Election Law and Litigation

ASPEN CASEBOOK SERIES

ELECTION LAW AND LITIGATION

THE JUDICIAL REGULATION OF POLITICS

SECOND EDITION

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Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-9270-0

Library of Congress Cataloging-in-Publication Data

Names: Foley, Edward B., author. | Pitts, Michael J., author. | Douglas, Joshua A., author.
Title: Election law and litigation: the judicial regulation of politics / Edward B. Foley, Charles W. Ebersold and Florence Whitcomb Ebersold Chair in Constitutional Law and Director, Election Law, The Ohio State University, Moritz College of Law; Michael J. Pitts, Vice Dean and Professor of Law, Indiana University Robert H. McKinney School of Law; Joshua A. Douglas, Ashland, Inc.-Spears Distinguished Research Professor of Law, University of Kentucky J. David Rosenberg College of Law.
Description: Second edition. | New York City: Wolters Kluwer, 2021. | Series: Aspen casebook series | Includes bibliographical references and index.
Identifiers: LCCN 2021034202 (print) | LCCN 2021034203 (ebook) | ISBN 9781454892700 (hardcover) | ISBN 9781543823424 (ebook)
Subjects: LCSH: Election law—United States. | LCGFT: Casebooks (Law)
Classification: LCC KF4886.F65 2021 (print) | LCC KF4886 (ebook) | DDC 342.73/07—dc23
LC record available at https://lccn.loc.gov/2021034202
LC ebook record available at https://lccn.loc.gov/2021034203

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To Miranda, Max, and Robbie, who have been enthusiastic supporters of this project ever since its origins.

—Ned

To Jenny, William, and Jonathan, who are the best family one could ever hope for.

—Mike

To Bari, who wins the campaign for my heart every day. And to Caitlyn and Harrison: May our democracy be even stronger when you are voters.

—Josh

To our wonderful students, whose feedback has helped make this book more student-friendly.

—Ned, Mike, and Josh

Summary of Contents

Contents

INTRODUCTION

This book covers the law that governs the operation of elections as well as the campaigns leading up to those elections. Implicit in this very first sentence is the fact that this field can be subdivided between "election" law on the one hand and "campaign" law on the other. Further subdivisions of election law are useful. There is the law that governs the nomination of candidates, sometimes called "ballot access" law and which includes the distinctive rules concerning primary elections, to be distinguished from the law that governs the casting and counting of votes for the nominated candidates. This latter area, regulating the voting process itself, is sometimes called "election administration," although that term is confusing since the distinctive rules for nominating candidates could be considered an aspect of election administration. Consequently, we prefer to call this latter area simply "voting" law.

Another distinctive component of election law is the law that governs the drawing of boundary lines for legislative districts, to define the specific constituency that will elect each member of the legislature. Obviously, this "districting" law is inapplicable to the election of candidates for statewide offices, such as Governor or U.S. Senator. Thus, districting law might be considered as belonging to a subfield of election law that concerns the special rules for different types of election offices. The distinctive rules for the operation of the Electoral College, which uniquely govern the election of the U.S. President, would be considered another component of this office-specific set of election laws. (The same holds true for the distinctive rules concerning referenda, initiatives, and other ballot propositions, even though they involve voting on issues rather than candidates.)

Nonetheless, the U.S. Supreme Court cases in the particular area of districting law loom sufficiently large over the entire field of election law that not only do they deserve separate consideration, but they also provide a good place to start one's study of this field. In the 1960s, as the Warren Court was reaching the apex of its activism, the Court ushered in what has been called the "reapportionment revolution," whereby the Court interpreted the Equal Protection Clause of the U.S. Constitution to require both houses of every state legislature to comply with a requirement of equally populated districts (or at least approximately so—more on that later). Not only did this revolution newly subject the districting of state legislatures to federal judicial oversight, but the interpretive principle upon which this revolution relied—that the Equal Protection Clause guarantees each citizen equal voting rights and, even more broadly, equal rights with respect to participating in the electoral process in various ways—has had profound ramifications in other areas of election law besides districting.

As we shall see, soon after the reapportionment revolution, the Warren Court extended this Equal Protection principle to the nomination of candidates, to assure that each citizen had an equal opportunity to run for office. In the twenty-first

century, the Supreme Court invoked this same Equal Protection principle in *Bush v. Gore*, 513 U.S. 98 (2000), to rule that a state's procedures for recounting ballots must contain standards of sufficient specificity to avoid disparate treatment of similar ballots depending upon the particular recounting panel that happens to review them.

If one had studied election law in 1950, before the reapportionment revolution occurred, the subject would have seemed entirely different than it does today. Consisting mostly of state-court cases interpreting state statutes and some state constitutional provisions, a book like this one would have contained hardly any federal law—and almost none of it federal constitutional law. Now, we have major federal statutes regulating various aspects of the subject: the Voting Rights Act of 1965, the Federal Election Campaign Act of 1974 (when its most important provisions were adopted), and the Help America Vote Act of 2002, among the most significant. Although many students today are surprised when they first learn how much state law, rather than federal law, still controls even elections to federal office (Congress and the President), the degree of federal-law control over U.S. elections, including those for state and local offices, is vastly greater than it was a half-century ago. And a considerable portion of this new federal-law control results from judicial interpretation of the U.S. Constitution, starting with the reapportionment revolution of the 1960s.

The first edition of this book was published in 2014. At the time, the field of election law was dominated primarily by the so-called "voting wars" that occurred in the aftermath of the disputed presidential election of 2000. The closeness of that race—a mere 537 votes in the pivotal state of Florida separated the two main candidates in the officially certified result—highlighted the degree to which election laws, and especially litigation over them, potentially could make a difference in the outcome of even statewide elections. That fact, combined with the increasing polarization of American politics, caused a sharp increase in litigiousness over all aspects of the voting process, both before and after the casting of ballots. Newly adopted voter identification rules became one prominent focal point of this disputation, although by no means the only one.

This second edition is going to press in the summer of 2021, in the aftermath of the 2020 election, which dwarfed all of the "voting wars" that preceded it. Before any ballots were cast in the November 2020 general election, there already had been an unprecedented spike in lawsuits over voting rules, prompted in large part due to changes in election procedures brought on by the coronavirus pandemic. President Donald Trump, running for reelection, railed against these changes, especially those involving expanded vote-by-mail. After the voting occurred, and the tally of ballot showed him to have been defeated by Joe Biden in enough states to determine the Electoral College result, Trump refused to accept defeat and claimed—falsely—that the election had been stolen from him. Recounts and litigation in the battleground states confirmed Biden's victory. In Georgia, for example, all the ballots in the state were counted multiple times, including by hand. But still Trump claimed he was cheated, spinning fantastical conspiracy theories about voting machines having been hacked by Venezuela (or Italy), a preposterous claim that even if true would be irrelevant once the ballots had all been counted by hand.

Nonetheless, Trump's "big lie" about being cheated of a second term took hold in the body politic, with the consequence that public opinion polls throughout 2021 consistently showed substantial majorities of Republican voters believing that President Biden did not take office legitimately but instead was installed by fraudulent means. For both the first and second editions, we have strived to be as nonpartisan as possible, our core credo being that a well-functioning electoral system must work properly for all voters regardless of their party affiliations, enabling them to make the choice of which party they wish to govern for the next period of time. As professors of election law, we maintain our duty to all students is to teach this subject impartially, so that all students regardless of their own political beliefs and any party affiliation have an equal opportunity to learn the material. But as professors we also have a duty to objective truth, and this duty requires us to be candid that Trump's "big lie" is indeed objectively false and has no basis in reality. In our judgment, it is the functional equivalent of claiming that the earth is flat, which is objectively false on the basis of all available empirical evidence. We cannot give any credence to the claim that Trump was robbed of a victory, when a reality-based evaluation of the vote-counting process in Georgia and the other battleground states necessitates the conclusion that Biden, not Trump, received the most valid votes in those states.

As this book goes to press, we cannot know what long-term damage to American democracy Trump's "big lie" will do. It caused the insurrection at the Capitol on January 6, when Congress met to count the Electoral College votes. That insurrection was a uniquely ugly moment in U.S. history, with its horrific violence and loss of life. But it did not negate Biden's inauguration, which was the authentic result of the votes actually cast and counted. The long-term consequences will be determined by the public's response to the insurrection and the "big lie" that instigated it. So far, the signs are troubling: after an initial moment in which leaders of both parties essentially expressed the same "never again" sentiment, there has developed a persistent effort by Trump and his allies to rehabilitate the insurrection as an understandable response of "patriots" as part of the "Stop the Steal" effort to save the country from a fraudulent Biden presidency. Only after the 2022 and 2024 elections will we be in a position to assess whether democracy survived intact, in the critical sense of the declared winners being the candidates the voters truly wanted to win.

The aftermath of the 2020 election has also produced a frenzy of election-related legislation in the states. Given the hyperpolarized nature of American politics, much (although not all) of this legislation has been one party's rules enacted over the opposition of the opposing party. Public discourse over these new laws has also, for the most part, been highly polarized. The ultimate fate of this new legislation is also unknown as we write: President Biden's Attorney General, Merrick Garland, has sued Georgia over its new law, alleging that it is motivated by an aim to suppress Black turnout and thus violates the Voting Rights Act. Private plaintiffs have also sued, and similar lawsuits can be expected in other states.

Congress is also considering potential sweeping reforms of election law. Although the prospects of adoption seem dim at this moment, because of an inability of Senate Democrats to overcome (or eliminate) a filibuster, if Congress were to enact even a portion of the changes being contemplated, it would be a dramatic

transformation of the entire field. Congress has pending provisions on redistricting and campaign finance, as well as the process of casting and counting ballots. All of these provisions taken together, were they to take effect, would shift the balance between federal and state regulation of elections more significantly than any previous Act of Congress.

The four-part division of this book is designed to reflect what might be considered the natural lifecycle of the process that governs any particular election. First, it is necessary to define the office to which the election applies. Thus, we start with the law of districting, which defines each seat in the legislative body. Then, it is necessary for candidates to appear on the ballot, and so we turn in Part II to the law of candidate nominations. Once the candidates are on the ballot, the campaigning to win the election officially can begin. Consequently, we next consider, in Part III, the various regulations of campaign practices, including campaign finance. Finally, the election itself consists of casting and counting votes, and thus the Law of Voting in Part IV addresses not only the basic question of who is eligible to vote, but also the subsidiary questions of how to implement the voting process—including registration laws, voter identification rules, the times and places for casting ballots, and the procedures for resolving any disputes that may arise over the counting of ballots. This order roughly tracks the chronological cycle of an election, although there are certainly overlaps. The goal of presenting the material in this manner is to help you place the doctrine within the setting of how an election actually proceeds.

Before we move on, a note about how we edited the judicial opinions that appear in this casebook. We view a casebook as a tool for teaching students fundamental principles and as a launching off point for discussing the intricacies of election law rather than as a reference resource. For this reason, we have tried to edit the opinions in a streamlined manner so that instructors can construct assignments of reasonable length for students while still having the capability of covering the entire casebook within the confines of a three-credit law school course. We have also tried to edit the opinions to make them relatively easy to read. Many of the opinions in the area of election law are quite lengthy and in some instances we have substantially trimmed the opinions. The omissions in the opinions are not indicated with ellipses; however, we have endeavored to indicate when we have edited out an entire part (e.g., Part I) of an opinion. We also adopted the editing philosophy of limiting citations to precedent and quotations from precedent, and limiting the citations themselves to the case names, years (where necessary), and court (when it is not the U.S. Supreme Court). We did this to make the opinions easier for students to read, and on the theory that when an opinion quotes directly from a prior opinion, it is adopting that language verbatim. While we recognize there is no perfect way to edit an opinion, we hope that our editing assists students in understanding the basics of this admittedly complex area of the law. Finally, we strongly encourage you to read the notes after the cases. We believe that they are unlike the notes you may typically have encountered in other case books, which often present many "case notes" describing detailed permutations of the law or citations to law review articles. We have chosen a different path that we hope is more helpful to students: the notes are designed to present the exact kinds of questions

your professor might ask in class. In this way, the notes are intended to focus your reading and help you prepare for each day's class. We hope that this book, with its focus on being as accessible to students as possible, will serve as a valued introduction to the exciting field of election law.

Edward B. Foley
Michael J. Pitts
Joshua A. Douglas

August 2021

Election Law and Litigation

Part I

The Law of Legislative Districting

Districting law, generally speaking, involves four distinct concepts, each with its own line of cases.

- The first is the constitutional principle of one person, one vote.
- The second is the prohibition against racial vote dilution under the U.S. Constitution and Section 2 of the federal Voting Rights Act.
- The third is the constitutional constraint against race-based districting (i.e., "racial gerrymandering").
- The fourth is the constitutional treatment of "political gerrymanders"—that is, the distortion of district boundaries to secure partisan advantage.

Although each of these areas has developed its own separate set of rules, it is also true that these areas are interrelated, and cases in each of these areas often refer to cases, principles, and doctrines developed in the others. This book presents the four lines of cases in the order listed, from first to fourth, because that way they become least entangled with one another. Even so, it will be necessary—especially as one reviews all four—to consider how they have affected each other's development.

In addition to the four lines of cases, there is a fifth area that merits discussion—Section 5 of the Voting Rights Act. As you will learn, Section 5 was essentially neutralized by the Supreme Court's 2013 decision in *Shelby County v. Holder*. Yet even though Section 5, in essence, has been stripped of much, if not all, of its vitality, it is still worth studying because of its importance to the development of voting rights for racial and ethnic minorities, the recency of the Supreme Court's decision in *Shelby County*, and because discussion of Section 5 and some of its basic principles will likely remain salient for the foreseeable future. Moreover, some jurisdictions have justified their consideration of race in redistricting by saying that the goal was to comply with either Sections 2 or 5 of the Voting Rights Act (or both), and that litigation has continued post-*Shelby County*. For these reasons, this book discusses Section 5 between the discussion of racial vote dilution and the constitutional constraints on race-based districting.

Before considering any of these various topics in districting law, however, it is first necessary to address whether the judiciary should review the legality of

legislative districting at all, a question that implicates the so-called "political question" doctrine.

A. THE POLITICAL QUESTION DOCTRINE

The most fundamental question to be addressed in the law of legislative redistricting (at least as it relates to constitutional, rather than statutory, law) is whether there should be a "law" of legislative redistricting at all. By "law" in this context, what is connoted is whether the judiciary should pass judgment upon the merits of claims that legislative redistricting plans violate some provision of the U.S. Constitution. The case you are about to read, *Baker v. Carr*, lays the groundwork for judicial intervention in the realm of legislative redistricting, and in many respects the *Baker* decision forms the foundation for many of the federal constitutional cases that appear in this casebook.

Before reading *Baker*, it is useful to have some background on a case that was decided about 16 years earlier — *Colegrove v. Green*, 328 U.S. 549 (1946). *Colegrove* was a case that presented a similar federal constitutional question as the one you are about to encounter in *Baker v. Carr*: whether legislative malapportionment (i.e., legislative districts with unequal numbers of persons) violates the federal Constitution. In *Colegrove*, the Illinois legislature had failed to change the congressional district lines since 1901, with the result that population disparities developed between the districts. In *Colegrove*, the most populated congressional district had 914,000 persons while the least populated congressional district had 112,116. Residents of the most populated districts sued, alleging a violation of the federal Constitution.

Only seven justices participated in *Colegrove*, and they split 4-3 on the result without a majority opinion for the Court. An opinion for three justices written by Justice Frankfurter invoked the political question doctrine and refused to consider the merits of any federal constitutional challenge to the alleged malapportionment of Illinois's congressional districts. Justice Frankfurter wrote these words, which have become oft-quoted in the realm of election law:

> Courts ought not enter this political thicket. . . . The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.

Justice Rutledge, who provided the necessary fourth vote for the Court's ruling, wrote a cryptic concurrence saying that even if the federal judiciary had the power to order a redrawing of the state's congressional districts, it should decline to do so in the context of the particular case. In *Colegrove*, the plaintiffs sought injunctive relief. Because the issuance of an injunction is always a matter of equitable discretion, Justice Rutledge thought that the public interest weighed in favor of withholding injunctive relief, in part because of the timing of the litigation in relation to the next upcoming election.

Justices Black, Douglas, and Murphy dissented and would have found a violation of the Equal Protection Clause. Justice Jackson did not participate in *Colegrove*, and Chief Justice Stone had recently died without his successor yet in place.

As you are reading *Baker v. Carr*, consider the best arguments for why the judiciary should or should not become involved in reviewing the process of drawing district lines. Is line drawing a purely legislative judgment? Do judges have the necessary tools to determine when redistricting has become unfair? Note that the Court creates six categories of cases that are nonjusticiable under the political question doctrine. Ultimately, did the Supreme Court adequately justify its decision to make redistricting questions "justiciable"? What are the consequences of saying that those unhappy with legislative districts may challenge them in court? Will the Court's entanglement in "political cases" erode the public's confidence in the Court, as the dissent suggests?

Baker v. Carr

369 U.S. 186 (1962)

Mr. Justice BRENNAN delivered the opinion of the Court.

[Plaintiffs claim that they have been denied "equal protection of the Laws" within the meaning of the Fourteenth Amendment to the U.S. Constitution as a result of an apportionment of the Tennessee General Assembly pursuant to a 1901 state statute. The district court dismissed the complaint, holding] that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. We noted probable jurisdiction of the appeal. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion.

The General Assembly of Tennessee consists of the Senate with 33 members and the House of Representatives with 99 members. [The facts indicate that 33 percent of the voters of Tennessee can elect 20 of the 33 Senators while 40 percent of the voters can elect 63 of the 99 members of the House. The facts also indicate that there is a wide disparity of voting strength between the large and small counties. Some examples are: Moore County has a total representation of two with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,303) though the latter has four times the population; Loudon County (13,264), Houston County (3,084), and Anderson County (33,990) have the same representation.]

Tennessee's constitutional standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. In the more than 60 years since [enactment of the 1901 statute], all proposals in both Houses of the General Assembly for reapportionment have failed to pass.

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings

of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, "made no apportionment of Representatives and Senators in accordance with the constitutional formula . . ., but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever." It is further alleged that "because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901, the 1901 statute became unconstitutional and obsolete." Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible.[14] The complaint concludes that "these plaintiffs and others similarly situated are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes." They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large. They also pray for such other and further relief as may be appropriate.

JUSTICIABILITY

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green* (1946). We understand the District Court to have read [*Colegrove*] as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question."

[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." *Nixon v. Herndon.* Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government[30] and that complaints based on that clause have been held to present political questions which are nonjusticiable.

14. The appellants claim that no General Assembly constituted according to the 1901 Act will submit reapportionment proposals either to the people or to a Constitutional Convention. There is no provision for popular initiative in Tennessee.

30. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. Art IV, §4.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove v. Green*. Appellants' claim that they are being denied equal protection is justiciable.

[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

We come to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they

tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought "political," can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization.

We have already noted that the District Court's holding that the subject matter of this complaint was nonjusticiable relied upon *Colegrove v. Green*. In *Colegrove*, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed.

No constitutional questions, including the question whether voters have a judicially enforceable constitutional right to vote at elections of congressmen from districts of equal population, were decided in *Colegrove*. Six of the participating Justices reached the questions but divided three to three on their merits. Mr. Justice Rutledge believed that it was not necessary to decide them.

Indeed, the refusal to award relief in *Colegrove* resulted only from the controlling view of a want of equity.

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice WHITTAKER did not participate in the decision of this case.

Mr. Justice DOUGLAS, concurring.
[Omitted.]

Mr. Justice CLARK, concurring.
[Omitted.]

Mr. Justice STEWART, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today's decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated

upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes."

The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary — without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court does not say or imply that "state legislatures must be so structured as to reflect with approximate equality the voice of every voter." The Court does not say or imply that there is anything in the Federal Constitution "to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people." And contrary to the suggestion of my Brother Douglas, the Court most assuredly does not decide the question, "may a State weight the vote of one county or one district more heavily than it weights the vote in another?"

My Brother Clark has made a convincing prima facie showing that Tennessee's system of apportionment is in fact utterly arbitrary — without any possible justification in rationality. My Brother Harlan has, with imagination and ingenuity, hypothesized possibly rational bases for Tennessee's system. But the merits of this case are not before us now. The defendants have not yet had an opportunity to be heard in defense of the State's system of apportionment; indeed, they have not yet even filed an answer to the complaint. As in other cases, the proper place for the trial is in the trial court, not here.

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins, 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 of neither 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.

Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that

underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption.

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 districting 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 a 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 *interrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

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 *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. Some of the cases so labeled have no relevance here. But from others emerge unifying considerations that are compelling.

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. Thus the Court, in cases involving discrimination against the Negro's right to vote, has recognized not only the action at law for damages, but, in appropriate circumstances, the extraordinary remedy of declaratory or injunctive relief. Injunctions in these cases, it should be noted, would not have restrained statewide general elections.

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 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," is not enforceable through the courts.

The present case involves all of the elements that have made the Guarantee Clause cases nonjusticiable. 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. Art. IV, §4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable. But where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another.

Here appellants 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. . . ." 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.

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

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 non-republican 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 their votes counted. 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. 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 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. 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 government, 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," provides no guide for judicial oversight of the representation problem.

The stark fact is that if among the numerous widely varying principles and practices that control state legislative apportionment today there is any generally prevailing feature, that feature is geographic inequality in relation to the population standard. 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. Representative districts in Minnesota range from 7,290 inhabitants to 107,246 inhabitants. Ratios of senatorial representation in California vary as much as two hundred and ninety-seven to one. In Oklahoma, the range is ten to one for House constituencies and roughly sixteen to one for Senate constituencies. Colebrook, Connecticut — population 592 — elects two House representatives; Hartford — population 177,397 — also elects two. 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. 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, censuses compiling relevant data, and a host of others. 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 complicated, intricate web of values meet the contending forces of partisan politics. 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. It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them.

Dissenting opinion of Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER joins.

[Justice Harlan noted that Tennessee might have retained the current legislative districts to "protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities."]

NOTES ON *BAKER v. CARR* AND THE POLITICAL QUESTION DOCTRINE

1. As mentioned in the introduction to this case, *Colegrove v. Green* raised the exact same basic question as *Baker* yet, as you have now learned, the Court's approach in *Baker* was much different than the Court's approach in *Colegrove*. One factual difference was that *Colegrove* concerned a state's *congressional* delegation, whereas *Baker* concerned a state's own legislature. Should that factual distinction make a difference under the Equal Protection Clause?

2. Even if *Baker* did not technically overrule *Colegrove*, the two cases are very much inconsistent, as Justice Frankfurter observes in his *Baker* dissent. Why did the Court adopt a very different approach only 16 years after *Colegrove* itself? Was the Court justified in departing from the *Colegrove* approach? If so, why? Does the majority opinion in *Baker* even attempt to justify taking a different approach from *Colegrove* (as opposed to trying to cast aside *Colegrove* as irrelevant)?

3. In both *Baker* and *Colegrove*, there was a discussion of the so-called Guaranty Clause of the U.S. Constitution, which says that the federal government will

guarantee the states a "Republican Form of Government." Early in the Court's history, in a fascinating case called *Luther v. Borden*, 48 U.S. 1 (1849), the Court refused to entertain any judicial claim based on this clause. Rather, the Court held, it is up to Congress to enforce this constitutional guarantee. The context was attempted political revolution in Rhode Island, where the existing state constitution limited the suffrage to property owners, and opponents of this restriction held a constitutional convention for the state, submitted a new constitution to the citizenry for ratification, and attempted to elect a new government under the new constitution. Defenders of the old state constitution, however, refused to acquiesce, and they declared martial law and arrested supporters of the new state constitution. After their arrest, these supporters of the new state constitution filed suit in state court, claiming protection under the Guaranty Clause. The U.S. Supreme Court ruled that the federal courts were not entitled to intervene in this political dispute, thus invoking what has come to be known as the political question doctrine.

4. The significance of *Baker* is that it reinterprets the political question doctrine so that the "nonjusticiability" of Guaranty Clause claims is clause-specific, meaning that the obstacle to judicial involvement is reliance on that particular clause, not the nature of the controversy itself. *Colegrove*, by contrast, had taken the approach that the problem was the subject matter of the litigation: It would not matter which particular clause of the U.S. Constitution was invoked to challenge disparities of population among legislative districts; according to *Colegrove*, courts cannot become involved in that subject matter. *Baker* says the opposite: The federal judiciary is entitled to entertain an Equal Protection claim with respect to districting because that involves a different clause than the Guaranty Clause.

B. ONE PERSON, ONE VOTE

Baker v. Carr declared that federal courts would entertain Equal Protection challenges to state legislative districts that were malapportioned. However, as Justice Stewart notes in his concurrence in *Baker*, the *Baker* Court did not delineate the full scope of the constitutional right or remedy in this area. The next two cases illustrate both the nature of the remedy and the breadth of the right. As you are reading, remember from *Baker* that the source of the right is the Equal Protection Clause. Does the remedy crafted for the violation of the Equal Protection Clause resemble traditional equal protection doctrine?

Reynolds v. Sims

377 U.S. 533 (1964)

[This case was one of six decided the same day concerning the make-up of state legislatures. Alabama's legislature had not been redistricted for over 60 years. As a result, neither house of Alabama's legislature had representation based even remotely on population. In the Senate, the ratio between the most populated and least populated district was 41:1; in the House, the ratio between the most populated and least populated district was 16:1. Accordingly, a group of Alabama citizens

sued various state officials in federal court, claiming that the make-up of Alabama's legislature violated the Equal Protection Clause. The District Court ruled in plaintiffs' favor, and the case was appealed directly to the Supreme Court.]

Mr. Chief Justice WARREN delivered the opinion of the Court.

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and

substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and

equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, (and) for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.

Much has been written since our decision in *Baker v. Carr* about the applicability of the so-called federal analogy to state legislative apportionment arrangements. We find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union." But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation.

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State

to assist in the carrying out of state governmental functions. These governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state." The relationship of the States to the Federal Government could hardly be less analogous.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.* We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open

* [Re-read this sentence as it contains both the nature and the breadth of the right.—Eds.]

invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts.* Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of

* [A multi-member district is a district that elects more than one candidate. A floterial district is a district that elects one candidate from a combination of districts. For instance, District 1, District 2, and District 3 each elect a single candidate and then another candidate is elected from a floterial district that combines District 1, District 2, and District 3.—Eds.]

them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance, however. Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought, was in 1901. Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and

should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Affirmed and remanded.

Mr. Justice Clark, concurring in the affirmance.
[Omitted.]

Mr. Justice Stewart.
[Omitted.]

Mr. Justice Harlan, dissenting.
[Omitted.]

Lucas v. 44th General Assembly of Colorado

377 U.S. 713 (1964)

[This case was a companion to *Reynolds v. Sims*. It concerned the structure of Colorado's General Assembly. As the Court noted, however, the facts of *Lucas* differed significantly from the facts of *Reynolds*. In Colorado, unlike in Alabama, the issue of the state legislature's makeup had been put directly to the electorate in a referendum held in 1962. In this referendum, which complied with the principle of one person, one vote, the Colorado voters had been asked to choose between two alternative plans.

One plan, which we shall call "Plan A," would have apportioned Colorado's House of Representatives strictly according to population, but would have apportioned the Senate based partly on population and also partly on the desire to protect the interests of those citizens who lived in sparsely populated, geographically distinctive regions within the state. The result of Plan A would be that the ratio of persons in the most populated Senate district to the least populated Senate district would have been 3:1. The other plan on the ballot, which we shall call "Plan B," would have apportioned both the House and the Senate strictly according to population.

The voters adopted Plan A and rejected Plan B by more than a three-to-two margin. Moreover, a majority of voters in every county in Colorado, *including those counties within the highly populous urban region of the state*, approved of Plan A in preference to Plan B.

Shortly thereafter, a group of Colorado voters sued the state legislature in federal district court, claiming that Plan A violated the Equal Protection Clause of the Fourteenth Amendment. The district court rejected the plaintiffs' claim, and this appeal followed.]

Chief Justice WARREN delivered the opinion of the Court.

In *Reynolds v. Sims*, we held that the Equal Protection Clause requires that both houses of a bicameral state legislature must be apportioned substantially on a population basis.

An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ. v. Barnette* "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds v. Sims*.

Appellees' argument, accepted by the court below, that the apportionment of the Colorado Senate [under Plan A] is rational because it takes into account a variety of geographical, historical, topographic and economic considerations fails to provide an adequate justification for the substantial disparities from population-based representation in the allocation of Senate seats to the disfavored populous areas.

Reversed and remanded.

Mr. Justice CLARK, dissenting.

While I join my Brother Stewart's opinion, I have some additional observations with reference to this case.

I would refuse to interfere with this apportionment for several reasons. First, Colorado enjoys the initiative and referendum system which it often utilizes and which, indeed, produced the present apportionment. As a result of the action of the Legislature and the use of initiative and referendum, the State Assembly has been reapportioned eight times since 1881. This indicates the complete awareness of the people of Colorado to apportionment problems and their continuing efforts to solve them. The courts should not interfere in such a situation. Next, as my Brother Stewart has pointed out, there are rational and most persuasive reasons for some deviations in the representation in the Colorado Assembly. The State has mountainous areas which divide it into four regions, some parts of which are almost impenetrable. There are also some depressed areas, diversified industry and varied climate, as well as enormous recreational regions and difficulties in transportation. These factors give rise to problems indigenous to Colorado, which only its people can intelligently solve. This they have done in the present apportionment.

Finally, I cannot agree to the arbitrary application of the "one man, one vote" principle for both houses of a State Legislature. In my view, if one house is fairly apportioned by population (as is admitted here) then the people should have some

latitude in providing, on a rational basis, for representation in the other house. The Court seems to approve the federal arrangement of two Senators from each State on the ground that it was a compromise reached by the framers of our Constitution and is a part of the fabric of our national charter. But what the Court overlooks is that Colorado, by an overwhelming vote, has likewise written the organization of its legislative body into its Constitution, and our dual federalism requires that we give it recognition. After all, the Equal Protection Clause is not an algebraic formula. Equal protection does not rest on whether the practice assailed "results in some inequality" but rather on whether "any state of facts reasonably can be conceived that would sustain it"; and one who attacks it must show "that it does not rest upon any reasonable basis, but is essentially arbitrary." Certainly Colorado's arrangement is not arbitrary. On the contrary, it rests on reasonable grounds which, as I have pointed out, are peculiar to that State. It is argued that the Colorado apportionment would lead only to a legislative stalemate between the two houses, but the experience of the Congress completely refutes this argument. Now in its 176th year, the federal plan has worked well. It is further said that in any event Colorado's apportionment would substitute compromise for the legislative process. But most legislation is the product of compromise between the various forces acting for and against its enactment.

In striking down Colorado's plan of apportionment, the Court, I believe, is exceeding its powers under the Equal Protection Clause; it is invading the valid functioning of the procedures of the States, and thereby is committing a grievous error which will do irreparable damage to our federal-state relationship. I dissent.

Mr. Justice Stewart, whom Mr. Justice Clark joins, dissenting.

I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of these States is represented by two United States Senators.

The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union. With all respect, I am convinced these decisions mark a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory. The rule announced today is at odds with long-established principles of constitutional adjudication under the Equal Protection Clause, and it stifles values of local individuality and initiative vital to the character of the Federal Union which it was the genius of our Constitution to create.

I

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State's distinct history, distinct geography, distinct distribution of population,

and distinct political heritage. My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course, this ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

I do not pretend to any specialized knowledge of the myriad of individual characteristics of the several States, beyond the records in the cases before us today. But I do know enough to be aware that a system of legislative apportionment which might be best for South Dakota might be unwise for Hawaii with its many islands, or Michigan with its Northern Peninsula. I do know enough to realize that Montana with its vast distances is not Rhode Island with its heavy concentrations of people. I do know enough to be aware of the great variations among the several States in their historic manner of distributing legislative power—of the Governors' Councils in New England, of the broad powers of initiative and referendum retained in some States by the people, of the legislative power which some States give to their Governors, by the right of veto or otherwise of the widely autonomous home rule which many States give to their cities. The Court today declines to give any recognition to these considerations and countless others, tangible and intangible, in holding unconstitutional the particular systems of legislative apportionment which these States have chosen. Instead, the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.

But legislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests, and the goal is solely that of equally "weighted" votes, I do not understand

why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large.[12]

The fact is, of course, that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State. And the further fact is that throughout our history the apportionments of State Legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can better be expressed by a medley of component voices than by the majority's monolithic command. What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, since each State is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.

II

This brings me to what I consider to be the proper constitutional standards to be applied in these cases. Quite simply, I think the cases should be decided by application of accepted principles of constitutional adjudication under the Equal Protection Clause. A recent expression by the Court of these principles will serve as a generalized compendium:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland.*

These principles reflect an understanding respect for the unique values inherent in the Federal Union of States established by our Constitution. They reflect,

12. Even with legislative districts of exactly equal voter population, 26% of the electorate (a bare majority of the voters in a bare majority of the districts) can, as a matter of the kind of theoretical mathematics embraced by the Court, elect a majority of the legislature under our simple majority electoral system. Thus, the Court's constitutional rule permits minority rule. Students of the mechanics of voting systems tell us that if all that matters is that votes count equally, the best vote-counting electoral system is proportional representation in statewide elections. It is just because electoral systems are intended to serve functions other than satisfying mathematical theories, however, that the system of proportional representation has not been widely adopted.

too, a wise perception of this Court's role in that constitutional system. The point was never better made than by Mr. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*. The final paragraph of that classic dissent is worth repeating here:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason we must let our minds be bold.

Moving from the general to the specific, I think that the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State. I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards. But, beyond this, I think there is nothing in the Federal Constitution to prevent a State from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.

III

The Colorado plan creates a General Assembly composed of a Senate of 39 members and a House of 65 members. The State is divided into 65 equal population representative districts, with one representative to be elected from each district, and 39 senatorial districts, 14 of which include more than one county. In the Colorado House, the majority unquestionably rules supreme, with the population factor untempered by other considerations. In the Senate rural minorities do not have effective control, and therefore do not have even a veto power over the will of the urban majorities. It is true that, as a matter of theoretical arithmetic, a minority of 36% of the voters could elect a majority of the Senate, but this percentage has no real meaning in terms of the legislative process. Under the Colorado plan, no possible combination of Colorado senators from rural districts, even assuming arguendo that they would vote as a bloc, could control the Senate. To arrive at the 36% figure, one must include with the rural districts a substantial number of urban districts, districts with substantially dissimilar interests. There is absolutely no reason to assume that this theoretical majority would ever vote together on any issue so as to thwart the wishes of the majority of the voters of Colorado. Indeed, when we eschew the world of numbers, and look to the real world of effective representation, the simple fact of the matter is that Colorado's three

metropolitan areas, Denver, Pueblo, and Colorado Springs, elect a majority of the Senate.[14]

[Justice Stewart then explains why Plan A is reasonable given Colorado's unique geography and issues.]

The present apportionment, adopted overwhelmingly by the people in a 1962 popular referendum as a state constitutional amendment, is entirely rational, and the amendment by its terms provides for keeping the apportionment current. Thus the majority has consciously chosen to protect the minority's interests, and under the liberal initiative provisions of the Colorado Constitution, it retains the power to reverse its decision to do so. Therefore, there can be no question of frustration of the basic principle of majority rule.

NOTES ON *REYNOLDS* AND *LUCAS*

1. *Reynolds* is the famous case, but *Lucas* is the more important one because it shows the full reach of the one person, one vote principle adopted in those cases.

2. Where does the one person, one vote principle, and the corresponding constitutional "right to vote," come from? The text of the Fourteenth Amendment? Political philosophy? (Is political philosophy able to identify objectively "true" or "correct" principles of democracy?) The personal political beliefs of Chief Justice Warren and other members of the Court majority? (If so, is *Reynolds* a valid decision?)

3. Were you persuaded by the majority's rejection of the so-called "federal analogy"? In other words, if it is okay for each state to have equal representation in the U.S. Senate (should it be okay?), then why isn't it okay for each county to have equal representation in a state senate?

4. Instead of using the one person, one vote principle from *Reynolds*, Justice Stewart's opinion in *Lucas* proposes an alternative approach to adjudicating claims of malapportioned districts. He would uphold plans that were rational and that would not permit the "systematic frustration of the will of a majority of the electorate of the State." Which approach is better, Chief Justice Warren in *Reynolds* or Justice Stewart in *Lucas*?

5. Based on *Reynolds* itself, do you understand how much deviation from strict compliance with one person, one vote is permissible? In other words, would it be okay for one district to have 110,000 persons, while another district has 90,000?

14. The theoretical figure is arrived at by placing the legislative districts for each house in rank order of population, and by counting down the smallest population end of the list a sufficient distance to accumulate the minimum population which could elect a majority of the house in question. It is a meaningless abstraction as applied to a multimembered body because the factors of political party alignment and interest representation make such theoretical bloc voting a practical impossibility. For example, 31,000,000 people in the 26 least populous States representing only 17% of United States population have 52% of the Senators in the United States Senate. But no one contends that this bloc controls the Senate's legislative process.

Does the permissibility of such deviation from strict equality depend upon the state's reason for the deviation as well as its (mathematical) extent?

* * *

Reynolds and *Lucas* leave the requirement for equal population among districts relatively open-ended. The Court's more recent pronouncements in the one person, one vote area demonstrate how the Court has put a bit more definition into the standards and how the Court's doctrine seems to differentiate between state legislative and congressional districts. As the next three cases will demonstrate, the Court has generally allowed for higher deviations in population in state legislative districts than in congressional districts. The next three cases (and the notes that follow) also demonstrate that in both the legislative and congressional districting context, the Court—despite the opportunity to do so—has avoided adopting clear mathematical rules to separate those districting plans that violate one person, one vote from those districting plans that do not.

The following case, *Harris v. Arizona Independent Redistricting Commission*, involves a one person, one vote challenge to a *state* legislative redistricting plan. Before delving into that opinion, it will be helpful for you to know about a prior opinion involving state legislative redistricting in Wyoming during the 1980s.

In *Brown v. Thompson*, 462 U.S. 835 (1983), plaintiffs challenged Wyoming's plan for the State House of Representatives. The 1980 Census placed Wyoming's total population at 469,557. The plan adopted following the 1980 Census provided for 64 representatives, meaning the ideal population (i.e., the number of persons that would create totally equal population in each district)* would be 7,377 persons per representative. The overall range of relative deviation (which the courts often call "maximum deviation") for the plan was 89 percent. [Overall range of relative deviation provides the difference between the most populated district and the least populated district expressed as a percentage.]**

The *Brown* plaintiffs chose to challenge the allocation of one representative to Niobrara County, the State's least populous county. Niobrara County had a population of 2,924. The issue was whether the State of Wyoming violated the Equal Protection Clause by allocating one of the 64 seats in its House of Representatives to a county with a population considerably lower than the ideal population for a district.

* With single-member districts, the ideal population is calculated by dividing the total population by the number of districts. For example, in a city with a population of 10,000 persons and five single-member districts, the ideal population of a district is 2,000 persons (10,000 divided by 5).

** Overall range of relative deviation is calculated by looking at the largest and the smallest districts and their relation to the ideal district population. For instance, if the ideal district population is 100,000 persons and if the largest district has a population of 105,000 persons and the smallest district has a population of 97,000 persons then the overall range of relative deviation is 8%.

The Court rejected the challenge. In doing so, the Court laid out the following framework involving the basic doctrine of one person, one vote as it relates to *state legislative* redistricting plans:

> [W]e have held that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State . . . The ultimate inquiry [] is whether the legislature's plan "may reasonably be said to advance [a] rational state policy," and, if so, "whether the population disparities among districts that have resulted from the pursuit of this plan exceed constitutional limits." *Mahan v. Howell.*

After laying out this framework, the Court upheld Wyoming's decision to award Niobrara County a Representative although on very limited grounds. Even though the result was a plan with an overall range of relative deviation well above 10 percent, the Court noted the plaintiffs did not challenge the entire plan but only the choice to award Niobrara a seat. Thus, the decision for the Court was between a plan that had an 89 percent overall range of relative deviation and a 66 percent overall range of relative deviation. The Court also noted that Wyoming had a policy since it had become a State of ensuring each county had one representative, that the policy had "particular force given the peculiar size and population of the State," and that there was "no evidence of a built-in bias tending to favor particular political interests or geographic areas."

The limited nature of the Court's specific holding was emphasized by the concurring opinion of Justice Sandra Day O'Connor (joined by Justice John Paul Stevens) whose votes were critical to the outcome. Justice O'Connor emphasized that the "relevant percentage in this case is not the 89 percent maximum deviation when the State of Wyoming is viewed as a whole, but the additional deviation from equality produced by the allocation of one representative to Niobrara County." She continued:

> In the past, this Court has recognized that a state legislative apportionment scheme with a maximum population deviation exceeding 10% creates a prima facie case of discrimination. Moreover, in *Mahan v. Howell*, we suggested that a 16.4% maximum deviation "may well approach tolerable limits." I have the gravest doubt that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries.

Brown involved a state justifying an overall range of relative deviation above the 10 percent threshold. The next case—*Harris*—involves a state legislative plan with an overall range of relative deviation under 10 percent and develops how the Court will treat such plans.

Harris v. Arizona Independent Redistricting Commission

136 S. Ct. 1301, 578 U.S. __ (2016)

Justice Breyer delivered the opinion of the Court.

Appellants, a group of Arizona voters, challenge a redistricting plan for the State's legislature on the ground that the plan's districts are insufficiently equal in population. Because the maximum population deviation between the largest and the smallest district is less than 10%, the appellants cannot simply rely upon the numbers to show that the plan violates the Constitution. Nor have appellants adequately supported their contentions with other evidence. We consequently affirm a 3-judge Federal District Court decision upholding the plan.

I

In 2000, Arizona voters, using the initiative process, amended the Arizona Constitution to provide for an independent redistricting commission. Each decade, the Arizona Commission on Appellate Court Appointments creates three slates of individuals: one slate of 10 Republicans, one slate of 10 Democrats, and one slate of 5 individuals not affiliated with any political party. The majority and minority leader of the Arizona Legislature each select one Redistricting Commission member from the first two lists. These four selected individuals in turn choose one member from the third, nonpartisan list. Thus, the membership of the Commission consists of two Republicans, two Democrats, and one independent.

After each decennial census, the Commission redraws Arizona's 30 legislative districts. The first step in the process is to create districts of equal population in a grid-like pattern across the state. It then adjusts the grid to the extent practicable in order to take into account the need for population equality; to maintain geographic compactness and continuity; to show respect for communities of interest; to follow locality boundaries; and to use visible geographic features and undivided tracts. The Commission will favor political competitiveness as long as its efforts to do so create no significant detriment to the other goals. Finally, it must adjust boundaries as necessary to comply with the Federal Constitution and with the federal Voting Rights Act.

After the 2010 census, the legislative leadership selected the Commission's two Republican and two Democratic members, who in turn selected an independent member, Colleen Mathis. Mathis was then elected chairwoman. The Commission hired two counsel, one of whom they thought of as leaning Democrat and one as leaning Republican. It also hired consultants, including mapping specialists, a statistician, and a Voting Rights Act specialist. With the help of its staff, it drew an initial plan, based upon the gridlike map, with district boundaries that produced a maximum population deviation (calculated as the difference between the most populated and least populated district) of 4.07%. After changing several boundaries, including those of Districts 8, 24, and 26, the Commission adopted a revised plan by a vote of 3 to 2, with the two Republican members voting against it. In late April 2012, the Department of Justice approved the plan [under Section 5 of the Voting Rights Act] as consistent with the Voting Rights Act.

The next day, appellants filed this lawsuit, primarily claiming that the plan's population variations were inconsistent with the Fourteenth Amendment. A 3–judge Federal District Court heard the case. After a 5–day bench trial, the court, by a vote of 2 to 1, entered judgment for the Commission. The majority found that "the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." We affirm.

II

A

The Fourteenth Amendment's Equal Protection Clause requires States to "make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable." *Reynolds*. The Constitution, however, does not demand mathematical perfection. In determining what is "practicable," we have recognized that the Constitution permits deviation when it is justified by "legitimate considerations incident to the effectuation of a rational state policy." *Id.* In related contexts, we have made clear that in addition to the traditional districting principles such as compactness and contiguity, those legitimate considerations can include a state interest in maintaining the integrity of political subdivisions, *Mahan v. Howell* (1973), or the competitive balance among political parties, *Gaffney v. Cummings*. In cases decided before *Shelby County v. Holder*,* Members of the Court expressed the view that compliance with § 5 of the Voting Rights Act is also a legitimate state consideration that can justify some deviation from perfect equality of population. It was proper for the Commission to proceed on that basis here.

We have further made clear that "minor deviations from mathematical equality" do not, by themselves, "make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney*. We have defined as "minor deviations" those in "an apportionment plan with a maximum population deviation under 10%." *Brown*. And we have refused to require States to justify deviations of 9.9% and 8%.

In sum, in a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" to which we have referred in *Reynolds* and later cases. Given the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases. And we are not surprised that the appellants have failed to meet their burden here.

B

Appellants' basic claim is that deviations in their apportionment plan from absolute equality of population reflect the Commission's political efforts to help the Democratic Party. We believe that appellants failed to prove this claim because,

* [*Shelby County v. Holder*, which essentially eliminated Section 5 of the Voting Rights Act, appears *infra* at pages 116 to 139.—Eds.]

as the district court concluded, the deviations predominantly reflected Commission efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party. Appellants failed to show to the contrary. And the record bears out this conclusion.

[Section 5 of] the Voting Rights Act, among other things, forbids the use of new reapportionment plans that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. A plan leads to impermissible retrogression when, compared to the plan currently in effect (typically called a "benchmark plan"), the new plan diminishes the number of districts in which minority groups can "elect their preferred candidates of choice" (often called "ability-to-elect" districts). A State can obtain legal assurance that it has satisfied the non-retrogression requirement if it submits its proposed plan to the Federal Department of Justice, and the Department does not object to the plan within 60 days. While *Shelby County* struck down the § 4(b) coverage formula [and, by extension, made Section 5 largely inoperable], that decision came after the maps in this case were drawn.

The record in this case shows that the gridlike map that emerged after the first step of the redistricting process had a maximum population deviation from absolute equality of districts of 4.07%. After consulting with their Voting Rights Act expert, their mapping consultant, and their statisticians, all five Commissioners agreed that they must try to obtain Justice Department Voting Rights Act "preclearance" and that the former benchmark plan contained 10 ability-to-elect districts. They consequently set a goal of 10 such districts for the new plan. They then went through an iterative process, involving further consultation, to adjust the plan's initial boundaries in order to enhance minority voting strength. In October 2011 (by a vote of 4 to 1), they tentatively approved a draft plan with adjusted boundaries. They believed it met their goal of 10 ability-to-elect districts. And they published the plan for public comment.

In the meantime, however, the Commission received a report from one of its statisticians suggesting that the Department of Justice might not agree that the new proposed plan contained 10 ability-to-elect districts. It was difficult to know for certain because the Justice Department did not tell States how many ability-to-elect districts it believed were present in a benchmark plan, and neither did it typically explain precisely and specifically how it would calculate the number that exist in a newly submitted plan. At the same time, the ability-to-elect analysis was complex, involving more than simply adding up census figures. The Department of Justice instead conducted a functional analysis of the electoral behavior within the particular election district, and so might, for example, count as ability-to-elect districts "crossover" districts in which white voters combine their votes with minorities, see *Bartlett v. Strickland* (2009). Its calculations might take into account group voting patterns, electoral participation, election history, and voter turnout. The upshot was not random decision-making but the process did create an inevitable degree of uncertainty. And that uncertainty could lead a redistricting commission, as it led Arizona's, to make serious efforts to make certain that the districts it believed were ability-to-elect districts did in fact meet the criteria that the Department might reasonably apply.

As a result of the statistician's report, the Commission became concerned about certain of its proposed boundaries. One of the Commission's counsel advised that it would be "prudent to stay the course in terms of the ten districts that are

in the draft map and look to . . . strengthen them if there is a way to strengthen them." Subsequently, the Commission adopted several changes to the boundaries of Districts 24 and 26. It reduced the populations of those districts, thereby increasing the percentage of Hispanic voters in each. The Commission approved these changes unanimously.

Changes in the boundaries of District 8, however, proved more controversial. District 8 leaned Republican. A Democrat-appointed Commissioner asked the mapping specialist to look into modifications that might make District 8 politically more competitive. The specialist returned with a draft that shifted the boundary line between District 8 and District 11 so as to keep several communities with high minority populations together in District 8. The two Republican-appointed Commissioners objected that doing so would favor Democrats by "hyperpacking" Republicans into other districts; they added that the Commission should either favor political competitiveness throughout the State or not at all.

The Democrat-appointed proponent of the change replied that District 8 had historically provided minority groups a good opportunity to elect their candidate of choice—an opportunity that the changes would preserve. The Voting Rights Act specialist then said that by slightly increasing District 8's minority population, the Commission might be able to claim an 11th ability-to-elect district; and that fact would "unquestionably enhance the submission and enhance chances for preclearance." The Commission's counsel then added that having another possible ability-to-elect district could be helpful because District 26 was not as strong an ability-to-elect district as the others.

Only then, after the counsel and consultants argued for District 8 changes for the sake of Voting Rights Act preclearance, did Chairwoman Mathis support those changes. On that basis, the Commission ultimately approved the changes to District 8 by a vote of 3 to 2 (with the two Republican-appointed commissioners dissenting). The total population deviation among districts in this final map was 8.8%. While the Commission ultimately concluded that District 8 was not a true ability-to-elect district, the State's submission to the Department of Justice cited the changes to District 8 in support of the argument for preclearance. On April 26, 2012, the Department of Justice precleared the submitted plan.

On the basis of the facts that we have summarized, the District Court majority found that "the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." This conclusion was well supported in the record. And as a result, appellants have not shown that it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations from mathematically equal district populations—deviations that were under 10%. Consequently, they have failed to show that the Commission's plan violates the Equal Protection Clause as interpreted in *Reynolds* and subsequent cases.

C

The appellants make three additional arguments. First, they support their claim that the plan reflects unreasonable use of partisan considerations by pointing to the fact that almost all the Democratic-leaning districts are somewhat underpopulated and almost all the Republican-leaning districts are somewhat overpopulated. That is likely true. But that fact may well reflect the tendency of minority

populations in Arizona in 2010 to vote disproportionately for Democrats. If so, the variations are explained by the Commission's efforts to maintain at least 10 ability-to-elect districts. The Commission may have relied on data from its statisticians and Voting Rights Act expert to create districts tailored to achieve preclearance in which minority voters were a larger percentage of the district population. That might have necessitated moving other voters out of those districts, thereby leaving them slightly underpopulated. The appellants point to nothing in the record to suggest the contrary.

Second, the appellants point to *Cox v. Larios* (2004), in which we summarily affirmed a district court's judgment that Georgia's reapportionment of representatives to state legislative districts violated the Equal Protection Clause, even though the total population deviation was less than 10%. In *Cox*, however, unlike the present case, the district court found that those attacking the plan had shown that it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality among districts. The district court produced many examples showing that population deviation as well as the shape of many districts "did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts." *Id.* No legitimate purposes could explain them. It is appellants' inability to show that the present plan's deviations and boundary shapes result from the predominance of similarly illegitimate factors that makes *Cox* inapposite here. Even assuming, without deciding, that partisanship is an illegitimate redistricting factor, appellants have not carried their burden.

Third, appellants point to *Shelby County v. Holder*, in which this Court held unconstitutional sections of the Voting Rights Act that are relevant to this case. Appellants contend that, as a result of that holding, Arizona's attempt to comply with the Act could not have been a legitimate state interest. The Court decided *Shelby County,* however, in 2013. Arizona created the plan at issue here in 2010. At the time, Arizona was subject to the Voting Rights Act, and we have never suggested the contrary.

* * *

For these reasons the judgment of the District Court is affirmed.
It is so ordered.

Karcher v. Daggett

462 U.S. 725 (1983)

Justice Brennan delivered the opinion of the Court.

The question presented by this appeal is whether an apportionment plan for congressional districts satisfies Art. I, §2* without need for further justification if

* [Art. I §2 provides, in relevant part, "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."—Eds.]