representation of political subdivisions within the State and is thus analogous to the Federal Senate, the District Court rejected the analogy on

*[377 US 548]

the ground that Alabama *counties are merely involuntary political units of the State created by statute to aid in the administration of state government. In finding the so-called federal analogy irrelevant, the District Court stated:

"The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties."[16]

The Court also noted that the senatorial apportionment proposal "may not have complied with the State Constitution," since not only is it explicitly provided that the population basis of legislative representation "shall not be changed by constitutional amendments,"[17] but the Alabama Supreme Court had previously indicated that that requirement could probably be altered only by constitutional convention.[18] The Court concluded, however, that the apportionment of seats in the Alabama House, under the proposed constitutional amendment, was "based upon reason, with a rational regard for known and accepted

15. 208 F Supp, at 437.

16. Id., at 438.

17. According to the District Court, in the interval between its preliminary order and its decision on the merits, the Alabama Legislature, despite adopting this constitutional amendment proposal, "refused to inquire of the Supreme Court of the State of Alabama whether this provision in the Constitution of the State of Alabama could be changed by constitutional amendment as the '67-Senator Amendment' proposes." 208 F Supp, at 437.

18. At least this is the reading of the District Court of two somewhat conflicting decisions by the Alabama Supreme Court, resulting in a "manifest uncertainty of the legality of the proposed constitutional amendment, as measured by State standards . . . . ." 208 F Supp, at 438. Compare Opinion of the Justices, 254 Ala 183, 184, 47 So 2d 713, 714 (1950), with Opinion of the Justices, 263 Ala 158, 164, 81 So 2d 881, 887 (1955).

*[377 US 549]

*standards of apportionment."[19] Under the proposed apportionment of representatives, each of the 67 counties was given one seat and the remaining 39 were allocated on a population basis. About 43% of the State's total population would live in counties which could elect a majority in that body. And, under the provisions of the 67-Senator Amendment, while the maximum population-variance ratio was increased to about 59-to-1 in the Senate, it was significantly reduced to about 4.7-to-1 in the House of Representatives. Jefferson County was given 17 House seats, an addition of 10, and Mobile County was allotted eight, an increase of five. The increased representation of the urban counties was achieved primarily by limiting the State's 55 least populous counties to one House seat each, and the net effect was to take 19 seats away from rural counties and allocate them to the more populous counties. Even so, serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative.

Turning next to the provisions of the Crawford-Webb Act, the District Court found that its apportionment of the 106 seats in the Alabama House of Representatives, by allocating one seat to each county and distributing the remaining 39 to the more populous counties in diminishing ratio to their populations, was "totally unacceptable."[20] Under this plan, about 37% of the

*[377 US 550]

State's total *population would reside in counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 persons while representatives from eight rural counties would each represent less than 20,000 people. The Court regarded the senatorial apportionment provided in the Crawford-Webb Act as "a step in the right direction, but an extremely short step," and but a "slight improvement over the present system of representation."[21] The net effect of combining a few of the less populous counties into two-county districts and splitting up several of the larger districts into smaller ones would be merely to increase the minority which would be represented by a majority of the members of the Senate from 25.1% to only 27.6% of the State's population.[22] The Court pointed out that,

19. See the later discussion, infra, at 531, 532 and note 68, infra, where we reject the lower court's apparent conclusion that the apportionment of the Alabama House, under the 67-Senator Amendment, comported with the requirements of the Equal Protection Clause.

20. While no formula for the statute's apportionment of representatives is expressly stated, one can be extrapolated. Counties with less than 45,000 people are given one seat; those with 45,000 to 90,000 receive two seats; counties with 90,000 to 150,000, three seats; those with 150,000 to 300,000, four seats; counties with 300,000 to 600,000, six seats; and counties with over 600,000 are given 12 seats.

21. Appendix F to the lower court's opinion sets out a chart showing the populations of the 35 senatorial districts provided for under the Crawford-Webb Act and the composition, by counties, of the various districts. 208 F Supp, at 451.

22. Cross-appellants in No. 27 assert that the Crawford-Webb Act was a "minimum-change measure" which merely redrew new senatorial district lines around the nominees of the May 1962 Democratic primary so as to retain the seats of 34

under the Crawford-Webb Act, the vote of a person in the senatorial district consisting of Bibb and Perry Counties would be worth 20 times that of a citizen in Jefferson County, and that the vote of a citizen in the six smallest districts would be worth 15 or more times that of a Jefferson County voter. The Court concluded

*[377 US 551]

that the Crawford-*Webb Act was "totally unacceptable" as a "piece of permanent legislation" which, under the Alabama Constitution, would have remained in effect without alteration at least until after the next decennial census.

Under the detailed requirements of the various constitutional provisions relating to the apportionment of seats in the Alabama Senate and House of Representatives, the Court found, the membership of neither house can be apportioned solely on a population basis, despite the provision in Art. XVIII, § 284, which states that "[r]epresentation in the legislature shall be based upon population." In dealing with the conflicting and somewhat paradoxical requirements (under which the number of seats in the House is limited to 106 but each of the 67 counties is required to be given at least one representative, and the size of the Senate is limited to 35 but it is required to have at least one-fourth of the members of the House, although no county can be given more than one senator), the District Court stated its view that "the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature" is the previously referred to language of § 284. The Court stated that the detailed requirements of Art. IX, §§ 197–200, "make is obvious that in *neither* the House nor the Senate can representation be based strictly and entirely upon population. . . . The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, . . . it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions."[23]

*[377 US 552]

*The District Court then directed its concern to the providing of an effective remedy. It indicated that it was adopting and ordering into effect for the November 1962 election a provisional and temporary reapportionment plan composed of the provisions relating to the House of Representatives contained in the 67-Senator Amendment and the provisions of the Crawford-Webb Act relating to the Senate. The Court noted, however, that "[t]he proposed reapportionment of the Senate in the 'Crawford-Webb Act,' unacceptable as a piece of permanent legislation, may not even break the strangle hold." Stating that it was retaining jurisdiction and deferring any hearing on plaintiffs' motion for a permanent injunction "until the Legislature, as provisionally reapportioned . . . , has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature," the Court emphasized that its "moderate" action was designed to break the strangle hold by the smaller counties on the Alabama Legislature and would not suffice as a permanent reapportionment. On

of the 35 nominees, and resulted, in practical effect, in the shift of only one Senate seat from an overrepresented district to another underpopulated, newly created district.

23. 208 F Supp, at 439.

July 25, 1962, the Court entered its decree in accordance with its previously stated determinations, concluding that "plaintiffs . . . are denied equal protection . . . by virtue of the debasement of their votes since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself as required by law." It enjoined the defendant state officials from holding any future elections under any of the apportionment plans that it had found invalid, and stated that the 1962 election of Alabama legislators could validly be conducted only under the apportionment scheme specified in the Court's order.

After the District Court's decision, new primary elections were held pursuant to legislation enacted in 1962 at the same special session as the proposed constitutional amendment and the Crawford-Webb

*[377 US 553]

Act, to be effective *in the event the Court itself ordered a particular reapportionment plan into immediate effect. The November 1962 general election was likewise conducted on the basis of the District Court's ordered apportionment of legislative seats, as Mr. Justice Black refused to stay the District Court's order. Consequently, the present Alabama Legislature is apportioned in accordance with the temporary plan prescribed by the District Court's decree. All members of both houses of the Alabama Legislature serve four-year terms, so that the next regularly scheduled election of legislators will not be held until 1966. The 1963 regular session of the Alabama Legislature produced no legislation relating to legislative apportionment,[24] and the legislature, which meets biennially, will not hold another regular session until 1965.

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.[25] No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people,[26] or as a result of a constitutional convention convened

*[377 US 554]

*after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.[27]

Notices of appeal to this Court from the District Court's decision were timely filed by defendants below (appellants in No. 23) and by two groups of intervenor-plaintiffs (cross-appellants in Nos. 27 and 41). Appellants in No. 23 contend that the District Court erred in holding the existing and the two proposed plans for the apportionment of seats in the Alabama Legislature unconstitutional, and that a federal

24. Possibly this resulted from an understandable desire on the part of the Alabama Legislature to await a final determination by this Court in the instant litigation before proceeding to enact a permanent apportionment plan.

25. However, a proposed constitutional amendment, which would have made the Alabama House of Representatives somewhat more representative of population but the Senate substantially less so, was rejected by the people in a 1956 referendum, with the more populous counties accounting for the defeat.

See the discussion in Lucas v Forty-Fourth General Assembly of Colorado, 377 US 736, 737, 12 L ed 2d 647, 648, with respect to the lack of federal constitutional significance of the presence or absence of an available political remedy.

26. Ala Const, Art XVIII, § 284.

27. Ala Const, Art XVIII, § 286.

court lacks the power to affirmatively reapportion seats in a state legislature. Cross-appellants in No. 27 assert that the court below erred in failing to compel reapportionment of the Alabama Senate on a population basis as allegedly required by the Alabama Constitution and the Equal Protection Clause of the Federal Constitution. Cross-appellants in No. 41 contend that the District Court should have required and ordered into effect the apportionment of seats in both houses of the Alabama Legislature on a population basis. We noted probable jurisdiction on June 10, 1963. 374 US 802, 10 L ed 2d 1029, 83 S Ct 1692.

II

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.

Headnote 1

A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbrough, 110 US 651, 28 L ed 274, 4 S Ct 152, and to have their votes counted, United States v Mosley, 238 US 383, 59 L ed 1355, 35 S Ct 904. In Mosley the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot

*[377 US 555]

in a box." 238 US, *at 386, 59 L ed at 1357.

Headnote 2

The right to vote can neither be denied outright, Guinn v United States, 238 US 347, 59 L ed 1340, 35 S Ct 926, LRA1916A 1124, Lane v Wilson, 307 US 268, 83 L ed 1281, 59 S Ct 872, nor destroyed by alteration of ballots, see United States v Classic, 313 US 299, 315, 85 L ed 1368, 1377, 61 S Ct 1031, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 US 371, 25 L ed 717, United States v Saylor, 322 US 385, 88 L ed 1341, 64 S Ct 1101. As the Court stated in Classic, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." 313 US, at 315, 85 L ed at 1377. Racially based gerrymandering, Gomillion v Lightfoot, 364 US 339, 5 L ed 2d 110, 81 S Ct 125, and the conducting of white primaries, Nixon v Herndon, 273 US 536, 71 L ed 759, 47 S Ct 446, Nixon v Condon, 286 US 73, 76 L ed 984, 52 S Ct 484, 88 ALR 458, Smith v Allwright, 321 US 649, 88 L ed 987, 64 S Ct 757, 151 ALR 1110, Terry v Adams, 345 US 461, 97 L ed 1152, 73 S Ct 809, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country.[28] The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by

Headnote 3

28. The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage. Also relevant, in this regard, is the civil rights legislation enacted by Congress in 1957 and 1960.

wholly prohibiting the free exercise of the franchise.[29]

*[377 US 556]

*In Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691, we held that a claim asserted under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts. The spate of similar cases filed and decided by lower courts since our decision in Baker amply shows that the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States.[30] In Baker, a suit involving an attack on the apportionment of seats in the Tennessee Legislature, we remanded to the District Court, which had dismissed the action, for consideration on the merits. We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies. Rather, we simply stated:

"Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."[31]

*[377 US 557]

*We indicated in Baker, however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:

"Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."[32]

Subsequent to Baker, we remanded several cases to the courts below for reconsideration in light of that decision.[33]

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29. As stated by Mr. Justice Douglas, dissenting, in South v Peters, 339 US 276, 279, 94 L ed 834, 838, 70 S Ct 641:

"There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group [h]as full voting strength . . . [and] the groups not in favor have their votes discounted."

30. Litigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 States prior to the end of 1962—within nine months of our decision in Baker v Carr. See McKay, Political Thickets and Crazy Guilts: Reapportionment and Equal Protection, 61 Mich L Rev 645, 706–710 (1963), which contains an appendix summarizing reapportionment litigation through the end of 1962. See also David and Eisenberg, Devaluation of the Urban and Suburban Vote (1961); Goldberg, The Statistics of Malapportionment, 72 Yale LJ 90 (1962).

31. 369 US, at 198, 7 L ed 2d at 674.

32. Id., at 226, 7 L ed 2d at 691.

33. Scholle v Hare, 369 US 429, 8 L ed 2d 1, 82 S Ct 910 (Michigan); WMCA, Inc. v Simon, 370 US 190, 8 L ed 2d 430, 82 S Ct 1234 (New York).

In Gray v Sanders, 372 US 368, 9 L ed 2d 821, 83 S Ct 801, we held that the Georgia county unit system, applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided. After indicating that the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex, we stated:

"How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their

*[377 US 558]

occupation, *whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. 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."[34]

Continuing, we stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State." And, finally, we 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."[35]

We stated in Gray, however, that that case, "unlike Baker v Carr, . . . 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. . . . Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population."[36]

*[377 US 559]

*Of course, in these cases we are faced with the problem not presented in Gray—that of determining the basic standards and stating the applicable guidelines for implementing our decision in Baker v Carr.

In Wesberry v Sanders, 376 US 1, 11 L ed 2d 481, 84 S Ct 526, we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjusticiable questions and should not be dismissed generally for "want of equity." We determined that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the

34. 372 US, at 379-380, 9 L ed 2d at 829, 830.

35. Id., at 381, 9 L ed 2d at 830.

36. Id., at 376, 9 L ed 2d at 827. Later in the opinion we again stated:

"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, 9 L ed 2d at 829.

various districts established by a state legislature for the election of members of the Federal House of Representatives.

In that case we decided that an apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional, since "the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote . . . ." We concluded that the constitutional prescription for election of members of the House of Representatives "by the People," construed in its historical context, means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." We further stated:

"It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."[37]

We found further, in Wesberry, that "our Constitution's plain objective" was that "of making equal rep-

*[377 US 560]

resentation *for equal numbers of people the fundamental goal . . . ." We concluded by stating:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."[38]

Gray and Wesberry are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. Gray, though not determinative here since involving the weighting of votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections. And our decision in Wesberry was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen "by the People," while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is

*[377 US 561]

one of equal *representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of

37. 376 US, at 14, 11 L ed 2d at 490.

38. Id., at 17–18, 11 L ed 2d at 492.

equality among voters in the apportionment of seats in state legislatures.

III

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States v Bathgate, 246 US 220, 227, 62 L ed 676, 680, 38 S Ct 269, "[t]he right to vote is personal . . . ."[39] While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like Skinner v Oklahoma, 316 US 535, 86 L ed 1655, 62 S Ct 1110, such a case "touches a sensitive and important area of human rights," and "involves one of the basic civil rights of man," presenting questions of alleged "invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." 316 US, at 536, 541, 86 L ed at 1657, 1660. Undoubtedly, the right of suffrage is a fundamental matter *in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in Yick Wo v Hopkins, 118 US 356, 30 L ed 220, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 US, at 370, 30 L ed at 226.

Headnote 4

Headnote 5

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted

Headnote 6

*[377 US 562]

39. As stated by Mr. Justice Douglas, the rights sought to be vindicated in a suit challenging an apportionment scheme are "personal and individual," South v Peters, 339 US, at 280, 94 L ed at 838, and are "important political rights of the people," MacDougall v Green, 335 US 281, 288, 93 L ed 3, 9, 69 S Ct 1 (Douglas, J., dissenting.)

to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that

Headnote 7

a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.

*[377 US 563]

Of course, the effect of *state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.[40] Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Ten, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever

Headnote 8

aware that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." Lane v Wilson, 307 US 268, 275, 83 L ed 1281, 1287, 59 S Ct 872; Gomillion v Lightfoot, 364 US 339, 342, 5 L ed 2d 110, 113, 81 S Ct 125. As we stated in Wesberry v Sanders, supra:

"We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that

*[377 US 564]

a vote is worth *more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . ."[41]

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40. As stated by Mr. Justice Black, dissenting, in Colegrove v Green, 328 US 549, 569-571, 90 L ed 1432, 1445, 66 S Ct 1198:

"No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. . . . [A] state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name."

41. 376 US, at 8, 11 L ed 2d at 487. See also id, at 17, 11 L ed 2d at 492, quoting from James Wilson, a delegate to the Constitutional Convention and later an Associate Justice of this Court, who stated:

"[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same." 2 The Works of James Wilson (Andrews ed 1896) 15.

And, as stated by Mr. Justice Douglas in MacDougall v Green, 335 US, at 288, 290, 93 L ed at 9, 10.

"[A] regulation . . . [which] discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

"Free and honest elections are the very foundation of our republican form of government . . . . Discrimination against

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of

*[377 US 565]

the Federal *Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen

Headnote 9

has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citi-

Headnote 10

zens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to

Headnote 11 Headnote 12

the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective rep-

*[377 US 566]

resentation for all citizens *is concededly the basic aim of legislative apportionment, we con-

Headnote 13 Headnote 14

clude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the

any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity . . . .

"None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government." (Douglas, J., dissenting).

Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, Brown v Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR2d 1180, or economic status, Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR2d 1055, Douglas v California, 372 US 353, 9 L ed 2d 811, 83 S Ct 814. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in Gomillion v Lightfoot, supra:

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[42]

*[377 US 567]

*To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban.[43] Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling

Headnote 14 Headnote 15 Headnote 16 Headnote 18

42. 364 US, at 347, 5 L ed 2d at 117.

43. Although legislative apportionment controversies are generally viewed as involving urban-rural conflicts, much evidence indicates that presently it is the fast-growing suburban areas which are probably the most seriously underrepresented in many of our state legislatures. And, while currently the thrust of state legislative malapportionment results, in most States, in underrepresentation of urban and suburban areas, in earlier times cities were in fact overrepresented in a number of States. In the early 19th century, certain of the seaboard cities in some of the Eastern and Southern States possessed and struggled to retain legislative representation disproportionate to population, and bitterly opposed according additional representation to the growing inland areas. Conceivably, in some future time, urban areas might again be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled. Malapportionment can, and has historically, run in various directions. However and whenever it does, it is constitutionally impermissible under the Equal Protection Clause.

Headnote 17

criterion for judgment in legislative
*[377 US 568]
apportionment controversies.[44] *A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.
Headnote 14 This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by
Headnote 19 the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

IV

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that
Headnote 20 the seats in both houses
Headnote 21 of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with
Headnote 22 votes of citizens living in other parts of the State. Since, under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitu-
Headnote 23 tionally invalid. Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.[45]
*[377 US 569]
Although *the District Court presumably found the apportionment of the Alabama House of Representatives under the 67-Senator Amendment to be acceptable, we conclude that the deviations from a strict population basis are too egregious to permit us to find that that body, under this proposed plan, was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained. Although about 43% of the State's total population would be required to comprise districts which could elect a majority in that body, only 39 of the 106 House seats were actually to be distributed on a population basis, as each of Alabama's 67 counties was given at least one representative, and population-vari-

44. The British experience in eradicating "rotten boroughs" is interesting and enlightening. Parliamentary representation is now based on districts of substantially equal population, and periodic reapportionment is accomplished through independent Boundary Commissions. For a discussion of the experience and difficulties in Great Britain in achieving fair legislative representation, see Edwards, Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v Carr, 15 Vand L Rev 1265, 1275 (1962). See also the discussion in Baker v Carr, 369 US, at 302–307, 7 L ed 2d at 735–738 (Frankfurter, J., dissenting.)

45. Under the existing scheme, Marshall County, with a 1960 population of 48,018, Baldwin County, with 49,088, and Houston County, with 50,718, are each given only one seat in the Alabama House, while Bullock County, with only 13,462, Henry County, with 15,286, and Lowndes County, with 15,417, are allotted two representatives each. And in the Alabama Senate, under the existing apportionment, a district comprising Lauderdale and Limestone Counties had a 1960 population of 98,135, and another composed of Lee and Russell Counties had 96,105. Conversely, Lowndes County, with only 15,417, and Wilcox County, with 18,739, are nevertheless single-county senatorial districts given one Senate seat each.

ance ratios of close to 5-to-1 would have existed. While
Headnote 24 mathematical nicety is not a constitutional requisite, one could hardly conclude that the Alabama House, under the proposed constitutional amendment, had been apportioned sufficiently on a population basis to be sustainable under the requirements of the Equal Protection Clause. And none of the other apportionments of seats in either of the bodies of the Alabama Legislature, under the three plans considered by the District Court, came nearly as close to approaching the required constitutional standard as did that of the House of Representatives under the 67-Senator Amendment.

Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States. At the time this litigation was commenced, there had been no
*[377 US 570]
reapportionment *of seats in the Alabama Legislature for over 60 years.[46] Legislative inaction, coupled with the unavailability of any political or judicial remedy,[47] had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism. Consistent failure by the Alabama Legislature to comply with state constitutional requirements as to the frequency of reapportionment and the bases of legislative representation resulted in a minority strangle hold on the State Legislature. Inequality of representation in one house added to the inequality in the other. With the crazy-quilt existing apportionment virtually conceded to be invalid, the Alabama Legislature offered two proposed plans for consideration by the District Court, neither of which was to be effective until 1966 and neither of which provided for the apportionment of even one of the two houses on a population basis. We find that the court below did not err in holding that neither of these proposed reapportionment schemes, considered as a whole, "meets the necessary constitutional requirements."

And we conclude that
Headnote 25 the District Court acted properly in considering these two proposed plans, although neither was to become effective until the 1966 election and the proposed constitutional amendment was scheduled to be submitted to the State's voters in November 1962.[48]
*[377 US 571]
*Consideration by the court below of the two proposed plans was clearly necessary in determining whether the Alabama Legislature had acted effectively to correct the admittedly existing malapportionment, and in ascertaining what sort of judicial relief, if any, should be afforded.

V

Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be jus-

46. An interesting pre-Baker discussion of the problem of legislative malapportionment in Alabama is provided in Comment, Alabama's Unrepresentative Legislature, 14 Ala L Rev 403 (1962).

47. See the cases cited and discussed in notes 4–5, supra, where the Alabama Supreme Court refused even to consider the granting of relief in suits challenging the validity of the apportionment of seats in the Alabama Legislature, although it stated that the legislature had failed to comply with the requirements of the State Constitution with respect to legislative reapportionment.

48. However, since the District Court found the proposed constitutional amendment prospectively invalid, it was never in fact voted upon by the State's electorate.

tified in proceeding no further. However, one of the proposed plans, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation followed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population. Seats in the Alabama House, under the proposed constitutional amendment, are distributed by giving each of the 67 counties at least one, with the remaining 39 seats being allotted among the more populous counties on a population basis. This scheme, at least at first glance, appears to resemble that prescribed for the Federal House of Representatives, where the 435 seats are distributed among the States on a population basis, although each State, regardless of its population, is given at least one Congressman. Thus, although there are substantial differences in underlying rationale and result,[49] *the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress.

*[377 US 572]

Much has been written since our decision in Baker v Carr about the applicability of the so-called federal analogy to state legislative apportionment arrangements.[50] After considering the matter, the court below concluded that no conceivable analogy could be drawn between the federal scheme and the apportionment of seats in the Alabama Legislature under the proposed constitu-

*[377 US 573]

Headnote 26

tional *amendment.[51] We agree with the District Court, and find the federal analogy inapposite and irrelevant to

49. Resemblances between the system of representation in the Federal Congress and the apportionment scheme embodied in the 67-Senator Amendment appear to be more superficial than actual. Representation in the Federal House of Representatives is apportioned by the Constitution among the States in conformity with population. While each State is guaranteed at least one seat in the House, as a feature of our unique federal system, only four States have less than 1/435 of the country's total population, under the 1960 census. Thus, only four seats in the Federal House are distributed on a basis other than strict population. In Alabama, on the other hand, 40 of the 67 counties have less than 1/106 of the State's total population. Thus, under the proposed amendment, over ⅔ of the total number of seats in the Alabama House would be distributed on a basis other than strict population. States with almost 50% of the Nation's total population are required in order to elect a majority of the members of the Federal House, though unfair districting within some of the States presently reduces to about 42% the percentage of the country's population which reside in districts electing individuals comprising a majority in the Federal House. Cf. Wesberry v Sanders, supra, holding such congressional districting unconstitutional. Only about 43% of the population of Alabama would live in districts which could elect a majority in the Alabama House, under the proposed constitutional amendment. Thus, it could hardly be argued that the proposed apportionment of the Alabama House was based on population in a way comparable to the apportionment of seats in the Federal House among the States.

50. For a thorough statement of the arguments against holding the so-called federal analogy applicable to state legislative apportionment matters, see, e.g., McKay, Reapportionment and the Federal Analogy (National Municipal League pamphlet 1962); McKay, The Federal Analogy and State Apportionment Standards, 38 Notre Dame Lawy. 487 (1963). See also Merrill, Blazes for a Trail Through the Thicket of Reapportionment, 16 Okla L Rev 59, 67–70 (1963).

51. 208 F Supp, at 438. See the discussion of the District Court's holding as to

state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population.[52] And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.[53] Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.[54]

*[377 US 574]

*The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic.[55] Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union." But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. In rejecting an asserted analogy to the federal electoral college in Gray v Sanders, supra, we stated:

"We think the analogies to the

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the applicability of the federal analogy earlier in this opinion, supra, at 518, 519.

52. Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 10–11, 45, 69 (1962).

53. Thomas Jefferson repeatedly denounced the inequality of representation provided for under the 1776 Virginia Constitution and frequently proposed changing the State Constitution to provide that both houses be apportioned on the basis of population. In 1816 he wrote that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself . . . ." Letter to Samuel Kercheval, 10 Writings of Thomas Jefferson (Ford ed 1899) 38. And a few years later, in 1819, he stated: "Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified." Letter to William King, Jefferson Papers, Library of Congress, Vol. 216, p. 38610

54. Article II, § 14, of the Northwest Ordinance of 1787 stated quite specifically: "The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the Legislature."

55. See the discussion in Wesberry v Sanders, 376 US, at 9–14, 11 L ed 2d 487–490.

electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are 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 im-

*[377 US 575]

plied nothing about the use of *an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued."[56]

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v City of Pittsburgh, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." The relationship of the States to the Federal Government could hardly be less analogous.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a "republican

Headnote 23

form of government." We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of

*[377 US 576]

Headnote 20

state *legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the electic m-bers of one house of a ral state legislature would a t to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis,

56. 372 US, at 378, 9 L ed 2d at 829.

stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constit-

*[377 US 577]

uencies *can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

VI

Headnote 28

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[57]

In Wesberry v Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry—equality of

*[377 US 578]

population *among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording ade-

57. As stated by the Court in Bain Peanut Co. v Pinson, 282 US 499, 501, 75 L ed 432, 491, 51 S Ct 228, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

quate representation to all parts of the State. To do so
Headnote 29 would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall 36, 78–79, 21 L ed 394, 409. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or
*[377 US 579]
*natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember[58] or floterial districts.[59] Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legisla-
Headnote 30 tures.[60] So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history
Headnote 31 alone,[61] nor economic or
*[377 US 580]
other sorts of *group interests, are permissible factors in attempting to

58. But cf. the discussion of some of the practical problems inherent in the use of multimember districts in Lucas v Forty-Fourth General Assembly of Colorado, 377 US 731–732, 12 L ed 2d 644, 645.

59. See the discussion of the concept of floterial districts in Davis v Mann, 377 US 686, 687 note 2, 12 L ed 2d 614, 615.

60. For a discussion of the formal apportionment formulae prescribed for the allocation of seats in state legislatures, see Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law. 367, 398–400 (1963). See also The Book of the States 1962–1963, 58–62.

61. In rejecting a suggestion that the representation of the newer Western States in Congress should be limited so that it

justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than in-
Headnote 32 substantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called
*[377 US 581]
local *legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body.[62] This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties.[63] Such a
Headnote 34 result, we conclude, would be constitutionally impermissible. And careful judicial

would never exceed that of the original States, the Constitutional Convention plainly indicated its view that history alone provided an unsatisfactory basis for differentiations relating to legislative representation. See Wesberry v Sanders, 376 US, at 14, 11 L ed 2d at 490. Instead, the Northwest Ordinance of 1787, in explicitly providing for population-based representation of those living in the Northwest Territory in their territorial legislatures, clearly implied that, as early as the year of the birth of our federal system, the proper basis of the legislative representation was regarded as being population.

62. See McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich L Rev 645, 698–699 (1963).

63. Determining the size of its legislative bodies is of course a matter within the discretion of each individ-
Headnote 33 ual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies.

scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a
Headnote 35 clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

*[377 US 582]
*VII

One of the arguments frequently offered as a basis for upholding a State's legislative apportionment arrangement, despite substantial disparities from a population basis in either or both houses, is grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle. Proponents of this argument contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such arrangements are plainly sufficient as establishing a "republican form of government." As we stated in Baker v Carr, some
Headnote 36 questions raised under
Headnote 37 the Guaranty Clause are
Headnote 38 nonjusticiable, where
Headnote 39 "political" in nature and
Headnote 40 where there is a clear absence of judicially manageable standards.[64] Nevertheless, it is not inconsistent with this view to hold that, despite congressional approval of state legislative apportionment plans at the time of admission into the Union, even though deviating from the equal-population principle here enunciated, the Equal Protection Clause can and does require more. And an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization. In any event, congressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

*[377 US 583]
*VIII

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population
Headnote 41 basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States,[65] often honored

64. See 369 US, at 217-232, 7 L ed 2d at 685-694, discussing the nonjusticiability of malapportionment claims asserted under the Guaranty Clause.

65. Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 56 (1962). Additionally, the constitutions of seven

more in the breach than the observance, however. Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought, was in 1901. Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legis-

Headnote 42 lators. In substance, we
Headnote 43 do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clear-

*[377 US 584]

ly meet the minimal *requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

IX

Although general provisions of the Alabama Constitution provide that the apportionment of seats in both houses of the Alabama Legislature should be on a population basis, other more detailed provisions clearly make compliance with both sets of requirements impossible. With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions. In those States where the alleged malapportionment has resulted from noncompliance with state constitutional provisions which, if complied with, would result in an apportionment valid under the Equal Protection Clause, the judicial task of providing effective re-

lief would appear to be
Headnote 44 rather simple. We agree
Headnote 45 with the view of the Dis-
Headnote 46 trict Court that state
Headnote 47 constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

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other States either require or permit reapportionment of legislative representation more frequently than every 10 years. See also The Book of the States 1962–1963, 58–62.

*[377 US 585]
*X

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases.[66] Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a

Headnote 48

State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding

Headnote 49

immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably en-

Headnote 50

deavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in Baker v Carr, "any relief accorded can be fashioned in the light of well-known principles of equity."[67]

*[377 US 586]
*We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly

Headnote 51

recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.

66. Cf. Baker v Carr, 369 US 186, 198, 7 L ed 2d 663, 674, 82 S Ct 691. See also 369 US, at 250-251, 7 L ed 2d at 705 (Douglas, J., concurring), and passages from Baker quoted in this opinion, ante, at 524, and infra.

67. 369 US, at 250, 7 L ed 2d at 705.

We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid,[68] was an appropriate and

Headnote 52

*[377 US 537]

*well-considered exercise of judicial power. Admittedly, the lower court's ordered plan was intended only as a temporary and provisional measure and the District Court correctly indicated that the plan was invalid as a permanent apportionment. In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion. Since the District Court evinced its realization that its ordered reapportionment could not be sustained as the basis for conducting the 1966 election of Alabama legislators, and avowedly intends to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim, we affirm the judgment below and remand the cases for further proceedings consistent with the views stated in this opinion.

It is so ordered.

SEPARATE OPINIONS

Mr. Justice Clark, concurring in the affirmance.

The Court goes much beyond the necessities of this case in laying down a new "equal population" principle for state legislative apportionment. This principle seems to be an offshoot of Gray v Sanders, 372 US 368, 581, 9 L ed 2d 821, 831, 83 S Ct 801 (1963), i. e., "one person, one vote," modified by the "nearly as is practicable" admonition of Wesberry v Sanders, 376 US 1, 8, 11 L ed 2d 481, 487, 84 S Ct 526 (1964).[1]

*[377 US 588]

Whether "nearly as is *practicable" means "one person, one vote" qualified by "approximately equal" or "some deviations" or by the impossibility of "mathematical nicety" is not clear from the majority's use of these vague and meaningless phrases. But whatever the standard, the Court applies it to each house of the State Legislature.

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is "a crazy quilt," clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. See my concurring opinion in Baker v Carr, 369 US 186, 253–258, 7 L ed 2d 663, 706–709, 82 S Ct 691 (1962).

I, therefore, do not reach the question of the so-called "federal an-

68. Although the District Court indicated that the apportionment of the Alabama House under the 67-Senator Amendment was valid and acceptable, we of course reject that determination, which we regard as merely precatory and advisory since the court below found the overall plan, under the proposed constitutional amendment, to be unconstitutional. See 208 F Supp, at 440–441. See the discussion earlier in this opinion, supra, 531, 532.

1. Incidentally, neither of these cases, upon which the Court bases its opinion, is apposite. Gray involved the use of Georgia's county unit rule in the election of United States Senators and Wesberry was a congressional apportionment case.

alogy." But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State. See my dissenting opinion in Lucas v Forty-Fourth General Assembly of Colorado, 377 US 741, 12 L ed 2d 650, 84 S Ct 1472.

Mr. Justice Stewart.

All of the parties have agreed with the District Court's finding that legislative inaction for some 60 years in the face of growth and shifts in population has converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, for the reasons stated in my dissenting opinion in Lucas v Forty-Fourth General Assembly of Colorado, infra, p. 581 [published in this edition as part of WMCA v Lomenzo] I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as

*[377 US 589]

closely *as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment.

Mr. Justice Harlan, dissenting.†

In these cases the Court holds that seats in the legislatures of six States[1] are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate.[2] These decisions, with Wesberry v Sanders, 376 US 1, 11 L ed 2d 481, 84 S Ct 526, involving congressional districting by the States, and Gray v Sanders, 372 US 368, 9 L ed 2d 821, 83 S Ct 801, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. Once again,[3] I must register my protest.

*[377 US 590]

*PRELIMINARY STATEMENT.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all

† [This opinion also applies to WMCA, Inc. v Lomenzo (No. 20), p. 568, infra; Maryland Committee for Fair Representation v Tawes (No. 29), p. 595, infra; Davis v Mann (No. 69), p. 609, infra; Roman v Sincock (No. 307), p. 620, infra; and Lucas v Forty-Fourth Genera. Assembly of the State of Colorado (No. 508), p. 632, infra.]

1. Alabama, Colorado, Delaware, Maryland, New York, Virginia.

2. In the Virginia case, Davis v Mann, 377 US 678, 12 L ed 2d 609, 84 S Ct 1453, the defendants introduced an exhibit prepared by the staff of the Bureau of Public Administration of the University of Virginia in which the Virginia Legislature, now held to be unconstitutionally apportioned, was ranked eighth among the 50 States in "representativeness," with population taken as the basis of representation. The Court notes that before the end of 1962, litigation attacking the apportionment of state legislatures had been instituted in at least 34 States. Ante, p. 524, note 30. See infra, p. 555.

3. See Baker v Carr, 369 US 186, 330, 7 L ed 2d 663, 750, 82 S Ct 691, and the dissenting opinion of Frankfurter, J., in which I joined, id., 369 US at 266, 7 L ed 2d at 714; Gray v Sanders, 372 US 368, 382, 9 L ed 2d 821, 831, 83 S Ct 801; Wesberry v Sanders, 376 US 1, 20, 11 L ed 2d 481, 494, 84 S Ct 526.

the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate (see the dissenting opinion of Frankfurter, J., in Baker v Carr, 369 US 186, 266, 301–323, 7 L ed 2d 663, 714, 734–746, 82 S Ct 691)—I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

The Court's constitutional discussion, found in its opinion in the Alabama cases (Nos. 23, 27, 41, ante, p. 506) and more particularly at pages 527–531 thereof, is remarkable (as, indeed, is that found in the separate opinions of my Brothers Stewart and Clark, ante, pp. 543, 542) for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertation which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to

*[377 US 591]

inhibit the States in choosing *any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before Baker v Carr, supra, made an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of "developing" constitutionalism. It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const, Art IV, § 4),[4] the Court's action now bringing them within the

4. That clause, which manifestly has no bearing on the claims made in these cases, see V Elliot's Debates on the Adoption of the Federal Constitution (1845), 332–333, could not in any event be the foundation for judicial relief. Luther v Borden, 7 How 1, 42–44, 12 L ed 2d 581, 599; Ohio ex rel. Bryant v Akron Metropolitan Park District, 281 US 74, 79–80, 74 L ed 710, 715, 50 S Ct 228, 66 ALR 1460; Highland Farms Dairy, Inc. v Agnew, 300 US 608, 612, 81 L ed 835, 839, 57 S Ct 549. In Baker v Carr, supra, 369 US at 227, 7 L ed 2d at 691, the Court stated that reliance on the Republican Form of Government Clause "would be futile."

purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of

*[377 US 592]

action, because what *has been alleged or proved shows no violation of any constitutional right.

Before proceeding to my argument it should be observed that nothing done in Baker v Carr, supra, or in the two cases that followed in its wake, Gray v Sanders and Wesberry v Sanders, supra, from which the Court quotes at some length, forecloses the conclusion which I reach.

Baker decided only that claims such as those made here are within the competence of the federal courts to adjudicate. Although the Court stated as its conclusion that the allegations of a denial of equal protection presented "a justiciable constitutional cause of action," 369 US, at 237, 7 L ed 2d at 697, it is evident from the Court's opinion that it was concerned all but exclusively with *justiciability* and gave no serious attention to the question whether the Equal Protection Clause touches state legislative apportionments.[5] Neither the opinion of the Court nor any of the concurring opinions considered the relevant text of the Fourteenth Amendment or any of the historical materials bearing on that question. None of the materials was briefed or otherwise brought to the Court's attention.[6]

*[377 US 593]

*In the Gray case the Court expressly laid aside the applicability to state legislative apportionments of the "one person, one vote" theory there found to require the striking down of the Georgia county unit system. See 372 US, at 376, 9 L ed 2d at 827, and the concurring opinion of Stewart, J., joined by Clark, J., id., at 381–382, 9 L ed 2d at 831.

In Wesberry, involving congressional districting, the decision rested on Art I, § 2, of the Constitution. The Court expressly did not reach the arguments put forward concerning the Equal Protection Clause. See 376 US, at 8, note 10, 11 L ed 2d at 487.

Thus it seems abundantly clear that the Court is entirely free to deal with the cases presently before it in light of materials now called to its attention for the first time. To these I now turn.

I

A. *The Language of the Fourteenth Amendment.*

The Court relies exclusively on

5. It is fair to say that, beyond discussion of a large number of cases having no relevance to this question, the Court's views on this subject were fully stated in the compass of a single sentence: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." 369 US, at 226, 7 L ed 2d at 691. Except perhaps for the "crazy quilt" doctrine of my Brother Clark, 369 US, at 251, 7 L ed 2d at 705, nothing is added to this by any of the concurring opinions, id., at 241, 265, 7 L ed 2d at 700, 713.

6. The cryptic remands in Scholle v Hare, 369 US 429, 8 L ed 2d 1, 82 S Ct 916, and WMCA, Inc., v Simon, 370 US 190, 8 L ed 2d 430, 82 S Ct 1234, on the authority of Baker, had nothing to say on the question now before the Court.

that portion of § 1 of the Fourteenth Amendment which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and disregards entirely the significance of § 2, which reads:

"Representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote at any election for* the choice of electors for President and Vice President of the United States, Representatives in Congress, *the executive and Judicial officers of a State, or the members of the Legislature thereof, is denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged*, except for participation in

*[377 US 594]

rebellion, or *other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis added.)

The Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee,[7] which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States,[8] which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate.[9] Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way" abridge the right of their inhabitants to vote for "the members of the [State] Legislature," and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures precluded the suggestion that the first section was intended to have the result reached by the Court today. If indeed the words of the Fourteenth Amendment speak for themselves, as the majority's disregard of history seems to imply, they speak as clearly as may be against the construction which the majority puts on them. But we are not limited to the language of the Amendment itself.

*[377 US 595]

*B. *Proposal and Ratification of the Amendment.*

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

(i) Proposal of the amendment in Congress.—A resolution proposing what became the Fourteenth

7. See the Journal of the Committee, reprinted in Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914), 83–117.

8. See the debates in Congress, Cong Globe, 39th Cong, 1st Sess, 2459–3149, passim (1866) (hereafter Globe).

9. Globe 3040.

Amendment was reported to both houses of Congress by the Reconstruction Committee of Fifteen on April 30, 1866.[10] The first two sections of the proposed amendment read:

"SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of

*[377 US 596]

such male citizens *shall bear to the whole number of male citizens not less than twenty-one years of age."[11]

In the House, Thaddeus Stevens introduced debate on the resolution on May 8. In his opening remarks, Stevens explained why he supported the resolution although it fell "far short" of his wishes:

"I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this."[12]

In explanation of this belief, he asked the House to remember "that three months since, and more, the committee reported and the House adopted a proposed amendment fixing the basis of representation in such way as would surely have secured the enfranchisement of every citizen at no distant period," but that proposal had been rejected by the Senate.[13]

He then explained the impact of the first section of the proposed Amendment, particularly the Equal Protection Clause.

"This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the

*[377 US 597]

*law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the

10. Globe 2265, 2286.

11. As reported in the House. Globe 2286. For prior versions of the Amendment in the Reconstruction Committee, see Kendrick, op cit, supra, note 7, 83–117. The work of the Reconstruction Committee is discussed in Kendrick, supra, and Flack, The Adoption of the Fourteenth Amendment (1908), 55–139, passim.

12. Globe 2459.

13. Ibid. Stevens was referring to a proposed amendment to the Constitution which provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation." Globe 535. It passed the House, id., at 538, but did not muster the necessary two-thirds vote in the Senate, id., at 1289.

man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen."[14]

He turned next to the second section, which he said he considered "the most important in the article."[15] Its effect, he said, was to fix "the basis of representation in Congress."[16] In unmistakable terms, he recognized the power of a State to withhold the right to vote:

"If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive."[17]

*[377 US 598]

*Closing his discussion of the second section, he noted his dislike for the fact that it allowed "the States to discriminate [with respect to the right to vote] among the same class, and receive proportionate credit in representation."[18]

Toward the end of the debate three days later, Mr. Bingham, the author of the first section in the Reconstruction Committee and its leading proponent,[19] concluded his discussion of it with the following:

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. *The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.*"[20] (Emphasis added.)

He immediately continued:

"*The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a

*[377 US 599]

republican to a *despotic government, and thereby deny suffrage to the people."[21] (Emphasis added.)

14. Globe 2459.
15. Ibid.
16. Ibid.
17. Ibid.
18. Globe 2460.
19. Kendrick, op cit, supra, note 7, 87, 106; Flack, op cit, supra, note 11, 60-68, 71.
20. Globe 2542.
21. Ibid. It is evident from the context of the reference to a republican government that Bingham did not regard limitations on the right to vote or the denial of the vote to specified categories of individuals as violating the guarantee of a republican form of government.

He stated at another point in his remarks: . . . .

"To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that *the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.*"[22] (Emphasis added.)

In the three days of debate which separate the opening and closing remarks, both made by members of the Reconstruction Committee, every speaker on the resolution, with a single doubtful exception,[23] assumed without question that, as Mr. Bingham said, supra, "the second section excludes the conclusion that by the first section suffrage is subjected to congressional law." The assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders. Attached as Appendix A hereto are some of those statements. The resolution was adopted by the House without change on May 10.[24]

*[377 US 600]

*Debate in the Senate began on May 23, and followed the same pattern. Speaking for the Senate Chairman of the Reconstruction Committee, who was ill, Senator Howard, also a member of the Committee, explained the meaning of the Equal Protection Clause as follows:

"The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? . . . .

"*But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting.* The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]."[25] (Emphasis added.)

Discussing the second section, he expressed his regret that it did "not

22. Ibid.

23. Representative Rogers, who voted against the resolution, Globe 2545, suggested that the right to vote might be covered by the Privileges and Immunities Clause. Globe 2538. But immediately thereafter he discussed the possibility that the Southern States might "refuse to allow the negroes to vote." Ibid.

24. Globe 2545.

25. Globe 2766.

recognize the authority of the United States over the question of
*[377 US 601]
suffrage in the several States *at all . . . ."[26] He justified the limited purpose of the Amendment in this regard as follows:

"But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?

. . . . . .

"The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race . . . .

"*The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.*"[27] (Emphasis added.)

There was not in the Senate, as there had been in the House, a closing speech in explanation of the Amendment. But because the Senate considered, and finally adopted, several changes in the first and second sections, even more attention was given to the problem of voting rights there than had been given in
*[377 US 602]
the House. In the *Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise. Attached as Appendix B hereto are representative statements from the debates to that effect. After having changed the proposed amendment to the form in which it was adopted, the Senate passed the resolution on June 8, 1866.[28] As changed, it passed in the House on June 13.[29]

(ii) Ratification by the "loyal" States.—Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available.[30] There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before

26. Ibid.
27. Ibid.
28. Globe 3042.
29. Globe 3149.
30. Such evidence as there is, mostly committee reports and messages to the legislatures from Governors of the States, is to the same effect as the evidence from the debates in the Congress. See Ark House J 288 (1866–1867); Fla Sen J 8–10 (1866); Ind House J 47–48, 50–51 (1867); Mass Legis Doc, House Doc No. 149, 4–14, 16–17, 23, 24, 25–26 (1867); Mo Sen J 14 (1867); NJ Sen J 7 (Extra Sess 1866); NC Sen J 96–97, 98–99 (1866–1867); Tenn House J 12–15 (1865–1866); Tenn Sen J 8 (Extra Sess 1866); Va House J & Doc, Doc No. 1, 35 (1866–1867); Wis Sen J 33, 101–103 (1867). Contra: SC House J 34 (1866); Tex Sen J 422 (1866 App).

For an account of the proceedings in the state legislatures and citations to the proceedings, see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan L Rev 5, 81–126 (1949).

1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the

*[377 US 603]

spread of population.[31] *Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas.[32] Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

Nor were these state constitutional provisions merely theoretical. In New Jersey, for example, Cape May County, with a population of 8,349, and Ocean County, with a population of 13,628, each elected one State Senator, as did Essex and Hudson Counties, with populations of 143,839 and 129,067, respectively.[33] In the House, each county was entitled to one representative, which left 39 seats to be apportioned according to population.[34] Since there were 12 counties besides the two already mentioned which had populations over 30,000,[35] it is evident that there were serious dispro-

*[377 US 604]

portions in the House also. In *New York, each of the 60 counties except Hamilton County was entitled to one of the 128 seats in the Assembly.[36] This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292.[37] With seven more counties having populations over 100,000 and 13 others having populations over 50,000,[38] the disproportion in the Assembly was necessarily large. In Vermont, after each county had been allocated one Senator, there were 16 seats remaining to be distributed among the larger counties.[39] The smallest county had a population of 4,082; the largest had a population of 40,651 and there were 10 other counties with populations over 20,000.[40]

(iii) Ratification by the "reconstructed" States.—Each of the 10 "reconstructed" States was required

31. Conn Const, 1818, Art Third, § 3 (towns); NH Const, 1792, Part Second, § XXVI (direct taxes paid); NJ Const, 1844, Art IV, § II, cl 1 (counties); RI Const, 1842, Art VI, § 1 (towns and cities); Vt Const, 1793, c II, § 7 (towns).

In none of these States was the other House apportioned strictly according to population. Conn Const, 1818, Amend II; NH Const, 1792 Part Second, §§ IX–XI; NJ Const, 1844, Art IV, § III, cl 1; RI Const, 1842, Art V, § 1; Vt Const, 1793, Amend 23.

32. Iowa Const, 1857, Art III, § 35; Kan Const, 1859, Art 2, § 2, Art 10, § 1; Me Const, 1819, Art IV-Part First, § 3; Mich Const, 1850, Art IV, § 3; Mo Const, 1865, Art IV, § 2; NY Const, 1846, Art III, § 5; Ohio Const, 1851, Art XI, §§ 2–5; Pa Const, 1838, Art I, §§ 4, 6, 7, as amended; Tenn Const, 1834, Art II, § 5; W Va Const, 1861–1863, Art IV, § 9.

33. Ninth Census of the United States, Statistics of Population (1872) (hereafter Census), 49. The population figures, here and hereafter, are for the year 1870, which presumably best reflect the figures for the years 1866–1870. Only the figures for 1860 were available at that time, of course, and they would have been used by anyone interested in population statistics. See, e.g., Globe 3028 (remarks of Senator Johnson).

The method of apportionment is contained in NJ Const, 1844, Art IV, § II, cl 1.

34. NJ Const, 1844, Art IV, § III, cl 1. Census 49.

35. Ibid.

36. NY Const, 1846, Art III, §§ 2, 5. Census 50–51.

37. Ibid.

38. Ibid.

39. There were 14 counties, Census 67, each of which was entitled to at least one out of a total of 30 seats. Vt Const, 1793, Amend 23.

40. Census 67.

to ratify the Fourteenth Amendment before it was readmitted to the Union.[41] The Constitution of each was scrutinized in Congress.[42]

*[377 US 605]

Debates over readmission *were extensive.[43] In at least one instance, the problem of state legislative apportionment was expressly called to the attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House:

"I might refer to the apportionment of representatives. By this constitution representatives in the Legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely-populated parts of the State are those where there are very few negroes, the parts inhabited by the white rebels, the men who, coming in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those

*[377 US 606]

counties is entitled *to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants."[44]

The response of Mr. Butler is particularly illuminating:

"All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have

41. Act of Mar. 2, 1867, § 5, 14 Stat 429. See also Act of June 25, 1868, 15 Stat 73, declaring that the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, would be admitted to representation in Congress when their legislatures had ratified the Fourteenth Amendment. Other conditions were also imposed, including a requirement that Georgia nullify certain provisions of its Constitution. Ibid. Arkansas, which had already ratified the Fourteenth Amendment, was readmitted by Act of June 22, 1868, 15 Stat 72. Virginia was readmitted by Act of Jan. 26, 1870, 16 Stat 62; Mississippi by Act of Feb. 23, 1870, 16 Stat 67; and Texas by Act of Mar. 30, 1870, 16 Stat 80. Georgia was not finally readmitted until later, by Act of July 15, 1870, 16 Stat 365.

42. Discussing the bill which eventuated in the Act of June 25, 1868, see note 41, supra, Thaddeus Stevens said:

"Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. . . . They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union." Cong Globe, 40th Cong, 2d Sess, 2465 (1868). See also the remarks of Mr. Butler, supra and p. 553, infra.

The close attention given the various Constitutions is attested by the Act of June 25, 1868, which conditioned Georgia's readmission on the deletion of "the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision . . . ." 15 Stat 73. The sections involved are printed in Sen Ex Doc No. 57, 40th Cong. 2d Sess, 14–15.

Compare United States v Florida, 363 US 121, 124–127, 4 L ed 2d 1096, 1098–1100, 80 S Ct 1026.

43. See, e.g., Cong Globe, 40th Cong, 2d Sess, 2412–2413, 2858–2860, 2861–2871, 2896–2900, 2901–2904, 2927–2935, 2963–2970, 2998–3022, 3023–3029 (1868).

44. Cong Globe, 40th Cong, 2d Sess, 3090–3091 (1868).

found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House."[45]

The Constitutions of six of the 10 States contained provisions departing substantially from the method of apportionment now held to be required by the Amendment.[46] And, as in the North, the departures were as real in fact as in theory. In North Carolina, 90 of the 120 representatives were apportioned among the counties without regard to population, leaving 30 seats to be distributed by numbers.[47] Since there were seven counties with populations under 5,000 and 26 counties with populations over 15,000, the disproportions must have been widespread and substantial.[48] In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,-

*[377 US 607]

269 to *42,486, elected one Senator.[49] In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four.[50] These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively.[51]

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.

The facts recited above show beyond any possible doubt:

(1) that Congress, with full awareness of and attention to the possibility that the States would not afford full equality in voting rights to all their citizens, nevertheless deliberately chose not to interfere with the States' plenary power in this regard when it proposed the Fourteenth Amendment;

(2) that Congress did not include in the Fourteenth Amendment restrictions on the States' power to control voting rights because it believed that if such restrictions were included, the Amendment would not be adopted; and

(3) that at least a substantial majority, if not all, of the States which ratified the Fourteenth Amendment did not consider that in so doing, they were accepting limitations on their freedom, never before questioned, to regulate voting rights as they chose.

Even if one were to accept the majority's belief that it is proper entirely to disregard the unmistak-

*[377 US 608]

able implications *of the second section of the Amendment in construing the first section, one is confounded by its disregard of all this history. There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which con-

45. Id., at 3092.

46. Ala Const, 1867, Art VIII, § 1; Fla Const, 1868, Art XIV; Ga Const, 1868, Art III, § 3, ¶ 1; La Const, 1868, Tit II, Art 20; NC Const, 1868, Art II, § 6; SC Const, 1868, Art II, §§ 6, 8.

47. NC Const, 1868, Art II, § 6. There were 90 counties. Census 52–53.

48. Ibid.

49. SC Const, 1868, Art II, § 8; Census 60.

50. Fla Const, 1868, Art XIV.

51. Census 18–19.

cern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.

C. *After 1868.*

The years following 1868, far from indicating a developing awareness of the applicability of the Fourteenth Amendment to problems of apportionment, demonstrate precisely the reverse: that the States retained and exercised the power independently to apportion their legislatures. In its Constitutions of 1875 and 1901, Alabama carried forward earlier provisions guaranteeing each county at least one representative and fixing an upper limit to the number of seats in the House.[52] Florida's Constitution of 1885 continued the guarantee of one representative for each county and reduced the maximum number of representatives per county from four to three.[53] Georgia, in 1877, continued to favor the smaller counties.[54] Louisiana, in 1879, guaranteed each parish at least one representative in the House.[55] In 1890, Mississippi guaranteed each county one representative, established a maximum number of representatives, and provided that specified groups of counties should each have approximately one-third of the seats

*[377 US 609]

in the House, whatever *the spread of population.[56] Missouri's Constitution of 1875 gave each county one representative and otherwise favored less populous areas.[57] Montana's original Constitution of 1889 apportioned the State Senate by counties.[58] In 1877, New Hampshire amended its Constitution's provisions for apportionment, but continued to favor sparsely settled areas in the House and to apportion seats in the Senate according to direct taxes paid;[59] the same was true of New Hampshire's Constitution of 1902.[60]

In 1894, New York adopted a Constitution the peculiar apportionment provisions of which were obviously intended to prevent representation according to population: no county was allowed to have more than one-third of all the Senators, no two counties which were adjoining or "separated only by public waters" could have more than one-half of all the Senators, and whenever any county became entitled to more than three Senators, the total number of Senators was increased, thus preserving to the small counties their original number of seats.[61] In addition, each county except Hamilton was guaranteed a seat in the Assembly.[62] The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House.[63] Oklahoma's Constitution at the time of its admission to the union (1907) favored small counties by the use of partial ratios and a maximum number of seats in the House; in addition, no county was permitted to "take part" in the election of

*[377 US 610]

more than seven *representatives.[64]

52. Ala Const, 1875, Art IX, §§ 2, 3; Ala Const, 1901, Art IX, §§ 198, 199.
53. Fla Const, 1885, Art VII, § 3.
54. Ga Const, 1877, Art III, § III.
55. La Const, 1879, Art 16.
56. Miss Const, 1890, Art 13, § 256.
57. Mo Const, 1875, Art IV, § 2.
58. Mont Const, 1889, Art V, § 4, Art VI, § 4.
59. NH Const, 1792, Part Second, §§ IX, XI, XXVI, as amended.
60. NH Const, 1902, Part Second, Arts 9, 10, 25.
61. NY Const, 1894, Art III, § 4.
62. NY Const, 1894, Art III, § 5.
63. NC Const, 1876, Art II, § 5.
64. Okla Const, 1907, Art V, § 10.

Pennsylvania, in 1873, continued to guarantee each county one representative in the House.[65] The same was true of South Carolina's Constitution of 1895, which provided also that each county should elect one and only one Senator.[66] Utah's original Constitution of 1895 assured each county of one representative in the house.[67] Wyoming, when it entered the Union in 1889, guaranteed each county at least one Senator and one representative.[68]

D. *Today.*

Since the Court now invalidates the legislative apportionments in six States, and has so far upheld the apportionment in none, it is scarcely necessary to comment on the situation in the States today, which is, of course, as fully contrary to the Court's decision as is the record of every prior period in this Nation's history. As of 1961, the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices, ranging from straight area representation or guaranteed minimum area representation to complicated schemes of the kind exemplified by the provisions of New York's Constitution of 1894, still in effect until struck down by the Court to-

*[377 US 611]

day in No. 20, post p. 568.[69] *Since Tennessee, which was the subject of Baker v Carr, and Virginia, scrutinized and disapproved today in No. 69, post, p. 609, are among the 11 States whose own Constitutions are sound from the standpoint of the Federal Constitution as construed today, it is evident that the actual practice of the States is even more uniformly than their theory opposed to the Court's view of what is constitutionally permissible.

E. *Other Factors.*

In this summary of what the majority ignores, note should be taken of the Fifteenth and Nineteenth Amendments. The former prohibited the States from denying or abridging the right to vote "on account of race, color, or previous condition of servitude." The latter, certified as part of the Constitution in 1920, added sex to the prohibited classifications. In Minor v Happersett, 21 Wall 162, 22 L ed 627, this Court considered the claim that the right of women to vote was protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Court's discussion there of the significance of the Fifteenth Amendment is fully applicable here with respect to the Nineteenth Amendment as well.

"And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should

65. Pa Const, 1873, Art II, § 17.
66. SC Const, 1895, Art III, §§ 4, 6.
67. Utah Const, 1895, Art IX, § 4.
68. Wyo Const, 1889, Art III, § 3.
69. A tabular presentation of constitutional provisions for apportionment as of Nov. 1, 1961, appears in XIV Book of the States 1962-1963, 58-62. Using this table, but disregarding some deviations from a pure population base, the Advisory Commission on Intergovernmental Relations states that there are 15 States in which the legislatures are apportioned solely according to population. Apportionment of State Legislatures (1962), 12.

make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than
*[377 US 612]
that the greater must "include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?" Id., at 175, 22 L ed at 630.

In the present case, we can go still further. If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for *federal* officers, how can it be that the far less obvious right to a particular kind of apportionment of *state* legislatures—a right to which is opposed a far more plausible conflicting interest of the State than the interest which opposes the general right to vote—can be conferred by judicial construction of the Fourteenth Amendment?[70] Yet, unless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself unprotected, the conclusion is inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.

Mention should be made finally of the decisions of this Court which are disregarded or, more accurately, silently overruled today. Minor v Happersett, supra, in which the Court held that the Fourteenth
*[377 US 613]
Amendment did *not* *confer the right to vote on anyone, has already been noted. Other cases are more directly in point. In Colegrove v Barrett, 330 US 804, 91 L ed 1262, 67 S Ct 973, this Court dismissed "for want of a substantial federal question" an appeal from the dismissal of a complaint alleging that the Illinois legislative apportionment resulted in "gross inequality in voting power" and "gross and arbitrary and atrocious discrimination in voting" which denied the plaintiffs equal protection of the laws.[71] In Remmey v Smith, 102 F Supp 708 (D. C. E. D. Pa), a three-judge District Court dismissed a complaint alleging that the apportionment of the Pennsylvania Legislature deprived the plaintiffs of "constitutional rights guaranteed to them by the Fourteenth Amendment." Id., at 709. The District Court stated that it was aware that the plaintiffs' allegations were "notoriously true" and that "the practical disenfranchisement of qualified electors in certain of the election districts in Phila-

70. Compare the Court's statement in Guinn v United States, 238 US 347, 362, 59 L ed 1340, 1347, 35 S Ct 926, LRA 1916A 1124.

". . . Beyond doubt the [Fifteenth] Amendment does not take away from the state governments in a general sense the powor over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

71. The quoted phrases are taken from the Jurisdictional Statement, pp. 13, 19.

delphia County is a matter of common knowledge." Id., at 710. This Court dismissed the appeal "for the want of a substantial federal question." 342 US 916, 96 L ed 685, 72 S Ct 368.

In Kidd v McCanless, 200 Tenn 273, 292 SW2d 40, the Supreme Court of Tennessee dismissed an action for a declaratory judgment that the Tennessee Apportionment Act of 1901 was unconstitutional. The complaint alleged that "a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives." Id., at 276, 292 SW2d, at 42. Without dissent, this Court granted the motion to dismiss the appeal. 352 US 920, 1 L ed 2d 157, 77 S Ct 223. In Radford v Gary, 145 F Supp 541 (D. C. W. D. Okla), a three-judge District Court was

*[377 US 614]

*convened to consider "the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States." Id., at 542. The plaintiff alleged that he was a resident and voter in the most populous county of the State, which had about 15% of the total population of the State but only about 2% of the seats in the State Senate and less than 4% of the seats in the House. The complaint recited the unwillingness or inability of the branches of the state government to provide relief and alleged that there was no state remedy available. The District Court granted a motion to dismiss. This Court affirmed without dissent. 352 US 991, 1 L ed 2d 540, 77 S Ct 559.

Each of these recent cases is distinguished on some ground or other in Baker v Carr. See 369 US, at 235–236, 7 L ed 2d at 696. Their summary dispositions prevent consideration whether these after-the-fact distinctions are real or imaginary. The fact remains, however, that between 1947 and 1957, four cases raising issues precisely the same as those decided today were presented to the Court. Three were dismissed because the issues presented were thought insubstantial and in the fourth the lower court's dismissal was affirmed.[72]

72. In two early cases dealing with party primaries in Texas, the Court indicated that the Equal Protection Clause did afford some protection of the right to vote. Nixon v Herndon, 273 US 536, 71 L ed 759, 47 S Ct 446; Nixon v Condon, 286 US 73, 76 L ed 984, 52 S Ct 484, 88 ALR 458. Before and after these cases, two cases dealing with the qualifications for electors in Oklahoma had gone off on the Fifteenth Amendment, Guinn v United States, 238 US 347, 59 L ed 1340, 35 S Ct 926, LRA 1916A 1124; Lane v Wilson, 307 US 268, 83 L ed 1281, 59 S Ct 872. The rationale of the Texas cases is almost certainly to be explained by the Court's reluctance to decide that party primaries were a part of the electoral process for purposes of the Fifteenth Amendment. See Newberry v United States, 256 US 232, 65 L ed 913, 41 S Ct 469. Once that question was laid to rest in United States v Classic, 313 US 299, 85 L ed 1368, 61 S Ct 1031, the Court decided subsequent cases involving Texas party primaries on the basis of the Fifteenth Amendment. Smith v Allwright, 321 US 649, 88 L ed 987, 64 S Ct 757, 151 ALR 1110; Terry v Adams, 345 US 461, 97 L ed 1152, 73 S Ct 809.

The recent decision in Gomillion v Lightfoot, 364 US 339, 5 L ed 2d 110, 81 S Ct 125, that a constitutional claim was stated by allegations that municipal lines had been redrawn with the intention of depriving Negroes of the right to vote in municipal elections was based on the Fifteenth Amendment. Only one Justice, in a concurring opinion, relied on the

I have tried to make the catalogue complete, yet to keep it within the manageable limits of a judicial opinion. In my judgment, today's deci-
*[377 US 615]
sions are refuted by *the language of the Amendment which they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history and by consistent theory and practice from the time of the adoption of the Fourteenth Amendment until today.

II

The Court's elaboration of its new "constitutional" doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

In the Alabama cases (Nos. 23, 27, 41), the District Court held invalid not only existing provisions of the State Constitution—which this Court lightly dismisses with a wave of the Supremacy Clause and the re-
*[377 US 616]
mark *that "it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions," ante, p. 540—but also a proposed amendment to the Alabama Constitution which had never been submitted to the voters of Alabama for ratification, and "standby" legislation which was not to become effective unless the amendment was rejected (or declared unconstitutional) and in no event before 1966. Sims v Frink, 208 F Supp 431. See ante, pp. 516–521. Both of these measures had been adopted only nine days before,[73] at an Extraordinary Session of the Alabama Legislature, convened pursuant to what was very nearly a directive of the District Court, see Sims v Frink, 205 F Supp 245, 248. The District Court formulated its own plan for the apportionment of the Alabama Legislature, by picking and choosing among the provisions of the legislative measures. 208 F Supp, at 441–442. See ante, p. 521. Beyond that, the court warned the legislature that there would be still further judicial reapportionment unless the legislature, like it or not, undertook the task for itself. 208 F Supp, at 442. This Court now states that the District Court acted in "a most proper and commendable manner," ante, p. 541, and approves the District Court's avowed intention of taking "some further action" unless the State Legislature acts by 1966, ante, p. 542.

In the Maryland case (No. 29, post, p. 595), the State Legislature was called into Special Session and enacted a temporary reapportionment of the House of Delegates, under pressure from the state
*[377 US 617]
courts.[74] Thereafter, the *Maryland

Equal Protection Clause of the Fourteenth Amendment. Id., at 349, 5 L ed 2d at 118.

73. The measures were adopted on July 12, 1962. The District Court handed down its opinion on July 21, 1962.

74. In reversing an initial order of the Circuit Court for Anne Arundel County dismissing the plaintiffs' complaint, the Maryland Court of Appeals directed the lower court to hear evidence on and determine the plaintiffs' constitutional claims, and, if it found provisions of the Maryland Constitution to be invalid, to "declare that

Court of Appeals held that the Maryland Senate was constitutionally apportioned. Maryland Committee for Fair Representation v Tawes, 229 Md 406, 184 A2d 715. This Court now holds that neither branch of the State Legislature meets constitutional requirements. Post, p. 606. The Court *presumes* that since "the Maryland constitutional provisions relating to legislative apportionment [are] hereby held unconstitutional, the Maryland Legislature . . . has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions" which satisfy the Federal Constitution, id., at 607. On this premise, the Court concludes that the Maryland courts need not "feel obliged to take further affirmative action" now, but that "under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan." Id., at 608.

In the Virginia case (No. 69, post, p. 609), the State Legislature in 1962 complied with the state constitutional requirement of regular reapportionment.[75] Two days later, a complaint was filed in the District Court.[76] Eight months later, the

*[377 US 618]

legislative reapportionment was *declared unconstitutional. Mann v Davis, 213 F Supp 577. The District Court gave the State Legislature two months within which to reapportion itself in special session, under penalty of being reapportioned by the court.[77] Only a stay granted by a member of this Court slowed the process;[78] it is plain that no stay will be forthcoming in the future. The Virginia Legislature is to be given "an adequate opportunity to enact a valid plan"; but if it fails "to act promptly in remedying the constitutional defects in the State's legislative apportionment plan," the District Court is to "take further action." Post p. 618.

In Delaware (No. 307, post, p. 620), the District Court entered an order on July 25, 1962, which stayed proceedings until August 7, 1962, "in the hope and expectation" that the General Assembly would take "some appropriate action" in the intervening 13 days. Sincock v Terry, 207 F Supp 205, 207. By way of prodding, presumably, the court noted that if no legislative action were taken and the court sustained the plaintiffs' claim, "the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2 [the chal-

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the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election." Maryland Committee for Fair Representation v Tawes, 228 Md 412, 438–439, 180 A2d 656, 670. On remand, the opinion of the Circuit Court included such a declaration. The opinion was filed on May 24, 1962. The Maryland Legislature, in Special Session, adopted the "emergency" measures now declared unconstitutional seven days later, on May 31, 1962.

75. The Virginia Constitution, Art IV, § 43, requires that a reapportionment be made every 10 years.

76. The 1962 reapportionment acts were approved on Apr. 7, 1962. The complaint was filed on Apr. 9, 1962.

77. The District Court handed down its opinion on June 28, 1962, and gave the Virginia General Assembly until Jan. 31, 1963, "to enact appropriate reapportionment laws." 213 F Supp, at 585–586. The court stated that failing such action or an appeal to this Court, the plaintiffs might apply to it "for such further orders as may be required." Id, at 586.

78. On Dec. 15, 1962, The Chief Justice granted a stay pending final disposition of the case in this Court.

lenged provisions of the Delaware Constitution], might be held not to be a de jure legislature and its legislative acts might be held invalid and unconstitutional." Id., at 205–206. Five days later, on July 30, 1962, the General Assembly approved a proposed amendment to the State Constitution. On August 7, 1962, the District Court entered an order de-

*[377 US 619]

nying the *defendants' motion to dismiss. The court said that it did not wish to substitute its judgment "for the collective wisdom of the General Assembly of Delaware," but that "in the light of all the circumstances," it had to proceed promptly. 210 F Supp 395, 396. On October 16, 1962, the court declined to enjoin the conduct of elections in November. 210 F Supp 396. The court went on to express its regret that the General Assembly had not adopted the court's suggestion, see 207 F Supp, at 206–207, that the Delaware Constitution be amended to make apportionment a statutory rather than a constitutional matter, so as to facilitate further changes in apportionment which might be required. 210 F Supp, at 401. In January 1963, the General Assembly again approved the proposed amendment of the apportionment provisions of the Delaware Constitution, which thereby became effective on January 17, 1963.[79] Three months later, on April 17, 1963, the District Court reached "the reluctant conclusion" that Art. II, § 2, of the Delaware Constitution was unconstitutional, with or without the 1963 amendment. Sincock v Duffy, 215 F Supp 169, 189. Observing that "the State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time," id., at 191, the court gave the General Assembly until October 1, 1963, to adopt acceptable provisions for apportionment. On May 20, 1963, the District Court enjoined the defendants from conducting any elections, including the general election scheduled for November 1964, pursuant to the old or the new constitutional provisions.[80] This Court now ap-

*[377 US 620]

proves all these *proceedings, noting particularly that in allowing the 1962 elections to go forward, "the District Court acted in a wise and temperate manner." Post p. 629.[81]

79. The Delaware Constitution, Art XVI, § 1, requires that amendments be approved by the necessary two-thirds vote in two successive General Assemblies.

80. The District Court thus nailed the lid on the "box of time" in which everyone seemed to it "to be trapped." The lid was temporarily opened a crack on June 27, 1963, when Mr. Justice Brennan granted a stay of the injunction until disposition of the case by this Court. Since the Court states that "the delay inherent in following the state constitutional prescription for approval of constitutional amendments by two successive General Assemblies cannot be allowed to result in an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them," post, p. 630, the lid has presumably been slammed shut again.

81. In New York and Colorado, this pattern of conduct has thus far been avoided. In the New York case (No. 20, post, p. 568), the District Court twice dismissed the complaint, once without reaching the merits, WMCA, Inc. v Simon, 202 F Supp 741, and once, after this Court's remand following Baker v Carr, supra, 370 US 190, 8 L ed 2d 430, 82 S Ct 1234, on the merits, 208 F Supp 368. In the Colorado case (No. 508, post, p. 632), the District Court first declined to interfere with a forthcoming election at which reapportionment measures were to be submitted to the voters, Lisco v McNichols, 208 F Supp 471, and, after the election, upheld the apportionment provisions which had been adopted, 219 F Supp 922.

In view of the action which this Court now takes in both of these cases, there is little doubt that the legislatures of these two States will now be subjected to the same kind of pressures from the federal judiciary as have the other States.

Records such as these in the cases decided today are sure to be duplicated in most of the other States if they have not been already. They present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference. So far as I can tell, the Court's only response to this unseemly state of affairs is ponderous insistence that "a denial of constitutionally protected rights demands judicial protection," ante, p. 530. By thus refusing to recognize the bearing which a potential for

*[377 US 621]

*conflict of this kind may have on the question whether the claimed rights are in fact constitutionally entitled to judicial protection the Court assumes, rather than supports, its conclusion.

It should by now be obvious that these cases do not mark the end of reapportionment problems in the courts. Predictions once made that the courts would never have to face the problem of actually working out an apportionment have proved false. This Court, however, continues to avoid the consequences of its decisions, simply assuring us that the lower courts "can and . . . will work out more concrete and specific standards," ante, p. 537. Deeming it "expedient" not to spell out "precise constitutional tests," the Court contents itself with stating "only a few rather general considerations." Ibid.

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possi-

*[377 US 622]

ble *solutions, with varying political consequences, than reapportionment broadside.[82]

The Court ignores all this, saying only that "what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case," ante, p. 537. It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated

82. It is not mere fancy to suppose that in order to avoid problems of this sort, the Court may one day be tempted to hold that all state legislators must be elected in statewide elections.

districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States.

Although the Court—necessarily, as I believe—provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that "indiscriminate districting" is an invitation to "partisan gerrymandering," ante, p. 537, the Court nevertheless excludes virtually every basis for the formation of electoral districts other than "indiscriminate districting." In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

(1) history;[83]

(2) "economic or other sorts of group interests";[84]

(3) area;[85]

(4) geographical considerations;[86]

(5) a desire "to insure effective representation for sparsely settled areas";[87]

*[377 US 623]

*(6) "availability of access of citizens to their representatives";[88]

(7) theories of bicameralism (except those approved by the Court);[89]

(8) occupation;[90]

(9) "an attempt to balance urban and rural power."[91]

(10) the preference of a majority of voters in the State.[92]

So far as presently appears, the *only* factor which a State may consider, apart from numbers, is political subdivisions. But even "a clearly rational state policy" recognizing this factor is unconstitutional if "population is submerged as the controlling consideration . . . ."[93]

I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that "legislators represent people, not trees or acres," ante, p. 527; that "citizens, not history or economic interests, cast votes," ante, p. 538; that "people, not land or trees or pastures, vote," ibid.[94] All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their elec-

*[377 US 624]

tors only by speaking *for their interests—economic, social, political—many of which do reflect the place

83. Ante, p. 537.
84. Ante, pp. 537, 538.
85. Ante, p. 538.
86. Ibid.
87. Ibid.
88. Ibid.
89. Ante, pp. 535, 536.
90. Davis v Mann, 377 US 691, 12 L ed 2d 617.
91. Id., at 618.
92. Lucas v Forty-Fourth General Assembly, 377 US 736, 12 L ed 2d 647.
93. Ante, p. 539.
94. The Court does note that, in view of modern developments in transportation and communication, it finds "unconvincing" arguments based on a desire to insure representation of sparsely settled areas or to avoid districts so large that voters' access to their representatives is impaired. Ante, p. 538.

where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

CONCLUSION

With these cases the Court approaches the end of the third round set in motion by the complaint filed in Baker v Carr. What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, Wesberry v Sanders, supra, 376 US at 48, 11 L ed 2d at 509, I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitu-

*[377 US 625]

tion is *not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

I dissent in each of these cases, believing that in none of them have the plaintiffs stated a cause of action. To the extent that Baker v Carr, expressly or by implication, went beyond a discussion of jurisdictional doctrines independent of the substantive issues involved here, it should be limited to what it in fact was: an experiment in venturesome constitutionalism. I would reverse the judgments of the District Courts in Nos. 23, 27, and 41 (Alabama), No. 69 (Virginia), and No. 307 (Delaware), and remand with directions to dismiss the complaints. I would affirm the judgments of the District Courts in No. 20 (New York), and No. 508 (Colorado), and of the Court of Appeals of Maryland in No. 29.

APPENDIX A TO OPINION OF MR. JUSTICE HARLAN, DISSENTING

Statements made in the House of Representatives during the debate on the resolution proposing the Fourteenth Amendment.[1]

*[377 US 626]

*"As the nearest approach to justice which we are likely to be able to make, I approve of the second section that bases representation upon voters." 2463 (Mr. Garfield).

"Would it not be a most unprecedented thing that when this [former slave] population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here; that when they will not count them in apportioning their own legislative districts, we are to count them as five fifths (no longer as three fifths, for that is out of the question) as soon as you make a new apportionment?" 2464–2465 (Mr. Thayer).

"The second section of the amendment is ostensibly intended to remedy a supposed inequality in the basis of representation. The real object is to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." 2467 (Mr. Boyer).

"Shall the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?" 2468 (Mr. Kelley).

"I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." 2469 (Mr. Kelley).

"But I will ask, why should not the representation of the States be limited as the States themselves limit suffrage? . . . If the ne-

*[377 US 627]

groes of the South are *not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union?" 2498 (Mr. Broomall).

"It is now proposed to base representation upon suffrage, upon the number of voters instead of upon the aggregate population in every State of the Union." 2502 (Mr. Raymond).

"We admit equality of representation based upon the exercise of the elective franchise by the people. The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." 2508 (Mr. Boutwell).

"Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage.

1. All page references are to Cong Globe, 39th Cong, 1st Sess (1866).

This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." 2510 (Mr. Miller).

*[377 US 628]

*"Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." 2511 (Mr. Eliot).

"I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to

*[377 US 629]

public opinion. The situation *of opinion in these States compels us to look to other means to protect the Government against the enemy." 2532 (Mr. Banks).

"If you deny to any portion of the loyal citizens of your State the right to vote for Representatives you shall not assume to represent them, and, as you have done for so long a time, misrepresent and oppress them. This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." 2539–2540 (Mr. Farnsworth).

APPENDIX B TO OPINION OF MR. JUSTICE HARLAN, DISSENTING

Statements made in the Senate during the debate on the resolution proposing the Fourteenth Amendment.[1]

"The second section of the constitutional amendment proposed by the committee can be justified upon no other theory than that the negroes ought to vote; and negro suffrage must be vindicated before the people in sustaining that section, for it does not exclude the non-voting population of the North, because it is admitted that there is no wrong in excluding from suffrage aliens, fe-

1. All page references are to Cong Globe, 39th Cong, 1st Sess (1866).

males, and minors. But we say, if the negro is excluded from suffrage he shall also be excluded from the basis of representation. Why this inequality? Why this injustice? For injustice it would be unless there be some good reason for this discrimination against the South in excluding her non-voting population
*[377 US 630]
from the basis *of representation. The only defense that we can make to this apparent injustice is that the South commits an outrage upon human rights when she denies the ballot to the blacks, and we will not allow her to take advantage of her own wrong, or profit by this outrage. Does any one suppose it possible to avoid this plain issue before the people? For if they will sustain you in reducing the representation of the South because she does not allow the negro to vote, they will do so because they think it is wrong to disfranchise him." 2800 (Senator Stewart).

"It [the second section of the proposed amendment] relieves him [the Negro] from misrepresentation in Congress by denying him any representation whatever." 2801 (Senator Stewart).

"But I will again venture the opinion that it [the second section] means as if it read thus: no State shall be allowed a representation on a colored population unless the right of voting is given to the negroes—presenting to the States the alternative of loss of representation or the enfranchisement of the negroes, and their political equality." 2939 (Senator Hendricks).

"I should . . much better satisfied if the right of suffrage had been given at once to the more intelligent of them [the Negroes] and such as had served in our Army. But it is believed by wiser ones than myself that this amendment will very soon produce some grant of suffrage to them, and that the craving for political power will ere long give them universal suffrage. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accom-
*[377 US 631]
plish now, and hoping it may in *the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." 2963–2964 (Senator Poland).

"What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less." 2987 (Senator Cowan).

"Now, sir, in all the States—certainly in mine, and no doubt in all —there are local as contradistinguished from State elections. There are city elections, county elections, and district or borough elections, and those city and county and district elections are held under some law of the State in which the city or county or district or borough may be; and in those elections, according to the laws of the States, certain qualifications are prescribed, residence within the limits of the locality and a property qualification in some. Now, is it proposed to say that if every man in a State is not at liberty to vote at a city or a country or a borough election that is to affect the basis of representation?" 2991 (Senator Johnson).

"Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States . . . not only the right, but the exclusive right, to regulate the franchise. . . . It

says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong)
*[377 US 632]
which the Government *of the United States will be impotent to redress." 3027 (Senator Johnson).

"The amendment fixes representation upon numbers, precisely as the Constitution now does, but when a State denies or abridges the elective franchise to any of its male inhabitants who are citizens of the United States and not less than twenty-one years of age, except for participation in rebellion or other crime, then such State will lose its representation in Congress in the proportion which the male citizens so excluded bears to the whole number of male citizens not less than twenty-one years of age in the State." 3033 (Senator Henderson).

EDITOR'S NOTE

An annotation on "Inequalities in population of election districts or voting units as rendering apportionment unconstitutional" appears p. 1282, infra.

REAPPORTIONMENT:

New Election Districts in 1981

State Reapportionment Board
Pouch A
Juneau, Alaska 99811

Prepared: September 1980

I. WHAT IS REAPPORTIONMENT?

Reapportionment is the process of dividing the population of an area into election districts of equal numbers of persons for purposes of fair and effective representation in an elective body. Redistricting is drawing boundary lines for election districts of equal population.

Article VI of Alaska's constitution requires that reapportionment of election districts take place following each decennial census. The Governor is responsible for reapportionment with the assistance of a five-member advisory board.

The Board must submit its plan for reapportionment and redistricting to the Governor within 90 days following receipt of the official census data. The Governor, in turn, has 90 days to approve the plan and issue a proclamation of reapportionment and redistricting. Any changes from the Board's plan must be outlined in the Governor's proclamation.

II. COMPOSITION OF THE REAPPORTIONMENT BOARD

Article VI, Section 8 of Alaska's constitution provides for appointment of a five-member reapportionment board to act in an advisory capacity to the Governor. None of the members are to be public employees or officials. Appointments are to be made without regard to political affiliation. One member each is to be appointed from the Southeastern, Southcentral, Central, and Northwestern Senate Districts; the original geographic districts at the time of statehood.

The members of the Board are:

Kent Dawson, Juneau;

Cliff Groh, Anchorage;

Av Gross, Juneau;

John Holm, Fairbanks; and

John Schaeffer, Kotzebue.

III. HISTORY OF REAPPORTIONMENT IN ALASKA

The Organic Act of 1912 provided for a bicameral legislature. Two senators and four representatives were elected from each of the four judicial divisions. In 1942, the senate was enlarged to 16 members (four from each division) and the house was increased to 24 members to be apportioned among the four divisions based on population.

With statehood, Janauary 3, 1959, the four geographic districts were retained and 40 house members were apportioned into 24 election districts based on population. There were 16 senate districts with 20 members.

Following the 1960 census, reapportionment took place on December 7, 1961 and reduced the number of election districts from 24 to 19. The senate districts remained unchanged.

The U.S. Supreme Court decision in Reynolds v. Sims, 1964, established the one-man, one-vote doctrine. On September 3, 1965, the senate was reapportioned based on population and 11 senate districts were created, combining single and multi-member senate districts.

Reapportionment was again conducted following the 1970 census on December 30, 1971. That plan was successfully challenged by 13 members of the legislature because of failure to achieve the degree of equal population proportions which was practicable. The Alaska Supreme Court appointed two masters to prepare an interim apportionment plan for the 1972 elections.

After the 1972 elections, the Superior Court requested the Governor to prepare a permanent apportionment plan. On December 11, 1973 a new plan was issued and subsequently challenged. On June 6, 1974, the Alaska Supreme Court approved all aspects of the plan with the exception of specific districts that exceeded permissible population variances without adequate justification. The Governor amended the plan to comply with the findings of the court.

On June 26, 1974 the reapportionment plan was accepted. This plan represents the current election districts in Alaska. A copy of the election district map and a description of the boundaries is attached.

IV. CONSIDERATIONS FOR REAPPORTIONMENT

1980 Census Data -- Alaska's constitution requires that reapportionment be based on the official reporting of the U.S. Census. Receipt of the official census data for reapportionment purposes is not expected until April 1, 1981.

Time-frame -- The Reapportionment Board has only 90 days to prepare its plan following receipt of the official census data. Therefore, it is necessary for the Board to determine, prior to receipt of census data, where potential problem areas are and what the public perceives to be a fair and effective reapportionment plan.

One-person; one-vote doctrine -- the U.S. Supreme Court mandates that election districts be based on the principle of one person; one vote, or districts of equal population. In the majority opinion issued in Reynolds v. Sims, Chief Justice Earl Warren said, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." Justice Warren's statement has become a leading slogan in reapportionment reform.

Alaska's constitution prescribes that districts be composed of compact, contiguous territory containing as nearly as practicable a relatively integrated socio-economic area. Although some population deviation in a newly created district may be justified based on the constitutional guidelines, the foremost consideration is that of equal population.

Single-member v. Multi-member Election Districts -- The current reapportionment plan for Alaska has 22 election (house) districts and 16

senate districts. Ten of the 22 election districts are multi-member; having two or more representatives in one district. Three of the 16 senate districts are multi-member.

The Reapportionment Board has adopted a policy to create 40 single-member house districts in developing the 1981 reapportionment plan. However, the Board realizes there may be areas where a single-member house district may not be practicable and will take that into consideration in developing the final plan.

The courts have not indicated a preference for single or multi-member districts, or a combination of both. The Reapportionment Board believes that single-member house districts will result in greater accountability of legislators to their constituents; will shorten the length of the ballot, allowing voters to obtain more information regarding fewer candidates; will encourage voter participation in the electoral process; and will increase competition and selection between candidates.

Military Servicemembers -- Alaskan and U.S. court cases have determined that persons who are not residents of the State may be excluded from the population for reapportionment purposes. In Alaska, the military population, including servicemembers, spouses, and dependents, may contain significant numbers of non-residents. The Board is undertaking a survey through the University of Alaska, Institute of Social and Economic Research, to determine the number of non-residents to be excluded from the population for reapportionment purposes. The Institute will also develop a methodology for subtracting the numbers of non-residents from the appropriate census enumeration districts.

V. SUMMARY

Reapportionment is one of the most critical events that will take place in the 1980's. Creation of new election district boundaries will have an effect on every Alaskan and their representation in the state legislature.

The Reapportionment Board is dedicated to developing a plan that will provide fair and effective representation for all Alaskans. By following the guidelines established in the State Constitution and by various court decisions, the Board will construct, as nearly as practicable, districts of equal population based on the 1980 U.S. Census, composed of contiguous, compact territory, encompassing a relatively integrated socio-economic area, and excluding persons who do not consider themselves to be residents of Alaska from the population base for reapportionment purposes.

If you have additional suggestions following the hearing, please feel free to contact the Board at:

Reapportionment Board
Pouch A
Juneau, Alaska 99811.

Thanks for your help!

Hugh J. WADE, Secretary of State, State of Alaska, Appellant,

v.

James NOLAN et al., Appellees.

No. 731.

Supreme Court of Alaska.

May 20, 1966.

Proceeding involving question whether Governor of Alaska was authorized by Alaska constitution to reapportion Senate on interim basis after United States Supreme Court decisions had declared invalid "frozen" area apportionment plans such as that provided by constitution. The Superior Court, First Judicial District, James A. von der Heydt, J., entered judgment and appeal was taken. The Supreme Court, Nesbett, C. J., held that Governor and reapportionment board had implied power to reapportion Senate on an interim basis.

Judgment that Alaska Senate was unconstitutionally apportioned, affirmed and remainder of judgment set aside and ordered that new judgment in accordance with views of opinion be entered.

1. States ⇐27

Governor, with assistance of reapportionment board, must reapportion representation in house of representatives on method of equal proportions, every ten years. Const. art. 6, §§ 5, 6, 8-11.

2. States ⇐27

Governor must explain any deviation from reapportionment plan submitted to him by reapportionment board in connection with reapportioning representation in house of representatives. Const. art. 6, §§ 5, 6, 8–11.

3. States ⇐27

Any qualified voter can invoke power of courts to compel governor to reapportion or to correct any error made by him in reapportioning or redistricting. Const. art. 6, §§ 5, 6, 8–11.

4. States ⇐27

Reapportionment is not exclusively a law making function. Const. art. 6, §§ 3, 4, 10.

5. States ⇐27

Governor and reapportionment board are merely delegated the duty of determining a plan for application of constitutional formula for apportionment and once valid plan has been established and proclaimed it becomes law, or effective, by force of the Constitution. Const. art. 6, §§ 3, 4, 10.

6. Constitutional Law ⇐12

Often, what is implied is as much a part of Constitution as what is expressed.

7. States ⇐27

Governor and reapportionment board have implied power to reapportion Senate on an interim basis. Const. art. 6, § 1 et seq.; U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇐225(1)
States ⇐27

Alaska Senate which under constitutional apportionment then existing was apportioned so that 30.7 per cent of voters resided in districts which could elect a majority in Senate was unconstitutionally apportioned. Const. art. 6, § 1 et seq.; art. 14, § 2; U.S.C.A.Const. Amend. 14.

9. States ⇐27

Section of Alaska Constitution establishing "frozen" Senate districts based on area is invalid. Const. art. 6, § 1 et seq.; art. 14, § 2; U.S.C.A.Const. Amend. 14.

Warren C. Colver, Atty. Gen., Michael M. Holmes, Deputy Atty. Gen., Theodore E. Fleischer, Asst. Atty. Gen., Juneau, for appellant.

Avrum M. Gross, Faulkner, Banfield, Boochever & Doogan, Juneau, for appellees.

Before NESBETT C. J., and DIMOND and RABINOWITZ, JJ.

NESBETT, Chief Justice.

The principal question presented by this appeal is whether the Governor of Alaska was authorized by the Alaska Constitution to reapportion the Alaska Senate on an interim basis after United States Supreme Court decisions had declared invalid "frozen" area apportionment plans such as that provided by Section 2, Article XIV of the Alaska Constitution.

In the historic decision of Baker v. Carr,[1] decided by the Supreme Court of the United States on March 26, 1962 it was held that the apportionment of a state legislature was subject to review by the courts for a violation of the equal protection clause of the Fourteenth Amendment[2] for effecting a gross disproportion of representation to voting population.

In Reynolds v. Sims,[3] decided two years later on June 15, 1964, the United States Supreme Court held that the equal protection clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis. In accordance with the foregoing, the court held that the three reapportionment plans for Alabama which were being considered were unconstitutional and that upon the legislature's failure to act effectively to revise the invalid plans, the United States District Court acted properly in ordering its own temporary reapportionment plan into effect so that a reapportioned legislature could act effectively to adopt a permanent valid plan.

The decision in Reynolds v. Sims immediately posed the question of whether the Alaska State Senate was constitutionally apportioned on a population basis since Section 2, Article VI of the Alaska Constitution provides that members of the Senate shall be elected by the voters of the senate districts as set forth in Section 2 of Article XIV,[4] which latter section establishes senate districts based on area, defined by combining various house districts established by Section 1 of Article XIV, and prescribes the number of senators to be elected from each senate district.[5] Further, Section 7 of Article VI provides that the senate districts can be modified to reflect changes in house election districts, but that a senate district shall nevertheless retain its total number of senators and its approximate perimeter.[6]

Section 3 of Article VI provides that the Governor shall reapportion the House of Representatives immediately following each decennial United States census upon the basis of civilian population in each house election district as reported by the census.[7]

1. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

2. Sec. 1, Art. XIV of the United States Constitution in pertinent part states:
No State shall make or enforce any law which * * *; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

4. Sec. 2, Art. VI states:
Section 2. Senate Districts. Members of the senate shall be elected by the qualified voters of the respective senate districts. Senate districts shall be as set forth in Section 2 of Article XIV, subject to changes authorized in this article.

5. See note 5 on page 691.

6. Sec. 7, Art. VI states:
Section 7. Modification of Senate Districts. The senate districts, described in Section 2 of Article XIV, may be modified to reflect changes in election districts. A district, although modified, shall retain its total number of senators and its approximate perimeter.

7. Sec. 3, Art. VI states:
Section 3. Reapportionment of House. The governor shall reapportion the house of representatives immediately following the official reporting of each decennial census of the United States. Reapportionment shall be based upon civilian population within each election district as reported by the census.

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Section 4 of Article VI provides basically that reapportionment should be by the method of equal proportions.[8]

Sections 5 and 5, Article VI provide that the Governor, in carrying out his reapportionment duties, can change the size and area of house election districts within prescribed limits, and prescribes other criteria for reapportioning to maintain representation by equal proportions.

Section 8, Article VI requires the Governor to appoint a five member, non-political, area representative, Reapportionment Board to act in an advisory capacity to him.[9]

Sections 9 and 10, Article VI provides some basic organization and procedure for the Board and require it, acting on its own initiative, to submit to the Governor a plan for redistricting and reapportionment with-

5. Sec. 2, Art. XIV states:

Section 2. Senate Districts. Members of the senate shall be elected from the senate districts and in the number shown below:

Name of District	Composed of Election Districts	Number of Senators
A. Southeastern	1, 2, 3, 4, 5, and 6	2
B. Ketchikan-Prince of Wales	1 and 2	1
C. Wrangell-Petersburg-Sitka	3 and 4	1
D. Juneau-Yakutat	5 and 6	1
E. Southcentral	7, 8, 9, 10, 11 12, 13, and 14	2
F. Cordova-Valdez	7 and 8	1
G. Anchorage-Palmer	9 and 10	1
H. Seward-Kenai	11 and 12	1
I. Kodiak-Aleutians	13 and 14	1
J. Central	15, 16, 17, 18, 19, and 20	2
K. Bristol Bay-Bethel	15 and 16	1
L. Yukon-Kuskokwim	17 and 18	1
M. Fairbanks-Fort Yukon	19 and 20	1
N. Northwestern	21, 22, 23, and 24	2
O. Barrow-Kobuk	21 and 22	1
P. Nome-Wade Hampton	23 and 24	1

Note: The Governor's Reapportionment Proclamation of December 7, 1961, reapportioning the House, caused minor changes to be made in the allocation of election districts from that shown above. See AS Vol. 1, pp. 208-209.

8. Sec. 4, Art. VI states:

Section 4. Method. Reapportionment shall be by the method of equal proportions, except that each election district having the major fraction of the quotient obtained by dividing total civilian population by forty shall have one representative.

9. Sec. 8, Art. VI states:

Section 8. Reapportionment Board. The governor shall appoint a reapportionment board to act in an advisory capacity to him. It shall consist of five members, none of whom may be public employees or officials. At least one member each shall be appointed from the Southeastern, Southcentral, Central, and Northwestern Senate Districts. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

in ninety days following each decennial census. Within ninety days after receipt of the plan the Governor is required to issue a proclamation of reapportionment and redistricting, explaining his reasons for changing any part of the Board's plan.[10]

Section 11, Article VI permits any qualified voter to apply to the superior court to compel the Governor to perform his reapportionment duties or to correct any error in reapportionment or redistricting.

[1–3] It is clear from the foregoing provisions that the Governor, with the assistance of the Reapportionment Board, must reapportion representation in the House of Representatives on a method of equal proportions, every ten years; that he must explain any deviation from the reapportionment plan submitted to him by the Board and that any qualified voter can invoke the power of the courts to compel him to reapportion or to correct any error made by him in reapportioning or redistricting.

No specific provision is made for reapportioning the Senate. In carrying out his reapportionment of the House, the Governor is empowered to modify senate districts to reflect changes made in house election districts, but each senate district must retain its total number of senators and its approximate perimeters.[11] It is clear therefore, that representation in the Senate is determined by area rather than population, with no specific provision made for changing this plan.

Approximately two months after Reynolds v. Sims and on August 17, 1964, the Attorney General of Alaska, in response to a request from the Governor, issued an opinion advising that in his opinion the Governor had authority to reapportion the Alaska Senate. On August 18, 1964 the Governor issued a "Proclamation Concerning Reapportionment and Redistricting" which called the advisory board on reapportionment established by the Alaska Constitution into session. After holding publicized hearings throughout the state, the Reapportionment Board submitted a plan to the Governor on December 10, 1964. On March 6, 1965 the Governor issued a second proclamation which reconvened the Reapportionment Board for another publicized ninety days of hearings and study for the purpose of reconsidering its Senate reapportionment plan in the light of recent United States Supreme Court decisions. On June 8, 1965 the Reapportionment Board submitted a second plan to the Governor, who, on September 3, 1965, issued the Proclamation of Reapportionment and Redistricting which was intended to be applicable to the 1966 primary and general elections and which is the subject of this suit.

On the 21st day of February 1966, appellees applied to the Superior Court for the First Judicial District in Juneau for a permanent injunction to prohibit the appellant Secretary of State from conducting any election pursuant to the Governor's Proclamation of Reapportionment and Redistricting on the ground that he did not have the authority to declare the apportionment of the Alaska Senate in conflict with the Constitution of the United States and to direct the appellant to ignore the existing Alaska Constitution Senate ap-

10. Sec. 9, Art. VI states:

Section 9. Organization. The board shall elect one of its members chairman and may employ temporary assistants. Concurrence of three members is required for a ruling or determination, but a lesser number may conduct hearings or otherwise act for the board.

Sec. 10, Art. VI states:

Section 10. Reapportionment Plan and Proclamation. Within ninety days following the official reporting of each decennial census, the board shall submit to the governor a plan for reapportionment and redistricting as provided in this article. Within ninety days after receipt of the plan, the governor shall issue a proclamation of reapportionment and redistricting. An accompanying statement shall explain any change from the plan of the board. The reapportionment and redistricting shall be effective for the election of members of the legislature until after the official reporting of the next decennial census.

11. Supra, note 6.

portionment formula in holding statewide elections. Appellees alleged that if the appellart Secretary of State is permitted to conduct the 1966 primary and general elections for the Alaska Senate, as directed by the Governor's proclamation, the election will be invalid and deprive them of their rights of suffrage under Article V of the Alaska Constitution.

Both sides eventually moved for summary judgment and on April 12, 1966 the superior court entered a judgment decreeing that Section 2, Article XIV of the Alaska Constitution, which establishes the present apportionment of the Alaska Senate, is in conflict with and invalid under the Fourteenth Amendment to the United States Constitution; that the Governor's Proclamation of Reapportionment and Redistricting of September 3, 1965 was null and void and that appellant Secretary of State could not follow the terms of the proclamation in the conduct of the 1966 primary and general elections. The superior court retained jurisdiction, providing that if a valid constitutional amendment modifying the apportionment of the Alaska Senate was not adopted by December 1, 1967 the court would issue the necessary orders to insure that the 1968 primary and general elections would be held under an apportionment plan consistent with the Fourteenth Amendment to the United States Constitution.

Appellees argue that the Alaska Constitution "limits" the Governor's reapportionment authority to the House and "prohibits" him from reapportioning the Senate. Appellees mean to argue, no doubt, that the claimed limitation and prohibition result from the fact that the constitution only explicitly grants the Governor the power to reapportion the House and makes no provision whatever for reapportioning the Senate under any circumstance or contingency. They also argue that the present necessity to reapportion does not affect his authority to do so and that while the Constitutional Convention did not foresee present developments, it nevertheless clearly intended that any reapportionment of the Senate be by constitutional amendment.

Appellant argues that Article VI of the Alaska Constitution makes reapportionment an executive function; that those provisions of the constitution which "freeze" the Alaska Senate and exempt it from periodic reapportionment have been invalidated by the United States Supreme Court's reapportionment decisions and that the task of reapportioning Alaska's Senate thus fell to the Governor as a part of his reapportionment function. Appellant points out that in states where reapportionment is a legislative function, the courts have permitted and required legislatures to enact laws reapportioning "frozen" houses, even though the legislature may have no specific authority under the state constitution to reapportion a "frozen" house. In Alaska, where the constitution makes reapportionment an executive function, appellant argues the Governor has authority to reapportion a "frozen" house.

Appellees' argument that the Governor's reapportionment authority was limited to the House and that the constitution "prohibits" him from reapportioning the Senate are not logical conclusions to be drawn from that document. Neither conclusion can be logically inferred from the written provisions. The fact that the constitution places upon the Governor the affirmative duty to reapportion the House at stated periods while in the same article it freezes the Senate and makes no provision for the Governor or any other official or branch to reapportion it, is no basis for the conclusion that the Governor was prohibited from reapportioning the Senate, or, that the Constitutional Convention "clearly opposed" a reapportionment system for the Senate similar to the one they provided for the House, as appellees argue.

The fact is that the Convention drafted the constitution some seven years before Baker v. Carr was decided. At the time of its drafting and providing for a "frozen" Senate, that is, a body whose representation was permanently based on area rather

than according to population, the Convention was following the pattern established by the United States Constitution and later followed by many of the states of the Union with respect to one or the other of their legislative bodies. The Convention obviously did not want the Senate apportioned on a population basis; it had practical reasons for not doing so and had no reason to anticipate that it would ever be necessary to reapportion the Senate on a population or on any other basis, hence no specific provision was made for its reapportionment.

The question which is squarely presented is whether the acts of the Governor and his advisory Reapportionment Board in reapportioning the Senate were authorized by the Alaska Constitution.

Before attempting to discuss this question it is well to explain the origin of a unique feature of the reapportionment provisions of the Alaska Constitution. Whereas, traditionally, reapportionment had been made the responsibility of state legislatures, the Alaska Constitutional Convention purposely avoided placing any authority or responsibility for reapportionment in the legislature. The Convention was aware of the notorious and frequent failure or downright refusal of state legislatures to comply with their constitutional or statutory duty to reapportion. The Alaska Convention's reason for placing reapportionment responsibility in the Governor was well stated by its Chairman of the Committee on Suffrage, Elections and Apportionment, John S. Hellenthal, as follows:

> HELLENTHAL: * * * Now on the method of the composition of the reapportionment and redistricting board, because redistricting, as we have explained would be necessary, the Committee recommends that the stress be placed on the executive in determining which of these election districts and where redistricting shall take place, or reapportionment, and it recommends the creation of a five-man advisory board to advise the governor with regard to the redistricting and reapportionment. * * * The reason that this plan was adopted is that the students and writers seem generally in accord that reapportionment, for some reason or other, I don't know why, but it has been neglected where it has been left to the legislators. Maybe it's that human element I spoke of earlier, but anyway the experience of the nation shows that the thing is delayed—procrastination; that in the State of Washington they waited for years and years and years, and finally, only by resorting to the courts and the initiative were they able to reapportion Washington. It was costly, the people suffered. And based on that experience and the recommendations, and it's almost universal of the advisors, and by advisors I don't mean the men that were here necessarily—but the writers throughout the country, the executive board was chosen, an advisory board. (Minutes of the Alaska Constitutional Convention, January 11, 1956, at 1839).
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> Now there are other plans. There is no end of variations of plans that can be devised for the reapportionment with the mandamus feature, and you could have variance where a board can be picked—three from the legislature, three nominated by the judicial council, if you want, three of them nominated by some other group of civilians, some appointed by the governor, and get a good cross-section, and they could have the authority themselves to make the redistricting and reapportionment. There is no end to it, but the best thought seemed to indicate that the people would be best helped if it [reapportionment] were an executive function. * * * But it is the inaction of the legislature, as testified to by the universal history of the 48 states, that we're trying to overcome. [Id. at 1859.]
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> HELLENTHAL: It was felt that it [reapportionment] was a proper executive

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In its "Report to the People of Alaska" issued in February of 1956 the Constitutional Convention stated:

> Representation [in the legislature] will be kept up to date every ten years by an automatic reapportionment carried out by the governor on the advice of a board representing each of the four major districts and subject to review by the courts. Thus, the constitution guards against what has become a great evil in many states: a legislature that becomes more and more unrepresentative and loses public confidence because it refuses to reapportion itself. Alaska Legislative Council, Legislative Apportionment in Alaska, 1912–1961, p. 4 (1962).

A reading of the Convention minutes in relation to the reapportionment provisions makes it abundantly clear that it was the specific intent of the Convention to grant no authority to and to place no responsibility in the legislature with respect to reapportionment. In a clear and clean-cut departure from tradition, all of the authority and responsibility for reapportionment granted or assigned was placed in the Governor, assisted by a Reapportionment Board, including the authority to make minor changes in Senate districts. In an effort to make the reapportionment provisions as nearly self executing as possible, the Convention provided that the Reapportionment Board should automatically commence to function after the decennial census, without any direction from the Governor; that it must submit its plan within ninety days and that the Governor must proclaim a plan within ninety days of receipt from the Board, explaining any deviation from the Board's plan. Any qualified voter was empowered to resort to the courts to force the Governor to perform his reapportionment duties or to correct any error in redistricting or reapportionment.

Baker v. Carr and Reynolds v. Sims resulted in court declarations in many states that one or both of the legislative bodies was malapportioned. In almost every instance the state constitution had made no provision for reapportioning the "frozen" body on an interim basis until the constitution could be amended. Because of the wide variations in factual situations, most of the court decisions dealing with the question of where the authority lay to reapportion a frozen legislative body on an interim basis are not of great assistance.

It is significant, however, that in some states where reapportionment was a legislative responsibility, the courts have approved reapportionment by those state legislatures on an interim basis even though the respective state constitutions gave no specific authority to reapportion the particular frozen legislative body. Illustrative is Buckley v. Hoff[12] decided by the United States District Court in Vermont. In a previous decision, that court had declared both the House and the Senate malapportioned. The constitution required the legislature to reapportion the Senate after each United States census, but the House was frozen to provide one representative for each inhabited town, forever. The General Assembly, consisting of the members of the Senate and House, was only empowered by the constitution to regulate the mode of filling vacancies in House seats. Without any specific constitutional authority, the General Assembly provided reapportionment plans for the Senate and the House which were approved by the court. The authority of the General Assembly to reapportion was not questioned.[13]

12. 243 F.Supp. 873 (D.Vt.1964).

13. See: Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation where reapportionment of "frozen" legislative bodies by the legislatures of New Jersey, Connecticut and North Dakota, was accomplished even though the constitutions gave no such specific authority. Pages 205–207, 374–375 and 304–306.

In some states where the constitutions placed reapportionment authority and responsibility in boards or commissions, the courts have recognized the authority of a board or commission to reapportion a "frozen" legislative body on an interim basis, although not specifically granted such power by the constitution.

A Board of Apportionment consisting of the Governor, Attorney General and Secretary of State was given authority by the Arkansas Constitution to reapportion the House and the Senate. The constitution was amended to "freeze" the Senate and remove the Board's power to reapportion it. This constitutional amendment was held invalid by a United States District Court, for having created a malapportioned Senate. The Supreme Court of Arkansas then, in Faubus v. Kinney,[14] held as a matter of state law that the Board of Apportionment was the proper authority to reapportion the Senate, even though it no longer had specific written constitutional authority to do so. The court held that invalidation of the unconstitutional amendment brought the original provision into force. Also, that the intent of the people, expressed in the constitution, that the Board of Apportionment accomplish reapportionment, made the Board the proper authority to undertake interim reapportionment.

In Michigan a constitutionally created Commission on Legislative Apportionment was given authority to reapportion. In In re Apportionment of Michigan Legislature[15] the court, in a decision in which most of the justices participated, seems to have held that the Commission had authority to reapportion, apparently to the exclusion of the legislature.[16]

[4] Appellees argue that reapportionment is a lawmaking function in which the Governor's only part is to recommend laws which he thinks wise and to veto laws he thinks bad, citing Youngstown Sheet & Tube Co. et al. v. Sawyer.[17] This argument and the authority cited do not fit the facts of the case before us. In the first place, there is no substance to the conclusion that reapportionment is exclusively a lawmaking function. Many states now make it the exclusive responsibility of boards or commissions. Reapportionment under the Alaska Constitution, for example, might more properly be defined to be the determination of a plan for the application of a representation formula, which plan once established and proclaimed, becomes law by the operation of our constitution. For example: Sec. 4, Art. VI states that "Reapportionment shall be by the method of equal proportions * * *". This establishes the formula. Sec. 3, Art. VI states "The Governor shall reapportion * * *", definitely placing in the executive the full authority and responsibility. Sec. 10, Art. VI provides that after receipt of the "plan" from the Reapportionment Board, the Governor shall issue his proclamation which "* * * shall be effective for the election of members of the legislature * * *".

[5] Thus, it is apparent that the Governor and the Reapportionment Board are merely delegated the duty of determining a plan for application of the constitutional

14. 239 Ark. 443, 389 S.W.2d 887, 892 (1965).

15. 370 Mich. 410, 137 N.W.2d 495, 507, 512 (1965),

16. Note the remarks of Justice Black at 137 N.W.2d at 510:

> * * * I do not believe that a voting majority of the electors would have voted for the proposed constitution had it not included section 6 or some separate-from-the-legislature counterpart thereof. Surely my Brother forgets that the people of Michigan learned, over a long period of years, one thing the hard way, that is, they could not trust any legislature to district and apportion itself according to any validly imposed constitutional principle or plan which might collide with self-perpetuation in office.

17. 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

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Youngstown Sheet & Tube, cited by appellees, is not in point. There the President had directed the Secretary of Commerce to seize and operate most of the nation's steel mills because of a labor dispute, in order to avoid a national catastrophe and in the interest of national defense. There was no statutory authority and the Supreme Court held there was no constitutional authority to seize private property under the circumstances, even though an emergency was alleged to have existed.

We are urged in effect to imply that since the constitution has not, in so many words, given the Governor the power to reapportion the frozen Senate, that it intended to "specifically deny" or "prohibit" him from exercising this power even on an interim basis.

The observation of Justice Miller in Ex parte Yarbrough[18] is appropriate to be considered in relation to the problem of constitutional construction before us. The question before the court was whether an act of Congress punishing conspiracies to intimidate any citizen in the free exercise of his vote was constitutional. The opinion states at 110 U.S. 658, 4 S.Ct. 155, 28 L.Ed. 276:

> The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. (Justice Miller's emphasis)

Appellant aptly quotes the famous observation of Justice Holmes in Bain Peanut Co. v. Pinson[19] that:

> The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

In M'Culloch v. Maryland[20] the Supreme Court of the United States held that there was nothing in the Constitution of the United States which excluded incidental or implied powers. Chief Justice Marshall stated:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The court held that Congress had the implied power to incorporate the Bank of the United States, establish branches in the states and that the states could not tax them.

In Gibbons v. Ogden[21] the Supreme Court of the United States held that the specific constitutional grant to Congress

18. 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884).

19. 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482, 491 (1930).

20. 4 Wheat. 316, 421, 4 L.Ed. 579, 605 (1819).

21. 9 Wheat. 1, 189, 6 L.Ed. 23, 68 (1824).

of the power "* * * to regulate commerce * * *" implied the exclusive power to regulate navigation.

The foregoing historic decisions have greatly influenced the affairs of our nation and demonstrate the wisdom of Justice Holmes' admonition that the interpretation of constitutional principles must not be too literal. The court, in M'Culloch v. Maryland could have held that since the constitution did not specifically so authorize, Congress could not incorporate a bank or establish branches. If the court in Gibbons v. Ogden had applied a literal construction to the grant of power to Congress "* * * to regulate commerce * * *" and held that since navigation was not specifically mentioned it was not to be logically implied as an included power, it would have gone unregulated to the extent that it is today, to the detriment of our national welfare.

Appellant has appropriately referred us to the observation of Justice Stone in United States v. Classic:[22]

> We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

[6] The facts before us were not anticipated by the Convention. It is appropriate, therefore, that we attempt to determine from Article VI as a whole and appropriate Convention Minutes, what was the pervading purpose and intent of the Convention. We must then determine whether a fair interpretation of the various provisions of Article VI will support a construction which permits accomplishment of this purpose, bearing in mind that often "* * * what is implied is as much a part of the instrument as what is expressed."

Using this approach, we have concluded that it is more reasonable and logical to imply that had the Convention been able to anticipate the need to reapportion the Senate on an interim or any other basis, it would have specifically given the Governor the same power to reapportion the Senate as it gave him to reapportion the House. The Convention obviously believed that orderly and representative government required that some authority, other than the legislature, should periodically reapportion the House, rather than depend upon constitutional amendment or a constitutional convention to do this. We find no basis for inferring that had it known that the Senate would in the future require periodic reapportionment, that it would not have placed this responsibility in the Governor also, rather than leave it to the cumbersome, expensive, and demonstrably ineffective remedy of constitutional amendment which must be initiated by the legislature.

The Convention gave the Governor the power to alter Senate districts within limits. Since it justifiably felt in 1956, that the Senate could remain permanently frozen, there was no reason to grant the power to do any other thing with respect to representation in the Senate. What is significant is that, to the extent that any power was given with respect to the Senate, it was given to

22. 313 U.S. 299, 316, 61 S.Ct. 1031, 1038, 85 L.Ed. 1368, 1378 (1940).

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The Convention's reason for placing reapportionment authority and responsibility in the Governor was because over the years it had been forcefully demonstrated on a nationwide scale that state legislatures would not reapportion themselves. The more malapportioned they became with the passage of time, the less likely it became that the representatives would reapportion themselves out of office. Knowing that the Convention was aware of and attempting to avoid this national evil, it is only reasonable to imply that it would have required the Governor to periodically reapportion the Senate had it known that its frozen formula would be declared invalid.

Appellees argue that the Convention intended that the Senate be reapportioned only by constitutional amendment or by constitutional convention. Section 1, Article XIII of the Alaska Constitution provides that amendments to the constitution may be proposed by a two-thirds vote of each house of the legislature.[23] This may have been their intent when they believed that a "frozen" Senate could remain "frozen" forever. On the other hand, if they could have anticipated that the "frozen" Senate would become illegal and would require periodic reapportionment, it is almost a certainty that they would not have left reapportionment to be performed by constitutional amendment. A malapportioned Senate is no more likely to propose a constitutional amendment to reapportion itself than it would be to perform reapportionment on itself. Section 2, Article XIII states that "The legislature may call constitutional conventions at any time." But there would be no more reason to expect that a malapportioned Senate would join in calling a constitutional convention to reapportion many of its seats than it would be to voluntarily reapportion itself. We know the Convention was aware of these facts. The most logical assumption, therefore, is that had it been able to anticipate Baker v. Carr, the Convention would undoubtedly have rescued the people from the same evil that it had saved them from as to the House and have given the Governor the power and duty to reapportion the Senate.[24]

Appellees quote and rely upon an exchange between Delegate McNealy, Chairman Hellenthal and Delegate Nolan, reported in Minutes of Alaska Constitutional Convention pages 1884–87 as evidencing a Convention intent relevant to the construction question before us. Delegate McNealy's question, in substance, was to inquire of Chairman Hellenthal whether, under the proposed frozen Senate apportionment based on area, if the population of the Fourth Judicial District increased to twice

23. Sec. 1, Art. XIII states:

> Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The secretary of state shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next statewide election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the secretary of state.

24. That amendment by constitutional convention can be uncertain, cumbersome and expensive is evident. The malapportioned Senate must first voluntarily join in calling a constitutional convention for the purpose of reapportioning itself. There must then be a statewide election of delegates to the Constitutional Convention, the Convention itself and finally, ratification by the people. In the case before us the earliest that the legislature could call a constitutional convention would be January of 1967, unless a special session were called. It is unlikely therefore, that a convention could remedy Senate malapportionment before late 1967 or early 1968. The legislature can propose amendments to the constitution. In the case before us two-thirds of the members of the malapportioned Senate must agree to a proposed amendment to reapportion the Senate. The Secretary of State would then place the proposal on a ballot which would not be voted on by the people until the next statewide election. See: Sec. 1, Art. XIII Alaska Const.

that of the rest of Alaska and even though it was as large in area as all the rest of Alaska, would the Senatorial districts nevertheless remain the same? The following then transpired:

HELLENTHAL: That is correct.

McNEALY: And there would be a great possibility that they would never change?

HELLENTHAL: I would not attempt to say that.

McNEALY: I guess that is a political matter.

* * * * * *

NOLAN: The third question is, I think it was answered in response to a question by Mr. McNealy, that the senatorial districts are fixed permanently without a constitutional amendment?

HELLENTHAL: That is correct, subject to the minor modification that we discussed last night and this morning, and which will be handed to you on this slip sheet this morning in a few minutes.

The most that can be said for the intent expressed by Delegate Nolan and Chairman Hellenthal in 1956 is that it had a definite relevance to Convention proceedings and compromises as of that time. It was entirely consistent with the existing national concept of fairness which permitted apportioning one body of a bicameral legislature based on area and freezing that apportionment. But the intent expressed then is not relevant to an analysis of the present problem. The delegates were conscientious, dedicated people. If they could have anticipated that their apportionment of the Senate would later be declared unfair and invalid, we do not believe they would have left the people of Alaska in the position of having to depend upon a malapportioned Senate to voluntarily propose a constitutional amendment or join in a call for a constitutional convention in order to correct what had been declared to be an unfairness.

We are convinced that the Alaska Constitutional Convention intended that reapportionment, to the extent provided for, be regularly performed, that the full authority and responsibility for carrying out this duty be placed on the Governor who could be forced to perform his duty by the courts at the instance of any qualified voter and who was to be assisted by the Reapportionment Board. No part of the authority or responsibility was intended to be entrusted to the legislature. It was not intended by the Convention that the frozen Senate ever be reapportioned because the delegates had finally agreed upon the "frozen", area apportionment plan of representation, only after long negotiation and compromise.[25]

Unanticipated changes in the law of the land have invalidated the Senate apportionment and now require that the Senate be expeditiously reapportioned on a population basis. Four years have elapsed since Baker v. Carr and two years since Reynolds v. Sims during which time the Alaska legislature has not called a constitutional convention or proposed a constitutional amendment to reapportion the Senate. The Governor and the Reapportionment Board have reapportioned the Senate in the same manner that the constitution requires them to reapportion the House.

[7] An enlightened construction of Article VI which permits realization of its fundamental purpose, that reapportionment not be dependent in any manner on legislative initiative and that effective means of enforcement be readily available to any voter, is that its remaining constitutional provisions provide the implied power in the Governor and the Reapportionment Board to reapportion the Senate on an interim basis and we so hold.

Since the appellees do not question the validity of the reapportionment plan proclaimed by the Governor on September 3, 1965 with respect to the requirements of the equal protection clause of the Fourteenth Amendment, it is declared to be effective for the 1966 primary and general elections and thereafter until the Alaska Constitution

25. Minutes of Alaska Constitutional Convention p. 1881.

has been amended to provide a valid, permanent reapportionment plan for the Senate.

[3, 9] Since the evidence clearly established that under the existing constitutional apportionment of the Senate 30.7 per cent of the voters reside in districts which could elect a majority in the Senate, we affirm the superior court's judgment that the Alaska Senate is unconstitutionally apportioned and that Section 2, Article XIV of the Alaska Constitution is unconstitutional.

The remainder of the judgment below is set aside and it is ordered that a new judgment in accordance with the views expressed in this opinion be entered.

The foregoing decision makes it unnecessary to pass upon any of the other points briefed and argued by the parties.

RABINOWITZ, J., concurs in the result.

RABINOWITZ, Justice (concurring in the result).

Although I agree with the result reached by the majority, I differ with the majority's reasons for its conclusion. A search for the probable intent of the framers of Alaska's Constitution had they anticipated *Baker* and *Reynolds* involves considerable speculation. If speculation is apposite here, then it is just as logical to conclude that the framers would have vested reapportionment in the legislature had they anticipated that effective judicial relief from a malapportioned legislature would be available to any citizen by virtue of the reapportionment decisions of the United States Supreme Court. For the reasons stated hereafter, I would have avoided any attempt to determine the intent of the Alaska Constitutional Convention in this situation.

Subsequent to Alaska's admission to statehood on January 3, 1959, the United States Supreme Court in Baker v. Carr [1] held that the apportionment of state legislatures was subject to review by courts on equal protection grounds. Two years after this landmark decision, the United States Supreme Court concluded that both houses of a bicameral legislature must, under the Equal Protection Clause of the fourteenth amendment, be apportioned substantially on an equal population basis. The Supreme Court further held that it was immaterial whether or not the electorate had the remedy of the initiative or had in fact adopted a malapportioned legislature by majority vote. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964); Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964); Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964). These decisions of the Supreme Court have been characterized "as one of the most far-reaching series of decisions in the history of American constitutionalism." [2] In requiring equal population districts for both houses of a bicameral legislature, the Supreme Court articulated the constitutional standard in terms of "substantial equality of population among the various districts" [3] and "as nearly of equal population as is practicable." [4]

1. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).
2. Dixon, Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 Mich.L.Rev. 209 (1964).
3. Reynolds v. Sims, supra, at 579, 84 S.Ct. at 1390, 12 L.Ed.2d at 537.
4. Id. at 577, 84 S.Ct. at 1390, 12 L.Ed.2d at 536. Note: The Supreme Court added another test, namely a prohibition on "crazy quilts, completely lacking in rationality." Reynolds v. Sims, at 568, 84 S.Ct. at 1385, 12 L.Ed.2d at 531. Compare this latter test with the superior court's judgment where it is stated "that it dilutes their right to representation in the Alaska State Legislature on irrational bases."

Subsequent to the Supreme Court's historic decisions in the reapportionment cases, the Attorney General of the State of Alaska issued an opinion on August 17, 1964, advising the Governor that in his opinion the Governor had authority to reapportion the Senate. On August 18, 1964, the Governor issued a "Proclamation Concerning Reapportionment and Redistricting" which called the Advisory Reapportionment Board created by Alaska Constitution, article VI, section 8 into session. After holding publicized hearings throughout the state the Board submitted a report to the Governor on December 10, 1964. Thereafter, on March 6, 1965, the Governor issued a second "Proclamation Concerning Reapportionment and Redistricting" which reconvened the Advisory Board for another publicized ninety days of hearings and study. On June 8, 1965, the Board submitted a second report to the Governor. Then on September 3, 1965, the Governor issued the now questioned "Proclamation of Reapportionment and Redistricting" which was intended to govern the 1966 primary and general elections.

Review of the proposed reapportionment of the Senate under the Governor's September 3, 1965, "Proclamation of Reapportionment and Redistricting" demonstrates that the Senate would thereby be apportioned on the basis of substantially equal population districts in accordance with the Equal Protection Clause. Under the Governor's plan the maximum population-variance ratio is 1.47 to 1 contrasted to existing gross malapportionment ratio of 18.7 to 1. The theoretical minimum percentage of Alaska's population that could elect a majority of the Senate under the Governor's plan is 50.3 per cent of the voters. Under the existing constitutional provisions pertaining to apportionment of Alaska's Senate, 30.7 per cent of the voters reside in districts which theoretically may elect a majority in the Senate.

It is established that both federal and state courts may pass on the constitutionality of an apportionment scheme. In Maryland Comm. for Fair Representation v. Tawes,[5] the Supreme Court of the United States stated "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."[6] The issues pertaining to apportionment of Alaska's Senate raised below and now raised on appeal are properly before this court for adjudication.

I am of the opinion that the superior court correctly held that the Alaska Senate is unconstitutionally apportioned under the Equal Protection Clause standards articulated by the United States Supreme Court in *Reynolds* and its companion reapportionment decisions. Whether the maximum population-variance ratio[7] or the theoretical minimum percentage of population which

5. Supra page 701, 377 U.S. at 674, 84 S.Ct. at 1430, 12 L.Ed.2d at 607.

6. See also Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 1527, 14 L.Ed.2d 477, 478 (1965), where in a per curiam opinion the Supreme Court said:

> We believe that the District Court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.

Note: Subsequent to the superior court's entry of judgment in this case an action was filed in the United States District Court for the District of Alaska. Plaintiffs in this federal action seek in part a declaration as to the unconstitutionality of the Alaska Const. art. XIV, § 2; an injunction against the superior court's ordering of elections to be held pursuant to art. XIV, § 2; and request the District Court to adopt a provisional plan of apportionment for the Senate for purposes of the forthcoming 1966 primary and general elections.

7. This ratio is obtained by comparing the largest to the smallest population per member of the legislative body in question.

could elect a majority of the Alaska Senate [8] is used as the measure of representativeness, the conclusion is the same. The "frozen" apportionment of the Alaska Senate under our constitution has resulted in a grossly malapportioned Senate. The existing apportionment of the Alaska Senate provided for under our constitution fails to meet the Equal Protection Clause's standards of "substantial equality of population among the various districts" or that of Senate election districts composed of "as nearly of equal population as is practicable." In short, the right to vote of appellees, and all other persons similarly situated, for state senators is unconstitutionally impaired and diluted under the existing apportionment of the Alaska Senate. Therefore, article XIV, section 2 of the Alaska Constitution is unconstitutional.

The right to vote in question in this case is an individual and personal right protected by the Equal Protection Clause. This was made clear in *Reynolds*,[9] where the Supreme Court said:

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States v. Bathgate, 246 U.S. 220, 227, 38 S.Ct. 269, 271, 62 L.Ed. 676 [680], '[t]he right to vote is personal * * *.' While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote.

Under the reapportionment decisions of the United States Supreme Court to which I have previously alluded, it is the function of this court to assure adherence to the Equal Protection Clause. My view of the manner in which this personal constitutional right of the electorate in the State of Alaska is to be vindicated differs from that held by the court below. Crucial to my conception of an apposite remedial vindication of this constitutionally protected right is that portion of *Reynolds* [10] where, in regard to the timing of an appropriate remedy, the Supreme Court stated:

> Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. *It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.* In awarding or withholding immediate relief, a court is entitled to and should consider the

8. This theoretical minimum percentage is obtained by ranking the various Senate election districts from the smallest population per member to the largest and then accumulating from the smallest district upwards until the point is reached where a given percentage of the population has the power to elect a majority of the Senate.

Other measurement tests, such as percentage deviation from the ideal district, also demonstrate that the Alaska Senate is grossly malapportioned.

9. Id. 377 U.S. at 561, 84 S.Ct. at 1381, 12 L.Ed.2d at 527.

10. Id. 377 U.S. at 585, 84 S.Ct. at 1393, 12 L.Ed.2d at 541.

proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. (Emphasis furnished.) [11]

Inherent in the decision of this case is an element which had been aptly characterized by counsel for appellees as that of "balancing"—that is, the weighing of the necessity for vindication of the individual's constitutionally protected right to vote for a constitutionally apportioned legislature against the interest of affording the "proper political agencies" of the State the opportunity to reapportion the Alaska Senate prior to the adoption by the courts of any interim reapportionment plan. In appellees' view, the proper political agencies are either a constitutional convention or legislatively initiated amendment to Alaska's Constitution providing for reapportionment of the Senate. In view of the total circumstances of this case and under my interpretation of *Reynolds*, I am of the opinion that the superior court erred in not adopting an interim reapportionment plan once the court found article XIV, section 2 unconstitutional. On the balance, I conclude that considerations compelling the taking of appropriate action to effectuate the right to vote involved here and "to insure that no further elections are conducted under the invalid" provisions of article XIV, section 2 of the Alaska Constitution are paramount.

I reach this conclusion for the following reasons. First: I find lacking the "unusual case" which would justify the superior court's refraining from undertaking appropriate action to insure that no further elections were conducted under article XIV, section 2's unconstitutional apportionment plan. Admittedly when this case was before the superior court, the impending primary election was imminent.[12] Yet the then existing circumstances in regard to the impending primary are perhaps unique in the history of apportionment litigation since *Reynolds*. This element of uniqueness is derived from the fact that subsequent to the issuance by the Governor of his September 3, 1965 "Proclamation of Reapportionment and Redistricting" appellant had taken steps to carry out the Governor's reapportionment plan and candidates had filed under this reapportionment plan. Whatever dislocation or interference in the State's election machinery that has occurred is attributable to the superior court's judgment which, on April 12, 1966 (for the first time in regard to the 1966 primary and general elections), brought into play the invalid apportionment scheme called for by article XIV, section 2 of the Alaska Constitution. In light of these circumstances, what I find lacking are relevant equitable principles which would justify departure from the implementation mandate of *Reynolds* in regard to the formulation of an appropriate judicial remedy.[13]

11. In 70 Harv.L.Rev. 1228, 1266 (1966), it is stated:

> A court must decide two questions when it fashions a remedy: (1) *whether the next election is so imminent that the court should not interfere in the election process at all*, and (2) if it does decide to act, either before the election or after it, what remedy is then most appropriate. (Emphasis furnished.)

12. The filing deadline for the primary election is June 1, 1966.

13. In reaching this conclusion I reject appellant's contention that the reapportionment decisions of the Supreme Court of the United States have established the year 1966 as the mandatory national deadline for reapportionment of a malapportioned state legislature. I do not interpret the cases cited by appellant as establishing such a deadline but do construe Reynolds and the other cited authorities as requiring a more accelerated compliance than was imposed under the "with all deliberate speed" formula in the public school segregation cases.

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Secondly: On June 15, 1964, the United States Supreme Court rendered its decision in *Reynolds* and five companion cases. Since that time no action has been initiated by the Alaska legislature to reapportion the Senate by amendment to our constitution.[14] In contrast, as I previously noted, the Governor of Alaska commenced steps on August 18, 1964, to reapportion the Senate. After statewide meetings and hearings, the Advisory Reapportionment Board furnished the Governor with two separate reports, all of which culminated in the presently contested September 3, 1965, "Proclamation of Reapportionment and Redistricting."

In light of these circumstances, any "balancing task" becomes less difficult. I do not find it unreasonable to give preference to the individual's constitutionally protected right of equality to vote in light of the fact that the Governor with the Advisory Board has already had the opportunity to study the political implications of Senate reapportionment. The amended decree which I would fashion today still leaves available to appellees an effective right under article XIII to have the apportionment articles of the Alaska Constitution amended by either legislative initiative or constitutional convention. I cannot discern how this right to obtain constitutional amendment is made any less effective, or becomes diluted in any way, by the presence of a constitutionally apportioned legislature elected pursuant to an interim plan embodying the Governor's reapportionment pla

Thirdly: The co[illegible] I reach is based on the following additional considerations. As indicated earlier, it is now established by virtue of Scott v. Germano [15] and Maryland Comm. for Fair Representation v. Tawes [16] that state courts have authority to formulate remedial interim reapportionment and redistricting plans. It has also been held in states where boards or commissions are vested with reapportionment authority that the courts will defer to such boards or commissions instead of to the legislature for the establishment of reapportionment plans.[17] In states where the legislature is not vested with the function of reapportionment (i. e. where reapportionment of a "frozen house" [18] can be accomplished only through constitutional amendment) courts, when necessary, have allowed such legislatures to enact reapportionment plans.[19]

My construction of Reynolds and subsequent Supreme Court decisions differs from that of appellees' as to the timing of appropriate remedial techniques. Appellees argue that courts are permitted to fashion judicial remedies in malapportioned cases only in the instance where there is "sufficient time prior to the [next] election for the properly authorized political agencies to act so as to produce a valid plan, and those agencies fail to act." I interpret Reynolds as imposing upon the courts the duty to fashion an appropriate judicial remedy, once malapportionment has been found, unless due to the imminency of the next election equitable considerations militate against judicial intervention.

14. That is either by an amendment proposed by two-thirds of the legislature or by the calling of a constitutional convention. During the same period the legislature has taken no steps to attempt to reapportion the Senate on an interim basis.

15. Supra note 6.

16. Supra page 701.

17. Yancey v. Faubus, 238 F.Supp. 290 (E. D.Ark.1965); In re Apportionment of Michigan State Legislature, 373 Mich. 250, 128 N.W.2d 722 (1964).

18. As used in this opinion the term "frozen house" signifies a legislative body whose election districts are constitutionally prescribed and there is no requirement, or body vested with the authority, to reapportion periodically.

19. Maryland Comm. for Fair Representation v. Tawes, supra page 701, at 377 U.S. at 675-676, 84 S.Ct. at 1439, 12 L. Ed.2d at 607; Buckley v. Hoff, 243 F. Supp. 573 (D.Vt.1965); Buckley v. Hoff, 234 F.Supp. 191 (D.Vt.1964), modified, Parsons v. Buckley, 379 U.S. 350, 85 S.Ct. 503, 13 L.Ed.2d 352 (1965); Butterworth v. Dempsey, 229 F.Supp. 754 (D.Conn.), aff'd sub nom. Pinney v. Butterworth, 378 U.S. 564, 84 S.Ct. 1918, 12 L.Ed.2d 1037 (1964).

These factors, in addition to those previously mentioned, have led me to conclude that an apposite judicial remedy in view of the unconstitutionality of article XIV, section 2 is the adoption by this court of the Governor's reapportionment plan on interim basis. In my view it is unnecessary to decide the issue of whether the Governor possesses the power to reapportion the Alaska Senate on an interim basis. I would limit this court's holding to the grounds that under the circumstances of this case the superior court should have, in formulating an appropriate remedy, adopted an interim reapportionment plan.

Despite any reservations I may entertain as to whether the goal of "fair and effective representation for all citizens"[20] will be realized through the standards articulated by the United States Supreme Court in its reapportionment decisions, this court is bound to insure compliance with the Equal Protection Clause.

For the foregoing reasons I would affirm paragraph number one of the superior court's judgment which declared unconstitutional article XIV, section 2 of the Alaska Constitution. I would also affirm paragraph number three of the superior court's judgment under which the superior court retained jurisdiction of the case to insure that "a valid constitutional amendment modifying the apportionment of the Alaska State Senate" is enacted and adopted by December 1, 1967.[21] Further, I would set aside in its entirety paragraph number two of the superior court's judgment and would amend paragraph number two to read as follows:

> The court adopts as an interim plan of apportionment for the Alaska Senate the reapportionment plan provided for in the Governor's September 3, 1965, "Proclamation of Reapportionment and Redistricting." The Secretary of State is to conduct the 1966 primary and general elections for the State Legislature pursuant to the interim reapportionment plan adopted herein.

20. Reynolds v. Sims, supra page 701, at 377 U.S. 565–566, 84 S.Ct. at 1383, 12 L.Ed.2d at 520.

21. In the event such an amendment is not adopted by December 1, 1967, the superior court has retained jurisdiction to "enter such orders as are necessary to insure that the 1968 primary and general elections will proceed only under an apportionment plan which is consistent with the fourteenth amendment to the federal constitution."

HYUNDAI CONSTRUCTION CO., LTD., and National Surety Corporation, Appellants,

v.

KALMBACH, INC., Appellee.

No. 1604.

Supreme Court of Alaska.

Nov. 10, 1972.

Appeal from Superior Court, Third Judicial District; Edward V. Davis, Judge.

Richard B. Collins and Daiil Park, Anchorage, for appellants.

Kenneth D. Jensen, of Jensen & Harris, Anchorage, for appellee.

OPINION

Before RABINOWITZ, C. J., and CONNOR and BOOCHEVER, JJ.

PER CURIAM.

This appeal arises out of a contract awarded by the State of Alaska in December 1969 to Hyundai for construction of the Hurricane Gulch Bridge near Cantwell, Alaska. Hyundai, together with National Surety Corporation, furnished the State of Alaska with payment and performance bonds as required for public works construction by AS 36.25.010. Thereafter Hyundai subcontracted with Kalmbach for certain aspects of the bridge construction. Several months later Hyundai found Kalmbach's performance unsatisfactory and terminated its subcontract with Kalmbach.

Pursuant to AS 36.25.020[1] Kalmbach filed suit against Hyundai and National Surety under the contractor's payment bond for the amount unpaid on the subcontract at the time of termination. Kalmbach also sued for damages for breach of the subcontract and for rentals of equipment which Hyundai was alleged to have rented after its termination of the subcontract. Hyundai counterclaimed asserting it was damaged by Kalmbach's breach of the subcontract. After trial by jury Kalmbach was awarded $141,020.96 for labor and materials supplied and $100 for Hyundai's breach of contract. Additionally, the jury returned a verdict in Hyundai's favor in the amount of $5,528 on its counterclaim.

In this appeal appellants have attempted to assert numerous specifications of errors. Our study of appellants' brief and the record in the case at bar has left us with the conclusion that appellants' assertions of error are without substance. In short we hold that the judgment entered below should be affirmed.

Affirmed.

EVANS, J., not participating.

1. Alaska's statute is substantially similar to 40 U.S.C. § 270a et seq., the "Miller Act." The state version provides that persons supplying labor and material for a contractor on a public works project may proceed against the payment bond in the name of the state.

William A. EGAN, Governor of Alaska, et al., Petitioners,

v.

Jay S. HAMMOND et al., Respondents.

No. 1711.

Supreme Court of Alaska.

July 21, 1972.

Opinion Sept. 29, 1972.

Review from the Superior Court, Third Judicial District, Anchorage, Edward V. Davis, J., in reapportionment case. On objections to interim reapportionment plan, the Supreme Court, Rabinowitz, J., held that it is constitutionally impermissible to discriminate against class of individuals in legislative reapportionment plan merely because of nature of their employment. The Court, in later opinion of Boochever, J., held that legislative re-

apportionment plan was invalid, where there was no adequate justification for variances which ranged from plus 23.35 to minus 45.93% in house districts and from plus 26.14 to minus 7.2% in senate districts, but that some military personnel might be excluded as permissible device for limiting impact of transients and nonresidents on legislative districting.

Objections overruled.

Decision of Superior Court affirmed in part and reversed in part and the case remanded with directions.

Boochever, J., dissented and filed opinion as to objections to interim plan.

1. States ⇐27

It is constitutionally impermissible to discriminate against a class of individuals in legislative reapportionment plan merely because of nature of their employment. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

2. States ⇐27

Census data was required to be employed in determining total population base for purposes of formulating an interim reapportionment plan for legislative elections. Const. art. 6, § 3; U.S.C.A. Const. Amend. 14.

3. States ⇐27

In fashioning interim apportionment plan for legislative elections, military personnel or civilians who were living in Alaska and enumerated in most recent census but who did not at time possess intent of making Alaska their home would not be excluded from total population. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

Opinion of Sept. 29, 1972

4. Constitutional Law ⇐225(1)

The equal protection clause requires that the states make an honest and good-faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable. U.S.C.A.Const. Amend. 14.

5. States ⇐27

Two separate justifications for deviation from ideal population figures in the apportionment of state legislatures are: variance occurring because of uncontrollable factors, despite a good-faith effort to achieve mathematical precision, and factors incident to effectuation of a rational state policy, but the latter justification is greatly limited. U.S.C.A.Const. Amend. 14.

6. States ⇐27

Only after good-faith effort has been made to achieve precise mathematical equality in reapportionment of state legislatures may variances be permitted and then state has burden of justifying in detail each such variance. U.S.C.A.Const. Amend. 14.

7. States ⇐27

Need for numerical adjustment is very focus of mandate to reapportion state legislatures. U.S.C.A.Const. Amend. 14.

8. States ⇐27

Legislative reapportionment plan was invalid, where there was no adequate justification for variances which ranged from plus 23.35 to minus 45.93% in house districts and from plus 26.14 to minus 7.2% in senate districts. U.S.C.A.Const. Amend. 14.

9. Elections ⇐18
States ⇐27

Military personnel as a class cannot be deprived of right to vote and cannot be arbitrarily eliminated in population base used to design legislative apportionment scheme. U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐225(1)
States ⇐27

Alaska constitutional provision specifying that reapportionment shall be based upon civilian population within each election district violated Federal Constitution insofar as it sought to exclude military as a class. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

11. States ⇐27

Although it is unconstitutional to exclude military as a class in reapportioning state legislature upon basis of popula-

tion, some military personnel may be excluded as permissible device for limiting impact of transients and nonresidents on legislative districting. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

12. States ⇐27

If even one person is disenfranchised on any irrational ground, legislative districting scheme rendering that result is invalid. U.S.C.A.Const. Amend. 14.

13. States ⇐27

With respect to legislative districting, attempt must be made to arrive at best approximation of population without losing sight of fact that right of equal representation is also an individual and personal right. U.S.C.A.Const. Amend. 14.

14. Constitutional Law ⇐225(1)
States ⇐27

Upon adequate notice and opportunity to register before use of master voter registration list for legislative reapportionment purposes, plan based upon current voter registration would be permissible under Federal Constitution in attempt to give accurate assessment of military population present in state with intent to make Alaska their home and also plans based on accurate data of state citizenship or state residency could meet standards of federal equal protection clause. U.S.C.A.Const. Amend. 14.

15. Constitutional Law ⇐49

Unconstitutional provisions of Alaska Constitution requiring that reapportionment be based upon civilian population within each election district as reported by the census is not severable; thus the entire provision is invalid. Const. art. 6, § 3; U.S.C.A.Const. Amend. 14.

16. Action ⇐6

Inasmuch as the apportionment plan was unconstitutional, question as to political affiliation of members composing advisory reapportionment board was moot and, since appointments to board were made many months before final plan was promulgated by governor and interested parties had ample time to appeal from moment appointments were made, judgment on the issue as to composition of board was not required. Const. art. 6, § 8.

17. States ⇐27

Inasmuch as governor in creating legislative reapportionment plan was not acting from political considerations and performed his function in good faith, any error in composition of advisory reapportionment board with respect to political affiliation of its members was rendered harmless error. Const. art. 6, § 8.

18. States ⇐27

Purpose of constitutional provision that appointment to advisory reapportionment board shall be made without regard to political affiliation is to prevent appointment of board whose efforts might result in politically motivated reapportionment plan. Const. art. 6, § 8.

19. States ⇐27

Constitutional requirement that appointments to advisory reapportionment board be made without regard to political affiliation was not equivalent of requiring a bipartisan board but, in reviewing validity of appointment, germane considerations include: the political affiliation of members of board, nature of their activities in partisan politics, particularly if from one political party only, and the expertise and general qualifications which members bring to the board. Const. art. 6, § 8.

20. States ⇐27

Creation of single-member legislative districts from multimember districts was within powers available to governor under constitutional provision authorizing him to redistrict by changing size and area of election districts. Const. art. 6, § 6.

21. States ⇐27

Governor's general power to reapportion legislature includes right to utilize tool of designated seats within multimember districts. Const. art. 6, § 6.

22. States ⇐27

A need to truncate terms of incumbents may arise when reapportionment results in permanent change in district lines which

either exclude substantial numbers of constituents previously represented by incumbent or include numerous other voters who did not have voice in selection of that incumbent. Const. art. 6, § 6.

23. States ⇐27

Governor has power to terminate state senate terms as incidental to his general reapportionment powers. Const. art. 6, § 6.

24. States ⇐27

Under Alaska Constitution, governor, with assistance of reapportionment board, has implied power to reapportion senate on interim basis. Const. art. 6, § 6.

John E. Havelock, Atty. Gen., Richard W. Garnett, III, Asst. Atty. Gen., Juneau, for petitioners.

Clifford J. Groh, of Groh, Benkert, Greene & Walter, Anchorage, for respondents.

OPINION IN RE OBJECTIONS TO INTERIM REAPPORTIONMENT PLAN

Before BONEY, C. J., and RABINOWITZ, CONNOR, ERWIN and BOOCHEVER, JJ.

RABINOWITZ, Justice.

In our Decision and Order of May 26, 1972,[1] this court declared the reapportionment plan embodied in the December 30, 1971, Proclamation of Reapportionment and Redistricting unconstitutional under the equal protection and supremacy clauses of the Constitution of the United States of America. We reached this conclusion for the reason that the proposed plan in its overall reapportionment of the Senate and House of Representatives would have established election districts which failed to encompass "as nearly equal population proportions as is practicable." To insure compliance with the equal protection requirements of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny, it was further determined that an interim reapportionment and redistricting plan, designed to meet the imminent 1972 elections, required formulation. In furtherance of this task, two Masters were appointed to assist the court in fashioning an appropriate interim reapportionment plan.

On May 26, 1972, the appointed Masters were given the following instructions in pertinent part:[2]

> 1. By use of the official Census of 1970, you should establish a population base for the State of Alaska. This population base should include military personnel who were enumerated in the 1970 Census.
>
> 2. You should make an inquiry to determine whether or not the number of nonresident military personnel included in the 1970 Census can be determined. If a determination can be made, then you should subtract the number from the total which you have arrived at in paragraph 1 above. You should also state the methods in detail by which you arrived at this determination.

After receipt of the Masters' Report,[3] an "Order Establishing an Interim Reapportionment Plan for 1972 Legislative Elections" was entered on June 14, 1972.[4] In its relevant part this order stated:

> By use of the Official Census of 1970, the Court determines that the total population base for the State of Alaska shall

1. This document is attached hereto as part of an appendix to this opinion. Also included in the appendix are the Reference to Masters, Masters' Report, Order Establishing an Interim Reapportionment Plan, and Order Denying Objections to Interim Reapportionment Plan.

2. The complete letter of instructions to the masters is attached hereto as part of the appendix.

3. The Report is included in the appendix attached hereto.

4. This document is included in the appendix attached hereto.

be 302,361. This figure includes the military population residing in the State of Alaska at the time of the Official Census of April, 1970. In the time available to the Court for the preparation of the interim plan, the Court could find no feasible method of excluding some or all of the military personnel from the total population base. Moreover, computations revealed that changes in representation under the interim plan due to the inclusion of military personnel were minimal.

[1-3] Subsequent to the entry of this court's order establishing an interim reapportionment plan, petitioners filed objections thereto on the stated grounds:

> The Court erred in instructing the masters that the population base should include all military personnel who were enumerated in the 1970 census and in allowing nonresident military personnel enumerated by the census to be counted for the purpose of determining the population size and shape of particular districts. . . .

Petitioners contended that the effect of the inclusion of all enumerated military personnel was to give greater political power to those communities which adjoin major military installations In arguing for preservation of the civilian population concept,[5] petitioners state that Alaska's legislature established a presumption against residency of military personnel except on affirmation of intent by the person involved that he chooses to be an Alaska resident.[6] In overruling petitioners' objection to the inclusion in the interim plan's population base of all military personnel who were enumerated in the 1970 Census, in our order of June 20, 1972,[7] we said in part:

> [We] could find no feasible basis for the exclusion of part or all of the military population from the population base required for interim reapportionment. Under the Alaska Constitution this base must include all residents of the State of Alaska as enumerated in the decennial census. The base is not limited to voter population. Neither the 1971 reapportionment plan nor the materials relied upon by the petitioners provide a legal basis for identifying nonresident military personnel in order to eliminate them from the population base.
>
> In the absence of reliable data, the elimination of the military from the population base as a class of persons would be a denial of equal protection of the law, prohibited by the Fourteenth Amendment to the United States Constitution. (Footnotes omitted.)

Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609, 617 (1964), instructs that it is constitutionally impermissible to discriminate against a class of individuals merely because of the nature of their employment. Given Davis v. Mann, this court is nevertheless under the duty, pursuant to article VI, section 3 of the Alaska constitution, to employ census data in determining the total population base for purposes of formulating an interim reapportionment plan.[8] The census practice of enumeration is as follows:

> In accordance with census practice dating back to 1790, each person enumerated in the 1970 census was counted as an in-

5. Alaska Const. art. VI, § 3 provides in part: "Reapportionment shall be based upon civilian population within each election district as reported by the census."

6. In support of this argument, petitioners cite AS 15.05.020. The 1971 Reapportionment Plan includes Const Guard Personnel, 3,752 resident aliens, and all military dependents. These persons cannot be classified as citizens of the State of Alaska under the test urged by petitioners.

7. This order is included in the appendix attached hereto.

8. *See* note 1, *supra*. In reaching the conclusion that census data must be employed, we do no more than hold that for purposes of fashioning an interim reapportionment plan the unconstitutional limitation in art. VI, § 3 of the Alaska constitution is severable.

habitant of his usual place of residence, which is generally construed to mean the place where he lives and sleeps most of the time. This place is not necessarily the same as his legal residence, voting residence or domicile.[9]

In light of the unconstitutionality of the civilian-military distinction made in article VI, section 3 of the constitution of Alaska for purposes of determining the requisite population base and this provision's further requirement that Alaska's population base be computed from census data, we concluded that in fashioning an interim reapportionment plan no lawful requirement or reliable basis existed for isolation and exclusion from the total population base of those military or civilians who were living in Alaska and enumerated in the 1970 census but did not at the time possess the intent of making Alaska their home. Alaska's constitution requires that the requisite population total be arrived at by use of the census data. It does not mandate a population base composed exclusively of registered voters, citizens who have previously voted in Alaska, or only those people living in Alaska with the intention of making Alaska their home.[10]

It is for these reasons that this court decided that petitioners' objections to the inclusion of all military personnel, who were enumerated in the 1970 census in the total population base for purposes of determining an interim reapportionment plan should be overruled.[11]

BOOCHEVER, Justice (dissenting).

I dissent from so much of the court's order as overrules petitioners' objection to inclusion, under the court's interim reapportionment plan, of all military personnel who were enumerated in the 1970 Census for the purpose of determining the population size and shape of particular districts.

I agree with the majority that it is impermissible to discriminate against a class of individuals because of the nature of their employment without more being shown, Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 12 L.Ed.2d 609, 617 (1964), just as it is unconstitutional to deprive members of a class such as the military of their right to vote, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

The United States Supreme Court, however, has recognized the problems created by including in population counts proportionately large numbers of military personnel (and other transients) having few ties with the state in which they are physically present. In Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), the Court affirmed the use of a registered voter base for Hawaii knowing that this system eliminated a much higher proportion of military than civilian persons. The Court indicated its approval of state citizen population as a permissible population base. *Id.* at 92–95, 86 S.Ct. at 1296–1298, 16 L.Ed. 2d at 391–92.

The use in Alaska of the April 1970 Census figures for civilians in effect established a state citizen population base for

9. Census Report PC(1)–C3, Alaska, Appendix A, at App–1.

10. *See* note 6, *supra*.

11. The relative effect of eliminating all military personnel, of eliminating only military personnel housed in group quarters, or of including all military personnel in this court's interim reapportionment plan, would be to produce only a slight change in the base population figure and to necessitate some minor redrawing of district lines; it would not change the number of legislators in any given district. On the other hand, elimination of military personnel housed in group quarters would result in substantially increased population variances among the election districts in comparison with the minimal variations present in the interim reapportionment plan as it now stands. For example, the variation in the Juneau district would shift from the present +4.6 to +10.2; in the Matanuska-Susitna district from +1.5 to +7.4; in the Aleutian district from +3.4 to −37.3; in the Yukon-Koyukuk-Kuskokwim district from +1.0 to −0.5; and in the Fairbanks district from +0.1 to −7.1. Excluding military personnel living in group quarters would correct the Ketchikan discrepancy from −22.5 to −18.0.

other than military. The April date effectively eliminated the large number of summer tourists and transient construction and fishing employees, leaving to be counted with minimal exceptions those voluntarily living in the state with the intention of making Alaska their home.[1]

While voting statistics are not synonymous with records of state citizenship, they do furnish a significant indication of a relatively definable military group's nexus with the state. Of the 9,818 census population of military personnel and civilian employees 18 years of age and over residing on the Elmendorf and Ft. Richardson bases, only 102 persons or approximately 1 percent voted as Alaskans in the November 3, 1970 election. At Eielsen and Ft. Wainwright, 172 of 9,997 or 1.7 percent so voted. Slightly higher figures of 8.8 percent and 4 percent voted at Adak and Kodiak, while none of Shemya's 1,131 voted. Civilians were also present on most of the bases so that the percentage of military personnel voting on the bases was in all probability even more minuscule.[2] Approximately 52 percent of the remaining Alaskan population over 18 years of age residing off the bases voted in the same election. (Masters' Report, Table 9) Moreover, according to the files of the Alaska Command, there are only 190 Alaskan "residents of record" among Army and Air Force personnel stationed in Alaska.

In my opinion, some adjustment with reference to counting military personnel is necessary in order to accomplish the substantive purpose of establishing equal population districting "as nearly as practicable."[3] If those physically in Alaska were to be counted in the middle of the summer when tourists and transient workers are present in vast numbers, a distorted population base would result. The counting of all military personnel regardless of their actual state residency results in a similar distortion.

As indicated in footnote 2 above, of Adak's population of 4,995 officers, enlisted men and dependents, and 450 civilians (a total of 5,445) only 165 could be induced to register as Alaskan voters, even after an extensive registration campaign. Under the court's interim reapportionment plan the ideal number of people to be represented by one legislator was fixed at 7,559. In areas such as the district embodying Adak, a relatively small number of voters would be represented by one legislator. The inequity of counting all military personnel is further illustrated by the fact that a decision to place the Ft. Richardson total population of 10,751 in a new district including Eklutna, Birchwood, Eagle River and Chugiak, as opposed to the Anchorage Northeast District, would change the representation of each by one legislator while involving a shift of less than 102 voters based on the 1970 elections.[4]

Even for an interim plan I feel that a more equitable solution is both feasible and constitutional.

I would deduct from the population base to be used for apportionment those members of the military, unaccompanied by dependents, living in military barracks, on ships, etc. These constitute 51.9 percent of the total number of military personnel enumerated in the census. (Masters' Report, p. 886) The location of such military personnel is readily ascertainable and is set forth

1. A small number of aliens who would not be eligible for state citizenship are included in the census count. Military personnel also include some aliens.

2. In a memorandum submitted to the court the Lieutenant-Governor of Alaska stated that the military population of Adak consisted of 4,995 officers, enlisted men and dependents, and 450 civilians. Despite an intensive voter registration effort only 165 were registered to vote as of June 1972.

3. Kirkpatrick v. Preisler, 394 U.S. 526, 528, 89 S.Ct. 1225, 22 L.Ed.2d 519, 523 (1969). Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

4. The court was petitioned to make such a change. The proposed change was not, however, adopted.

in Table 7 of the Masters' Report submitted to this court.[5]

Admittedly, there is no completely accurate means at our disposal for determining the number of both civilian and military persons enumerated in the census who are not Alaskan citizens. It is readily apparent, however, that the proportion of military who are not Alaskan citizens so far exceeds the proportion of nonresident civilians who may have been included in the April 1970 enumerations, that no discrimination to the military as a class will result from eliminating the military personnel unaccompanied by dependents who reside in barracks, on ships, etc. That portion of the military personnel who reside neither in their own homes nor in rented private quarters obviously have the fewest ties with the state. There are doubtlessly many other non-Alaskan citizens among the remaining off-base military personnel and their dependents so that the elimination of only the 51.9 percent constituting the personnel uaccompanied by dependents residing in barracks, on ships, etc. will actually result in the inclusion of a substantially higher number of military personnel than in all likelihood are Alaskan citizens.

The Alaska Constitution dictates that, to the extent permitted by the United States Constitution, military personnel should not be included in the population base. There can be no other reason for stating "[r]eapportionment shall be based upon *civilian* population within each election district as reported by the census." (Emphasis mine.)[6]

While I agree with the majority that all military personnel may not be excluded from the population base, the interim plan should follow as closely as feasible the intent indicated by the Alaska Constitution. For that reason the portion of the military in group quarters should be excluded as representing the minimum number of military who are not Alaskan citizens. As stated in Burns v. Richardson, "The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting, [sic] a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification." 384 U.S. at 92, 86 S.Ct. at 1297, 16 L.Ed.2d at 391 n. 21. I am convinced that this pointed statement by the United States Supreme Court provides a method for us to more closely follow our own Alaska Constitution without drifting from the course of the equal protection clause of the United States Constitution. Thus, I respectfully dissent from the decision to include all of the military in the population base.

OPINION SEPT. 29, 1972

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

BOOCHEVER, Justice.

This case arises out of the 1971 reapportionment of the Alaska legislature pur-

5. If my colleagues had agreed to such a deduction, some slight changes would have had to be made in the districts as previously established in the interim plan. With the assistance of the Masters such alterations would not have been unduly difficult to accomplish and in my opinion would have resulted in further decreasing the population variances present in the interim reapportionment plan, especially with reference to the only substantial population variance, that of the Ketchikan District.

6. Alaska Const. art. VI, § 3. Since both the court's interim plan of reapportionment and the 1971 plan utilized census figures, I do not here reach the question of whether some other basis for determining population for reapportionment purposes, may now be used in view of the unconstitutionality of a portion of the provision. I do not necessarily agree with the court's apparent conclusion that the elimination of the "civilian" requirement may be severed from the requirement of using the census as a basis for population. It may well be that the two provisions are not separable. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062, 1078 (1932); Dorchy v. Kansas, 264 U.S. 286, 289–290, 44 S.Ct. 323, 68 L.Ed. 686, 689–690 (1924).

suant to the mandate of article VI of the Alaska Constitution. The constitution provides for decennial reapportionment of the House of Representatives.[1] The authority to reapportion the House is vested in the Governor of the state, with the advice of a reapportionment board.[2] Since the adoption of the Alaska Constitution in 1956 the United States Supreme Court has ruled that both houses of a state legislature must be apportioned according to population.[3]

Because the Alaska Constitution made no provision for reapportionment of the Senate, we held in Wade v. Nolan[4] that on an interim basis until amendment of the Alaska Constitution the Governor had the power to reapportion the Senate in the same manner as specified by the constitution for the reapportionment of the House.

In 1971, following the 1970 decennial census, no amendment having been made to the Alaska Constitution, the Governor reapportioned both houses of the Alaska legislature. Thirteen members of the Alaska legislature then challenged the validity of the 1971 plan.[5] They urged that the percentage variations from the population norms for legislative districting violated the equal protection clauses of both the United States and the Alaska Constitutions; that the exclusion of the military from the population base was a denial of equal protection; that the Advisory Reapportionment Board was not constituted in the manner required by the Alaska Constitution; that the Governor lacked power to subdivide existing multi-member districts; that the Governor lacked power to create "designated seats" within multi-member districts; that the Governor was without authority to require incumbent Senators to stand for mid-term elections; and that the Governor exceeded his constitutional power by reapportioning the Senate.

The superior court held for the plaintiffs that the variances from population norms were so great as to render the plan invalid; that the Governor lacked the power to subdivide existing multi-member districts and to designate seats within such districts; and that the Governor could not prematurely terminate the terms of senators elected for four years.

The superior court held for the defendants that the military were properly excluded from the population base; that the Advisory Reapportionment Board was properly constituted; and that the Governor did possess the power to reapportion the Senate. The trial court directed that the matter of reapportionment of the Alaska State Legislature be sent back to the Governor and the Advisory Reapportionment Board for further consideration in accordance with the decision. Both the plaintiffs and the defendants below filed petitions for review from the superior court holdings adverse to their respective positions.

This court was mindful of the need for a speedy decision to enable election officials to prepare registration lists and ballots, to disseminate information and to afford time for election campaigns in the impending primary elections.[6] The petitions for review were filed on April 26, 1972. The time for filing briefs was accelerated and oral arguments were heard on May 23, 1972. During the course of those oral arguments, counsel were requested to recommend to this court procedures to be followed in the event that the 1971 plan was found to be constitutionally defective. It was suggested that the court fashion its own interim plan, and the Attorney General further recommended that Masters be appointed by the court.

1. Alaska Const. art. VI, § 3.
2. Alaska Const. art. VI, § 8.
3. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).
4. 414 P.2d 689 (Alaska 1966).
5. Alaska Const. art. VI, § 11.
6. The date of filing for candidacies was May 31, 1972. It was extended by this court in accordance with its powers over reapportionment matters first to June 13, 1972 and then to June 30, 1972. Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

Having found in our Decision and Order of May 24, 1972,[7] that the 1971 plan contained variances from population norms which could not meet the criteria set forth by the United States Supreme Court, we reluctantly concurred with the suggestion of counsel that the court fashion an interim plan of reapportionment for the forthcoming 1972 primary and general elections. The court appointed Masters to assist in the formulation of such a plan.

The Masters presented a written report and conferred with the court on June 13, 1972. The report was modified in accordance with determinations made by the court. After objections filed by the parties were considered by the court, an Order Establishing an Interim Reapportionment Plan for the 1972 Legislative Elections was issued on June 14 with the modified report of the Masters appended thereto.[8] Because that plan is merely an interim plan, it is necessary to discuss and rule on each of the issues raised on appeal so that the Governor and his Advisory Reapportionment Board will have sufficient guidelines to devise a constitutionally acceptable permanent plan.

I. POPULATION VARIANCES

At the outset we recognize the difficulty of creating districts of equal population while also conforming to the Alaska constitutional mandate that the districts "be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area."[9] When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.[10]

Despite the possibility of belaboring this opinion we feel obliged to set forth a few of the facts which make it difficult to fit Alaska's reapportionment plan into standards established for the 48 contiguous states which preceded it into the Union. Alaska has a total land area of 586,400 square miles—as large as the entire Louisiana Purchase, and one-fifth the total area of the continental United States. Its boundaries embrace four time zones. The state contains the highest mountain on the North American continent, glaciers that exceed the size of the State of Rhode Island, and a coastline longer than the total coastline along the remainder of the continental United States. Mountain ranges which equal or exceed the length and height of the Rockies divide Alaska into five relatively isolated regions which in turn are subdivided by river systems and other geographic factors such as broad expanses of frozen tundra challenging the most advanced roadway engineering.

The 1970 Census reveals a population of 302,361 persons including members of the Armed Forces.[11] There is less population in the State of Alaska than in the cities of Omaha, Nebraska or Toledo, Ohio. The contrasting ethnic backgrounds, cultural interests and economic activities of this Alaska population are detailed in the Report of the Masters.[12]

When confronted with conditions so different from those of any other single state

7. The Order for an interim plan of reapportionment and the Report of the Masters are attached to this opinion as Appendix I.

8. Appendix I.

9. Alaska Const. art. VI, § 6.

10. Based on 1970 census figures, the population norm per representative is 7,559 so that a change of boundaries involving only 76 people would result in a one percent variation in the population ratio. (Masters' Report, Table A, p. 880)

11. Census Report PC(1)-C3, Alaska.

12. Appendix I, pp. 880-891.

in the continental United States, it is readily apparent that it becomes well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states. The situation is more analogous to that of the State of Hawaii, whose unusual difficulties[13] were recognized as potentially requiring special remedies by the United States Supreme Court in Burns v. Richardson.[14]

[4] Nevertheless, the initial standard to which a state legislative apportionment plan must be held is that set forth by the Supreme Court in Reynolds v. Sims:[15]

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[16]

Although the 1971 plan represents a substantial improvement in the [illegible] apportionment,[17] the new plan does still conflict with the guidelines established by the United States Supreme Court. We are, therefore, compelled to hold that the plan violates the United States constitutional guarantee of equal protection.

In the earlier reapportionment cases, the United States Supreme Court refused to articulate a strict test for what was required by the equal protection clause. In Reynolds v. Sims[18] the Court noted that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." Hence the present guidelines for reapportionment evolved on a case-by-case basis. In Swann v. Adams,[19] percentage variances in

13. The unique circumstances surrounding reapportionment in Hawaii are ably described in the opinion of Judge Pence in Burns v. Gill, 316 F.Supp. 1285 (D. Hawaii 1970).

14. 384 U.S. 73, 90-96, 86 S.Ct. 1286, 16 L.Ed.2d 376, 390-93 (1966).

15. 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506, 530 (1964).

16. The procedure followed by Hawaii in reapportioning its legislature in 1968 is illustrative of such "honest and good faith effort". A committee of three Senators and eight Representatives held 30 hearings before submitting its recommendations to the entire Constitutional Convention. After 15 hours of debating over a three-day period the apportionment provisions were adopted. The committee heard testimony from over 53 witnesses —political scientists, statisticians, attorneys and others—reviewed judicial decisions, analyzed apportionment and districting provisions of other state constitutions and reviewed numerous publications on the subject. Then, utilizing all those resources, the Committee formulated and adopted districting criteria. The Committee engaged an independent team of computer programmers, a statistician, and appropriate staff members, and turned over to that team the primary work of formulating and analyzing districting plans. That team, using a computer upon data gleaned from the 1966 registered voter figures for election precincts, as well as corresponding census tracts, prepared various districting plans and maps according to the Committee's criteria. No member of the Committee or any other delegate was involved in any preparation of the various plans. That team developed 30 house districting plans covering the several islands

> . . . . .
>
> The foremost criterion, of course, was that the average number of registered voters per legislator shall be as nearly equal as possible. Burns v. Gill, 316 F.Supp. 1285, 1289 (D.Hawaii 1970) (Footnotes omitted.)

17. The Alaska legislature was first reapportioned in 1965. The Governor's power to reapportion the Senate was challenged in the case of Wade v. Nolan, 414 P.2d 689 (Alaska 1966). In that case, however, the plaintiffs did not question the validity of the numerical variations among districts. By the time of the Governor's proposed plan six years later, the 1965 plan engendered population variances ranging from +104.57 to —65.49 percent in the House of Representatives and from +26.19 to —23.72 percent in the Senate. In the 1971 plan, population variations were reduced to a range of +23.75 to —45.93 percent in the House, and to a range of +26.14 to —17.22 percent in the Senate.

18. 377 U.S. 533, 577-578, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506, 537 (1964).

19. 385 U.S. 440, 443-444, 87 S.Ct. 569, 17 L.Ed.2d 501, 504 (1967).

the Florida Senate from +15.09 to −10.56 and in the Florida House of Representatives from +18.28 to −15.27 were held to be impermissible "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the population of the various legislative districts . . . ." The degree of rigidity in the requirement of equality reached its zenith in Kirkpatrick v. Preisler[20] where population variances from +3.13 to −2.84 percent were held to be invalid. The Missouri Assembly had rejected a plan with smaller variances. The Court stated:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case . . . . [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.[21]

[5] Thus the present standard for reapportionment allows two separate justifications for deviation from the ideal population figures. The first is that variance occurring because of uncontrollable factors, despite a good faith effort to achieve mathematical precision. The second acceptable deviation is that which "the State must justify"—the implication being that while it was a controllable deviation, other factors "incident to the effectuation of a rational state policy"[22] can be advanced in justification. However, as the Supreme Court cautioned at an early date in Reynolds v. Sims, acceptable state policies are greatly limited.

> [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation . . . . Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.
>
> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions.[23]

[6] Only after a good-faith effort has been made to achieve precise mathematical equality may variances be permitted; and then the state has the burden of justifying in detail each such variance.[24]

The Report of the Governor's Advisory Reapportionment Board offers some of the reasons which justify greater percentage variations in Alaska districts "in terms of

20. 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969).

21. 394 U.S. at 530–531, 89 S.Ct. at 1228, 1229, 22 L.Ed.2d at 524–525 (citation omitted).

22. Reynolds v. Sims, 377 U.S. 533, 579, 84 S.Ct. 1362, 12 L.Ed.2d 506, 537 (1964).

23. *Id.* at 579–580, 84 S.Ct. at 1391, 12 L.Ed.2d at 537–538.

24. Kirkpatrick v. Preisler, 394 U.S. 526, 532, 89 S.Ct. 1225, 22 L.Ed.2d 519, 526 (1969); Kilgarlin v. Hill, 386 U.S. 120, 122, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967); Swann v. Adams, 385 U.S. 440, 443–446, 87 S.Ct. 569, 17 L.Ed.2d 501, 504–506 (1967).

rational state policy forwarded as factors unique to Alaska." The report notes for example that in some isolated areas a local population would necessarily be divided between contiguous districts, achieving numerical precision at the grave expense of depriving that community of any political power or attention from campaigning candidates.

[7] For other districts, however, the Advisory Reapportionment Board offers little or no explanation for the percentage deviations which were created. For example, no explanations are given for the variations in the Yukon-Kuskokwim House District 15, the Nome House District 19, and the Yukon-Kuskokwim Senate District K which respectively were −9.2 percent, −16.7 percent and −17.29 percent from the population norm. Such disparities as exist in the Wade Hampton District 20 of −28.4 percent, and in the Bethel House District 21 of +4.9 percent cannot be justified simply because a combination of pre-existing districts or a readjustment of district lines does not produce any other "benefits" than a numerical adjustment. The need for numerical adjustment is the very focus of the mandate to reapportion. In too many districts we are forced to conclude that the disparities are without adequate justification in terms of rational state policies to meet the stringent standards established by the United States Supreme Court.

[8] It is significant to note that in no case coming before the Supreme Court have population variances approaching those of the 1971 plan been upheld, while less substantial variances have been repeatedly rejected as unconstitutional.[25] Judged by the standards set out above, we are compelled to hold that the 1971 plan is invalid since there is no adequate justification offered for the variances which range from +23.35 to −45.93 percent in the House districts, and from +26.14 to −7.2 percent in the Senate districts.[26]

II. MILITARY PERSONNEL

The Alaska Constitution specifies that "[r]eapportionment shall be based upon civilian population within each election district as reported by the census."[27] The validity of this provision was not questioned by the parties in Wade v. Nolan,[28] although the 1965 plan eliminated military personnel from the population base. The 1971 reapportionment plan similarly limited the population base to civilians.[29] The plaintiffs below have chailenged the validity of this constitutional provision, contending that the

25. *E. g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) (variations from +3.13 to −2.84 percent held unconstitutional); Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967) (variations from +14.84 to −11.64 percent held unconstitutional); Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) (variations from +15.01 to −10.56 percent held unconstitutional). *Cf.* Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971) (variations from −4.8 to −7.1 percent upheld).

26. With the single exception of the Ketchikan district, the range of variations in this court's interim plan is from +4.3 to −2.7 percent in the House, and from +4.3 to −2.3 percent in the Senate. The Ketchikan variation in both House and Senate is −22.5 percent. The reasons for the Ketchikan variance are explained in the Report of the Masters at p. 892. Due to the pressure of time in adopting interim plans, the United States Supreme Court has been much more liberal in condemnancing variations which might not otherwise be acceptable. *E. g.*, Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967). *See also* Burns v. Gill, 316 F.Supp. 1285, 1288 (D. Hawaii 1970) saying, "[N]o one particular area of deviation or variance from the ideal of absolute equality of voting power, per se, invalidates an apportionment plan."

27. Alaska Const. art. VI, § 3.

28. 414 P.2d 689 (Alaska 1966).

29. With the exception of members of the United States Coast Guard, uniformed military personnel were eliminated. Military dependents were counted as part of the civilian base. Coast Guard personnel were counted as civilians because they operate under the control of the Department of Transportation.

elimination of military personnel as a class violated the equal protection clauses of the United States and Alaska Constitutions.

In Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964), underrepresentation of certain districts was attempted to be justified by the state noting that a substantial number of military personnel resided in the deficient districts. In rejecting this argument, the Court stated:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.[30]

In Carrington v. Rash, 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed.2d 675 (1965), a Texas attempt to deprive military personnel of the right to vote in a state election simply because of their military status was held unconstitutional.

[9–11] These cases make clear that military personnel as a class cannot be deprived of the right to vote, and that they cannot be arbitrarily eliminated in a population base used to design an apportionment scheme. But while the clause of the Alaska Constitution seeking to exclude military as a class is unconstitutional, that is not to say that some military cannot be excluded as a permissible device for limiting the impact of transients and nonresidents on legislative districting.

[12, 13] It is also necessary to distinguish the degree of precision required in dealing with representational rights as against the strict right to vote. Carrington v. Rash indicates that if even one person is disenfranchised on any irrational ground, the scheme rendering that result must be declared invalid. On the other hand, fixing equal population counts for each legislative district is a more ephemeral and elusive goal when the mathematical precision achieved one day is destroyed the next by Alaskan society's chronic mobility. Given the fact that dilution of a voter's influence is not completely avoidable, the challenge is to arrive at the best approximation of the population to be counted without losing sight of the fact that the right of equal representation is also an individual and personal right.[31]

In light of these considerations, it becomes important to evaluate the accuracy and recency of the information relied on by the Governor's Advisory Reapportionment Board. Their report to the Governor merely stated that

> [u]niformed military personnel who are residents of Alaska and therefore, arguably not excludable under the United States Constitution were so few in number as to be negligible.

The only support for this statement offered in evidence at the trial below was a letter received from an officer of the Alaska Command at the time of the 1965 reapportionment, indicating that among the military stationed in Alaska there were only 111 "residents". There is no indication in the letter of the accuracy of the source for this information. The officer warned in his letter "that this cannot be considered an absolutely accurate figure, as military personnel records do not contain an entry showing what can be called a 'legal residence' for voting purposes. The record shows only the place the person prefers to consider as his permanent home."[32] Without inquiring to up-date the 1965 figure, or obtaining other information on the military from any source, the Board excluded all military personnel from the population base. Hence we were forced to conclude in our Order Denying Objections to the Interim Reapportionment Plan, filed June 20, 1972, that

30. 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964).

31. Reynolds v. Sims, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964).

32. In the 1970 general elections there were 632 votes cast in precincts located solely on military installations. (Masters' Report, Table 9) There are no available statistics as to what proportion of those, if any, were civilians.

> [i]n the absence of reliable data, the elimination of the military from the population base as a class of persons would be a denial of equal protection of the law, prohibited by the Fourteenth Amendment to the United States Constitution.

In the short time available for devising an interim reapportionment plan, a majority of this court decided that it was not possible to compile sufficiently accurate data to provide a reasonable basis for excluding any number of military from the population base.[33] Thus we included all military personnel with an eye to the fact that our plan would only apply to this year's election, and that a more accurate assessment of the military vote can be achieved in the process of devising a permanent decennial apportionment scheme.[34]

We recognize that the substantial military population present in the state because of military orders and without intention to make Alaska their home can easily give an unbalanced representation to areas abutting their bases. But we are also mindful of the need for a permanent plan which achieves a level of accuracy of their voting participation which is closer than either including or excluding all military as a class. Thus it is incumbent upon us to discuss alternative plans which may be available to handle the problem.[35]

The United States Supreme Court in Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), permitted the use of a registered voter base for Hawaii, knowing that this system eliminated a much higher proportion of military than civilian persons. Further, the Court indicated its approval of state citizen enumeration as a permissible population base.[36]

[14] Alaska has a master voter registration list[37] and the court takes judicial notice that active efforts have been made to register all eligible voters. Upon adequate notice and opportunity to register before use of such a registration list for reapportionment purposes, it would appear that an apportionment plan based on current voter registration would be permissible under the federal constitution. Likewise plans based on accurate data of state citizenship or state residency could meet the standards of the federal equal protection clause.[38]

Another problem, however, would be involved in the use of any but a census population base. As noted above the Alaska Constitution specifies that: "Reapportionment shall be based upon civilian population within each election district as reported by the *census*." (Emphasis added.) Since we have held that the provision is invalid insofar as it is based on "civilian population", a question is presented as to whether the balance of the provision is separable so as to continue to be effective, or in the alternative whether the entire provision should be stricken leaving some flexibility of choosing a population base for a new, permanent apportionment plan.

Similar problems have frequently arisen with reference to legislation. In Dorchy v. Kansas, 264 U.S. 286, 289–290, 44 S.Ct. 323, 324, 68 L.Ed. 686, 689–690 (1924), Justice Brandeis set forth the following

33. *But see* dissenting opinion of Justice Boochever in Egan v. Hammond, Opn. No. 815 (Alaska, July 21, 1972).

34. This court's opinion in Egan v. Hammond, *supra* n. 33, discusses in greater detail the reasons for the inclusion of all military personnel in the court's interim plan of reapportionment.

35. The alternatives here discussed are not intended to be an all inclusive list, but are illustrative of constitutional means of treating the problem.

36. 384 U.S. at 91, 86 S.Ct. 1286, 16 L.Ed. 2d at 390.

37. AS 15.07.120.

38. In the *Burns* case the Court noted that:
> The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting, [sic] a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.

384 U.S. at 92, 86 S.Ct. at 1297 fn. 21, 16 L.Ed.2d at 391, n. 21.

criteria for determining the effect on the remainder of a statute when part is found unconstitutional:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad . . . . But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.

In Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062, 1078 (1932) the standard was phrased as follows:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

These criteria would appear to apply equally to a state constitutional provision as to an act of the legislature. To enforce the balance of the section in question requiring exclusive use of the census, the court should be able to find that the constitutional provision would have been enacted independently of the void reference to "civilian population".[39]

The members of the Constitutional Convention must have considered the fact that many military personnel present in Alaska do not regard this state as their home and do not actively participate in its affairs. Yet the large number of such personnel concentrated in small areas of the state is capable of distorting the representational base. Although the minutes of the Constitutional Convention are silent on the subject, it appears highly likely that this was the reason that the convention limited the reapportionment base to civilian population.

[15] If the requirement to use census figures were to be retained after striking the provision which limited the base to civilian population, this apparent intent might be frustrated. Only skeletal information of location and mobility characteristics of the military can be extrapolated from census data. Because the equal protection clause of the United States Constitution requires more specific factual justification for eliminating portions of the military from the population base, we conclude that the Board and the Governor should be permitted to use alternates to the census base.[40] We thus hold that the provisions of that portion of article VI, section 3, requiring that "reapportionment shall be based upon civilian population within each election district as reported by the census" is not severable. While we so hold, we remain hopeful that before a permanent plan is created, the legislature will initiate procedures to up-date the reapportionment provisions of the Alaska Constitution by an appropriate constitutional amendment.[41]

39. Springfield Gas & Elec. Co. v. Springfield, 292 Ill. 236, 126 N.E. 739 (Ill. 1920), aff'd 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131 (1921); New Jersey Chapter, American Institute of Planners v. New Jersey State Bd. of Professional Planners, 48 N.J. 581, 227 A.2d 313 (N.J.1967).

40. In reaching this conclusion we are mindful of the great danger that statistical data from different sources can inadvertently be corrupted or misconstrued in the process of assimilation. We trust that the Board and the Governor will also be mindful of this possibility, and will include in the reapportionment process the statistical expertise which is necessary to ensure that such errors will not occur.

41. Suggested in Wade v. Nolan, 414 P.2d 689, 700–701 and by Justice Rabinowitz, concurring at 700. Counsel for plaintiffs stated in their briefs that a resolution initiating such an amendment would be enacted at the 1972 legislative session, but no such resolution was passed.

III. COMPOSITION OF THE ADVISORY REAPPORTIONMENT BOARD

[16] Plaintiffs have contended that the reapportionment board was not constituted as required by article VI, section 8, of the Alaska Constitution, which specifies in part: "Appointments shall be made without regard to political affiliation." There were no Republican members appointed to the reapportionment board. Since we have found that the 1971 reapportionment plan is unconstitutional, the question as to the composition of the board has become moot and we therefore do not reach that issue at this time.[42]

[17, 18] We also note that the parties stipulated that the Governor in creating the reapportionment plan was not acting from political considerations and that he did perform his function in good faith. Thus if there was error in the composition of the board such error was rendered harmless, as the obvious purpose of the constitutional provision was to prevent the appointment of a board whose efforts might result in a politically motivated reapportionment plan.

[19] Under our decision it will be necessary to refer this matter to a reapportionment board for formulation of a permanent plan. Thus, although it is not necessary for us to rule at this time on the question of whether the 1971 reapportionment board was validly constituted, it is incumbent upon us to set forth some criteria which we determine applicable in deciding whether a board has been appointed "without regard to political affiliation", so as to withstand challenge.[43] At the outset, we recognize that this phrase is not the equivalent of requiring a "bi-partisan" board.[44] Nevertheless, in reviewing the validity of the appointment, some (although not necessarily all) of the following considerations would appear to be germane: The political affiliation of members of the board; the nature of their activities in partisan politics, particularly if from one political party only; and the expertise and general qualifications which members bring to the board.

42. *Cf.* Doe v. State, 487 P.2d 47, 53 (Alaska 1971). In that case we stated the general proposition that "we will refrain from deciding questions where the facts have rendered the legal issues moot" except: "where the matter is one of grave public concern and is recurrent but is capable of evading review . . . . ." We do not feel that the issue presently before us evinces the same elusiveness which would require our judgment at this time. Appointments to the Advisory Reapportionment Board are made many months before a final plan is promulgated by the Governor, and interested parties have ample time to appeal from the moment the appointments are made.

43. The defendants quite properly point out that the reapportionment board was convened on May 20, 1971, and that it conducted widely publicized hearings throughout the state during the summer of 1971. Hence the doctrine of laches might well further bar questioning the composition of the board after awaiting the outcome of its work involving the expenditure of substantial funds and the devotion of much time and effort. There was ample opportunity to bring a suit long before the completion of the board's functions. McCrocklin v. Fowler, 285 F. Supp. 41, 45 (E.D.Wis.1968) (alternate holding). *Accord*, Gersten v. United States, 364 F.2d 850, 852, 176 Ct.Cl. 633 (1966); Nelson v. Lord, 4 Alaska 174, 182–83 (1910).

44. At the Alaska Constitutional Convention, in the discussion of the original draft of section 8 which used the word "nonpartisan" the following explanation was given:

> HELLENTHAL: The word was chosen deliberately. Now an alternative and perhaps the one that the delegate has in mind would be "chosen from each of the major parties." *That alternative was specifically rejected* because [the committee] felt it placed emphasis upon political considerations on this board which as has been pointed out, it is hoped to keep as objective as possible. Now it is true and the Committee realized that "*nonpartisan*" *doesn't mean that you cannot belong to a political party* . . . . [On] the contrary to use the political language, would emphasize politics, and *it is the whole purpose of this article to de-emphasize politics.* (Emphasis added.)

Convention Minutes, p. 1958.

IV. CREATING SINGLE-MEMBER DISTRICTS FROM MULTI-MEMBER DISTRICTS

The Alaska Constitution specifically authorizes the Governor to redistrict "by changing the size and area of election districts . . . ."[45] subject to certain restrictions set forth in the constitution. It is thus clear that the Governor is authorized to redistrict by changing boundaries and areas. The creation of single-member districts from multi-member districts would appear to be a concomitant power under the authorization to redistrict. Furthermore, this authority is inherent in the general power to reapportion the legislature. Redistricting is inseparable from reapportionment and the Governor should be able to authorize any constitutional device to accomplish the task. The Oregon Supreme Court in its recent review of that state's reapportionment set forth the applicable principles as follows:

> Apportionment is accomplished by changing legislative district lines and an integral part of apportionment is making a choice between fixing legislative district lines along a single-member district plan or a multi-member district plan. This is a decision that the legislature would have had to make if it had done the reapportioning. It must be made by the Secretary of State or whatever body makes the apportionment.[46]

[20] Where the method or motive of districting rather than the mathematical precision of the apportionment is being challenged, the Supreme Court of the United States has consistently required that the challenger bear the burden of proving unconstitutionality.[47] The plaintiffs below failed to meet this burden of proof and we hold that the creation of single-member districts from multi-member districts was within the powers available to the Governor.

V. DESIGNATION OF SEATS WITHIN MULTI-MEMBER DISTRICTS

The 1971 plan provided that each seat within the multi-member districts of Anchorage and Fairbanks should be designated alphabetically, and that each candidate for office within that district should indicate at the time of filing the particular lettered seat for which he seeks election. The plaintiffs challenged the authority of the Governor to designate seats within multi-member districts.

[21] The Governor's general power to reapportion includes the right to utilize the tool of designated seats. The reasoning set forth in Hovet v. Myers,[48] gives support to this position. An identical problem arose in the case of Moss v. Burkhart,[49] wherein the court in redistricting the Oklahoma legislature authorized designated seats. If a court has such power under its general authority to reapportion, a Governor authorized specifically by a state constitution to reapportion should be held to have similar power.

VI. TERMINATING LEGISLATORS' TERMS

[22, 23] The 1971 Reapportionment Plan provided for termination of all Senators' terms, with the exception of two Senators whose districts were not altered. Under the 1971 plan the areas to be represented by the remaining Senators were changed, and particularly the Anchorage senatorial districts had drastic changes in that the Senators no longer were to run at large. A need to truncate the terms of incumbents may arise when reapportionment

45. Alaska Const. art. VI, § 6.

46. Hovet v. Myers, 489 P.2d 664, 669 (Or.1971).

47. *E. g.*, Whitcomb v. Chavis, 403 U.S. 124, 144, 91 S.Ct. 1858, 29 L.Ed.2d 363, 376 (1971). *Cf.* Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771, 774 (1967).

48. 489 P.2d 65, 669 (Or.1971).

49. 220 F.Supp. 150, 158 (W.D.Okl.1963), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964).

results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established.[50] We accordingly hold that the Governor had the power to terminate Senate terms as incidental to his general reapportionment powers.[51]

VII. GOVERNOR'S AUTHORITY TO REAPPORTION

[24] The Governor's authority to reapportion the Senate was also challenged by the plaintiffs below. In Wade v. Nolan this question was discussed in detail, and we concluded that under the Alaska Constitution the Governor with the assistance of the reapportionment board had the implied power to reapportion the Senate on an interim basis.[52] Since there has been no amendment to the constitution, our decision on that point remains unaltered.

Plaintiffs below indicated that the legislature was prepared to initiate a constitutional amendment pertaining to reapportionment. Since the constitution does not specifically provide for Senate reapportionment and impermissibly limits the reapportionment base to civilian population, we strongly urge that an appropriate amendment to the constitution be prepared and presented to the electorate.

The decision of the superior court is affirmed in part and reversed in part in accordance with the provisions of this opinion. The case is remanded to the superior court for the purpose of referring the matter of a permanent reapportionment plan to the Governor with the assistance of an advisory board to be appointed by him in accordance with the provisions of the Alaska Constitution.

APPENDIX I

1. Decision and Order of May 26, 1972.
2. Reference to Masters, May 26, 1972.
3. Masters' Report.
4. Order Establishing an Interim Reapportionment Plan.
5. Order Denying Objections to Interim Reapportionment Plan.

DECISION AND ORDER

This matter was heard by the court on May 24, 1972, upon petition for review and cross-petition for review. The court recognizes the extreme difficulty of the task confronted by the Governor and the Reapportionment Board in reapportioning the

50. Mann v. Davis, 238 F.Supp. 458 (E.D. Va.1964), aff'd, 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965); Moss v. Burkhart, 220 F.Supp. 149, 157 (W.D. Okl.1963), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964); Sims v. Amos, 336 F.Supp. 924, 940 (M.D.Ala.1972); Butcher v. Bloom, 420 Pa. 305, 216 A.2d 457, 459 (1966).

51. In the interim plan promulgated by this court, Senate terms of incumbent Senators were not terminated. The interim plan did not contain the drastic reapportionment of the Anchorage Senatorial districts. We felt that it was preferable not to shorten the terms of Senators, particularly as this may become a necessity upon the formulation of a permanent plan. The additions or substitutions of geographical areas under the interim plan have not so materially changed the population base which elected each of the Senators as to prevent him from adequately representing his designated district. There is ample authority for permitting Senators to serve out their terms *under an interim plan* even when the boundaries of their districts have been changed. Mann v. Davis, 238 F.Supp. 458 (E.D.Va.1964), aff'd, 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965); Moss v. Burkhart, 220 F.Supp. 149, 158 (W.D. Okl.1963), aff'd sub nom., Williams v. Moss, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964); Sims v. Amos, 336 F.Supp. 924, 940 (M.D.Ala.1972); Butcher v. Bloom, 420 Pa. 305, 216 A.2d 457, 459 (1966).

52. 414 P.2d 689, 700 (Alaska 1966).

State of Alaska because of its differing climates, topography, ethnic composition, socio-economic interests and distribution of its relatively sparce population. However, under the mandate of various decisions of the United States Supreme Court, we make the following determinations and order:

1. The reapportionment plan proposed by the Governor of Alaska in his Proclamation of Reapportionment and Redistricting of December 30, 1971, is unconstitutional in that its overall reapportionment of the Senate and House of Representatives results in proposed election districts that do not contain as nearly equal population proportions as is practicable. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d [illegible] (1964); Wade v. Nolan, 414 P.2d 689 (Alaska 1966). Under the Equal Protect[illegible] and Supremacy Clause of the Constitution of the United States of America, the constitutional right to vote of every citizen of Alaska is protected against impermissible dilutions and impairments flowing from malapportionment of either the House of Representatives or the Senate. In order to effectuate this constitutionally protected right to vote, we are obliged to declare the reapportionment plan of December 30, 1971, invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. To insure compliance with the Equal Protection Clause in regard to the forthcoming 1972 primary and general elections for the State Legislature this court must formulate an interim reapportionment and redistricting plan. Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 675–676, 84 S.Ct. 1429, 12 L.Ed.2d 595, 607 (1964). The Lieutenant Governor is to conduct the 1972 primary and general elections for the State Legislature pursuant to the interim reapportionment and redistricting plan which this court will adopt.

3. In order to fashion an interim plan this court will appoint one or more masters to assist it.

4. Upon receipt of the report of the master or masters, this court will consider the manner in which the House and Senate districts shall be reapportioned. This court will then proceed to adopt an interim plan of reapportionment which, as nearly as practicable, considering the allotted time, reflects the standards which have been made binding upon the states by the United States Supreme Court. Ely v. Klahr, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971); Reynolds v. Sims, 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.Ed.2d 506 541 (1964).

5. In the event this court determines that the exigencies of the situation preclude the fashioning of an interim constitutional reapportionment plan by June 15, 1972, this court will enter a further order specifying the plan under which the Lieutenant Governor shall conduct the 1972 primary and general elections for the State Legislature, together with the dates that such elections will be held. Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

6. A full opinion discussing and determining the issues which were raised in the petition and cross-petition will be filed in due course.

Dated at Juneau, Alaska, this 26th day of May, 1972.

George F. Boney
Chief Justice

Jay A. Rabinowitz
Associate Justice

Roger G. Connor
Associate Justice

Robert C. Erwin
Associate Justice

Robert Boochever
Associate Justice

Clifford J. GROH et al., Appellants,

v.

William A. EGAN, Governor of Alaska, et al., Appellees.

No. 2233.

Supreme Court of Alaska.

Sept. 13, 1974.

Action was brought challenging validity of plan for reapportionment of the Alaska legislature. The Superior Court, Third Judicial District, Anchorage District, James K. Singleton, J., dismissed and appeal was taken. The Supreme Court, Boochever, J., held that use of 1970 census data as basis for reapportionment plan adopted in 1973 was not unreasonable; that formula used to exclude transient military personnel from data base did not discriminate against military personnel; that State failed to demonstrate that individual variances from the mean in certain districts were based on legitimate considerations incident to the implementation of a rational state policy; that division of Greater Anchorage area into six election districts was not improper; and that it was within governor's discretionary authority to require mid-term elections in Greater Anchorage area following adoption of the plan, Fitzgerald, J., concurred in part, dissented in part and filed opinion.

Affirmed in part and reversed in part.

Erwin, J., dissented and filed opinion.

1. States ⇐27(3)

Supreme Court does not have constitutional authority to decide what is preferable between alternative rational plans for legislative reapportionment. Const. art. 6, §§ 3, 8, 11.

2. States ⇐27(2)

Constitutional authority to reapportion the legislature resides in the executive, not the courts. Const. art. 6, §§ 3, 8, 11.

3. States ⇐27(10)

Supreme Court views a legislative reapportionment plan promulgated under the constitutional authority of the governor in the same light as it would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. Const. art. 6, §§ 3, 8, 11.

4. Administrative Law and Procedure ⇐760

Supreme Court has authority to review constitutionality of administrative action but may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency; wisdom of a given regulation is not a subject for review.

5. States ⇐27(10)

On appeal from dismissal of action challenging validity of legislative reapportionment plan, Supreme Court would consider matter de novo upon record developed in the superior court. Const. art. 6, §§ 3, 8, 11.

6. States ⇐27(3)

Governor may select from among different available statistical compilations in preparing a legislative reapportionment plan. Const. art. 6, § 3.

7. States ⇐27(10)

Supreme Court's review of governor's use of 1970 census data for purposes of adopting legislative reapportionment plan in 1973 was restricted to determining whether governor's authority to choose census data as population base was exercised in a rational as opposed to an arbitrary manner. Const. art. 6, §§ 3, 8, 11.

8. States ⇐27(5)

Governor's use of 1970 census data for purposes of adopting legislative reapportionment plan in 1973 was not improper, despite contention that there were more accurate and current data available. Const. art. 6, § 3.

9. States ⇐27(5)

Elimination of portion of military personnel within the state from population base for purpose of legislative reapportionment plan did not constitute an unconstitu-

tional employment classification on theory that civilian transients were not treated equally, as civilian transients were not present in significant numbers at time census data were obtained, civilian transients were not included in census population though military were so included and special nature of military transients created reasonable basis to distinguish between military and civilian transients. U.S.C.A.Const. Amend. 14.

10. States ⇐27(5)

Formula for exclusion of transient military personnel from population base used for legislative reapportionment purposes whereby statewide ratio of those registered to vote in November 1970 election and number counted in April 1970 census was applied to those registered to vote in locations populated exclusively by the military and their dependents to determine nonresidency factor did not discriminate against the military as class or improperly exclude military personnel based on the nature of their employment. U.S.C.A.Const. Amend. 14.

11. States ⇐27(5)

In absence of showing that manner of reapportioning state legislature is improperly motivated or has an impermissible effect, deviations between legislative districts of up to 10% require no showing of justification; however, state has burden of showing that deviations in excess of 10% are based on legitimate considerations incident to the effectuation of a rational state policy. U.S.C.A.Const. Amend. 14.

12. Constitutional Law ⇐225(1)
States ⇐27(5)

State authorities failed to demonstrate that individual variances from the mean in certain legislative districts which were malapportioned in excess of a 10% maximum comparative variance were based on legitimate considerations incident to the implementation of a rational state policy and, therefore, such variance denied residents of underrepresented districts equal protection. U.S.C.A.Const. Amend. 14.

13. States ⇐27(5)

Underrepresentation of certain legislative districts created by legislative reapportionment plan could not be justified on theory that variance was caused by desire to preserve boundaries of regional corporations established under the Alaska Native Claims Settlement Act and to establish homogeneous groupings of native peoples where none of the districts had the boundaries of a native corporation and makeup of population to the north and east of one area alleged to have unique native composition did not vary significantly from that of adjoining villages within the district. Alaska Native Claims Settlement Act, §§ 2 et seq., 3(b), 7, 43 U.S.C.A. §§ 1601 et seq., 1602(b), 1606.

14. States ⇐27(7)

Patterns of housing, income levels and minority residency within Greater Anchorage Borough lacked necessary significance to justify underrepresentation of three legislative districts in the Borough by 5.9, 6.5 and 8.6%.

15. States ⇐27(7)

Underrepresentation of Juneau legislative district by 14%, overrepresentation of Wrangell-Petersburg district by 9.3% and overrepresentation of Aleutian Chain district by 6.5%, which disparities would result from adoption of legislative reapportionment plan, were justified by valid historical and geographic considerations.

16. States ⇐27(7)

Constitutional requirement that legislative districts be formed from contiguous, compact, and relatively integrated socioeconomic areas does not prohibit smaller districts within such areas. Const. art. 6, § 6.

17. States ⇐27(7)

Division of Greater Anchorage area into six election districts was not improper, despite contention that area constituted a single integrated socioeconomic area which should not have been fragmented. Const. art. 6, § 6.

18. States ⇐

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here legislative reapportionment substantially altered senatorial dis- .s in Greater Anchorage area so that .tricts from which four "hold-over" sentors had been elected no longer existed and new districts had vastly changed boundaries, it was within governor's discretionary authority to require mid-term elections, thus truncating terms of four incumbents.

Kenneth P. Eggers, Clifford J. Groh, Groh, Benkert & Walter, Anchorage, for appellants.

James N. Reeves, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for appellees.

Ben T. Delahay, Borough Atty., Soldotna, as amicus curiae for Kenai Peninsula Borough.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, Justices.

OPINION

BOOCHEVER, Justice.

For the third time, we are confronted with a challenge to the reapportionment of the Alaska legislature.[1] In Egan v. Hammond, we held that the 1971 reapportionment of the Alaska legislature, which was promulgated pursuant to the mandate of Art. VI of the Alaska Constitution, was unconstitutional under the equal protection and supremacy clauses of the United States Constitution. Due to the imminence of the 1972 elections we adopted an interim plan of reapportionment for the 1972 legislative elections. The case was thereafter remanded to the superior court which on January 13, 1973 issued an order, pursuant to our mandate, requesting the governor of the State of Alaska, with the assistance of an advisory board appointed by him, to develop a permanent reapportionment plan for the Alaska legislature. The governor appointed an advisory board which, after conducting numerous public hearings, submitted a report and proposed plan of reapportionment[2] which was adopted by the governor on December 11, 1973.

Suit was commenced in the superior court challenging the validity of the plan. After trial of the case, Judge Singleton entered a judgment on May 14, 1974 dismissing the action on the merits. Appellants raise the following issues on appeal:

1. Population variance between districts was excessive.
2. The division of the Greater Anchorage area into six districts violated the Alaska constitutional requirement that districts be formed of contiguous and compact territories containing as nearly as practicable a relatively integrated socio-economic area.
3. There was no need to truncate the terms of four senators, and termination of their terms constituted a denial of equal protection.
4. The use of a formula establishing the number of military personnel to be included in the population base violates the due process and equal protection clauses of the United States and Alaska constitutions.
5. Failure to base the plan on the latest population data resulted in malapportionment.

Because of the imminence of the 1974 elections, we expedited briefing and heard arguments on June 4, 1974. On June 6, we entered an order approving all aspects of the plan except the composition of specified house and senate districts, which we found exceeded permissible constitutional

1. *See* Egan v. Hammond, 502 P.2d 856 (Alaska 1972) and Wade v. Nolan, 414 P.2d 689 (Alaska 1966).

2. The report was unanimously approved by the five-member board, with the exception of the districting of the Anchorage area, to which portion of the report two members dissented.

limits regarding population variances without adequate justification.[3]

The case was remanded to enable the governor of the State of Alaska, if he desired, to resubmit the plan to the Advisory Reapportionment Board for the purpose of revising it and bringing the districts specified within constitutional standards.[4] We stated in our order that a full opinion would follow.

I

STANDARD OF REVIEW

Besides determining whether the reapportionment plan meets constitutional requirements, we must settle upon an appropriate standard of review applicable in Alaska reapportionment cases. Article VI of the Alaska Constitution provides for reapportionment of the House of Representatives by the governor after each decennial census. Although no comparable provision governs reapportionment of the senate, we have held that the Senate, too, must be similarly reapportioned in order to conform to constitutional requirements imposed by the United States Supreme Court.[5] Section 11 of Article VI confers original jurisdiction on the superior court to hear challenges to the reapportionment plan, and provides that "On appeal, the cause shall be reviewed by the supreme court upon the law and the facts."

[1,2] Appellants argue that this constitutional authority confers upon the supreme court the power to decide what is preferable between alternative rational plans. We do not so construe our authority, for if that were the case, there would be little reason to provide for the governor to promulgate the reapportionment plan after receiving the recommendations of the Advisory Reapportionment Board.[6] The constitutional authority to reapportion resides in the executive, not the courts. Jurisdiction is conferred on the courts only when an application is made to compel the governor, "[T]o perform his reapportionment duties or to correct any error in redistricting or reapportionment."[7] It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes "error" which would invoke the jurisdiction of the courts.

[3,4] We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulations first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation

3. A copy of the order of remand is appended hereto as Exhibit A.

4. The governor did resubmit the plan to the Board, which recommended changes in the various districts, and the governor has submitted the revised plan to this court.

5. *See* Egan v. Hammond, 502 P.2d 850, 874 (Alaska 1972); Wade v. Nolan, 414 P.2d 689, 700 (Alaska 1966).

6. Art. VI, §§ 3 and 8, Alaska Constitution.

7. Art. VI, § 11 of the Alaska Constitution provides:

> Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties or to correct any error in redistricting or reapportionment. Application to compel the governor to perform his reapportionment duties must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting or reapportionment must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.[8] The superior court indicated that it applied these criteria to its review of the reapportionment plan, and we shall apply like standards in our review of the law and facts raised by this appeal.

[5] One other aspect of our review function pertains to the weight to be given to the decision of the superior court. When the reapportionment article was first proposed at the constitutional convention, original jurisdiction for review was vested in the supreme court. After discussion, it was deemed more practical to have original jurisdiction in the superior court, but the delegates indicated a preference for the application by the supreme court of a standard other than the familiar "abuse of discretion" test in reviewing the decision of the superior court. The draft was amended to specify that "[o]n appeal, the cause shall be reviewed by the supreme court upon the law and the facts."[9] The minutes of the Constitutional Convention indicate that the drafters of this provision intended that appellate review be in the nature of a de novo proceeding, but without additional evidence being presented.[10] Accordingly, in reviewing the reapportionment plan we shall consider the matter de novo upon the record developed in the superior court.

II

USE OF THE 1970 CENSUS DATA

In determining the population base to be used for reapportionment, the Advisory Board relied upon the 1970 decennial census. Appellants contend that there were more accurate and current data available, and that it was improper not to utilize them.

Article VI, Section 3 of the Alaska Constitution provides that, "[R]eapportionment shall be based upon civilian population within each election district as reported by the census." In Egan v. Hammond, we held that the elimination of military personnel as a class was unconstitutional, and that the "civilian population" clause could not be severed from the requirement that

8. *See* Kingery v. Chapple, 504 P.2d 831, 834–835 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

9. Alaska Constitution art. VI, § 11.

10. The intent was best articulated by Delegate McLaughlin:

> I believe, Mr. Johnson, in answer to you, there was one addition that Mr. Taylor desired. He desired not only a review on the law, but he wanted to make sure that the supreme court could review all the facts as presented in the superior court. He wanted in substance a trial de novo without any other evidence than the evidence presented in the superior court. That's why he insisted that the law and facts appear there.

Minutes, Constitution Convention 1947. Previously, the following exchange had taken place between Delegates Taylor and Hellenthal:

> Taylor: . . . Why in this proposed article, did you confer upon the supreme court of the State of Alaska original jurisdiction to try disputes as to reapportioning?
>
> Hellenthal: That language came identically from the language of the Hawaii Constitution which was recently adopted, and we felt that the matter of such supreme importance as this should be conferred on the supreme court and that they should be given original jurisdiction. There might be a better court.
>
> Taylor: Do you not believe that the superior court could be more available to any disgruntled voter . . . an' allow the supreme court of Alaska to be the appellate court . . . ?
>
> Hellenthal: Of course their review would be confined to review of legal matters and not facts. Perhaps it was thought that the supreme court was a bit more detached than a superior court.
>
> Taylor: But if the district courts abuse their discretion, you can always raise that in the appellate court.
>
> Hellenthal: But as you know and I know as lawyers, to raise the question of abusive [sic] discretion you have got to be awfully right.
>
> Taylor: Could you not in your proposal put it that the superior court should have original jurisdiction and that the supreme court would be the appellate court and also could find as to the facts? (Minutes, pp. 1850–60).

reapportionment be based exclusively upon census data. We concluded that alternatives to the census base could be utilized.[11] Thus, there is no longer a specific constitutional mandate as to the population base to be utilized by the governor. On the other hand, it has never been held that the due process or equal protection clauses of the United States or Alaska constitutions dictate reapportionment upon some population base other than that of decennial census.[12] In fact, in Reynolds v. Sims, the United States Supreme Court stated:

> In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.[13]

[6] While *Reynolds* indicates that it is not necessary to reapportion more frequently than decennially, it does not really address itself to the question of what population data may be used. There can be little question but that the general principle of equalizing votes per persons can best be achieved by use of the most current accurate data reasonably available. We indicated in Egan v. Hammond, that in the absence of a constitutional amendment reestablishing specific guidelines, the governor has the power to select alternative bases for reapportionment purposes. We referred to the permissibility of a registered voter, state citizenship or state residency base.[14] Similarly, the governor may select from among different available statistical compilations.

[7,8] Since the governor's authority to choose census data as a population base is not limited by either the state or the federal constitution, our review is restricted to whether that authority has been exercised in a rational as opposed to an arbitrary manner. The report of the Reapportionment Advisory Board evidences thorough and exemplary exploration of the possibility of using more current statistics. Only after alternatives were carefully examined was the determination made to use the 1970 census data. As to the rationality of that decision, we agree with the findings of the superior court:

> The Advisory Reapportionment Board examined the feasibility of such an update. Its statistical technician (who is otherwise the employee of the Research and Analysis Section who is responsible for preparing that office's annual estimates) and its counsel sought the advice of Dr. George Rogers on this matter and were informed that it would be impossible to update the 1970 data in a statistically meaningful way with the geographical specificity required for reapportionment. The Board also took this question up with Ronald Evans, federal census coordinator at the University of Alaska's Institute for Social, Economic and Government Research, who advised that updated population data was not available and that it would be possible to contract with the Census Bureau to obtain a special census for reapportionment purposes at a cost of about $250,000. For these reasons, and in addition because the Annual Estimates represent population in July rather than in April and cannot effectively be extrapolated with geographic

11. 502 P.2d at 870–871.

12. Justice Brennan in his dissent in White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314, 334 (1972), asserted that a reapportionment plan must be "grounded on the most accurate available data", and that unreliability of data may necessitate invalidation of a plan. No holding of the United States Supreme Court, however, implies that decennial census data is not constitutionally appropriate, and Justice Brennan did not address himself to the question of how current reapportionment data must be.

13. 377 U.S. 533, 583, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506, 540 (1964).

14. 502 P.2d at 870.

specificity, it was not unreasonable for the Board to conclude that it could not effectively update 1970 census data.

The use of the 1970 census data under those circumstances did not constitute error.

III

MILITARY PERSONNEL

The Advisory Board sought to eliminate from the data base, to the extent that reliable information could be developed on which to do so, all nonresidents who could be statistically identified. The Board found that approximately 26 percent of the census population consisted of military personnel and their dependents, substantial numbers of whom were not residents of the state.[15] A complicated formula was established whereby 28,581 of the approximately 78,998 military and military dependents,[16] were eliminated from the population base. Appellants contend that the elimination of a portion of the military personnel from the population base constitutes an unconstitutional employment classification violative of due process and equal protection.[17]

In Egan v. Hammond, we wrestled with the thorny problem of accounting for military personnel in the Alaska population base. Since many of the considerations there discussed are still controlling on this issue, we shall summarize the basic rationale of that case.[18] We held invalid the constitutional requirement that reapportionment shall be based upon civilian population within each election district as reported by the census for the reason that military personnel as a class could not be eliminated arbitrarily. We pointed out, however, that by holding such elimination unconstitutional we were not saying "that some military cannot be excluded as a permissible device for limiting the impact of transients and nonresidents on legislative districting." Reference was made to the possibility of using a registered voter base, which has been approved in Burns v. Richardson,[19] or employing a state citizen or state residency basis. We expressed what has now proved to be a vain hope that the legislature would update the reapportionment provision of the Alaska Constitution with an appropriate constitutional amendment.

15. The masters we appointed collected the following data regarding participation of military personnel in the 1970 general election: Elmendorf and Fort Richardson, 102 voters of 9,445 population over age 18; Eielson and Fort Wainwright, 172 voters of 10,270 population over age 18; Shemya Station, no voters among 1,085 population over age 18; Kodiak Station, 78 voters of 1,717 population over age 18. In these six enumeration districts populated by military personnel and their dependents, there were thus only 352 voters from an adult population of 22,523 or less than 1.6 percent. Approximately 52 percent of non-military adults voted in the same election. Egan v. Hammond, 502 P.2d at 969, *see* 502 P.2d at 862 (Boochever, J., dissenting). If voting can be taken, as we believe, to be an indication of a person's desire to make a state his home, the desires of Alaska-based military personnel have been clearly expressed in the negative. Of all the military personnel in Alaska, only 190 claimed to be residents of record according to the Alaska Command at the time of Egan v. Hammond, *id.* at 862, and nothing in the record indicates that this figure has changed significantly.

16. In April 1970, the census indicated that there were 32,113 uniformed military personnel in the state. Figures provided by the Alaska Command and other sources indicated approximately 1.46 military dependents for each uniformed military personnel in July 1973. Assuming the same ratio in 1970, there were 46,885 military dependents and personnel in 1970. Thus, military personnel and their dependents accounted for 78,998 of the state's 1970 population of 302,361. Although the Board originally sought to eliminate nonresident military and nonresident dependents, the exclusionary formula was finally applied only to uniformed personnel.

17. *See* Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964). "Discrimination against a class of individuals merely because of the nature of their employment, without more being shown, is constitutionally impermissible."

18. *See* 502 P.2d at 868–871.

19. 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

[9] In the absence of any constitutionally mandated population base, the Advisory Board sought information regarding Alaska's transient population. Military personnel were found to be the most prominent component, and on the basis of its data the Board found a certain proportion of the military to be excludable from the population base. The dissent finds error in the decision to exclude military transients from the apportionment population base primarily because the Board failed to treat civilian transients equally. For three reasons we find the Board's decision reasonable: (1) it was reasonable for the Board to conclude that civilian transients are not present in significant numbers in April, when the census data was obtained; (2) even if transients were present, they were not included in the Alaska census population, although all military stationed in Alaska were so included; (3) the special nature of military transience creates a reasonable basis to distinguish between military and civilian transients.

Initially we believe the Board was justified in concluding that civilian transients were not included in the 1970 Alaska census figures. The 1970 census data, upon which the exclusion was based, was obtained in April. The seasonality of tourism in Alaska is well known; although published data on tourist presence is not readily available, the absence of tourists in the state during school months and before the spring thaw is common knowledge. The likelihood that any number of tourists could have been included in Alaska's census population is, therefore, minute. The seasonality of much of Alaska's employment market has been authoritatively documented over several decades.[20] Specific data bearing out the general trend in recent years, and the 1970 census year in particular, is available through the Alaska Workforce Estimates prepared on a monthly basis by the Research and Analysis Section of the Employment Security Division of the Alaska Department of Labor. A review of those documents for 1970 shows the presence in April 1970 of a total statewide labor pool of 109,972 employable civilians.[21] That figure is but 7,000 more than the January ebb and over 17,000 less than the 127,144 peak in July.[22] The actual number of persons employed showed a similar pattern of increase and decline: for instance, in the food processing industry, which is inextricably tied to the highly seasonal fishing industry,[23] total employment doubled from 6,700 in April to 13,600 in July.[24]

Even if non-military transients were contacted by census takers in Alaska, it does not follow that they were included in Alaska's population. The census enumerates a person according to his "usual place of residence".[25] That clause is "generally

20. *See* Rogers, G. W. and Cooley, R. A., Alaska's Population and Economy, 127–30 (1962); Rogers, G. W., The Future of Alaska, 106–07 (1962); Rogers, G. W., Alaska, The Economy and the Labor Force, 78 Monthly Labor Rev. 1375 (1955); *cf.* Rogers, G. W., Alaska Regional Population and Employment, University of Alaska S.E.G. Report No. 15 at 30, 94 (1967). *See generally* Research and Analysis Section, Empl. Security Div., Alaska Dept. of Labor, Alaska Workforce Estimates by Industry and Area, 1965–72. The workforce estimates are prepared under mandate of the United States Department of Labor to the state to make available to the public, "accurate and timely area manpower and job market information for decision-making purposes." III United States Department of Labor, Employment Security Manual § 8020, *implementing* 20 C.F.R. § 602.6, *implementing* 29 U.S.C. § 301 *et seq.* We harbor no reluctance to take notice of such authoritative sources documenting a well known aspect of the Alaska economy. Civil Rule 43(a)(2)[c] and 43(a)(2)[d].

21. Research and Analysis Section, Empl. Security Div., Alaska Dept of Labor, Revised 1970 Alaska Workforce Estimate (1972).

22. *Id.*

23. *See generally* authorities cited at note 20, *supra*.

24. Research and Analysis Section, Empl. Security Div., Alaska Dept. of Labor, Revised 1970 Alaska Workforce Estimate (1972).

25. Bureau of the Census, Social and Economic Statistics Administration, United States Department of Commerce, Characteristics of the Population, Part A at v. (1971).

construed to mean the place where [a person] lives and sleeps most of the time." [26] Transient individuals in Alaska in April 1970 were not necessarily counted as Alaska residents. For example, the residence of tourists was attributed to their state of origin.[27] The same was true where a short-term worker was encountered in Alaska.[28] Those persons who were counted as residents of Alaska lived and slept here "most of the time", and it would be difficult to find a basis for excluding them from the population base.

Servicemen were treated very differently from civilians by the census, however:

> Members of the Armed Forces living on military installations were counted, as in every previous census, as residents of the area in which the installation was located. Similarly, members of the Armed Forces not living on a military installation were counted as residents of the area in which they were living. Crews of U.S. Navy vessels were counted as residents of the home port to which the particular vessel was assigned. . . . [29]

Thus the census fails to cull out the nonresident from the military census population, although it does so with respect to the civilian population.[30] In that distinction alone lies justification for the Board's excluding of nonresident military persons without also attempting to eliminate civilian nonresidents.

Finally, in concluding that the exclusion of the military cannot be reconciled with "the board's tolerance toward civilian transients" and comparing the exclusion of military personnel to a durational residency requirement, the dissent in our opinion ignores the fundamental reason for the exclusion of some military personnel—their want of any contact with the state beyond mere presence. Although some may volunteer for such duty, military personnel are ordered to report to the Alaska Command. Recognizing the involuntary nature of military assignment, common law courts, including the territorial district court,[31] have long stated that a person who enters the military retains the residence and domicil he established before entering the

26. *Id.*

27. *Id.* at vi.

28. *Id.* The rules followed by enumerators to decide residence questions further support the understanding that civilian transients were not included in Alaska's census population in a significant number. Persons who maintained a permanent residence elsewhere than Alaska but were encountered in Alaska because of seasonal employment would have been classified as "Person who has more than one home and divides time between them", and the assigned residence would have been "Place where he spends largest part of calendar year." Bureau of the Census, United States Department of Commerce, Enumerator's Handbook Pub. D-507 [Rule 11] at 76. (The rules may also be found in other versions of the handbook, Publications D-500, D-520 and D-526.) Thus, the census included as Alaska residents only those transients who spent a majority of the year in Alaska. For the Board to seek to determine who among them actually considered themselves to be state citizens would be a Herculean task, if it could be accomplished at all. Persons who were in Alaska as seasonal laborers when their families were enumerated in other states would also have been referred back as residents of the locale of the family household. *Id.* [Rule 1] at 75. Only homeless migrants could have been included as Alaska residents, had such persons been present in the state. The relevant rule assigns "Persons in places which have shifting populations composed mainly of persons with no fixed residence, such as convict camps, highway and other construction camps, and camps for migratory agricultural workers," a residence in the camp where they are found. *Id.* [Rule 16] at 77. The thought that any significant number of people could have been encountered in agricultural or construction camps in Alaska on April 1, 1970 defies experience.

29. Bureau of the Census, *supra* note 25 at v.

30. The census does place college students where they attend school. The Board made an effort to determine the percentage of college students who were nonresidents. The number was found to be statistically insignificant.

31. Wilson v. Wilson, 10 Alaska 616, 621 (D.C.Anch.1945). The legislature in enacting AS 09.55.160 rendered nugatory the portion of *Wilson* which held that a serviceman may not sue for divorce within the state of assignment. *See* Lauterbach v. Lauterbach, 392 P.2d 24 (Alaska 1964).

military.[32] Most of these courts accept the principle that those in the military may acquire a domicil of choice where they are billeted, but the first Restatement of Conflict of Laws denied even that opportunity to some,[33] and the Second Restatement considers a new domicil "difficult to establish."[34] The principle that a military person retains his entrance domicil and residence has been embodied in a federal statute which exempts servicemen from virtually every form of taxation on income or personal property in the state where they are stationed unless they are domiciled there.[35]

As a result of the common and statutory law and the economics of military life, the serviceman and his family may remain completely aloof from the state of assignment, neither utilizing its services nor contributing to its treasury or public life.

We hold that it was reasonable for the Board to exclude some proportion of military personnel not merely because of their transience, but because a significant number of Alaska-based military personnel exercise an option to be non-Alaskans, despite their physical presence here. This phenomenon is well demonstrated by the minuscule voter registration on military enclaves. tions of the popu who have periods o have exer dent and

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32. *See* Stifel v. Hopkins, 477 F.2d 1116, 1122 (6th Cir. 1973); Ellis v. Southeast Constr. Co., 260 F.2d 280, 281–282 (8th Cir. 1958); Prudential Ins. Co. of America v. Lewis, 306 F.Supp. 1177, 1184 (N.D.Ala.1969); Kopasz v. Kopasz, 107 Cal.App.2d 308, 237 P.2d 284, 285–286 (1951); Means v. Means, 145 Neb. 441, 17 N.W.2d 1, 3 (1945); Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713, 715–716 (1961); Wiseman v. Wiseman, 216 Tenn. 702, 393 S.W.2d 892, 895 (1965).

33. Restatement of Conflict of Laws, § 21 comment *c*. (1934).

34. Restatement (Second) of Conflict of Laws, § 17 comment *d*. (1971):

> A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicil there though he lives in the assigned quarters with his family. He must obey orders and cannot choose to go elsewhere. On the other hand, if he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duties, he retains some power of choice over the place of his abode and may acquire a domicil. To do so, however, he must regard the place where he lives as his home. Such an attitude on his part may be difficult to establish in view of the nomadic character of military life and particularly if he intends, upon the termination of his service, to move to some other place.

We recognize, of course, that durational requirements for establishment of residence or domicil often suffer constitutional defects. State v. Adams, 522 P.2d 1125 (Alaska 1974); State v. Von Dort, 502 P.2d 453 (Alaska 1972). We deal here not with a durational requirement, but with the question of whether an individual may be considered a resident for purposes of apportionment.

35. 50 U.S.C.A. App. § 574 provides:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile, in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders
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enclaves. It is thus not offensive to notions of equal protection to exclude from the population base even military personnel who have lived in Alaska for substantial periods of time, so long as those people have exercised their option to remain residents and domiciliaries of other states.

We turn, then, to the specific exclusion effected by the Board. The Board requested the military authorities in Alaska to compile and furnish data on Alaska's military and military-related population, and to furnish comments and suggestions concerning methods of identifying state residents among them. The Alaska Command reported that as of July 1, 1973, of the 18,581 uniformed military persons at the five major installations in Anchorage and Fairbanks, only 200, or 1.07 percent, are reflected as Alaska residents in personnel records. Since such figures probably are not promptly changed when personnel decide on a change of residence, they are of somewhat dubious value. They do show, however, that a substantial portion of the military population do not regard themselves as residents of Alaska.

The Board finally adopted a modification of a plan employed by the State of Washington in its recent reapportionment. The Washington plan was based on the premise that in any group of citizens approximately the same number will register to vote.[36] Therefore, the number of citizens could be extrapolated from the number of registered voters if the number of registered voters was known, but the number of residents was not. The statewide ratio of citizens to registered voters was 2.2:1. This ratio was then applied to the number of registered voters in the Fort Lewis-McCord Field military complex and in other military establishments occupying complete census enumerating districts. The number of military state residents (2.2 times the number of registered voters) was then subtracted from the total number of military persons present in the state, and the difference was deemed to represent the number of transient military personnel. The computation resulted in the exclusion of 58,507 persons—estimated to be nonresidents—of the total of 60,143 military personnel. A corresponding downward adjustment was effected in the districts in which they had been counted (only 1,636 were included in the population base). A three-judge federal court adopted the reapportionment plan containing this formula which had been the result of a stipulation of some of the parties to the case. Two intervenors who were not parties to the stipulation appealed to the United States Supreme Court alleging in part that the method used unconstitutionally failed to include all of the military personnel. On appeal, the United States Supreme Court without opinion affirmed the order adopting the statistical reapportionment method.[37]

36. We do not find the dissent's suspicion of voter registration as an index of state citizenship of military personnel tenable. First, there is no contention that military personnel are subjected to some invidious discrimination in voter registration. In fact, there is evidence in the record that special efforts have been made to convince military personnel to register to vote, and that those efforts have failed. Nor do we consider the low percentage of registration or voting in bush areas to have any bearing upon the fairness of a voter-registration-based statistic, since the travel, communication, language, and cultural barriers of residents of those areas are not experienced by the vast majority of Alaska's military personnel. In any event, any statistical skew produced by low registration or voting in bush areas would lead, in the Board's exclusion formula discussed *infra*, to a result more favorable to military personnel as a class than that which would obtain if larger numbers of civilians registered and voted. There is every reason to believe that military personnel who desire to be Alaska residents and domiciliaries will register to vote because voter registration is a prime index of intention to become a resident or domiciliary. For like reason, we think that those who do no want to become Alaskans demonstrate that intention by refusing to register to vote. *See* Egan v. Hammond, 502 P.2d at 862 n. 2 for an example of the dismal results of efforts to register military persons as Alaska voters. Similar examples appear in the record of this case.

37. Washington State Labor Council AFL-CIO v. Prince, 409 U.S. 808, 93 S.Ct. 63.

526 P.2d—55½a

The Alaska Advisory Board ascertained that the ratio between those registered to vote in the November 1970 Alaska election and the number counted in the April 1970 census was 1 to 2.717. This ratio was applied to those registered to vote in six locations populated exclusively by the military and their dependents.[38] A total of 1,049 persons were registered to vote in those military areas, thereby indicating 2,850 state residents (1,049 x 2.717). The census population within the sample area was 41,659, of whom 25,234 were estimated to be adults. Utilizing only the adults in the sample area, the Board found that approximately 11 percent were estimated to be residents (2,850/25,234), and accordingly 89 percent were nonresidents. Applying the 89 percent nonresidency factor to each place in which military personnel were counted resulted in a deduction of 28,581 from the total uniformed military population and corresponding deductions in each census district.

[10] There are obviously certain assumptions which had to be made in evolving the formula used, and admittedly there are inexactitudes. Any error, however, is bound to have resulted in more military and their dependents being counted than are actually residents of the state. For instance the exclusionary formula was applied only to uniformed military personnel and not their dependents. Dependents of military persons may be assumed, for the most part, to have the same residential characteristics as the uniformed personnel upon whom they are dependent. There was an approximate total of 78,998 military and dependents counted in the 1970 census. Since but 28,581 were deducted, the actual percentage counted as residents was approximately 65 percent. Based on all statistical information available, this percentage is in all likelihood much higher than the actual percentage of military and military dependents who are residents of the state.[39] While an exclusion of a larger percentage of military personnel and dependents may be justified, we have not been presented with an issue as to overrepresentation of the military. We conclude that there was no discrimination against all military as a class and no improper exclusion of military personnel based on the nature of their employment.

IV

POPULATION VARIANCES

The 1973 reapportionment plan contains a maximum deviation in the House of Representatives of 29 percent, the Juneau district being underrepresented by 14 percent and the Nome district overrepresented by 15 percent. In the Senate, the maximum deviation is 22.4 percent.[40] Of 40 house seats, 22 derive from districts where representation deviates by five percent or more from the mean, and of 20 senate seats, 11 are situated in districts characterized by similar deviations. Since the deviations in both the house and the senate were, of course, both below and above the mean, the total deviations between several pairs of districts were in excess of ten percent. Appellants contend that such variances in population dilute and impair the right to vote of Alaskans in the underrepresented districts, in violation of the equal protec-

34 L.Ed.2d 68 (1972). *See also* In re Opinion of Justices, 111 N.H. 146, 276 A.2d 825 (1971), wherein the New Hampshire Supreme Court decided in an advisory opinion that excluding from the population base military personnel who have not met reasonable residence requirements was constitutionally permissible.

38. Approximately 60 percent of Alaska's military live in these six locations.

39. The largest claim to representation was detailed in our masters' report, where it was reported that 25 to 30 percent of military personnel and dependents in Alaska answered affirmatively to a census question whether their residence was the same in 1970 as it was in 1965. Assuming that pure duration creates voting residency, the 65 percent inclusion is more than double the allowance which could be argued for. *See* Egan v. Hammond, 502 P.2d at 886.

40 The Juneau senate district is underrepresented by 14 percent, and the Bethel district overrepresented by 8% percent.

tion clauses of the United States and Alaska constitutions.

In Egan v. Hammond, we discussed the then-applicable constitutional criteria, first delineating the unique problems involved in attempting to secure equal population districts in Alaska:

> When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state. Surprisingly small changes in district boundaries create large percentage variances from the ideal population.[41]

We concluded:

> Thus the present standard for reapportionment allows two separate justifications for deviation from the ideal population figures. The first is . . . variance occurring because of uncontrollable factors, despite a good faith effort to achieve mathematical precision. The second acceptable deviation is that which "the State must justify"—the implication being that while it was a controllable deviation, other factors "incident to the effectuation of a rational state policy" can be advanced in justification. However, as the Supreme Court cautioned at an early date in Reynolds v. Sims, acceptable state policies are greatly limited.[42]

Since our opinion in Egan v. Hammond, there have been three United States Supreme Court opinions somewhat ameliorating the rigid standards previously applied. In the first of this trilogy, Mahan v. Howell,[43] a Virginia reapportionment plan involving a maximum variation of 16.4 percent[44] (one district was overrepresented by 6.8 percent and another underrepresented by 9.6 percent) was held to be justified by the state policy of following political subdivision boundary lines. The court recognized that the states had been accorded more latitude with respect to state legislative reapportionment than with respect to congressional redistricting.[45] While reaffirming the holding of Reynolds v. Sims that:

> [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[46]

the court in *Mahan* emphasized that:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[47]

In Gaffney v. Cummings,[48] the Supreme Court upheld a reapportionment plan for the Connecticut General Assembly involving a maximum deviation of 7.83 percent although a proposed plan had been submitted involving a much smaller deviation. In establishing the reapportionment plan, the apportionment board had followed a policy

41. 502 P.2d at 865 (footnote omitted).

42. *Id.* at 867 (footnote omitted). *See* Reynolds v. Sims, 377 U.S. at 579–580, 84 S.Ct. at 1390–1391, 12 L.Ed.2d at 537–538.

43. 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), modified, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973).

44. *But see* opinion of Brennan, J., dissenting, indicating that the maximum variation might well have been 23.6 percent. 410 U.S. at 336, 93 S.Ct. at 991, 35 L.Ed.2d at 337.

45. 410 U.S. at 322, 93 S.Ct. at 984, 35 L.Ed.2d at 329.

46. 410 U.S. at 324–325, 93 S.Ct. at 985, 35 L.Ed.2d at 330, *quoting from* Reynolds v. Sims, 377 U.S. at 577, 84 S.Ct. at 1390, 12 L.Ed.2d at 536.

47. *Id.*, *quoting from* Reynolds v. Sims, 377 U.S. at 579, 84 S.Ct. at 1391, 12 L.Ed.2d at 537.

48. 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

of "political fairness" aimed at establishing "a rough scheme of proportional representation of the two major political parties." [49]

The Supreme Court concluded:

> We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an invidious discrimination under the Fourteenth Amendment which would entitle appellees to relief absent some countervailing showing by the State.[50]

Although the Court found in its previous decisions the principle that, "[T]he larger variations from substantial equality are too great to be justified by any state interest so far suggested", nevertheless it also held that, "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination. . . ." [51] The Court recognized that state reapportionment is the task of the organ of state government selected to perform it,[52] and that even though a slightly better plan could be created, that fact did not establish an invidious discrimination under the fourteenth amendment.

[11] Finally, in White v. Regester,[53] a Texas reapportionment plan was upheld although it contained a maximum population variance between the largest and smallest district of 9.9 percent. No acceptable state policy was advanced to support the deviations. However, only 23 districts were over or underrepresented by more than three percent, and only three of those districts by more than five percent. The Court held that it did not consider relatively minor population deviations among state districts to so dilute the franchise in underrepresented districts so that individuals in those districts were deprived of fair and effective representation:

> Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," Reynolds v. Sims, 377 U.S. at 579, 84 S.Ct., at 1391, 12 L.Ed.2d 506; Mahan v. Howell, supra, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone.[54]

According to Justice Brennan, *White* established a rigid demarcation line:

> [T]he Court today . . . reason[s] . . . that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been

49. *Id.* at 738, 93 S.Ct. at 2324, 37 L.Ed.2d at 303.

50. *Id.* at 740, 93 S.Ct. at 2325, 37 L.Ed.2d at 304–305.

51. *Id.* at 745, 93 S.Ct. at 2327, 37 L.Ed.2d at 307.

52. *Id.* at 751, 93 S.Ct. at 2330, 37 L.Ed.2d at 311. The Court pointed out that constitutional violations could occur even though districts were equal or substantially equal in population as, for example, when multi-member districts are so established as to invidiously minimize the voting strength of racial or political groups.

53. 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314.

54. *Id.* at 764, 93 S.Ct. at 2338, 37 L.Ed.2d at 323.

drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.[55]

We conclude that in the absence of a showing that the manner of reapportioning a state was improperly motivated or had an impermissible effect, deviations of up to ten percent require no showing of justification.[56] The state, however, has the burden of showing that deviations in excess of ten percent are "based on legitimate considerations incident to the effectuation of a rational state policy".

[12] We thus must ascertain whether the state has met its burden of justification here. As indicated in our order of June 6, 1974, we find that House districts No. 22 (Nome), No. 16 (Bristol Bay), No. 12 (Anchorage West), No. 20 (Fairbanks), No. 11 (Anchorage South), No. 9 (Anchorage Spenard), and No. 17 (Bethel), and Senate districts J (Anchorage West), M (Bristol Bay-Bethel), O (Fairbanks), G (Anchorage Spenard) and I (Anchorage South) are malapportioned in excess of a 10 percent maximum comparative variance, and that the appellees failed to demonstrate that the individual variances from the mean in those districts were based on legitimate considerations incident to the implementation of a rational state policy.[57]

[13] We find it necessary to discuss briefly the reasons advanced by the Advisory Board in attempting to justify the disparities in each of the districts referred to above. We are convinced that the Board made a good faith effort, but unfortunately we find that the reasons advanced by the Board do not withstand close scrutiny under the standards enunciated by the United States Supreme Court. In many instances, one of the principal reasons advanced by the Board was the preservation of the boundaries of regional corporations established under the Alaska Native Claims Settlement Act. Under that Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought to establish homogeneous groupings of Native[58] peoples having a common heritage and sharing common interests.[59] The use of such corporate boundaries in districting might constitute justification for some population deviation. Following corporate boundaries was stated as a reason for the composition of House districts 22 (Nome), which was 15 percent overrepresented, 16 (Bristol Bay), which was 10.9 percent overrepresented, and 17 (Bethel), which was 6.3 percent overrepresented. We find, however, that none of those districts has the boundaries of a Native corporation. Each included substantial portions of more than one corporate region.

Additionally, it was suggested that the Nome area had a unique Native composition. But the makeup of the population both to the north and east does not vary significantly from that of the adjoining villages within the Nome boundaries. The mining potential in the area and the need for a "common port facility" do not constitute considerations incident to the implementation of a rational state policy so as to justify a disparity of 15 percent overrepresentation.

55. *Id.* at 776, 93 S.Ct. at 2345, 37 L.Ed.2d at 331 (Brennan, J., dissenting).

56. The challengers' briefs are silent on the issue of whether the governor's plan had the purpose or effect of discriminating impermissibly against any racial, ethnic or political group. At oral argument, counsel for the challengers, who is also a state senator from Anchorage, conceded that the record did not demonstrate any such discrimination.

57. The attempted justifications are to be found in the report and proposed plan of the Governor's Advisory Reapportionment Board. The testimony at the trial of this case produced little if any evidence to supplement the justifications set forth in the report.

58. "Native" is basically defined in the Act as a citizen of the United States who is ¼th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof. 43 U.S.C.A. § 1602(b).

59. 43 U.S.C.A. § 1606.

No valid reasons were advanced for the 10.9 percent overrepresentation with reference to House District 16 (Bristol Bay). We can agree with the Board's decision not to combine the Bristol Bay area with the Aleutian Chain because of conflicts between the residents of the two areas, but that does not explain why other areas could not have been added to the district so as to create less of a variance.

District 20 (Fairbanks) is a multi-member district electing six house members. It is 7.4 percent overrepresented, and no valid reasons were set forth as to why additional areas could not be included so as to reduce the variance.

The explanation advanced for District 17 (Bethel) having 6.3 percent overrepresentation was the inclusion of a portion of the Calista Native Corporation Region and utilization of one of the boundaries of that region. In view of the fractionation of Calista revealed by reference to the maps, the reason advanced cannot justify the discrepancy under the Supreme Court guidelines.

Finally, Anchorage districts 9, 11 and 12 were underrepresented respectively by 5.9, 6.5 and 8.6 percent. Having made the policy decision to divide Anchorage into six districts, the Advisory Board endeavored to identify like socio-economic areas, based on the cost of housing, the concentration of minorities, income levels, the need for transit systems and growth and development plans. It is clear from the testimony, however, that there are few if any homogeneous areas within the Anchorage Borough; the patterns of housing, income levels and minority residency criss-cross extensively.

The Board's apparent effort was directed at compliance with the Alaska constitutional mandate that districts contain "as nearly as practicable a relatively integrated socio-economic area."[60] Some guidance as to the meaning of the term "socio-economic area" may be garnered from the minutes of the Constitutional Convention.

It appears that Delegate Hellenthal advocated the use of the term, describing it as follows:

> [w]here people live together and work together and earn their living together, where people do that, they should be logically grouped that way.[61]
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> . . . . . .
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> It cannot be defined with mathematical precision, but it is a definite term, and is susceptible of a definite interpretation. What it means is an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits. It has, as I say, no mathematically precise definition, but it has a definite meaning.
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> . . . . . .
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> It is in common use among political scientists.
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> . . . . . .
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> I think it is a political and economic term rather than a legal term.[62]

It would appear from that discussion that a community such as the Greater Anchorage Borough might be considered as a socio-economic area, but that it becomes extremely difficult to fragment the area with geographic nicety according to the patterns endeavored to be followed by the Board. As was stated in The Report of the Masters, appended to the decision in Egan v. Hammond: "Close scrutiny of population characteristics in Anchorage do [sic] not reveal clearly delineated ethnic ghettos."[63] And at least as far as the election of legislators is concerned, Alaska does not seem to be afflicted with the racial miasma adversely affecting other sections of the United States.[64]

60. Art. VI, § 6 Alaska Const.

61. Minutes, Constitutional Convention 1830.

62. *Id.* at 1873.

63. 502 P.2d at 804.

64. Many Alaska Natives have been elected to the legislature, and two have been elevated

[14] The testimony in the court below indicated that there are few if any homogeneous socio-economic areas within the Greater Anchorage Area Borough, and that patterns of housing, income levels and minority residency are difficult to delineate. While such patterns may form a basis for districting, they lack the necessary significance to justify the substantial disparities of 5.9, 6.5 and 8.6 percent. In an urban area such as Anchorage, more mathematical exactness can be achieved than in the sparsely settled portions of the state where pockets of culturally and economically divergent populations may be separated by geographic barriers. We hold that appellees have failed to meet the constitutional burden of justifying the discrepancies found in Districts 9, 11 and 12.

[15] On the other hand, we do find that the burden was met with reference to House districts 2 (Wrangell-Petersburg), 4 (Juneau), 14 (Kodiak), and 15 (Aleutian Chain). With reference to the Juneau and Wrangell-Petersburg areas, the Board was confronted with the difficult problem of juggling the more contiguous, compact, relatively integrated socio-economic areas of Southeast Alaska without extending a substantial distance into an unrelated area separated by immense natural barriers. Yakutat, the northwestern-most settlement in Southeast Alaska, which is itself separated by great distance from the other communities in the region, is 225 air miles from the nearest population center in the Southcentral region, Cordova. There are valid considerations both historically and geographically for not endeavoring to span that gap. Within the Southeast area, Juneau is substantially underrepresented, exceeding the norm for a two-member district by 14 percent. The Board, however, presented a rational basis for not severing Skagway and Haines from the district, the only logical alternative which would reduce the underrepresentation. There are close transportation ties between Juneau, Haines and Skagway by daily scheduled air flights and frequent ferry service; a Juneau-Haines highway connection has been planned. The district is quite distinct from the rest of the Southeast region by virtue of the nature of its development and the fact that it is almost entirely composed of portions of the mainland, rather than the islands of the archipelago; historically the three communities have always been closely linked, with Juneau serving as an economic hub for Haines and Skagway.

District 2 (Wrangell-Petersburg) is the other Southeastern district with a substantial deviation—9.3 percent overrepresentation. The Board stated valid considerations for this variation, which necessarily implemented the rational state policy, expressed in the Alaska Constitution, of achieving, as nearly as practicable, contiguous, compact territory containing a relatively integrated socio-economic area.[65]

We likewise find adequate justification for the 6.5 percent overrepresentation in the vast and remote Aleutian Chain District. The district includes all of the area of the Aleut League Corporation. There appears to be no feasible means of adding additional areas of population to this district without worsening the imbalance al-

to the position of President of the Senate. Appellants point out that a black was elected to the House from a district with an insignificant minority population. [Hedland Dep. 34]

65. As the Board explained:

> The orientation of this entire district is fishing, fish processing, forest products, and tourism, and nearly all of its communities partake of all of these activities. They are integrated by the Southeast System of the Alaska Marine Highway and by numerous air taxi operators and a scheduled commercial airlines. The population is a mixture of natives and non-native [sic]. The only option for reducing the slight overrepresentation which the district may enjoy would be to reach into the Juneau district from the south or west, taking part of Douglas, Juneau, or Haines. Such a course would either effectively disenfranchise that part of Douglas or Juneau engrafted to the district or would require a bisection of the Haines Borough, further submerging its institutional voice in the legislature. Extending into Prince of Wales Island or the Sitka district would only magnify the slight numerical advantage already inevitable for those districts.

ready present in District 14 (Kodiak). By the same token, Kodiak, which is overrepresented by 5.7 percent, does not readily present an alternative, as it is surrounded by the Aleutian Chain District.

Since the senate districts combined house districts and utilized the same boundaries, the identical reasons for approving or disapproving the disparities are applicable. We thus find it necessary to hold that Senate Districts G (Anchorage Spenard), I (Anchorage South), J (Anchorage West), M (Bristol Bay-Bethel), and O (Fairbanks) exceed permissible constitutional limits as to population variances, and that appellees have failed to demonstrate that such variances are based on legitimate considerations incident to the implementation of a rational state policy.

V

DISTRICTING OF THE GREATER ANCHORAGE AREA

Appellants complain of the division of Anchorage into six election districts, contending that the area constitutes one integrated socio-economic area which should not be fragmented.

[16] We have previously upheld the authority of the governor to create single-member districts from multi-member districts.[66] The power to create such single-member districts applies to integrated soci-economic areas as well as to other areas. We do not construe the Alaska constitutional requirement that districts be formed from contiguous, compact, relatively integrated socio-economic areas to prohibit smaller districts within such areas. The smaller districts would still conform to the constitutional standard. It is conceivable, for example, that the population of Anchorage could vastly increase. It surely could not have been contemplated by the framers of the Constitution that a compact, contiguous, and socio-economically integrated metropolis of perhaps 500,000 persons could not be districted.

[17] The Advisory Board was confronted with competing policy considerations with reference to the desirability of keeping the ballot simple, encouraging qualified candidates to run for public office, and ensuring maximum voter participation, as opposed to avoiding undue fragmentation of the community. The majority of the Board found that:

> At-large representation would produce an unwieldly primary ballot with well over 100 candidates. Two districts—each to elect eight representatives and four senators—would still produce a cumbersome total of candidates and would be a more complicated ballot than is presented to voters in any part of Alaska.

The governor adopted the plan advocated by a majority of the Board, whereby the city was divided into six districts. While substantial arguments have been advanced both for and in opposition to the Board's decision, we cannot say that it is not based on rational as opposed to arbitrary considerations. Therefore, under the standard of review which we have adopted, the decision of the Board must be upheld.

Arguments have also been advanced as to the manner of delineating the districts, aside from the population imbalances discussed previously. We do not find that the boundaries lack a rational basis. Since we are not free to impose our judgment as to the wisdom of the particular partitions, we cannot entertain the argument that Anchorage could have been divided more prudently.

The superior court did not err in upholding this portion of the reapportionment plan.

VI

THE TERMINATION OF SENATORIAL TERMS

Because the reapportionment plan substantially altered the senatorial districts in the Greater Anchorage area, the governor

66. Egan v. Hammond, 502 P.2d at 873.

ordered that new elections must be held in 1974 for all senate seats in these districts. Formerly, the area constituted one senatorial district from which eight senators were elected, four being selected to four-year terms at each biennial election. The four incumbents whose terms would otherwise have extended to 1976 thus had the balance of their terms of office truncated.

Appellants contend that there was no need to terminate senatorial terms. The principal argument advanced, however, is not directed to the authority of the governor to terminate the terms of incumbents under the Anchorage reapportionment plan establishing six new districts, but to the appellants' preference that members of the senate should represent "larger, broader, socio-economic constituencies and should be elected area wide." Reference is made to a Senate Resolution expressing similar sentiments.[67]

[18] While the governor might have favorably considered the policies of having senators from Anchorage elected at large, there were valid reasons for him to exercise his discretion by dividing the area into six districts. In the previous section of this opinion, we stated our reasons for upholding the governor's decision to redistrict the Anchorage area. Once this portion of the reapportionment plan has been approved, appellants' principal argument evaporates. Since the district from which the four holdover senators were elected no longer exists and the new districts have vastly changed boundaries, it was within the governor's discretionary authority to require mid-term elections. When confronted with the same question in Egan v. Hammond, we stated:

> A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established.[68]

Counsel refers to the decision of the Supreme Court of California in Legislature v. Reinecke.[69] There a masters-recommended reapportionment plan which provided for hold-over senators to continue to serve for the balance of their terms was upheld as having a rational basis. The court considered the desirability of continuing the orderly operation of the four-year staggered term system whereby half of the senators would hold over at each session. Although it recognized a "resulting inequality among electors", the court found that the mere two-year duration of such inequality was not sufficiently egregious to require truncation of terms.[70]

If we had the original decision to make, we might well be persuaded by similar reasons to have the four senators continue to serve the balance of their terms. We conclude, however, that valid reasons were presented for truncating the terms and, accordingly, we affirm the trial court's decision upholding that portion of the reapportionment plan.

Affirmed in part and reversed in part.

ERWIN, J., with whom CONNOR, J., joins, dissenting.

ORDER

This case is before the Supreme Court of Alaska on appeal from a judgment entered by Superior Court Judge James K. Singleton in favor of appellees. Appellants below have raised a number of objections to the proclamation of reapportionment and redistricting issued by Governor William A. Egan on December 11, 1973, adopting a plan submitted by the Gover-

67. S.Res. 1, 8th Legis.2d Sess. (1974).

68. 502 P.2d at 873-874 (footnote omitted).

69. 10 Cal.3d 396, 110 Cal.Rptr. 718, 516 P.2d 6 (1973).

70. *Id.* 110 Cal.Rptr. at 723-724, 516 P.2d at 11-12.

nor's Advisory Reapportionment Board. After considering the briefs of the parties and hearing oral argument, a majority of the Supreme Court affirms the decision of Judge Singleton on the following issues:

1. The use of the 1970 census data.
2. The use of the formula establishing the number of military personnel and dependents to be included in the population base.
3. The authority of the Governor to establish multiple senatorial districts within the greater Anchorage area.
4. The authority of the Governor to truncate senatorial terms when the districts from which the senators were elected have been substantially changed.

We hold, however, that the superior court's conclusion that all House and Senate districts have been properly apportioned is erroneous. Specifically, House districts No. 22 Nome, No. 16 Bristol Bay, No. 12 Anchorage—West, No. 20 Fairbanks, No. 11 Anchorage—South, No. 9 Anchorage—Spenard, and No. 17 Bethel and Senate districts J Anchorage—West, M Bristol Bay—Bethel, O Fairbanks, G Anchorage—Spenard, and I Anchorage—South exceed permissible constitutional limits as to population variances as delineated by decisions of the United States Supreme Court.[1] Appellees have failed to demonstrate that such variances in the plan are based on legitimate considerations incident to implementation of a rational state policy.

The case is remanded so as to enable the Governor of the State of Alaska, if he so desires, to re-submit the plan to the Advisory Reapportionment Board for the purpose of revising it to bring the districts specified above within constitutional standards.

In revising the proposed plan the Board may alter any district to correct population imbalances. Every effort shall be made to insure that maximum variances in the districts set out above shall not exceed ten (10) per cent. There shall not be a spread exceeding ten (10) per cent in the population of any over-represented district and any under-represented district, excluding the districts of Southeast Alaska, District 14 Kodiak, and District 15 Aleutian Chain, unless such variance is based on legitimate considerations incident to a rational state policy with specific reasons in justification being stated. In assessing permissible population variances the Board may disregard deviations in districts located in Southeast Alaska, District 14 Kodiak, and District 15 Aleutian Chain because variances in those districts are based upon legitimate considerations incident to implementation of a rational state policy. Changes may be made in other districts as may be found necessary.

Unless a revised plan is returned to the court on or before June 20, 1974, the interim plan promulgated by this court by Order Establishing An Interim Reapportionment Plan For 1972 Legislative Elections, dated June 14, 1972,[2] shall be effective for the 1974 legislative elections. Objections to the June 20, 1974, deadline shall be filed on or before three (3) days from the date of this order, setting forth reasons why some date other than June 20, 1974, would be more appropriate. In the event an alternative plan is submitted by the Governor to this court, the court will receive written comments or objections from appellants if filed by 12:00 noon on June 24, 1974. In the event an alternative plan is submitted by the deadline, the court will

1. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973).

2. Egan v. Hammond, 502 P.2d 856, 927–929 (Alaska 1972).

review it and take whatever action is appropriate.

A full opinion shall follow including dissents of individual justices on different points raised by this appeal.

Dated this 6th day of June, 1974.

ERWIN, Justice, with whom CONNOR, Justice, joins (dissenting).

I dissent from the majority opinion on the ground that the exclusion of all but a small percentage of the military from the reapportionment plan's population base violates the equal protection clauses of the United States and Alaska Constitutions.[1]

In Egan v. Hammond,[2] this court recognized that military personnel as a class cannot be denied the right to vote in a state election or be arbitrarily eliminated from the population base in a reapportionment plan solely because of their military status, although some military may be excluded as a permissible device for limiting the impact of transients and non-residents. One plan suggested in *Egan* for achieving this goal was to limit the population base to state citizens by adopting a registered voter base, even though such a base inherently eliminates a much higher proportion of the military than civilians. But, as we were careful to point out, the equal protection clause of the United States Constitution, and presumably the Alaska Constitution, require specific factual justification for eliminating any portion of the military from the population base. When a particular class of the state's population—namely the military—is singled out in a reapportionment plan for exclusion on the basis of the nature of their employment alone, the burden is squarely upon the proponents of the plan to demonstrate the reasonableness of that course of action, because such an exclusion is prima facie invalid. In the absence of sufficient justification, the military must receive the same treatment as their civilian counterparts.[3]

My examination of the record reveals that appellees clearly failed to justify application of any version of the Washington formula in Alaska. I thus cannot agree with the majority's assumption that the basic principle of the formula is as applicable to Alaska as it was to Washington. On the contrary, I find the majority's acceptance of the formula without sufficient proof of its validity in Alaska to be remarkable in itself, for in upholding many other aspects of the proposed reapportionment plan the majority has repeatedly emphasized Alaska's uniqueness.[4]

I also cannot accept the Board's tolerance of civilian transients while at the same time excluding apparent military transients from the population base. As we indicated in Egan v. Hammond, population bases grounded upon state citizenship are acceptable only when supported by accurate and statistically reliable data for discriminating between citizens and transients.[5] In this case, the Board's assumption that military but not civilian transients would distort the population base is without foundation or justification in

1. I harbor further misgivings about whether some of the election districts in the reapportionment plan are "relatively integrated socio-economic areas," as required by article VI, section 6 of the Alaska Constitution. However, since a number of these districts have been found to have population deviations in excess of those allowed under federal constitutional standards and have been remanded to the Board for modification, I reserve judgment on this issue until I have had an opportunity to study the modified plan.

2. 502 P.2d 856, 869-870 (Alaska 1972).

3. *See* Mahan v. Howell, 410 U.S. 315, 330-332, 93 S.Ct. 979, 988-989, 35 L.Ed.2d 320, 333-334 (1973); Burns v. Richardson, 384 U.S. 73, 92 n. 21, 86 S.Ct. 1286, 1296 n. 21, 16 L.Ed.2d 376, 391 n. 21 (1966); Carrington v. Rash, 380 U.S. 89, 95-96, 85 S.Ct. 775, 779-780, 13 L.Ed.2d 675, 679-680 (1965); Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609, 617 (1964); Egan v. Hammond, 502 P.2d 856, 869, 869 (Alaska 1972).

4. See the discussion in Egan v. Hammond, 502 P.2d 856, 865 (Alaska 1972), emphasizing Alaska's uniqueness.

5. 502 P.2d at 870-871.

the record. And the majority's effort to justify the Board's tolerance toward civilian transients with documentation on Alaska's employment patterns which is not part of the record is patently inconsistent with their earlier conclusion that the duty of this court is to exercise *de novo* jurisdiction based "upon the record developed in the superior court." [6]

In fact, the record is almost completely devoid of data on civilian transients. For example, there is little, if any, support for the majority's observation that at the time of year when the census was taken—April—most of the civilian transient elements were absent from the population base. Without concrete data it cannot be merely assumed that migrants and seasonal employees are not present in the state in significant numbers during the month of April, for it is common knowledge that an increasing number of transients are present in Alaska during the winter months. It also cannot be assumed that because the census counts a person at the place "he lives and sleeps most of the time" most of the civilian transients are necessarily excluded from Alaska's population base. As the majority itself points out, the census enumerates not only those migrants who claim ties to no other state but also those individuals who maintain a permanent residence elsewhere and spend a majority of their time in Alaska. Yet the record reveals that the Board made no effort to determine the impact of these transient groups upon the population base. Surely these transients have no greater contacts with the state than military residents who live here on a year-around basis and whose children attend local schools.[7]

The majority attempts to justify the inclusion of these transient groups in the population base by concluding that it would be a "herculean task" to determine who among them actually consider themselves citizens of Alaska. Again the record fails to support the majority. The record reveals that Robert Sharp, City Manager of Anchorage, testified before the Board that it cost the City only $40,000 in 1968 to conduct a door-to-door canvass of the entire Anchorage area, which has approximately 65 per cent of Alaska's population.[8] Assuming this to be a fair measure of the cost of surveying the incidence of state citizenship among civilians, it becomes apparent that such a survey would hardly be a "herculean task." Even if it were, however, the greater difficulty of determining the incidence of state citizenship among the civilian population is a weak excuse for singling out the military for discriminatory treatment.[9]

The majority goes on to assert that the dissent "ignores the fundamental reason for the exclusion of military personnel—their want of any contact with the state." In support of this cold assertion they cite to a body of law which, in short, indicates only that the involuntary nature of military assignments points toward retention of the domicile established prior to entering the service. They also cite to a federal statute exempting servicemen from various forms of state taxation and then sum-

6. The majority has attempted to bring this material within the reviewable record by judicial notice under Civil Rule 43(a)(2) [c] and [d]. Since this material is reasonably subject to dispute and its accuracy cannot be determined by resort to sources of indisputable accuracy, I do not believe it to be an appropriate subject of judicial notice.

7. Even the state's 3,752 aliens who were enumerated in the 1970 census and consequently included in the population base, were not, like the military, subjected to a state citizenship test. Egan v. Hammond, 502 P.2d 856, 920 n. 2 (Alaska 1972).

8. Transcript of the June 29, 1973, hearing in Anchorage, at 24.

9. The Board did consider the effect of the state's transient college students. But even there, in deciding that their number was statistically insignificant, the Board rested its conclusion upon admittedly inconclusive data based upon durational residency requirements which have been specifically disapproved as criteria for determining voter eligibility. *See* State v. Van Dort, 502 P.2d 453 (Alaska 1972).

marily conclude that as a result of this law and the "economics of military life, a serviceman and his family may remain completely aloof from the state of his assignment . . . ."

This argument is unpersuasive for three basic reasons. One, it ignores the location of the burden of proof; two, it indicates a fundamental misunderstanding of the economic facts of military life; and three, it ignores the fact that the same argument can be made with regard to other classes of federal public servants who serve in Alaska for limited terms but were not excluded from the population base.

First, it is not disputed that a serviceman has an option to remain economically aloof from the state of his assignment, neither contributing to its treasury nor utilizing its services. But the burden nevertheless remains squarely upon the state to establish that each and every military person excluded from the population base in a reapportionment plan has in fact exercised this option. By silently condoning the state's failure to meet this burden, the majority is overruling our holding in Egan v. Hammond respecting the burden of proof on the military exclusion issue.

Second, no doubt the "economics of military life"—which presumably refers to the tax exempt status of servicemen and the bonuses offered nondomiciliaries stationed in Alaska—are largely responsible for the failure of many military personnel stationed in Alaska to publicly admit domicile by registering to vote. But what the majority fails to discern is that an unwillingness to register to vote is not conclusive of a serviceman's intentions or desire to become a state citizen. All that it demonstrates is a perfectly expectable reluctance, even on the part of bona fide military residents, to risk losing significant economic advantages by registering to vote. The "economics of military life" indicate not that the military lack "any contact with the state beyond mere presence" but rather only that the military, both resident and nonresident, are subjected to unique economic pressures to which civilians are not exposed. Forcing military residents to withstand these pressures at the cost of surrendering their fundamental right to be included within the population base effectively penalizes them for exercising constitutional rights.[10]

Third, the same argument regarding minimum contacts with the state that the majority makes with respect to the military also applies to a body of federal public servants who serve for limited terms in Alaska and enjoy many of the same trappings and benefits as the military. Yet the majority ignores the fact that no attempt was made to exclude them from the population base. Certain employees of the federal Public Health Service and the Coast and Geodetic Survey, who enjoy military rank similar to Coast Guard rank, are assigned to Alaska for limited terms of duty, as are certain employees of the Federal Aviation Administration and the Army Corps of Engineers. Certainly these groups should be treated on a par with the military if the military are to be subjected to a state citizenship test.

The majority goes on to point out that the "largest claim" to representation of the military in the population base lies in the 25–30 per cent of military personnel and their dependents who at the time of the 1970 census had lived in the state for more than five years. They then note that the

10. Another disturbing aspect of "military economics" which is ignored by the majority is that, despite the fact that all military personnel are counted for the purpose of obtaining federal revenue sharing, they are now effectively denied representation in the legislative body which sets the priorities controlling the expenditure of this revenue. Basic fairness would appear to require that a state which accepts federal funds for the purpose of providing local services to military personnel should be required to assure an effective voice to the military in determining how these funds are to be spent. Counting a mere 11 per cent of the military in the population base falls far short of achieving this goal.

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present plan includes a far larger percentage—65 per cent—of the military and their dependents than the 25–30 per cent that would be included if a 5-year residency were taken to be conclusive of state citizenship. The majority then observes that the opponents of the military exclusion formula have failed to argue for a higher inclusion figure than 25–30 per cent and imply that the formula is valid because, while it does not provide statistical certainty, it is more than generous to the military.[11]

Again the majority has lost focus of the location of the burden of proof. The burden is not upon the opponents of the plan to argue for a higher inclusion figure but upon the proponents to justify exclusion of any military. Even if it were to the contrary, however, the conclusion that the formula is valid because it resolves doubts in favor of increased military representation does not justify adoption of a formula which discriminates between military and civilian transients. The fact remains that the formula does not accurately reflect residency among the military. It is thus contrary to all notions of fairness and equal protection to utilize it in the reapportionment plan.

I also cannot accept the majority's assumption that voter registration can be taken as an indication of a person's state citizenship in Alaska. In the Hawaii reapportionment plan litigated in Burns v. Richardson,[12] the state's registered voters were accepted as a permissible population base only because this base purportedly produced a distribution of legislators not unlike that which would have resulted from the use of a more conventional population base such as state citizenship or total population. This correlation was undoubtedly due in part to the fact that Hawaii exerted a monumental reapportionment and voter registration effort.[13] The Court in *Burns* was quick to point out, however, that, even though it was accepting a voter registration base in Hawaii, it considered such a population base generally suspect:

> Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process . . .[14]

Thus, at the very least, a voter registration base must be shown to correlate with state citizenship, total population, or some other permissible reapportionment base.

The record amply demonstrates that no such showing has been made in this case. On the contrary, there is substantial evidence that voter registration does not correlate with state citizenship or total population. For example, Alaska alone among the northern states was singled out by the 1965 federal Voting Rights Act[15] as a state that possibly abridges the rights of its citizens to vote because of the low percentage of votes cast by its eligible voters.[16] Although Alaska has since rid itself of that dubious status by a declaratory judgment, that judgment remains reviewable.[17]

11. Note 20 of the majority opinion *supra*.

12. 384 U.S. 73, 92–93, 86 S.Ct. 1286, 1296–1297, 16 L.Ed.2d 376, 391 (1966).

13. See the discussion of this effort in Burns v. Gill, 316 F.Supp. 1285, 128 (D.Hawaii 1970), *quoted in* Egan v. Hammond, 502 P.2d 856, 866 n. 16 (Alaska 1972).

14. 384 U.S. at 92–93, 86 S.Ct. at 1297, 16 L.Ed.2d at 391.

15. 42 U.S.C. § 1973 et seq. (1970).

16. 1965 U.S.Code Cong. and Admin.News, p. 2445.

17. On August 17, 1966, Alaska was granted a declaratory judgment by the District Court for the District of Columbia in Civil No. 101-66 removing it from coverage under the Voting Rights Act. When portions of the state were again included under a 1970 amendment to the Act, Alaska again secured a declaratory judgment from the same court in Civil No. 21-22-71 removing those portions of the state from coverage under the Act. This latter judgment remains reviewable for a period of five years following its entry. 42 U.S.C. § 1973a (1973).

Also, it is not uncommon for a particular segment of Alaska's citizens to exhibit a reluctance to register to vote. For example, statistics compiled from the 1970 census and the 1972 official primary and general election returns reveal that a very low percentage of Alaska's large aboriginal population registers to vote, although they are undeniably state citizens.[18] Without a showing that the military do not exhibit a similar reluctance to register, even though they are citizens, voter registration behavior alone cannot be used to estimate the number of state citizens among the military.

Further, Burns v. Richardson,[19] which recognized that if voter registration is indicative of state citizenship, it may be used as a reapportionment base, was decided before the United States Supreme Court and this court began to move toward de-emphasizing the role of state citizenship in the election process. The recent decisions of Dunn v. Blumstein[20] and State v. Van Dort,[21] which disapprove of durational residency requirements conditioning the right of franchise, severely restrict the use of objective state citizenship tests in determining voter eligibility. And State v. Adams[22] goes even further to suggest that no objective test for state citizenship which inherently infringes upon a fundamental right—*e. g.*, franchise—should be permitted to condition the exercise of that right. Even more importantly, however, these cases squarely place the burden upon the proponent of such a test to demonstrate a compelling justification for it. While I am not persuaded that the compelling state interest standard should be applied to reapportionment, I believe that these cases nevertheless place a heavy burden of persuasion upon the proponents of any reapportionment plan based upon a state citizenship test to demonstrate that the test in fact excludes only non-citizens from exercising their fundamental right of franchise. In this case the proponents have quite clearly failed to meet this burden for they have established no reliable correlation between voter registration and state citizenship. I would thus hold that voter registration has not been demonstrated to be a sufficiently reliable population base for a reapportionment plan in Alaska and remand the case to the Board to change the population base.

Both this case and Egan v. Hammond pointedly illustrate the perils of expedited litigation. Twice within the space of two years this court has been called upon at the eleventh hour to review reapportionment plans under the pressures of an imminent election. And twice these pressures have forced us to make decisions on the basis of records which, in my opinion, have been inadequate. I, for one, hesitate to reach a decision on an issue as far-reaching and important as reapportionment without an adequate record. Were it not for the fact that small numerical variations in the apportionment of people between the election districts are greatly magnified by Alaska's comparatively small population, I would not be so insistent that the record provide adequate justification for each attempt by the Board to depart from the constitutionally mandated goal of mathematical equality. But since a variation of only 68 people causes a one per cent variation in the population of each election district in Alaska, great care must be taken to assure that the exclusion of each and every person from the population base is constitutionally permitted. If any reapportionment case reaches us in the future with an inadequate record like the present one, I will vote to remand the case for further findings.

18. For example, in the 1972 general election only about 19 per cent of the total populations in the predominantly aboriginal communities of Barrow and Bethel voted. Approximately 33 per cent of Alaska's total population voted in the same election.

19. 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

20. 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

21. 502 P.2d 453 (Alaska 1972).

22. 522 P.2d 1125 (Alaska 1974).

OPINION

ON OBJECTION TO THE REVISED REDISTRICTING PLAN PROCLAIMED ON JUNE 14, 1974

BOOCHEVER, Justice.

On June 6, 1974, we remanded this case to enable the governor of the State of Alaska to resubmit the reapportionment plan to the Advisory Reapportionment Board for the purpose of revising it to bring the population of districts specified in our order within federal constitutional standards. In the event a revised plan was submitted on or before June 20, 1974, written comments or objections were to be filed by 12:00 noon on June 24, 1974. The Advisory Reapportionment Board submitted to the governor of the State of Alaska its Proposed Revised Plan of Reapportionment and Redistricting which the governor adopted by proclamation on June 14, 1974. Objections were filed by the appellants. In addition, a notice of objection and a motion for leave to intervene as a party or to file an amicus curiae brief was also filed by the Kenai Peninsula Borough. After denying the Kenai Peninsula Borough motion to intervene but granting the Borough the right to file a memorandum as amicus curiae, the court, upon request for oral argument on the objections, specially heard such arguments on June 26. Counsel for the Borough was permitted to participate in the oral arguments.

The objections filed by the appellants pertained to the redistricting of the Anchorage area, the termination of Anchorage senate terms and the exclusion of some military personnel from the population base. None of these objections was addressed to the revisions set forth in the revised plan proclaimed by the governor on June 14, 1974.[1] The objections reiterated and amplified arguments previously advanced against the original reapportionment plan of December 11, 1973. We have again carefully considered those objections and find no reason to alter our opinion with reference to the issues raised.

The Kenai Peninsula Borough objected to the portion of the revised plan which severed the southern end of the Kenai Peninsula from the Borough, the peninsula and House District No. 13 (Kenai-Cook Inlet) and joined it to House District No. 16 (Bristol Bay) in order to achieve a less-than-five-percent deviation in House District No. 16. The area transferred to District No. 16 comprised about 680 residents or slightly more than ten percent of the entire population of District No. 16, most of which is located across sea and mountains from the Kenai Peninsula area. The Borough points out that the residents of the Kenai area so transferred had interests similar to those of other residents of the Kenai-Cook Inlet District No. 13 and little in common with the residents of House District No. 16 (Bristol Bay). The Borough argues that the residents of the severed portion of House District No. 13 would be disenfranchised because their influence would not be of sufficient weight to receive attention from Bristol Bay District Legislators.

We found in our order of June 6, 1974 that District No. 16 exceeded constitutionally permissible population variances as delineated by decisions of the United States Supreme Court, and that the state had failed to demonstrate that the variance was based on ligitimate considerations incident to the implementation or rational state poli-

1. The Anchorage districts were somewhat altered in the revised plan, but appellants' objections again touched general concepts of dividing Anchorage into multiple senatorial districts, and the aggregate underrepresentation of the Anchorage area. No federal constitutional question regarding the propriety of the district lines in Anchorage was raised, and we disposed of the state constitutional issues in our prior opinion. Appellants' counsel admitted at oral argument that the Anchorage area taken as a whole would be properly represented within federal constitutional standards by a 16-representative, 8-senator district. We need not further consider whether the current plan, which has the same numerical effect, unfairly represents the Anchorage area.

cy. We stated in out opinion partially rejecting the original plan:

> No valid reasons were advanced for the 10.9 percent overrepresentation with reference to House District 16 (Bristol Bay). We can agree with the Board's decision not to combine the Bristol Bay area with the Aleutian Chain because of conflicts between the residents of the two areas, but that does not explain why other areas could not have been added to the district so as to create less of a variance.

The Reapportionment Board has made a good faith effort to correct the overrepresentation of House District No. 16 by adding to the district the southern end of the Kenai Peninsula. Considerations incident to the implementation of rational state policy have now been advanced to us justifying the original overrepresentation of District No. 16 (Bristol Bay). It is now apparent that the only alternative to the Board's original districting of that area is to disregard an impassible mountain range, the natural barrier formed by Cook Inlet, the lack of direct transportation or communication links, the corporate boundaries of the Kenai Peninsula Borough, the cohesiveness of interests of residents of that Borough and the disparate interests of the population of the Bristol Bay area. We now find that legitimate considerations incident to the implementation of rational state policy justify the overrepresentation of House District No. 16 (Bristol Bay) as originally designated and override mathematical requirements.[2] We accordingly have ordered that the severed portion of the Kenai Peninsula Borough, specifically the southern end thereof where the communities of Seldovia, Port Graham, English Bay, Portlock and Jakaiof Bay are located, shall remain in House District No. 13 (Kenai-Cook Inlet) rather than in House District No. 16 (Bristol Bay).

We realize that reasonable arguments can be advanced to show that certain communities might be better represented by different districting. Our previous opinion in this case points out that it is not our function to develop apportionment schemes for the State of Alaska. We are limited in review to determining whether a plan adopted by the governor suffers state or federal constitutional defects alleged by the parties in the litigation before us. In our previous opinion we found no violation of those standards set forth in Art. VI of the Alaska Constitution which have not been made obsolete by decisions of the United States Supreme Court. Particularly where specific objections have not been presented to us, we do not believe it appropriate to substitute out judgment for that of the constitutionally empowered authority regarding the wisdom of delicate adjustments to be made in political boundaries. It is our duty to assure that the reapportionment plan complies with the requirement of substantial mathematical equality established by the United States Supreme Court, with the state carrying the burden to demonstrate that additional deviations are based upon legitimate considerations incident to implementation of a rational state policy. Where that burden was not met, we were compelled to require revision of the plan to conform to what has been described as "the tyranny of numbers". The Board having complied with out request, we accordingly have denied the objections to the revised plan, except where the revision demonstrated to us that the original district was properly formed in implementation of a rational state policy.

ERWIN, J., dissents.

2. Under the revised plan as amended by our order, the Bristol Bay district is slightly smaller than in the original plan, due to the Board's inclusion of Nelson Lagoon in the revised House District No. 17 (Bethel) where it more properly belongs. Granting the Kenai Peninsula Borough's objection reverses our prior order; in effect, it grants a rehearing based upon newly-discovered evidence, the evidence being the lack of reasonable alternatives to the initial plan. In granting the objection, we do not suggest that we will engage in wholesale redrafting upon request.

FITZGERALD, J., concurs in part and dissents in part.

ERWIN, Justice (dissenting).

While I agree that the revised reapportionment plan meets federal constitutional standards, I am unable to agree with the majority's conclusion that it meets the requirements of Alaska's Constitution. In my opinion, the revised plan includes districts which do not comply with the mandate of article VI, section 6, of the Alaska Constitution.

Whatever the merits of the retreat from precise mathematical equality evident in recent reapportionment decisions of the United States Supreme Court, we should not lose sight of the fundamental principle involved in reapportionment—truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.

If we were constrained solely by numbers, Alaska could obviously be divided into any given number of equally populated districts without regard to other considerations. Such a result would satisfy all federal constitutional requirements but would hardly be consistent with traditional notions of representative government, for it would inevitably lead to absurd combinations of historical, social, economic and geographical boundaries within the state. Fortunately, Alaska's Constitution commands that:

> Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.[1] Thus, it only is within this framework that equally populated election districts may be constructed. If the search for equal representation is not undertaken within the limits of this constraint, then the underlying rationale for geographical election districts is destroyed.

In my view, the revised plan includes a number of house districts with respect to which the command of article VI, section 6, of the Alaska Constitution was sacrificed in the interest of numerical equality. For example, Fort Greely was included within the Fairbanks District, although it lies over 100 road miles from metropolitan Fairbanks and is located outside of the North Star Borough. Even more objectionable, however, is the fact that Big Delta and Delta Junction, which are five and ten miles respectively closer to Fairbanks along the only highway linking the two areas, were excluded. Many of the dependents of Fort Greely military personnel live, work, and attend school in these communities. If the Big Delta-Delta Junction-Fort Greely community is not a "relatively integrated socio-economic area," it is hard to imagine what is.

There is a similar problem with the addition to the Nome district of the communities of Selawik and Kiana, which are both located near Kotzebue. It is abundantly clear that the Board took this action solely to achieve equality of numbers,[2] for there are no ethnic or commercial ties between these communities and the Nome area and they are separated from Nome by mountains and Kotzebue Sound. In addition, both communities have transportation, economic, and ethnic ties with Kotzebue, not Nome; and, while Kotzebue is part of the same native corporation, Nome is not. In view of all these factors—which lie at the

1. Alaska Const. art. VI, § 6.

2. The state conceded at oral argument that all the changes made in the revised plan were made solely to meet numerical requirements of the United States Constitution.

very heart of the concept of socio-economic integration—I fail to discern how such a combination could possibly satisfy article VI, section 6, of the Alaska Constitution.[3]

Yet another example of this failure to comply with the mandate of the Alaska Constitution lies in the Anchorage area. The Anchorage-West district comprising portions of the downtown area, Inlet View, the South Addition, Turnagain, International Airport, Sand Lake, and Jewell Lake, includes a diversity of area residents which range from the most urban in Anchorage to the most rural.[4] Further, the district includes no less than four separate service areas—the City of Anchorage, the Spenard Public Utility District, the Sand Lake Service Area, and the Greater Anchorage Area Borough. In my mind, such a district, which includes as many diverse elements as could conceivably be combined within the Anchorage area, is not a "relatively integrated socio-economic area."

These major miscombinations, along with the short-lived Seldovia-Bristol Bay marriage disapproved by the majority, demonstrate the real tyranny of numbers, for they are products of an effort to achieve mathematical equality by shifting about population centers without regard to socio-economic considerations. By making small numerical adjustments to satisfy federal constitutional standards, the board dismembered important socio-economic communities in violation of Alaska constitutional standards.

In my view, major readjustments on a statewide basis are required if the plan is to meet minumum state and federal constitutional standards. The revised plan demonstrates all too clearly that such adjustments cannot be made in a matter of days under pressure of preparations for an imminent election, for a hastily conceived change correcting a minor deficiency in one district often causes major deficiencies in other districts. As a result, rather than improving the plan, such changes only serve to make it less likely to assure truly representative government.

I sympathize with the majority's desire to end this court's unsatisfactory and controversal intrusions into the political thicket of reapportionment. However, regardless of how reluctant we may be to confront this problem, it nevertheless remains our constitutional duty to the people of Alaska to assure a truly representative government. In my opinion, this goal cannot be achieved by making minor adjustments in the present plan. Because the interim plan had far smaller variances in population and unquestionably respected geographical and socio-economic considerations, I would have continued it in effect for the 1974 elections and remanded the revised plan back to the Board to comply with the mandate of the Alaska Constitution. It is better to err on the side of caution than to perpetuate mistakes for the balance of this decade.

FITZGERALD, Justice (concurring in part and dissenting in part). I would accept the governor's revised apportionment plan as submitted. I disagree with the majority that the southern end of the Kenai Peninsula should be separated from proposed House District 16 (Bristol Bay) and incorporated in House District 13 (Kenai-Cook Inlet). My disagreement with the majority is based on the procedural aspects of the Kenai separation issue.

Kenai Peninsula Borough was not a party to the reapportionment action, nor have we decided its standing to become a party. The Borough appeared before this court

3. Separation by mountains and an expanse of water, lack of direct transportation and communication links, and borough boundaries were all factors which the majority cited as justifying severance of the Seldovia area from the Bristol Bay district. I cannot understand why the presence of the same factors dividing the Selawik-Kiana area from the Nome area does not compel a similar conclusion.

4. The board made a point of its desire to avoid diluting the rural vote with the urban vote in the Fairbanks area. No rational reason has been shown for not following a similar course of action in the Anchorage area.

only amicus curiae. The court accepted the Borough's memorandum two days before final argument without providing an opportunity for the litigants to respond. Moreover, the Borough was then given leave to appear before the court at oral argument. As the majority opinion states, reasonable arguments could be advanced on behalf of other communities that different districting would better represent their interests.[1] To accede to the Kenai Borough's objections to the proposed plan may lead to questions of the right for other communities to raise similar arguments. In light of these circumstances I would accept the governor's revised reapportionment plan without the southern Kenai exclusion despite any reservations I may have about the merits of the particular district boundaries.

1. Supra, p. 5.