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Legislative Reapportionment—The Kentucky Legal Context

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Notes

LEGISLATIVE REAPPORTIONMENT—THE KENTUCKY LEGAL CONTEXT

In its continuing role as guardian of citizens' constitutional rights, the Supreme Court in *Baker v. Carr*¹ unlocked widespread concern for equal representation in state legislatures. Having been suppressed for two decades in which an amazing shift of population has occurred,² the question of reapportionment and what to do about it had become one of great importance. In November, 1960, apportionments of 30 state legislatures had been challenged in state and federal courts.³ In addition, ten cases of an electoral character are presently on the docket of the Supreme Court of the United States.⁴

Apart from the legal implications and mysteries created by the Supreme Court in deciding *Baker v. Carr*, this decision, that the Federal courts have a permissible and necessary role to perform in assuring constitutional representation at the state level under the fourteenth amendment, illustrates a modern political fact of transcending importance. The fact is that state governments now must be responsive to recurring demands for relief from long-standing discriminatory practices in the apportionment of legislative seats. Of particular significance is the additional fact that in the future the question of reapportionment of state legislatures will arise periodically, the frequency depending upon the different state constitutions. Reaffirmation of these facts by the *Baker* case will alone assure this decision a high rank in historical importance.

Public attention has been focused on the issue of reapportionment

¹ 369 U.S. 186 (1962).

² The redistribution of Kentucky's population during the last two decades is illustrative of that occurring throughout the country. Although this state's population, as a whole has only increased about 200,000 since 1940, its urban population has increased 40.9 per cent during this period, while its rural population has declined 11.3 per cent. In 1940, the urbanized areas contained only 29.8 per cent of the state's population, in 1960, 44.5 per cent. This population shift has resulted in a loss of total population to 87 of the 120 Kentucky counties. Bureau of The Census, U.S. Dept. of Commerce, 1 1960 Census of Population 19-9, 19-10 (1961); Bureau of Census, U.S. Dept. of Commerce, 1 1950 Census of Population 17-7, 17-8 (1951).

³ *Grey v. Sanders*, 83 Sup. Ct. 801, 809 (1963) (dissent).

⁴ *Wesberry v. Sanders*, No. 507, Ga., *Reynolds v. Sims*, No. 508, Ala., *Beadle v. Scholle*, No. 517, Mich., *WMCA, Inc. v. Simon*, No. 460, N.Y., *Vann v. Frnk*, No. 540, Ala., *Maryland Comm. for Fair Representation v. Tawes*, No. 554, Md., *McConnell v. Frnk*, No. 610, Ala., *Price v. Moss*, No. 688, Okla., *Oklahoma Farm Bureau v. Moss*, No. 689, Okla., *Davis v. Mann*, No. 797, Va.

through the press, greatly accelerating the prospect of relief from grossly disproportionate representation in all states.⁵ And no state is completely immune to this rapidly developing public question: How must the state legislature be reapportioned to comply with the equal protection clause of the fourteenth amendment? Treating this question as it relates to Kentucky, this note, in its first two parts, explains briefly the *Baker* case and the Kentucky legal history of reapportionment. The third and fourth parts are concerned with the requirements of the Kentucky constitution and the known meanings of the fourteenth amendment as it is now being defined.

Fundamentals of Baker v. Carr

The *Baker* case was instituted on behalf of all eligible voters of Tennessee who were suffering debasement of their vote as a result of the state legislature's failure to reapportion itself every ten years in compliance with a constitutional mandate.⁶ This inaction by the legislature, accompanied by substantial growth and redistribution of the state's population, had resulted in disparity in popular representation between the largest and smallest senatorial districts of about *five to one*; the corresponding ratio between the largest and smallest house districts was about *eighteen to one*.⁷ The district court dismissed the suit, resting its decision upon two grounds, lack of jurisdiction over the subject matter and lack of a justiciable cause of action.⁸ In reversing this decision, the Supreme Court held only that: (a) the district court possessed jurisdiction of the subject matter; (b) the appellants had standing to challenge the Tennessee apportionment statutes; and (c) a justiciable cause of action had been stated upon which appellants would be entitled to appropriate relief.⁹ In addition to these three fundamental points, which deal with the procedural aspects of bringing the legislative apportionment question into the federal courts, the question of possible remedies contemplated by the Supreme Court for correction of an unconstitutional apportionment will be considered.

The basic source of federal jurisdiction is article III, section 2, of the United States Constitution, which provides that the "judicial

⁵ The disparities in popular representation that exist in the various state senates range from 422 to 1 in California to 1.6 to 1 in Missouri. The disparities in the lower houses of the state legislatures range from 873 to 1 in Vermont to 2.1 to 1 in Hawaii. The corresponding ratios in Kentucky, before this most recent statute, were 2.9 to 1 in the Senate and 6 to 1 in the House. National Municipal League, *Compendium On Legislative Apportionment* (2d ed. 1962).

⁶ Tenn. Const. art. II, §4.

⁷ *Baker v. Carr*, 369 U.S. 186, 275 (1962) (dissent).

⁸ *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959).

⁹ *Baker v. Carr*, 369 U.S. 186, 197-98 (1962).

Power shall extend to all Cases, in Law and Equity," arising under the Constitution and the laws of the United States. This provision, not being self-executing, requires congressional implementation before jurisdiction is conferred on the federal district courts.¹⁰ The Supreme Court in *Baker* ruled that Congress had exercised its power to confer jurisdiction of the reapportionment question in 28 U.S.C. §1343 (3),¹¹ and that unless the appellant's claim was so "unsubstantial as to be absolutely devoid of merit,"¹² or "frivolous,"¹³ the trial court had erred in dismissing for lack of subject matter jurisdiction. The lower tribunal itself had stated that there was merit in the appellants' allegation that the grossly unequal representation in Tennessee's legislature denied them equal protection of the laws. The Supreme Court, therefore, experienced no difficulty in finding a "substantial" and "non-frivolous" claim upon which to hinge federal jurisdiction.

The Supreme Court's finding that appellants had the necessary standing to challenge the existing apportionment in Tennessee was given very concise treatment. Their interest in obtaining an equal vote for themselves in state legislative policy was thought to be a sufficient "personal stake in the outcome."¹⁴ of the controversy to assure the necessary adversity for deciding such a sweeping constitutional issue.

The second reason given for dismissing *Baker v. Carr* in the lower court was the inappropriateness of the reapportionment question for judicial determination. Holding this issue a nonjusticiable "political question," the lower court interpreted the Supreme Court decision of *Colegrove v. Green*¹⁵ as deciding that federal courts could not intervene in this type of case to compel reapportionment. The *Colegrove* case contained three written opinions from the seven justices who participated. Two of the opinions, expressing the views of six

¹⁰ *E.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Bankers Trust Co. v. Texas and Pac. Ry. Co.*, 241 U.S. 295 (1916); *California ex rel. McColgan v. Bruce*, 129 F. 2d 421 (9th Cir. 1942), *cert. denied*, 317 U.S. 678 (1942).

¹¹ 28 U.S.C. §1343(3) (1958), provides that "the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law, of any right, privilege or immunity secured by the Constitution of the United States." (Emphasis added.) In 42 U.S.C. §1983 (1958), which provides every citizen with relief from the "deprivation of any rights, privileges, or immunities secured by the Constitution," the Supreme Court found the necessary authority to commence the reapportionment action.

¹² *Bell v. Hood*, 327 U.S. 678, 683 (1946), cited with approval in *Baker v. Carr*, 369 U.S. 186, 199 (1962).

¹³ *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904), cited with approval in *Baker v. Carr*, *supra* note 12.

¹⁴ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹⁵ 328 U.S. 549 (1946).

members of the Court, resulted in an even split on whether congressional redistricting presented a justiciable controversy.¹⁶ The deciding vote was cast by Mr. Justice Rutledge, who affirmed the lower court's dismissal, but only because the remaining time before the forthcoming elections made it extremely doubtful that the demanded relief could be secured; his opinion clearly supported the view that congressional reapportionment does present a justiciable controversy. In *Baker*, the Supreme Court held not only that the district court had misinterpreted the *Colegrove decision*,¹⁷ but also that the basic elements of a political question—a constitutional commitment of the issue to a coordinate political department, and a lack of judicial criteria for resolving it—are not present in a legislative reapportionment suit. Mr. Justice Brennan, speaking for the Court, stated:

We have no question decided, or to be decided, by a political branch of government coequal with this Court. 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.¹⁸

In failing to reach the merits of Tennessee's apportionment, the Court does not elaborate at all on the "well developed and familiar" standards of the fourteenth amendment of which it speaks.

After the apportionment of a particular state legislature has been declared unconstitutional, what remedies are available to the courts if that legislature should fail to enact a fair apportionment plan?¹⁹ The majority of the court in *Baker* thought it inappropriate to consider the question.²⁰ The language of the Court, however, clearly indicates that the federal courts will take a more active role in

¹⁶ Justices Frankfurter, Burton, and Reed affirmed the dismissal on the ground that the redistricting was a "political question." *Id.* at 552. Justices Black, Douglas, and Murphy held for reversal on the ground that the issue was justiciable. *Id.* at 566.

¹⁷ *Baker v. Carr*, 369 U.S. 186, 209 (1962).

¹⁸ *Id.* at 226.

¹⁹ Several cases indicate that even if a legislative representation is found to be an invidious discrimination, the federal courts will allow the state legislature additional time to enact a fair apportionment statute before imposing a judicial remedy. See *e.g.*, *Baker v. Carr*, 206 F Supp. 341 (M.D. Tenn. 1962); *Toombs v. Fortson*, 205 F Supp. 248 (N.D. Ga. 1962); *Sims v. Frnk*, 208 F Supp. 431 (M.D. Ala. 1962).

²⁰ Justice Brennan, speaking for the Court, merely stated that there was no cause to doubt that the District Court would be able to fashion relief if violations of constitutional rights were found to exist. *Baker v. Carr*, 369 U.S. 186, 198 (1962).

apportionment issues than merely reviewing the constitutionality of redistricting statutes.

Although the courts may become somewhat involved in what Justice Frankfurter termed a "political thicket,"²¹ a court reapportionment may well prove to be the most effective means of giving that equality of representation demanded by the fourteenth amendment. It would not be necessary for the court to make a final and complete reapportionment, but, as suggested by Justice Clark, only to eliminate the most egregious discrimination, leaving final redistricting to the newly created assembly.²² At least one federal district court has adopted this remedy.²³

A second possible remedy is to order an election-at-large. Unlike the court reapportionment, this remedy is not intended as an end in itself, but merely as a "spur to legislative action."²⁴ Admittedly, the election-at-large may not be politically desirable since it violates the vital political principle of affording some influence in legislative policy to those governmental subdivisions with only a small number of people. But historical evidence indicates that ordering this remedy does provide the necessary stimulus for legislative action.²⁵ This fact alone has motivated some state courts to adopt this remedy.²⁶

Kentucky Historical Background

As early as 1907, the Kentucky Court of Appeals adopted in part the same view recently taken by the Supreme Court in the *Baker* case, that the constitutionality of legislative action in this area is a proper question for judicial decision.²⁷ The Kentucky court, however, avoided the correlative implication of *Baker*, that legislative inaction requires judicial remedy. Since the adoption of the present constitution in 1891, the Kentucky legislature has enacted six districting statutes, the most recent in 1963. The first,²⁸ third,²⁹ and

²¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²² *Baker v. Carr*, 369 U.S. 186, 260 (1962). Justice Clark suggests that the stranglehold on the legislature could be released merely by consolidating the smallest districts and awarding the seats released to those counties that are most under-represented. This would permit a legislative enactment of a fair redistricting plan.

²³ *Sims v. Frnk*, 208 F. Supp. 431 (M.D. Ala. 1962).

²⁴ See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958).

²⁵ See e.g., *Carroll v. Becker*, 285 U.S. 380 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); *Hume v. Mahan*, 1 F. Supp. 142 (E.D. Ky. 1932).

²⁶ *Stein v. General Assembly*, 374 P. 2d 66, 73 (Colo. 1962) (dissent); *Scholle v. Hare*, 116 N.W. 2d 350 (Mich. 1962).

²⁷ *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907).

²⁸ Kentucky Acts ch. 235 (1891-1893).

²⁹ Kentucky Acts ch. 45 (1918).

fifth,³⁰ of these acts were not challenged in the courts. The second³¹ and fourth³² were held unconstitutional under section 33 of the Kentucky constitution. These decisions provide the judicial view of Kentucky constitutional standards for reapportionment.

In the first case, *Ragland v. Anderson*,³³ the court of appeals held that an apportionment resulting in a population disparity of seven to one between given districts lacked the equality of representation required by section 33. In so doing, the court established a general standard for equality representation:

All that the Constitution requires is that equality in the representation of the State which an ordinary knowledge of its population and a sense of common justice would suggest. If exactness cannot, from the nature of things, be attained, then the nearest practical approach to exactness ought to be made.³⁴

Although this case establishes historically a standard for constitutional representation in Kentucky, these extremes offer little practical help to a federal court in passing on the validity of a redistricting plan under the fourteenth amendment. The real problem in a modern context is to define what is meant by "the nearest practical approach to exactness."

As will be pointed out subsequently, although section 33 of the Kentucky constitution establishes population as the proper criterion for apportionment, it hedges this principle with various subsidiary provisions designed to maintain the county as a representative unit, including a requirement that not more than two counties may be joined to form a legislative district. The treatment of this provision in the *Ragland* case has proven to be of more than passing historical interest, since questions concerning its meaning and effect were interjected into the Kentucky reapportionment issue, and ultimately decided by the Kentucky Court of Appeals.

In holding the apportionment act of 1906 unconstitutional on the grounds that equality of representation based on population was not achieved, the court in *Ragland* said unequivocally that more than two counties could be joined to form a district, provided "it be necessary in order to effectuate that equality of representation which the spirit of the whole section so imperatively demands."³⁵ The two-county rule in section 33 provides:

³⁰ Ky. Rev. Stat. §6.010.

³¹ Kentucky Acts ch. 139 (1906).

³² Kentucky Acts ch. 147 (1930).

³³ 125 Ky. 141, 100 S.W. 865 (1907).

³⁴ *Id.* at 153, 100 S.W. at 869.

³⁵ *Id.* at 161-62, 100 S.W. at 870.

Not more than two counties shall be jointed to form a representative district; *Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated.* (Emphasis added).

This dictum in *Ragland* was compelled by the specific wording of section 33, and left little or no doubt as to the view of the Kentucky court on this point. Then in January, 1963, the court of appeals, in deciding *Combs v. Matthews*,³⁶ adopted the dictum of *Ragland*, and held that the Kentucky constitution does not limit representative districts to two counties.

*Stiglitz v. Schardien*³⁷ is the only other case in which the court of appeals has spoken clearly on the constitutionality of a districting act under section 33. Under the acts involved in this case the average population in the twelve smallest representative districts was 12,412, while the average population in the twelve largest districts was 46,434. In some of the senatorial districts there were more than three times as many people as in others. The court in declaring the acts unconstitutional, reaffirmed strongly the reasoning of the *Ragland* case, and said:

It is obvious on the face of the figures that no attempt was made to redistrict into districts as nearly equal as may be.

The Constitution is not concerned with election returns, but contemplates equal representation based upon population and territory. Its requirements may not be satisfied *with less than such equality of representation as common justice and ordinary knowledge of our territory and population would suggest.*³⁸ (Emphasis added.)

Both the *Ragland* and *Stiglitz* decisions support the conclusion that Kentucky constitutional policy, as set out in section 33, demands apportionment according to population which will meet a standard of "common justice" and "ordinary knowledge." This is very much in line with the meaning of the fourteenth amendment as it is now being defined, and strongly suggests that a federal court is not likely to strike down a reapportionment plan for Kentucky which lives up to the spirit of section 33.

Kentucky's Redistricting Criteria

There are basic causes for inequalities in legislative representation other than the mere growth and redistribution of population. In fact most state constitutions require reapportionment at intervals sufficiently frequent to compensate for the ordinary shifts in population. If under-representation exists, it results either from failure of the

³⁶ 364 S.W. 2d 647 (Ky. 1963).

³⁷ 239 Ky. 799, 40 S.W. 2d 315 (1931).

³⁸ *Id.* at 806, 812, 40 S.W. 2d at 319, 321.

legislature to comply with the state constitutional mandate to periodically reapportion the state, or from the inherent inequalities in the provisions of the state constitution which establish the redistricting formula. Since *Baker v. Carr* clearly implies that continued failure of a legislature to comply with the state constitutional mandate to redistrict is invidious discrimination, the alternative practical issue is whether existing state policy as expressed in the constitutional redistricting criteria violates the fourteenth amendment. Determination of this issue in a particular state necessarily calls for close scrutiny of the relevant constitutional provisions and their evaluation in terms of the federal equal protection clause.

The provisions of section 33 of the Kentucky constitution are similar to those found in the constitutions of a great many other states.³⁹ Aside from the provision that the state shall be divided into thirty-eight senatorial districts, and one hundred representative districts,⁴⁰ the districting criteria of section 33 fall into two categories, each composed of three specific provisions. The first category requirements are: (a) the districts shall be "as nearly equal in population as may be;" (b) the state shall be redistricted every ten years; and (c) any advantage resulting from unavoidable inequalities shall be given the districts with the largest territory. Since the clear purpose of these particular provisions is achievement of "equal" representation, their constitutionality, as such, ought not be questionable.

The second category requirements are: (a) "not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated;"⁴¹ (b) no part of a county shall be added to another county in forming a district; and (c) the counties forming a district shall be contiguous. In terms of purpose, these requirements obviously were designed to preserve the county unit in the districting and redistricting processes.

When read as a whole, section 33 establishes population as the principal criterion for apportionment of seats in the Kentucky legislature. The effectiveness of this factor in achieving equal representation is substantially reduced by the criteria requiring strict observance

³⁹ For a very good comparison of the districting and redistricting provisions of the various state constitutions, see Durfee, *Apportionment of Representatives in the Legislature: A Study of State Constitutions*, 43 Mich. L. Rev. 1091 (1945).

⁴⁰ This proviso of section 33 along with section 35 of the state constitution make it clear that an increase in the membership of the Kentucky legislature can be achieved only by a constitutional amendment.

⁴¹ No comparable limitation on senatorial districts is contained in the Kentucky constitution, therefore, the "two-county rule" applies only to representative districts.

of county lines. While this fact alone should not make the constitutionality of the second category provisions doubtful under the equal protection clause, it is apparent that full compliance with these limitations prevents perfection in popular representation. This is especially true in Kentucky since the maximum number of legislators is also constitutionally fixed. The courts, state and federal, have held repeatedly, as a general proposition, that absolute equality, or "mathematical perfection, is not required,⁴² but have provided little or no concrete instruction as to the permissible inequalities allowed under the fourteenth amendment. It has been said that state policy in this connection must be "reasonable" and must avoid "invidious discrimination."⁴³ Just what this means in fact, when state policy is constitutionally expressed in terms of specific county unit limitations on the population criterion, is the narrow and difficult question which lies at the heart of an evaluation of section 33.

The majority of the Supreme Court disavowed any intention to reach the merits of this and similar questions in the *Baker* case. An examination of Justice Clark's concurring opinion, in connection with similar county unit provisions of the Tennessee constitution, however, suggests strongly that at least two of the second category requirements of section 33 do not violate the fourteenth amendment. The relevant Tennessee constitutional provisions at issue in *Baker* established a maximum limitation on the number of legislators for the entire state,⁴⁴ required that all counties in multi-county districts be adjoining,⁴⁵ and provided that no county could be divided in forming a district.⁴⁶ In spite of the fact that they necessarily resulted in some inequality, Justice Clark found the last two provisions to be reasonable factors in Tennessee's apportionment plan. He said:

It is true that the apportionment policy incorporated in Tennessee's Constitution, i.e., statewide numerical equality of representation with certain minor qualifications, is a rational one. On a county-by-county comparison a districting plan based thereon naturally will have disparities in representation due to the qualifications.

⁴² E.g., *Baker v. Carr*, 369 U.S. 186, 260 (1962) (concurring opinion); *Toombs v. Fortson*, 205 F Supp. 248 (N.D. Ga. 1962); *Sims v. Frink*, 208 F Supp. 431 (M.D. Ala. 1962); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907).

⁴³ E.g., *Baker v. Carr*, *supra* note 42, at 258; *Sanders v. Gray*, 203 F Supp. 158, 167 (N.D. Ga. 1962); *Caesar v. Williams*, 371 P. 2d 241, 255 (Idaho 1962); *Maryland Comm. for Fair Representation v. Tawes*, 180 A. 2d 656, 668 (Md. 1962).

⁴⁴ "The number of Representatives shall never exceed ninety-nine. " Tenn. Const. art. 2, §5. "The number of Senators shall not exceed one-third the number of representatives. " Tenn. Const. art. 2, §6.

⁴⁵ Tenn. Const. art. 2, §6.

⁴⁶ *Ibid.*

But this to my mind does not raise constitutional problems, for the overall policy is reasonable.⁴⁷

Analysis of the litigation stimulated by *Baker v. Carr* not only supports the conclusion derived from Justice Clark's reasoning, but also seems to indicate that compliance in full with the provisions of section 33 is all that is needed for a fair apportionment of the Kentucky legislature.

In *Sims v. Frink*,⁴⁸ a federal case involving Alabama's legislative representation, the court declared the existing apportionment to be an "invidious discrimination" and violative of the fourteenth amendment. The Alabama constitution, in addition to requiring that senatorial districts shall be as nearly equal in population as possible, provides that no county shall be divided between two districts and that all counties in the same district shall be contiguous.⁴⁹ The federal district court stated that this criteria did not offend the fourteenth amendment, and that if the constitutional formula had been fully complied with, no valid objection could have been made "under the equal protection clause or any other part of the Constitution of the United States."⁵⁰

Since Alabama, like Kentucky, places a limitation on the maximum number of representatives,⁵¹ another significant factor in the *Sims* case is the validity attributed to the constitutional provision that "each county shall be entitled to at least one representative."⁵² This provision is comparable of the requirement of section 33 of the Kentucky constitution that not more than two counties may be joined together to form one district. In terms of purpose both are designed to provide some voice in legislative policy to those governmental units with relatively few people. As stated earlier, the language of section 33, in connection with the cases of *Ragland v. Anderson*⁵³ and *Combs v. Matthews*⁵⁴ leaves no doubt but that more than two counties can be joined in forming a representative district. But, even if section 33 had been construed to prohibit the joining of more than two counties into one district, the conclusion to be drawn from the implications of *Sims v. Frink* is that even then the provision would

⁴⁷ *Baker v. Carr*, 369 U.S. 186, 283-84 (1962). The conclusion of Justice Clark that an "invidious discrimination" did exist in Tennessee's representation was based principally upon the failure of the legislature to reapportion itself every ten years in accordance with its constitutional mandate.

⁴⁸ 208 F Supp. 431 (M.D. Ala. 1962).

⁴⁹ Ala. Const. art. IX, §200.

⁵⁰ *Sims v. Frink*, 208 F Supp. 431, (M.D. Ala. 1962).

⁵¹ Ala. Const. art. IX, §198.

⁵² Ala. Const. art IX, §199.

⁵³ 125 Ky. 141, 100 S.W 865 (1907).

⁵⁴ 364 S.W 2d 647 (Ky. 1963).

have been constitutional. Since the two-county rule, so construed, would have provided that each two-county district would have one representative, the inequality resulting from this rule would have been of a lesser degree than from the Alabama provision giving one representative to each county. The two-county rule would have been more constitutional than the Alabama rule to which validity has already been attributed.

A result contrary to *Sims* has been reached in the reapportionment litigation of Rhode Island.⁵⁵ The constitution of Rhode Island fixes the number of representatives at one hundred, and provides for at least one representative for every city and town, without regard to population.⁵⁶ In passing upon the constitutionality of these provisions the Supreme Court of Rhode Island stated:

We are constrained to conclude that the limitation of one hundred members and the securing of representation to each municipality, taken together, is an apportionment formula which when followed results in a denial of equal protection within the meaning of Article XIV of amendments as laid down by the United States Supreme Court. ⁵⁷

As subsequent discussion indicates, the meaning of the fourteenth amendment in regard to legislative reapportionment has not been "laid down" by the Supreme Court with the clarity seemingly expressed by the Rhode Island court. And no federal court has given any indication that constitutional provisions such as the two involved in the Rhode Island case are irrational per se. The only definite standard made thus far by the Supreme Court is that a districting formula with a rational design does not violate the federal constitution.

Equal Representation Under The Fourteenth Amendment

In holding that federal courts can review the constitutionality of legislative representation, the Supreme Court has indicated that some apportionments can be so unfair as to violate the equal protection clause. The Court, however, has declined to say just how unrepresentative a state legislature must be in order that its apportionment be vulnerable. Obviously, some slight differences in population among the senatorial and representative districts of a state will not render its apportionment unconstitutional. But, in formulating a redistricting plan, how is the state legislature to determine when these differences pass the allowable limits of the fourteenth amendment? Al-

⁵⁵ *Sweeney v. Notte*, 183 A. 2d 296 (R.I. 1962).

⁵⁶ R.I. Const. art. XIII, §1.

⁵⁷ *Sweeney v. Notte*, 183 A. 2d 296, 302 (R.I. 1962).

though this question has not been answered with certainty, the several opinions of *Baker v. Carr*, and subsequent decisions stimulated by this landmark ruling, offer some suggestion of the standard required to satisfy the federal constitution. The purpose of this section of the note is to analyze these decisions, and to draw some conclusion as to what is a "constitutional representation" as viewed by federal and state courts.

In spite of the fact that equal protection of the laws is said to be "a pledge of the protection of equal laws,"⁵⁸ the Supreme Court, long before *Baker*, made it clear that legislative classification is permissible under the fourteenth amendment.⁵⁹ The criteria established by the Court for determining the constitutionality of classification is set forth in the case of *Walters v. City of St. Louis*.⁶⁰ As stated by the Court in that case:

Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that for the different treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary.⁶¹

Justice Brennan must have had this well-recognized standard⁶² in mind when he stated in *Baker*, not that legislative districts have to be equal in population, but only that "arbitrary and capricious" districting which reflects no policy violates the federal constitution.⁶³ Essentially the same policy is espoused in the concurring opinions of Justices Clark and Douglas, except that the prohibition of the equal protection clause is phrased in terms of "invidious discrimination." Under the *Baker* policy, two factors must exist before a legislative apportionment will be declared unconstitutional by the courts. First, there must exist some inequality in popular representation, and second, that inequality must have resulted from action or inaction by the state, which, in Justice Brennan's words, is arbitrary and capricious.⁶⁴

⁵⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

⁵⁹ *E.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938); *Great Atl. & Pac. Tea Co. v. Grasjean*, 301 U.S. 412 (1937); *Dommon Hotel, Inc. v. Arizona*, 249 U.S. 265 (1919).

⁶⁰ 347 U.S. 231 (1954).

⁶¹ *Id.* at 237.

⁶² See text accompanying note 18, *supra*.

⁶³ *Baker v. Carr*, 369 U.S. 186, 236 (1962).

⁶⁴ See *e.g.*, *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350, 381 (1962) where it was stated that even if there were legitimate reasons for the classification, "the wide disparity in the ratio of population between the most populous and the least populous districts a disparity neither minor nor unavoidable, would require our finding the amendments invidiously discriminatory in violation of the equality clause, and therefore, void."

Since mathematical equality of legislative districts is not required, what degree of inequality is necessary to bring a state's apportionment into the realm of invidious discrimination? In spite of the obvious difficulty in establishing a rigid standard for determining this question, the most recent decision in the Michigan litigation, *Scholle v. Hare*,⁶⁵ originated a mathematically precise formula by which to judge when population disparity surpasses the permissible limits of the fourteenth amendment. As stated by the Supreme Court of Michigan:

When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is constitutionally good. It is only to say that peril ends and disaster occurs when that line is crossed.⁶⁶

This judicial standard leaves little discretion in the legislature for consideration of geographic, economic, social, and other interests, in establishing a redistricting plan. For this reason it would seem to be too stringent for application of such a broad constitutional concept as the equal protection of the laws. In the words of a federal district court in Virginia:

While predominant, population is not in our opinion the sole or definitive measure of districts when taken by the Equal Protection Clause. Compactness and contiguity of the territory, community of interests of the people, observance of natural lines, and conformity to historical divisions, such as county lines, for example, are all to be noticed in assaying the justness of the apportionment.⁶⁷

The second element necessary under the *Baker* principles for an unconstitutional apportionment is action or inaction by the state which is arbitrary or capricious. In the preceding part of this note, this element was discussed as it relates to constitutional provisions (especially those of the Kentucky constitution), which are designed to preserve the county unit in the redistricting process. It was concluded that these provisions as such are not arbitrary or capricious. To complete the analysis of the "arbitrary or capricious" element of *Baker*, requires a determination of whether a state may have as its objective in apportioning one of the houses of its legislature, the dilution of voting strength of some citizens in favor of others.

Tennessee's constitution contains a provision affording representation to those governmental units which do not have sufficient population to equal a full ratio.⁶⁸ In finding this provision to be constitutional, the federal district court stated:

⁶⁵ 367 Mich. 176, 116 N.W. 2d 350 (1962).

⁶⁶ *Id.* at—, 116 N.W. 2d at 355.

⁶⁷ *Mann v. Davis*, 213 F. Supp. 577, 584 (E.D. Va. 1962).

⁶⁸ Tenn. Const. art. 2, §5.

Such a state plan for distribution of legislative strength, at least in one house of a bicameral legislature, cannot be characterized as per se irrational or arbitrary. We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units. ⁶⁹

The implication of this case is that one house of a bicameral legislature may be arranged in such a way as to give representation to each of the governmental units of the state (counties, wards, parishes, etc.), even if this requires districting solely on the basis of non-population criteria. Direct authority for this proposition is available in *Toombs v. Fortson*:⁷⁰

[W]e do not find any *authoritative decision* by the Supreme Court that causes us to require that in order to give the voters their constitutional rights the state legislature must be constituted of two houses, both of which are elected according to population.⁷¹ (Emphasis added.)

True, no authoritative decision exists requiring both houses of a state legislature to be elected according to population. But, the Supreme Court's decision in the Michigan litigation⁷² contains some implication of such a requirement. At the time of this decision, the Michigan House of Representatives was apportioned on the basis of population.⁷³ Representation in the senate was based on geographical units which resulted in disproportionate representation favoring rural areas.⁷⁴ In *Scholle v. Hare*,⁷⁵ an attack was made only upon Michigan's senatorial representation. The Supreme Court of Michigan promptly dismissed the suit. Four judges joined in an opinion stating that the fourteenth amendment does not prohibit a state from enacting provisions for electoral districts for *one* house of the legislature which result in substantial inequality of popular representation in that house. On appeal to the Supreme Court of the United States, the judgment was vacated in a per curiam opinion, and the case "remained to the Supreme Court of Michigan for further consideration in light of *Baker v. Carr*."⁷⁶ Does this amount to a determination that a cause of action had been stated in the state court which demanded relief? If so, then it stands for the proposition that constitutional standards of the fourteenth amendment require that *both* houses of a bicameral legislature be apportioned on the

⁶⁹ *Baker v. Carr*, 206 F. Supp. 341, 345 (M.D. Tenn. 1962).

⁷⁰ 205 F. Supp. 248 (N.D. Ga. 1962).

⁷¹ *Id.* at 257.

⁷² *Scholle v. Hare*, 369 U.S. 429 (1962).

⁷³ Mich. Const. art. V §3.

⁷⁴ Mich. Const. art. V §2.

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

⁷⁶ *Scholle v. Hare*, 369 U.S. 429 (1962).

basis of population. In a subsequent case, *WMCA, Inc. v. Simon*,⁷⁷ the Supreme Court again remanded a reapportionment case to be considered in light of *Baker v. Carr*. In doing so, the Court indicated that it was a well-established practice to remand cases to be considered in light of a subsequent Supreme Court decision, so that the lower court would have first opportunity to pass on the merits. This seems to indicate that the Court made no consideration whatsoever as to whether a cause of action had been stated in *Scholle v. Hare*.

After *Scholle* was remanded to the Michigan court, the question of whether a state may have as its policy the dilution of voting strength of some citizens in favor of others was sidestepped. The court stated merely that the geographical classification, as made, "was arbitrary, discriminatory, and without reasonable or just relation to the electoral process."⁷⁸ The ultimate answer to whether both houses of a bicameral legislature must be apportioned according to population may depend upon the final decision in the *Scholle* case, which is once again pending before the Supreme Court of the United States.

The meaning of the fourteenth amendment, so far as it applies to the reapportionment issue, is still somewhat obscure. It seems clear that if the redistricting formula contained in a state constitution is based upon reasonable factors, the formula itself will satisfy the fourteenth amendment, even though some inequality in popular representation is inevitable. On the other hand, if the redistricting formula of a state is irrational, or if the legislature fails to comply with the constitutional mandate to redistrict, the legislative representation of that state is certain to fall within the category of arbitrary and capricious state action.

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⁷⁷ 82 Sup. Ct. 1234 (1962).

⁷⁸ *Scholle v. Hare*, 367 Mich. 176,, 116 N.W. 2d 350, 354 (1962).