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Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to *Baker v. Carr**

Dr. Charles P. Edwards**

Dr. Edwards in this article applies political theory to evaluate the impact of reapportionment and redistricting on representative government. In so doing he discusses the sources of this political theory and the goals of representative government. He also surveys comparative political practice in Great Britain and the United States. In suggesting various legislative, administrative, and judicial remedies to malapportionment and inequitable districting, Dr. Edwards concludes that the effect of the present litigation resulting from the Baker v. Carr decision will be to arouse public opinion and prompt legislators to meet the accumulated challenges of urbanization as well as other contemporary demands.

I. INTRODUCTION

The significant decision of the United States Supreme Court, *Baker v. Carr*,¹ finding legislative districts in the State of Tennessee violative of principles of rationality and the "equal protection of the laws" clause of the fourteenth amendment and remanding the case to the federal district court for further action, represents the culmination of several decades of rising dissatisfaction with legislative reapportionment and redistricting in the United States. It also represents the beginning of a judicial, and doubtless political, venture along virtually uncharted seas. Although reapportionment and redistricting are uniquely an episode in the game of politics—and indeed has in the past been found by courts to be a "political question" in accord with *Colegrove v. Green*²—nevertheless, it also presents an exceptional opportunity for the reexamination of basic principles of our philosophy of

*The initial portion of this paper through the subsection "Goals of Representation" was presented at the Annual Conference of the Pennsylvania Political Science and Public Administration Association in Harrisburg, April 6-7, 1962, and is included in the publication of the papers presented at this conference, by the Institute of Public Administration, the Pennsylvania State University, University Park, Pennsylvania, 1962. Authority to use this material is granted to the *Vanderbilt Law Review* by the Association and the Institute of Public Administration. The author was chairman of this conference.

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1. 369 U.S. 186. See also N.Y. Times, Mar. 27, 1962, pp. 18-20.

2. 328 U.S. 549 (1946).

representative government. This is true despite the patina of positivism that overlays all contemporary social science, for that positivism would be agonizingly sterile without political theory to supply many of the propositions for empirical examination. An understanding of theory and of comparative, historical, and statistical data can clarify the intent of framers of statutes and constitutions, as well as the purposes implicit in political systems such as representative government in the United States. Moreover, despite the apparent dominance of positivist jurisprudence, the Justices of the Supreme Court continue to invoke higher law imperatives of constitutional rationality, as witness the notable *Brown*³ and *Baker* cases of this decade. Such invocations to reason based on philosophic jurisprudence might appear to some as cavalier usurpations by the Justices of the free play of contending political forces, especially where "political questions" are involved, but the general public has often demonstrated that it is prepared to accept just this when fundamental constitutional principles are at stake. Furthermore, the judicial process supplies an adversary system which does accomplish a confrontation of the pertinent facts in the light of an open court; there is also stare decisis and enough experience with latent elements of due process and equal protection of the laws to provide judicial standards.

Finally, of course, political theory can provide political weapons, albeit perhaps chiefly for the losing side. Rarely are cries of "unfairness" and "unconstitutional" heard more than when articulated by the victims of the gerrymander, for, as Sir Austen Chamberlin once remarked, "'Unconstitutional . . . is a term applied in politics to the other fellow who does something that you don't like.'"⁴ On a somewhat different level, but in similar vein, Pennsylvania Republicans gleefully levelled the charge of "ladies first" at Democrat counterparts when the state's Democratic leadership, having agreed to abolish one Democratic congressional district, selected for elimination the only one occupied by a woman.

Fundamental to democracy is the premise that authority is derived from an enlightened, popular will or wills with equality of participation at one point at least. Therefore, those elements of political theory involving democracy, equality, and representation are the facets especially relevant to a study of reapportionment and redistricting. In the interest of definition, reapportionment can be described as determination of ratios and units of representation chiefly by legislative bodies pursuant to constitutional and statutory mandates. Redistricting, by contrast, connotes more the political process of drawing—or attempting to draw—such units, be they mandated or permissive, and the resultant configurations of such districts, both congressional and state legislative. The American Founding Fathers rejected

3. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. Quoted in BUTLER, *THE ELECTORAL SYSTEM IN BRITAIN* 142 (1953).

direct democracy, not only because it was too capricious, but because it was obviously impossible in a well-constructed Republic of continental dimensions.⁵ On the other hand, there is ample evidence to conclude that the Fathers' intended elements of democratic control lodged upon an equality of voting power, at least at the base of the House of Representatives;⁶ they also intended election for the House by means of districts.⁷ Given these elements, the only assurance of equality among voters would be equal proportions between voter to district and all voters to all districts, or at least a proximate equality of such ratios given the impossibility of mathematical exactness—hence the necessary application of political theory to evaluate the impact of reapportionment and redistricting on representative government.

II. SOURCES OF THEORY

It is pertinent to examine at the outset classical (Graeco-Roman) concepts because the Founding Fathers were steeped in this tradition, both through direct knowledge and through the pervasive influence of the later disciples of these theories: Locke, Montesquieu, and the adherents of neo-Stoicism in general. Although the matured Greek and Roman city-states did retain elements of direct government in the form of primary assemblies open to all male citizens, nevertheless, considerable elements of representative government (government in which ultimate decisions are made by elected representatives) were also present.⁸ One of these was the Athenian Council of 500, based upon election from geographic localities or *demes* intended to supply representation in proportion to population.⁹ The enduring image of the aristocratic Roman *Senatus* also comes to mind. Of equal impact on the future of political institutions were the writings of Aristotle and Polybius, based upon their respective observations of the Greek and Roman systems. Aristotle's well-known empirical and normative defense of constitutional democracy suggested popular selection and control of leaders by means of several alternative combinations involving the rule of numbers and the rule of wealth with broad-based property distribution among a middle-class. This was matched by the Polybian discovery that the Roman amalgam of monarchy, aristocracy, and democracy resulted in checks and balances able to respond to any emergency.¹⁰

5. See THE FEDERALIST No. 10 72-74 (Beard ed. 1948) (Madison).

6. Anthony Lewis writes that: "An examination of the historical material demonstrates that a right of equality of representation can be drawn from the Constitution." Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1058 (1958).

7. See statement of Hamilton to the New York Convention, June 21, 1788, quoted in 1961 CONG. Q. WEEKLY REP. 678.

8. LARSON, REPRESENTATIVE GOVERNMENT IN GREEK AND ROMAN HISTORY 1-21 (1961).

9. *Id.* at 12.

10. For an assessment of the impact of Polybius upon the authors of the United States Constitution, see EBENSTEIN, GREAT POLITICAL THINKERS 111 (3d ed. 1960).

Montesquieu's subsequent doctrines in his *Spirit of the Laws*, so persuasive to the thinking of the Founding Fathers with regard to equality, liberty, popular government, election, roles of assemblies and upper chambers, confederation, and separation of powers, echo his classic masters. Surely the current Supreme Court criterion of rationality in schemes for representation districts—including such tests as “fairness,” “equal protection,” and opposition to district disparities amounting to “invidious discrimination”—can draw insights from this classic heritage.

Another thread of classical influence, more important for the judicial than for the legislative branch, is the theory of natural law, traceable to the early Stoics, adumbrated in the writings of Cicero, the Scholastics, and neo-Stoics such as Grotius, and codified in norms and maxims of Roman Law. From this comes the symbolism of social compact, property rights, majority rule, supremacy of legislative bodies, and the premise of harmony of interests among men endowed with natural reason wanting only a common judge. The shaping influence of John Locke, expositor *par excellence* of rationalist natural law and natural rights, upon American values as well as representative institutions hardly requires reference.

John Locke's common judge was somewhat more than a common law judge, for in its centuries of meandering growth before and after the publication of the *Treatises of Civil Government*, the English Common Law had inevitably acquired some elements of philosophic—natural law—jurisprudence.¹¹ Indeed, in Coke's famous lecture to James I, the law was described as a contrivance of human reason;¹² it was also claimed as the distinct province of the judge not only to find it, but to assert it as against the prerogative of the Crown and Parliamentary statutes. The supremacy of common law judges over statutes, asserted by Coke in his *Bonham's Case*¹³ but subverted by the later assumption of Parliamentary sovereignty, took root in the United States, was shaped by Colonial and Revolutionary court precedents, and led finally to the Hamilton-Marshall doctrine of judicial review. The Constitution, as higher law, was henceforth to be safeguarded against conflicting statutes by those with a natural right to do so, the people's judges. But the Constitution, as Professor Corwin pointed out in his *The "Higher Law" Background of American Constitutional Law*,¹⁴ is also higher law; it is, in short, reason embodied by social contract, the reification of natural law, a single written document to be safeguarded for the ages by judicial review through which the latent ration-

11. Cf. POUND, *THE SPIRIT OF THE COMMON LAW* ch. IV (1921).

12. *Id.* at 61. To be sure, Coke intended “artificial reason” as against “natural reason,” but there was a subsequent blending of Coke's concepts with natural law elements. *Id.* at 95.

13. *Dr. Bonham's Case*, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1610).

14. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1959).

ality of due process would unfold. If this were not enough, the Radical Republicans following the Civil War endowed the Justices of the Supreme Court and lesser courts with the "equal protection of the laws" clause of the fourteenth amendment to be applied as a limit upon the states. Henceforth a broad-axe of rational jurisprudence was sharpened to strike down that which was discriminatory, arbitrary, unreasonable, devoid of rationality, lacking reasonable standards, as well as violative of due process. To be sure, at the outset, corporations as juristic persons enjoyed the protections of the clauses originally designed for benefit of negro citizens, but the Court has lately, as in *Brown v. Board of Education*,¹⁵ returned to meanings originally intended for the fourteenth amendment by its authors (at least, according to Justice Black). And now, in *Baker v. Carr*, the Court has taken jurisdiction in an action brought by citizens under the fourteenth amendment and has pointed the way to equitable remedies for malapportionment of Tennessee legislative districts.

The threads of classical and natural law influence upon contemporary articulation of representation in the United States are interwoven with a third significant influence: that of nineteenth century English utilitarianism. To be sure, Bentham and his disciples hardly affected the shaping of the American Constitution itself, but their influence upon the development of democracy in America is not doubted.¹⁶ Given the commitment of government to the greatest happiness of the greatest number and the equality of individual assessments of pleasures and pains, it was only logical to select representatives by counting heads, the more heads counted the better. And so universal suffrage arrived in the Anglo-American world within a century of Bentham's demand for it, together with a strengthened approach to individual equality in the exercise of the ballot. A contemporary British authority on election practice notes that universal suffrage treats every elector as equal and states that therefore, the ratio between electors and elected should be everywhere the same; he concludes that "the principle of equal electorates is the direct and inevitable consequence of universal suffrage."¹⁷ In other words, malapportionment of election districts violates present democratic political theory, as well as the more esoteric invocations to reason and to history.

In actual fact, contemporary British districting practice does support the Benthamite imperative that electoral districts be drawn in such a way to safeguard the equality of each and every vote. Under recent Representation of People Acts, expert impartial Boundary Commissions—in essence, appointive, administrative boards—draw district boundaries within set time-intervals in accord with parliamentary statutes calling for population equal-

15. 347 U.S. 483 (1954).

16. See GRIMES, *AMERICAN POLITICAL THOUGHT* 289-91 (1955) for references to utilitarian influences. See SCHLESINGER, *THE AGE OF JACKSON* 78, 128 (1949).

17. ROSS, *ELECTIONS AND ELECTORS* 101 (1955).

ity consistent with respect for traditional community identities.¹⁸ D. E. Butler writes of British practice that "there has certainly been no *deliberate* gerrymandering in the drawing of boundaries."¹⁹ British practice does indeed provide analogies valid to the political climate in the United States.²⁰

III. GOALS OF REPRESENTATION

Although democratic theory does demand equality in popular participation, a true representation-system must consider more than people or numbers; other values, for example, property, territory, leadership, restraints on power, also have claims. The very end of government, according to Locke, is the preservation of property, and property qualifications both for electors and office-holders were once traditional. Another significant method employed to achieve multiple representation is to appoint or elect upper chambers representing property and community interests. In *The Federalist No. 60*, Hamilton anticipated that a durable supremacy of landed interest would be lodged in the Senate, although, as Hamilton stressed, the Constitution itself prescribed no property qualifications.²¹ The Fathers also fully expected the Senate to become a continuing body of more knowledgeable and experienced statesmen, able to check the lower house, but chiefly, of course, to provide for equality of representation of the states. Thus, the principle of geographic and other representation in the upper chamber of the bicameral national legislature was basic to the federal plan; but this is also true in election of Senators in upper chambers of twenty-nine states.²² Likewise, in England boroughs and counties have been traditional units for selection of members of the lower House,²³ and respect for locality boundaries continues among the present criteria in Parliamentary instructions to British Boundary Commissions used in establishing constituencies.²⁴

This facet of territorial and community identity can be discerned in the mere fact of the traditional single-member congressional districts used in

18. BUTLER, *THE ELECTORAL SYSTEM IN BRITAIN 1918-1951* 96 (1953). For further commentary on this subject see "The British Model," pp. 1275-78 *infra*.

19. BUTLER, *op. cit. supra* note 18, at 195. (Emphasis added.)

20. Gabriel Almond identifies an analogous Anglo-American political system in ALMOND, *Comparative Political Systems*, in *POLITICAL BEHAVIOR* 34 (Eulau ed. 1956).

21. See *THE FEDERALIST* No. 60 259-60 (Beard ed. 1948) (Hamilton).

22. Based on author's cross-tabulation taken from table on *Apportionment of Legislatures, as of November 1, 1961*, in *THE BOOK OF STATES* (1962-63 ed.) (data obtained prior to publication).

23. ROSS, *PARLIAMENTARY REPRESENTATION* 118-26 (1944) (historic sketch of evolution of Parliament and Commons).

24. Under the Redistribution of Seats Act, 1958, 6 & 7 Eliz. 2, c. 26, the Boundary Commissions are to "follow local boundaries as far as practicable." *BRIT. INFORMATION SERVICES, PARLIAMENTARY ELECTION IN BRITAIN* 2 (Sept. 1958).

the United States,²⁵ and is even more marked in methods of determining districts to elect members for the lower houses in state legislatures as well as the upper chambers. Twenty-seven states employ a mixed system involving population and locality, while three other states base their lower house districts entirely on localities.²⁶ Indeed, in *Baker v. Carr*, the Court did not specifically say that districts must be based on population exclusively; Justice Brennan's opinion referred rather to "arbitrary and capricious" districting violating the Constitution, without defining them [districts].²⁷ Hence, a possible consequence of this opinion might be to reinforce geographic representation, probably as regards upper chambers, while accepting the principle of equitable population representation in the lower houses.²⁸ If this does result, *Baker v. Carr* may not generate all the relief for the urban voter alleged, and the theory of geographic representation in at least one house of state legislative bodies will be strengthened, up to the point at least of "invidious discrimination."

At this writing, this particular point is under litigation. To be sure, in the recent Michigan apportionment case, *Scholle v. Hare*,²⁹ the Supreme Court voted by a margin of 7 to 1 to return for reconsideration by the Michigan Supreme Court a case which challenged the legality of apportionment of the state senate by area instead of by population. Subsequently, however, Justice Potter Stewart of the United States Supreme Court granted a stay of the resultant Michigan court's order that the state senate be reapportioned on a population basis or that state senators face election at-large;³⁰ this case is complicated by revised reapportionment provisions in a new state constitution to be voted on in April 1963, and the Supreme Court will doubtless review the case again in its 1962-63 term.

Arthur Bonfield suggests that this matter of equal protection of voters and invidious discrimination against them must be resolved within the context of a prior determination by the Supreme Court that genuine republican government does exist as required by the guarantee clause of the Constitution.³¹ Possible yardsticks on representative-republicanism to be developed by the Court might be: (1) no state to permit control of either house by a smaller proportion of the electorate than at the time of admission, or (2) no state chamber to be controlled by a percentage less than the 16.5 per cent of voters currently selecting a majority of the United

25. On this point Anthony Lewis writes that: "Representation based on districts . . . tends to accommodate both geographic and numerical interests." Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 n.3 (1958).

26. See author's tabulation of data in table on "Apportionment of Legislatures," in *THE BOOK OF STATES* 54-55 (1960-61 ed.). Also see *Appendix*, p. 1291 *infra*.

27. N.Y. Times, Mar. 27, 1962, p. 19, col. 7.

28. N.Y. Times, Mar. 27, 1962, p. 21, cols. 1-9.

29. 369 U.S. 429 (1962).

30. *Scholle v. Hare*, 369 U.S. 863 (1962) (stay order).

31. U.S. CONST. art. IV, § 9.

States Senate.³² *Baker* did not construe the guarantee clause.

Finally, some conclusions based upon the capacity of representative government to achieve competent leadership are pertinent to the problem of carving legislative districts. The Anglo-American approach to government has never accepted the Rousseauvian concept that members of legislative bodies are mere deputies closely chained to the mystical general will of the sovereign mass; nor do Anglo-American goals of representation accept the common law analogy of people as principal and representative as agent. True, the history of representation in the United States, and also in Britain, reveals oscillations between tendencies sometimes towards the agency or "direct" theory, other times towards the independent representative or "virtual" theory;³³ and, to be sure, members of lower chambers are more tightly bound to their constituents' apron-strings than their more august counterparts, whose senatorial profiles are sometimes marred by the mandates of courage. Nevertheless, the oft-quoted Burkean concept of the representative exercising mature judgment and an enlightened conscience as a trust on behalf of district and nation,³⁴ is still the model for present practice—at least between elections. This ideal was strongly endorsed by John Stuart Mill in his *Representative Government*.³⁵ Likewise, Madison's normative assertion of the capacity of representative government to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country" ³⁶ is a proposition now tested by empirical studies on both sides of the Atlantic. J. F. S. Ross, in his *Parliamentary Representation*, examines the data on age, education, profession, income, and length of service in Parliament, to show that "the House is not a reproduction of the nation in miniature, but something different."³⁷ It is different in the sense that Members of Parliament exceed national norms as regards levels of education, income, professional skills, and so forth. Similar in approach is Donald Matthews' study of "United States Senators and the Class Structure,"³⁸ documenting the considerably superior levels of Senators—social and economic—compared to the national norms surveyed. More significant to correlations between district configurations and the role of actors in Congress, are the admittedly tentative propositions set forth in a research design proposed by Eldersveld, Leiser-

32. Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962).

33. LUCE, *LEGISLATIVE PRINCIPLES* (1930). Chapters XX and XXI present a historical survey.

34. *Id.* at 439-40.

35. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 240.

36. BEARD, *THE ENDURING FEDERALIST* 73 (1948).

37. ROSS, *PARLIAMENTARY REPRESENTATION* 118 (1944).

38. Matthews, *United States Senators and the Class Structure*, in *POLITICAL BEHAVIOR* 184-93 (1956).

son, and others to the effect that *inter alia*: (1) "the behavior of legislative leaders differs significantly from that of the rank and file of the same party" tending towards greater loyalty to the administration; and that (2) administration-directed loyalty of congressmen "will be directly correlated with the leader's socio-economic status . . . [and] . . . inversely correlated with his length of residence in his constituency . . . , allowances being made . . . for the norms characteristic of the section in which his constituency lies."³⁹

The propositions presented above suggest that there may be few positive correlations between the action of the representative and the combined will of his district—or at least less positive correlation than generally supposed. This is because of alleged superior qualities of the house member, his relative freedom to exercise independent judgment, and also the conditioning process of group dynamics in legislative bodies directed by institutionalized elites, not to mention the restraining impact of other chambers and branches. Likewise, it is generally agreed that the state assembly member is under even greater control of the chamber leadership than his counterpart in the national Congress. If this is indeed true, then the actual configurations of electoral districts are less significant than the utility of such districts in selecting representatives with claims of republican legitimacy—as tested, for example, by voter suits charging invidious discrimination or absence of genuine republicanism. In short, diversity in district construction is valid up to the point at which a justiciable action is or may be found in favor of the voter-plaintiff. The author is, of course, aware that generalizations based upon relationships between district and representative can be advanced only with caution in view of the fact that a science of legislative behavior, and the variables involved, is at a beginning stage;⁴⁰ much systematic work remains to be done.

Thus far, then, the traditional bases for representation (population, property, and territory) have been examined; there is no need to explore the theory of functional representation (representation by vocation or class rather than by region or people) in the Anglo-American system, since its final vestiges were abolished in Britain by the Representation of the People Act of 1948⁴¹ and it has never been expressly used in the United States. On the other hand, a system of proportional representation, particularly the Hare system of the single-transferable vote,⁴² has its adherents on both

39. Eldersveld, *Research in Political Behavior*, in *POLITICAL BEHAVIOR* 79 (1956).

40. See Ogul, *Research on Legislative Process in Congress*, in *THE LEGISLATIVE PROCESS IN CONGRESS AND THE STATES* 13 (1961). These are papers which were presented to the annual conference of the Pennsylvania Political Science and Public Administration Association in 1961 (University Park: The Pennsylvania State University, Institute of Public Administration, Aug. 1961).

41. The Representation of Peoples Act, 1948, 11 & 12 Geo. 6, c. 65.

42. This is a system of proportional representation. "According to the Hare Rules the voter indicates his preferences among the various candidates by making his first

sides of the Atlantic; and it is agreed that this system does mirror with precision all shades of a popular universe and thereby does guarantee an equality of all votes where population is the chief determinant. Furthermore, the fact that single-member districts are not used in the Hare system obviates this type of districting problem. Nevertheless, despite potent supporters and some tentative experience, this system has never taken root in British and American experience and is now in decline. Doubtless the principal cause for the failure of this ingenious method was the presence of splinter elements which it introduced into the symmetry of traditional Anglo-American two party politics. Given two parties, the purpose of an electoral system is to obtain a majority able to govern and to retain a minority able to oppose, particularly in the disciplined British two-party system. The single-member districts, returning by pluralities and not quotas or lists, do accomplish this end. In short, in the Anglo-American world, there is no practical alternative to election of representatives from single-member districts for at least one chamber of legislative bodies, hence the central significance of district configurations.

One must note that internal structural aspects of representative bodies—organization, rules of procedure, staff services, income and terms of members, and the like—vitaly affect the responsiveness and responsibility of legislative chambers. Consideration of these factors is clearly beyond the scope of this particular paper.

The purposes of representation, then, are to provide for people, property, and territory; to offer limits to power; to select members of superior competence; and to assist the functioning of two-party government. Single-member districts are requisite, and the drawing of such districts to achieve standards of proximate equality and rationality is certainly basic to democratic doctrine. Moreover, it may also be required to best achieve the multiple purposes of representation in a representative-republic as described in this paper. In the absence of valid theory and sound historic perspective, no possible framework exists within which to construe the imperatives of the "equal protection of the laws." Theory, then, provides weighty arguments, arguments perhaps more pertinent to treatises and judicial opinion than to the party caucus and legislative chamber. To be sure, practice in the the United States does suggest that inequalities among voters due to malapportionment and maldistricting may be the rule, equality of the individual vote, even at the representation base of one

choice and his succeeding choices with the appropriate numerals. The first step in the count, the determination of the quota, involves dividing the number of valid ballots by the number of candidates to be elected plus one and completing the quotient to the next round number. All candidates having more than the quota are declared elected and their surplus ballots are transferred to the next available choices. After this is done the low men are eliminated in turn and their ballots transferred in the same manner until all the offices are filled." XII ENCYC. SOC. SCI. 541-42 (1934).

chamber only, the exception. Theorists and judges must recognize the established political practices and processes, chiefly state legislative practices subject to congressional standards for congressional districts, for principal determination of the election districts and hence the relative weights of votes. Nevertheless, *Baker v. Carr* gives notice that the legislator now flagrantly violates theoretical, comparative, historic, equitable, and justiciable factors involved in reapportionment and redistricting under risk of judicial review and remedy.

A survey of current practice in the United States, as well as possibilities for political and administrative adjustment and remedy, is clearly an essential prelude to the potential for judicial action and remedy latent in the *Baker* decision. At the outset, however, a backdrop of comparison to British practice can be instructive.

IV. THE BRITISH MODEL

Comparisons to British theory and practice are pertinent to theory and practice in the United States; indeed, Gabriel Almond, in an article on "Comparative Political Systems," identifies a distinct Anglo-American political system.⁴³ In point of fact, an occasional reference to British experience appears in recent hearings on redistricting bills brought before the House Judiciary Committee,⁴⁴ and it is invoked at length in Justice Frankfurter's dissenting opinion in *Baker v. Carr*.⁴⁵ Specifically, the method of plurality election by single-member districts, and resultant political turmoil over the creation and configuration of such districts, has been at the heart of Parliamentary reform for over one hundred years.

It will be remembered that Jeremy Bentham and his "philosophical radical" disciples helped pioneer the first significant modern statutory reform of Parliamentary elections, including abolition of rotten boroughs and enfranchisement of new municipalities, in the justly historic Great Reform Act of 1832.⁴⁶ Qualified successes continued throughout the nineteenth century, although "Redistribution Acts were, to begin with, highly controversial."⁴⁷ By the Gladstone era, equality in redistribution had become a "serious political issue" although Gladstone himself "repudiated the principle of precise mathematical equality in redistribution."⁴⁸ Thus, the present method of fairly periodic drawing of reasonably equal constituencies by expert and impartial Boundary Commissions is the con-

43. Almond, *Comparative Political Systems*, in *POLITICAL BEHAVIOR* 34-42 (1956).

44. *Hearings Before the Subcommittee No. 3 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 9, at 34 (1961).

45. *Baker v. Carr*, 369 U.S. 186, 266 (1962) (dissenting opinion of Frankfurter, J.).

46. 2 Will. 4, c. 45.

47. BUTLER, *THE ELECTORAL SYSTEM IN BRITAIN 1918-1951* 5 (1953).

48. *Id.* at 6.

sequence of a century of pragmatic British "muddling through."⁴⁹

D. E. Butler reports the year 1918 as a turning point in electoral reform, with Britain moving from medieval to modern and uniform approaches.⁵⁰ Notably, that year saw the first successful use of the Boundary Commission, which drew constituency lines according to proximate population equalities on the basis of recommendations from a Speaker's Conference.⁵¹ It was not, however, until the Representation of the People Act of 1944⁵² that the principle of permanent Boundary Commissioners was accepted by Parliament.⁵³ A major redistribution of seats in 1948, as a result of significant population shifts, left only eighty of six hundred and thirty constituencies untouched,⁵⁴ and this despite the fact that the majority party, Labor, was somewhat adversely affected by the redistribution.⁵⁵ Seemingly a political tradition, commenced in 1918 and with roots back to 1832, of impartial redistricting by administrative experts under delegation from Parliament, had overcome the partisan pressures generated in reapportionment and redistricting. By the general elections of 1950 and 1951 "biases" as regards the constituencies had "for the most part disappeared."⁵⁶

The Redistribution of Seats Act of 1958⁵⁷ introduced certain refinements—such as extending the time period for reports by boundary commissioners to a maximum of fifteen years between reports—but the basic elements of the post-1918 approach remain. Four Boundary Commissions for the United Kingdom, each chaired by the Speaker of the House and composed of senior civil and judicial personnel, are instructed to establish electorates in each constituency conforming as nearly as possible to the average population of all and with locality boundaries followed as far as practicable.⁵⁸ A previous maximum limitation of twenty-five per cent variation, permitted above or below average, has now been rejected as too stringent to maintain community boundaries and identities.⁵⁹ Notices of proposed changes are published to invite appeals; final redistricting is established by Order in Council subject to affirmative resolution of both Houses of Parlia-

49. Butler writes: "Reform was always on a pragmatic level . . ." *Id.* at 3.

50. *Id.* at 1.

51. *Id.* at 10, 11.

52. Redistribution of Seats Act, 1944, 7 & 8 Geo. 6, c. 41.

53. BUTLER, *THE ELECTORAL SYSTEM IN BRITAIN 1918-1951* 96 (1953).

54. *Id.* at 32.

55. *Id.* at 112. Partisanship, however, was displayed in debates on the bill. *Id.* at 135-36.

56. *Id.* at 199. This does not mean that actual population equality obtains as between constituencies. Justice Frankfurter in his dissenting opinion notes considerable inequality as regards populations of British districts. *Baker v. Carr*, 369 U.S. 186, 266 (1962) (dissenting opinion of Frankfurter, J.).

57. 6 & 7 Eliz. 2, c. 26.

58. BRIT. INFORMATION SERVICES, *PARLIAMENTARY ELECTIONS IN BRITAIN* 2 (Sept. 1958).

59. BUTLER, *op. cit. supra* note 18, at 104, 206 (1953).

ment.⁶⁰ In consequence, a problem that once vexed the halls of Commons and Lords and continues to vex the legislative chambers and party caucuses in the United States has been shunted to the limbo of vital, but virtually forgotten, reform victories in Britain. Deliberate gerrymandering no longer exists in Britain, writes D. E. Butler,⁶¹ who anticipates that the next decade will be "even more devoid of parliamentary contention on electoral matters than the last few have been."⁶²

Certain elements within the British model are of particular relevance when considering analogy or transfer to the American model. Virtual abolition of malapportionment and maldistricting as regards Parliamentary constituencies was achieved within the context of partisan and pragmatic politics, with little overt invocation of theory or principles involving representation. Apparently, over time, reform leadership coupled with growing voter expectation of fairness and equality in redistricting conditioned the practical politics of both parties; as noted above, even the Labor Party Government in 1948 accepted a somewhat adverse redistribution. To be sure, when respect for localities so demanded, permissive variations in district population even beyond an attempted limitation of twenty-five per cent above or below the average might on the face appear excessive.⁶³ However, as American practitioners well know, various biases can be introduced even where populations among districts are equal. British authorities do affirm that the various biases associated with gerrymandering and malapportionment in general have indeed been effectively contained in British practice; doubtless the technique of the expert, impartial administrative boundary commission under broad delegation from Parliament supplies one answer. Broadly comparable administrative apportioning agencies are used in fourteen states of the United States with constructive effect.⁶⁴

There is no record of significant resort to judicial remedies in the British experience; British courts have rejected suits challenging the authority of Boundary Commissions. Because British courts do not exercise judicial review over statutes on the basis of judicial interpretation of a written

60. *Id.* at 211.

61. *Id.* at 195.

62. *Id.* at 139.

63. This factor is cited as proof of enduring excessive inequalities among constituencies by Justice Frankfurter in his dissent. *Baker v. Carr*, 369 U.S. 186, 301-02 (1962) (dissenting opinion of Frankfurter, J.). The author does not have precise data on actual population deviations among British constituencies but is aware that such deviations exist. The point, perhaps overlooked by Mr. Justice Frankfurter, is that the districts are established by an impartial agency, and voter expectations of fairness are thereby satisfied. A figure of a permissive twenty per cent deviation above or below average is endorsed by the American Political Science Association and appears in a bill on congressional redistricting offered by Representative Emanuel Celler. H.R. 73, 86th Cong., 1st Sess. (1959).

64. See cross-tabulation charts, Appendix, p. 1291 *infra*.

Constitution and specifically under an "equal protection of the laws" clause as applied against territorial subdivisions of a federal state, judicial remedies are not indicated.

V. THE AMERICAN MODEL, CURRENT PRACTICE

By contrast to present British practice, the gerrymander and other varieties of malapportionment are much in evidence in the United States.⁶⁵ Not only is this an accepted element in the political game, it is an element viewed by politicians and sometimes judges alike as uniquely the province of the political departments.

Strictly speaking, the gerrymander implies the application of contorted physical shapes for an intended partisan gain, although it can be loosely used to describe any districting based on partisan political motive, such as gross population disparities or a failure to redistrict which continues a beneficial status quo (the "silent gerrymander").⁶⁶ The contemporary redistricting of congressional districts, resulting from reapportionment based on the population changes following the 1960 census, has produced all varieties—as witness the so-called New York "Rockymander." There clever contortions of district lines promise a shift from a Democrat balance of one seat to an anticipated Republican balance of nine seats in that state's congressional delegation, while at the same time keeping all forty-one districts within 15% of average district population.⁶⁷ Or contrast the California preference for gross malapportionment as regards variations in district population which runs from 43% above to 27% below the norm.⁶⁸ The dominant Democrats in California were thus virtually assured that California's gain of eight seats, the largest of any state since the Civil War (following a given census), would become a margin of eight for the Democrats over the Republican Congressional delegation after the 1962 elections.⁶⁹ The equally dominant Republicans of New York anticipate congressional delegations of 25 Republicans to 16 Democrats from New York as a partial consequence of their gerrymander.⁷⁰

In all, 25 states were affected by congressionally directed reapportion-

65. The "hoary tradition" of gerrymandering is referred to in Newsweek, Nov. 27, 1961, p. 21, col. 2. *Congressional Quarterly* points out that "historically, parties controlling the governorship and both chambers . . . have frequently run roughshod over the interests of the minority party in the state by carving out gerrymandered and malapportioned districts." 16 CONG. Q. ALMANAC 826 (1960).

66. Varieties of malapportionment are described in Lewis, *supra* note 6, at 1059.

67. 1961 CONG. Q. WEEKLY REP. 1868.

68. *Ibid.*

69. *Id.* at 1280.

70. *Id.* at 1868. For an account of the New York districts, see 1962 CONG. Q. WEEKLY REP. 370. New York's 68-year-old formula favoring rural areas in apportionment is now challenged in an action brought by Radio Station WMCA and other residents. N.Y. Times, April 4, 1962, p. 1, col. 2; *id.*, Aug. 2, 1962, p. 1, col. 4.

ment ratios following the 1960 census, as determined by the operation of the Automatic Reapportionment Act of 1929,⁷¹ with 9 states gaining congressional seats and 16 losing them.⁷² With 3 exceptions (Arizona, Florida, and New Jersey) the 9 states gaining seats typically left them to the chance of the state-wide "at-large" election. Faced with the formidable threat of at-large elections for entire congressional delegations in case of failure to redistrict following the 1960 reapportionment, all of the 16 states losing seats managed to meet 1962 deadlines for establishing new districts. To be sure, where one party controlled all political departments (the governor's office and both legislative chambers), there was little likelihood of an at-large election, and the notorious gerrymanders such as in New York and California resulted. Matters were far different in Pennsylvania, Missouri, Illinois, Alabama, and Massachusetts, where the parties divided control of the political departments or the dominant party itself was split by contending factions.⁷³ In Illinois and Pennsylvania special sessions of the state assemblies had to be called; Massachusetts, in an extended session, barely met the constitutional dead-line.

In Pennsylvania, which was faced with the loss of three seats, the largest loss of any state, the virtual Republican "veto" in the state senate eventually forced on the Pennsylvania Democrats (who controlled the House and the Governor's office) the mid-winter special session of 1962. This session managed an admittedly "makeshift and stopgap" compromise with no "significant changes in the existing arrangement of U.S. House seats."⁷⁴ The reduction of three seats was secured by the abolition respectively of one safe Republican and one safe Democrat seat, with the creation of a large "swing" district in the central part of the state by merger of two seats, one from each party.⁷⁵ The plan was the work of an inner elite of skilled practitioners of the art of the possible in politics and had been drawn up in party caucuses even before the calling of the special session of the state assembly.⁷⁶ It was introduced at the session on January 22, 1962, and there was little impact from concern for theoretical standards of equitable reapportionment. Indeed, "considerations such as fairness, equity, compactness, etc., were given only lip-service throughout."⁷⁷

71. 46 Stat. 26 (1929), as amended, 55 Stat. 761 (1941), 2 U.S.C. § 2(a) (Supp. 1961).

72. 16 CONG. Q. ALMANAC 825 (1960). For reference to the Automatic Reapportionment Act see Margolin, Apportionment of Membership in the House of Representatives, Sept. 1962 (unpublished monograph in Library of Congress).

73. Christian Science Monitor, Nov. 27, 1961.

74. 1962 CONG. Q. WEEKLY REP. 216.

75. *Id.* at 371. A "bitter battle" was predicted in the new "swing" district during the 1962 election. *Ibid.*

76. *Id.* at 217. This was confirmed by the author in correspondence with a member of the Pennsylvania House.

77. Letter from Thomas W. Adams to the author, March 8, 1962; in the same letter Dr. Adams quotes Representative McCormack (Democrat, Philadelphia) speaking on

Although few unusual shapes, except for districts in Philadelphia, resulted from the Pennsylvania redistricting, the scheme was most heavily criticized for rather large variations in district populations, adversely affecting the burgeoning suburbs adjacent to Philadelphia and Pittsburgh.⁷⁸ By contrast, all five districts within the city of Philadelphia were below the norm, as was true of three of the four in Allegheny County (greater Pittsburgh).⁷⁹ If Pennsylvania is typical of population shifts over the past decade, it is not only the urban centers themselves which are often underrepresented but also their adjacent suburban localities. Apparently in Pennsylvania the "Old Guard" Republican leaders of the caucus were not willing to stage a fight on behalf of equality for the underrepresented suburbs; consequently, the Pennsylvania Democrats registered a slight advantage out of the redistricting, with Democrat districts averaging seven per cent under the state norm, and alleged Republican districts four per cent over.⁸⁰ The Democrats are thus expected to pull within one or two seats of the Republican majority of the state's congressional delegation in the fall elections.

If any one conclusion can be drawn from this survey of congressional district reapportionment, it is that the time-honored techniques of gerrymandering are firmly entrenched. Both parties, when commanding the necessary pinnacles of power, produced monuments of malapportionment as judged by theoretical standards of compactness, contiguity, and equality of population; both were justified by the rules of the game. To be sure, the comparative advantages gained were doubtless cancelled out, with at most an anticipated net national Republican gain of five seats following the 1962 congressional elections resulting from redistricting.⁸¹ At the same time, Republican districts throughout the country averaged about 35,000 persons more than Democrat ones,⁸² and variations in populations as great as sixty-two per cent from the average population of all districts were recorded.⁸³

the floor of the Pennsylvania House of Representatives, January 23, 1962: "We must recognize that this is political. We are politicians. We are dealing in politics. . . . You cannot submit a reapportionment program that is not political." Dr. Adams observed at first-hand the Pennsylvania special session in capacity as a Pennsylvania Citizenship Clearing House fellow. For a full account of this session see Adams, *The Politics of Congressional Reapportionment in Pennsylvania*, in PAPERS PRESENTED AT THE ANNUAL CONFERENCE OF THE PENNSYLVANIA POLITICAL SCIENCE AND PUBLIC ADMINISTRATION ASSOCIATION (1962). The conference was held in Harrisburg on April 6th and 7th and the papers were published by the Institute of Public Administration, The Pennsylvania State University.

78. 1962 CONG. Q. WEEKLY REP. 216.

79. *Id.* at 217.

80. *Id.* at 216.

81. 1961 CONG. Q. WEEKLY REP. 1231. For a survey of final results of the 1961-62 redistricting, see *id.* at 362-71.

82. National average, based on the 1960 census, is 410,481 persons for each congressional district; 430,380 for Republican and 395,459 for Democrat.

83. 1962 CONG. Q. WEEKLY REP. 216.

Significant to the interplay of interests in the United States is the fact that this politically-oriented system of redistricting reinforces an advantaged rural status quo at the expense of underrepresented and proliferating urban-suburban majorities.⁸⁴ Writing in the *Harvard Law Review* in 1958, Anthony Lewis labelled failure to meet rapid urbanization problems as a major national failure "stemming in large part from the underrepresentation of urban areas in the state and national legislatures."⁸⁵ A case in point could be the defeat of a proposed Urban Affairs Department by the 87th Congress, in which 194 negative votes from rural districts more than offset the 106 affirmative votes representing the urban and suburban districts.⁸⁶

VI. STATE LEGISLATIVE DISTRICTS

The practice of gerrymandered state legislative districts is equally part of the American model, and because the states in turn determine the congressional districts, this practice directly affects the complexion of the national Congress. Not considering various state constitutional mandates designed to safeguard special interests of community localities, the obstruction to majority rule within the states is striking. The National Municipal League's *Compendium of Legislative Apportionment* shows, for example, that in only 6 states do forty per cent or more of the electors elect a majority of the legislature, and in 13 states one-third of the population or less can elect a majority of both chambers of the state legislature.⁸⁷ Extreme examples of this kind of malapportionment are supplied by Connecticut's lower house, controlled by less than twelve per cent of the population, and Vermont House districts, not apportioned since 1793, where the 48 persons of the town of Victory elect one member as do the 33,000 persons of the city of Burlington.⁸⁸ Although 42 states require reapportionment at least once every ten years (36 for both houses), 12 states are currently in violation of these mandates, and an additional 5 states

84. In Tennessee, for example, two-fifths of the population elected more than three-fifths of both houses. U.S. News and World Report, Nov. 6, 1961, p. 101, col. 1. See also O'Hallaren, *A Fair Share for the Cities*, The Reporter, Nov. 12, 1959, p. 22, col. 2.

85. Lewis, *supra* note 6, at 1058. Lewis also attributes continuation of one-party states to malapportionment. *Id.* at 1063.

86. 1962 CONG. Q. WEEKLY REP. 275, 276.

87. Editorial, N.Y. Times, Mar. 27, 1962, p. 36, col. 1.

88. See 1961 CONG. Q. WEEKLY REP. 531, 532; AMERICAN CIVIL LIBERTIES UNION, 41ST ANNUAL REPORT: TESTING WHETHER THAT NATION 32 (1961). For a historical survey of state apportionment practices, and the rural-urban relationships, see LUCE, LEGISLATIVE PRINCIPLES 356-80 (1930) (Chapter XVI "apportionment under the union"). Arthur Bonfield notes the percentage of electors controlling the following states' geographically based houses as follows: Nevada 8, California 10.7, Vermont 11.6, Connecticut 12, Florida 12.3, Arizona 12.8. He doubts that such extremes could possibly meet the substantive quality of "republican government" requisite under the guarantee clause of the federal constitution. Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 259 (1962).

have failed to meet other mandated requirements.⁸⁹ Pennsylvania, for example, has not reapportioned its senatorial districts since 1921, and a recent study by that state's Internal Affairs Department reports 3 instances in which senatorial districts appear to be in violation of the state constitution.⁹⁰ Additionally, 10 Pennsylvania counties are overrepresented and 8 are underrepresented in the House—notably the third district Montgomery county, 410 per cent above average, and the sixth Philadelphia district, 61 per cent below.⁹¹ To be sure, Pennsylvania constitutional provisions preclude an equality based exclusively on population, but a house district reapportionment based on the 1960 census would record gains in 8 counties and losses in 10 requiring district changes.⁹²

Although, to be sure, the majority of states have been carrying out reapportionment and redistricting mandates at least superficially, the disparities that exist between districts have been increasing with the advent of burgeoning metropolitan areas.⁹³ Moreover, until *Baker v. Carr* the promise of effective remedy was not in sight. Legislative fairness, writes Lewis, "is inhibited by factors built into our political structure. Once a group has the dominant position—as rural legislators generally have—its overriding interest is to maintain that position."⁹⁴ In short, politicians are adversely affected by basic changes in the rules of the game that present new risks to them, and few will willingly vote themselves out of a job. In Tennessee, for example, a reapportionment is required as to districts for election to both chambers every ten years, but the Legislature had refused to act since 1901. Finally, the under-representation of the urban voters of Nashville became so gross that it prompted the action brought by Charles Baker and associates against the Secretary of State of Tennessee on the ground of an unconstitutional deprivation of equal protection of the laws. Baker sought relief in the courts only after political means had been found wanting.⁹⁵ Dramatic evidence of widespread district inequities is given by the fact that within two months of the *Baker* decision, suits challenging

89. See author's cross-tabulation tables, Appendix, p. 1291 *infra*. Anthony Lewis writes: "But failure of the legislatures to act is by far the more significant source of unequal representation." Lewis, *supra* note 6, at 1060.

90. PENNSYLVANIA DEPARTMENT OF INTERNAL AFFAIRS, RE-APPORTIONMENT IN PENNSYLVANIA 10 (1961).

91. *Id.* at 25, table 4.

92. *Id.* at 20, map 11.

93. Lewis writes: "Effects of malapportionment are much graver today than they were a century ago. . . . Rapid growth of our population and change in its character make even more urgent . . . adjustment of representation. Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1095-96 (1958). Bonfield also notes that urbanization has augmented distortions at the expense of majorities. Bonfield, *supra* note 88, at 262.

94. Lewis, *supra* note 93, at 1091.

95. For a recital of the facts see *Baker v. Carr*, 369 U.S. 186 (1962). See also 134 SCIENCE 1677-79 (1961).

constitutionality of legislative districts in 21 states had been filed.⁹⁶

Before turning to an examination of administrative and judicial remedies to malapportionment, it is necessary to survey the powers of the United States Congress as regards congressional districts, as well as the approach of Congress to reapportionment and redistricting of such districts.

VII. THE CONSTITUTION AND CONGRESS

Based upon the language of certain provisions of the Constitution,⁹⁷ as well as the historical materials surrounding their construction, it can be affirmed that election by single-member districts as well as a right to equality of representation for each voter is intended, if not required, by the Constitution as regards elections for the House of Representatives.⁹⁸ Other provisions, such as the clause guaranteeing to the states a republican form of government (article IV, section 4) and the first section of the fourteenth amendment, could be utilized by the Congress to impose similar standards upon the states as regards state elections for at least one chamber.⁹⁹ The Constitution and amendments, notably the fifteenth, would void discriminatory electoral practices based on race—practices such as the notorious Tuskegee gerrymander overturned in *Gomillion v. Lightfoot*.¹⁰⁰ The Civil Rights Acts of 1957¹⁰¹ and 1960,¹⁰² in essence voting rights acts, are based upon such provisions. Indeed, the Civil Rights Commission established by these acts, in its report and recommendations on voting, urged that Congress should consider legislation requiring that voting districts be substantially equal in population when the state legislature is based on

96. Legal actions are pending in the following States: Alabama, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wisconsin. N.Y. Times, May 14, 1962, p. 1, col. 2.

97. U.S. Const. art. I, § 2 (3) (on apportionment); *id.* art. I, § 4 (1) (the "times, places and manner of holding elections" clause). Lewis says that "In addition to Article I, a federal right to equality of representation in the House may be based on various provisions in section I of the fourteenth amendment." Lewis, *supra* note 93, at 1076.

98. According to Lewis, "An examination of historical material demonstrates that a right to equality of representation can be drawn from the Constitution." Lewis, *supra* note 93, at 1058. See also *Hearings Before the Subcommittee on Increasing the Membership of the House of Representatives and Redistricting Congressional Districts of the House Committee on the Judiciary*, 87th Cong., 1st Sess., at 183-84 (1961), for statements on the intent of the framers.

99. A system of state legislative representation could "be so unreasonable as to offend the equal-protection and due-process clauses . . ." of the fourteenth amendment. Lewis, *supra* note 93, at 1077. Indeed, upon this basis rather than on the basis of the guarantee clause, the Supreme Court took jurisdiction in the *Baker* case.

100. 364 U.S. 339 (1960).

101. Civil Rights Act, 1957, 89a 71 Stat. 634, as amended (codified in scattered sections of 28, 42 U.S.C.).

102. 89b 74 Stat. 86 (1960), as amended, 18 U.S.C. § 1509 (Supp. III 1962).

population, and granting federal courts jurisdiction of suits to enforce the requirements of the Constitution and federal law in regard to electoral districts.¹⁰³

Congress thus possesses ample power not only to apportion the congressional districts among the several states pursuant to population shifts following each decennial census, but also to establish uniform standards for districting by state legislatures, with power to compel enforcement of its standards.¹⁰⁴ Pursuant to this authority, between the years 1842 and 1929 Congress wrote into apportionment statutes the requirements that mandated single-member congressional districts drawn by the states be of "contiguous territory," be "as nearly as practicable [of] an equal number of inhabitants," and be "compact."¹⁰⁵ It must be added that Congress never provided precise statutory definitions or sanctions.

The undoubted implied power of Congress to enforce statutory provisions suggests in this context a variety of techniques. The Congress could, for example, (1) legislate more precise standards amenable to delegation of express jurisdiction to the courts; (2) refuse to seat members elected at-large or representing malapportioned (gerrymandered) districts; (3) delegate to an administrative agency such as the Census Bureau authority to redraw malapportioned districts; (4) withhold federal grant-in-aid funds from states with inequitable districts; or (5) draw districts itself. Clearly, all such remedies would apply only after manifest failure of traditional political processes within the states to do the job; clearly, also, the impractical nature of some of these proposals, if not all, from a political point of view needs no comment.¹⁰⁶ In actual fact, Congress has never attempted to district or redistrict a state, nor has it attempted the enforcement of any provisions of reapportionment laws passed from time to time.¹⁰⁷ Indeed, Lewis affirms that effective enforcement of equitable districting by Congress is "flatly negated by history and by political horse sense."¹⁰⁸ Administrative or judicial remedies would appear, then, on the face the only alternatives. By analogy, and on the basis of empirical data

103. U.S. COMMISSION ON CIVIL RIGHTS, VOTING 141 (1961).

104. "It thus appears clearly to have been the intent of the framers of the Constitution to give Congress the power to district or redistrict the States for election of Representatives." *Subcommittee Hearings*, *supra* note 98, at 70. For a similar position, based upon statements of Madison and others at the federal convention drawing a federal power to prevent malapportionment on the basis of the "times, places and manner" clause, see Lewis, *supra* note 93, at 1071-72.

105. For a brief history of congressional apportionment statutes see Lewis, *supra* note 93, at 1073-74; see also Margolin, *supra* note 72.

106. Lewis, *supra* note 93, at 1094.

107. Margolin, *supra* note 72, at 7.

108. Lewis, *supra* note 93, at 1093. Lewis suggests that attempts by the Congress, itself, to establish district lines would generate intense partisan political pressures, would be spasmodic, might lead to the denial of any representation to certain districts, and would subject members to uncertainty. *Id.* at 1093-94.

presented above in this paper in the subsection on "State Legislative Districts," a similar conclusion can be reached with regard to the carving of state legislative districts by state legislatures.

In point of fact, by the Reapportionment Act of 1929 as amended by the Equal Proportions Act of 1941,¹⁰⁹ Congress actually deleted previous standards calling for compactness, contiguity, and substantial equality of population. These statutes provide an automatic procedure for reapportioning the house districts: The Census Bureau, using the mathematics of equal proportions, prepares after each decennial census for assignment to state governors through the Clerk of the House of Representatives the *pro rata* share of districts available to each state given the fixed House total membership of 435.¹¹⁰ The actual drawing of the districts is, of course, left to the states themselves. Under the statutes, states gaining may elect the additional members at-large; states losing must redistrict on penalty of electing the entire state's congressional delegation at-large at the next congressional election following the census.

This threat of entire delegations facing at-large election is a formidable spur or club to the practical politician. At-large elections of this sort are expensive, risky, invite publicity-seekers and incompetents, place senior House members and their seniority on the chopping-block of a chance "winner-take-all," and tend to distort the complexion of the House. Indeed, since 1932 "no large states have permitted elections of entire delegations at-large."¹¹¹ This threat was undoubtedly the principal spur forcing such politically divided states as Pennsylvania, Massachusetts, Illinois, and Missouri to achieve districting schemes before 1962 deadlines; in point of fact, the abrupt apparition of a possible at-large election in Pennsylvania was sufficient to kill, at third reading, the previously strongly supported 1962 House Enlargement Bill.¹¹² Clearly a court order voiding an inequitable districting scheme and presenting thereby the threat of an at-large election represents a potent instrument.

The situation surveyed in this paper of evident malapportionment and gerrymandering of congressional and state legislative districts and equally evident inaction by Congress despite mounting urban-suburban dissatisfaction appears unchanged over the past decade. To be sure, President Truman in his message to Congress of January 9, 1951, pointed to the discrepancies among districts and advocated remedial congressional legisla-

109. 55 Stat. 761 (1941), 2 U.S.C. § 2 (a) (1958).

110. For statutory provisions and administrative procedures see *Subcommittee Hearings*, *supra* note 98, at 178-79. See also Margolin, *supra* note 72, at 13; *cf.* 1961 CONG. Q. WEEKLY REP. 274.

111. 1961 CONG. Q. WEEKLY REP. 678 (1961). This reference includes a discussion on the dangers latent in an at-large election of an entire state delegation.

112. 1962 CONG. Q. WEEKLY REP. 429; see also N.Y. Times, Mar. 9, 1962, p. 1, col. 4.

tion where states had failed.¹¹³ Since then a number of bills on reapportionment and redistricting have been introduced and have been considered by the House Committee on the Judiciary and the subcommittees thereof, notably proposals frequently reintroduced by Representative Emanuel Celler of New York.¹¹⁴ The latest version of the Celler bill would restore previous provisions calling for compact and contiguous territory for congressional districts and would limit population disparities between districts to a figure not more than "20 per centum greater or less than the average obtained by dividing the whole number of persons . . . by the number of Representatives to which such State is entitled. . . ."¹¹⁵ A significant feature of this bill in contrast to past proposals and in view of the *Baker* case was a proviso for judicial review of congressional districts "at the suit of any citizen . . . by the district court of the United States."¹¹⁶ Although this bill was approved by the Judiciary Subcommittee of the 86th Congress, no further action in either the House or Senate was taken during that Congress;¹¹⁷ nor has any final action been taken by the 87th Congress. It would again appear that remedies outside the chambers of Congress—remedies of an administrative or judicial nature—must perforce be employed if relief against gerrymandered districts is to be obtained.

VIII. ADMINISTRATIVE AND JUDICIAL REMEDIES

The British success with the expert, impartial, essentially administrative Boundary Commission has been noted above in this paper in the subsection on "The British Model"; furthermore, fourteen states of the United States provide various types of administrative boards with authority to intervene at some point in the process of reapportionment and redistricting; and where administrative boards have been used within the states, as in Britain, there has been a record of constructive accomplishment towards equitable districting.¹¹⁸ However, given the fact that the United States is a federal state with a considerable tradition of state political autonomy in the establishment of congressional districts, a centrally directed action or

113. Margolin, *supra* note 72, at 15.

114. For legislative history see *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 9 (1961); *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 10 (1959); *Hearings Before Special Subcommittee on Reapportionment of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 21 (1951). See also 1962 CONG. Q. WEEKLY REP. 429.

115. *Hearings on H.R. 4068 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 9, at 86 (1961).

116. *Ibid.*

117. 16 CONG. Q. ALMANAC 826 (1960). Lewis adds, "But a realist must recognize that legislation like the Celler bill has little chance of passage." Lewis, *supra* note 93, at 1095.

118. *Id.* at 1089-90; see also author's cross-tabulation tables, *Appendix*, p. 1291 *infra*.

review by an administrative agency would encounter greater opposition than in Britain. Nevertheless, three identical bills in the 87th Congress referred to a Judiciary Committee Subcommittee authorized the Director of the Bureau of the Census to redistrict states found in violation of specified standards for districting.¹¹⁹ Testifying rather gingerly on this measure, Census Director Richard Scammon pointed out that the Bureau could do a pretty fair job of redistricting but that "this legislation . . . would put me in a rather unenviable position . . ." ¹²⁰ Testifying at the previous hearings, Dr. Howard Penniman of the American Political Science Association doubted that Congress could provide much more than information and publicity in the way of enforcement of approved standards calling for compactness, contiguity, and equality of population above or below a fairly flexible margin of 20 per cent variation from the norm.¹²¹

In the United States federal system, notably as in the process of public school integration, it is evident on the record that judicial litigation is going to supplement legislation in effective enforcement of constitutionally required principles of equality of representation. Not only has Congress failed to implement the spirit and the intent, if not the letter of the Constitution, but the political departments of the several states have generally failed to carry out their own constituent mandates as well as mandates of the federal constitution as applied to them. Consequently, the well-known pattern of malapportionment and gerrymandering continues entrenched, to the present jeopardy of urban-suburban needs.¹²² In short, judicial remedies may well provide the only effective relief now in regard to the problem of gerrymandered congressional districts.¹²³ In the states, administrative boards as well as judicial remedies can be effective as regards equitable construction of state legislative districts.

Prior to the *Baker* case, Justice Frankfurter's "political questions" doctrine, enunciated in the leading *Colegrove v. Green* case,¹²⁴ involving Illinois congressional districts, had tended to cause a denial of jurisdiction by courts in actions involving congressional districts, and by analogy state legislative districts. Actually, *Colegrove* may no longer be good law; it was enunciated by a divided Court, with the majority turning on a concurring opinion by Justice Rutledge who decided on grounds other than

119. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 9, at 18-21 (1961).

120. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 9, at 123 (1961).

121. *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 10, at 38-39 (1959).

122. On the problem of denied urban needs see the reference to amicus curiae brief submitted to the Court by the Solicitor General, Archibald Cox, in 1961 CONG. Q. WEEKLY REP. 531-32.

123. "It is difficult to see how a policy of equal congressional representation can be enforced . . . without the use of the Judiciary." Lewis, *supra* note 93, at 1094.

124. 328 U.S. 549 (1946).

denial of jurisdiction. In recent years holdings by federal and state courts indicate a judicial reappraisal of the role of the courts in actions involving the issue of equal representation casting "considerable doubt as to the viability of *Colegrove v. Green* . . . as a lasting precedent."¹²⁵ *Colegrove* can, of course, be justified on the ground that it gave time to the political departments to effectuate remedies in the absence of judicial sanctions; but time obviously had run out with the enunciation of the *Baker v. Carr* holding, which applied specifically to state legislative districts.

Although the *Baker* case did resolve in favor of complainant the questions of standing, jurisdiction, and justiciability by finding a constitutional cause of action in denial by Tennessee of equal protection of the laws required by the fourteenth amendment, Justice Brennan's opinion for the majority did not devise or suggest a specific judicial remedy.¹²⁶ Rather, this thorny issue was temporarily foreclosed by the Court order remanding to the federal district court for further proceedings. Subsequent to the decision, the Governor of Tennessee called a special session of the legislature to meet in June to redistrict, hoping thereby to avoid lower-court implementation of the Supreme Court decision. The result of that session was then presented to the district court.

Accordingly, on June 22, 1962, the United States District Court for the Middle District of Tennessee, pursuant to the decision of the Supreme Court that the complaint presented a justiciable constitutional cause of action, on remand held that the apportionment in at least one house of Tennessee's bicameral legislature should be based on the number of qualified voters without regard to any other factor.¹²⁷ The three-judge court concluded that the expedient course to follow, rather than declare the 1962 statutory apportionment unconstitutional, was to allow the 1963 Tennessee General Assembly, elected under the 1962 statutes, to enact a fair and valid reapportionment. The court retained full jurisdiction of the matter in order to assure compliance with its order.

There are an array of conceivable judicial remedies the courts might invoke involving equity or civil law powers, depending in each instance upon the facts presented and the forum employed. Such remedies are, for example: a mandamus to compel legislative redistricting; a quo warranto to members of malapportioned legislatures; contempt proceedings against legislators failing to implement a court reapportionment order; an injunction against election officials certifying returns from malapportioned dis-

125. Statement by Prof. Gordon E. Baker, *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 10, at 35 (1959). Lewis records the action of state courts granting relief in Lewis, *supra* note 93, at 1066-67. Also see the recital of precedent in Justice Brennan's majority opinion in *Baker*. 369 U.S. at 198-218.

126. 369 U.S. at 235.

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

tricts or enjoining a general election pending reapportionment; an order to establish a court-devised districting scheme; an order quashing a challenged districting plan with the resultant threat of an at-large election, failing equitable redistricting by the legislature consistent with established standards. In his amicus curiae brief in the *Baker* case Solicitor-General Archibald Cox brought to the attention of the Court remedies judged suitable, such as an order to state officials to prepare an apportionment plan for court approval, or the threat of an at-large election resulting from a court order voiding a challenged malapportionment.¹²⁸ The effectiveness of the at-large threat in compelling states losing congressional seats to redistrict following the 1960 census has been documented above in this paper. Anthony Lewis also defends at-large elections pursuant to a court order as "a simple, appropriate, and effective remedy" already supported by state court precedent.¹²⁹ Likewise, Gordon Baker proposed an amendment to the Celler Bill to include a court order that "all Representatives from such [malapportioned] State be elected from the entire state at-large until such time as districts . . . conform to the requirements. . . ."¹³⁰ This does not exhaust judicial ingenuity; for example, a three-judge Wisconsin court has appointed a special master to draw a plan to reapportion that state's congressional and legislative districts.¹³¹

Manifestly, application of some of the "remedies" suggested above would raise problems as grave as the evils challenged—a point emphasized by Justice Frankfurter in his dissenting opinion in the *Baker* case.¹³² Nevertheless, this paper has already reached the conclusion that judicial remedies may provide the only generally effective relief against malapportionment of congressional and state legislative districts in the United States, a view impliedly sustained by the majority in *Baker v. Carr*.

Thus, at this writing, the actual effect of the decision of the Supreme Court in the *Baker* case is not clear, and the positive remedies not fully known. More, much more, remains to be done, and additional clauses of the Constitution, particularly the guarantee clause, await construction. Whatever is done will be done in part by the ponderous pace of hammering out judicial opinion in individual actions up through the hierarchy of courts. Suffice it to say that within two months of the *Baker* opinion, lawsuits were pending in twenty-one states challenging imbalances of representation, chiefly as regards state legislatures.¹³³ The Supreme Court of

128. Summary of Cox brief in 1961 CONG. Q. WEEKLY REP. 531-32. For a survey of possible judicial remedies see Lewis, *supra* note 93, at 1068-70.

129. *Id.* at 1070.

130. Statement by Professor Baker, *supra* note 125, at 35.

131. N.Y. Times, July 4, 1962, p. 1, col. 1.

132. 369 U.S. at 266.

133. N.Y. Times, May 14, 1962, p. 20, col. 2. Mr. Bonfield states that most of the suits subsequent to *Baker* are challenging *de jure* schemes of state representation as violative of the fourteenth amendment, rather than the failure of state legislatures

the United States had additionally returned to the Supreme Court of Michigan, for "further consideration in the light of *Baker v. Carr*," an action challenging gross inequality of senate districts in that state.¹³⁴ Indeed, "close observers of the Supreme Court can think of no other recent decision that has led to so much litigation and political action in so short a time."¹³⁵

Litigation has well commenced a new approach to a situation not amenable to resolution by unaided legislation, as is brought out by this survey of comparative political practice in the United States. Possibly more effective use of impartial administrative agencies along the lines of the British experience can be brought to bear on the problem, at least within state jurisdictions. More equitable apportionment and districting of state legislative districts is the anticipated result of litigation, which will in turn promote greater fairness in the drawing of congressional districts by the states. The Supreme Court may also take jurisdiction in suits directly challenging congressional districts. The theoretical ends of representation must be served by this process, to enable the nation to better meet accumulated challenges of urbanization as well as other contemporary demands. For the present, public opinion has been aroused by the Court, providing a spur to legislators in addition to the newly attendant presence of judicial review.

to carry out state constitutional mandates. Bonfield, *supra* note 88.

134. N.Y. Times, April 24, 1962, p. 1, col. 1.

135. N.Y. Times, May 14, 1962, p. 1, col. 2.

APPENDIX

*Cross-Tabulation Tables on Sets of Variables Affecting Representation in State Legislative Bodies.***Table I—Representative Base*

	<i>People</i>	<i>Territory</i>	<i>Mixed (People and Territory)</i>	<i>Not Classified</i>
Senate	18 States	16 States	13 States	3 States
House	17 States	3 States	27 States	3 States

Table II—Agency Redistricting

<i>By Legislature (Subject to Review in Some States)</i>	<i>By Direct Administrative Board, or Administrative Board Review</i>	<i>Judicial Review</i>	<i>No Provision (Both Houses)</i>
39 States	14 States	2 States	1 State

Table III—Constitutional Reapportionment and Redistricting Requirement (48 States)

	<i>Done</i>	<i>Not Done</i>
every ten years:	29 States	12 States
other than every ten years:	2 States	5 States

Table IV—Record of Accomplishment (Both Chambers)

	<i>Done</i>	<i>Not Done</i>
by Legislature:	13 States	17 States
by other (Board; Review, etc):	14 States	

*Source: COUNCIL OF STATE GOVERNMENTS, *Apportionment of Legislatures, as of November 1, 1961*, in *THE BOOK OF STATES* (1962-63 ed.) (data supplied by Warren E. Harper, Research Associate, prior to actual publication).