To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart

From: Frankfurter, J.

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Literary changes throughout, particularly pp. 1-3

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SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1961.

Charles W. Baker, et al., Appellants, v. Joe C. Carr, et al. } On Appeal From the United States District Court for the Middle District of Tennessee.

[February —, 1962.]

Mr. Justice Frankfurter, whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker join, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling

must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guide-lines for formulating specific, definite remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. Jurisdiction in the abstract is meaningless. It is devoid of reality as "a brooding omnipresence in the sky" and conveying no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety.

Recent legislation, creating a district appropriately described as "an atrocity of ingenuity," is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political dis-

tricting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there's the rub. In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only an euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to issue merely hortatory addresses.

This is the latest in the series of cases in which the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been invoked in federal courts as

restrictions upon the power of the States to allocate electoral weight among the voting populations of their various geographical subdivisions.[1] The present action, which comes here on appeal from an order of a statutory three-judge District Court dismissing amended complaints seeking declaratory and injunctive relief, challenges the provisions of Tenn. Code Ann., 1955, §§ 3-101 to 3-109, which apportion state representative and senatorial seats among Tennessee's ninety-five counties.

The original plaintiffs, citizens and qualified voters entitled to vote for members of the Tennessee Legislature in the several counties in which they respectively reside, bring this action in their own behalf and "on behalf of all other voters in the State of Tennessee," or, as they alternatively assert, "on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated." The cities of Knoxville and Chattanooga and the Mayor of Nashville—on his own behalf as a qualified voter and, pursuant to an authorizing resolution by the Nashville City Council, as a representative of all the city's residents—were permitted to intervene as parties plain-

[1] See *Wood* v. *Broom*, 287 U. S. 1; *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied, 329 U. S. 828; *Cook* v. *Fortson*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Turman* v. *Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Colegrove* v. *Barrett*, 330 U. S. 804; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276; *Tedesco* v. *Board of Supervisors*, 339 U. S. 940; *Remmey* v. *Smith*, 342 U. S. 916; *Cox* v. *Peters*, 342 U. S. 936, rehearing denied, 343 U. S. 921; *Anderson* v. *Jordan*, 343 U. S. 912; *Kidd* v. *McCanless*, 352 U. S. 920; *Radford* v. *Gary*, 352 U. S. 991; *Hartsfield* v. *Sloan*, 357 U. S. 916; *Matthews* v. *Handley*, 361 U. S. 127; *Perry* v. *Folsom*, 144 F. Supp. 874 (D. C. N. D. Ala.); *Magraw* v. *Donovan*, 163 F. Supp. 184 (D. C. D. Minn.); cf. *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. C. D. Hawaii). And see *Keogh* v. *Neely*, 50 F. 2d 685 (C. A. 7th Cir.).

tiff.[2] The defendants are executive officials charged with statutory duties in connection with state elections.[3]

The original plaintiffs' amended complaint avers, in substance, the following.[4] The Constitution of the State of Tennessee declares that "elections shall be free and equal," provides that no qualifications other than age, citizenship and specified residence requirements shall be attached to the right of suffrage, and prohibits denying to any person the suffrage to which he is entitled except upon conviction of an infamous crime. Art. I, § 5; Art.

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[2] Although the motion to intervene by the Mayor of Nashville asserted an interest in the litigation in only a representative capacity, the complaint which he subsequently filed set forth that he was a qualified voter who also sued in his own behalf. The municipalities of Knoxville and Chattanooga purport to represent their residents. Since the claims of the municipal intervenors do not differ materially from those of the parties who sue as individual voters, the Court need not now determine whether the municipalities are proper parties to this proceeding. See, *e. g., Stewart* v. *Kansas City*, 239 U. S. 14.

[3] The original complaint named as defendants Tennessee's Secretary of State, Attorney General, Coordinator of Elections, and the three members of the State Board of Elections, seeking to make the Board members representatives of all the State's County Election Commissioners. The prayer in an intervening complaint by the City of Knoxville, that the Commissioners of Elections of Knox County be added as parties defendant seems not to have been acted on by the court below. Defendants moved to dismiss, *inter alia*, on the ground of failure to join indispensable parties, and they argue in this Court that only the County Election Commissioners of the ninety-five counties are the effective administrators of Tennessee's elections laws, and that none of the defendants have substantial duties in connection therewith. The District Court deferred ruling on this ground of the motion. Inasmuch as it involves questions of local law more appropriately decided by judges sitting in Tennessee than by this Court, and since in any event the failure to join County Election Commissioners in this action looking to prospective relief could be corrected, if necessary, by amendment of the complaints, the issue does not concern the Court on this appeal.

[4] Jurisdiction is predicated upon R. S. § 1979, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3).

IV, § 1. It requires an enumeration of qualified voters within every term of ten years after 1871 and an apportionment of representatives and senators among the several counties or districts according to the number of qualified voters in each [5] at the time of each decennial enumeration. Art. II, §§ 4, 5, 6. Notwithstanding these provisions, the State Legislature has not reapportioned itself since 1901. The Reapportionment Act of that year, Tenn. Acts 1901, c. 122, now Tenn. Code Ann., 1955, §§ 3–101 to 3–109,[6] was unconstitutional when enacted,

[5] However, counties having two-thirds of the ratio required for a Representative are entitled to seat one member in the House, and there are certain geographical restrictions upon the formation of Senate districts. The applicable provisions of Article II of the Tennessee Constitution are:

"*Sec. 4. Census.*—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

"*Sec. 5. Apportionment of representatives.*—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member."

"*Sec. 6. Apportionment of senators.*—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

[6] It is alleged that certain amendments to the Act of 1901 made only minor modifications of that Act, adjusting the boundaries of individual districts in a manner not material to plaintiffs' claims.

because not preceded by the required enumeration of qualified voters and because it allocated legislative seats arbitrarily, unequally and discriminatorily, as measured by the 1900 federal census. Moreover, irrespective of the question of its validity in 1901, it is asserted that the Act became "unconstitutional and obsolete" in 1911 by virtue of the decennial reapportionment requirement of the Tennessee Constitution. Continuing a "purposeful and systematic plan to discriminate against a geographic class of persons," recent Tennessee Legislatures have failed, as did their predecessors, to enact reapportionment legislation, although a number of bills providing for reapportionment have been introduced. Because of population shifts since 1901, the apportionment fixed by the Act of that year and still in effect is not proportionate to population, denies to the counties in which the plaintiffs live an additional number of representatives to which they are entitled, and renders plaintiffs' votes "not as effective as the votes of the voters residing in other senatorial and representative districts . . . ." Plaintiffs "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly . . .," and the totality of the malapportionment's effect—which permits a minority of about thirty-seven percent of the voting population of the State to control twenty of the thirty-three members of Tennessee's Senate, and a minority of forty percent of the voting population to control sixty-three of the ninety-nine members of the House—results in "a distortion of the constitutional system" established by the Federal and State Constitutions, prevents the General Assembly "from being a body representative of the people of the State of Tennessee, . . ." and is "contrary to the basic principle of representative government . . .," and "contrary to the

philosophy of government in the United States and all Anglo-Saxon jurisprudence . . . ."

Exhibits appended to the complaint purport to demonstrate the extent of the inequalities of which plaintiffs complain. Based upon "approximate voting population," [7] these set forth figures showing that the State Senator from Tennessee's most populous senatorial district represents five and two-tenths times the number of voters represented by the Senator from the least populous district, while the corresponding ratio for most and least populous House districts is more than eighteen to one. The General Assembly thus apportioned has discriminated against the underrepresented counties and in favor of the overrepresented counties in the collection and distribution of various taxes and tax revenues, notably in the dis-

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[7] The exhibits do not reveal the source of the population figures which they set forth, but it appears that the figures were taken from the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 41, at 76–91. These census figures represent the total population over twenty-one years of age in each Tennessee county; they do not purport to enumerate "qualified voters" or "qualified electors," the measure of apportionment prescribed by the Tennessee Constitution. See note 5, *supra*. To qualify to vote in Tennessee, in addition to fulfilling the age requirement, an individual must be a citizen of the United States, a resident of the State for twelve months and of the county where he offers his vote for six months next preceding the election, and must not be under the disqualification attaching to conviction for certain offenses. Tenn. Code. Ann., 1955, §§ 2–201, 2–205. The statistics found in the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 42, at 92–97, suggest that the residence requirement, in particular, may be an unknown variable of considerable significance. Appellants do not suggest a means by which a court, on the basis of the federal census figures, can determine the number of qualified voters in the various Tennessee counties.

tribution of school and highway-improvement funds,[8] this discrimination being "made possible and effective" by the Legislature's failure to reapportion itself. Plaintiffs conclude that election of the State Legislature pursuant to the apportionment fixed by the 1901 Act violates the Tennessee Constitution and deprives them of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment. Their prayer below was for a declaratory judgment striking down the Act, an injunction restraining defendants from any acts necessary to the holding of elections in the districts prescribed by Tenn. Code Ann., 1955, §§ 3–101 to 3–109, until such time as the legislature is reapportioned "according to the Constitution of the State of Tennessee," and an order directing defendants to declare the next primary and general elections for members of the Tennessee Legislature on an at-large basis—the thirty-three senatorial candidates and the ninety-nine representative candidates receiving the highest number of votes to be declared elected.[9]

Motions to dismiss for want of jurisdiction of the subject matter and for failure to state a claim were made and granted, 179 F. Supp. 824, the District Court relying upon this Court's series of decisions beginning with *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied,

[8] The "county aid funds" derived from a portion of a state gasoline privilege tax, for example, are distributed among the counties as follows: one-half equally among the ninety-five counties, one-quarter on the basis of area, one-quarter on the basis of population, to be used by county authorities in the building, repairing and improving of county roads and bridges. Tenn. Code. Ann., 1955, § 54–403. Appellants urge that this distribution is discriminatory.

[9] Plaintiffs also suggested, as an alternative to at-large elections, that the District Court might itself redistrict the State. They did not, however, expressly pray such relief.

329 U. S. 828. The original and intervening plaintiffs bring the case here on appeal. 364 U. S. 898. In this Court they have altered their request for relief, suggesting a "step-by-step approach." The first step is a remand to the District Court with directions to vacate the order dismissing the complaint and to enter an order retaining jurisdiction, providing "the necessary spur to legislative action . . . ." If this proves insufficient, appellants will ask the "additional spur" of an injunction prohibiting elections under the 1901 Act, or a declaration of the Act's unconstitutionality, or both. Finally, all other means failing, the District Court is invited by the plaintiffs, greatly daring, to order an election at large or redistrict the State itself or through a master. The Solicitor General of the United States, who has filed a brief *amicus* and argued in favor of reversal, asks the Court on this appeal to hold only that the District Court has "jurisdiction" and may properly exercise it to entertain the plaintiffs' claims on the merits. This would leave to that court after remand the questions of the challenged statute's constitutionality and of some undefined, unadumbrated relief in the event a constitutional violation is found. After an argument at the last Term, the case was set down for reargument, 366 U. S. 907, and heard this Term.

I.

In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years are overruled or disregarded. Explicitly it begins with *Colegrove* v. *Green*, *supra*, decided in 1946, but its roots run deep in the Court's historic adjudicatory process.

Colegrove held that a federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection

Clause and other federal constitutional and statutory provisions, of a state statute establishing the respective districts for the State's election of Representatives to the Congress. Two opinions were written by the four Justices who composed the majority of the seven sitting members of the Court. Both opinions joining in the result in *Colegrove* v. *Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power. While the two opinions show a divergence of view regarding some of these considerations, there are important points of concurrence. Both opinions demonstrate a predominant concern, first, with avoiding federal judicial involvement in matters traditionally left to legislative policy-making; second, with respect to the difficulty—in view of the nature of the problems of apportionment and its history in this country—of drawing on or devising judicial standards for judgment, as opposed to legislative determinations, of the part which mere numerical equality among voters should play as a criterion for the allocation of political power; and, third, with problems of finding appropriate modes of relief—particularly, the problem of resolving the essentially political issue of the relative merits of at-large elections and elections held in districts of unequal population.

The broad applicability of these considerations—summarized in the loose shorthand phrase, "political question"—in cases involving a State's apportionment of voting power among its numerous localities has led the Court, since 1946, to recognize their controlling effect in a variety of situations. (In all these cases decision was by a full Court.) The "political question" principle as applied in *Colegrove* has found wide application commensurate with its function as "one of the rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army* v. *Municipal Court,* 331

U. S. 549, 570. In *Colegrove* v. *Barrett*, 330 U. S. 804, litigants brought suit in a Federal District Court challenging as offensive to the Equal Protection Clause Illinois' state legislative apportionment laws. They pointed to state constitutional provisions requiring decennial reapportionment and allocation of seats in proportion to population, alleged a failure to reapportion for more than forty-five years—during which time extensive population shifts had rendered the legislative districts grossly unequal—and sought declaratory and injunctive relief with respect to all elections to be held thereafter. After the complaint was dismissed by the District Court, this Court dismissed an appeal for want of a substantial federal question. A similar District Court decision was affirmed here in *Radford* v. *Gary*, 352 U. S. 991. And cf. *Remmey* v. *Smith*, 342 U. S. 916. In *Tedesco* v. *Board of Supervisors*, 339 U. S. 940, the Court declined to hear, for want of a substantial federal question, the claim that the division of a municipality into voting districts of unequal population for the selection for councilmen fell afoul of the Fourteenth Amendment, and in *Cox* v. *Peters*, 342 U. S. 936, rehearing denied, 343 U. S. 921, it found no substantial federal question raised by a state court's dismissal of a claim for damages for "devaluation" of plaintiff's vote by application of Georgia's county-unit system in a primary election for the Democratic gubernatorial candidate. The same Georgia system was subsequently attacked in a complaint for declaratory judgment and an injunction; the federal district judge declined to take the requisite steps for the convening of a statutory three-judge court; and this Court, in *Hartsfield* v. *Sloan*, 357 U. S. 916, denied a motion for leave to file a petition for a writ of mandamus to compel the district

judge to act. In *MacDougall* v. *Green*, 335 U. S. 281, 283, the Court noted that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and, citing the *Colegrove* cases, declined to find in "such broad constitutional concepts as due process and equal protection of the laws," *id.*, at 284, a warrant for federal judicial invalidation of an Illinois statute requiring as a condition for the formation of a new political party the securing of at least two hundred signatures from each of fifty counties. And in *South* v. *Peters*, 339 U. S. 276, another suit attacking Georgia's county-unit law, it affirmed a District Court dismissal, saying

> "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *Id.*, at 277.

Of course it is important to recognize particular, relevant diversities among comprehensively similar situations. Appellants seek to distinguish several of this Court's prior decisions on one or another ground—*Colegrove* v. *Green* on the ground that congressional, not state legislative, apportionment was involved; *Remmey* v. *Smith* on the ground that state judicial remedies had not been tried; *Radford* v. *Gary* on the ground that Oklahoma has the initiative, whereas Tennessee does not. It would only darken counsel to discuss the relevance and significance of each of these assertedly distinguishing factors here and in the context of this entire line of cases. Suffice it that they do not serve to distinguish *Colegrove* v. *Barrett*, *supra*, which is on all fours with the present case, or to distinguish *Kidd* v. *McCanless*, 352 U. S. 920, in which

the full Court without dissent, only five years ago, dismissed on authority of *Colegrove* v. *Green* and *Anderson* v. *Jordon*, 343 U. S. 912, an appeal from the Supreme Court of Tennessee in which a precisely similar attack was made upon the very statute now challenged. If the weight and momentum of an unvarying course of carefully considered decisions are to be respected, appellants' claims are foreclosed not only by precedents governing the exact facts of the present case but are themselves supported by authority the more persuasive in that it gives effect to the *Colegrove* principle in distinctly varying circumstances in which state arrangements allocating relative degrees of political influence among geographic groups of voters were challenged under the Fourteenth Amendment.

II.

The *Colegrove* doctrine, in the form in which repeated decisions have settled it, was not an innovation. It represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. To classify the various instances as "political questions" is rather a form of stating this conclusion than revealing of analysis.[10] Some of the cases so labelled have no relevance here. But from others emerge unifying considerations that are compelling.

1. The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters. While this concern alone undoubtedly accounts for many of the decisions,[11] others do not fit the pattern. It would hardly

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[10] See Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 45 *et seq.* (1961).

[11] See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 634, 635; *The Divina Pastora*, 4 Wheat. 52; *Williams* v. *Suffolk Ins. Co.*, 13 Pet.

embarrass the conduct of war were this Court to determine, in connection with private transactions between litigants, the date upon which war is to be deemed terminated. But the Court has refused to do so. See, *e. g.*, *The Protector*, 12 Wall. 700; *Brown* v. *Hiatts*, 15 Wall. 177; *Adger* v. *Alston*, 15 Wall. 555; *Williams* v. *Bruffy*, 96 U. S. 176, 192–193. It does not suffice to explain such cases as *Ludecke* v. *Watkins*, 335 U. S. 160—deferring to political determination the question of the duration of war for purposes of the Presidential power to deport alien enemies—that judicial intrusion would seriously impede the President's power effectively to protect the country's interests in time of war. Of course, this is true; but the precise issue presented is the duration of the time of war which demands the power. Cf. *Martin* v. *Mott*, 12 Wheat. 19; *Lamar* v. *Browne*, 92 U. S. 187, 193; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Kahn* v. *Anderson*, 255 U. S. 1. And even for the purpose of determining the extent of congressional regulatory power over the tribes and dependent communities of Indians, it is ordinarily for Congress, not the Court, to determine whether or not a particular Indian group retains the characteristics constitutionally requisite

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415; *Kennett* v. *Chambers*, 14 How. 38; *Doe* v. *Braden*, 16 How. 635; *Jones* v. *United States*, 137 U. S. 202; *Terlinden* v. *Ames*, 184 U. S. 270; *Charlton* v. *Kelly*, 229 U. S. 447; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ex parte Peru*, 318 U. S. 578; *Clark* v. *Allen*, 331 U. S. 503. Compare *Foster and Elam* v. *Neilson*, 2 Pet. 253 with *United States* v. *Arredondo*, 6 Pet. 691. Of course, judgment concerning the "political" nature of even a controversy affecting the nation's foreign affairs is not a simple mechanical matter, and certain of the Court's decisions have accorded scant weight to the consideration of unity of action in the conduct of external relations. Compare *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, with *United States* v. *Pink*, 315 U. S. 203.

to confer the power.[12] *E. g., United States* v. *Holliday,* 3 Wall. 407; *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *United States* v. *Sandoval,* 231 U. S. 28. A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the politicial agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. Where the question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where its determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action. See *Chicago & Southern Air Lines, Inc.,* v. *Waterman S. S. Corp.,* 333 U. S. 103. The dominant consideration is "the lack of satisfactory criteria for a judicial determination . . . ." Mr. Chief Jusice Hughes, for the Court, in *Coleman* v. *Miller,* 307 U. S. 433, 454–455. Compare *United States* v. *Rogers,* 4 How. 567, 572, with *Worcester* v. *Georgia,* 6 Pet. 515.[13]

This may be, like so many questions of law, a matter of degree. Questions have arisen under the Constitu-

[12] Obviously, this is the equivalent of saying that the characteristics are not "constitutionally requisite" in a judicially enforceable sense. The recognition of their necessity as a condition of legislation is left, as is observance of certain other constitutional commands, to the conscience of the non-judicial organs. Cf. *Kentucky* v. *Dennison,* 24 How. 66.

[13] Also compare the *Coleman* case and *United States* v. *Sprague,* 282 U. S. 716, with *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221. See the *National Prohibition Cases,* 253 U. S. 350; and consider the Court's treatment of the several contentions in *Leser* v. *Garnett,* 258 U. S. 130.

tion to which adjudication gives answer although the criteria for decision are less than unwavering bright lines. Often in these cases illumination was found in the federal structures established by, or the underlying presuppositions of, the Constitution. With respect to such questions, the Court has recognized that, concerning a particular power of Congress put in issue, ". . . effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard* v. *Filburn,* 317 U. S. 111, 120. It is also true that even regarding the duration of war and the status of Indian tribes, referred to above as subjects ordinarily committed exclusively to the nonjudicial branches, the Court has suggested that some limitations exist upon the range within which the decisions of those branches will be permitted to go unreviewed. See *United States* v. *Sandoval, supra,* at 46; cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543. But this is merely to acknowledge that particular circumstances may differ so greatly in degree as to differ thereby in kind, and that, although within a certain range of cases on a continuum, no standard of distinction can be found to tell between them, other cases will fall above or below the range. The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest. See the disposition of contentions based on logically distorting views of *Colegrove* v. *Green* and *Hunter* v. *Pittsburgh,* 207 U. S. 161, in *Gomillion* v. *Lightfoot,* 364 U. S. 339.

2. The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of state power challenged under broad federal guarantees. "We should be very reluctant to decide

that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been . . . such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution." *Wilson* v. *North Carolina*, 169 U. S. 586, 596. See *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548; *Walton* v. *House of Representatives*, 265 U. S. 487; *Snowden* v. *Hughes*, 321 U. S. 1. Cf. *In re Sawyer*, 124 U. S. 200, 220–221.

Where, however, state law has made particular federal questions determinative of relations within the structure of state government, not in challenge of it, the Court has resolved such narrow, legally defined questions in proper proceedings. See *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135. In such instances there is no conflict between state policy and the exercise of federal judicial power. This distinction explains the decisions in *Smiley* v. *Holm*, 285 U. S. 355; *Koenig* v. *Flynn*, 285 U. S. 375; and *Carroll* v. *Becker*, 285 U. S. 380, in which the Court released state constitutional provisions prescribing local lawmaking procedures from misconceived restriction of superior federal requirements. Adjudication of the federal claim involved in those cases was not one demanding the accommodation of conflicting interests for which no readily accessible judicial standards could be found. See *McPherson* v. *Blacker*, 146 U. S. 1, in which, in a case coming here on writ of error from the judgment of a state court which had entertained it on the merits, the Court treated as justiciable the claim that a State could

not constitutionally select its presidential electors by districts, but held that Art. II, § 1, cl. 2, of the Constitution left the mode of choosing electors in the absolute discretion of the States. Cf. *Pope* v. *Williams*, 193 U. S. 621; *Breedlove* v. *Suttles*, 302 U. S. 277. To read with literalness the abstracted jurisdictional discussion in the *McPherson* opinion reveals the danger of conceptions of "justiciability" derived from talk and not from the effective decision in a case. In probing beneath the surface of cases in which the Court has declined to interfere with the actions of political organs of government, of decisive significance is whether in each situation the ultimate decision has been to intervene or not to intervene. Compare the reliance in *South* v. *Peters*, 339 U. S. 276, on *MacDougall* v. *Green*, 335 U. S. 281, and the "jurisdictional" form of the opinion in *Wilson* v. *North Carolina*, 169 U. S. 586, 596, *supra*.

3. The cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms, and it is no less true of the Equal Protection Clause of the Fourteenth. *Slaughter-House Cases*, 16 Wall. 36, 67–72; *Strauder* v. *West Virginia*, 100 U. S. 303, 306–307; *Nixon* v. *Herndon*, 273 U. S. 536, 541. Thus the Court, in cases involving discrimination against the Negro's right to vote, has recognized not only the action at law for damages,[14] but, in appropriate circumstances, the extraordinary

[14] *E. g., Myers* v. *Anderson*, 238 U. S. 368; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 649. The action for damages for improperly rejecting an elector's vote had been given by the English law since the time of *Ashby* v.

remedy of declaratory or injuctive relief.[15] *Schnell* v. *Davis,* 336 U. S. 933; *Terry* v. *Adams,* 345 U. S. 461.[16] Injunctions in these cases, it should be noted, would not have restrained state-wide general elections. Compare *Giles* v. *Harris,* 189 U. S. 475.

4. The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sovereignty, of government." *Massachusetts* v. *Mellon,* 262 U. S. 447, 485. See *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162; *New Jersey* v. *Sargent,* 269 U. S. 328, 337. The "political question" doctrine, in this aspect, reflects the policies underlying the requirement of "standing": that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry. See *Stearns* v. *Wood,* 236 U. S. 75; *Fairchild* v. *Hughes,* 258 U. S. 126; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89–91. What renders cases of this kind non-justiciable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; [17] nor is it the nature of the legal

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White, 1 Brown's Cases in Parliament 62; 2 Ld. Raym. 938; 3 Ld. Raym. 320, a case which in its own day precipitated an intra-parliamentary war of major dimensions. See 6 Hansard, Parliamentary History of England (1810), 225–324, 376–436. Prior to the racial discrimination cases, this Court had recognized the action, by implication, in dictum in *Swafford* v. *Templeton,* 185 U. S. 487, and *Wiley* v. *Sinkler,* 179 U. S. 58, both respecting federal elections.

[15] Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339.

[16] By statute an action for preventive relief is now given the United States in certain voting cases. 71 Stat. 637, 42 U. S. C. § 1971 (c), amending R. S. § 2004. See *United States* v. *Raines,* 362 U. S. 17; *United States* v. *Thomas,* 362 U. S. 58.

[17] Compare *Rhode Island* v. *Massachusetts,* 12 Pet. 657, and cases following, with *Georgia* v. *Stanton,* 6 Wall. 50.

question involved, for the same type of question has been adjudicated when presented in other forms of controversy.[18] The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade. See *Texas* v. *White*, 7 Wall. 700; *White* v. *Hart*, 13 Wall. 646; *Phillips* v. *Payne*, 92 U. S. 130; *Marsh* v. *Burroughs*, 1 Woods 463, 471–472 (Bradley, Circuit Justice); cf. *Wilson* v. *Shaw*, 204 U. S. 24; but see *Coyle* v. *Smith*, 221 U. S. 559. Thus, where the Cherokee Nation sought by an original motion to restrain the State of Georgia from the enforcement of laws which assimilated Cherokee territory to the State's counties, abrogated Cherokee law, and abolished Cherokee government, the Court held that such a claim was not judicially cognizable. *Cherokee Nation* v. *Georgia*, 5 Pet. 1.[19] And in *Georgia* v. *Stanton*, 6 Wall. 50, the Court dismissed for want of jurisdiction a bill by the State of Georgia seeking to enjoin enforcement of the Reconstruction Acts on the ground that the command by military districts which they established extinguished existing state government and re-

[18] Compare *Worcester* v. *Georgia*, 6 Pet. 515, with *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 20, 28 (Mr. Justice Johnson, concurring), 51 and 75 (Mr. Justice Thompson, dissenting).

[19] This was an alternative ground of Chief Justice Marshall's opinion for the Court. *Id.*, at 20. The question which Marshall reserved as "unnecessary to decide," *ibid.*, was not the justiciability of the bill in this aspect, but the "more doubtful" question whether that "part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession," might be entertained. *Ibid.* Mr. Justice Johnson, concurring, found the controversy non-justiciable and would have put the ruling solely on this ground, *id.*, at 28, and Mr. Justice Thompson, in dissent, agreed that much of the matter in the bill was not fit for judicial determination. *Id.*, at 51, 75.

placed it with a form of government unauthorized by the Constitution: [20]

> "That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court." *Id.*, at 77.[21]

5. The influence of these converging considerations—the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted—has been decisive of the

[20] Cf. *Mississippi* v. *Johnson*, 4 Wall. 475.

[21] Considerations similar to those which determined the *Cherokee Nation* case and *Georgia* v. *Stanton* no doubt explain the celebrated decision in *Nabob of the Carnatic* v. *East India Company*, 1 Vesey Jr. *371; 2 Vesey Jr. *56, rather than any attribution of a portion of British sovereignty, in respect of Indian affairs, to the company. The reluctance of the English Judges to involve themselves in contests of factional political power is of ancient standing. In *The Duke of York's Claim to the Crown*, 5 Rotuli Parl. 375, printed in Wambaugh, Cases on Constitutional Law (1915), 1, the role which the Judges were asked to play appears to have been rather that of advocates than of judges, but the answer which they returned to the Lords relied on reasons equally applicable to either role.

settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," [22] is not enforceable through the courts. *E. g., O'Neill* v. *Leamer*, 239 U. S. 244; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Cochran* v. *Board of Education*, 281 U. S. 370; *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U. S. 608.[23] Claims resting on this specific guarantee of the Constitution have been held non-

[22] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

[23] Cf. the cases holding that the Fourteenth Amendment imposes no such restriction upon the form of a State's governmental organization as will permit persons affected by government action to complain that in its organization principles of separation of powers have been violated. *E. g., Dreyer* v. *Illinois*, 187 U. S. 71; *Soliah* v. *Heskin*, 222 U. S. 522; *Houck* v. *Little River Drainage District*, 239 U. S. 254. The same consistent refusal of this Court to find that the federal Constitution restricts state power to design the structure of state political institutions is reflected in the cases rejecting claims arising out of the States' creation, alteration, or destruction of local subdivisions or their powers, insofar as these claims are made by the subdivisions themselves, see *Laramie County* v. *Albany County*, 92 U. S. 307; *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394; *Trenton* v. *New Jersey*, 262 U. S. 182; *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 389–390; *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, or by the whole body of their residents who share only a general, undifferentiated interest in their preservation. See *Hunter* v. *Pittsburgh*, 207 U. S. 161. The policy is also given effect by the denial of "standing" to persons seeking to challenge state action as infringing the interest of some separate unit within the State's administrative structure—a denial which precludes the arbitrament by federal courts of what are only disputes over the local allocation of government functions and powers. See, *e. g., Smith* v. *Indiana*, 191 U. S. 138; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Marshall* v. *Dye*, 231 U. S. 250; *Stewart* v. *Kansas City*, 239 U. S. 14.

justiciable which challenged state distribution of powers between the legislative and judicial branches, *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, state delegation of power to municipalities, *Kiernan* v. *Portland, Oregon,* 223 U. S. 151, state adoption of the referendum as a legislative institution, *Ohio ex rel. Davis* v. *Hildebrandt,* 241 U. S. 565, 569, and state restriction upon the power of state constitutional amendment, *Marshall* v. *Dye,* 231 U. S. 250, 256–257. The subject was fully considered in *Pacific States Telephone and Telegraph Co.* v. *Oregon,* 223 U. S. 118, in which the Court dismissed for want of jurisdiction a writ of error attacking a state license tax statute enacted by the initiative, on the claim that this mode of legislation was inconsistent with a Republican Form of Government and violated the Equal Protection Clause and other federal guarantees. After noting ". . . the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for," [24] the Court said:

[24] 223 U. S., at 141. ". . . [T]he contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character." Compare *Luther* v. *Borden,* 7 How. 1, 38–39:

". . . For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and com-

> ". . . [The] essentially political nature [of this claim] is at once made manifest by understanding that the assault which the contention here advanced makes it [sic] not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." *Id.*, at 150–151.

The starting point of the doctrine applied in these cases is, of course, *Luther* v. *Borden*, 7 How. 1. The case arose out of the Dorr Rebellion in Rhode Island in 1841–1842. Rhode Island, at the time of the separation from England, had not adopted a new constitution but had continued, in its existence as an independent State, under its original royal Charter, with certain statutory alterations. This frame of government provided no means for amendment of the fundamental law; the right of suffrage was to be prescribed by legislation, which limited it to freeholders. In the 1830's, largely because of the growth of towns in which there developed a propertied class whose means

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pensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

"When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

were not represented by freehold estates, dissatisfaction arose with the suffrage qualifications of the charter government. In addition, population shifts had caused a dated apportionment of seats in the lower house to yield substantial numerical inequality of political influence, even among qualified voters. The towns felt themselves underrepresented, and agitation began for electoral reform. When the charter government failed to respond, popular meetings of those who favored the broader suffrage were held and elected delegates to a convention which met and drafted a state constitution. This constitution provided for universal manhood suffrage (with certain qualifications); and it was to be adopted by vote of the people at elections at which a similarly expansive franchise obtained. This new scheme of government was ratified at the polls and declared effective by the convention, but the government elected and organized under it, with Dorr at its head, never came to power. The charter government denied the validity of the convention, the constitution and its government and, after an insignificant skirmish, routed Dorr and his followers. It meanwhile provided for the calling of its own convention, which drafted a constitution that went peacefully into effect in 1843.[25]

Luther v. *Borden* was a trespass action brought by one of Dorr's supporters in a United States Circuit Court to recover damages for the breaking and entering of his house. The defendants justified under military orders pursuant to martial law declared by the charter government, and plaintiff, by his reply, joined issue on the legality of the charter government subsequent to the adoption of the Dorr constitution. Evidence offered by

[25] See Bowen, The Recent Contest in Rhode Island (1844); Frieze, A Concise History of the Efforts to Obtain an Extension of Suffrage in Rhode Island; From the Year 1811 to 1842 (2d ed. 1842); Mowry, The Dorr War (1901); Wayland, The Affairs of Rhode Island (2d ed. 1842).

the plaintiff tending to establish that the Dorr government was the rightful government of Rhode Island was rejected by the Circuit Court; the court charged the jury that the charter government was lawful; and on a verdict for defendants, plaintiff brought a writ of error to this Court.

The Court, through Mr. Chief Justice Taney, affirmed. After noting that the issue of the charter government's legality had been resolved in that government's favor by the state courts of Rhode Island—that the state courts, deeming the matter a political one unfit for judicial determination, had declined to entertain attacks upon the existence and authority of the charter government—the Chief Justice held that the courts of the United States must follow those of the State in this regard. *Id.*, at 39–40. It was recognized that the compulsion to follow state law would not apply in a federal court in the face of a superior command found in the federal constitution, *ibid.*, but no such command was found. The Constitution, the Court said—referring to the Guarantee Clause of the Fourth Article—". . . as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." *Id.*, at 42.

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as

> its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts." *Ibid.*[26]

In determining this issue non-justiciable, the Court was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government.[27] It acknowledged that tradition had long entrusted questions of this nature to non-judicial processes,[28] and that judicial processes were unsuited to their decision.[29] The absence of guiding standards for judgment was critical, for the question whether the Dorr constitution had been rightfully adopted depended, in part, upon the extent of the franchise to be recognized—the very point of contention over which rebellion had been fought.

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[26] The Court reasoned, with respect to the guarantee against domestic violence also contained in Art. IV, § 4, that this, too, was an authority committed solely to Congress; that Congress had empowered the President, not the courts, to enforce it; and that it was inconceivable that the courts should assume a power to make determinations in the premises which might conflict with those of the Executive. It noted further that, in fact, the President had recognized the governor of the charter government as the lawful authority in Rhode Island, although it had been unnecessary to call out the militia in his support.

[27] See note 24, *supra*.

[28] *Id.*, at 39, 46–47.

[29] *Id.*, at 41–42.

". . . [I]f the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." *Id.*, at 41.

Mr. Justice Woodbury (who dissented with respect to the effect of martial law) agreed with the Court regarding the inappropriateness of judicial inquiry into the issues:

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrisic right. . . .

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a

> dispute among the people, depend on our decision finally. . . . [D]isputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, . . . if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times . . . ." *Id.*, at 51–53.[30]

III.

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. We have been admonished to avoid "the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114. Art. IV, § 4, is not committed by

[30] In evaluating the Court's determination not to inquire into the authority of the charter government, it must be remembered that, throughout the country, Dorr "had received the sympathy of the Democratic press. His cause, therefore, became distinctly a party issue." 2 Warren, The Supreme Court in United States History (Rev. ed. 1937), 186.

express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable. Of course, if a controversy falls within judicial power, it depends "on how he [the plaintiff] casts his action," *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656, 662, whether he brings himself within a jurisdictional statute. But where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. When what was essentially a Guarantee Clause claim was sought to be laid, as well, under the Equal Protection Clause in *Pacific States Telephone & Telegraph Co.* v. *Oregon, supra*, the Court had no difficulty in "dispelling any mere confusion resulting from forms of expression and considering the substance of things . . . ." 223 U. S., at 140.

Here appellants attack "the State as a State," precisely as it was perceived to be attacked in the *Pacific States* case, *id.*, at 150. Their complaint is that the basis of representation of the Tennessee Legislature hurts them. They assert that "a minority now rules in Tennessee," that the apportionment statute results in a "distortion of the constitutional system," that the General Assembly is no longer "a body representative of the people of the State of Tennessee," all "contrary to the basic principle of representative government . . . ." Accepting appellants' own formulation of the issue, one can know this handsaw from a hawk. Such a claim would be nonjusticiable not merely under Art. IV, § 4, but under any clause of the Constitution, by virtue of the very fact that a federal court is not a forum for political debate. *Massachusetts* v. *Mellon, supra.*

But appellants, of course, do not rest on this claim *simpliciter*. In invoking the Equal Protection Clause, they assert that the distortion of representative govern-

ment complained of is produced by systematic discrimination against them, by way of "a debasement of their votes . . . ." Does this characterization, with due regard for the facts from which it is derived, add anything to appellants' case? [31]

At first blush, this charge of discrimination based on legislative underrepresentation is given the appearance of a more private, less impersonal claim, than the assertion that the frame of government is askew. Appellants appear as representatives of a class that is prejudiced as a class, in contradistinction to the polity in its entirety. However, the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence. This, of course, is the practical effect of any allocation of power within the institutions of government. Hardly any distribution of political authority that could be assailed as rendering government nonrepublican would fail similarly to operate to the prejudice of some groups, and to the advantage of others, within the body politic. It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have

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[31] Appellants also allege discrimination in the legislature's allocation of certain tax burdens and benefits. Whether or not such discrimination would violate the Equal Protection Clause if the tax statutes were challenged in a proper proceeding, see *Dane* v. *Jackson*, 256 U. S. 589; cf. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 268, these recitative allegations do not affect the nature of the controversy which appellants' complaints present.

their votes counted.[32] But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion* v. *Lightfoot*, 364 U. S. 339, *supra*. What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice

[32] Appellants would find a "right" to have one's ballot counted on authority of *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299; *United States* v. *Saylor*, 322 U. S. 385. All that these cases hold is that conspiracies to commit certain sharp election practices which, in a federal election, cause ballots not to receive the weight which the law has in fact given them, may amount to deprivations of the constitutionally secured right to vote for federal officers. But see *United States* v. *Bathgate*, 246 U. S. 220. The cases do not so much as suggest that there exists a constitutional limitation upon the relative weight to which the law might properly entitle respective ballots, even in federal elections.

and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. See *Luther* v. *Borden, supra.* Certainly, "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words "the basic principle of representative government"—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our govern-

ment, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today. Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty cannot but give the appearance, if not reflect the reality, of involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, "itself a historical product," *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31, provides no guide for judicial oversight of the representation problem.

1. *Great Britain.* Writing in 1958, Professor W. J. M. Mackenzie aptly summarized the British history of the principle of representation proportioned to population: " 'Equal electoral districts' formed part of the programme of radical reform in England in the 1830s, the only part of that programme which has not been realised." [33] Until the late nineteenth century, the sole base of representation (with certain exceptions not now relevant) was the local geographical unit: each county or borough returned its fixed number of members, usually two for the English units, regardless of population.[34] Prior to the Reform Act of 1832, this system was marked by the almost total disfranchisement of the populous nothern industrial centers, which had grown to significant size at the advent of the Industrial Revolution and had not been granted borough representation, and by the existence of

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[33] Mackenzie, Free Elections (1958) (hereafter, Mackenzie), 108

[34] Ogg, English Government and Politics (2d ed. 1936) (hereafter, Ogg), 248–250, 257; Seymour, Electoral Reform in England and Wales (1915) (hereafter, Seymour), 46–47.

the rotten borough, playing its substantial part in the Crown's struggle for continued control of the Commons.[35] In 1831, ten southernmost English counties, numbering three and a quarter million people, had two hundred and thirty-five parliamentary representatives, while the six northernmost counties, with more than three and a half-million people, had sixty-eight.[36] It was said that one hundred and eighty persons appointed three hundred and fifty members in the Commons.[37] Less than a half-century earlier, Madison in the Federalist had remarked that half the House was returned by less than six thousand of the eight million people of England and Scotland.[38]

The Act of 1832, the product of a fierce partisan political struggle and the occasion of charges of gerrymandering not without foundation,[39] effected eradication of only the most extreme numerical inequalities of the unreformed system. It did not adopt the principle of representation based on population, but merely disfranchised certain among the rotten borrough and enfranchised most of the urban centers—still quite without regard to their relative numbers.[40] In the wake of the Act there remained substantial electoral inequality: the boroughs of Cornwall were represented sixteen times as weightily, judged by population, as the county's eastern division; the average ratio of seats to population in ten agricultural counties was four and a half times that in ten manufacturing divisions; Honiton, with about three thousand inhabitants, was equally represented with Liver-

[35] Ogg 257–259; Seymour 45–52; Carpenter, The Development of American Political Thought (1930) (hereafter, Carpenter), 45–46.

[36] Ogg 258.

[37] Seymour 51.

[38] The Federalist, No. 56 (Wright ed. 1961), at 382. Compare Seymour 49. This takes account of the restricted franchise as well as the effect of the local-unit apportionment principle.

[39] Seymour 52–76.

[40] Ogg 264–265; Seymour 318–319.

pool, which had four hundred thousand.[41] In 1866 apportionment by population began to be advocated generally in the House, but was not made the basis of the redistribution of 1867, although the act of that year did apportion representation more evenly, gauged by the population standard.[42] Population shifts increased the surviving inequalities; by 1884 the representation ratio in many small boroughs was more than twenty-two times that of Birmingham or Manchester, forty-to-one disparities could be found elsewhere, and, in sum, in the '70's and '80's, a fourth of the electorate returned two-thirds of the members of the House.[43]

The first systematic English attempt to distribute seats by population was the Redistribution Act of 1885.[44] The statute still left ratios of inequality of as much as seven to one,[45] which had increased to fifteen to one by 1912.[46] In 1918 Parliament again responded to "shockingly bad" conditions of inequality,[47] and to partisan political inspiration,[48] by redistribution.[49] In 1944, redistribution was put on a periodic footing by the House of Commons (Redistribution of Seats) Act of that year,[50] which committed a continuing primary responsibility for

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[41] For these and other instances of gross inequality, see Seymour 320–325.

[42] Seymour 333–346; Ogg 265.

[43] Seymour 349, 490–491.

[44] Seymour 489–518.

[45] Mackenzie 108; see also Seymour 513–517.

[46] Ogg 270.

[47] Ogg 253.

[48] Ogg 270–271.

[49] Ogg 273–274.

[50] 7 & 8 Geo. VI, c. 41. The 1944 Act was amended by the House of Commons (Redistribution of Seats) Act, 1947, 10 & 11 Geo. VI, c. 10, and the two, with other provisions, were consolidated in the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, since amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26.

reapportioning the Commons to administrative agencies (Boundary Commissions for England, Scotland, Wales and Northern Ireland, respectively).[51] The Commissions, having regard to certain rules prescribed for their guidance, are to prepare at designated intervals reports for the Home Secretary's submission to Parliament, along with the draft of an Order in Council to give effect to the Commissions' recommendations. The districting rules adopt the basic principle of representation by population, although the principle is significantly modified by directions to respect local geographic boundaries as far as practicable, and by discretion to take account of special geographical conditions, including the size, shape and accessibility of constituencies. Under the original 1944 Act, the rules provided that (subject to the exercise of the discretion respecting special geographical conditions and to regard for the total size of the House of Commons as prescribed by the Act) so far as practicable, the single-member districts should not deviate more than twenty-five percent from the electoral quota (population divided by number of constituencies). However, apparently at the recommendation of the Boundary Commission for England, the twenty-five percent standard was eliminated as too restrictive in 1947, and replaced by the flexible provision that constituencies are to be as near the electoral quota as practicable, a rule which is expressly subordinated both to the consideration of special geographic conditions and to that of preserving local boundaries.[52] Free

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[51] See generally Butler, The Redistribution of Seats, 33 Public Administration 125 (1955).

[52] See note 50, *supra*. However, Commissions are given discretion to depart from the strict application of the local boundary rule to avoid excessive disparities between the electorate of a constituency and the electoral quota, or between the electorate of a constituency and that of neighboring constituencies. For detailed discussion, see Craig, Parliament and Boundary Commissions, [1959] Public Law 23. See also Butler, *supra*, note 51, at 127.

of the twenty-five percent rule, the Commissions drew up plans of distribution in which inequalities among the districts run, in ordinary cases, as high as two to one and, in the case of a few extraordinary constituencies, three to one.[53] The action of the Boundary Commission for England was twice challenged in the courts in 1954—the claim being that the Commission had violated statutory rules prescribing the standards for its judgment—and in both cases the Judges declined to intervene. In *Hammersmith Borough Council* v. *Boundary Commission for England,*[54] Harman, J., was of opinion that the nature of the controversy and the scheme of the Acts made the matter inappropriate for judicial interference, and in *Harper* v. *Secretary,*[55] the Court of Appeal, per Evershed, M. R., quoting Harman, J., with approval, adverting to the wide range of discretion entrusted to the Commission under the Acts, and remarking the delicate character of the parliamentary issues in which it was sought to engage the court, reached the same conclusion.[56]

The House of Commons (Redistribution of Seats) Act, 1958,[57] made two further amendments to the law. Responsive to the recommendation of the Boundary Commission for England,[58] the interval permitted between Commission reports was more than doubled, to a new maximum of fifteen years.[59] And at the suggestion of

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[53] Mackenzie 108, 113.

[54] The Times, Dec. 15, 1954, p. 4, cols. 1–2.

[55] [1955] 1 Ch. 238.

[56] The court reserved the question whether a judicial remedy might be found in a case in which it appeared that a Commission had manifestly acted in complete disregard of the Acts.

[57] Note 50, *supra.*

[58] First Periodical Report of the Boundary Commission for England [Cmd. 9311] (1954), 4, par. 19.

[59] Under the 1949 Act, see note 50, *supra,* the intervals between reports were to be not less than three nor more than seven years, with certain qualifications. The 1958 Act raised the minimum to ten and the maximum to fifteen years.

the same Commission that "It would ease the future labours of the Commission and remove much local irritation if Rule 5 [requiring that the electorate of each constituency be as near the electoral quota as practicable] were to be so amended as to allow us to make recommendations preserving the status quo in any area where such a course appeared to be desirable and not inconsistent with the broad intention of the Rules," [60] the Commissions were directed to consider the inconveniences attendant upon the alteration of constituencies, and the local ties which such alteration might break. The Home Secretary's view of this amendment was that it worked to erect "a presumption against making changes unless there is a very strong case for them." [61]

2. *The Colonies and the Union.* For the guiding political theorists of the Revolutionary generation, the English system of representation, in its most salient aspects of numerical inequality, was a model to be avoided, not followed.[62] Nevertheless, the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies.[63] In some, as in Massachusetts and Rhode Island, numbers of electors were taken into account, in a rough fashion, by allotting increasing fixed quotas of representatives to several towns or classes of towns graduated by population, but in most of the colonies delegates were allowed to the local units without respect to numbers.[64] This resulted in grossly unequal electoral

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[60] First Periodical Report, *supra*, note 58, at 4, par. 20.

[61] 582 H. C. Deb. (5th ser. 1957–1958), 230.

[62] See Madison, *supra*, note 38; Tudor, Life of James Otis (1823), 188–190.

[63] Griffith, The Rise and Development of the Gerrymander (1907) (hereafter, Griffith), 23–24.

[64] Luce, Legislative Principles (1930) (hereafter, Luce), 336–342.

units.[65] The representation ratio in one North Carolina county was more than eight times that in another.[66] Moreover, American rotten boroughs had appeared,[67] and apportionment was made an instrument first in the political struggles between the King or the royal governors and the colonial legislatures,[68] and, later, between the older tidewater regions in the colonies and the growing interior.[69] Madison in the Philadelphia Convention adverted to the "inequality of the Representation in the Legislatures of particular States, . . ." [70] arguing that it was necessary to confer on Congress the power ultimately to regulate the times, places and manner of selecting Representatives,[71] in order to forestall the overrepresented counties' securing themselves a similar overrepresentation in the national councils. The example of South Carolina, where Charleston's overrepresentation was a continuing bone of contention between the tidewater and the back-country, was cited by Madison in the Virginia Convention and by King in the Massachusetts Convention, in support of the same power, and King also spoke of the extreme numerical inequality arising from Connecticut's town-representation system.[72]

Such inequalities survived the constitutional period. The United States Constitution itself did not largely adopt the principle of numbers. Apportionment of the national legislature among the States was one of the most difficult problems for the Convention; [73] its solution—

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[65] Griffith 25.

[66] Griffith 15–16, n. 1.

[67] Griffith 28.

[68] Carpenter 48–49, 54; Griffith 26, 28–29; Luce 339–340.

[69] Carpenter 87; Griffith 26–29, 31.

[70] II Farrand, Records of the Federal Convention (1911), 241.

[71] The power was provided. Art. I, § 4, cl. 1.

[72] III Elliot's Debates (2d ed. 1891), 367; II *id.*, at 50–51.

[73] See Madison, in I Farrand, *op. cit., supra*, note 70, at 321: "The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable."

involving State representation in the Senate [74] and the three-fifths compromise in the House [75]—left neither chamber apportioned proportionately to population. Within the States, electoral power continued to be allotted to favor the tidewater.[76] Jefferson, in his Notes on Virginia, recorded the "very unequal" representation there: individual counties differing in population by a ratio of more than seventeen to one elected the same number of representatives, and those nineteen thousand of Virginia's fifty thousand men who lived between the falls of the rivers and the sea-coast returned half the State's senators and almost half its delegates.[77] In South Carolina in 1790, the three lower districts, with a white population of less than twenty-nine thousand elected twenty senators and seventy assembly members; while in the uplands more than one hundred and eleven thousand white persons elected seventeen senators and fifty-four assemblymen.[78]

In the early nineteenth century, the demands of the interior became more insistent. The apportionment quarrel in Virginia was a major factor in precipitating the calling of a constitutional convention in 1829. Bitter animosities racked the convention, threatening the State with disunion. At last a compromise which gave the three hundred and twenty thousand people of the west thirteen senators, as against the nineteen senators returned by the three hundred sixty-three thousand people of the east, commanded agreement. It was adopted at the polls but left the western counties so dissatisfied that there

[74] See The Federalist, No. 62 (Wright ed. 1961), at 408–409.

[75] See The Federalist, No. 54, *id.*, at 369–374.

[76] Carpenter 130.

[77] Jefferson, Notes on the State of Virginia (Peden ed. 1955), 118–119. See also II Writings of Thomas Jefferson (Memorial ed. 1903), 160–162.

[78] Carpenter 139–140.

were threats of revolt and realignment with the State of Maryland.[79]

Maryland, however, had her own numerical disproportions. In 1820, one representative vote in Calvert County was worth five in Frederick County, and almost two hundred thousand people were represented by eighteen members, while fifty thousand others elected twenty.[80] This was the result of the county-representation system of allotment. And, except for Massachusetts which, after a long struggle, did adopt representation by population at the mid-century, a similar town-representation principle continued to prevail in various forms throughout New England, with all its attendant, often gross inequalities.[81]

3. *The States at the time of ratification of the Fourteenth Amendment, and those later admitted.* The several state conventions throughout the first half of the nineteenth century were the scenes of fierce sectional and party strifes respecting the geographic allocation of representation.[82] Their product was a wide variety of apportionment methods which recognized the element of population in differing ways and degrees. Particularly pertinent to appraisal of the contention that the Fourteenth Amendment embodied a standard limiting the freedom of the States with regard to the principles and bases of local legislative apportionment is an examination of the apportionment provisions of the thirty-three states which ratified the Amendment between 1866 and 1870, at their respective times of ratification. These may be considered in two groups: (A) the ratifying States

[79] Griffith 102–104.

[80] Griffith 104–105.

[81] Luce 343–350. Bowen, *supra*, note 25, at 17–18, records that in 1824 Providence County, having three-fifths of Rhode Island's population elected only twenty-two of its seventy-two representatives, and that the town of Providence, more than double the size of Newport, had half Newport's number of representatives.

[82] Carpenter 130–137; Luce 364–367; Griffith 116–117.

other than the ten Southern States whose constitutions, at the time of ratification or shortly thereafter, were the work of the Reconstruction Act conventions;[83] and (B) the ten Reconstruction-Act States. All thirty-three are significant, because they demonstrate how unfounded is the assumption that the ratifying States could have agreed on a standard apportionment theory or practice, and how baseless the suggestion that by voting for the Equal Protection Clause they sought to establish a test mold for apportionment which—if appellants' argument is sound—struck down *sub silentio* not a few of their own state constitutional provisions. But the constitutions of the ten Reconstruction-Act States have an added importance, for it is scarcely to be thought that the Congress which was so solicitous for the adoption of the Fourteenth Amendment as to make the readmission of the late rebel States to Congress turn on their respective ratifications of it, would have approved constitutions which—again, under appellants' theory—contemporaneously offended the Amendment.

A. Of the twenty-three ratifying States of the first group, seven or eight had constitutions which demanded or allowed apportionment of both houses on the basis of population,[84] unqualifiedly or with only qualifications

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[83] See 14 Stat. 428; 15 Stat. 2, 14, 41.

[84] Various indices of population were employed among the States which took account of the factor of numbers. Some counted all inhabitants, *e. g.*, N. J. Const., 1844, Art. IV, § 3; some, only white inhabitants, *e. g.*, Ill. Const., 1848, Art. III, § 8; some, male inhabitants over twenty-one, *e. g.*, Ind. Const., 1851, Art. IV, §§ 4–5; some, qualified voters, *e. g.*, Tenn. Const., 1834, Art. II, §§ 4 to 6; some excluded aliens, *e. g.*, N. Y. Const., 1846, Art. III, §§ 4, 5 (and untaxed persons of color); some excluded untaxed Indians and military personnel, *e. g.*, Neb. Const., 1866–1867, Art. II, § 3. For present purposes these differences, although not unimportant as revealing fundamental divergences in representation theory, will be disregarded.

respecting the preservation of local boundaries.[85] Three more apportioned on what was essentially a population base, but provided that in one house counties having a specified fraction of a ratio—a moiety or two-thirds—should have a representative.[86] Since each of these three States limited the size of their chambers, the fractional rule could operate—and, at least in Michigan, has in fact operated [87]—to produce substantial numerical inequalities

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[85] Ore. Const., 1857, Art. IV, §§ 5, 6, 7; Ill. Const., 1848, Art. III, §§ 8, 9; Ind. Const., 1851, Art. IV, §§ 4, 5, 6; Minn. Const., 1857, Art. IV, § 2; Wis. Const., 1848, Art. IV, §§ 3 to 5; Mass. Const., 1780, Amends. XXI, XXII; Neb. Const., 1866–1867, Art. II, § 3. All of these but Minnesota made provision for periodic reapportionment. Nevada's Constitution of 1864, Art. XV, § 13, provided that the federal censuses and interim state decennial enumerations should serve as the bases of representation for both houses, but did not expressly require either numerical equality or reapportionment at fixed intervals.

Several of these constitutions contain provisions which forbid splitting counties or which otherwise require recognition of local boundaries. See, *e. g.*, the severe restriction in Ill. Const., 1848, Art. III, § 9. Such provisions will almost inevitably produce numerical inequalities. See, for example, University of Oklahoma, Bureau of Government Research, Legislative Apportionment in Oklahoma (1956), 21–23. However, because their effect in this regard will turn on idiosyncratic local factors, and because other constitutional provisions are a more significant source of inequality, these provisions are here disregarded.

[86] Tenn. Const., 1834, Art. II, §§ 4 to 6 (two-thirds of a ratio entitles a county to one representative in the House); W. Va. Const., 1861–1863, Art. IV, §§ 4, 5, 7, 8, 9 (one-half of a ratio entitles a county to one representative in the House); Mich. Const., 1850, Art. IV, §§ 2 to 4 (one-half of a ratio entitles each county thereafter organized to one representative in the House). In Oregon and Iowa a major-fraction rule applied which gave a House seat not only to counties having a moiety of a single ratio, but to all counties having more than half a ratio in excess of the multiple of a ratio. Ore. Const., 1857, Art. IV, § 6, note 85, *supra;* Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37, note 89, *infra.*

[87] See Bone, States Attempting to Comply with Reapportionment Requirements, 17 Law & Contemp. Prob. 387, 391 (1952).

in favor of the sparsely populated counties.[88] Iowa favored her small counties by the rule that no more than four counties might be combined in a representative district,[89] and New York and Kansas compromised population and county-representation principles by assuring every county, regardless of the number of its inhabitants, at least one seat in their respective Houses.[90]

Ohio and Maine recognized the factor of numbers by a different device. The former gave a House representative to each county having half a ratio, two representatives for a ratio and three quarters, three representatives for three ratios, and a single additional representative for each additional ratio.[91] The latter, after apportioning among counties on a population base, gave each town of fifteen hundred inhabitants one representative, each town of three thousand, seven hundred and fifty inhabitants two representatives, and so on in increasing intervals to twenty-six thousand, two hundred and fifty inhabitants—towns of that size or larger receiving the maximum permitted number of representatives: seven.[92] The departure from numerical equality under these systems is apparent: in Maine, assuming the incidence of towns in all categories, representative ratios would differ by factors of two and a half to one, at a minimum. Similarly,

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[88] It also appears, although the section is not altogether clear, that the provisions of West Virginia's Constitution controlling apportionment of senators would operate in favor of the State's less populous regions by limiting any single county to a maximum of two senators. W. Va. Const., 1861–1863, Art. IV, § 4.

[89] Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37.

[90] N. Y. Const., 1846, Art. III, §§ 4, 5 (except Hamilton County); Kan. Const., 1859, Art. 2, § 2; Art. 10. The Kansas provisions require periodic apportionment based on censuses, but do not in terms demand equal districts.

[91] Ohio Const., 1851, Art. XI, §§ 1 to 5. See Art. XI, §§ 6 to 9 for Senate apportionment.

[92] Me. Const., 1819, Art. IV, Pt. First, §§ 2, 3. See Art. IV, Pt. Second, § 2 for Senate apportionment based on numbers.

Missouri gave each of its counties, however small, one representative, two representatives for three ratios, three representatives for six ratios, and one additional representative for each three ratios above six.[93] New Hampshire allotted a representative to each town of one hundred and fifty ratable male polls of voting age and one more representative for each increment of three hundred above that figure;[94] its Senate was not apportioned by population but among districts based on the proportion of direct taxes paid.[95] In Pennsylvania, the basis of apportionment in both houses was taxable inhabitants; and in the House every county of at least thirty-five hundred taxables had a representative, nor could more than three counties be joined in forming a representative district; while in the Senate no city or county could have more than four of the State's twenty-five to thirty-three senators.[96]

Finally, four States apportioned at least one House with no regard whatever to population. In Connecticut[97] and Vermont[98] representation in the House was on a town basis; Rhode Island gave one senator to each of its towns or cities,[99] and New Jersey, one to each of its counties.[100] Nor, in any of these States, was the other house apportioned on a strict principle of equal numbers: Connecticut gave each of its counties a minimum of two senators[101]

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[93] Mo. Const., 1865, Art. IV, § 2, 7, 8. See Art. IV, §§ 4 to 8 for Senate apportionment based on numbers.

[94] Towns smaller than one hundred and fifty, if so situated that it was "very inconvenient" to join them to other towns for voting purposes, might be permitted by the legislature to send a representative.

[95] N. H. Const., 1792, Pt. Second, §§ IX to XI; Pt. Second, § XXVI.

[96] Pa. Const., 1838, as amended, Art. I, §§ 4, 6, 7.

[97] Conn. Const., 1818, Art. Third, § 3.

[98] Vt. Const., 1793, c. II, § 7.

[99] R. I. Const., 1842, Art. VI, § 1.

[100] N. J. Const., 1844, Art. IV, § 2, cl. One.

[101] Conn. Const., 1818, Amend. II.

and Vermont, one; [102] New Jersey assured each county a representative; [103] and in Rhode Island, which gave at least one representative to each town or city, no town or city could have more than one-sixth of the total number in the House.[104]

B. Among the ten late Confederate States affected by the Reconstruction Acts, in only four did it appear that apportionment of both state legislative houses would or might be based strictly on population.[105] In North Carolina,[106] South Carolina,[107] Louisiana,[108] and Alabama,[109] each county (in the case of Louisiana, each parish) was assured at least one seat in the lower house irrespective of numbers—a distribution which exhausted, respectively, on the basis of the number of then-existing counties, three-quarters, one-quarter, two-fifths and three-fifths of the maximum possible number of representatives, before a single seat was available for assignment on a population basis; and in South Carolina, moreover, the Senate was composed of one member elected from each county, except

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[102] Vt. Const., 1793, Amend. 23.

[103] N. J. Const., 1844, Art. IV, § 3, cl. One.

[104] R. I. Const., 1842, Art. V, § 1.

[105] Ark. Const., 1868, Art. V, §§ 8, 9; Va. Const., 1864, Art. IV, § 6 (this constitution was in effect when Virginia ratified the Fourteenth Amendment); Va. Const., 1870, Art. V, § 4 (this was Virginia's Reconstruction-Act convention constitution); Miss. Const., 1868, Art. IV, §§ 33 to 35; Tex. Const., 1868, Art. III, §§ 11, 34. The Virginia Constitutions and Texas' provisions for apportioning its lower chamber do not in terms require equality of numbers, although they call for reapportionment following a census. In Arkansas, the legislature was authorized, but not commanded, to reapportion periodically; it is not clear that equality was required.

[106] N. C. Const., 1868, Art. II, §§ 6, 7. See Art. II, § 5 for Senate apportionment based on numbers.

[107] S. C. Const., 1868, Art. I, § 34; Art. II, §§ 4 to 6.

[108] La. Const., 1868, Tit. II, Arts. 20, 21. See Tit. II, Arts. 28 to 30 for Senate apportionment based on numbers.

[109] Ala. Const., 1867, Art. VIII, § 1. See Art. VIII, § 3 for Senate apportionment based on numbers.

that Charleston sent two.[110] In Florida's House, each county had one seat guaranteed and an additional seat for every thousand registered voters up to a maximum of four representatives; [111] while Georgia, whose Senate seats were distributed among forty-four single-member districts each composed of three contiguous counties,[112] assigned representation in its House as follows: three seats to each of the six most populous counties, two to each of the thirty-one next most populous, one to each of the remaining ninety-five.[113] As might be expected, the one-representative-per-county-minimum pattern has proved incompatible with numerical equality,[114] and Georgia's county-clustering system has produced representative-ratio disparities, between the largest and smallest counties, of more than sixty to one.[115]

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[110] S. C. Const., 1868, Art. II, § 8.

[111] Fla. Const., 1868, Art. XIV, par. 1. See Art. XIV, par. 2, for Senate apportionment.

[112] Ga. Const., 1868, Art. III, § 2. The extent of legislative authority to alter these districts is unclear, but it appears that the structure of three contiguous counties for each of forty-four districts is meant to be permanent.

[113] Ga. Const., 1868, Art. III, § 3. The extent of legislative authority to alter the apportionment is unclear, but it appears that the three-tiered structure is meant to be permanent.

[114] See, *e. g.*, Durfee, Apportionment of Representation in the Legislature: A Study of State Constitutions, 43 Mich. L. Rev. 1091, 1097 (1945); Short, States That Have Not Met Their Constitutional Requirements, 17 Law & Contemp. Prob. 377 (1952); Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Prob. 364, 370 (1952). For an excellent case study of numerical inequalities deriving solely from a one-member-per-county minimum provision in Ohio, see Aumann, Rural Ohio Hangs On, 46 Nat. Mun. Rev. 189, 191–192 (1957).

[115] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 574 (1955). (This is the effect of a later Georgia constitutional provision, Ga. Const., 1945, § 2–1501, substantially similar to that of 1868.) The same three-tiered system has subsequently been adopted in Florida, Fla. Const., 1885, Art. VII, §§ 3, 4, where its effects have

C. The constitutions [116] of the thirteen States which Congress admitted to the Union after the ratification of the Fourteenth Amendment showed a similar pattern. Six of them required or permitted apportionment of both houses by population, subject only to qualifications concerning local boundaries.[117] Wyoming, apportioning by population, guaranteed to each of its counties at least one seat in each house,[118] and Idaho, which prescribed (after the first legislative session) that apportionment should be "as may be provided by law," gave each county at least one representative.[119] In Oklahoma, House members were apportioned among counties so as to give one seat for half a ratio, two for a ratio and three quarters, and one for each additional ratio up to a maximum of seven representatives per county.[120] Montana required reapportionment of its House on the basis of periodic enumerations according to ratios to be fixed by law [121] but its counties were represented as counties in the Senate,

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been inequalities of the order of eighty to one. Dauer and Kelsay, *supra*, at 575, 587.

[116] The constitutions discussed are those under which the new States entered the Union.

[117] Colo. Const., 1876, Art. V, §§ 45, 47; N. D. Const., 1889, Art. 2, §§ 29, 35; S. D. Const., 1889, Art. III, § 5; Wash. Const., 1889, Art. II, §§ 3, 6; Utah Const., 1895, Art. IX, §§ 2, 4; N. M. Const., 1911, Art. IV, following § 41. The Colorado and Utah Constitutions provide for reapportionment "according to ratios to be fixed by law" after periodic census and enumeration. In New Mexico the legislature is authorized, but not commanded, to reapportion periodically. North Dakota does not in terms demand equality in House representation; members are to be assigned among the several senatorial districts, which are of equal population.

[118] Wyo. Const., 1889, Art. III, Legislative Department, § 3; Art. III, Apportionment, §§ 2, 3.

[119] Idaho Const., 1889, Art. III, § 4.

[120] Okla. Const., 1907, Art. V, § 10 (b) to (j). See Art. V, § 9 (a), (b) for Senate apportionment based on numbers.

[121] Mont. Const., 1889, Art. VI, §§ 2, 3.

each county having one senator.[122] Alaska [123] and Hawaii [124] each appointed a number of senators among constitutionally fixed districts; their respective Houses were to be periodically reapportioned by population, subject to a moiety rule in Alaska [125] and to Hawaii's guarantee of one representative to each of four constitutionally designated areas.[126] The Arizona Constitution assigned representation to each county in each house, giving one or two senators and from one to seven representatives to each, and making no provision for reapportionment.[127]

4. *Contemporary apportionment.* Detailed recent studies are available to describe the present-day constitutional and statutory status of apportionment in the fifty States.[128] They demonstrate a decided twentieth-century

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[122] Mont. Const., 1889, Art. V, § 4; Art. VI, § 4. The effective provisions are, first, that there shall be no more than one senator from each county, and, second, that no senatorial district shall consist of more than one county.

[123] Alaska Const., 1956, Art. VI, § 7; Art. XIV, § 2. The exact boundaries of the districts may be modified to conform to changes in House districts, but their numbers of senators and their approximate perimeters are to be preserved.

[124] Hawaii Const., 1950, Art. III, § 2.

[125] Alaska Const., 1956, Art. VI, §§ 3, 4, 6. The method of equal proportions is used.

[126] Hawaii Const., 1950, Art. III, § 4. The method of equal proportions is used, and, for sub-apportionment within the four "basic" areas, a form of moiety rule obtains.

[127] Ariz. Const., 1910, Art. IV, Pt. 2, § 1. On the basis of 1910 census figures, this apportionment yielded, for example, a senatorial-ratio differential of more than four to one between Mohave and Cochise or between Mohave and Maricopa Counties. II Thirteenth Census of the United States (1910), 71–73.

[128] The pertinent state constitutional provisions are set forth in tabular form in XIII Book of the States (1960–1961), 54–58; and Greenfield, Ford and Emery, Legislative Reapportionment: California in National Perspective (University of California, Berkeley, 1959), 81–85. An earlier treatment now outdated in several respects but still useful is Durfee, *supra*, note 114. See discussions in Harvey,

trend away from population as the exclusive base of representation. Today, only a dozen state constitutions provide for periodic legislative reapportionment of both houses by a substantially unqualified application of the population standard,[129] and only about a dozen more prescribe such reapportionment for even a single chamber. "Specific provision for county representation in at least one house of the state legislature has been increasingly adopted since the end of the 19th century. . . ." [130] More than twenty States now guarantee each county at least one seat in one of their houses regardless of population, and in nine others county or town units are given equal representation in one legislative branch, whatever the number of each unit's inhabitants. Of course, numerically considered, "These provisions invariably result in over-representation of the least populated areas. . . ." [131] And in an effort to curb the political dominance of metropolitan regions, at least ten States now limit the maximum entitlement of any single county (or, in some cases, city) in one legislative house—another source of substantial numerical disproportion.[132]

Moreover, it is common knowledge that the legislatures have not kept reapportionment up to date, even where state constitutions in terms require it.[133] In particular,

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supra, note 114; Shull, Political and Partisan Implications of State Legislative Apportionment, 17 Law & Contemp. Prob. 417, 418–421 (1952).

[129] Nebraska's unicameral legislature is included in this count.

[130] Greenfield, Ford and Emery, *supra*, note 128, at 7.

[131] Harvey, *supra*, note 114, at 367. See Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277, 282–283 (1956).

[132] See, *e. g.*, Mather and Ray, The Iowa Senatorial Districts Can Be Reapportioned—A Possible Plan, 39 Iowa L. Rev. 535, 536–537 (1954).

[133] See, *e. g.*, Walter, Reapportionment and Urban Representation, 195 Annals of the American Academy of Political and Social Science 11, 12–13 (1938); Bone, *supra*, note 87. Legislative inaction and

the pattern of according greater per capita representation to rural, relatively sparsely populated areas—the same pattern which finds expression in various state constitutional provisions,[134] and which has been given effect in England and elsewhere [135]—has, in some of the States, been made the law by legislative inaction in the face of population shifts.[136] Throughout the country, urban and suburban areas tend to be given higher representation ratios than do rural areas.[137]

The stark fact is that if among the numerous widely varying principles and practices that control state legislative apportionment today there is any generally pre-

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state constitutional provisions rejecting the principle of equal numbers have both contributed to the generally prevailing numerical inequality of representation in this country. Compare Walter, *supra*, with Baker, One Vote, One Value, 47 Nat. Mun. Rev. 16, 18 (1958).

[134] See, *e. g.*, Griffith 116–117; Luce 364–367, 370; Merriam, American Political Ideas (1929), 244–245; Legislation, Apportionment of the New York State Senate, 31 St. John's L. Rev. 335, 341–342 (1957).

[135] In 1947, the Boundary Commission for England, ". . . impressed by the advantages of accessibility [that large compact urban regions] . . . enjoy over widely scattered rural areas . . . came to the conclusion that they could conveniently support electorates in excess of the electoral quota, and would in the majority of cases prefer to do so rather than suffer severance of local unity for parliamentary purposes,"—that "in general urban constituencies could more conveniently support large electorates than rural constituencies . . . ." Initial Report of the Boundary Commission for England [Cmd. 7260] (1947), 5. See also Mackenzie 110–111; De Grazia, General Theory of Apportionment, 17 Law & Contemp. Prob. 256, 261–262 (1952).

[136] See Walter, *supra*, note 133; Walter, Reapportionment of State Legislative Districts, 37 Ill. L. Rev. 20, 37–38 (1942). The urban-rural conflict is often the core of apportionment controversy. See Durfee, *supra*, note 114, at 1093–1094; Short, *supra*, note 114, at 381.

[137] Baker, Rural Versus Urban Political Power (1955), 11–19; MacNeil, Urban Representation in State Legislatures, 18 State Government 59 (1945); United States Conference of Mayors, Government Of the People, By the People, For the People (ca. 1947).

vailing feature, that feature is geographic inequality in relation to the population standard.[138] Examples could be endlessly multiplied. In New Jersey, counties of thirty-five thousand and of more than nine hundred and five thousand inhabitants respectively each have a single senator.[139] Representative districts in Minnesota range from 7,290 inhabitants to 107,246 inhabitants.[140] Ratios of senatorial representation in California vary as much as two hundred and ninety-seven to one.[141] In Oklahoma,

[138] See, in addition to the authorities cited in notes 130, 131, 136 and 137, *supra*, and 140 to 144, *infra*, (all containing other examples than those remarked in text), Hurst, The Growth of American Law, The Law Makers (1950), 41–42; American Political Science Assn., Committee on American Legislatures, American State Legislatures (Zeller ed. 1954), 34–35; Gosnell, Democracy, The Threshold of Freedom (1948), 179–181; Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1059–1064 (1958); Friedman, Reapportionment Myth, 49 Nat. Civ. Rev. 184, 185–186 (1960); 106 Cong. Rec. 13827–13842 (daily ed., June 29, 1960) (remarks of Senator Clark and supporting materials); H. R. Rep. No. 2533, 85th Cong., 2d Sess. 24; H. R. Doc. No. 198, 84th Cong., 1st Sess. 38–40; Hadwiger, Representation in the Missouri General Assembly, 24 Mo. L. Rev. 178, 180–181 (1959); Hamilton, Beardsley and Coats, Legislative Reapportionment in Indiana; Some Observations and a Suggestion, 35 Notre Dame Law. 368, 368–370 (1960); Corter, Pennsylvania Ponders Apportionment, 32 Temple L. Q. 279, 283–288 (1959). Concerning the classical gerrymander, see Griffith, passim; Luce 395–404; Brooks, Political Parties and Electoral Problems (3d ed. 1933), 472–481. For foreign examples of numerical disproportion, see Hogan, Election and Representation (1945), 95; Finer, Theory and Practice of Modern Government (Rev. ed. 1949), 551–552.

[139] Baker, *supra*, note 137, at 11. Recent New Jersey legislation provides for reapportionment of the State's lower house by executive action following each United States census subsequent to that of 1960. N. J. Laws 1961, c. 1. The apportionment is to be made on the basis of population, save that each county is assured at least one House seat. In the State's Senate, however, by constitutional command, each county elects a single senator, regardless of population. N. J. Const., 1947, Art. IV, § II, par. 1.

[140] Note, 42 Minn. L. Rev. 617, 618–619 (1958).

[141] Greenfield, Ford and Emery, *supra*, note 128, at 3.

the range is ten to one for House constituencies and roughly sixteen to one for Senate constituencies.[142] Colebrook, Connecticut—population 592—elects two House representatives; Hartford—population 177,397—also elects two.[143] The first, third and fifth of these examples are the products of constitutional provisions which subordinate population to regional considerations in apportionment; the second is the result of legislative inaction; the fourth derives from both constitutional and legislative sources. A survey made in 1955, in sum, reveals that less than thirty percent of the population inhabit districts sufficient to elect a House majority in thirteen States and a Senate majority in nineteen States.[144] These figures show more than individual variations from a generally accepted standard of electoral equality. They show that there is not—as there has never been—a standard by which the place of equality as a factor in apportionment can be measured.

Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself. Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics,

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[142] University of Oklahoma, Bureau of Government Research, The Apportionment Problem in Oklahoma (1959), 16–29.

[143] 1 Labor's Economic Rev. 89, 96 (1956).

[144] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 572, 574 (1955).

censuses compiling relevant data, and a host of others.[145] Legislative responses throughout the country to the reapportionment demands of the 1960 Census have glaringly confirmed that these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit. And this is the more so true because in every strand of this

[145] See the Second Schedule to the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, as amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26, § 2, and the English experience described in text at notes 50 to 61, *supra*. See also the Report of the Assembly Interim Committee on Elections and Reapportionment, California Assembly (1951) (hereafter, California Committee Report), 37: "The geographic—the socio-economic—the desires of the people—the desires of the elected officeholders—the desires of political parties—all these can and do legitimately operate not only within the framework of the 'relatively equal in population districts' factor, but also within the factors of contiguity and compactness. The county and Assembly line legal restrictions operate outside the framework of theoretically 'equal in population districts.' All the factors might conceivably have the same weight in one situation; in another, some factors might be considerably more important than others in making the final determination." A Virginia legislative committee adverted to ". . . many difficulties such as natural topographical barriers, divergent business and social interests, lack of communication by rail or highway, and the disinclinations of communities to breaking up political ties of long standing, resulting in some cases of districts requesting to remain with populations more than their averages rather than have their equal representation with the changed conditions." Report of the Joint Committee on the Re-apportionment of the State into Senatorial and House Districts, Virginia General Assembly, House of Delegates, H. Doc. No. 9 (1922), 1–2. And the Tennessee State Planning Commission, concerning the problem of congressional redistricting in 1950, spoke of a "tradition [which] relates to the sense of belonging—loyalties to groups and items of common interest with friends and fellow citizens of like circumstance, environment or region." Tennessee State Planning Commission, Pub. No. 222, Redistricting for Congress (1950), First page.

complicated, intricate web of values meet the contending forces of partisan politics.[146] The practical significance of apportionment is that the next election results may differ because of it. Apportionment battles are overwhelmingly party or intra-party contests.[147] It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them.[148]

IV.

Appellants, however, contend that the federal courts may provide the standard which the Fourteenth Amend-

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[146] See, *e. g.*, California Committee Report, at 52.

". . . [T]he reapportionment process is, by its very nature, political. . . . There will be politics in reapportionment as long as a representative form of government exists . . . .

"It is impossible to draw a district boundary line without that line's having some political significance. . . ."

[147] See, *e. g.*, Celler, Congressional Apportionment—Past, Present, and Future, 17 Law & Contemp. Prob. 268 (1952), speaking of the history of congressional apportionment:

". . . A mere reading of the debates [from the Constitutional Convention down to contemporary Congresses] on this question of apportionment reveals the conflicting interests of the large and small states and the extent to which partisan politics permeates the entire problem."

[148] See Standards for Congressional Districts (Apportionment), Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 86th Cong., 1st Sess. 23, concerning a proposed provision for judicial enforcement of certain standards in the laying out of districts:

"Mr. KASEM. You do not think that that [a provision embodying the language: 'in as compact form as practicable'] might result in a decision depending upon the political inclinations of the judge?

"Mr. CELLER. Are you impugning the integrity of our Federal judiciary?

"Mr. KASEM. No; I just recognize their human frailties."

For an instance of a court torn, in fact or fancy, over the political issues involved in reapportionment, see *State ex rel. Lashly* v. *Becker*, 290 Mo. 560, 235 S. W. 1017, and especially the dissenting opinion of Higbee, J., at 613, 235 S. W. at 1037.

ment lacks by reference to the provisions of the constitution of Tennessee. The argument is that although the same or greater disparities of electoral strength may be suffered to exist immune from federal judicial review in States where they result from apportionment legislation consistent with state constitutions, the Tennessee legislature may not abridge the rights which, on its face, its own constitution appears to give, without by that act denying equal protection of the laws. It is said that the law of Tennessee, as expressed by the words of its written constitution, has made the basic choice among policies in favor of representation proportioned to population, and that it is no longer open to the State to allot its voting power on other principles.

This reasoning does not bear analysis. Like claims invoking state constitutional requirement have been rejected here and for good reason. It is settled that whatever federal consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the State's fundamental law. *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362. And see *Castillo* v. *McConnico,* 168 U. S. 674; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 608–609; *Owensboro Waterworks Co.* v. *Owensboro,* 200 U. S. 38; *Hebert* v. *Louisiana,* 272 U. S. 312, 316–317; *Snowden* v. *Hughes,* 321 U. S. 1, 11. Appellants complain of a practice which, by their own allegations, has been the law of Tennessee for sixty years. They allege that the apportionment act of 1901 created unequal districts when passed and still maintains unequal districts. They allege that the Legislature has since 1901 purposefully retained unequal districts. And the Supreme Court of Tennessee has refused to invalidate the law establishing these unequal districts. *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40; appeal dismissed here

in 352 U. S. 920. In these circumstances, what was said in the *Browning* case, *supra,* at 369, clearly governs this case:

> ". . . Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . [T]he Equal Protection Clause is not a command of candor. . . ."

Tennessee's law and its policy respecting apportionment are what 60 years of practice show them to be, not what appellants cull from the unenforced and, according to its own judiciary, unenforceable words of its Constitution. The statute comes here on the same footing, therefore, as would the apportionment laws of New Jersey, California or Connecticut,[149] and is unaffected by its supposed repugnance to the state constitutional language on which appellants rely.[150]

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[149] See text at notes 139–143, *supra.*

[150] Decisions of state courts which have entertained apportionment cases under their respective state constitutions do not, of course, involve the very different considerations relevant to federal judicial intervention. State-court adjudication does not involve the delicate problems of federal-state relations which would inhere in the exercise of federal judicial power to impose restrictions upon the States' shaping of their own governmental institutions.

In another aspect, however, the *Kidd* v. *McCanless* case, *supra*, introduces a factor peculiar to this litigation, which only emphasizes the duty of declining the exercise of federal judicial jurisdiction. In all of the apportionment cases which have come before the Court, a consideration which has been weighty in determining their non-justiciability has been the difficulty or impossibility of devising effective judicial remedies in this class of case. An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable. A declaration devoid of implied compulsion of injunctive or other relief would be an idle threat.[151] Surely a Federal District Court could not itself remap the State: the same complexities which impede effective judicial review of apportionment *a fortiori* make impossible a court's consideration of these imponderables as an original matter. And the choice of elections at large as opposed to elections by district, however unequal the districts, is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts.

In Tennessee, moreover, the *McCanless* case has closed off several among even these unsatisfactory and dangerous

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Moreover, state constitutions generally speak with a specificity totally lacking in attempted utilization of the generalities of the Fourteenth Amendment to apportionment matters. Some expressly commit apportionment to state judicial review, see, *e. g.*, N. Y. Const., 1938, Art. III, § 5, and even where they do not, they do precisely fix the criteria for judicial judgment respecting the allocation of representative strength within the electorate. See, *e. g.*, *Asbury Park Press, Inc.*, v. *Woolley*, 33 N. J. 1, 161 A. 2d 705.

[151] Appellants' suggestion that, although no relief may need be given, jurisdiction ought to be retained as a "spur" to legislative action does not merit discussion.

modes of relief. That case was a suit in the state courts attacking the 1901 Reapportionment Act and seeking a declaration and an injunction of the Act's enforcement or, alternatively, a writ of mandamus compelling state election officials to hold the elections at large, or, again alternatively, a decree of the court reapportioning the State. The Chancellor denied all coercive relief, but entertained the suit for the purpose of rendering a declaratory judgment. It was his view that despite an invalidation of the statute under which the present legislature was elected, that body would continue to possess *de facto* authority to reapportion, and that therefore the maintaining of the suit did not threaten the disruption of the government. The Tennessee Supreme Court agreed that no coercive relief could be granted; in particular, it said, "There is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn., at 277, 292 S. W. 2d, at 42. Thus, a legislature elected at large would not be the legally constituted legislative authority of the State. The court reversed, however, the Chancellor's determination to give declaratory relief, holding that the ground of demurrer which asserted that a striking down of the statute would disrupt the orderly process of government should have been sustained:

> "(4) It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the *de facto* doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only not have any existing members of the General Assembly but we would have no appor-

> tionment act whatever under which a new election could be held for the election of members to the General Assembly.
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> . . . . .
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> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." *Id.*, at 281–282, 292 S. W. 2d, at 44.

A federal court enforcing the Federal Constitution is not, to be sure, bound by the remedial doctrines of the state courts. But it must consider as pertinent to the propriety or impropriety of exercising its jurisdiction those state-law effects of its decree which it cannot itself control. A federal court cannot provide the authority requisite to make a legislature the proper governing body of the State of Tennessee. And it cannot be doubted that the striking down of the statute here challenged on equal protection grounds, no less than on grounds of failure to reapportion decennially, would deprive the State of all valid apportionment legislation and—under the ruling in *McCanless*—deprive the State of an effective law-based legislative branch. Just such considerations, among others here present, were determinative in *Luther* v. *Borden* and the Oregon initiative cases.[152]

Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action. The judgment of the District Court, in dismissing the complaint for failure to state a claim on which relief can be granted, should therefore be affirmed.

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[152] See note 24, *supra*.