

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2976

HSA

HJR

33

2976

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 be-

cause 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 57-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**

25. 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 national 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*]

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

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 depri-

vations 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.<sup>1</sup>

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.<sup>2</sup> 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 juris-

diction 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.<sup>3</sup>

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).

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

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 reapportion according \*to population decennially,<sup>4</sup> that court had nevertheless indicated that it would not interfere with matters of legislative reapportionment.<sup>5</sup>

Plaintiffs requested that a three-judge District Court be convened.<sup>6</sup> 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 Counties 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 603, 82 S Ct 691, refused to review a denial of injunctive relief sought against the conducting of the 1962 primary elec-

tion 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,

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

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.<sup>7</sup> Continuing, the

\*[37 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*—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-

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."<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> 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.

ed 2d

on in  
t on a  
e legis-  
ed its  
e Ala-  
ng, the

slature  
consti-  
legisla-  
used on  
no ob-  
tional  
onment.  
that, if  
or if its  
tutional  
a "clear  
on the  
er 1962  
ct Court  
inking"  
ggested  
concur-  
Carr<sup>9</sup>—

by the  
; of ex-  
uffering  
rimina-  
strangle  
fficiently  
elected  
ally valid  
tionment  
dismiss-  
ly, plain-  
end their  
further  
sked the  
ction the  
visionally  
old would  
mit it to

extraordi-  
ma Legis-

ral counties  
lation.

ed 2d at 710

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, where-

as Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives.<sup>12</sup> 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,<sup>13</sup> 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.<sup>14</sup>

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 pieces 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.”<sup>15</sup>

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 Dis-

trict 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.”<sup>16</sup>

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,”<sup>17</sup> but the Alabama Supreme Court had previously indicated that that requirement could probably be altered only by constitutional convention.<sup>18</sup> 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, 164, 47 So 2d 713, 714 (1950), with Opinion of the Justices, 263 Ala 158, 164, 81 So 2d 881, 887 (1955).

\*[377 US 519]

\*standards of apportionment."<sup>19</sup> 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 Dis-

trict 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."<sup>20</sup> 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."<sup>21</sup> 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.<sup>22</sup> The Court pointed out that,

19. See the later discussion, *infra*, at 531, 532 and note 18, *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

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

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,

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

"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."

\*[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

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,<sup>24</sup> 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.<sup>25</sup> 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,<sup>26</sup> 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.<sup>27</sup>

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 refer-

endum, 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.

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

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

Headnote 1 to vote, in state as well as in federal elections.

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 Mesley*, 238 US 383, 59 L ed 1355, 35 S Ct 904. In *Mesley* 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]

Headnote 2 in a box." 238 US, \*at 386, 59 L ed at 1357.

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 103, 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 494, 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." 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

23. 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.<sup>29</sup>

\*[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.<sup>30</sup> 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:

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

"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."<sup>31</sup>

\*[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."<sup>32</sup>

Subsequent to *Baker*, we remanded several cases to the courts below for reconsideration in light of that decision.<sup>33</sup>

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).

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

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."<sup>34</sup>

Continuing, we stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguish-

ing 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."<sup>35</sup>

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."<sup>36</sup>

\*[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 any-

thing 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."<sup>37</sup>

We found further, in Wesberry, that "our Constitution's plain objective" was that "of making equal representation \*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."<sup>38</sup>

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, Headnote 4 680, 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 funda-

\*[377 US 562]

mental 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 citi-

zens 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.

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 constitu-

tional 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

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.<sup>40</sup> 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. Two, 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 . . . ."<sup>41</sup>

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, 98 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 citizens in state government

Headnote 10 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 the allocation of legislative representation, all

Headnote 12 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 representation for all citizens

\*[377 US 566]

is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause

Headnote 13 guarantees the opportunity for

Headnote 14 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

[12 L ed 2d]—34

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 636, 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

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

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."<sup>42</sup>

\*[377 US 567]

\*To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact

Headnote 14 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.<sup>43</sup> 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.

Headnote 18 Population is, of necessity, the starting point for consideration and the controlling

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

Headnote 17 can, and has historically, run in various directions. However and whenever it does, it is constitutionally impermissible under the Equal Protection Clause.

criterion for judgment in legislative  
\*[377 US 568]

apportionment controversies.<sup>44</sup> \*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 constitutionally invalid. Furthermore, the existing

**Headnote 23** 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.<sup>45</sup>

\*[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.<sup>46</sup> Legislative inaction, coupled with the unavailability of any political or judicial remedy,<sup>47</sup> 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 Legisla-

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

ture. 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.<sup>48</sup>

\*[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-

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 ration-

\*[377 US 572]

ale and result,<sup>49</sup> \*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.

Much has been written since our decision in *Eaker v Carr* about the applicability of the so-called federal analogy to state legislative apportionment arrangements.<sup>50</sup> 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 20 tional \*amendment.<sup>51</sup> 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 1/2 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 dis-

tricts 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 Law.* 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

\*[377 US 571]

\*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.<sup>55</sup> 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

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, 35, 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. 3861f.

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 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."<sup>56</sup>

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 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]

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 elective members of one house of a state legislature would amount 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 constitu-

\*[377 US 577]

encies \*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

By holding that as a federal constitutional requisite both houses of a state legislature must <sup>Headnote 28</sup> 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.<sup>57</sup>

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."

377 US 533, 12 L ed 2d 506, 94 S Ct 1362

quate representation to all parts of the State. To do so 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 apportion-

ment 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 multi-member<sup>58</sup> or atorial districts.<sup>59</sup> 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 legislatures.<sup>60</sup> 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 alone,<sup>61</sup> 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 atorial districts in *Davis v Mann*, 377 US 686, 687 note 2, 12 L ed 2d 614, 615.

60. For a discussion of the formal ap-

portionment 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 deviation 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 insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legis-

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 400. 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 representa-

ture, 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.<sup>62</sup> 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.<sup>63</sup> Such a

result, we conclude, would be constitutionally impermissible. And careful judicial

tion 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 individual 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.

Headnote 33

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.<sup>64</sup> Nevertheless,

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.

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 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,<sup>65</sup> often honored

65. Report of Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures* 56 (1952). 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 practically desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

## IX

Although general provisions of

other States either require or permit reapportionment of legislative representation more frequently than every 10 years. See

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 relief 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 viola-

tive of the Federal Constitution only

when validly asserted constitutional

rights could not otherwise be pro-

ected and effectuated. Clearly,

courts should attempt to accommo-

date the relief ordered to the appor-

tionment provisions of state consti-

tutions insofar as is possible. But it

is also quite clear that a state legisla-

tive apportionment scheme is no less

violative of the Federal Constitution

when it is based on state constitu-

tional provisions which have been

consistently complied with than

when resulting from a noncompli-

ance with state constitutional re-

quirements. When there is an un-

avoidable conflict between the Fed-

eral and a State Constitution, the

Supremacy Clause of course controls.

also The Book of the States 1962-1963, 58-62.

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

\*[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.<sup>66</sup> 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 ad-

justing 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."<sup>67</sup>

\*[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 **Headnote 52** 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,<sup>68</sup> was an appropriate and

\*[377 US 587]

\*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).<sup>1</sup>

\*[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.

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

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 editor 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

† [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 Sinecock* (No. 307), p. 620, *infra*; and *Lucas v Forty-Fourth General 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,

\*[377 US 599]

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<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> 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

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 84 States. *Ante*, p. 524, note 30. See *infra*, p. 555.

3. See *Baker v Carr*, 369 US 186, 390, 7 L ed 2d 663, 750, 82 S Ct 691, and the dissenting opinion of Frankfurter, J., in which I joined, *id.*, 303 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 assertion 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),<sup>4</sup> 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."

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

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.<sup>5</sup> 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.<sup>6</sup>

\*[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,

[12 L ed 2d]—35

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,<sup>7</sup> which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States,<sup>8</sup> 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.<sup>9</sup> Whatever one might take to be the application to these cases of the Equal Protection Clause if it

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

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

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.<sup>10</sup> 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."<sup>11</sup>

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:

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

"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."<sup>12</sup>

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.<sup>13</sup>

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

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."<sup>14</sup>

He turned next to the second section, which he said he considered "the most important in the article."<sup>15</sup> Its effect, he said, was to fix "the basis of representation in Congress."<sup>16</sup> 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."<sup>17</sup>

\*[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."<sup>18</sup>

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,<sup>19</sup> 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.*"<sup>20</sup> (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."<sup>21</sup> (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: . . . the Equal Protection Clause as follows:

"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.*"<sup>22</sup> (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,<sup>23</sup> 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.<sup>24</sup>

\*[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 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 despotism [sic]."<sup>25</sup> (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.<sup>28</sup> As changed, it passed in the House on June 13.<sup>29</sup>

(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.<sup>30</sup> 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).

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

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.<sup>31</sup> \*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.<sup>32</sup> 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.<sup>33</sup> In the House, each county was entitled to one representative, which left 39 seats to be apportioned

according to population.<sup>34</sup> Since there were 12 counties besides the two already mentioned which had populations over 30,000,<sup>35</sup> 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.<sup>36</sup> This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292.<sup>37</sup> With seven more counties having populations over 100,000 and 13 others having populations over 50,000,<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

(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, § 8; 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 80 seats. Vt Const, 1793, Amend 23.

40. Census 67.

to ratify the Fourteenth Amendment before it was readmitted to the Union.<sup>41</sup> The Constitution of each was scrutinized in Congress.<sup>42</sup>

\*[377 US 605]

Debates over readmission \*were extensive.<sup>43</sup> 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."<sup>44</sup>

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*, 353 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).

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

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."<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four.<sup>50</sup> 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.<sup>51</sup>

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. Cens. 2-53.

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.<sup>52</sup> 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.<sup>53</sup> Georgia, in 1877, continued to favor the smaller counties.<sup>54</sup> Louisiana, in 1879, guaranteed each parish at least one representative in the House.<sup>55</sup> 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.<sup>56</sup> Missouri's Constitution of 1875 gave each county one representative and otherwise favored less populous areas.<sup>57</sup> Mon-

tana's original Constitution of 1889 apportioned the State Senate by counties.<sup>58</sup> 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;<sup>59</sup> the same was true of New Hampshire's Constitution of 1902.<sup>60</sup>

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.<sup>61</sup> In addition, each county except Hamilton was guaranteed a seat in the Assembly.<sup>62</sup> The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House.<sup>63</sup> 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.<sup>64</sup>

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.

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

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

#### 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.<sup>69</sup> \*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, 68-62. 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?<sup>70</sup> 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 constitu-

tional 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.<sup>71</sup> In *Remmey v Smith*, 192 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, 302, 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 power 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.

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

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 McCannless*, 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.<sup>72</sup>

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 413, 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 549, 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 decision. In my judgment, today's decision.

[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,<sup>73</sup> 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.<sup>74</sup> 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

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

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.<sup>76</sup> Two days later, a complaint was filed in the District Court.<sup>77</sup> Eight months later, the

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.

\*[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.<sup>77</sup> Only a stay granted by a member of this Court slowed the process;<sup>78</sup> 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-

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 Dec. 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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.

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

[12 L ed 2d]—36

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.<sup>82</sup>

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

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;<sup>83</sup>
- (2) “economic or other sorts of group interests”;<sup>84</sup>
- (3) area;<sup>85</sup>
- (4) geographical considerations;<sup>86</sup>
- (5) a desire “to insure effective representation for sparsely settled areas”;<sup>87</sup>
- \*[377 US 623]
- \* (6) “availability of access of citizens to their representatives”;<sup>88</sup>
- (7) theories of bicameralism

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 601, 12 L ed 2d 617.

91. *Id.*, at 618.

92. *Lucas v Forty-Fourth General As-*

(except those approved by the Court);<sup>89</sup>

(8) occupation;<sup>90</sup>

(9) “an attempt to balance urban and rural power.”<sup>91</sup>

(10) the preference of a majority of voters in the State.<sup>92</sup>

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 . . . .”<sup>93</sup>

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.*<sup>94</sup> 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

sembly, 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 Constitution

[377 US 625]

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.<sup>1</sup>

\*[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

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

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.

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

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.<sup>1</sup>

"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 be 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 county 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. 282, *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, January 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*,<sup>1</sup> 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<sup>2</sup> for effecting a gross disproportion of representation to voting population.

In *Reynolds v. Sims*,<sup>3</sup> 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,<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

1. 369 U.S. 186, 82 S.Ct. 601, 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. 1302, 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.

Section 4 of . . .  
that reapportion  
method of equ

Sections 5 a . . .  
the Governor,  
tionment dutie  
area of house  
scribed limits,  
for reapportion  
tion by equal p

5. See

Section  
senate d

Name

A. Sout

B. Kete

C. Wran

D. June

E. K. t

F. Cord

G. Ancl

H. Sowi

I. Kodl

J. Cent

K. Brist

L. Yuko

M. Fair

N. Nort

O. Barr

P. Nomo

Note: T  
pportion  
election d

8. Sec. 4, Art. V  
*Section 4.*  
shall be by  
tions, except  
having the  
tient obtain  
population b  
sentative.

9. Sec. 8, Art. V  
*Section 8.*  
The governo

Section 4 of Article VI provides basically that reapportionment should be by the method of equal proportions.<sup>8</sup>

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.<sup>9</sup>

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-Aleutinas	13 and 14	1
J. Central	15, 16, 17, 18, 19, and 20	2
K. Bristol Bay-Bethel	15 and 16	1
L. Yukon-Fuskokwim	17 and 18	1
M. Fairbanks-Port 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. 208-269.

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 reappor-

tionment 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.

ordering its own  
ent plan into ef-  
ficient legislature  
adopt a permanent

is v. Sims immedi-  
a of whether the  
as constitutionally  
ation basis since  
the Alaska Com-  
members of the Sen-  
the voters of the  
orth in Section 2  
atter section estab-  
ased on area, de-  
ous house districts  
of Article XIV,  
er of senators to  
senate district.<sup>5</sup>  
rticle VI provides  
an be modified to  
election districts,  
t shall neverthe-  
er of senators and  
t.<sup>6</sup>

provides that the  
on the House of  
ely following each  
census upon the  
on in each house  
d by the census.<sup>7</sup>

n of Senate Dis-  
tricts, described  
: XIV, may be  
nges in election  
though modified,  
number of sena-  
e perimeter.

ment of House.  
ortion the house  
lately following  
each decennial  
ates. Reappor-  
l upon civilian  
election district  
s.

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.<sup>10</sup>

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.<sup>11</sup> 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-

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.

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

portionment form elections. Appellant Secretary of State to conduct the elections for the by the Governor's tion will be invade their rights of su the Alaska Consti

Both sides ev primary judgment a superior court ca ing that Section Alaska Constitution present apportion ate, is in conflict the Fourteenth A States Constitution Proclamation of districting of Sep and void and that State could not proclamation in primary and general superior court retained that if a valid modifying the ap ka Senate was n 1, 1967 the court sary orders to ins and general electi an apportionment Fourteenth Ame States Constitution

Appellees argue tution "limits" the ment authority t hibits" him from ate. Appellees m that the claimed result from the only explicitly g power to reapport no provision wh the Senate under tinguency. They ent necessity to r his authority to Constitutional Co present developme

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 appellart 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 clear-

ly 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).

\* \* \* \* \*

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.] HELLENTHAL: It was felt that it [reapportionment] was a proper executive

function a  
\* \* \*

In its "Re  
issued in F  
tional Conve

Represent:  
be kept up  
automatic  
the govern  
representi  
tricts and  
Thus, the  
what has  
states: a  
and more  
lic confid  
apportion  
Council,  
Alaska, 1'

A reading  
in relation  
sions make:  
was the sp  
tion to grant  
responsibilit  
spect to rea  
clean-cut de  
the authorit  
portionment  
placed in the  
portionment  
ity to make  
tricts. In a  
tionment pr  
ing as poss  
that the Rea  
tomatically  
decennial c  
from the Ge  
plan within  
ernor must  
days of rec  
any deviat  
qualified ve

12. 243 F.S.

13. See: R  
ment: T  
Represent  
"frozen"

ward to advise the  
to the redistricting  
\* \* \* The rea-  
adopted is that the  
seem generally in  
onment, for some  
n't know why, but  
where it has been  
Maybe it's that  
ke of earlier, but  
ce of the nation  
ng is delayed—  
in the State of  
ed for years and  
inally, only by re-  
and the initiative  
pportion Washing-  
e people suffered.  
xperience and the  
it's almost uni-  
, and by advisors  
n that were here  
writers throughout  
cutive board was  
ard. (Minutes of  
ional Convention,  
839).

\* \* \*  
plans. There is no  
ans that can be de-  
tionment with the  
d you could have  
d can be picked—  
ature, three nomi-  
ouncil, if you want,  
ted by some other  
ome appointed by  
a good cross-sec-  
have the authority  
e redistricting and  
re is no end to it,  
eemed to indicate  
be best helped if it  
ere an executive  
ut it is the inaction  
testified to by the  
he 48 states, that  
me. [Id. at 1859.]  
was felt that it [re-  
proper executive

function as contrasted to the legislative.  
\* \* \* [Id. at 1863.]

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

12. 243 F.Supp. 573 (D.Vt.1964).

13. See: Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation where reapportionment of "frozen" legislative bodies by the legisla-

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<sup>12</sup> 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.<sup>13</sup>

tures of New Jersey, Connecticut and North Dakota, was accomplished even though the constitutions gave no such specific authority. Pages 295-297, 374-375 and 304-300.



formula for apportionment. Once a valid plan has been established and proclaimed it becomes law, or "effective" by the force of the constitution. Even if it can be argued that indirectly this is law-making, it is nevertheless the unquestioned, unequivocal intent of the constitution that the function be performed only by the Governor with the assistance of the Reapportionment Board.

*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*<sup>18</sup> 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*<sup>19</sup> 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'ulloch v. Maryland*<sup>20</sup> 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*<sup>21</sup> 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. 400, 501, 51 S.Ct. 228, 220, 75 L.Ed. 492, 401 (1930).

414 P.2d—44½

20. 4 Wheat. 310, 421, 4 L.Ed. 579, 605 (1819).

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

mission had au-  
apparently to the  
ire.<sup>16</sup>

that reapportion-  
ction in which the  
o recommend laws  
d to veto laws he  
ngstown Sheet &  
yer.<sup>17</sup> This argu-  
cited do not fit the  
e us. In the first  
tance to the con-  
ment is exclusively  
Many states now  
responsibility of  
Reapportionment  
ution, for example,  
defined to be the  
n for the applica-  
n formula, which  
d proclaimed, be-  
tion of our consti-  
Sec. 4, Art. VI  
ment shall be by  
portions \* \* \*".  
mula. Sec. 3, Art.  
r shall reapportion  
ing in the execu-  
and responsibility.  
des that after re-  
the Reapportion-  
or shall issue his  
\* \* shall be  
n of members of  
"

ent that the Gov-  
onment Board are  
ty of determining  
the constitutional

other forgets that  
a learned, over a  
ne thing the hard  
ld not trust any  
and apportion it-  
validly imposed  
or plan which  
f-perpetuation in

c. 803, 06 L.Ed.

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*:<sup>22</sup>

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

the Governor Board.

The Convention apportionment in the Governor it had been for nationwide so would not reap more malapportioned passage of time that the representatives themselves out the Convention ing to avoid t reasonable to i quired the Gov portion the Se frozen formula

Appellees argued that the only by const constitutional c cle XIII of the that amendment proposed by a house of the le been their inter "frozen" Sena forever. On t have anticipate would become periodic reapportionment tainty that the

23. Sec. 1, Art. Amendme be proposed house of th of state shi proposition amendment ballot for If a major proposition shall be no vided in th of the elect of state.

24. That amen tion can l expensive is Senate mus calling a con

re intended to be  
stitution as a con-  
f government.

re us were not antici-  
n. It is appropriate,  
tempt to determine  
hole and appropriate  
that was the pervad-  
of the Convention.  
ine whether a fair  
arious provisions of  
a construction which  
at of this purpose,  
ten " \* \* \* what  
part of the instru-  
ssed."

we have concluded  
able and logical to  
vention been able to  
to reapportion the  
r any other basis, it  
given the Governor  
pportion the Senate  
pportion the House.  
ously believed that  
give government re-  
rity, other than the  
odically reapportion  
depend upon con-  
or a constitutional  
Ve find no basis for  
own that the Senate  
quire periodic reap-  
uld not have placed  
the Governor also,  
he cumbersome, ex-  
ly ineffective reme-  
ndment which must  
ature.

the Governor the  
stricts within limits.  
in 1956, that the  
ermanently frozen,  
grant the power to  
respect to represen-  
that is significant is  
ny power was given  
te, it was given to

1040).

the Governor and the Reapportionment Board.

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.<sup>23</sup> 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 re-

apportionment 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.<sup>24</sup>

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 Hellethal 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 reap-

portionment, 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.<sup>25</sup>

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

has been amended  
nent reapportion

[8,9] Since  
lished that under  
apportionment of  
of the voters res  
elect a majority  
the superior cou  
ka Senate is un  
and that Sectio  
Alaska Constitu

The remainde  
set aside and it  
ment in accord  
pressed in this

The foregoing  
sary to pass up  
briefed and arg

RABINOWITZ

RABINOWITZ  
the result).

Although I ag  
by the majority  
reasons for its  
the probable  
Alaska's Consti  
*Baker* and *Rey*  
speculation. If  
then it is just  
the framers wo  
ment in the leg  
that effective  
apportioned leg  
to any citizen b  
ment decisions of  
Court. For th  
I would have

1. 369 U.S. 186, (1902).
2. Dixon, *Reapportionment: A Constitutional Struggle for Michigan*, L.Rev. 2
3. *Reynolds v. Sims*, 377 U.S. 533, 12 L.Ed.2d 846, 84 S.Ct. 1414 (1964).
4. *Id.* at 577. See also *Id.* at 536. Note

25. Minutes of Alaska Constitutional Convention p. 1551.

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 de-

termine 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*<sup>1</sup> 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."<sup>2</sup> 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"<sup>3</sup> and "as nearly of equal population as is practicable."<sup>4</sup>

another test, namely a prohibition on "crazy quilts, completely lacking in rationality." *Reynolds v. Sims*, at 508, 84 S.Ct. at 1395, 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."

1. 369 U.S. 180, 82 S.Ct. 691, 7 L.Ed.2d 603 (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 530. Note: The Supreme Court added

provided for, be  
the full authority  
ing out this duty  
who could be  
by the courts at  
d voter and who  
reapportionment  
priority or respon-  
entrusted to the  
attended by the  
Senate ever be  
delegates had  
ozen", area ap-  
sentation, only  
compromise.<sup>25</sup>  
the law of the  
enate apportion-  
ne Senate be ex-  
n a population  
sed since Baker  
ce Reynolds v.  
Alaska legisla-  
tional conven-  
onal amendment  
The Governor  
Board have re-  
e same manner  
s them to reap-  
struction of Ar-  
elization of its  
reapportionment  
anner on legis-  
effective means  
available to any  
constitutional  
d power in the  
onment Board  
on an interim  
t question the  
nent plan pro-  
September 3,  
rements of the  
he Fourteenth  
o be effective  
neral elections  
a Constitution

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

5. *Supra* page 701, 377 U.S. at 074, 84 S.Ct. at 1430, 12 L.Ed.2d at 007.

6. See also *Scott v. Germano*, 351 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

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*,<sup>5</sup> 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."<sup>6</sup> 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<sup>7</sup> or the theoretical minimum percentage of population which

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 is used as the test, the conclusion is "frozen" apportionment. The Senate under the plan is in a grossly malapportioned state. Existing apportionment provided for under the Constitution to meet the standards of "substantial equality" of population among the districts of Senate electors "as nearly as practicable." In such cases, appellants, and appellees, and appellants, situated, for substantial constitutional impairment of existing apportionment of the Senate. There are 2 of the Alaska Constitution.

The right to a fair trial is an individual right protected by the Constitution. This was made clear in the Supreme Court.

A predominant factor in terminating the apportionment is the vicious discrimination asserted under the Equal Protection Clause is that the districts are unequal in nature. As stated in *Reynolds v. Sims*, 377 U.S. 533, 38 S.Ct. 269, 12 L.Ed.2d 274, "[t]he right to a fair trial. While the right to a fair trial in a state legislative election controversy may be a matter of the apportionment of seats in a

8. This theoretical minimum percentage obtained by dividing the total population by the number of seats in the legislative body per member accumulating upwards until a given percentage of the power to elect is reached.

maximum popula-  
7 to 1 contrasted  
portionment ratio  
oretical minimum  
ulation that could  
Senate under the  
per cent of the  
ng constitutional  
apportionment of  
er cent of the  
hich theoretically  
n the Senate.

both federal and  
e constitutionality  
ne. In Maryland  
tation v. Tawes,<sup>5</sup>  
e United States  
willingness of  
jurisdiction and  
olving cha'enges  
ment schemes."<sup>6</sup>  
o apportionment  
below and now  
perly before this

that the superior  
ne Alaska Senate  
tioned under the  
standards articu-  
Supreme Court  
ion reapportion-  
the maximum  
or the theoretical  
opulation which

States District  
Alaska. Plain-  
o seek in part  
constitutionally  
XIV, § 2; an  
rior court's or-  
ld pursuant to  
st the District  
al plan of ap-  
e for purposes  
inary and gen-

comparing the  
opulation per  
body in ques-

could elect a majority of the Alaska Senate<sup>8</sup> 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*,<sup>9</sup> 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

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.

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*,<sup>10</sup> 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

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.)<sup>11</sup>

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 fur-

ther 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.<sup>12</sup> 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.<sup>13</sup>

11. In 70 Harv.L.Rev. 1223, 1266 (1960), 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. (Emphases 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 reapportion-

ment decisions of the Supreme Court of the United States have established the year 1960 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.

Secondly: On States Supreme decision in *Reynolds*. Since that time, by the Alaska Legislature and Senate by amendment. In contrast, as I learned from the Governor of Alaska on August 18, 1964, after statewide Advisory Reapportionment the Governor was of which culminated in the tested September Reapportionment

In light of the "balancing task" before me, I do not find it unreasonable to the individual right of equality that the Governor has already had the political in the reapportionment. I would fashion the remedy for appellees an amendment to Article XIII to have the the Alaska Con-

My construction of the Supreme Court's decision in *Reynolds* from that of the Alaska Supreme Court is appropriate and appellees argue that the fashion judicial remedies in such cases only in "sufficient time for the political agencies to adopt a plan, and the Supreme Court's interpretation of *Reynolds* courts the due judicial remedy has been for the imminence of the legislative consideration in the convention.

14. That is contemplated by two by the calling of the convention. During the course of the convention has taken to reapportion the

15. *Supra* note

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.<sup>14</sup> 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 embodied in the Governor's reapportionment plan.

Thirdly: The conclusion I reach is based on the following additional considerations. As indicated earlier, it is now established by virtue of *Scott v. Germano*<sup>15</sup> and *Maryland Comm. for Fair Representation v. Tawes*<sup>16</sup> 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.<sup>17</sup> In states where the legislature is not vested with the function of reapportionment (i. e. where reapportionment of a "frozen house"<sup>18</sup> can be accomplished only through constitutional amendment) courts, when necessary, have allowed such legislatures to enact reapportionment plans.<sup>19</sup>

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.

414 P.2d—45  
Alaska Rep. 411—419 P.2d—12

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 1429, 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. 359, 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. 1018, 12 L.Ed.2d 1037 (1964).

Supreme Court of  
the established the  
mandatory national  
ment of a malap-  
ure. I do not in-  
y appellant as es-  
to but do construe  
cited authorities  
accelerated compli-  
under the "with  
nula in the public

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"<sup>20</sup> 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.<sup>21</sup> 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. 505-506, 84 S.Ct. at 1883, 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<sup>1</sup> 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 \$141,020.56 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.



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-

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.