BAKER V. CARR: THE NEW DOCTRINE OF JUDICIAL INTERVENTION AND ITS IMPLICATIONS FOR AMERICAN FEDERALISM

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AS A result of the Supreme Court's decision in *Baker v. Carr*,¹ the age-old quest for effective representation is being pressed with urgency in public forums across the land. America's "rotten borough" system—long under attack as a sore on the national polity—has been confronted with a thinly veiled threat of sanctions fashioned and imposed by the federal courts. Yet, for 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*.² 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 federalism. Some form of intervention in state affairs undoubtedly has been accepted by the Court as a necessary step 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.

The majority opinion in *Baker* gives rise to a re-examination of familiar guideposts in our public law. What emerges is a revamped and generally restricted notion of political questions tied to an expansive gloss upon the fourteenth amendment's guarantee of equal protection. The Court has reformulated the concept of justiciability in a vaguely defined setting of preferred freedoms. Its opinion implies a judicial responsibility to afford some type of relief and rejects traditional arguments of the inappropriateness of the issues for decision by a "non-political" body. To spell out these shifts in any detail is to raise still broader problems concerning professed rules of self-restraint, the degree of control that the national judiciary properly may exercise in a federal system and, ultimately, the Court's role in a democratic state. There is also the highly charged question of choice of remedies. The Court has taken a stand, be it salutary, unwise or tenuous; it must now weigh fidelity to the principal opinion against the risk involved in major incursions upon the historic diversities of the states.

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¹ 369 U.S. 186 (1962).

² *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

I. THE CASE AND ITS SETTING

In its origins and factual details, *Baker v. Carr* differs little from the many apportionment cases that have come before the courts over the past two decades. Complainants, a group of urban citizen-voters in Tennessee, brought a class action in a federal district court under the civil rights statutes,³ alleging a denial of equal protection and due process under the fourteenth amendment by virtue of the debasement of their votes.⁴ They charged that the legislature was guilty of violating the state constitution as a result of its failure, since 1901, to reapportion members among the several counties or districts according to the number of qualified voters in each.⁵ Because of the composition of the legislature effected in the act of 1901,⁶ redress in the form of a constitutional amendment was difficult, if not impossible, of attainment. The aggrieved city dwellers, in consequence of what was termed an invidious discrimination, sought a declaration that the 1901 statute was unconstitutional and an injunction restraining the responsible state officials from conducting any future elections under it. In the alternative, they asked the court to order that all subsequent elections be held from the state at large or to decree a reapportionment in accordance with the constitutional formula by applying mathematically the most recent federal census figures.⁷

The immediate issue in the district court⁸ centered about the propriety of creating a three-judge tribunal to determine the question of jurisdiction. After a brief review of the leading cases, Judge Miller refused to accede to demands by state officials that the complaint be dismissed summarily for want of judicial power to intervene or to grant any kind of relief. He took the view that *Colegrove v. Green*⁹ did not preclude consideration of the issues raised and concluded that, in the circumstances, a court of equity should be willing to "re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy . . ."¹⁰ It was at least debatable, Judge Miller maintained, whether the Supreme Court had foreclosed review in all cases of legislative apportionment on the basis of a plurality opinion in which the grounds for denying intervention were unclear. Nor did he think that the subsequent decisions in *MacDougall v. Green*¹¹ and *South v. Peters*¹² sharpened

³ Rights were asserted under 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1958) which authorizes an action at law, a suit in equity, or other proper proceedings to redress deprivations under color of state authority. Reference also was made to 16 Stat. 144 (1870), 42 U.S.C. § 1988 (1958) which permits the application of state law in civil rights cases when federal law proves inadequate to furnish a suitable remedy.

⁴ The complaint averred that, under the existing allocation, 37 percent of the voting population controlled 20 of the 33 members of the state senate while a minority of 40 percent held 63 of the 99 seats in the lower house. Record, p. 13.

⁵ TENN. CONST., art. II, §§ 4-6.

⁹ 328 U.S. 549 (1946).

⁶ TENN. CODE ANN. §§ 3-101 to 3-107.

¹⁰ 175 F. Supp. at 653.

⁷ Record, pp. 19-20.

¹¹ 335 U.S. 281 (1948).

⁸ 175 F. Supp. 649 (M.D. Tenn. 1959).

¹² 339 U.S. 276 (1950).

the arguments for judicial inaction. As Judge Miller interpreted the Supreme Court's composite reaction, it could not be demonstrated conclusively whether the dismissals were predicated on a lack of jurisdiction or the discretionary right of a court of equity to refuse to entertain jurisdiction.¹³

When thus convened, the three-judge court dismissed the action in *Baker v. Carr* on traditional grounds.¹⁴ The sole concession to the plaintiffs lay in an acknowledgment that a violation of the state constitution had occurred and that the complainants' rights had been denied.¹⁵ But the court in a per curiam opinion declined to grant any relief, alleging an "array of decisions by our highest court, charting the unmistakable course which this Court must pursue. . . ."¹⁶ Aside from a recital of precedent, however, the panel's major argument for non-intervention turned on the inappropriateness of fashioning a judicial remedy in the circumstances of the case. To order an election at large, the three judges reasoned, would violate the state constitution while requiring the court to supervise the entire election and to devise detailed polling rules and regulations. Nor would there be any means of compelling the newly constituted legislature to reapportion the state in accordance with the constitutional mandate.¹⁷ Direct redistricting, the court held, would be even more objectionable since such a remedy would amount to "the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state."¹⁸

From this ruling, complainants filed a notice of appeal to the Supreme Court. That Court noted probable jurisdiction¹⁹ and argument was heard first at the 1960 Term and again the following fall when the case was set over for reargument.²⁰ Judged by the intensive questioning of counsel from the Bench and the time allotted for oral argument, it became increasingly evident that some effort would be made to redefine the equivocal stand taken in *Colegrove v. Green*.²¹ This expectation and more was realized when the long-awaited decision of March 26, 1962²² was handed down. Yet the Court only hinted at the reasons why it had chosen this occasion to present the first full-scale exposition of its views since *Colegrove* when for more than a decade, it had restricted almost all pronouncements in this area to cryptic one-line per curiams. Timing undoubtedly was an important consideration. Were there also certain elements in *Baker*, presumably missing elsewhere, that tendered the issues in such "clean-cut and concrete form"²³ as to set the case apart and give it primacy? Aside from the obvious and cumulative effect of changes in

¹³ 175 F. Supp. at 652.

¹⁴ 179 F. Supp. 824 (M.D. Tenn. 1959).

¹⁵ *Id.* at 828.

¹⁶ *Id.* at 826.

¹⁷ *Id.* at 827.

¹⁸ *Id.* at 828.

¹⁹ 364 U.S. 898 (1960).

²⁰ 366 U.S. 907 (1961).

²¹ 328 U.S. 549 (1946).

²² *Baker v. Carr*, 369 U.S. 186 (1962).

²³ *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947).

the Court's personnel, some clues can be found in an examination of the checkered course of earlier apportionment cases before the federal courts.

II. A HERITAGE OF NON-INTERVENTION

*Colegrove v. Green*²⁴ was long regarded as compelling precedent for much of the litigation concerned with districting practices. In federal and state courts alike, the case was taken as a definitive indicator of the Supreme Court's attitude and, for more than a decade, it served as an effective barrier against reform groups intent upon pressing for judicial relief where the regular political channels had failed.²⁵ On occasion, judges denounced legislative inaction as an abridgement of rights under the federal and state constitutions and as denials of equal representation. But the Supreme Court had spoken in *Colegrove*, or so the argument ran, and the lower courts had little choice except to follow. The right to that which the Constitution guaranteed was beyond question, but viable standards and effective remedies seemed unattainable.²⁶

In many ways, *Colegrove* was a curious choice as a "landmark" case for subsequent litigation. It arose from a citizen-voter complaint charging the failure of the Illinois Legislature to realign congressional districts to reflect population shifts over a period of almost half a century. Plaintiffs sought a declaratory decree and a bill²⁷ to enjoin the election of members of Congress under a state law of 1901²⁸ which continued in effect. A three-judge court dismissed on the authority of *Wood v. Broom*²⁹ which, narrowly construed, held that prior requirements of compactness, contiguity, and population equality imposed by a former federal statute no longer applied.³⁰ The per curiam opin-

²⁴ 328 U.S. 549 (1946).

²⁵ To be sure, *Colegrove* was not the first case to treat claims of "oppressed majorities" seeking to invoke the powers of the federal judiciary in the enforcement of alleged political rights. See, e.g., *Wood v. Broom*, 287 U.S. 1 (1932) and *Mahan v. Hume*, 287 U.S. 575 (1932).

²⁶ The federal district courts adhered to this general view in a number of cases immediately preceding and including *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn., 1959). See also *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956).

²⁷ *Colegrove v. Green*, 64 F. Supp. 632 (N.D. Ill. 1946). The action was brought under 48 Stat. 955 (1934).

²⁸ Ill. Acts 1901, at 3. A redistricting statute of 1931 (Ill. Acts 1931, at 545) previously had been invalidated by the Supreme Court of Illinois with the result that the act of 1901 was left in force. *Moran v. Bowley*, 347 Ill. 148, 179 N.E. 526 (1932). A decade later, the 1901 law was upheld in *Daly v. Madison County*, 378 Ill. 357, 38 N.E.2d 160 (1941).

²⁹ 287 U.S. 1 (1932).

³⁰ The federal district court, one judge dissenting, had enjoined the holding of an election for members of Congress under a Mississippi redistricting statute on the ground that the new districts failed to comply with the requirements of an Act of Congress of 1911. 37 Stat. 13, 2 U.S.C. § 3. See *Broom v. Wood*, 1 F. Supp. 134 (S.D. Miss. 1932). The Supreme Court, speaking through Mr. Chief Justice Hughes, reversed with directions to dismiss the complaint. It held that the Reapportionment Act of 1929 (Act of June 18, 1929, 46 Stat. 21, 26, 27, 62 U.S.C. § 2(a)) did not carry forward these requirements and that it was manifestly the intention of Congress not to reenact them. The Court expressly reserved consideration of questions as to the right of the complainant to relief in equity or as to the justiciability of the

ion of the three-judge court took issue with the Supreme Court's disposition of *Wood v. Broom* and appended a vigorous condemnation of the attitude of the Illinois Legislature.³¹ In the absence of the decision in *Wood v. Broom*, the court made plain that it would have assumed that a requirement of population equality arose necessarily from the Constitution. The judges apparently acquiesced in plaintiffs' contentions that their rights had been abridged in violation of the privileges and immunities and due process clauses of the fourteenth amendment.³²

At the time *Colegrove* was argued, Mr. Chief Justice Stone was the only remaining member of the Court who had participated in *Wood v. Broom*, but he died before the decision was handed down.³³ Mr. Justice Jackson was abroad representing the United States at the Nuremberg war trials.³⁴ As a consequence, the case was decided by a seven-member Bench which could not agree beyond a bare majority judgment affirming the district court's dismissal of the complaint. Three opinions were rendered and, strictly speaking, none established a precedent.

Mr. Justice Frankfurter's plurality opinion was joined by Justices Reed and Burton. Though over the next decade the views he expressed were repeatedly cited as controlling, the exact basis for dismissal of the complaint remained in doubt. It was plain that there had been a denial of the exercise of jurisdiction, but not in the sense of a want of power.³⁵ The case could have been disposed of on the authority of *Wood v. Broom* and, if the usual principles of judicial parsimony prevailed, it is difficult to understand why Mr. Justice Frankfurter was not content to stop at this point. Instead, he went on to express agreement with the four concurring Justices in *Wood v. Broom* that the bill should be dismissed for want of equity and to explain that the intervening passage of the Federal Declaratory Judgment Act of 1934 did not substantially alter the picture.³⁶

controversy "if it were assumed that the requirements invoked by the complainant are still in effect." 287 U.S. 1, 8. Justices Brandeis, Stone, Roberts, and Cardozo concurred in the majority's reversal of the decree, but on the ground that the bill should be dismissed for want of equity without passing on the applicability of the Act of 1911. *Ibid.*

³¹ The court compared the legislative response to "the action of South Carolina in the days of President Jackson. Its continuance provokes, if it does not invite the resort to arms if appeals to reason or the patriotism of the individuals are too long ignored." *Colegrove v. Green*, 64 F. Supp. 632, 633 (N.D. Ill. 1946).

³² *Ibid.*

³³ Mr. Chief Justice Stone was stricken on the bench April 22, 1946 and died the same evening. See 327 U.S. iii n. 1.

³⁴ Mr. Justice Jackson was absent from the bench throughout the October Term, 1945. *Id.* at n. 2.

³⁵ Mr. Justice Frankfurter admitted that the case was appropriately before the Court and that it presented "one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.'" *Colegrove v. Green*, 328 U.S. 549, 552 (1945).

³⁶ *Id.* at 551-52.

Apart from a rambling effort to reconcile all of the views expressed in *Wood v. Broom*, Mr. Justice Frankfurter adverted to a number of alternative grounds without indicating the relative weight attached to any. One implied that appellants had no standing since the suit was not "a private wrong, but a wrong suffered by Illinois as a polity."³⁷ Beyond this lay the problem of finding appropriate modes and avenues of relief. The Court could not affirmatively remap the state's congressional districts. At best, it could only invalidate the existing electoral system and bring about an election at large—a result which might be politically undesirable and might not be acquiesced in by the House of Representatives in the exercise of its power to judge the qualifications of its members.³⁸ To involve the judiciary in party contests, Mr. Justice Frankfurter warned, would be hostile to its proper function and role in a democratic state. If any cure is available, he suggested, it must lie within the exclusive control of Congress.³⁹

What, then, is the major premise on which the plurality opinion turns? Assuming, as appears evident, that *Wood v. Broom* was not determinative and that a suggested lack of standing was peripheral at most, the crux of Mr. Justice Frankfurter's argument would seem to revolve about an attempt to incorporate political rights in districting cases within a reformulation of the doctrine of political questions. *Colegrove's* "contribution," if it may be deemed such, lay in an assertion of the non-justiciable character of any measure to secure equality of voter participation. According to its rationale, satisfactory criteria are lacking for a judicial inquiry into the reasonableness of districting standards and the possible consequences of intervention are beyond the ken of judicial adequacy or propriety. The only recourse, therefore, is a political solution or citizen "self-help" in electing legislative bodies that will meet the challenge of providing fair representation.⁴⁰ Doubtless other implications may be drawn from *Colegrove*, but the doctrine of non-justiciability came to prevail in federal and state courts over the next fifteen years.⁴¹

In a concurring opinion, Mr. Justice Rutledge took the position that the

³⁷ *Id.* at 552. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1298 (1961).

³⁸ *Colegrove v. Green*, 328 U.S. 549, 553 (1945).

³⁹ Article I, Section 4 of the Constitution provides that "The Times, Places and Manner of holding Elections for . . . 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 . . ." (emphasis added).

⁴⁰ This approach was the subject of much critical comment in the years following the decision in *Colegrove*. See Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (Cahn ed. 1954); Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958); Roche, *Judicial Self-Restraint*, 49 AMER. POL. SCI. REV. 762 (1955); Note, 62 HARV. L. REV. 659 (1949).

⁴¹ There have been suggestions that some of the confusion in *Colegrove* may have resulted from inadequate preparation by the appellant and a failure to invoke the civil rights statutes. See Lewis *supra*, note 40, at 1078.

complaint in *Colegrove* should be dismissed for want of equity. He indicated that the questions raised were justiciable on the basis of the Court's ruling in *Smiley v. Holm*⁴² that an existing state apportionment of congressional districts did not meet federal requirements.⁴³ Assuming, then, that power existed to afford relief, Mr. Justice Rutledge felt that the case was one in which the Court might appropriately decline to exercise its jurisdiction.⁴⁴ The question properly may be raised whether a dismissal for "want of equity" differs essentially from "non-justiciability." Judged on the basis of results alone, the two would seem to be variants stemming from a broadly conceived policy of judicial self-restraint. But, it may be argued, the doctrine of equitable discretion provides a broader range of flexibility than the sterile and rigid dictates of non-justiciability. As Mr. Justice Stone noted in *Matthews v. Rodgers*,⁴⁵ want of equity does not go to the power of a court and, consequently, it admits of waiver when the circumstances warrant.⁴⁶

Mr. Justice Black's dissent in *Colegrove* was joined by Justices Douglas and Murphy. Finding no bar in terms of jurisdiction, standing, or justiciability, Black moved quickly to the merits and a holding that equity could and should grant relief.⁴⁷ He premised the constitutional issue squarely on Article I of the Constitution and the equal protection clause of the fourteenth amendment and took both to mean that the state legislatures must make every effort to bring about approximate population equality in creating a representative system.⁴⁸ From a deceptively narrow interpretation of *Wood v. Broom*,⁴⁹ Mr. Justice Black foresaw no obstacle in the way of declaring the Illinois act of 1901 invalid and enjoining state officials from providing for elections under it. The remedy would be an at-large election which, according to his standards, might be

⁴² 285 U.S. 355 (1932).

⁴³ Mr. Chief Justice Hughes, writing for the Court in *Smiley*, maintained that the division of a state into congressional districts under the power conferred by Article I, Section 4 was an exercise of the state's lawmaking function. Where the state constitution required participation by the governor in the legislative process, a redistricting bill needed his approval or had to be passed over his veto before it could become effective. In the instant case, an election at large was ordered. *Id.* at 367, 374-75.

⁴⁴ Mr. Justice Rutledge maintained that the states were vested with broad discretionary authority in establishing electoral districts: "There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution." 328 U.S. at 566.

⁴⁵ 284 U.S. 521 (1932).

⁴⁶ *Id.* at 524, 525.

⁴⁷ 328 U.S. 549, 568.

⁴⁸ *Id.* at 572.

⁴⁹ In this view, the Court expressly reserved the question of the complainant's right to relief in equity. For a critical account of Mr. Justice Black's approach to *Wood v. Broom*, see Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194, 223.

inconvenient but, unlike other proposed solutions, had the virtue of being constitutional.⁵⁰

If the meaning of *Colegrove v. Green* was inconclusive, the cases which followed served to compound the uncertainty. *Cook v. Fortson*,⁵¹ the first in a series contesting the constitutionality of Georgia's county unit system, raised familiar claims alleging deprivations of rights under the equal protection clause of the fourteenth amendment. The district court refused to grant equitable relief on the authority of *Colegrove*.⁵² In a one-line per curiam opinion, the Supreme Court concurred in the dismissal of the appeal, citing *United States v. Anchor Coal Co.*⁵³ as the basis. Justices Black and Murphy expressed the view that probable jurisdiction should have been noted. Mr. Justice Rutledge called for postponing a determination of the jurisdictional issues to a hearing of the case on the merits. While admitting that *Cook* presented questions closely linked to *Colegrove*, he declined to accept the earlier decision as foreclosing the adjudication of substantive rights in this area and, in fact, favored granting a petition for rehearing in *Colegrove*.⁵⁴ As Mr. Justice Rutledge put it, the discretionary exercise or nonexercise of equitable jurisdiction in one case could not be taken as precedent in another case *where the facts differed*.⁵⁵

Colegrove v. Barrett,⁵⁶ decided the following year, challenged Illinois' state apportionment law as offensive to the equal protection clause of the fourteenth amendment. In a complaint filed in the district court, appellants alleged that the legislature's failure to reapportion for more than forty-five years had resulted in grossly unequal legislative districts. They sought declaratory and injunctive relief with respect to all future elections. The Supreme Court, once again resorting to a one-line per curiam, dismissed the complaint for want of a substantial federal question. Despite misgivings expressed the previous year, Mr. Justice Rutledge concurred in the action taken on the basis of the Court's refusal to grant a rehearing in *Colegrove v. Green* and its dismissal of the appeal in *Cook*. Justices Black, Douglas, and Murphy took the view that probable jurisdiction should have been noted.⁵⁷

If Mr. Justice Rutledge's attachment to the doctrine of equitable discretion represented one of the most hopeful signs in the apportionment quagmire, it

⁵⁰ 328 U.S. 549, 574.

⁵¹ 329 U.S. 675 (1946). *Cook* concerned the requirements for equality in the election of members of the House of Representatives. A companion case, *Turman v. Duckworth*, *ibid.*, related to the state's gubernatorial election machinery.

⁵² *Cook v. Fortson*, 68 F. Supp. 624 (N.D. Ga. 1946); *Turman v. Duckworth*, 68 F. Supp. 744 (N.D. Ga. 1946).

⁵³ 329 U.S. 675 (1946). The complaints in *Anchor* were dismissed because the controversy had become moot. 279 U.S. 812 (1929).

⁵⁴ Rehearing was denied by the Court, 329 U.S. 825 (1946).

⁵⁵ 329 U.S. at 678-79.

⁵⁶ 330 U.S. 804 (1947).

⁵⁷ *Ibid.*

was also one of the most equivocal. According to the thesis expounded in his *Colegrove v. Green* concurrence, the denial of equitable relief left the door open should future litigation merit intervention. Indeed, *Cook* seemed to inject new vitality into the Rutledge formula by reopening the issues treated in *Colegrove v. Green*. How, then, can this approach be reconciled with the statement in *Colegrove v. Barrett*, just a year later, acquiescing in dismissal merely because a rehearing had been denied in *Colegrove v. Green* and the appeal in *Cook* had been set aside? Equitable discretion surely could have little meaning if its very flexibility was to be sacrificed.

On the eve of the national election of 1948, the Court was asked to pass on a claim of unconstitutionality in the application of an Illinois elections procedure statute. At issue in *MacDougall v. Green*⁵⁸ was a ruling by the state's electoral board that Progressive Party nominees had failed to qualify for a place on the ballot by virtue of a code provision requiring that the nominating petition of a new political party, in addition to being signed by at least 25,000 qualified voters, include 200 valid signatures from each of at least 50 of the state's 102 counties. Appellants alleged that the law was discriminatory since eligible voters in 49 of the counties with 87 percent of the electorate could not, but 25,000 of the remaining 13 per cent of the registered voters could form a new party. A three-judge district court, without citation of authority, refused to grant injunctive relief for want of jurisdiction.⁵⁹

The Supreme Court affirmed dismissal of the bill in a per curiam opinion which went to the core of the substantive issues without considering the question of justiciability. In many respects, *MacDougall* came closer to the enunciation of a judicial philosophy on the districting issue than any previous pronouncement. The Court held that it was permissible state policy to require that candidates for state-wide office have support not limited to a particular locality. "To assume that political power is a function exclusively of numbers," the Court maintained, "is to disregard the practicalities of government."⁶⁰ Citing *Colegrove v. Green* and *Colegrove v. Barrett*, a majority made clear that the Constitution did not deny a state the power to assure "a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses. . . ."⁶¹ Mr. Justice Rutledge, concurring, expressed no opinion concerning the substantive questions presented. He reiterated his view that the Court should decline to exercise its jurisdiction in equity.⁶²

Mr. Justice Douglas wrote a dissenting opinion, joined by Justices Black and Murphy. Referring to the primary cases,⁶³ he averred that the constitu-

⁵⁸ 335 U.S. 281 (1948).

⁵⁹ 80 F. Supp. 725 (N.D. Ill. 1948).

⁶⁰ 335 U.S. 281, 283.

⁶¹ *Id.* at 284.

⁶² *Id.* at 287.

⁶³ *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Herndon*, 273 U.S. 536 (1927).

tional protection afforded voting rights covered not only the general election but extended to every part of the electoral process.⁶⁴ Within this context, he found that the Illinois law under review applied a rigid and arbitrary formula both to sparsely settled and populous counties. As he saw it, the law gave disproportionately greater weight to the individual votes of one group of citizens than to those of another. The legislation, therefore, revealed the same "inherent infirmity as that which some of us saw in *Colegrove v. Green*."⁶⁵

If *Colegrove v. Green* raised doubts concerning the justiciability of apportionment questions, the majority's position in *MacDougall v. Green* should have dispelled them. The latter case, undeniably decided on the merits, resulted in an outright rejection of efforts to make population equality a constitutional measure deriving from the fourteenth amendment. *South v. Peters*,⁶⁶ coming two years later, confirmed the principle of justiciability when the Court reviewed Georgia's county unit system as applied to primary elections.⁶⁷ With citations to *MacDougall v. Green*, *Colegrove v. Green*, and *Wood v. Broom*, the majority affirmed dismissal of the complaint on the basis of a refusal to exercise equity powers in a case "posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."⁶⁸ The issue of non-justiciability seemed finally to have been set aside in favor of Mr. Justice Rutledge's oft-stated approach in earlier concurrences.

Mr. Justice Douglas, dissenting in *South*, for the first time interjected the racial issue into the consideration of apportionment questions. He pointed to the large Negro population in the urban centers; these were the only areas in which racial minorities had been able to vote in important numbers, and they were heavily disenfranchised by the county unit system.⁶⁹ At the same time, he found none of the objections to judicial intervention which had been claimed in *Colegrove v. Green* and *MacDougall v. Green*. The formulation of a remedial decree would involve no danger of collision with Congress; the elec-

⁶⁴ 335 U.S. 281, 288.

⁶⁵ *Id.* at 289. Mr. Justice Douglas denied that intervention would disrupt the orderly process of the election. Indeed, he took the occasion to disavow having the federal courts undertake the superintendence of state elections. The equity court, he cautioned, "must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." *Id.* at 290.

⁶⁶ 339 U.S. 276 (1950).

⁶⁷ The case was before the Court on appeal from the dismissal of a plea to enjoin adherence to the state's county unit statute in the Democratic primary. The district court, per curiam, had held that the equalization of subdivisions was a matter of policy in which courts of equity could not meddle to put forth their own ideas. 89 F. Supp. 672, 680 (N.D. Ga. 1950). Judge Andrews dissented on the ground that the protection of individual political rights was properly within the exercise of equitable power. *Id.* at 681.

⁶⁸ 339 U.S. 276, 277.

⁶⁹ *Id.* at 277-78.

toral map of Georgia would not have to be altered by the courts; indeed, the state legislature would not be required to take any new action to change the place, time, or conduct of the election. The impact of the decree, Mr. Justice Douglas avouched, would be limited solely to the tallying of votes. As he conceived the Court's role, the degree of interference with the state's political processes would be no greater than it is "when ballot boxes are stuffed or other tampering with the votes occurs and we take action to correct the practice."⁷⁰

South v. Peters was the last case before *Baker v. Carr* in which the Court moved beyond a one-line per curiam in disposing of a districting issue. The grounds for dismissing appeals on subsequent occasions varied, but non-judiciability did not appear to be a critical element. In *Cox v. Peters*,⁷¹ the Court found no substantial federal question raised by the Georgia Supreme Court's dismissal of a claim for damages for an alleged "devaluation" of plaintiffs' votes by application of the county unit system in a Democratic primary election.⁷² A failure to exhaust state remedies and problems of timing were controlling in *Remmey v. Smith*,⁷³ which dismissed for want of a substantial federal question a three-judge district court's refusal to entertain a suit as prematurely brought.⁷⁴ *Anderson v. Jordan*⁷⁵ presented for review a state court's denial of a petition for mandamus to compel the secretary of state to disregard the existing state apportionment statutes. While the Supreme Court dismissed the appeal on the authority of *MacDougall v. Green*, *Colegrove v. Green*, and *Wood v. Broom*, the prior denial of the writ without opinion raised the question whether, in fact, an adequate state ground barred review. In *Kidd v. McCaless*,⁷⁶ involving an attack upon the same Tennessee apportionment law before the Court in *Baker v. Carr*, the appeal was dismissed with citations to *Colegrove v. Green* and *Anderson v. Jordan*. The reference to *Anderson* seemed to have been controlling in view of the fact that the holding of the state court had rested on the state law of remedies—an adequate ground to preclude

⁷⁰ *Id.* at 280.

⁷¹ 342 U.S. 936 (1952).

⁷² Justice Hawkins, speaking for the Georgia Supreme Court, had distinguished *Smith v. Allwright*, 321 U.S. 649 (1944) and *Nixon v. Herndon*, 273 U.S. 536 (1927) on the ground that Texas law had required the holding of a primary. In Georgia, he contended, a primary took place at the option of any political party and was not requisite to nomination or to a place on the official ballot. As a consequence, the holding of primary elections implicated no "state action." 208 Ga. 498, 67 S.E.2d 579, 583 (1951).

⁷³ 342 U.S. 916 (1952).

⁷⁴ Judge Biggs expressly reserved the question of the court's jurisdiction to treat the issues presented in a citizen-voter suit to invalidate Pennsylvania's apportionment act of 1921. Non-intervention was premised upon abstention where an apparent, but untried, remedy appeared to lie in the state courts. *Smith v. Remmey*, 102 F. Supp. 708, 711 (E.D. Pa., 1951).

⁷⁵ 343 U.S. 912 (1952).

⁷⁶ 352 U.S. 920 (1956).

Supreme Court review.⁷⁷ *Radford v. Gary*⁷⁸ affirmed a district court's refusal to intervene in a case arising from a state legislature's failure to reapportion on the basis of an express directive in the state constitution.⁷⁹ The Court continuing to build a precedential pattern based upon one-line per curiams, cited *Colegrove v. Green* and *Kidd v. McCanless*. Problems of relief seem to have controlled. In *Hartsfield v. Sloan*,⁸⁰ the Court declined to entertain a motion to force a district judge, by mandamus, to convene a three-judge court for the purpose of reviewing Georgia's unit system. The problem of timing appears to have controlled.⁸¹ Most recently, the Court, in *Matthews v. Handley*,⁸² affirmed a lower court's refusal to strike down a state tax statute on the ground that the legislature which had enacted it was malapportioned. Doubtless non-intervention was predicated upon the adequacy of available state remedies.

Aside from the generally inconclusive cases reaching the Supreme Court and the shifting premises which still seemed to preclude intervention, much of the pre-*Baker* ferment occurred in the state tribunals and in those federal courts that did not take *Colegrove v. Green* to be controlling. The most ambitious assertions of judicial power came over the past half-decade and were strengthened by the assumption that the precedential value of *Colegrove*, never firmly rooted, was being undermined sub silentio by the Court itself in a continuing re-definition of equal protection. To be sure, the Court offered no substantiation of the proposition that the "new concept" of equal protection embraced the apportionment issue. Indeed, as late as *Baker v. Carr*, a majority held no more than that the right asserted was within the reach of judicial protection under the fourteenth amendment. Yet speculation persisted that

⁷⁷ The Supreme Court of Tennessee refused to intervene on the ground that, if the existing apportionment act were held unconstitutional, the *de facto* doctrine could not be applied to maintain the then present members of the legislature in office. The result, the court held, would be to deprive the people of any effective legislative body and the means of electing a new one and "ultimately bring about the destruction of the State itself." *Kidd v. McCanless*, 200 Tenn. 273, 282, 292 S.W.2d 40, 44 (1956).

⁷⁸ 352 U.S. 991 (1957).

⁷⁹ Suit had been instituted against the governor, the state legislature, members of the state supreme court, and members of the state election board for mandamus or a mandatory injunction to compel a reapportionment as required by the Oklahoma Constitution. Judge Murrah declined to undertake a reappraisal of *Colegrove* in the light of the school desegregation cases and held further that it was not the function of the court "to psychoanalyze the justices of the Supreme Court in order to divine the trend of decisions." *Radford v. Gary*, 145 F. Supp. 541, 544 (W.D. Okla. 1956). Among the possible remedies available, Judge Murrah pointed out, was the right of the people to initiate a proper statute in accordance with the provisions of the state constitution. *Id.* at 543.

⁸⁰ 357 U.S. 916 (1958).

⁸¹ Movants had sought to advance consideration of their case before the district court on the ground that "the mere lapse of time before this can be reached . . . may defeat the cause . . ." Mr. Chief Justice Warren and Justices Black, Douglas, and Brennan expressed the view that a rule to show cause should issue. *Ibid.*

⁸² 361 U.S. 127 (1959).

*Brown v. Board of Education*⁸³ signaled a constitutional metamorphosis of major proportions that could not be contained within the generally defined area of racial discrimination.

A territorial case, *Dyer v. Kazuhisa Abe*,⁸⁴ set the pace for the judicial intervention which came to be adopted in a scattering of federal and state courts. The plaintiff, a Hawaiian voter, alleged equal protection and due process deprivations on the ground that the legislature had not reapportioned to reflect population shifts occurring over a period of fifty-five years. Chief Judge McLaughlin refused to preclude relief on the basis of *Colegrove v. Green* since, in his view, the issue was justiciable and a federal-state relationship was not involved. There was nothing delicate, Judge McLaughlin averred, in the way the Supreme Court had treated a three-step process to prevent Negroes from voting in *Terry v. Adams*,⁸⁵ Nor were there misgivings in having state-federal relations bow to the principles of the Constitution in the *School Segregation Cases*.⁸⁶ Following these guidelines, the court declared: "The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination."⁸⁷

While the Hawaiian case stirred considerable interest concerning the feasibility of judicial remedies, the basis of the decision was narrowly limited to authority conferred under the Organic Act. As the district court stated in explicit terms, Hawaii was a political subdivision of the United States bearing the same relation to Congress that a county ordinarily would have to a state.⁸⁸ The real test, then, remained to be determined if and when a federal court should agree to intervene in the apportionment of a state legislature. Such an opportunity presented itself in *Magraw v. Donovan*⁸⁹ when a three-judge district court in Minnesota asserted jurisdiction under the fourteenth amendment in a citizen-voter suit to have the state's legislative districting act

⁸³ 347 U.S. 483 (1954).

⁸⁴ 138 F. Supp. 220 (D.C. Hawaii, 1956).

⁸⁵ 345 U.S. 461 (1953).

⁸⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁸⁷ 138 F. Supp. at 236. The district court's judgment was reversed as moot, *Kazuhisa Abe v. Dyer*, 256 F. 2d 728 (9th Cir. 1958), when Congress amended the Organic Act by creating new Hawaiian legislative districts. To avoid the possibility of future stalemates, the governor was empowered to reapportion and the territorial supreme court was authorized to compel gubernatorial action by mandamus. 70 Stat. 903 (1956), 48 U.S.C. § 562 (1958). These provisions conform to those now a part of the new state's constitution, Constitution of Hawaii, art. III, § 4.

⁸⁸ 138 F. Supp. at 234.

⁸⁹ 163 F. Supp. 184 (D. Minn., 1958).

declared invalid.⁹⁰ In a per curiam opinion, the panel expressly deferred decision on all issues, including that of the power to grant relief, in order to afford the legislature full opportunity to heed the constitutional mandate. Following adjournment of the next legislative session, the parties were authorized to petition the court for such further action as might be deemed appropriate.⁹¹ For the first time since *Colegrove v. Green* was decided, a federal court had crossed the tenuous dividing line into the "political thicket" of which Mr. Justice Frankfurter had written. But the speedy action of the Minnesota Legislature in passing a redistricting act⁹² put off the need for fashioning an effective judicial remedy.⁹³

In the state courts, judicial review of apportioning procedures has been an established practice for some years. The power to intervene generally stems from constitutional or statutory provisions designating some officer or body outside the legislature as the districting agent. A number of the plans specifically authorize the courts to compel reapportionment by mandamus or to make any necessary revisions to assure conformity to establish standards.⁹⁴ Aside from such explicitly sanctioned intervention, however, the state courts traditionally have followed a policy of aloofness similar to that adhered to in the federal courts. On the one hand, this derives from judicial reluctance to coerce a coordinate branch of government under the doctrine of separation of powers. On the other, it underscores a sense of futility in attempting to formulate a workable remedy that will not expose the judiciary to possible conflict, open defiance, or public ridicule.⁹⁵

Absent express constitutional or statutory authority, the New Jersey Supreme Court launched perhaps the boldest of the pre-*Baker* forays in the 1960 case of *Asbury Park Press, Inc. v. Woolley*.⁹⁶ The controversy arose from a

⁹⁰ In an earlier opinion calling for the establishment of a three-judge court, Judge Devitt had held that the state of the law was such as to require a full examination and appraisal of the issues because of an increasing judicial consciousness of the propriety of acting in cases where any type of discrimination was alleged. *Magraw v. Donovan*, 159 F. Supp. 901, 903 (D. Minn., 1958).

⁹¹ 163 F. Supp. at 187, 188.

⁹² Minn. Laws 1959, Extra Session c. 45.

⁹³ On plaintiffs' motion to dismiss without prejudice, the court held the issues presented had been rendered moot. *Magraw v. Donovan*, 177 F. Supp. 803, 806 (D. Minn., 1959).

⁹⁴ See the National Municipal League's COMPENDIUM ON LEGISLATIVE APPORTIONMENT (2d ed., 1962).

⁹⁵ For an exposition of the arguments for non-justiciability in the state courts, see *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939); *Romang v. Cordell*, 206 Okla. 369, 243 P.2d 677 (1952). Only three years ago, the Supreme Court of Pennsylvania affirmed dismissal of a decree to enjoin the election of state senators on the ground that an apportionment act of 1921 was unconstitutional. The court held that there was no justiciable controversy since political questions not cognizable in equity were presented. *Butcher v. Rice*, 397 Pa. 158, 153 A.2d 869 (1959).

⁹⁶ 33 N.J. 1, 161 A.2d 705 (1960).

taxpayers' suit for a declaratory judgment that a 1941 apportionment law was unconstitutional in the light of the 1950 census figures. Ancillary relief was sought to prevent the holding of a primary or general election under the statute. In sweeping terms, a unanimous court rejected the doctrine of non-judiciability as wholly incompatible with judicial responsibilities.⁹⁷ Legislative inaction, resulting in an unequal and arbitrary apportionment, was held to offend the state constitution and the equal protection clause of the fourteenth amendment. In a strongly worded mandate to the legislature, the court reserved selection of a remedy only to provide an opportunity for action based upon the 1960 census data.⁹⁸ When the legislature proved remiss in its obligation to reapportion, the court designated a precise date and time for the issuance of a subsequent decree. The legislature, now faced with what amounted to a judicial ultimatum, passed a reapportionment bill less than two hours before the court-appointed deadline had arrived.⁹⁹

The same year, *Gomillion v. Lightfoot*¹⁰⁰ led to a collateral re-examination of the non-intervention doctrine before the Supreme Court itself. At issue was an action for a declaratory judgment holding unconstitutional an Alabama statute¹⁰¹ redrawing the boundaries of the City of Tuskegee in a scheme alleged to exclude Negroes. The district court rendered a judgment adverse to the plaintiffs¹⁰² and they appealed. The court of appeals affirmed on the ground that, in the absence of any racial or class discrimination appearing on the face of the statute, it could not be held violative of the fourteenth and fifteenth amendments.¹⁰³ Judge Wisdom, in a concurring opinion, averred that the court should withhold the exercise of its equity powers out of deference to considerations of federalism and because effective relief could not be afforded. *Colegrove v. Green* and *South v. Peters* were taken to be controlling.¹⁰⁴ Judge Brown, dissenting, held that when a racial discrimination voting issue was clearly posed the Court had evidenced little concern for judicial abstention. He distinguished *Colegrove* and *South* since the conflicts there were

⁹⁷ The court held that *Colegrove v. Green* was inapposite, for there no mandatory apportionment requirement of a state constitution was involved. *Id.* at 12, 161 A.2d at 710.

⁹⁸ *Id.* at 21, 161 A.2d at 715.

⁹⁹ The New Jersey Supreme Court thereupon issued a statement that the pending litigation had become moot and that the prepared opinion would not be filed. *N.Y. Times*, February 2, 1961, p. 1, col. 2.

¹⁰⁰ 364 U.S. 339 (1960).

¹⁰¹ Ala. Acts 1957, No. 140.

¹⁰² The district court premised its dismissal on *Laramie County v. Albany County*, 92 U.S. 307 (1875); *Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879); and *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) to the effect that the legislative power to alter municipal boundaries is plenary and, when properly exercised, is not subject to review by the courts. 167 F. Supp. 405 (M.D. Ala. 1958).

¹⁰³ 270 F.2d 594 (5th Cir. 1959).

¹⁰⁴ *Id.* at 615.

between rural and urban areas or political parties, but not races. While some citizens only had one-ninth the vote of others, Judge Brown argued, all were permitted to participate in the formality of balloting.¹⁰⁵

The Supreme Court, speaking through Mr. Justice Frankfurter, premised a limitation of state power over Tuskegee's municipal boundaries on the fifteenth amendment.¹⁰⁶ *Colegrove* was distinguished as involving only a dilution of voting strength over a course of years rather than a discriminatory scheme singling out a readily isolated segment of a racial minority.¹⁰⁷ Such considerations were said to have lifted the controversy out of the political category and into the conventional area of constitutional litigation. "While in form," Mr. Justice Frankfurter concluded, "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*."¹⁰⁸ Mr. Justice Douglas, while joining the opinion of the Court, adhered to the dissents in *Colegrove v. Green* and *South v. Peters*.¹⁰⁹ Mr. Justice Whittaker, concurring, would have rested the case on the equal protection clause of the fourteenth amendment.¹¹⁰

III. *Baker v. Carr* AND ITS AFTERMATH

Following the Court's decision in *Gomillion*, there was increasing speculation that a full-scale reexamination of *Colegrove* and subsequent cases was about to be undertaken. Indeed, probable jurisdiction in *Baker v. Carr* was noted at the same Term.¹¹¹ The attention given *Colegrove* by the majority in *Gomillion* suggested that the application of the non-justiciability doctrine had been considered at some length. It would seem that the Court relied upon the fifteenth amendment as a compromise expected to mask or at least to postpone more fundamental disagreements which might have arisen under the equal protection clause.¹¹²

The factual details of *Baker v. Carr*¹¹³ were well suited to provide a groundwork for the Court's reversal of policy. Unlike *Colegrove v. Green*, a state legislative apportionment was squarely at issue. Congressional resolution of the problem clearly was not called for, thus eliminating the possibility of conflict between co-equal branches of the national government. Nor could there be any doubt concerning the exhaustion of state remedies in the light of *Kidd v.*

¹⁰⁵ *Id.* at 605.

¹⁰⁸ *Id.* at 347.

¹⁰⁶ 364 U.S. at 345.

¹⁰⁹ *Id.* at 348.

¹⁰⁷ *Id.* at 346.

¹¹⁰ *Id.* at 349.

¹¹¹ 364 U.S. 898 (1960). The Court agreed to review just a week following the decision in *Gomillion*.

¹¹² For a detailed analysis of *Gomillion*, see Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194.

¹¹³ 369 U.S. 186 (1962).

McCanless,¹¹⁴ a case involving an unsuccessful attack upon precisely the same statute before the Supreme Court of Tennessee. The holding of the state court, bottomed on its state law of remedies, foreclosed the possibility of judicial relief.¹¹⁵ At the same time, the Tennessee Constitution did not authorize resort to the initiative or any comparable device as a means of circumscribing legislative inaction. The only avenue remaining was the legislature itself, hardly a realistic forum for reapportionment in view of its long history of domination by the rural interests. To pose the issue even more sharply, the same rough measure of population equality applied to both houses of the general assembly.¹¹⁶

Mr. Justice Brennan, writing for the Court¹¹⁷ in *Baker v. Carr*, held that the district court's dismissal of the complaint was error and remanded for trial and further proceedings. In reaching this result, he focused first on the threshold questions of subject-matter jurisdiction and standing. The jurisdictional problem, in many respects, was the least troublesome to resolve. The Court noted that neither *Colegrove* nor subsequent districting cases had been dismissed for want of jurisdiction. Avoiding a ruling on the merits, the majority made clear that the matter set forth in the complaint was one which "arises under" article III of the Constitution and states a cognizable cause of action.¹¹⁸ The problem of standing proved to be somewhat more complex. As measured by Mr. Justice Brennan, the controlling yardstick was whether the appellants had such a personal stake in the outcome of the controversy as to assure that concrete adverseness which "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."¹¹⁹ The Court admitted that many prior decisions had assumed rather than articulated the premise in deciding the merits of similar claims. Nonetheless, emphasizing the rights secured in the election cases,¹²⁰ the majority found that the voters had standing since they alleged facts showing disadvantage to themselves as individuals.

¹¹⁴ 200 Tenn. 273, 292 S.W.2d 40 (1956).

¹¹⁵ *Ibid.*

¹¹⁶ TENN. CONST. art. II, §§ 5, 6. While the state constitution spoke in terms of "qualified voters," the actual basis of apportioning seats among the several counties or districts appears to have been the number of persons twenty-one years of age and over.

¹¹⁷ Justices Douglas, Clark, and Stewart, who joined the majority, filed separate concurring opinions. Justices Frankfurter and Harlan dissented. Mr. Justice Whittaker did not participate in the decision.

¹¹⁸ 369 U.S. at 199-200. The Court noted the applicability of 28 U.S.C. § 1343 (3) (1958) which confers upon the district courts jurisdiction in civil actions to redress deprivations under color of state law of any right, privilege, or immunity secured by the Federal Constitution.

¹¹⁹ 369 U.S. at 204.

¹²⁰ *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Mosley*, 238 U.S. 383 (1915); *Ex parte Siebold*, 100 U.S. 371 (1880).

Setting aside the essentially peripheral issues, Mr. Justice Brennan moved to the central question of justiciability. At the outset, he denied the proposition that the protection of a political right presented a political question.¹²¹ The non-justiciability of a political question, he asserted, is primarily a function of the separation of powers. It presupposes commitment to other branches of the ultimate decision and a lack of judicially recognized criteria. Absent reliance on the guaranty clause,¹²² there exists no constitutional bar to a determination of districting controversies on the merits.¹²³ Judicial standards under the equal protection clause are well developed and familiar, Mr. Justice Brennan declared, and it is the duty of the courts to decide whether, on the facts, a discrimination reflects no policy, but simply arbitrary and capricious action.¹²⁴ Nor can claims be held non-justiciable under the fourteenth amendment merely because they touch matters of state governmental organization.¹²⁵

The precise meaning of the Court's pronouncement in *Baker v. Carr* remains in doubt. Surely it is an over-simplification to accept Mr. Justice Stewart's view, expressed in a concurring opinion, that the majority opinion connotes nothing more than an affirmation of the district court's jurisdiction, of the standing of the litigants, and of the justiciability of the controversy.¹²⁶ To avouch that a federal forum has been made available for the assertion of a constitutional claim without at least some intimation that a violation may have occurred seems too recondite a proposition to maintain. While the Court's treatment of the issues remains technically within the "correct" bounds outlined by Mr. Justice Stewart, the equal protection clause plainly is made the adjudicatory standard by reference to which the "reasonableness" of

¹²¹ The Court cited Mr. Justice Holmes' oft-quoted remark that such an objection is "little more than a play upon words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

¹²² Article IV, § 4 of the Constitution provides that: "The United States shall guaranty to every state in this Union a Republican Form of Government . . ." The Court consistently has refused to resort to this clause as the source of a constitutional standard for invalidating state action. See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.* 281 U.S. 74 (1930); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *O'Neill v. Leamer*, 239 U.S. 244 (1915); *Marshall v. Dye*, 231 U.S. 250 (1913); *Kiernan v. Portland*, 223 U.S. 151 (1912); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Taylor & Marshall v. Beckham (No. 1)*, 178 U.S. 548 (1900); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹²³ The Court, while rejecting any "semantic cataloguing," distinguished six elements characteristic of a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

¹²⁴ *Id.* at 226.

¹²⁵ *Id.* at 229.

¹²⁶ *Id.* at 266.

apportionment plans are to be judged.¹²⁷ The right asserted, the Court declares, is within the reach of judicial protection under the fourteenth amendment and there is no cause to doubt that trial courts will be able to fashion appropriate relief.¹²⁸

Mr. Justice Stewart cites with approval the Court's holding in *MacDougall v. Green*¹²⁹ that the equal protection clause does not deny a state the right to assure a proper diffusion of power between areas of disparate population. In case after case, he notes, the fourteenth amendment has been construed to afford the states a broad scope of discretion in enacting laws which affect some groups of citizens differently than others.¹³⁰ He reasserts the time-honored proposition—now accepted unqualifiedly in economic and social litigation¹³¹—that the presumption is strongly in favor of the constitutionality of a statute and the burden of establishing the contrary rests on him who assails it.¹³² Yet the Court's opinion does not warrant attributing such latitude to the states. Mr. Justice Brennan studiously avoids any effort to define the fourteenth amendment guarantee although the averment of a justiciable cause of action is tenable only when tied to allegations of a denial of equal protection. Nor is reference made to the discretionary standards of districting set forth in *MacDougall*. To have given explicit meaning to equal protection criteria, it may be argued, would have come close to an adjudication on the merits—an objective which the majority eschewed assiduously. On the other hand, the absence of standards cannot be taken to imply simply that federal and state courts are free to devise their own measures. Rather it suggests that the pattern of deference to the states in most areas of contemporary federalism is inapplicable to the apportionment problem. And there is reason to suppose that a variant of the doctrine of preferred status¹³³ ultimately may provide the ra-

¹²⁷ *Id.* at 226.

¹²⁸ *Id.* at 198, 237.

¹²⁹ See *supra*, p. 681.

¹³⁰ Mr. Justice Stewart follows the views expressed by the Court in *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

¹³¹ See Friedelbaum, *The Warren Court and American Federalism—A Preliminary Appraisal*, 28 U. CHI. L. REV. 53, 54-55 (1960).

¹³² Citing *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935).

¹³³ The preferred status doctrine was enunciated by Mr. Justice Stone in his now famous footnote to *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n. 4 (1938): "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . ." (Restrictions upon the right to vote were included among the categories cited.)

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . ."

tionale for post-*Baker* litigation in view of the continuing decline of equal protection as a substantive standard other than in racial discrimination cases.

The concurring opinions of Justices Clark and Douglas go much beyond the cautious posture adopted by the Court. Indeed, the weakest links in the arguments presented by both Justices stem from their efforts to maintain the permissive standards of equal protection usually applied in economic and social cases.¹³⁴ Mr. Justice Clark is particularly forthright in expressing the view, on the merits,¹³⁵ that Tennessee's apportionment statute offends the equal protection clause. Yet it detracts from his plea when he states categorically that there must be an "invidious discrimination,"¹³⁶ since a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹³⁷ Applying such broad strictures, it can hardly be held unconstitutional if, as Mr. Justice Harlan points out in a cogent dissent, "a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities."¹³⁸ Indeed, any apportionment plan, no matter how structured, can be made to provide *some* state of facts reasonably calculated to justify its existence.

The thrust of Mr. Justice Frankfurter's dissent goes to the lack of adequate standards and the obstacles to fashioning workable and enforceable remedies.¹³⁹ In uncompromising language, he takes the majority to task for remanding a "hypothetical claim resting on abstract assumptions" without providing guidelines or criteria for the making of judgments or for formulating effective modes of relief.¹⁴⁰ What is actually asked of the Court, Mr. Justice Frankfurter charges, is to choose among competing philosophies and bases of representation in order to establish an appropriate frame of government for the states. The equal protection issue, therefore, is tied inextricably to the republican-form question because what is reasonable for equal protection purposes depends upon the frame of government that is considered permissible.¹⁴¹

¹³⁴ For recent approaches to equal protection in areas other than those affecting racial minorities, see *Martin v. Walton*, 368 U.S. 25 (1961); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334 (1959); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959).

¹³⁵ Mr. Justice Clark confessed his inability to "muster a court to dispose of the case on the merits. . . ." He expressed doubt that anything more could be gained on remand, other than time. 369 U.S. at 261.

¹³⁶ Citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

¹³⁷ Citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

¹³⁸ 369 U.S. at 336.

¹³⁹ The opinion also contains an eloquent plea for judicial self-restraint and additional supporting props for the defunct doctrines of *Colegrove v. Green*. *Id.* at 277-78.

¹⁴⁰ *Id.* at 267.

¹⁴¹ *Id.* at 301.

Most disturbing to Mr. Justice Frankfurter is the seemingly irresponsible attitude of the Court in making *in terrorem* pronouncements without first resolving the problem of remedies.¹⁴² He condemns the advice offered by the United States as *amicus curiae* to have the Court put off any effort to determine the nature of the remedy, but merely to assert the justiciability of the issue.¹⁴³

Mr. Justice Harlan joined Mr. Justice Frankfurter's dissent and, in a separate opinion, scored the inadequacy of mathematical formulas as measures of the rationality of an apportionment.¹⁴⁴ He found nothing in recent interpretations of the equal protection clause to prevent the states from choosing an electoral legislative structure best suited to their own internal needs.¹⁴⁵ The Court's action, Harlan averred, strikes deep into the heart of the American federal system and reverses the traditional deference afforded the judgment of state legislatures and courts on matters of basically local concern.¹⁴⁶ He concluded that "what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication."¹⁴⁷

Surely the most telling arguments of the dissenters in *Baker* concern the failure of the Court to delineate viable standards and remedies. Can judges in federal and state courts be expected to provide solutions unless the Supreme Court demonstrates a willingness at some point to lead the way? The refusal to offer some inkling of the guidelines to be followed likewise places in doubt any efforts on the part of the states to undertake revisions of their representative systems. Ultimately, too, a choice must be made among alternative modes of relief created on an *ad hoc* basis in the federal and state courts or, as was done in the second *Brown*¹⁴⁸ case, a general implementing procedure will have to be devised by the Court itself.

A month after the ruling in *Baker v. Carr*, the Court handed down its second apportionment decision in *Scholle v. Hare*.¹⁴⁹ The case arose from a citizen-voter action for mandamus before the Supreme Court of Michigan¹⁵⁰ to prevent the secretary of state from holding elections for the state senate and, on the failure of the legislature to enact a valid reapportionment measure, to order that the election be conducted on an at-large basis. At issue was an equal protection challenge to the constitutionality of a 1952 amendment to the state constitution¹⁵¹ which had the effect of "freezing" senatorial districts which had existed since 1925. No provision was made for coping with disparities of population. The petition made the point that, on the basis of pro-

¹⁴² *Id.* at 270.

¹⁴³ See the Brief for the United States as Amicus Curiae on Reargument, pp. 48-50.

¹⁴⁴ 369 U.S. at 340.

¹⁴⁵ *Id.* at 334.

¹⁴⁸ *Brown v. Board of Education*, 349 U.S. 294 (1955).

¹⁴⁶ *Id.* at 332.

¹⁴⁹ 369 U.S. 429 (1962).

¹⁴⁷ *Id.* at 339.

¹⁵⁰ 360 Mich. 1, 104 N.W.2d 63 (1960).

¹⁵¹ MICH. CONST. art. V, § 2, as implemented by MICH. STAT. ANN. §§ 2.27(1), 2.27(2) (1961).

jected 1960 census figures, plaintiff's district would have 724,000 persons while the smallest would have only 49,000, a variation of 15 to 1.

In a five to three decision, the Michigan Supreme Court dismissed the petition for mandamus. However, the exact basis of the court's action was not clear. Four of the majority justices joined in an opinion which rejected the proposition that substantial voting equality was a measure of legislative representation under the equal protection clause.¹⁵² A fifth member of the eight-man court expressed the view that the fourteenth amendment created a justifiable constitutional right but, he held, *Colegrove*, *MacDougall*, and *South* precluded judicial intervention.¹⁵³ Herein lay the puzzle: Had a majority of the Michigan Supreme Court actually disposed of the case on fourteenth amendment grounds, *i.e.*, on the merits, or was the court equally divided on the substantive issue?

The United States Supreme Court, in a one-line per curiam opinion, vacated the judgment and remanded to the state court for further consideration in the light of *Baker v. Carr*. As Justices Clark and Stewart reflected upon the Michigan decision in a concurring opinion, all but three members of the state court had held that, whatever the underlying merits of the equal protection claim, its assertion was not enforceable in the courts.¹⁵⁴ Mr. Justice Harlan, dissenting, took issue with this interpretation and asserted that the appeal should be dismissed for want of a substantial federal question or that probable jurisdiction should be noted and the case set for argument.¹⁵⁵ He charged that the Court had been less than forthright in remanding: "That court [the Supreme Court of Michigan] is left in the uncomfortable position where it will have to choose between adhering to its present decision—in my view a faithful reflection of this Court's past cases—or treating the remand as an oblique invitation from this Court to hold that the Equal Protection Clause prohibits a State from constitutionally freezing the seats in its Senate, with the effect of maintaining numerical voting inequalities . . ."¹⁵⁶

The dangers of per curiam disposition¹⁵⁷ in a factually different context came sharply to the fore in *Scholle v. Hare*. Unlike *Baker v. Carr* in the "light" of which the case was remanded, the challenged districting in *Scholle* reflected a popular mandate expressed in a state-wide referendum held in 1952. It was the positive product of the electorate itself and not of legislative inaction. Furthermore, the senatorial districting approved at the election became a part

¹⁵² See the opinion by Justice Edwards, 360 Mich. at 85, 104 N.W.2d at 107.

¹⁵³ Opinion by Justice Black. *Id.* at 110, 104 N.W.2d at 120.

¹⁵⁴ 369 U.S. at 430.

¹⁵⁵ *Id.* at 435.

¹⁵⁶ *Id.* at 434-35.

¹⁵⁷ On "per curiam practice," see Brown, *Foreword: Process of Law, The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77 (1958); Note, 69 HARV. L. REV. 707 (1956); Comment, 27 U. CHI. L. REV. 128 (1959).

of the state's constitution upon adoption. Nor was the districting clause subject to the charge that all political channels for change had been exhausted since the people had open to them, and had actually resorted to, the regular amending process to establish the very apportionment now under review.

IV. DRAFTING WORKABLE STANDARDS AND REMEDIES

The Meaning of Equal Protection—Perhaps the most perplexing question left open in *Baker* concerns the equal protection standards to be applied in judging the constitutionality of a state apportionment scheme. In a brief reference, the Court speaks of "well developed and familiar" standards.¹⁵⁸ Yet there are at least two sets of judicial criteria which mark out the contemporary bounds of equal protection. The first has emerged from post-1937 cases involving attacks on the validity of economic and social legislation. The second has developed from claims of invalidity based on discrimination as to race. In each of these areas, the nature of the tests employed has been such as to produce almost diametrically opposite results.

Differences in fashioning a consistent doctrine of deference¹⁵⁹ to the states cannot obscure the Court's unequivocal repudiation of the old equal protection standards as a measure of the constitutionality of economic regulatory statutes. Cases postdating 1937 reiterate the now familiar theme that judges should not presume to decide questions of desirability for society. In a return to the traditional philosophy expressed by Mr. Chief Justice Waite in *Munn v. Illinois*,¹⁶⁰ the Court has held that the proper forum for the correction of ill-considered legislation is a responsible and responsive electorate. There has developed a policy of realignment which shifts the balance within the federal system in the direction of state legislative and judicial control. On the face of the opinions in cases involving a review of economic and social programs, the Court has abandoned its former supervisory role.

If *Berman v. Parker*¹⁶¹ and *Williamson v. Lee Optical*¹⁶² are accepted as conclusive, the Court has adopted a sweeping presumption of constitutional validity when any legislative basis reasonably can be assumed or inferred. The burden of proving unconstitutionality—in practice, almost an insuperable

¹⁵⁸ 369 U.S. at 226.

¹⁵⁹ For background materials concerning the development of a doctrine of deference, see generally Friedelbaum, *supra*, note 131.

¹⁶⁰ 94 U.S. 113 (1877).

¹⁶¹ 348 U.S. 26 (1954). At issue was a constitutional challenge to an urban redevelopment statute in the District of Columbia. Mr. Justice Douglas, speaking for a unanimous Court, referred to the police power in these terms: "The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32.

¹⁶² 348 U.S. 483 (1955). In *Lee Optical*, the Court sustained an Oklahoma statute dealing with the regulation of those engaged in various aspects of visual care.

one—is thrust wholly upon the party attacking the statute. Such a set of standards, applied uniformly, would serve to nullify the possibility of successful review in the federal courts. Yet, the question remains, is there a point of “invidious discrimination”¹⁶³ beyond which an exercise of state power will not be sanctioned? In the 1957 case of *Morey v. Doud*,¹⁶⁴ the Court found that the Illinois Legislature had crossed this ill-defined boundary and had violated equal protection guarantees in exempting the American Express Company from the requirement that any firm selling or issuing money orders secure a license and submit to state regulation. The majority opinion emphasized the remote relationship of the statutory classification to the purpose of the law or to business characteristics and the creation of a closed class by the singling out of the money orders of a named company.¹⁶⁵ Despite repeated disclaimers that the past was being revived, Mr. Justice Frankfurter expressed regret that the Court found it necessary to revert to its former role as a super-legislature: “Sociologically one may think what one may of the State’s recognition of the special financial position obviously enjoyed by the American Express Co. Whatever one may think is none of this Court’s business.”¹⁶⁶

Apart from the admitted contingency of an occasional deviation like *Morey v. Doud*, the fears adverted to by Mr. Justice Frankfurter find little basis in the Court’s oft-expressed attitude. In the 1959 case of *Allied Stores of Ohio, Inc. v. Bowers*,¹⁶⁷ a state taxing statute was held to comport with equal protection requirements in subjecting the property of domestic corporations to a levy not applied to identical property of out-of-state corporations. The Court denied that a classification, though discriminatory, was “invidious or palpably arbitrary” if any state of facts reasonably could be conceived to sustain it.¹⁶⁸ Mr. Justice Whittaker refused categorically to be guided by considerations of intent: “What were the special reasons, motives, or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor is it important that we should . . . for a state legislature need not explicitly declare its purpose.”¹⁶⁹

The Court had occasion to review its latitudinarian approach to equal protection standards in the *Sunday Closing Law Cases*¹⁷⁰ and, if possible, it seemed to broaden the permissible scope of state legislative activity. Mr. Chief Justice Warren, speaking for a majority in *McGowan v. Maryland*, held that

¹⁶³ Mr. Justice Douglas, writing for the Court in *Lee Optical*, declared that the “prohibition of the Equal Protection Clause goes no further than the invidious discrimination.” *Id.* at 489. Compare *Goesaert v. Cleary*, 335 U.S. 464 (1948).

¹⁶⁴ 354 U.S. 457 (1957).

¹⁶⁷ 358 U.S. 522 (1959).

¹⁶⁵ *Id.* at 467.

¹⁶⁸ *Id.* at 528-29.

¹⁶⁶ *Id.* at 475 (dissenting opinion).

¹⁶⁹ *Id.* at 528.

¹⁷⁰ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Mkt., Inc.*, 366 U.S. 617 (1961).

while no precise formula had been developed, the fourteenth amendment afforded the states a wide area of discretion in enacting laws which affect some groups of citizens differently than others:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

...

[T]he Equal Protection Clause relates to equality between persons as such, rather than between areas and . . . territorial uniformity is not a constitutional prerequisite.¹⁷¹

Though the Court divided on first amendment grounds, there were no differences over the majority's interpretation of the equal protection clause.¹⁷²

Recent opinions portend a general substitution of state judicial appraisals of equal protection for a nationally-oriented standard. Remedies against legislation in the regulatory field—indeed, any measure of effective review—hereafter must be sought from state courts not bound by precedents of national authority in determining what have, in fact, become state constitutional issues.¹⁷³ How, then, can the authors of the three concurring opinions in *Baker* look to such cases for measures in determining whether a state apportionment betrays an "invidious discrimination"? In practical terms, the established tests afford the state unlimited discretion if any basis for the legislative scheme reasonably may be assumed. It seems evident that a literal application of the precedents cited could render the much-vaunted assertion of justiciability in *Baker* wholly unavailing.

While the standards proffered in the concurring opinions are excessively permissive, alternative contemporary measures of the fourteenth amendment guarantee are tied to the racial discrimination cases. In this area, the Court has placed increasing emphasis on equal protection as a means of imposing a substantial burden of justification on the state. At times, the weight of this burden has been so pronounced as to create a presumption against constitutional-

¹⁷¹ 366 U.S. at 425-26, 427.

¹⁷² See the separate opinion of Mr. Justice Frankfurter, *Id.* at 524 and Mr. Justice Brennan's opinion in *Braunfeld v. Brown*, 366 U.S. at 610. During the 1961 Term, the Court considered and rejected an equal protection challenge to a state statute and court rules denying a duly licensed resident the right to practice law in the courts of the state, without associating local counsel, solely because he practiced regularly in an adjoining state. *Martin v. Walton*, 368 U.S. 25 (1961). Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the ground that the law was "invidious in its application" since it bore no relation to the declared evil at which it was aimed. *Id.* at 28.

¹⁷³ See Hetherington, *State Economic Regulation and Substantive Due Process*, 53 NW. U.L. REV. 13, 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

ity.¹⁷⁴ It requires little imagination to perceive that the approach being developed here is as ill-adapted to the apportionment problem as that deriving from the regulatory cases. Pursued with any degree of constancy, a standard grounded upon what is fast becoming a presumption of invalidity could effect far-reaching changes in the institutional structure of the states.

If the traditional diversities of American federalism are to be preserved, flexible standards, especially adapted to districting, need to be developed. The Court must avoid the easy temptation to create a judicially-inspired mold, fashioned and imposed uniformly. To be sure, the equal protection clause of the fourteenth amendment can be made to provide a serviceable fulcrum in the adjudication of claims. But it would seem inescapable that some reliance be placed on a balancing formula. Competing interests need to be weighed carefully in giving substantive content to the amorphous phrases of the fourteenth amendment. At root, the problem reduces to one of reconciling the interest of the individual or the group alleging discrimination with that of maintaining the integrity of the state as a polity.

The majority opinion in *Baker* points the way to the development of pliable standards: "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."¹⁷⁵ In *W.M.C.A., Inc. v. Simon*,¹⁷⁶ the Court offered an additional clew in holding that a justiciable cause of action is stated by a claim of "arbitrary impairment of votes by means of invidiously discriminatory geographic classification."¹⁷⁷ Intrinsically, there can be no objection to any of these characterizations. Indeed, there is considerable room for differences in weighing conflicting values.¹⁷⁸

Within the guidelines of a flexible concept of equal protection, how best

¹⁷⁴ Though the doctrinal progress of equal protection in the area of racial discrimination was modeled anew in *Brown v. Board of Education*, 347 U.S. 483 (1954), the origins of a "national constitutional policy" favoring equality predate the desegregation controversy. See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) in the field of public education, and *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948) relating to restrictive covenants. The expanding scope of the state action concept recently was evidenced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

¹⁷⁵ 369 U.S. at 226 (emphasis by the Court).

¹⁷⁶ 370 U.S. 190 (1962). The case came before the Court on appeal from a doctrinally divided three-judge district court to review a challenge to the validity of the apportionment article of the Constitution of New York. In a brief per curiam opinion, the case was remanded for further consideration in the light of *Baker v. Carr*. Mr. Justice Harlan dissented.

¹⁷⁷ *Id.* at 191.

¹⁷⁸ Some could be expected to demonstrate a strong attachment to the reasonable man doctrine in support of an existing state districting scheme unless it were clearly "irrational." Others might feel a propensity to uphold the fourteenth amendment claim with greater emphasis upon the rights of the individual or the group.

may the assertion of justiciability in *Baker* be made a curative rather than a destructive force? It would seem that, whenever "invidious discrimination," "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 representative systems. Decisions of this nature call for a most discreet and resourceful exercise of the Court's judgment.

Remedies and Methods of Implementation—A federal court, in giving effect to a federal right, is not bound to follow the remedial doctrines of the state courts.¹⁷⁹ Once a declaration of unconstitutionality has been made, ancillary relief conceivably could take the form of mandamus, injunction, or an order for an at-large election. Clearly, a state legislature is not constitutionally immune from the issuance of mandamus by a federal court. Unlike litigation before the state judiciaries, those involved in a federal proceeding cannot interpose the doctrine of separation of powers as a bar.¹⁸⁰ Yet the Supreme Court has been reluctant to enforce a decree against a state legislature by mandamus. In a historic decision in *Virginia v. West Virginia*,¹⁸¹ a unanimous Court ordered the legislature of West Virginia to fulfill a prior obligation to assume its just share of Virginia's state debt. While Mr. Chief Justice White warned that the judicial power involved the right to enforce, if need be, by mandamus, the fashioning of a remedy was postponed. The real possibility of an ultimate resort to the writ was averted when the West Virginia Legislature appropriated sufficient funds to meet the obligation.¹⁸² Though the power of the federal courts to issue the writ undoubtedly remains unimpaired, serious considerations arising from the federal-state relationship militate against any general resort to it.¹⁸³

A number of apportionment suits have included pleas for injunctive re-

¹⁷⁹ *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 455-56 (1942); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940).

¹⁸⁰ Traditionally, the state courts have declined to issue mandamus against a coordinate and co-equal branch of government. See, e.g., *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564 (1944). However, a recent California decision sanctions the writ against a governor in carrying out ministerial responsibilities. *Jenkins v. Knight*, 46 Cal. 2d 220, 293 P.2d 6 (1956). By analogy, this line of reasoning might be applied to a legislature under a constitutional mandate to apportion periodically. On the general problem, see Note, 15 *RUTGERS L. REV.* 82, 91-92 (1960).

¹⁸¹ 246 U.S. 565 (1918).

¹⁸² See Powell, *Coercing a State to Pay a Judgment: Virginia v. West Virginia*, 17 *MICH. L. REV.* 1 (1918).

¹⁸³ A failure to obey by a state legislature could lead to contempt proceedings and difficult, yet unresolved, questions of enforcement.

lief¹⁸⁴ to restrain election officials from certifying candidates or holding elections for members of the legislature. This approach is particularly designed to meet the objection that mandamus is unavailing to compel action by a legislative body. However, consideration must be given to the results that may flow from enjoining all future elections. Continued legislative inaction in defiance of this form of judicial pressure would at best simply maintain the *status quo*. At worst is the contingency, accepted as "inevitable" in a few jurisdictions, that the legislature would come to an end unless express legal provision is made for the election of a new body.¹⁸⁵

A judicial order requiring a state-wide election at large has been suggested as the least disruptive alternative to mandamus and injunctive restraint. On the positive side, the at-large technique has the authority of precedent established in a series of federal and state cases.¹⁸⁶ Moreover, it is frankly put forward as a temporary spur to legislative action, underscoring the need in such dramatic terms that the electorate cannot fail to be aware of it. Although the at-large election would seem to be desirable in coping with state recalcitrance to make provision for increases or decreases in the periodic allotment of congressional seats, it is ill-suited for use by a federal court as a remedy to compel the internal apportionment of a state legislature. The state-law effects of such an order might be beyond the control of a federal court which, in an affirmative sense, could not confer legitimacy upon the body created. Should the highest court of a state refuse to "recognize" the federally-inspired body as a constitutional unit with power to enact laws,¹⁸⁷ the state would be deprived of an effective legislature short of an authoritative determination by the Supreme Court affirming its status.¹⁸⁸ Viewed in this light, the at-large requirement could occasion a more extreme encroachment upon a state's power to fix upon and maintain its internal structure than either mandamus or injunction.

There is a fourth alternative, an implementing procedure deriving from the

¹⁸⁴ See, e.g., *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959); *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958); *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960); *Butcher v. Rice*, 397 Pa. 158, 153 A.2d 869 (1959).

¹⁸⁵ For a recent exposition of the "state destruction" theory, see *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (1956). An earlier version appears in *Fesler v. Brayton*, 145 Ind. 71, 44 N.E. 37 (1896).

¹⁸⁶ See, e.g., *Smiley v. Holm*, 285 U.S. 355 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932). Virginia's highest court ordered an election at large although the state constitution did not expressly authorize it. *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932).

¹⁸⁷ This eventuality, though admittedly remote, is within the bounds of possibility. In *Kidd v. McCanless*, the Supreme Court of Tennessee stated categorically that "there is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn. 273, 277, 292 S.W.2d 40, 42 (1956). It is at least problematical whether an at-large requirement, embodied as a federal remedy, would alter the attitude of a state court.

¹⁸⁸ Such a judgment conceivably could enmesh the Court in questions resting on the guaranty clause as construed in *Baker v. Carr*, 369 U.S. at 223-29.

principles of equitable abstention,¹⁸⁹ that would seem to hold great promise in malapportionment cases.¹⁹⁰ It involves postponement of the exercise of federal jurisdiction to permit a remission of issues to the state courts. Where, as here, federal constitutional questions are closely intermingled with questions of state law, the abstention doctrine could minimize the degree of interference in the basic framework of state government and reduce the areas of possible federal-state conflict. Yet there is no danger of a reversion, by indirection, to the nonjusticiability quandary of *Colegrove*. Like equitable discretion, the abstention doctrine does not go to the power of the federal courts. Rather it concerns the discretion with which such power is to be exercised.¹⁹¹ In malapportionment cases, there can be no question that the federal courts retain jurisdiction pending a determination in the state courts. Presumably, "correctives" may be introduced, where necessary, to bring the state's final product into conformity with equal protection standards once these have been carved out by the Supreme Court.

Measured in terms of effectiveness, the state courts are to be preferred as supervisory agents in the apportioning process. On proper presentment of a federal claim, it is settled that state tribunals may exercise jurisdiction coextensive with that of the federal courts.¹⁹² In some instances, too, the state constitutions provide a specificity wholly lacking in the general phrases of the fourteenth amendment. In others, the state courts have attained remarkable success in achieving apportionment reform by legislative action or constitutional amendment.¹⁹³ As a part of a separate opinion in *Scholle v. Hare*, Justice

¹⁸⁹ An early statement of the doctrine appears in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Its subsequent development is reflected in a series of cases decided during the 1958 Term. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Harrison v. NAACP*, 360 U.S. 167 (1959); *Martin v. Creasy*, 360 U.S. 219 (1959). A review of these cases may be found in Friedelbaum, *supra* note 131, at 66-68; Kurland, *Toward A Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960). For detailed applications of the doctrine, see Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, 59 COLUM. L. REV. 749 (1959).

¹⁹⁰ The Solicitor General acknowledges the attractiveness of equitable abstention in this area. However, relitigation of the questions in the Tennessee case was held unnecessary in view of an authoritative decision by the state's highest court. See Brief for the United States as Amicus Curiae on Reargument, pp. 72-73, *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁹¹ *Catoggio v. Grogan*, 149 F. Supp. 94 (D. N.J. 1957).

¹⁹² In *Claffin v. Houseman*, 93 U.S. 130, 137 (1876), the Court stated: "The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." See also *Testa v. Katt*, 330 U.S. 386 (1947).

¹⁹³ See, e.g., *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960). For a survey of pre-*Baker* efforts to work out solutions to the apportionment dilemma, see generally Baker, *STATE CONSTITUTIONS: REAPPORTIONMENT* (1960) and Lewis, *supra* note 40, at 1087-90.

Black of the Michigan Supreme Court extended both an invitation and a challenge to the federal judiciary:

Let the Supreme Court loan the 14th amendment to the state courts—for employment in cases where the Constitution or laws of a state create and insure gross inequality of voting power of citizens—, and those courts will experience little difficulty in working out as needed a continuing general observance of the equality clause. . . . We can, if authorized to proceed, control the effect of our decree or decrees so that transition becomes orderly, making this provision effective prospectively, that one effective retrospectively, others effective instantler, all as proof and indicated adjustment may require.¹⁹⁴

Objection may be made that the abstention doctrine permits, if it does not encourage, evasive tactics or a purposeful proliferation of litigation by some of the state judiciaries whose philosophies may be at variance with that expressed in the prevailing opinion in *Baker v. Carr*. Absent a "pattern of subterfuge," such criticisms ignore the elementary fact—stated many years ago by Mr. Justice Gibson of the Pennsylvania Supreme Court in a paraphrase of the supremacy clause—that state judges are bound conclusively by the federal Constitution and laws.¹⁹⁵ Then, too, it bears repeating that the abstention doctrine is primarily a rule of comity; it relates to the timing rather than the propriety of a decision by the federal courts. State court proceedings, wholly inconsonant with federal judicial policy, doubtless would be reviewed by the Supreme Court and followed by a remand to the state court with directions. Should the need arise, mandamus remains available to compel a state court to give effect to the mandate of the Court.¹⁹⁶ Indeed, where non-compliance has occurred despite a second remand, the Court has asserted its power to take action of a more summary and affirmative character than mandamus by proceeding to a final decision of the case and awarding execution to the prevailing party.¹⁹⁷

V. CONCLUSION

Baker v. Carr signaled the close of an era marked by a mounting volume of futile litigation directed toward judicial intervention in the solution of an essentially political problem—the districting or apportionment of state legislatures. Following long-established tradition, groups of Americans once again

¹⁹⁴ 360 Mich. 1, 120-21, 104 N.W.2d 63, 125 (1960).

¹⁹⁵ *Eakin v. Raub*, 12 S. & R. 330 (Pa. 1825).

¹⁹⁶ See *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959); *Deen v. Hickman*, 358 U.S. 57 (1958); *Fisher v. Hurst*, 333 U.S. 147 (1948). The Supreme Court impliedly has overruled the holding of *In re Blake*, 175 U.S. 114 (1899) that the summary character of mandamus "renders it inappropriate in respect of the courts of another jurisdiction." *Id.* at 118.

¹⁹⁷ See *Williams v. Bruffy*, 102 U.S. 248 (1880); *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253 (1872); *Cook v. Burnley*, 78 U.S. (11 Wall.) 672 (1871); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

looked to the judiciary to set right what apparently had gone awry in the democratic process. And they were successful beyond expectation. Stripped of the cobwebs of "non-justiciability" and "political questions," the issue of representation took on a new dimension as one of judicial cognizance tied to the fourteenth amendment. Yet, at this writing, the standards to be applied remain vague. Existing definitions of equal protection seem inappropriate as measures in judging an apportionment plan which often reflects not merely a statutory scheme but a constitutional basis for the state's legislative machinery. The problem of weighing competing values in this area is *sui generis*. It merits nothing less than a body of flexible measures developed by careful application of sound judicial discretion in balancing local diversities against the right of the individual or group to the equal protection of the laws.

Much can be lost by hasty adjudications or the application of doctrinaire formulas. On the one hand, a literal resort to the permissive standards of the regulatory cases can, in effect, negate the new doctrine of intervention. On the other, a mechanistic approach to the broad strictures of the fourteenth amendment—tied to an exacting measure of population equality—may hold far-reaching implications for the future of American federalism. A federal district court in Atlanta,¹⁹⁸ searching for a concrete point of reference, has already succumbed to the allurements of specificity. It held that Georgia's county-unit electoral system was unconstitutional "provided no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years."¹⁹⁹ This, the court averred, was a "judicially manageable standard" contemplated in *Baker v. Carr*. Doubtless the district court was groping for some constitutional mooring where none was available. Yet a multiplicity of such "experiments," if sanctioned by the Supreme Court, could bring a stifling uniformity to the structure of state legislatures. Similarly, a formula of rigidity also could result from a congressional effort to "define" the fourteenth amendment guarantee or from a constitutional amendment embracing federally-imposed measures of "equitable representation."²⁰⁰

The problem of implementation remains another of the great unknowns in the post-*Baker* equation. Federal courts admittedly are not bound within the limitations of state remedies. But much that has been achieved in the development of a cooperative federalism can be set aside by a broad-stroked assertion

¹⁹⁸ *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962).

¹⁹⁹ *Id.* at 170.

²⁰⁰ See, e.g., Senator Clark's proposed constitutional amendment (S.J. Res. 141) introduced in September, 1961. The text is reprinted in S. REP. No. 1305, 87th Cong., 2d Sess. 23-24 (1962).

of federal judicial power. Shown the way by the Supreme Court, the states can be expected to undertake changes on their own initiative instead of awaiting judicial intervention. Should internal reform efforts fail to materialize or fall short of expectations, the abstention doctrine offers much promise as an alternative channel of relief. The state courts, armed with the fourteenth amendment, can serve as the most effective instrument for attaining long-sought objectives with a minimum of direct federal involvement. At the same time, federal jurisdiction is preserved and the traditional relationships of the national and state courts are not disturbed.

There can be little doubt that a new epoch in the history of American federalism is beginning to unfold. In well over half the states, suits challenging existing apportionment plans are either before the courts or about to be undertaken. *Baker v. Carr* is back before a three-judge court in Tennessee while the state legislature grapples with reapportionment proposals. In Michigan, *Scholle v. Hare* once again is before the state's supreme court amidst partisan debate over a revamped apportionment article included in the state's proposed new constitution. New York's basic apportionment techniques are being challenged anew as a result of the Court's remand in *W.M.C.A., Inc. v. Simon*. Doubtless more litigation will follow before the drawing of guidelines can be expected. Yet a course for the future can readily be charted. Having asserted the constitutional right, the Court's major task is to formulate standards and to make a choice among possible remedies. Few, if any, occasions in the development of the American constitutional system have called for a more circumspect exercise of judicial power.