I. Background

It was 1796 when the first apparent application of a political question doctrine—that political matters are not justiciable—was made by the Supreme Court of the United States. Chief Justice John Marshall first attempted to describe such a doctrine in his momentous opinion on judicial review, Marbury v. Madison, by stating that "questions in their nature political . . . can never be made in this court." 2

Yet it was perhaps an 1838 dissenting opinion of Chief Justice Taney that led to the first clear exposition of the doctrine. 3 Here the Court first accepted jurisdiction of a suit by one state against another involving a disputed boundary line. Taney dissented on the ground that Rhode Island was attempting to secure a ruling on what was a political rather than a properly judicial question. He felt that the court would have had jurisdiction had rights of property, rather than rights of sovereignty, been involved; but they were not. 4 "He was outvoted in this case, but he wrote the opinion in Luther v. Borden 5 ten years later, the famous decision in which the Court refused to pass upon a political question." In issue here was the disputed control of the government of Rhode Island during Dorr's Rebellion, and which of two constitutions was the state's organic law. The court held that this question was not of a judicial nature; that it was a political question to be determined by political departments of government.

The doctrine of nonjusticiability of political questions was
upheld for over one hundred years until overthrown, at least in the area of legislative apportionment, by *Baker v. Carr.*

A number of cases have reached the Court in the past thirty years involving disparities in the influence of the voters, caused by the placing or maintaining of unequal numbers of citizens in districts which collectively have the same political power. However, no clear line of constitutional development toward a justiciability of districting can be found in studying these decisions. As early as 1932 the Court did not hesitate to act where state legislative power had been actively used to produce inequality in congressional districts. However, in these cases the justiciability question did not arise. The Court merely found that the federal Constitution did not invest state redistricting with such special character as to shield it from gubernatorial veto.

In 1932 the Court also held that there was then no federal statutory restriction on states in their creation of congressional districts for the election of members of the House of Representatives. By statute in 1911 Congress had provided that the representatives to the next Congress and each subsequent Congress were to be elected by districts composed of continuous and compact territory and containing as nearly as practicable an equal number of inhabitants. A 1929 apportionment statute had, however, failed to include this requirement. The Supreme Court held that this omission was deliberate and that a lack of compactness or equality did not render a Mississippi redistricting law unconstitutional.

As the courts did not enforce any standard of equality on states in the distribution of congressional representation, districts in many states became entirely unequal in terms of population within congressional districts. By 1946, Illinois was said to have the worst apportionment, with the largest district having 914,000 residents, the smallest, 112,000, and

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8 *Smiley v. Holm, supra, note 7.*
9 *Wood v. Broom, 287 U.S. 1 (1932).*
considerable disparity to be noted among the others. Illinois had refused to redistrict since 1901. Three Illinois voters, in challenging the constitutionality of this arrangement, asked a federal district court to restrain the Illinois Primary Certifying Board from conducting an election under existing laws. Upon dismissal, appeal was taken to the Supreme Court. In the case of Colegrove v. Green, the Court dismissed the complaint on the grounds that it "ought not to enter into this political thicket" and that the "remedy for unfairness is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress." 

Having thus ruled that state apportionment of congressional seats allotted to the state is a political matter, this decision became a landmark case upon which the Court relied in deciding attacks upon other state activities in the election arena. In Colegrove v. Barrett, Illinois' state legislative apportionment law was challenged under the equal protection clause of the Fourteenth Amendment to the Constitution; the legislature had also not been reapportioned for more than forty-five years and was now allegedly composed of grossly unequal districts. At issue in MacDougall v. Green, was the denial by a district court of an injunction against the enforcement of an Illinois Election Code section which required that a nominating petition of a new political party bear the signatures of 25,000 qualified voters, including 200 valid signatures from each of at least fifty of the state's 102 counties. Barrett was dismissed, while a dismissal in MacDougall was affirmed without further consideration of the question of justiciability.

In South v. Peters, after a federal district court had refused under the authority of Colegrove v. Green to grant equitable relief against the Georgia County-Unit System, the court

11 328 U.S. 549 (1946).
12 Id. at 556.
14 335 U.S. 281 (1948).
was asked to invalidate the system. This mechanism weighted votes in statewide and congressional elections, giving considerably less power to voters in more heavily-populated counties. Again the political question doctrine was upheld, as dismissal of a challenge under both the Fourteenth and Seventeenth Amendments, the latter being raised because of its requirement of the popular election of senators, was affirmed.

At this point it can be seen that a continuing line of cases had been developed establishing a supposedly strong weight of authority for the argument that state action in distributing voting power, even where recognizably discriminatory, was not within the purview of federal courts. After *South v. Peters* only one case involving legislative apportionment arose before *Baker v. Carr*, and although remedy was awarded to disfranchised, de-annexed Negro citizens of Tuskegee, Alabama, in *Gomillion v. Lightfoot*,17 not even this case foretold the soon-to-arrive *Baker* decision. Some did, no doubt, now see the Court moving to re-examine the non-justiciability doctrine of *Colegrove*,18 but in *Gomillion* the Supreme Court once again declined to consider a voting rights case under the equal protection clause of the Fourteenth Amendment, although finding a violation of the Fifteenth.

In *Gomillion*, Negro citizens of Alabama charged that prior to their de-annexation from Tuskegee in 1957, by state statute, the city was square, rather than twenty-eight sided, as afterwards, and that the effect was to remove all but a handful of 400 previous Negro voters while not removing any white voters. The result, they alleged, was to discriminatorily deprive them of their voting rights under equal protection as well as the vote guaranty provisions of the Fifteenth Amendment. The Court, Mr. Justice Frankfurter again speaking, held that "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."19 Frankfurter distin-

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guished this situation from the situation of disparity of population in districts arising from population shifts in *Colegrove v. Green*, which doctrine respondents here relied upon:

... the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city in boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*.

II.

*Baker v. Carr*

This was the state of the law when *Baker v. Carr* was decided by the Supreme Court. Complainants were urban voters in Tennessee who alleged a denial of equal protection and due process through debasement of their voting rights, Tennessee not having reapportioned since 1901, in violation of the state constitution. They asked that the 1901 reapportionment statute, now allegedly "invidiously discriminatory" be declared unconstitutional and that future elections under it be enjoined, or that elections be held at large or conducted under a court-decreed apportionment. Although it acknowledged that a violation of the state constitution had occurred, the three-judge federal court dismissed the action. Appeal was filed to the Supreme Court. In the words of Mr. Justice Brennan, for the majority, the Supreme Court held:

(a) that the court possessed jurisdiction of the subject matter;

(b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief;

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20 *Id* at 347.
(c) ... that the appellants have standing to challenge the Tennessee apportionment statutes ... 

Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violation of constitutional rights are found, *it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.*22 (Emphasis added)

In finding that the case presented no nonjusticiable political questions, Justice Brennan declared that the district court misinterpreted *Colegrove v. Green* and other political question decisions, that "neither singly nor collectively do these cases support a conclusion that this apportionment case is non-justiciable."23 Nonjusticiability is primarily a function of the separation of powers, "the relationship between the judiciary and the coordinate branches of the Federal Government",24 not involved in this action regarding state activity, he contended.

There were five additional opinions presented by the justices, three concurring and two dissenting. Mr. Justice Douglas, who has reaffirmed his dissenting view in *Colegrove* in a concurring opinion in *Gomillion*, took perhaps the strongest stand for federal court action while, although concurring, Mr. Justice Stewart reminded that the Court had not considered the merits of the state apportionment questions but had decided only the three points above quoted from Justice Brennan's opinion. Mr. Justice Clark declared that he "would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee,"25 initiative and referendum not being there available.

It might be contended, therefore, that the Court decided very little. Two of the six justices in the majority wished to limit the ramifications of the decision, and the author of the majority opinion failed to point to any extensive implication

[22 Id. at 197-198.]
[23 Id. at 210.]
[24 Ibid.]
[25 Id. at 259.]
for the decisions in his highly legalistic essay. Therefore, no majority supported any major doctrinal development. Distinguishing Colegrove v. Green rather than overruling it, the court established no standards or guidelines for state and lower federal courts—it did not even hear the case on the merits.

But the dissenting speakers among the justices behind this decision would be of considerable import. Mr. Justice Frankfurter, the author of the majority views in Colegrove v. Green and Gomillion v. Lightfoot, in an eloquent and lengthy statement, saw this case as overruling Colegrove and other decisions and he foresaw dire consequences.

The impressive body of rulings thus cast aside reflected the ... uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial doctrine demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court’s “judicial power” not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has from time out of mind been and now is determined. It may well impair the Court’s position as the ultimate organ of “the Supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which the Court must pronounce.26

III.

The Problem of the Implementation of Baker v. Carr by the Courts

A veritable deluge of apportionment cases followed Baker, the plaintiffs relying on the Court’s ruling for the legal force needed to require action in state courts or specially-constituted three-judge federal courts to enforce an effective

26 Id. at 267.
change in their state's system of representation. In Georgia a suit was instituted within hours after the Baker announcement to enjoin the use of the infamous County-Unit System in Democratic Primaries; and within a short time many more suits had been brought, seeking equitable reapportionment in all but a few states.

Two cases, previously decided but appealed to the Supreme Court, were shortly remanded to the courts from which they arose for further consideration in view of the action of the Court in the Tennessee case. In Scholle v. Hare, a geographical apportionment of the Michigan Senate which provided extensive overrepresentation of rural citizens had been upheld by the state's supreme court, while in Wi.M.C.A., Inc. v. Simon, a federal district court dismissed an attempt to have the apportionment provisions of the New York legislature invalidated. On remand, the two lower courts took opposite turns, but perhaps upon the close scrutiny requested by the Supreme Court, they found different situations. The Michigan Supreme Court no longer found it proper that its state senate be disproportionately constituted and found previous Michigan decisions upon which to rely. Yet in New York, although representation was not perfectly distributed on the basis of population, the federal court found that discrimination was not extensive and that the districting plan there involved was systematic, rational, of historical origin, and thus clearly in line with Baker v. Carr.

It is significant to note that the Supreme Court did not advise the lower courts to any extent in these cases. Nor has the Court provided any guidance subsequent to its original opinion, which chiefly held that malapportionment questions were justiciable and that courts could consider such issues on the merits. Thus no standards or guidelines have come down to aid a state or federal court in determining whether a legislative body that is not absolutely representative of the population is or is not compatible with the equal protection clause. This has been the situation: they did not know specifically

29 370 U.S. 190 (1962).
what the law was; they only knew, clearly, that they must hear the case! Perhaps this is what the court intended—various courts in various states deciding the matter as it best suited them. But this would be incongruous since there are not many different legitimate interpretations of the same clause of the Constitution. Thus it appears quite possible that the Court wished to defer the establishment of standards until it had an opportunity for consideration of the views of many learned judges on the issues arising and, perhaps most important, it learned what issues would require a uniform position.

IV.

Decisions Categorized

Certain patterns of decisions, however, seem to be clearly indicated by the decisions subsequent to Baker v. Carr. For example, where there has been a failure to reapportion over a long period, contrary to the state constitution, as in Alabama and Tennessee, the courts will act to invalidate a present inequitable apportionment or order reapportionment. Also, where no rationale or formula is found to justify the present distribution of legislative seats, the courts appear most likely to overrule such apportionments. This was also the case in both the Tennessee and Alabama cases. In the latter state, it was so ruled in the case of the proposed Crawford-Webb Act, which allotted one House of Representatives seat to each county, then distributed the remaining thirty-nine seats according to no understandable standard. Even in Virginia, where there were no severe population disparities, as compared to many other states, reapportionment was ordered, primarily, it seemed, because no rational plan had been adopted.

A number of the cases have been dismissed, the primary causes being that no remediable discrimination was found. Discrimination in terms of population was found but it followed a rational plan and was not unconstitutional, or in the case

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of state courts, the court found no authority to enforce reapportionment. In *Wright v. Rockefeller*, barely a nine percent disparity from the average was found among Manhattan congressional districts. An admittedly extraordinary basis of districting was found in New Hampshire, in *Levitt v. Maynard*. Representation of units in the Senate was based upon direct tax payments but, as the court learned upon inspection, little inequality according to population had resulted.

Although minimal discrimination according to population was found in New York, *W.M.C.A., Inc. v. Simon* held that it resulted from a rational basis and was not unconstitutional. In Maryland, where lack of population equality was clear, the court made no consideration of whether the Senate was fairly apportioned. Dismissal was ordered on the ground that only the Senate, which historically had represented political units while the lower house represented the people, was attacked. The Senate was not intended to represent the people equally and was not unconstitutional.

Both the Rhode Island and Vermont Supreme Courts ruled apportionment statutes unconstitutional, but each also found the state courts had no authority in the area of reapportionment. The Idaho Supreme Court, however, in *Caesar v. Williams* found extensive discrimination and that it had authority to order reapportionment, yet still did not order it. The Court merely declared that state constitutional provisions made some imbalance inevitable and, although much more serious imbalance had here been created by act of the legislature, the court determined to take no action until the legislature had an opportunity to fully re-examine the situation. It should be noted that Idaho has been foreseen as likely to be a state where federal court action might overturn a state supreme court decision.

38 Mikell v. Rousseau, 123 Vt. 139, 183 A.2d 817 (1962).
Some of the courts have quite naturally shown a marked reluctance to step rapidly over a path formerly trod almost exclusively by state legislatures. Judges in Sims,40 W.M.C.A.,41 and Baker,42 all were of the view that court action should be held to a minimum. In Baker it was deemed to be desirable that "there should be a minimum of judicial intrusion by federal courts into the governmental affairs of the state."43

Where a federal court found that a state court had the first opportunity to take action and failed to do so, it was held that it is now the responsibility of the federal courts to enforce reapportionment.44 Here the Colorado Supreme Court in In Re Legislative Apportionment45 had ruled that the legislature had not had the full opportunity to act as permitted by the state constitution, i.e., a full regular general session at which to consider the problem. After declaring that the state court had failed to act, however, this federal court noted that new legislative elections were imminent, and rather than enjoin them or cause utter confusion regarding them, it determined to wait until after the November, 1962, elections before rendering a decision on the merits. Thus a strong possibility persists that the federal court will here do just what the state court is doing—wait until the legislature has another opportunity to reapportion.

A notably strong and widespread desire has been shown that the state legislature have the opportunity to attempt an equitable apportionment, now that the Supreme Court has ruled and the lower court has invalidated the state's current allotment. The district court in Baker v. Carr left a newly-constituted legislature, although still somewhat malapportioned, with full authority to redistrict, while the Rhode Island Supreme Court, in an Opinion to the Governor,46 held that although malapportioned the legislatures still could act.

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43 Id. at 348.
46 185 A.2d 111 (1962).
At least three courts were so anxious that the legislature create the new allotment, to eliminate any necessity for further action on their part, that they offered a second opportunity to the lawmakers. A number of other courts seemed to take a similar approach.

However, in two instances courts moved immediately to enjoin action under invalid state law. In Michigan, the holdings of a senatorial primary was enjoined and it was ordered that senators be elected at large, if the legislature did not reapportion in time. In Sanders v. Gray, the court immediately enjoined the use of the County-Unit System in statewide Democratic Primaries in Georgia, so long as it does not proportionately represent Georgia citizens. This system did not apply to elections for the Georgia legislature, only to congressional and statewide elections. However, the voting strength allotment was based upon representation in the lower house and although it related only to party primaries, Georgia being among the most obvious one-party states, this system still played a most significant role in Georgia's electoral process. Sanders apparently ruled contra to the Supreme Court decision of South v. Peters, on the strength of the Court's ruling in Baker v. Carr.

V.

Court Standards

But perhaps the question that most needs to be answered is, what standards have been set by the lower courts regarding the extent of apportionment based on population to be required in state statutes to render them compatible with the Baker decision. Here is where the greatest uncertainty lies,

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49 Scholle v. Hare, 367 Mich. 176, 116 N.W. 2d 350 (1962). (Mr. Justice Stewart did later stay this injunction).
as demonstrated by the obvious lack of consensus in the views of the various courts.

Of course if a state's constitution required apportionment based strictly on population in both houses the court would be expected to enforce this. However, where there is no such mandate, it still might seem an elementary question as to whether one or both houses must equally represent the population. Yet there is no unanimity in answers given. At least one house should be apportioned according to population, as is the case in Congress, according to three courts. In Georgia, it was held that apportionment in both houses was "invidiously" discriminatory, and at least one must be representative of the people, quantitatively. If not, the apportionment would fail to meet constitutional requirements. In Maryland, an arrangement providing that the lower house represent the population proportionately and the senate represent local political units was held to be proper, as similar to Congress. This also appeared to be the view of the judges in Baker v. Carr, on remand, it being found that the constitution does not preclude some protection for less popular governmental units.

On the other hand, several courts found that both houses were unconstitutionally apportioned, or at least apparently did so. Several courts had under consideration only one house, or ruled on only one house, which might appear to imply that both houses must be proportionately representative. In Scholle v. Hare districting of the Senate was invalidated, while in Sweeney v. Notte the statute apportioning the Rhode Island House of Representatives was declared unconstitutional. Only the Senate was in question in a Vermont case, but here

54 Supra note 49.
56 Mickell v. Rousseau, 123 Vt. 139, 183 A.2d 817 (1962).
it was pointed out that the Senate was established to give Vermont a representative body, the House representing each town equally, so this does not lend to the implication. In New Hampshire, the House was intended to be representative of the population; the Senate, although not so intended, was held not inequitable in regard to population.

Three courts have considered what has become recognized as the "federal analogy", the argument that the distribution of seats in state legislatures is not violative of "equal protection" if similar to the federal Congress in its basis, one house representing population and the other, political units. This approach coincides with the position of the above-discussed three courts which found that at least one house must be population-based. The two categories might have been combined, although the analogy argument was discussed in one only, the *Tawes* case. But for those who feel that here is a proper solution on which the states can rely to rid them of at least some of their apportionment problem, there is little security to offer. As stated, only three cases here considered discussed this contention; two of these rejected the argument. In *Sims v. Frink*, it was held that the Alabama Senate is not analogous to its United States counterpart, as the county, in contrast to the state, is "nothing more than an involuntary . . . division of the state." No analogy between the United States Senate and the state senate can be made, as state senatorial districts do not have state autonomy, the federal court ruled in Virginia. Only in Maryland has it been held that representation according to political units in one body and according to population in the other is entirely proper.

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58 Supra note 52.
60 Id. at 438.
61 Mann v. Davis, 213 F.Supp. 577 (E.D. Va. 1962) (It may be well to note here that Virginia's Senate districts frequently cross county lines, are subject to change upon statutory reapportionment, and therefore do not represent separate units of government. Perhaps, therefore, the argument could be more strongly presented in another state).
Is there, then, any standard to be found in these lower decisions upon which one might place reliance as a test for the legislatures in an attempt to comply with the equal protection clause of the Fourteenth Amendment? Is it representation strictly distributed according to population in either one or both houses, whichever might be required? The answer to this latter question is no, for while several courts in their opinions have seemed to be concerned only with population representation, others have found numerous other features significant in determining whether a legislative body is unduly discriminatory. \textit{W.M.C.A., Inc. v. Simon} lists a number of other factors which have been considered in various cases: rationality, lack of arbitrariness, historical basis, geographical basis, and a remedy available to the electorate. In Florida, geographical and historical factors, Dade County's enormity, and the fact that special legislation is required for changes in local government for all counties except Dade, were all found to require consideration in addition to population. \textit{Lund v. Mathas}, a Florida Supreme Court case, found that population was only one of several important factors to be considered. No definite standards were set in Colorado but it was indicated that the state's great area, much of it being sparsely-settled, and the extensive geographical differences arising therefrom, were valid considerations. The Rhode Island Supreme Court found that apportionment along geographical, county, municipal, or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale is justified. And of course already noted was the upholding of New Hampshire's representation according to direct tax payments, but this may be irrelevant as the court seemed to rule for validity because the method was not popularly discriminatory.

64 Supra note 41.
VI.

**Invidious Discrimination**

*If there is one reliable standard, it must be one which is difficult to define and on the meaning of which it might readily be feared the courts will vary—it may even be a major factor behind so many varying opinions, in addition to the factor of varying situations among the states. This standard is invidious discrimination. This somewhat unfamiliar term grew out of the Georgia County-Unit System cases. Mr. Justice Douglas had proposed it as the test for non-compliance with equal protection in his dissenting opinion in *South v. Peters*. Then, in invalidating the System, Circuit Judge Bell stated, "We think the court by its opinion in *Baker v. Carr* has now adopted the . . . test."*70 Judge Bell quoted from Webster's International Dictionary in defining "invidious":

1. Tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminatory; as invidious distinctions.71

He then listed as tests or conditions for invidious discrimination, whether the system is rational, or is arbitrary, or has a historical basis in American political institutions, or coincides with the absence of political remedy, and, before federal courts can interfere in state matters, whether the violation is clear.72

*Sims v. Frink* applies this test, with Judge Bell's definitions, most clearly to legislative apportionment. There the court, speaking in July, 1962, stated:

> Each of the cases which has arisen since *Baker v. Carr*, *supra*, has agreed that the test of compliance with the guaranty of the equal protection of the laws is whether the inequality in voting power is a result of "invidious discrimination".

They listed the *Toombs* and *Moss* cases, in addition to *Sanders*, as being among these cases. The *V.M.C.A.* case used this

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71 *Id.* at 168, n. 9.
72 *Id.* at 168-170.
test and listed these same conditions, noting that other cases had followed them.

VII.

Baker v. Carr and Apportionment of the House of Representatives

Did the court intend that Baker v. Carr apply to the districting of seats in the Federal House of Representatives, normally done within the states by state legislatures, as well? No, said courts in Georgia\(^7\) and Florida.\(^4\) In Wesberry v. Vandiver, it was declared that the Court in Baker took pains to distinguish from Colegrove.Echoing Colegrove, this court said the courts could not interfere with the powers of a coordinate body in the federal government. Although a state supreme court spoke in Lund v. Mathas, Wesberry was followed, and it was again held that Baker did not apply, Colegrove still being determinative. In Wright v. Rockefeller,\(^7\) the indication was that the judges clearly were of the opinion that Baker applied, as they ruled on the merits, but found no invidious discrimination.

VIII.

Summary of the Court's Attitude Towards Baker v. Carr

In summary, it may be stated the decisions generally agree:

(1) Where there is little or no discrimination, the courts will not act.

(2) Where there is "invidious discrimination" the courts will invalidate state statutory or constitutional representation provisions, and federal courts, at least, will take steps to see to a reapportionment.

(3) The courts are, however, generally reluctant to act drastically, and can be expected to show a strong desire that the legislature itself act, in order that the courts can be relieved of the task of redistricting by decree.

Differences in the courts' views, which, it appears, will remain unreconciled until the court speaks at greater length are:

(1) the preponderance of the influence of population over other factors in apportionment,

(2) whether one or both houses must be apportioned according to population,

(3) whether a "federal analogy" can be found in state legislatures, and

(4) whether Baker applies to congressional districts.

IX.

State Government and Baker v. Carr

There are differing views regarding the effectiveness and influence of state government as strong arguments for reapportionment. It may safely be said at present that reapportionment will not be the answer to all the problems of state and local government. Executive Assistant to the Secretary of Labor, Daniel Moynihan, has well expressed the doubt that lingers.

General reapportionment could bring about a fundamental, almost constitutional, change in American government. Or it could end up merely as more tinkering with the machinery, as has referendum and recall. The outcome will largely be determined by whether or not reapportionment is accompanied by a revival of interest in state government, which for half a century has declined amidst neglect, indifference and, worse, disdain.\footnote{Moynihan, \textit{The Question of the States}, 77 COMMONWEAL 65 (1962).}

Even at this early stage, however, some possible repercussions of the decisions can be observed. If the Court takes this act of intervention into what was formerly regarded as the non-justiciable political activities of the state governments as only the first step toward extensive federal court surveillance over state affairs, or if some lower courts are left unchecked in
their interpretations of extensive authority to enforce reapportionment according to population in both houses, even where conditions are quite unlike those in Tennessee, a revolution in doctrine and in structure will have occurred in American federalism. Perhaps the Court will further clarify its views on reapportionment and when it is again asked to intervene in other facets of the state government, it will modify the more extensive lower decisions. If this occurs, then perhaps little long-run change will result in the horizontal distribution of powers in our system.

Most so-called political "conservatives" or "States Rightists" would surely not oppose the reversal of the trend toward centralism or the rebirth of state governments. Many of them would probably not disagree with the contention that the best argument against federal encroachment in an area of activity formerly operated in exclusively by the states is adequate fulfillment of the need for government participation by the state government. But when the federal government is seen as revitalizing the state governments by ordering them to act otherwise than they have been, the question arises as to whether or not it is actually refurbishing the power of the states or is it further extending the arm of centralism? If the decision is interpreted as the latter, it may even be unrealistic to think of the states, in mid-twentieth century, as "viable political entities with independent or even quasi-independent roles of their own." 

Some writers see such a constitutional revolution as a possible outgrowth of this case. For example, Stanley H. Friedelbaum has stated:

... [F]or all that has been written on the subject, the issues go deeper than malapportionment and, in many respects, the Court's reversal of long-standing policy in Baker may rank with that effected in the School Desegregation cases. The latter foreshadowed a social revolution under the guise of a modification in judicial doctrines. The former could prepare the way for an equally momentous political upheaval in the traditional fabric of American

\[\text{Wheeler and Bebout, After Reapportionment, 51 NAT. CIV. REV. 246 (1962).}\]
federalism. Some form of intervention in state affairs undoubtedly has been accepted by the Court as a necessity to insure urban voters an adequate voice in councils long dominated by the rural minorities. Such action would seem to turn upon an assertion of federal supremacy in a matter intimately related to the basic structure of the legislatures.\(^7\)\(^8\)

Certainly one result will be activity with new strength of purpose by state legislatures to reapportion themselves, as has already occurred. Already it has been shown that legislatures will act when there is fear of judicial intervention, caused by the pendency of a case, a ruling invalidating a prior statute, or, merely an anticipation that a remedy will be sought in the courts.

One of the anticipated results, in the minds of the justices making the decision, probably was that state legislatures would be influenced to redistrict without the necessity of further action. Perhaps this was a major reason why no specific remedy was outlined in the original decision: the court hoped none would be necessary. It should be remembered that the Court did not hold that courts are the only appropriate instruments to reform electoral inequities; it merely declared that legislatures are no longer free to maintain them. The Court invites state legislative action, but says the federal district court can act if they do not.\(^7\)\(^9\) Still, the district courts have been most anxious that the legislatures comply and not make necessary an apportionment by them.

X.

*Effects of Baker v. Carr on the Urban Electorate*

If reapportionment will not solve all the state’s problems, will it be a panacea for the cities? A widespread attitude has been that it would, because the rural areas held the majority in so many legislative bodies and had lost population very rapidly in recent decades, thereby becoming over-repre-
However, it is common knowledge that in recent years the large cities have been losing population unless they annexed suburban territory. Therefore, if there had been no reapportionment, city residents were in all likelihood becoming better represented. Population growth has come into sprawling, well-to-do, politically disorganized suburbia. Here are the areas of "chief injustice". They are, in most cases, entirely separate political units from the city, and with problems in many cases surely quite unrelated to those of the city. With cities, proper, or what today are often called core cities—the strictly urban political units—levelling off or even losing population, urban problems may not be nearer solution because of reapportionment. "Important for city fathers to recognize is that minority status within the state legislature is likely to remain permanent whether reapportionment takes place or not." 81

In any case, it is questionable whether urban legislators cannot already gain passage of needed legislation if they are really convinced it is needed. In an exhaustive study of two of the larger states, one unimetropolitan (Illinois-Chicago) and one bimetropolitan (Missouri-St. Louis and Kansas City), Indiana University political scientist, David R. Derge, arrived at three major conclusions, supporting the argument that urban legislators could already gain passage of legislation if theyconcertedly sought passage:

1. Non-metropolitan legislators seldom vote together with high cohesion against metropolitan legislators.

2. Metropolitan legislators usually do not vote together with high cohesion.

3. Metropolitan legislators are usually on the prevailing side when they do vote together with high cohesion. 82

Derge declared that his study showed "the city's bitterest opponents in the legislature are political opponents from within

81 Friedman, Reapportionment Myth, 49 NAT. CIV. REV. 184, 188 (1960).
82 Derge, Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations, 52 AM. POL. SCI. REV. 1051, 1065 (1958).
its own walls, and those camped in the adjoining suburban areas." 83

Other writers have been led to question whether or not there is an urban interest,84 as opposed to a rural interest, in state legislatures. It is questionable whether the city leaders would vote for measures to benefit the city when a majority of them were placed in the legislature, and according to current population-shift trends, they are not likely to be. Consequently, the effect on the larger cities will probably not give the urban electorate the power to dictate to the rural electorate as had been originally forecast.

XI.

Future Development of the Doctrine Enunciated by Baker v. Carr

Just as the lower courts in considering the cases subsequent to Baker v. Carr, have been unable to state with assurance what the Court intended as the proper limits of judicial action, or the proper course for courts to take in determining the fairness of an apportionment, or even to create uniform standards for themselves in the interim until the courts speak more clearly, so it is not possible here to predict what the Court will eventually declare that judges can do in assuring reapportionment. It is even difficult to arrive at a determination of what the courts should do in evaluating apportionment, now that it has been adjudged that this is a justiciable question. However, as it is clear that the states should be permitted to conduct their own redistricting if they will, and the courts have indicated a strong desire that they do so; that this is an area of activity that lends itself more to legislative action than to judicial; that circumstances and laws will be somewhat different in each state; and that there are as yet no established standards or precedents on which courts might rely.

Most authorities who thus far have spoken have indicated strong reasons why a course of restraint should be followed by the courts. Professor McCloskey finds that there are two

83 Ibid.
84 Young, The 1958 Special Session of the Missouri General Assembly, MO. POL. SCI. ASSN. NEWSLETTER, No. 3 (1958); Wheeler and Bebout, supra, note 77 at 248.
standards which might be adopted: the "procedural" in which the inquiry is "whether the ultimate constituent power was being allowed an adequate opportunity to express itself, and the qualitative consideration of the actual apportionment, in which the courts would decide the extent of departure from a norm of equality which would be permitted." McCloskey provides a convincing argument that only the first course should be followed. The states have responded to the decision with an "astonishing spirit of compliance" indicating widespread popular acceptance, which is a surprising and desirable reaction to Court action. If the courts risk overextending the intervention doctrine, however, this present acceptance may quickly wither, the spirit of cooperation disappear, and tedious litigation may be necessary to force any state action. Furthermore, if the courts are to intervene in situations where there is a popular remedy, the courts will be in the business of making value judgments. They will have to become experts on political matters and on the environment, traditions, history, geography, etc., of the states, and will surely become legislators superior to the state tribunals more so than judges.

McCloskey's argument is eloquent, but it must be admitted that initiative would be successful only where there is a desire for equitable representation by the majority. It is reasonable to agree that in such a case the courts might hear the minority argument, but again, they will have difficulty in arriving at a standard to require as a guarantee of "equal protection of the laws". State constitutional requirements could here well be utilized as a standard for the courts, unless it is clear that no guarantee of protection for the minority can be gathered from the constitutional provisions for the legislature. If, then, the state constitutional provisions required that both houses be reapportioned after each decennial census, and that this reapportionment be based on population, the federal courts could require that this be followed, if there is not substantial compliance as the people's chosen standard of equal protection. Where, however, the constitution requires that only one house be reapportioned according to population shifts, and the method provided for the other house is being

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86 Id. at 74.
followed by the legislature, the courts could leave the matter
to popular processes of change, if one is desired. Friedelbaum
has suggested this approach:

It would seem that whenever "invidious discrimi-
nation", "irrationality", arbitrary or capricious action,
or inaction are found to exist, primary consideration
should be given to the likelihood of effecting revision
within the state's existing constitutional structure. A
judicial requirement of "reasonable" adherence to the
state's self-imposed standards for periodic apportionment
is a first step. Incursions upon state constitutions should
be restricted to the most flagrant violations lest the states
be forced to a rigid and barren sameness in their represent-
ative systems. Decisions of this nature call for a most
discreet and remorseful exercise of the Court's judgment.87

Where no provisions are to be found in the state constitu-
tion for legislative reapportionment, or where there is no
rationale for the apportionment provided which the courts
can interpret as providing equal protection, the courts might
require that in establishing the apportionment by statute or
otherwise, a distribution be made according to a stated
formula or pattern which would rationally and reasonably
represent the state's citizens. Then the courts could look to
this standard to determine whether such rational representation
was being provided.

The final test provided in Sanders v. Gray88 for determining
whether invidious discrimination exists, that it must be a clear
case of discrimination, should be adopted as a standard test
by the courts. Every encouragement should continue to be
provided for the legislature to reapportion itself. This, how-
ever, will not lead to a perfectly equitable solution in all cases,
as legislators are quite as hesitant to make drastic changes in
some matters as are judges. This is particularly true when
they are asked to eliminate their own job or influence, or that
of their colleagues.

87 Friedelbaum, supra, note 78 at 699.
... [S]ince actual apportionment decisions are usually made by legislative bodies elected on a previous apportionment system, they inevitably involve the elements of arbitrary choice, popular cynicism, and possible effects upon the distribution of seats and party strength. Hence the incumbent representatives and party organizations are apt to approach the problem of apportionment with distaste, to say the least. 89

Recognizing these difficulties, the courts should be prepared to approve reasonable attempts at solution. If the legislature fails to reapportion at all, which is unlikely, or if their product is found to be unreasonable, then the courts should ask the legislature to try again, if no other state body or official has reapportionment power. They should be prepared to call on the governor to call special sessions for this purpose and, perhaps, should threaten to require elections at large, if redistricting is not enacted by a specific date, before considering the involved, non-judicially compatible, and possibly regrettable remedy of themselves providing a redistribution of seats. A court-ordered at-large election of state legislators may be a "highly questionable device", 90 but surely it is preferable to a court-produced apportionment. It has been clearly demonstrated that "passage of a fair apportionment and districting statute is likely to follow immediately a court order requiring all of a state's legislators to be elected at-large." 91

Again, recognizing the desire of judicial restraint and the state legislators' difficulties, it might be well if the courts do not undertake a program of promoting equality, as the great difficulties of court-legislating will surely arise in such an effort, but instead adopt a "principle of negating proven instances of egregiously unreasonable apportionment patterns." 92 This might be merely a small extension of their

90 Dixon, supra, note 80 at 381.
91 Silva, Legislative Representation—With Special Reference to New York, 27 LAW & CONTEMP. PROB. 408, 432 (1962).
92 Dixon, supra, note 80 at 383.
long-established practice of negating new apportionment statutes which are not in compliance with legal requirements.\textsuperscript{93}

Even before recent federal court action state officials had been grappling with apportionment problems for a long time. Now they have the additional problem of avoiding being hauled into court and perhaps ordered to act in accordance with court dictates, or having statutes thrown out and having to create entirely new representation systems. This is not to imply that the net effect of court activity will necessarily be bad, as it may well provide a major impetus toward the more or less permanent solution of many of the pre-existing problems. But, in order to avoid the perennial wrangling that takes place after the release of new census figures every ten years, extensive measures may be necessary.

Most likely to aid in solutions of these problems would be action to decrease the influence or discretion of legislators over their own reapportionment. Earlier indicated was the problem that legislators are too influenced by their personal attitudes and outside pressures to do the job well and promptly. One report stated it in these words:

To ask the General Assembly to consider its own basis of apportionment is to ask a man to judge his own case. He can scarcely rise above his own interest if he does, and he cannot escape the charge of bias however he decides. It is not fair to impose even a moral responsibility for such a judgment on the principal party at interest.\textsuperscript{94}

Yet the fact is that most state constitutions do provide for reallocation of seats by the legislature.

Many proposals have been made for reform of apportionment laws and a number have been tried. It does not seem that any one proposed solution can clearly be held preferable

\textsuperscript{93} While perhaps not proposing such extensive restraint as that espoused by the quoted authorities, other recent writers have also foreseen considerable potential difficulty for the courts if they are to attempt a qualitative analysis of state apportionment programs. See, e.g., Bikell, The Durability of Colegrove v. Green, 72 Yale L.J. 39 (1962).

\textsuperscript{94} Commission on State Government Organization, Report to the General Assembly and Governor of Connecticut, 55 (1950).
to all others, nor that a specific program would work in all states. However, each state should require in its constitution a reapportionment after each census. Furthermore, clear, systematic, and reasonable step-by-step programs should be outlined under which the legislature or other body or officials can more or less act automatically. In addition, if the legislature is first called upon to act and an automatic or specific mathematical formula is not provided, a non-legislative body should be empowered to act in case the legislative body does not.

A few states today make apportionment compulsory, and at least one, Arizona, makes it automatic. These generally have a fairly specific formula by which the reapportionment is to be made. Some specifically delegate to the state courts power to review reapportionment statutes.

The constitutions of the new states of Alaska and Hawaii, formed after extensive consultation with American political and state government experts, placed on executive-administrative officials responsibility to reapportion, with provision that their acts or omission to act could be challenged in the courts. Several older states have also adopted the apportion-by-commission (or executive official) approach, either giving the initial responsibility to a non-legislative body, as in Missouri, or turning the matter over to some other group only if the legislature fails, as in Illinois. Perhaps the strongest constitutional order requiring reapportionment is found in a 1945 constitutional amendment in Florida's document, in a requirement that if the legislature fails to reapportion, the Governor shall call a special session "and such extraordinary session called for reapportionment shall not be limited to

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95 Bone, States Attempting to Comply with Reapportionment Requirements, 171 LAW AND CONTEMP. PROB. 387, 411 (1952).
96 Harvey, Reapportionment of State Legislatures—Legal Requirements, 17 LAW AND CONTEMP. PROB. 364, 369 (1952).
97 Id. at 373.
99 Daver and Kelsey, Unrepresentative States, 44 NAT. MUNIC. REV. 571, 575 (1955); See also, Harvey, supra, note 96 at 369; Bone, supra, note 95 at 413.
expire at the end of twenty days or at all,¹⁰⁰ until reapportionment is effected, and shall consider no business other than such reapportionment.”¹⁰¹

In conclusion, it is reiterated that no one method of solution can be said to be most workable in all situations. It is obvious from the foregoing that there are many possible avenues for the states to explore. The primary objective is to prod the lawmakers and remove discretion and opportunity for criticism from them. Probably, the best solution is to turn the reapportionment mandate over to another body entirely.

¹⁰⁰ Emphasis added.
¹⁰¹ FLA. CONST., Art. VII, §§ 3, 4; Bone, supra note 95 at 403.