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# Reapportionment: Revisionism Or Revolution?

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# REAPPORTIONMENT: REVISIONISM OR REVOLUTION?

WILLIAM F. SWINDLER\*

*It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them.*<sup>1</sup>

## I. "ONE PERSON, ONE VOTE"

In the space of twenty-six months—from March 26, 1962, to June 15, 1964—a series of nine epochal rulings by the Supreme Court of the United States has fundamentally altered the rationale of representative government in this country. The manifest cumulative result of the complementary opinions is as follows: The initial Tennessee case<sup>2</sup> by a six-to-two majority held that an irrational basis for apportionment of representation in the lower house of a state legislature violated the equal protection clause of the fourteenth amendment. Two Georgia cases<sup>3</sup> then overturned state election laws that gave unequal weight to voting in various parts of the state in statewide elections, whether for state officers, United States Senators, or United States Representatives. The wheel then came full circle in a series of cases covering upperhouse state legislative repre-

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<sup>1</sup> Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). (Emphasis added.)

<sup>2</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>3</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

sentation in Alabama,<sup>4</sup> Colorado,<sup>5</sup> Delaware,<sup>6</sup> Maryland,<sup>7</sup> New York,<sup>8</sup> and Virginia;<sup>9</sup> for, declared the Court, "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,"<sup>10</sup> and electoral districts cannot give primary consideration to trees and land over flesh and blood.<sup>11</sup>

Seldom in American constitutional history—if ever—has the Court had occasion to touch upon virtually all dimensions of a fundamental issue so promptly and so completely. While recognizing that "a federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies,'" <sup>12</sup> the Court in *Baker v. Carr*<sup>13</sup> virtually invited the raising of such issues, not only by vigorously reasserting jurisdiction of the subject matter but in the process indicating that the danger that assumption and exercise of jurisdiction "may bring our function into clash with the political departments of Government"<sup>14</sup> would not be a serious deterrent. The Court thus not only rejected the Frankfurter thesis of "judicial restraint"—applied in the 1946 case of *Colegrove v. Green*<sup>15</sup> to a mounting apportionment agitation—but made reasonably clear, by

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<sup>4</sup> Reynolds v. Sims, 377 U.S. 533 (1964).

<sup>5</sup> Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964).

<sup>6</sup> Roman v. Sincock, 377 U.S. 695 (1964).

<sup>7</sup> Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).

<sup>8</sup> WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

<sup>9</sup> Davis v. Mann, 377 U.S. 678 (1964).

<sup>10</sup> Reynolds v. Sims, 377 U.S. 533, 565 (1964).

<sup>11</sup> "Citizens, not history or economic interests, cast votes. . . . Again, people, not land or trees or pastures, vote." *Id.* at 580.

<sup>12</sup> Baker v. Carr, 369 U.S. 186, 204 (1962) (citing Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1884)).

<sup>13</sup> 369 U.S. 186 (1962).

<sup>14</sup> Colegrove v. Green, 328 U.S. 549, 564 (1946) (dissenting opinion).

<sup>15</sup> 328 U.S. 549 (1946). See Mr. Justice Frankfurter's opinion for the four-to-three majority, holding that a question of malapportionment under the Illinois election laws was not justiciable because "due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id.* at 552. It is worth noting that Frankfurter dissented in *Baker*, and subsequently retired from the bench; his three concurring colleagues in *Colegrove*—Justices Burton, Reed and Rutledge—have all left the Court, as has Mr. Justice Murphy, who joined with Justices Black and Douglas in the dissent. At the time of this opinion, June 10, 1946, Mr. Chief Justice Stone had died, and Mr. Justice Jackson was absent on service with the War Crimes Commission.

its criticism of the thesis in pertinent cases,<sup>16</sup> that the future rulings would definitely lead in new directions.

The *Baker* case itself, in the opinion of the majority read by Mr. Justice Brennan, went on to indicate the new directions of constitutional jurisprudence on the subject. "A citizen's right to vote free of arbitrary impairment by state action"<sup>17</sup> was shown to have been established in earlier cases involving erroneous tallies,<sup>18</sup> failure to count votes,<sup>19</sup> and ballot-box stuffing.<sup>20</sup> Gerrymandering, particularly with a racial motivation, had been added to the instances of justiciability in this subject area,<sup>21</sup> and *Baker* readily analogized from the finding in that case: "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>22</sup>

That federally protected right, identified in such case by the equal protection clause of the fourteenth amendment, was—as the Court made clearer a year later—a broad one in the matter of electoral privileges. In *Gray v. Sanders*,<sup>23</sup> speaking for a majority of eight to one, Mr. Justice Douglas observed:

If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. . . . 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 a geographical unit for which a representative is to be chosen is designated,

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<sup>16</sup> See the cases cited in 369 U.S. at 202-03, and see 369 U.S. at 205-07 nn.24-28. The Frankfurter thesis is epitomized in his familiar dictum in *United States v. Lovett*, 328 U.S. 303 (1946), stating that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them. . . ." *Id.* at 320. This would appear to be a denial both of jurisdiction and justiciability. Indeed, the second question cannot even be reached if the first is negated. However, Frankfurter was content to apply his thesis to the question of justiciability. On jurisdiction, see his opinion and the concurring opinion of Mr. Justice Rutledge in *Colegrove v. Green*, *supra* note 15, at 552, 566.

<sup>17</sup> 369 U.S. at 208.

<sup>18</sup> *United States v. Mosley*, 238 U.S. 383 (1915).

<sup>19</sup> *United States v. Saylor*, 322 U.S. 385 (1944).

<sup>20</sup> *United States v. Classic*, 313 U.S. 299 (1941).

<sup>21</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1961).

<sup>22</sup> *Id.* at 347; *cf. Baker v. Carr*, 369 U.S. 186, 229 (1962).

<sup>23</sup> 372 U.S. 368 (1963).

all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their 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.<sup>24</sup>

The opinion went on to comment: “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>25</sup>

Eleven months later, in February, 1964, the case of *Wesberry v. Sanders*<sup>26</sup> disposed of the remnants of the Georgia county unit voting system. The majority opinion<sup>27</sup> was read by Mr. Justice Black, who with Douglas represented the surviving dissent from the Frankfurter thesis in *Colegrove*. The opinion held that nothing in the Constitution, and particularly in article I, section 4,<sup>28</sup> “gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of the courts to protect the constitutional rights of individuals from legislative destruction . . . .”<sup>29</sup> The Court added:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected “by the People,” a principle tenaciously fought for and established at the Constitutional Convention.<sup>30</sup>

In the sweeping set of opinions handed down on June 15, 1964, the Court bound the series of reapportionment rulings into an integrated restatement. In his introduction to *Reynolds v. Sims*,<sup>31</sup> Mr.

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<sup>24</sup> *Id.* at 379-80.

<sup>25</sup> *Id.* at 381.

<sup>26</sup> 376 U.S. 1 (1964).

<sup>27</sup> Six members of the court concurred in the majority opinion. Mr. Justice Clark dissented in part, and Justices Harlan and Stewart dissented entirely. On the rationale of dissent, see text accompanying notes 78-92 *infra*.

<sup>28</sup> “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” U.S. CONST. art. I, §4.

<sup>29</sup> 376 U.S. at 6.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> 377 U.S. 533 (1964).

Chief Justice Warren sketched the progression from *Baker* through *Gray* to *Wesberry*, viz.—the question of whether a constitutionally protected right to an equally weighted vote has been impaired is justiciable; where the issue is state impairment of the right in statewide elections for state offices, the controlling constitutional authority is the equal protection clause of the fourteenth amendment; where it is state impairment of the right in voting for members of the United States House of Representatives, the controlling constitutional authority is the stipulation that these members “are to be chosen ‘by the People’ . . .”<sup>32</sup> of the several States. In either instance, the principle to be enforced is the same—“one person, one vote”—and if constitutionally applicable to the lower house of the state legislature (*Baker*), to state officers and United States Senators in statewide elections (*Gray*), and to United States Representatives (*Wesberry*), then it must logically extend to the upper house of the state legislature since it turns upon the authority of the federal constitution and not upon the theory of representation set out in the state constitutions.<sup>33</sup>

The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. . . . 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, 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 legislature.<sup>34</sup>

The opinion thereupon rejected the suggestion that it was rendering the concept of bicameralism anachronistic and meaningless,<sup>35</sup> reasserted the ruling in *Gray* that the “federal analogy” was

<sup>32</sup> *Id.* at 560, quoting U.S. CONST. art. I, § 2.

<sup>33</sup> For the theory of state constitutionalism, see text accompanying notes 139-69 and note 170 *infra*.

<sup>34</sup> 377 U.S. at 576.

<sup>35</sup> *Ibid.*

"inapposite,"<sup>36</sup> and dismissed the argument "grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle."<sup>37</sup> In companion opinions, the Court, still speaking through the Chief Justice, held invalid a redistricting process which, however complex and sophisticated, contained "a built-in bias against voters living in the State's more populous counties,"<sup>38</sup> or provided an improbable remedy in the form of a so-called "floterial district."<sup>39</sup> Nor, declared the Court in *Lucas v. Forty-Fourth Gen. Assembly*,<sup>40</sup> can the fact that malapportionment plans have been submitted to and ratified by the state electorate overcome the constitutional objection to any scheme which distorts the weight of individual votes.<sup>41</sup>

The sum of this litigation, concentrated in the twenty-six months from *Baker* to *Lucas*, is conclusively that the exercise of the electoral function under the federal constitution must be as nearly equal in the weight of individual votes as is practicable to establish. It is equally evident that on March 26, 1962, the Court moved consciously and deliberately into a new path—away from the rationale which had culminated in the Frankfurter argument in *Colegrove*—and with only one consistent dissent maintained by Mr. Justice Harlan.<sup>42</sup> The completeness of the shift can best be described by summarizing the earlier jurisprudence and then by stating the present Harlan thesis.

The first concerted effort to devise a judicial role in the matter of reapportionment developed in the 1931 term of the Supreme Court, when several of the states were confronted, after the 1930 decennial census, with losses in the number of their Representatives in Congress. The 1930 census thus confirmed the historic shift in

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<sup>36</sup> *Gray v. Sanders*, 372 U.S. 368, 378 (1963); cf. *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675 (1964).

<sup>37</sup> 377 U.S. at 582; cf. *Roman v. Sincock*, 377 U.S. 695 (1964).

<sup>38</sup> *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 654 (1964).

<sup>39</sup> *Davis v. Mann*, 377 U.S. 678 (1964). The term "floterial" is defined by the Court as a legislative district that includes several separate districts that independently would not be entitled to additional representation but whose conglomerate population entitles the area as a whole to another seat in the legislature. *Id.* at 686 n.2. The etymology of the term is obscure, to say the least.

<sup>40</sup> 377 U.S. 713 (1964).

<sup>41</sup> *Id.* at 736-37.

<sup>42</sup> The divergencies and consistencies of opinions in these cases may be illustrated thus:

population trends which had crystallized in the years following the first World War—a shift in favor of predominantly urban states and in favor of urban areas within most states. The acceleration of these trends under the economic impacts of the decade of the Great Depression and the decade of the second World War was emphasized in the statistics of the 1940 and 1950 decennial censuses,<sup>43</sup> and it obviously accounts for part of the pressure developing in the litigation culminating in the present series of opinions. Until the 1931 term, the Court had successfully avoided involvement in matters of apportionment or of calling in question the adequacy (equality) of the exercise of the electoral franchise. Sometimes it denied jurisdiction,<sup>44</sup> but more generally it simply held the

| Justice:    | <i>Baker</i> | <i>Gray</i> | <i>Wesberry</i> | <i>Sims</i> | <i>W/MCA</i> | <i>Tawes</i> | <i>Davis</i> | <i>Roman</i> | <i>Lucas</i> |
|-------------|--------------|-------------|-----------------|-------------|--------------|--------------|--------------|--------------|--------------|
| Warren      | 1            | 1           | 1               | 1*          | 1*           | 1*           | 1*           | 1*           | 1*           |
| Black       | 1            | 1           | 1*              | 1           | 1            | 1            | 1            | 1            | 1            |
| Frankfurter | 4            |             |                 |             |              |              |              |              |              |
| Douglas     | 2            | 1*          | 1               | 1           | 1            | 1            | 1            | 1            | 1            |
| Clark       | 2            | 2           | 3               | 2           | 4            | 2            | 2            | 2            | 4            |
| Harlan      | 4            | 4           | 4               | 4           | 4            | 4            | 4            | 4            | 4            |
| Brennan     | 1*           | 1           | 1               | 1           | 1            | 1            | 1            | 1            | 1            |
| Whitaker    | †            |             |                 |             |              |              |              |              |              |
| Stewart     | 2            | 2           | 4               | 2           | 4            | 4            | 4            | 4            | 4            |
| White       |              | 1           | 1               | 1           | 1            | 1            | 1            | 1            | 1            |
| Goldberg    |              | 1           | 1               | 1           | 1            | 1            | 1            | 1            | 1            |

\*—delivered majority opinion

1—majority

2—concurring

3—partial dissent

4—dissent

†—not participating

<sup>43</sup> "A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable became archaic and outdated." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (Warren, C.J.). The majority shift to urban population actually was recorded in the 1920 census, but the urban-rural gap did not significantly widen until the 1930 census and those following. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES*, COLONIAL TIMES TO 1957, at 14 (1960); Schattschneider, *Urbanization and Reapportionment*, 72 *YALE L.J.* 7 (1962).

<sup>44</sup> See the majority opinion by Mr. Chief Justice Fuller in *Taylor v. Beckham*, 178 U.S. 548, 577-81 (1900) (6-to-3 decision). This case is also worth noting for the dissent of the first Mr. Justice Harlan, citing with approval the comment quoted in text accompanying note 1 *supra* by Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), and disputing the majority finding of lack of jurisdiction be-



issue nonjusticiable because it was "political."<sup>45</sup>

Now, being asked to adjudicate a definite and substantial federal question, the Court moved cautiously. In *Smiley v. Holm*,<sup>46</sup> Mr. Chief Justice Hughes, speaking for a unanimous Court, found that Minnesota, having lost a Representative as a result of the 1930 census and not having provided for redistricting to take this into account as prescribed by the Act of June 18, 1929,<sup>47</sup> was required to elect its Representatives at large.<sup>48</sup> The Court followed this *Smiley* doctrine in other cases, involving New York<sup>49</sup> and Missouri,<sup>50</sup> arising in the same term. But the circumspect rationale by which the Court disposed of these questions foundered on the Mississippi case presented to it in the next term; here the issue was not failure to redistrict in conformity with the congressional enactment, but failure to redistrict equitably in terms of population. The Court, declared the Chief Justice in this instance, could not compel Mis-

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cause of the "political" character of the question. *Taylor v. Beckham, supra* at 592-93.

<sup>45</sup> Long haunting the Court is the ghost of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), where the opinion of Mr. Chief Justice Taney has been understood (or rather, this writer contends, misunderstood) to hold any cases arising under the guaranty clause to be "political" and hence beyond the jurisdiction of the Court. See generally Bonfield, *The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962). See text accompanying notes 200-08 *infra*.

Relying on the *Luther* rule, Mr. Chief Justice White, for a unanimous Court, dismissed an apportionment issue in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Cf. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Pitney, J., for a 5-to-4 majority); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Marshall v. Dye*, 231 U.S. 250 (1913) (Day, J.). See also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 79 (1930) (Hughes, C.J.).

<sup>46</sup> 285 U.S. 355 (1932).

<sup>47</sup> Ch. 28, 46 Stat. 21 (codified in scattered sections of 2, 5 U.S.C.). Appellants contended, and the Court found, that the 1929 statute depended for its effective interpretation upon portions of the Act of Aug. 8, 1911, ch. 5, §4, 37 Stat. 14, which had not been repealed or superseded by the later enactment. The 1929 law provided that apportionment should be provided for following the fifteenth decennial census and subsequent censuses, according to the method of the last preceding apportionment—the method of "major fractions," or of equal proportions. The 1911 law provided for state legislative action to redistrict in cases where a state became entitled to additional representation in Congress and for the use of existing districts where the number was unchanged. The possibility of loss in representation was not anticipated.

<sup>48</sup> 285 U.S. at 374-75.

<sup>49</sup> *Koenig v. Flynn*, 285 U.S. 375, 379 (1932).

<sup>50</sup> *Carroll v. Becker*, 285 U.S. 380, 381 (1932).

issippi to redistrict equitably because Congress had failed to stipulate such a requirement in its legislation.<sup>51</sup>

There the matter rested,<sup>52</sup> until the cumulative social and economic effects of depression and the second World War—combined with the changing philosophy of the Court itself—brought the reapportionment issue back into the limelight. For a dozen years following the second World War, malapportionment cases were carried to the high tribunal without a definitive response. The Georgia county unit voting system was challenged in 1946 in cases involving the application of the system to the election of members of the United States House of Representatives<sup>53</sup> and of the governor of the state.<sup>54</sup> In both instances the Supreme Court dismissed the appeal from the lower federal court, which had upheld the system, suggesting but not stating in terms that it entertained doubts as to its jurisdiction.<sup>55</sup> The same year an Illinois apportionment case, appealed from the district court, was dismissed for want of a substantial federal question.<sup>56</sup> In a 1948 Illinois case,<sup>57</sup> a six-to-three majority held per curiam: "It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. . . . To assume that political power is a function exclusively of numbers is to disregard the practicalities of government."<sup>58</sup> In dissent, Mr. Justice Douglas rejoined: "The fact that the Constitution itself sanctions inequalities in some phases of our political system does not justify us in allowing a state to create additional ones."<sup>59</sup>

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<sup>51</sup> *Wood v. Broom*, 287 U.S. 1 (1932). Although Mr. Chief Justice Hughes had no difficulty in *Smiley* in finding that the 1911 statute could remedy an omission in the 1929 statute, he concluded in *Wood* that the 1911 law's requirement as to compactness, contiguity, and equality of population could not similarly remedy the omission in 1929 because this "omission was deliberate"—his reasoning being that the 1911 law had repeated a stipulation of prior apportionment statutes. *Id.* at 7.

<sup>52</sup> See Mr. Justice Cardozo's opinion in *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937). Note also the novel argument of the Illinois appellants in *Keogh v. Neely*, 50 F.2d 685 (7th Cir. 1931).

<sup>53</sup> *Cook v. Fortson*, 68 F. Supp. 624 (N.D. Ga. 1946), *appeal dismissed*, 329 U.S. 675 (1946) (per curiam).

<sup>54</sup> *Turman v. Duckworth*, 68 F. Supp. 744 (N.D. Ga. 1946), *appeal dismissed sub nom. Cook v. Fortson*, 329 U.S. 675 (1946) (per curiam).

<sup>55</sup> *Cook v. Fortson*, 329 U.S. 675 (1946) (per curiam). Mr. Justice Rutledge advocated a hearing on the merits, after which the question of jurisdiction could be determined. *Id.* at 675-79 (separate opinion).

<sup>56</sup> *Colgrove v. Green*, 328 U.S. 549 (1946).

<sup>57</sup> *MacDougall v. Green*, 335 U.S. 281 (1948).

<sup>58</sup> *Id.* at 283.

<sup>59</sup> *Id.* at 289-90. (Footnote omitted.)

The bugaboo of "political" questions involved in cases of this type has haunted the Court persistently. In 1950 a majority of seven stated per curiam: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."<sup>60</sup> To which Mr. Justice Douglas replied, in a dissent supported by Mr. Justice Black, that "the only tenable premise under the Fourteenth, Fifteenth and Seventeenth Amendments is that where nominations are made in primary elections, there shall be no inequality in voting power by reason of race, creed, color or other invidious discrimination."<sup>61</sup> The next year the Court sustained the lower federal court in refusing to intervene in a Pennsylvania apportionment issue where citizens of the state had "an apparent, but untried, remedy"<sup>62</sup> in the state courts and the state legislature.<sup>63</sup> Exhaustion of local remedies was a well enough established constitutional requirement; much less tenable was the opinion, handed down in this same term, that the Georgia county unit system when applied to a primary election did not present a federal question because a primary is not an election within the meaning of constitutional jurisprudence.<sup>64</sup>

Still more tenuous was the reasoning in the 1956 case of *Kidd v. McCanless*,<sup>65</sup> where the Supreme Court dismissed an appeal from a ruling by the Tennessee Supreme Court and accepted the state court's tortuous explanation that it could not set aside, as inoperative, the 1901 redistricting law because to do so would leave the state without a prior law to fall back upon and hence without a legal government or the means of electing one. "If . . . this statute has expired by the passage of the decade following its enactment," the Tennessee court had said, "then for the same reason all prior apportionment acts have expired by a like lapse of time and are nonexistent."<sup>66</sup> The judiciary was very close to being impaled upon the horns of a dilemma—with the prospect of permanent estoppel

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<sup>60</sup> *South v. Peters*, 339 U.S. 276, 277 (1950).

<sup>61</sup> *Id.* at 281.

<sup>62</sup> *Remmey v. Smith*, 102 F. Supp. 708, 711 (E.D. Pa. 1951), *appeal dismissed*, 342 U.S. 916 (1952) (mem.).

<sup>63</sup> *Remmey v. Smith*, 342 U.S. 916 (1952), *dismissing appeal mem. from* 102 F. Supp. 708 (E.D. Pa. 1951).

<sup>64</sup> *Cox v. Peters*, 342 U.S. 936 (1952), *dismissing appeal mem. from* 208 Ga. 498, 67 S.E.2d 579 (1951).

<sup>65</sup> 352 U.S. 920 (1956).

<sup>66</sup> *Kidd v. McCanless*, 200 Tenn. 273, 281, 292 S.W.2d 40, 44 (1956).

by the "political" concept on the one hand, and the prospect of perpetual inaction by the states on the other hand. It remained for a federal district court judge, in a dissent from the majority opinion in *Radford v. Gary*,<sup>67</sup> to summon a return to reality. To the majority holding that redistricting under the Oklahoma constitution was a political question over which a federal court could not assume jurisdiction, Judge Wallace replied:

With no threatened conflict between the Congress and the Federal Judiciary, the question simply is "Will the Federal Judiciary stand idly by and permit the mastication of a federally guaranteed constitutional right?" At such point the question of "political issue" or "delicacy of federal-state relationship" becomes secondary.<sup>68</sup>

The continuing efforts of the "unweighted" voters to make representative government conform with mid-century economic and social facts were not discouraged by the continued refusal of state or federal courts to sustain their arguments. Between the mid-1930's and the end of the 1950's, no less than fifty suits had been carried to the highest state courts and more than a dozen had been litigated in various federal courts.<sup>69</sup> The issues had occasionally agitated Congress, although without any practical prospect of action.<sup>70</sup> But the judiciary—and particularly the Supreme Court—could not go on indefinitely clinging to a policy of non-involvement. On the one hand, the refusal to concede defeat on the part of those who considered themselves deprived of their full electoral rights kept a continual pressure on the Court to step into the vacuum created by state and congressional inaction; on the other, the Court's

<sup>67</sup> 145 F. Supp. 541, 544 (W.D. Okla.), *aff'd per curiam*, 352 U.S. 991 (1957).

<sup>68</sup> *Id.* at 546.

<sup>69</sup> See the list of such cases in the appendix to Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 102-04 (1962). See also *Board of Supervisors v. Pratt*, 47 Ariz. 536, 57 P.2d 1220 (1936); *Butler v. Democrat State Comm.*, 204 Ark. 14, 160 S.W.2d 494 (1942); *Shaw v. Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941); *Attorney Gen. v. Secretary of Commerce*, 306 Mass. 25, 27 N.E.2d 265 (1940); *City of Lansing v. Ingham County Clerk*, 308 Mich. 560, 14 N.W.2d 426 (1944); *State ex rel. Davis v. Ramacciotti*, 193 S.W.2d 617 (Mo. 1946); *In the Matter of Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W.2d 300 (1953).

<sup>70</sup> For discussion of early proposed amendments to the Constitution concerning reapportionment, see AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 42-54 (1897). For discussion of the debate in the 88th Congress, 2d session, see note 100 *infra*.

own record showed a definite, if ambivalent, acceptance of jurisdiction and adjudication in the subject area. At least as far back as 1884; in *Ex parte Yarbrough*,<sup>71</sup> the Court had disposed of electoral questions presented under the fifteenth amendment;<sup>72</sup> other cases involving related questions had been heard under the equal protection clause of the fourteenth amendment.<sup>73</sup>

It became reasonably clear that the Court had crossed this Rubicon when at the 1960 term it noted probable jurisdiction,<sup>74</sup> and a flurry of anticipatory actions began developing in various states. When the direction of the judicial trend was confirmed on March 26, 1962,<sup>75</sup> the flurry grew to a storm; even before June 15, 1964, almost sixty cases in at least thirty-eight states had been adjudicated or were awaiting appeal.<sup>76</sup> Once the Court was launched on its course, there was no prospect of a reversal, but all of the nine reapportionment cases between these dates have been accompanied by an eloquent and elaborate dissent.<sup>77</sup> Mr. Justice Harlan has

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<sup>71</sup> 110 U.S. 651 (1884).

<sup>72</sup> The indifferent treatment of the electoral franchise under the fifteenth amendment is reflected in cases like *James v. Bowman*, 190 U.S. 127 (1903), and *United States v. Reese*, 92 U.S. 214 (1875).

<sup>73</sup> See *Smith v. Allwright*, 321 U.S. 649 (1944); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

<sup>74</sup> *Baker v. Carr*, 364 U.S. 898 (1960) (memorandum decision).

<sup>75</sup> See the comment of Mr. Justice Clark in *Baker v. Carr*, 369 U.S. 186, 251 (1962) (concurring opinion).

<sup>76</sup> See the list of cases in the appendix to McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706-10 (1963). In addition to the cases listed therein, see *Dorsey v. Fortson*, 228 F. Supp. 259 (N.D. Ga. 1964); *Marshall v. Hare*, 227 F. Supp. 989 (E.D. Mich.), *rev'd per curiam*, 378 U.S. 561 (1964); *Swanson v. Illinois*, 226 F. Supp. 699 (N.D. Ill. 1964); *Bush v. Martin*, 224 F. Supp. 499 (S.D. Tex. 1963), *aff'd mem.*, 376 U.S. 222 (1964); *Daniel v. Davis*, 220 F. Supp. 601 (E.D. La. 1963); *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963); *People ex rel. Spence v. Carpentier*, 30 Ill. 2d 43, 195 N.E.2d 690 (1964); *People ex rel. Giannis v. Carpentier*, 30 Ill. 2d 24, 195 N.E.2d 665 (1964); *Le Doux v. Parish Democratic Executive Comm.*, 244 La. 981, 156 So. 2d 48 (1963); *In the Matter of Apportionment of Michigan State Legislature*, 372 Mich. 418, 126 N.W.2d 731 (1964); *Robertson v. Hatcher*, 135 S.E.2d 675 (W. Va. 1964).

<sup>77</sup> Mr. Justice Stewart has dissented in six of the nine apportionment cases, and Mr. Justice Clark in two. See note 42 *supra*. The two justices joined in their dissent covering *Lomenzo* and *Lucas*, stating:

[T]he Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan

admonished the majority that "those who have the responsibility for devising a system of representation [by his definition, the state's duly authorized agencies] may permissibly consider that factors other than bare numbers should be taken into account,"<sup>78</sup> and he has demanded why a state may not deliberately choose to employ population imbalance as a justifiable and practical means of protecting minority economic (i.e., agricultural) interests.<sup>79</sup> In *Baker*, the dissent was paired with Mr. Justice Frankfurter's detailed historical refutation of the proposition that strict equality of voting strength had ever been a concept of Anglo-American government.<sup>80</sup>

With the retirement of Mr. Justice Frankfurter, the Harlan thesis became a minority of one, but its vigor was undiminished. In *Gray v. Sanders*,<sup>81</sup> the justice continued his criticism of "one person, one vote" as a matter of arithmetic which he had maintained in an appendix to his *Baker* opinion<sup>82</sup> to be irrational in itself. In *Wesberry v. Sanders*<sup>83</sup> he warned that the majority opinion "casts grave doubt on the constitutionality of the composition of the House of Representatives,"<sup>84</sup> and he insisted that the only constitutionally guaranteed right is the right to vote, not to have an equal weight given to the vote. He reminded the majority of the language of the Constitution itself, in article I, section 2, that the electors for members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,"<sup>85</sup> with its implication that only one branch would be chosen on a population basis. The records of the Constitutional Convention of 1787 he found to "indicate as clearly as may be that the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives : . . ."<sup>86</sup> The only federal agency permitted by the Constitution to lay down guidelines in this area, the dissent continued, was Congress itself,

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must be such as not to permit the systematic frustration of the will of the majority of the electorate of the State.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753-54 (1964).

<sup>78</sup> *Baker v. Carr*, 369 U.S. 186, 333 (1962) (dissenting opinion).

<sup>79</sup> *Id.* at 336.

<sup>80</sup> *Id.* at 266.

<sup>81</sup> 372 U.S. 368, 382 (1963).

<sup>82</sup> 369 U.S. at 340.

<sup>83</sup> 376 U.S. 1, 20 (1964).

<sup>84</sup> *Ibid.*

<sup>85</sup> *Id.* at 22.

<sup>86</sup> *Id.* at 33.

whose enactments over nearly a century, from 1842 to 1940, he reviewed.<sup>87</sup>

The climax of the Harlan dissent appeared in *Reynolds v. Sims*<sup>88</sup> and was appended by reference to the other cases decided on the same day. From the legislative history of the fourteenth amendment, the dissent concluded:

(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.<sup>89</sup>

The dissent then reviewed discriminatory provisions in state constitutions of the late nineteenth century which failed to evoke any successful challenge under the fourteenth amendment, and pointed out that the subsequent fifteenth and nineteenth amendments were found necessary in order to overcome inequities which had been considered beyond the scope of the fourteenth.<sup>90</sup> Following this exhaustive statement, the Harlan dissent takes the majority to task for ruling out every reasonable alternative to the population basis for reapportionment.<sup>91</sup> The dissent concludes:

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be

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<sup>87</sup> *Id.* at 42-45.

<sup>88</sup> 377 U.S. 533, 589 (1964).

<sup>89</sup> *Id.* at 607.

<sup>90</sup> *Id.* at 608-12.

<sup>91</sup> *Id.* at 621-24. The dissent listed as alternatives the following:

(1) history; (2) "economic or other sorts of group interests"; (3) area; (4) geographical considerations; (5) a desire "to insure effective representation for sparsely settled areas"; (6) "availability of access of citizens to their representatives"; (7) theories of bicameralism (except those approved by the Court); (8) occupation; (9) "an attempt to balance urban and rural power." (10) the preference of a majority of voters in the States.

*Id.* at 622-23. (Footnotes omitted.)

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 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.<sup>92</sup>

The exhaustiveness of the Harlan exposition not only serves to place in sharp relief the countervailing argument in the question of apportionment, but confirms the fact that the majority opinions have fundamentally affected the processes of representative government in the United States. Indeed, a reading of the majority opinions underlines the striking fact that no serious attempt has been made to reconcile the current jurisprudence of reapportionment with constitutional or political history. There is, on the other hand, tacit recognition of recent socioeconomic history. Indeed, the thrust of these cases is an accommodation of the fact of a general urbanization of American life in the second and third quarters of this century.<sup>93</sup> There is also an obvious and sharp reversal of the former position of the Court which treated such issues as "political" and

<sup>92</sup> *Id.* at 624-25.

<sup>93</sup> "*Baker v. Carr* is best treated as an episode in the urbanization of the American community . . ." Schattschneider, *supra* note 43, at 7.



hence nonjusticiable, or as non-federal questions and hence outside the Court's jurisdiction. But the new jurisprudence has been sudden and exhaustive, and its effect is to require the construction of an entirely new rationale of American government and of constitutional federalism.

The potential cataclysm in *Baker* was early recognized; to one scholar<sup>94</sup> it was second only to *Marbury v. Madison*<sup>95</sup> in its bearing on national life, while another<sup>96</sup> ranked it with *Brown v. Board of Educ.*<sup>97</sup> as the two most important decisions of the twentieth century. While *Baker* was criticized as a "political thicket" and a "crazy quilt,"<sup>98</sup> the subsequent cases have constructed a definite enough standard to apply to reapportionment: equally weighted votes determined primarily if not exclusively on a population basis, however distasteful this standard may be for many. Much of the discussion after *Baker* has been rendered academic by the answers which the later cases gave to the questions raised in professional literature.<sup>99</sup> At the political level, the commentary has followed predictable lines, and has touched off a series of bills in Congress, including proposed Constitutional amendments seeking to override the Court rationale.<sup>100</sup>

<sup>94</sup> Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 330 (1962).

<sup>95</sup> 5 U.S. (1 Cranch) 49 (1803).

<sup>96</sup> McKay, *supra* note 76, at 645.

<sup>97</sup> 347 U.S. 483 (1954).

<sup>98</sup> McKay, *supra* note 76, at 645.

<sup>99</sup> See Bonfield, *Baker v. Carr*, 50 CALIF. L. REV. 245 (1962); Cormack, *Baker v. Carr and Minority Government in the United States*, 3 WILLIAM & MARY L. REV. 282 (1962); Dixon, *supra* note 94; Hagan, *The Bicameral Principle in State Legislatures*, 11 J. PUB. L. 310 (1962); Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962); McKay, *supra* note 76; Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REV. 252; Schattschneider, *supra* note 43.

<sup>100</sup> The original opinion in *Baker* touched off a reaction in 1962 in the form of three proposed "amendments to strengthen the position of the states in the federal system." One called for a new Constitutional Convention to alter the amending process itself; the second sought to remove reapportionment questions from the jurisdiction of the Supreme Court; the third proposed a fifty-member Court of the Union to review certain Supreme Court opinions. See Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1 (1963).

Following the June 15, 1964, opinions, Congress in September received a proposed amendment (S.J. Res. 204) which would override the apportionment cases. 110 CONG. REC. 21372 (daily ed. Sept. 14, 1964). When this was referred to the Senate Judiciary Committee with little prospect of action, Senator Dirksen of Illinois and Senator Mansfield of Montana pro-

Assuming compliance on the part of the states with the now confirmed standard of apportionment of representation, the electoral pattern in virtually every state of the Union is obviously due to change.<sup>101</sup> The results in terms of state and national political positions are more speculative—whether the new urban-suburban-rural ratios in state legislatures, and perhaps in Congress, will mean a renaissance of effective local legislation and a corresponding decentralization of government,<sup>102</sup> or whether the suburban interest will prove as inimical to the urban as to the rural,<sup>103</sup> are consequences yet to be assessed. But from the standpoint of constitutional Federalism in the United States, the questions to be answered are more immediate. If, as one student of the problems contends, the changes set in motion by *Baker* are really “politics in search of law,”<sup>104</sup> the judicial overriding of so many engrained political concepts in American life can be termed nothing less than a revolution. At the very least, the complete reorientation of the national cultural and political outlook demanded by the jurisprudence from *Brown* through its companion integration cases, and from *Baker* to *Lucas*, constitutes an unprecedented revisionism. One fact, at least, is beyond dispute—whether revolution or revisionism, the integration and reapportionment cases have established a new frame of reference for American constitutional law; the jurisprudence of the decade from 1954 to 1964 clearly marks a zone of discontinuity vis-à-vis the constitutional developments from the Marshall Court to the Hughes Court.<sup>105</sup>

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posed a “rider” to the 1964 Foreign Assistance Act which would have relieved the states of compliance with the Court’s rulings until January 1966. 110 CONG. REC. 21372-77 (daily ed. Sept. 14, 1964). Senators Humphrey and McCarthy of Minnesota and Senator Javits of New York then proposed an alternative “rider” making it the sense of Congress that the states should have reasonable time to comply. 110 CONG. REC. 21377 (daily ed. Sept. 14, 1964). The two proposals eventually cancelled each other out. See Foreign Assistance Act of 1964, Pub. L. No. 633, 88th Cong., 2d Sess. (Oct. 7, 1964).

<sup>101</sup> Knowles, *Redistricting Will Have Wide Impact on Most States*, N.Y. Times, June 21, 1964, § 4 (Editorials), p. 3, cols. 2-7.

<sup>102</sup> See Edwards, *Theoretical and Comparative Aspects of Reapportionment and Redistricting*, 15 VAND. L. REV. 1265 (1962).

<sup>103</sup> Note, *Small Town Representation: Invidious Discrimination?* 43 B.U.L. REV. 523 (1963).

<sup>104</sup> Neal, *supra* note 99.

<sup>105</sup> Referring to a long line of judicial opinions which he held to be passed over without reference in the majority *Sims* opinion, Mr. Justice Harlan observed in his dissent: “The failure of the Court to consider any of these matters cannot be excused or explained by any concept of ‘develop-

The following parts of the present study will explore, first, the case for the proposition that this new jurisprudence is in fact constitutional revolution—*i.e.*, that the judicial branch of the government, if it has not usurped the legislative function outright, has in any event overridden certain basic assumptions, extending back to the Founding Fathers, as to the exclusive area of legislative jurisdiction. Thereafter, the study will address itself to whether, if this jurisprudence may be sanctioned as revisionism rather than indicted as revolution, it is in fact jurisprudence in search of legitimacy.

## II. REPRESENTATIVE GOVERNMENT: THEORY AND PRACTICE

The most obvious feature of American government—and of the eighteenth-century parliamentary government which provided the colonial model—has been a division of the several “estates” into separate legislative divisions.<sup>106</sup> “What touches all, should be by all approved” is virtually an axiom of Anglo-American political science, although bicameralism has not—as Mr. Justice Frankfurter so firmly insisted—been synonymous with universal equality of representation. Indeed, historical evidence suggests that one function of bicameralism is to preserve certain specific class interests not reconcilable with a “one person-one vote” democracy. Writing in 1788 of the Senate proposed in the new Constitution, James Madison argued:

If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.<sup>107</sup>

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ing’ 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.” 377 U.S. at 591.

<sup>106</sup> The “great and model Parliament” of Edward I in 1295 recognized three estates—the lords spiritual (clergy) and temporal (barons) and the commons. 1 ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 50 (5th ed. 1922).

<sup>107</sup> *THE FEDERALIST* No. 62, at 416 (Cooke ed. 1961) (Madison).

Madison wrote at another point:

It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniencies will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects.<sup>108</sup>

Madison saw the best course in a reasonably wide representation:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>109</sup>

At still another point, Madison concluded:

The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention therefore to define and establish this right, in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the State Governments, that branch of the Foederal Government, which ought to be dependent on the people alone. To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the Foederal Constitution.<sup>110</sup>

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<sup>108</sup> *Id.* No. 10, at 63 (Madison).

<sup>109</sup> *Id.* at 64.

<sup>110</sup> *Id.* No. 52, at 354 (Madison).

Madison's arguments reflected the basic assumption of the Convention of 1787, which, in the initial "Virginia plan" for a new frame of government, proposed that "the members of the first branch of the National Legislature ought to be elected by the people of the several States . . . ."<sup>111</sup> This proposal was promptly challenged by Roger Sherman and Elbridge Gerry. "The people," said Sherman, should "have as little to do as may be about the Government. They want information and are constantly liable to be misled."<sup>112</sup> George Mason, James Wilson, and Madison spoke vigorously in support of election by the people; the future Supreme Court Justice observed that "the opposition of States to federal measures had proceeded much more often from the Officers of the States, than from the people at large."<sup>113</sup> The first vote on the subject carried in favor of the popular election, six to two with two divided.<sup>114</sup>

A full-dress debate was touched off on June 6 of the Convention when Charles Pinckney moved, and John Rutledge seconded, a proposal to have the House of Representatives elected by state legislatures. The motion was defeated, eight to three.<sup>115</sup> Two weeks later, on June 21, another effort to minimize the election by direct popular vote was defeated.<sup>116</sup> The only other debate which indicated anything of the feeling of the Convention on the matter of suffrage arose in August. Gouverneur Morris, preferring to limit the vote to freeholders and fearing that unpropertied masses would use their franchise irresponsibly, sought to strike the proviso on electors. Benjamin Franklin held that "the elected [did not have] any right in any case to narrow the privileges of the electors,"<sup>117</sup> and Mason added his view that the Constitution should encourage the widest possible franchise—"every man having . . . common interest with the Society [*i.e.*, government] ought to share in all its rights & privileges."<sup>118</sup> The effort to eliminate the elector provision was defeated, seven to one, with one divided and one absent.<sup>119</sup>

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<sup>111</sup> 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (rev. ed. 1937).

<sup>112</sup> *Id.* at 48.

<sup>113</sup> *Id.* at 49.

<sup>114</sup> *Id.* at 48-50.

<sup>115</sup> *Id.* at 132-38.

<sup>116</sup> *Id.* at 358-60.

<sup>117</sup> 2 *id.* at 205.

<sup>118</sup> *Id.* at 203.

<sup>119</sup> *Id.* at 201-06.

From the record of the Constitutional Convention two things are clear: (1) the intention of the Founding Fathers was to base the House of Representatives on a wide popular vote within each state, and (2) the assumption was that the most numerous branch of the national legislature would rest on the same electoral basis as its counterpart in the state legislatures. If there was such a thing as a rural bias in 1787, it was expressed in terms of freeholders as contrasted with unpropertied persons. Any imbalance between rural and urban areas was not considered significant.<sup>120</sup> The chief concern of the democratic forces in the Convention was to place the electoral power in the hands of the people themselves, rather than in their state legislatures.<sup>121</sup>

The extended Convention debate on the Senate section only serves to underline more vividly the Founders' concept of the function of the popular electoral franchise in the case of the lower house. The proposal to elect the Senate by state legislatures carried, ten to none, after a heated debate which emphasized that the Convention understood the Senate function to be a process of deliberation with "more coolness, with more system, & with more wisdom, than the popular branch"<sup>122</sup> and "because the sense of the States would be better collected through their Governments."<sup>123</sup> The object of the second branch was to control the democratic branch, Randolph insisted, drawing examples from the Maryland legislature as characteristic of state bicameralism.<sup>124</sup> In a thoughtful speech foreshadowing, by more than a century, the basic argument for the seventeenth amendment, Wilson said:

[I]t was necessary to observe the twofold relation in which the people would stand. 1. as Citizens of the Gen'l Gov't. 2. as Citizens of their particular State. The Genl. Govt. was meant for them in the first capacity; the State Govts. in the second. Both Govts. were derived from the people—both meant for the people—both therefore ought to be regulated on the same principles. The same train of ideas which belonged to the relation of the Citizens to their State Govts. were applicable to their relations to the Genl. Govt. and in forming the latter, we ought to proceed,

<sup>120</sup> See Dixon, *supra* note 94, at 385 (Chart I).

<sup>121</sup> The chief practical issue in the 1787 Convention, in the matter of apportionment, concerned the counting of slaves—a group of persons without any franchise at all.

<sup>122</sup> 1 FARRAND, *op. cit.* *supra* note 111, at 151 (quoting James Madison).

<sup>123</sup> *Id.* at 150 (quoting John Dickenson).

<sup>124</sup> *Id.* at 218.

by abstracting as much as possible from the idea of State Govts. With respect to the province & objects of the Genl. Govt. they should be considered as having no existence. . . . The Genl. Govt. is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them: the *individuals* therefore not the *States*, ought to be represented in it . . . .<sup>125</sup>

Throughout the debates of the Convention of 1787, the delegates drew for their analogies from three primary sources: the historical experience of the unicameral Senate of classical Rome, the bicameral example of the British Parliament, and the constitutional machinery of the state governments set up after 1776. For obvious reasons, the last of these proved the most fruitful source of practical information. From the state governments as they existed at the time of the Convention, the delegates could discern six (Georgia, Massachusetts, New Hampshire, New York, Pennsylvania, and South Carolina) which sought to elect their more populous house by equally apportioned districts, while three states (Massachusetts, New York, and South Carolina) undertook a comparable electoral plan for their upper houses.<sup>126</sup> It is hardly to be doubted that the men at Philadelphia—whether conservatives like Oliver Ellsworth, Gerry, Morris, and Sherman, or liberals like Madison, Mason, and Wilson (with Hamilton and Randolph vacillating between the poles)—took for granted that the selection of members of the lower house of Congress should be on a basis similar to the election to the lower houses of the state legislatures. Hence the final language of article I, section 2 that electors for the House of Representatives should have the same qualifications in each state as the electors in that state for the more numerous branch of the state legislature.

This being the manifest theory of the original Constitution, it remains to determine the modifications wrought by subsequent amendments—specifically, the fourteenth, whose legislative history was so eloquently reviewed in the Harlan dissent.<sup>127</sup> This question is discussed in part here and continued in the final portion of this study, since it goes ultimately to the legitimacy of the new rationale of representative government which the apportionment cases have

<sup>125</sup> *Id.* at 405-06. (Emphasis added.)

<sup>126</sup> See Dixon, *supra* note 94, at 385 (Chart I); see also text accompanying notes 139-69 *infra*.

<sup>127</sup> See text accompanying note 89 *supra*.

made necessary. Here, where the issue is the revolutionary character of these decisions, one must inquire whether the fourteenth amendment, specifically or by subsequent construction, affected the original intent or provisions of article I, section 2. It is self-evident, of course, that section 2 of the amendment, requiring the "counting [of] the whole number of persons in each State," modified the effect of the clause in article 1, section 2 that had limited slave population to three-fifths of its actual numbers for apportionment purposes. But it is pertinent to inquire whether, under standard procedure in statutory construction, the tenor of section 2 may in any way be related to section 1 of the amendment.

Section 1 of the fourteenth amendment declares all native-born or naturalized persons to be citizens of the United States and of the state wherein they reside—an extension of a rule, generally recognized as applying to white persons, to the newly freed Negroes.<sup>128</sup> It then prohibits state infringement of the rights of United States citizens, extends the specific due process provision of the fifth amendment to the states, and inhibits states from denying to any person within its jurisdiction (*i.e.*, including non-residents) the equal protection of the laws. Taking the two sections together, a case may be made for the proposition that the effect of the fourteenth amendment is to enjoin the state governments from any action affecting rights that are preserved under other parts of the Constitution to citizens of the United States. This proposition, of course, is the familiar ground on which the Court has based an extension of other provisions of the Constitution to the states,<sup>129</sup> relying solely on section 1 in most instances as the basis of the extension.

"Article I, §§ 2, 4, and 5, and Amendment XIV, § 2, relate only to congressional elections and obviously do not govern apportionment in state legislatures," conceded the Court in *Baker*.<sup>130</sup> "When challenges to state action . . . have rested on claims of con-

<sup>128</sup> "While . . . the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, . . . it is not restricted to that purpose. . . . [but related also to] discriminations in matters entirely outside of the political relations of the parties aggrieved." Holden v. Hardy, 169 U.S. 366, 382 (1898).

<sup>129</sup> See, *e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). See generally U.S. LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 963-1176 (1953).

<sup>130</sup> 369 U.S. at 234.



stitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim."<sup>131</sup> Yet, in *Baker*, the Court betrayed an uncertainty as to the logical consequences of its majority conclusion in the disparity of the concurring opinions which tipped the scales against the dissenting Frankfurter and Harlan. In his concurring opinion, Mr. Justice Douglas suggested one standard of adjudication: the totality of constitutional experience up to the date when an issue comes before the Court, coupled with the specific applicable statutes<sup>132</sup>—*e.g.*, the Civil Rights Act of 1875.<sup>133</sup> Speaking for a more cohesive majority in *Gray*, Mr. Justice Douglas developed this argument further: state action fundamentally influencing the effectiveness of an individual's vote is within reach of the equal protection clause; and equality of voting rights "extended to all phases of state elections"<sup>134</sup> as confirmed by the fifteenth and seventeenth amendments.<sup>135</sup>

Yet all this argument is, in view of the Harlan dissent, mere begging of the question. That question is whether bicameralism, by definition, is not based upon two different categories of representation (only one category being equality of population in each constituency) and whether the constitutional experience of the American people has altered this definition. The majority of the Court has focussed exclusively upon the equal protection clause in answering the second part of the question affirmatively. It has declined to review the proposition of reliance upon the guaranty clause of article IV, section 4. It failed, in *Wesberry*, adequately to develop the conclusions it reached on the 1787 Convention history of article I, section 2.<sup>136</sup> And it has dismissed the "federal analogy" of the

<sup>131</sup> *Id.* at 229. Compare Mr. Justice Clark's concurring opinion: "In view of the detailed study that the Court has given this problem, it is unfortunate that a decision is not reached on the merits." *Id.* at 261.

<sup>132</sup> *Id.* at 241-44, 247, 249.

<sup>133</sup> 28 U.S.C. § 1343(3) (1958).

<sup>134</sup> *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

<sup>135</sup> *Id.* at 379-80. The Douglas opinion all but disposed of the renowned "Bradley syllogism" in the Civil Rights Cases, 109 U.S. 3 (1883), in which the majority of the Court (the first Mr. Justice Harlan dissenting) speaking through Mr. Justice Bradley held that the fourteenth amendment prohibited only state action against individuals in denial of their constitutional rights.

<sup>136</sup> See *Wesberry v. Sanders*, 376 U.S. 1 (1964), where from the record of the 1787 Convention the Court concluded:

It is in the light of such history that we must construe Article I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be

equal-state-representation in the Senate as "inapposite,"<sup>137</sup> although it could have strengthened its argument by pointing out that the seventeenth amendment substantially modified the federal definition of bicameralism.

The state definition of bicameralism, on the other hand, has been singularly affected by a wide variance between constitutional generalities and legislative realities and by the disavowal of judicial responsibility by the courts (until 1962).<sup>138</sup> Consequently, one must cut through the platitudes of state constitutions, which express an almost universal concern for equality of electoral privileges, and the legislative and judicial posture of state governments over the years. The manifest established fact of bicameralism in state governments, with the single exception of Nebraska, should be annotated with a historical review of the changing forms of bicameralism; this review, together with a comparative review of the constitutional position vis-à-vis apportionment, should equip one to answer the ultimate question raised by the apportionment cases: if the matter turns on equal protection of the laws, then *what* laws?

The historical record of state legislative development may be adequately summarized by a recapitulation of the experience of the thirteen original states.

(1) Connecticut<sup>139</sup> did not replace its colonial charter of 1662 until 1818, and it retained in its constitution the "estate" concept of the charter. The towns were the "estates" represented in the lower house, while the senate was a body of twelve elders. All members of the legislature were elected only by freeholders. The senatorial membership was doubled by an amendment in 1828, and

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chosen "by the People of the several States . . . according to their respective Numbers." It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted.

*Id.* at 17.

<sup>137</sup> 372 U.S. at 378.

<sup>138</sup> See *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353 (1907); *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (1895); *Prouty v. Stover*, 11 Kan. 235 (1873); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *State ex rel. Major v. Patterson*, 229 Mo. 364, 129 S.W. 894 (1910); *People ex rel. Carter v. Rice*, 135 N.Y. 473, 31 N.E. 921 (1892); *Harmison v. Ballot Comm'rs*, 45 W. Va. 179, 31 S.E. 394 (1898); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932).

<sup>139</sup> A collection of the organic laws comprising the Connecticut experience is found in 1 THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE . . . UNITED STATES OF AMERICA* 519-55 (1909) [hereinafter cited as THORPE].

the freehold electoral qualification was abolished in 1845. Other suffrage restrictions were abolished by subsequent amendments, so that the 1955 constitutional revision now provides equal voting rights to all United States citizens over twenty-one years of age who are residents in the state; the lower house consists of one representative for towns of less than 5,000 population, two for towns of more than that; the senate is drawn from districts of contiguous and reasonably equal population areas.<sup>140</sup>

(2) Delaware,<sup>141</sup> incorporating into a state the three "lower counties" of New Castle, Kent and Sussex in its 1776 constitution, created a lower house of seven members from each county and an upper house of three from each county. The constitution of 1897 divided the lower house into thirty-five districts, the upper into seventeen. Uniform male suffrage prevails in state elections.<sup>142</sup>

(3) Georgia<sup>143</sup> in 1777 established a unicameral legislature "composed of the representatives of the people."<sup>144</sup> In 1789 a new constitution divided the legislature into two houses, the upper consisting of one senator from each county and the lower of representatives apportioned among the counties. The 1945 constitution provides that in the lower house the eight counties with the largest population are to have three representatives each, the next thirty counties two, and the remaining counties one.<sup>145</sup>

(4) Maryland<sup>146</sup> in 1776 established detailed property qualifications for electors and elected and created an electoral college for the fifteen members of the senate. The property qualifications were abolished in 1810, and the popular election of senators established in 1837. The present (1867) constitution provides for one senator from each county and six from Baltimore and a progressive table of representation for specific counties and for Baltimore in the lower house.<sup>147</sup>

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<sup>140</sup> For the modern constitution, see CONN. CONST. art. III, §§ 3, 5.

<sup>141</sup> A collection of the organic laws comprising the Delaware experience is found in 1 THORPE 557-636.

<sup>142</sup> For the modern constitution, see DEL. CONST. art. II, § 2; art. V, § 2.

<sup>143</sup> A collection of the organic laws comprising the Georgia experience is found in 2 THORPE 765-876.

<sup>144</sup> GA. CONST. art. II (1777).

<sup>145</sup> For the modern constitution, see GA. CONST. art. III, § III.

<sup>146</sup> A collection of the organic laws comprising the Maryland experience is found in 3 THORPE 1669-1826.

<sup>147</sup> For the modern constitution, see MD. CONST. art. III, §§ 2, 5.

(5) Massachusetts,<sup>148</sup> ultimately agreeing upon a constitution in 1780, established a senate whose members were chosen from districts determined "by the proportion of the public taxes paid by the said districts,"<sup>149</sup> and a lower house chosen by equal population areas. Universal male suffrage was established in 1820, reapportionment in the lower house in 1836 and in the senate in 1840. In 1930 a general reorganization of the legislature provided for equal-population apportionment for both houses.<sup>150</sup>

(6) New Hampshire<sup>151</sup> in 1784 adopted a plan similar to that of Massachusetts, and in 1792 extended the equal-population standard to both houses. The apportionment formula, with certain amendments in the nineteenth century, continues to the present.<sup>152</sup>

(7) New Jersey<sup>153</sup> in 1776 provided that one delegate from each county should be elected to the legislative council (senate) and three from each county to the lower house. The formula for the senate was retained in the constitution of 1844, which apportioned the membership of the lower house on a population basis. This revised procedure was continued by the constitution of 1947.<sup>154</sup>

(8) New York's<sup>155</sup> constitution of 1777 provided for an apportioned lower house and senatorial districts of equal numbers of freeholders. The property qualification was eliminated in 1845. The 1895 constitution recapitulated the provisions of a number of prior amendments to provide for election of both houses on a population basis.<sup>156</sup>

(9) North Carolina<sup>157</sup> in 1776 provided for a senate composed of one member from each county and a "house of commons" with two members from each county and one each from six incorporated towns. The constitution of 1868 provided for senatorial districts

<sup>148</sup>A collection of the organic laws comprising the Massachusetts experience is found in 3 THORPE 1827-1923.

<sup>149</sup>MASS. CONST. pt. II, ch. I, § II, art. I (1780).

<sup>150</sup>For the modern constitution, see MASS. CONST. pt. II, ch. I, §§ II, III.

<sup>151</sup>A collection of the organic laws comprising the New Hampshire experience is found in 4 THORPE 2433-2531.

<sup>152</sup>For the modern constitution, see N.H. CONST. pt. II, arts. 9, 26.

<sup>153</sup>A collection of the organic laws comprising the New Jersey experience is found in 5 THORPE 2533-2614.

<sup>154</sup>For the modern constitution, see N.J. CONST. art. IV, §§ II, III.

<sup>155</sup>A collection of the organic laws comprising the New York experience is found in 5 THORPE 2623-2741.

<sup>156</sup>For the modern constitution, see N.Y. CONST. art. III, §§ 2-5.

<sup>157</sup>A collection of the organic laws comprising the North Carolina experience is found in 5 THORPE 2743-2843.

established on an equitable population basis and county representation in the lower house on a scale according to population. This system was retained in the revised constitution of 1876.<sup>158</sup>

(10) Pennsylvania<sup>159</sup> in 1776 established a unicameral legislature of freemen elected by "freemen of every city and county . . . respectively."<sup>160</sup> A bicameral government was set up in 1790 with apportioned representation in each house. Reapportionment was provided for in the lower house in 1857 and a more specific population ratio in the constitution of 1874.<sup>161</sup>

(11) Rhode Island<sup>162</sup> retained until 1843 its colonial charter of 1663 with its highly limited one-house assembly of privileged parties. Indeed, the birth pangs of the first constitution, continuing well into the second quarter of the nineteenth century, precipitated a renowned constitutional case<sup>163</sup> which has plagued the Courts into the twentieth.<sup>164</sup> The 1842 constitution provided for apportioned representation for all towns and cities in the lower house, and equal representation for these "estates" in the senate. In 1928 the senate apportionment was changed to a population basis.<sup>165</sup>

(12) South Carolina<sup>166</sup> in the temporary government established in 1776 created a unicameral legislature apportioned among established parishes (counties) on a population basis. In establishing its permanent form of government three years later, it created a two-house legislature with representation in both houses on a population basis. This system was retained in the Constitution of 1790, but a century later the 1895 constitution, while retaining the system for the lower house, reorganized the senate on a plan of county representation.<sup>167</sup>

(13) Virginia<sup>168</sup> in 1776 provided for a house of delegates with

<sup>158</sup> For the modern constitution, see N.C. CONST. art. II, §§ 3-6.

<sup>159</sup> A collection of the organic laws comprising the Pennsylvania experience is found in 5 THORPE 3035-3152.

<sup>160</sup> PA. CONST. § 7 (1776).

<sup>161</sup> For the modern constitution, see PA. CONST. art. II, §§ 16-18.

<sup>162</sup> A collection of the organic laws comprising the Rhode Island experience is found in 6 THORPE 3205-3240.

<sup>163</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>164</sup> See text accompanying notes 200-08 *infra*.

<sup>165</sup> For the modern constitution, see R.I. CONST. arts. V, VI.

<sup>166</sup> A collection of the organic laws comprising the South Carolina experience is found in 6 THORPE 3241-3354.

<sup>167</sup> For the modern constitution, see S.C. CONST. art. III, §§ 3, 6.

<sup>168</sup> A collection of the organic laws comprising the Virginia experience is found in 7 THORPE 3783-3962.

two representatives from each county and additional representatives from certain towns, while the senate was elected from specified districts. The system has continued, with certain modifications, in subsequent constitutions; decennial reapportionment was provided for in the constitution of 1902.<sup>169</sup>

Thus the language of bicameralism in the constitutional history of our oldest states indicates a variable concept of the function of a two-house legislature. As is quite evident from the litigation which has developed around the question of legislative apportionment, the constitutional principle in practice has not met with general acceptance, for the equally evident reason that it has not been carried out literally in practice. Yet by far the majority of the states protest in their constitutions that equality of population is the primary basis for apportionment in both houses of their legislatures, or at least in the more populous house.<sup>170</sup>

<sup>169</sup> For the modern constitution, see VA. CONST. art. IV, §§ 40-43.

<sup>170</sup> See COUNCIL OF STATE GOVERNMENT, *THE BOOK OF THE STATES 1964-1965*, at 62-66 (1964); Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 387 (Chart III) (1962). The states and their bases of representation may be classified thus:

(1) Lower House of the Legislature

(a) The equal-population principle is found in 41 states: Ala., Alaska, Ark. Cal., Colo., Del., Hawaii, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Mo., Mont., Nev., N.H., N.J., N.Y., N.C., N.D., Ohio, Okla., Ore., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Va., Wash., W. Va., Wis., Wyo.

(b) County representation, although with a provision for apportionment within counties according to population, is found in 3 states: Fla., Ga., N.M.

(c) County representation with apportionment based upon number of votes in the next preceding gubernatorial election is provided by one state: Ariz.

(d) Town and city representation is found in 2 states: Conn., Vt.

(e) Apportionment rests upon legislative enactments in 2 states: Idaho, Miss.

(2) Upper House of the Legislature

(a) The equal-population principle is found in 34 states: Ala., Ark., Cal., Colo., Conn., Del., Fla., Ind., Iowa, Kan., Ky., Me., Mass., Minn., Mo., Mont., Nev., N.Y., N.C., N.D., Ohio, Okla., Ore., Pa., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wis., Wyo.

(b) County representation is found in 6 states: Ariz., Ga., Md., N.J., N.M., S.C.

(c) Area representation is found in 5 states: Alaska, Hawaii, Ill., La., Mich.

(d) Town and city representation is found in one State: R.I.

(e) Apportionment according to taxes paid in senatorial district is found in one state: N.H.

The discrepancy between constitutional proposition and legislative performance—or between the constitutional definition of an equal-population principle and an equal weight of individual votes in legislative apportionment, as the case may be—is dramatically emphasized by the fact that all of the eight states involved in the apportionment cases before the Supreme Court have constitutions protesting that equality of population is the primary basis for apportionment.<sup>171</sup> Granting that such a categorization is largely subjective, the point is, as the Court has emphasized in each decision, that state constitutional protestations of equality either must fall because they are not literally true, or must be lived up to if they are. Thus, in *Baker*, the Court found that the state constitutional provision for apportionment based on population could only be effectuated by legislative initiative, since popular initiative was not an electoral process available to the state's voters. Denial of equal protection by state action (or inaction) was thus discernible within the context of the state's own constitutional rationale and on the face of the state legislature's record of frustrating the constitutional protestation.<sup>172</sup>

In *Sims* and its companion cases, the Court continued to demonstrate the discrepancies between the apparent disposition of the state constitution and the actual situation vis-à-vis apportionment. Alabama's constitutional provision for legislative apportionment based on successive decennial census returns was found by the Court to have been ignored for six successive census periods, with the result that "population growth and shifts had converted the 1901 [apportionment statute] . . . into an invidiously discriminatory plan. . . ."<sup>173</sup> In the case of New York's constitutional provisions—repeatedly described as having a historic concern for population accommodation—the Court found that the formulae for apportionment "are so explicit and detailed, the New York Legislature has little discretion, in decennially enacting implementing statutory reapportion-

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(f) Apportionment based on legislation is found in 2 states: Idaho, Miss.

(3) Unicameral Legislature: Nebraska (based on population).

<sup>171</sup> See cases cited notes 2-9 *supra*. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court relied primarily upon article I, section 2 and only secondarily upon the equal protection clause.

<sup>172</sup> 369 U.S. at 189-90 n.4, 193-94 n.14, 237-41.

<sup>173</sup> *Reynolds v. Sims*, 377 U.S. 533, 545 (1964).

ment provisions. . . .<sup>174</sup> Maryland's constitutional prescription, too, the Court found so rigid that the best intentioned legislative effort could not bring an equitable apportionment in terms of equally weighted voting rights.<sup>175</sup> Virginia's constitutional requirement was condemned for failure to compel legislative redistricting on an equitable population basis.<sup>176</sup> And constitutional formulae which fix apportionment on population bases which are themselves inequitable, whether backed by long history like Delaware's<sup>177</sup> or recently ratified by popular vote like Colorado's,<sup>178</sup> must likewise fall before the equal protection standard.

Alabama's constitution provides that "representation in the legislature shall be based upon population,"<sup>179</sup> that each county is entitled to at least one representative but the rest of the lower house is to be apportioned equitably,<sup>180</sup> and that the senatorial districts are to be divided equitably on a population basis.<sup>181</sup> In practice, the Court found that members representing 25.1 per cent of the state's population actually controlled the senate, and 25.7 per cent of the people elected a majority of the house.<sup>182</sup> In New York, the percentage of population controlling the lower house was found to be 37.1, and controlling the senate, 40.9.<sup>183</sup> In Maryland, the upper house was controlled by 14.1 per cent of the people, and the lower house by slightly less than 25 per cent.<sup>184</sup> Virginia's senate was under the control of 41.1 per cent of the population, and the lower house was under the control of a slightly smaller percentage.<sup>185</sup> In Delaware, 21 per cent controlled the senate and 28 per cent the house, notwithstanding a 1963 amendment by which the constitution purportedly was brought into line with the rationale of *Baker*.<sup>186</sup> Finally, in the case of Colorado's 1962 amendment, the

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<sup>174</sup> *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 646 (1964).

<sup>175</sup> *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 662-64 (1964).

<sup>176</sup> *Davis v. Mann*, 377 U.S. 678, 685-90 (1964).

<sup>177</sup> *Roman v. Sincock*, 377 U.S. 695, 705-08 (1964).

<sup>178</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 734-37 (1964).

<sup>179</sup> ALA. CONST. art. XVIII, § 284.

<sup>180</sup> ALA. CONST. art. IX, § 199.

<sup>181</sup> ALA. CONST. art. IX, § 200.

<sup>182</sup> *Reynolds v. Sims*, 377 U.S. 533, 545-51 (1964).

<sup>183</sup> *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 646-48 (1964).

<sup>184</sup> *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 664-66 (1964).

<sup>185</sup> *Davis v. Mann*, 377 U.S. 678, 688-89 (1964).

<sup>186</sup> *Roman v. Sincock*, 377 U.S. 695, 705-08 (1964).



lower house majority is now controlled by 45.1 per cent of the population, while 33.2 per cent are in control of the senate.<sup>187</sup>

And so, to the question of whether the state constitutional definition of bicameralism rests upon variable concepts of representation (admittedly a moot point under the presently confirmed "one person-one vote" rule), it may be somewhat anticlimactic to answer with a qualified negative. The fact is that the historical development of state constitutionalism, as exemplified by the record of the original thirteen states,<sup>188</sup> has looked generally toward a broadened base of representation which has become embodied in the language of most of the current state constitutions.<sup>189</sup> The further fact is that the practice in most states, as exemplified in the findings of the Court in the six apportionment cases of June 15, 1964, has negated the constitutional protestation of equality. Hence, the laws to which the Court now applies the equal protection guarantee are both the constitutional propositions ratified by the people of the United States in the fourteenth, fifteenth, seventeenth, nineteenth, twenty-third, and twenty-fourth amendments and the constitutional convictions of the people of at least four-fifths of the states.<sup>190</sup> The Court intends to give meaning to the state provisions despite contradictory or inconsistent constitutional formulae or legislative circumvention.

Representative government, from the record of both federal and state constitutional development, has assumed an ever broadening definition with experience and changing times. Confirmed by the constitutional record, the new rationale of the Supreme Court may properly be absolved of the charge of revolution.

### III. TOWARD A NEW CONSTITUTIONALISM

In view of the cataclysmic effect of the apportionment decisions—overturning virtually generations of political practices in order to give full effect to federal and state constitutional generalities—the "charge" of revisionism<sup>191</sup> cannot be denied. It must be justified.

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<sup>187</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 726-29 (1964).

<sup>188</sup> See text accompanying notes 139-69 *supra*.

<sup>189</sup> See note 170 *supra*.

<sup>190</sup> See note 170 *supra*.

<sup>191</sup> Revisionism has various ideological definitions which should not be read into the commentary on the reapportionment cases. This writer has used it in its generally understood, though technical, sense, to relate to processes which seek to convert potential or actual revolutionary movements into evolutionary ones. For the use of the term in socialist theory, see *Socialism*, 14 ENCYC. SOC. SCI. 188, 203 (1934).

What Mr. Justice Douglas has said with reference to the totality of constitutional jurisprudence to be applied as a standard of judgment in the reapportionment issues<sup>192</sup> may be taken as a proper refutation of the Harlan dissent if it is taken in its fullest meaning. Mr. Justice Harlan has protested that the legislative intent of the fourteenth amendment was never construed to reach the states in such a fundamental matter of internal organization. He has cited the subsequent fifteenth and nineteenth amendments in particular as demonstrating the proposition that constitutional alteration is the only means of achieving a more specific limitation upon state action in this sphere.<sup>193</sup> To which it may be replied that the rights of United States citizens that the fourteenth amendment protects from state infringement and the laws to which it guarantees equal protection have grown and diversified in the century now being rounded out since the amendment was adopted. The constitutional postures of the thirty-seven states in 1868 have virtually all changed; thirteen more states have been added to the Union, and ten more amendments to the Constitution. The nation has shifted its economic poles from a rural to an urban—indeed, a metropolitan—orientation.

It is inescapable that the Constitution applied to issues of the mid-twentieth century is the Constitution of the mid-twentieth century. Five of the ten amendments adopted since the fourteenth have concerned themselves with continually broadening needs of representative government.<sup>194</sup> The very fact of state resistance to apportionment requirements which would tend to accommodate these needs is a recognition, however negative, of the proposition that the people have a right to full and equal representation.<sup>195</sup> Representative government itself must be defined in contemporary terms. Where the action of the state tends to frustrate the clear objectives of the people as these may reasonably be inferred from their constitutional protestations, this action may be set aside under the fourteenth amendment.

The history of the seventeenth amendment and the changing

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<sup>192</sup> See text accompanying notes 132-35 *supra*.

<sup>193</sup> See text accompanying notes 78-92 *supra*.

<sup>194</sup> See U.S. CONST. amends. XV, XVII, XIX, XXIII, XXIV.

<sup>195</sup> Following *Baker*, twenty-seven states reapportioned at least one house of their legislatures. The date of last apportionment ranges from 1793 in the case of Vermont to 1964 in other instances. See COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 170, at 62.

concept of representative government which it reflected emphasize the validity of the foregoing proposition. Despite James Wilson's clear view of the people's rights in the matter in 1787,<sup>196</sup> the persuasion of the majority of the Convention was that government should be a process of increasing removal from the people with increasing degrees of authority over government affairs.<sup>197</sup> Alternatively, the lingering analogy of the Articles of Confederation, where the states (rather than the people of the states) had equal voices in national affairs, had a manifest influence on some of the Founding Fathers. The country's growth in population and in number of states, the practical function of political parties, the practical unimportance of the electoral college, and the frequent corruption of the state legislative function under article I, section 3 together have overriden, qualified, or refined the original theory of representative government. An increasing and increasingly articulate electorate in the America of the newborn twentieth century demanded that the people of the states, not the state governments, elect the Senate.<sup>198</sup>

It is, in fact, the rights of the people of the United States and of the individual states, and not the governments of the states, with which the fourteenth amendment and the applicable subsequent amendments are concerned. These rights must be defined in contemporary terms, for they are the sum of the accepted principles and practices of our development up to the present. With respect to the basic questions of apportionment, the sum of this development points to the widest possible participation in government on the most complete degree of equality that is possible. Republican government today means representative government, and representation means universal and equal representation. If this is revisionism, it is national history and not an arbitrary Court which is the revisionist.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," states the ninth amendment; the rule of construction in con-

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<sup>196</sup> See 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405-06 (rev. ed. 1937).

<sup>197</sup> Consider, for example, the constitutional provisions for state legislative choices for the Senate and an electoral college for the President as contrasted with popular elections for the House.

<sup>198</sup> See U.S. LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 1207 (1953).

tract law—*expressio unius est exclusio alterius*—shall not apply to American constitutionalism where inchoate rights always wait upon particular events to become functional. All political power is in the people, uniformly over the bills of rights of state constitutions from the Revolution to the present.<sup>199</sup> And while these clauses, like the ninth amendment, are essentially policy statements rather than self-executing principles of substantive law, they are of fundamental significance, both because they contribute to the standard of adjudication where rights of the people are involved and because they gain in force as the definition of "people" broadens from freeholders and men of property to all adult citizens in the society.

The rights of the people of the United States, set out in the Constitution as a whole, include all guarantees contained in the document. Thus we come to the guaranty clause of article IV, section 4. Here a number of difficulties present themselves, but none so vexatious as the 115-year-old dictum of Mr. Chief Justice Taney in the case of *Luther v. Borden*<sup>200</sup> which maintained that the question of "a Republican Form of Government" was "political" in nature and hence subject to the exclusive jurisdiction of Congress and the Executive.<sup>201</sup> The Court in *Baker* readily accepted the Taney dictum,<sup>202</sup> and it has clung to this position in the subsequent apportionment cases—an unfortunate and needless weakening of its rationale as a whole, and a failure to recall the specific circumstances involved in the older case.

In Rhode Island in 1841-1842, a group of disfranchised residents met in convention, adopted a new constitution, and attempted by force to establish a new government under it. The rebellion, which bears the name of Thomas W. Dorr, the governor elected under the new constitution, was suppressed. In the process one Martin Luther, a Dorr adherent, was arrested. Luther thereupon initiated an action in trespass against Luther Borden and others of the arresting party, claiming Borden had no lawful authority to come on the Luther property. The action turned upon whether the

<sup>199</sup> See, e.g., Virginia Declaration of Rights of 1776: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." 7 THORPE 3813. Compare HAWAII CONST. art. I, § 1: "All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority."

<sup>200</sup> 48 U.S. (7 How.) 1 (1849).

<sup>201</sup> *Id.* at 42.

<sup>202</sup> 369 U.S. at 223, 292-97.

government of the 1842 constitution was lawful or whether the prior government continued in power until the constitution of 1843 was promulgated by the anti-Dorr forces. As Taney disposed of it, the question was not whether either government was republican, but which was legal. Taney held:

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State . . . that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment.<sup>203</sup>

In so holding, Taney was relying<sup>204</sup> on the final provision of the guaranty clause—the guaranty against “domestic Violence”—and not the provision concerning “a Republican Form of Government.”<sup>205</sup> Inapposite, to say the least, was his gratuitous comment on republicanism:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal . . . .<sup>206</sup>

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<sup>203</sup> 48 U.S. (7 How.) at 39.

<sup>204</sup> In regard to the threats of President John Tyler to intervene on the side of the incumbent government, Taney cited as authority the Act of February 28, 1795, ch. 36, § 1, 1 Stat. 424 (now 10 U.S.C. § 331 (1958)), which relates to domestic disturbances. 48 U.S. (7 How.) at 43.

<sup>205</sup> “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

<sup>206</sup> 48 U.S. (7 How.) at 42.

Section 4 of article IV in the Constitution is part of a general statement of state-federal relationships. Section 1, the full faith and credit clause, specifically empowers Congress to implement it. Section 2 is the privileges and immunities clause, and it has been enforced by judicial interpretation without challenge. Section 3 specifically vests in Congress the authority to admit new states and administer territories. Section 4, however, is a general federal power, vesting no exclusive jurisdiction in Congress or the Executive, but by its terms being open to reasonable application by any branch of the federal government.<sup>207</sup> It is, moreover, a right guaranteed to the states. If state action frustrates the enjoyment of the right of republican government, today understood to be fully representative government, then the citizens of the state, as proper parties at interest, should be permitted to allege that this action by the state falls under the prohibition of the equal protection clause.

Acceptance of such a position on the guaranty clause—revisionist in its own right, if you will—would round out the totality of the new constitutionalism which the Court may properly bring to bear upon the question of representative government. Taney, of course, was a prophet of judicial restraint as Marshall was an advocate of constitutional dynamism. The present Court in its jurisprudence of reapportionment follows Marshall rather than Taney, if a proper analogy between these early Courts may thus be drawn. Marshall's fundamental position is illustrated in the opening citation in the present study; it is pertinent to conclude with another of his remarks, even more familiar:

This . . . is . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur.<sup>208</sup>

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<sup>207</sup> See Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

<sup>208</sup> *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).