COURT VERSUS LEGISLATURE

(The Socio-Politics of Malapportionment)

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The decision of the Supreme Court of the United States in *Baker v. Carr* contains a double irony.[1] First, the Supreme Court—that branch of government traditionally most removed from popular control—appears as tribune of the people, demanding a fuller voice for democracy. Second, the state legislature—that branch of government traditionally most responsive to popular control—appears as the tyrant, denying a full and fair voice to the citizenry. This reversal of historic roles reveals a great deal about the accumulated social and political pressures that lie behind the Court's Tennessee decision and that may profoundly affect the contours of American government in the future.

The local legislature was historically the people's voice, serving in colonial America as goad and check on the governor. The friction between assembly and governor fired and foreshadowed the mounting hostility between colony and motherland that flared in the American Revolution. When the liberated colonies and then the United States composed their separate and common constitutions they set up legislative assemblies to guard the interests of the "people" against executive encroachment.

The elected assembly, as personification of the citizenry, is an image deeply engraved in the preambles and apportionment language of our present state constitutions. The New York State Constitution provides that senatorial districts shall "contain as nearly as may be an equal number of citizen inhabitants"[2] and that the Assembly shall be apportioned on a citizen population basis.[3] The Louisiana Constitution of 1921 provides that "representation in the House of Representatives shall be equal and uniform and shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."[4] In Florida,

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[1] In Baker v. Carr, 369 U.S. 186, 187-88 (1962), Justice Brennan, speaking for six members of the Supreme Court, found: "This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, 'these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes,' was dismissed by a three-judge court convened under 28 U.S.C. § 2281 in the Middle District of Tennessee. The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F. Supp. 824. We noted probable jurisdiction of the appeal. 364 U.S. 898. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion."

[2] N.Y. CONST. art. III, § 4. [3] *Id.* § 5. [4] LA. CONST. art. III, § 2.

TABLE I

PERCENT OF STATE'S POPULATION REPRESENTED BY MAJORITY OF MEMBERS IN STATE LEGISLATIVE CHAMBERS

State	Lower House	Senate
Connecticut	9.6%	36.5%
California	44.7	11.9
Nevada	28.8	12.4
Vermont	12.6	45.7
Rhode Island	34.2	13.5
Maryland	27.6	15.5
New Jersey	44.0	17.0
Florida	17.2	17.7
Montana	40.8	18.4
Indiana	41.5	19.1
Arizona	no info.	19.3
Delaware	19.4	22.7
New Mexico	35.7	20.1
Oregon	29.2	20.7
Kansas	22.6	33.7
Missouri	23.7	47.4
Georgia	26.3	26.9
South Carolina	46.7	26.6
Utah	39.0	26.8
Alabama	27.2	28.3
Wyoming	39.9	28.8
Idaho	29.3	33.9
Illinois	46.0	29.4
Oklahoma	33.4	29.5
Tennessee	30.1	33.3
North Carolina	30.2	40.1
Minnesota	31.6	35.9
Louisiana	31.9	36.0
Michigan	42.3	32.3
Mississippi	32.7	34.6
Washington	38.9	35.4
Colorado	34.7	36.1
North Dakota	39.0	35.4
Pennsylvania	41.6	35.4
Texas	39.9	36.8
Indiana	37.0	39.3
New York	37.1	40.9
New Hampshire	37.4	44.8
Arkansas	37.5	47.0
Kentucky	37.6	45.2
South Dakota	38.7	40.9
West Virginia	38.9	45.7
Wisconsin	38.9	47.5
Minnesota	39.1	39.7
Nebraska	unicameral	41.9
Massachusetts	42.2	48.8
Oregon	45.4	42.2
Virginia	43.7	43.9

Source: Based on tables in Dauer & Kelsay, *Unrepresentative States*, 44 NAT. MUNIC. REV. 571 (1955); corrected figures appear in 45 *id.* 198 (1956).

the constitution calls for senatorial districts "as nearly equal in population as practicable."[5] In Michigan, a constitutional amendment of 1952 provided for house seats to contain "as nearly as may be an equal number of inhabitants."[6] In Georgia, where the county unit system prevails, the constitution states that "all government,

[5] FLA. CONST. art. III, § 3.

[6] MICH. CONST. art. V, § 2.

of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the people."[7]

In thirty-three states, the senate is apportioned on the basis of people-population, or adults over 21, or citizens, or qualified electors. In forty-one states, the house uses a similar base. The unicameral legislature of Nebraska rests on a population basis.[8]

The myth of the state legislature as champion of the people is preserved not only in the formal language of the constitutions, but also in the popular belief. In political debate, to "leave it to the states" is viewed as synonymous with "leave it to the folks back home." Yet, in reality, there is no branch of American government—be it state executive, federal legislature or executive, or the courts—more structurally unrepresentative of the American people than the state legislature.

In Connecticut's Lower House, legislators from districts containing 9.6 per cent of the total population of the state can compose an absolute majority of the state legislature; in the California Senate, a group speaking for 11.9 per cent of the state population is a majority; in the Nevada Senate, a 12.4 per cent group rules; in the Vermont Lower House, a 12.6 per cent group dominates. Table one shows the percentage of a state's population that can, through its legislators, compose a majority in each body.

Among the states where minorities control legislatures are included those where the constitutional decree is representation based on "people." The distortion between written intent and actual practice arises from modifying provisions of the selfsame constitutions that twist the general purpose into its opposite, from the capricious actions of state legislatures, and from the failure of legislatures to comply with their own constitutions.

The ratio of most populous to least populous districts further underscores the unrepresentative character of our state legislatures, as will be seen from table two.

Malapportionment in state legislatures is usually attributed to the political tug of war between urban and rural areas, especially as the latter tried to hold on to power against the advance of the cities in the twentieth century. Actually, the problem predates the modern farm-versus-town conflict, reaching all the way back to the colonial period.

"In most colonies," note Morison and Commager, "representation was so apportioned as to favor the older settled regions."[9]

This favoring of the older settled regions effectively put colonial power in the hands of a dominant aristocracy, often residing in cities where the lower classes were without a vote. Through limited franchise and inflated representation, the colonial elite could be certain of political power over the city poor and the landed yeomanry.

[7] GA. CONST. art. I, § 1.

[8] INDEX DIGEST OF STATE CONSTITUTIONS (Legislative Drafting Research Fund, Columbia University, 1959).

[9] 1 SAMUEL E. MORISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 165 (4th ed. 1950).

TABLE II

RATIO OF POPULATION OF MOST POPULOUS TO LEAST POPULOUS DISTRICT IN EACH LEGISLATIVE CHAMBER, 1960*

Key: S=Senate
LH=Lower House

State & Chamber	Ratio	State & Chamber	Ratio
New Hampshire, LH	1,081.3 to 1	Texas, S	9.4 to 1
Vermont, LH	987.0 to 1	West Virginia, LH	9.0 to 1
Connecticut, LH	424.5 to 1	Mississippi, S	8.8 to 1
California, S	422.5 to 1	Colorado, LH	8.1 to 1
Nevada, S	223.6 to 1	Louisiana, S	8.0 to 1
Rhode Island, S	141.0 to 1	North Dakota, LH	7.5 to 1
New Mexico, S	139.9 to 1	Colorado, S	7.3 to 1
Florida, LH	108.7 to 1	Washington, S	7.3 to 1
Idaho, S	102.1 to 1	Virginia, LH	7.1 to 1
Georgia, LH	98.8 to 1	Utah, S	6.9 to 1
Florida, S	98.0 to 1	Texas, LH	6.7 to 1
Montana, S	88.4 to 1	Connecticut, S	6.7 to 1
Arizona, S	85.8 to 1	Maine, LH	6.6 to 1
Georgia, S	42.6 to 1	Arkansas, LH	6.4 to 1
Alabama, S	41.2 to 1	Alaska, LH	6.4 to 1
Rhode Island, LH	39.0 to 1	Vermont, S	6.4 to 1
Delaware, LH	35.4 to 1	California, LH	6.2 to 1
Kansas, LH	33.2 to 1	Kentucky, LH	6.0 to 1
Maryland, S	31.8 to 1	Tennessee, S	6.0 to 1
Nevada, LH	31.4 to 1	North Carolina, S	6.0 to 1
Pennsylvania, LH	31.1 to 1	Hawaii, S	5.9 to 1
Utah, LH	27.8 to 1	Minnesota, S	5.8 to 1
Oklahoma, S	26.4 to 1	South Dakota, S	5.8 to 1
Idaho, LH	25.5 to 1	Virginia, S	5.5 to 1
South Carolina, S	25.1 to 1	Indiana, LH	5.4 to 1
Tennessee, LH	23.0 to 1	Arizona, LH	5.3 to 1
Missouri, LH	22.2 to 1	South Dakota, LH	4.7 to 1
Kansas, S	21.3 to 1	Washington, LH	4.6 to 1
North Carolina, LH	19.0 to 1	Indiana, S	4.4 to 1
New Jersey, S	19.0 to 1	New York, S	4.0 to 1
Iowa, LH	17.8 to 1	Michigan, LH	4.0 to 1
Louisiana, LH	17.4 to 1	Wisconsin, LH	3.9 to 1
Delaware, S	16.8 to 1	Illinois, LH	3.6 to 1
Mississippi, LH	16.7 to 1	Oregon, S	3.5 to 1
Alabama, LH	15.6 to 1	Wyoming, LH	3.4 to 1
New Mexico, LH	15.5 to 1	West Virginia, S	3.4 to 1
Iowa, S	15.0 to 1	South Carolina, LH	3.1 to 1
New York, LH	14.8 to 1	New Jersey, LH	3.0 to 1
Ohio, LH	14.5 to 1	Oregon, LH	3.0 to 1
Oklahoma, LH	14.0 to 1	New Hampshire, S	3.0 to 1
Montana, LH	14.0 to 1	Kentucky, S	2.9 to 1
Massachusetts, LH	13.9 to 1	Wisconsin, S	2.8 to 1
Minnesota, LH	13.3 to 1	Missouri, S	2.8 to 1
Maryland, LH	12.5 to 1	Maine, S	2.8 to 1
Michigan, S	12.4 to 1	Nebraska (unicameral)	2.7 to 1
Alaska, S	10.8 to 1	Arkansas, S	2.3 to 1
Pennsylvania, S	10.7 to 1	Massachusetts, S	2.3 to 1
North Dakota, S	9.9 to 1	Hawaii, LH	2.2 to 1
Wyoming, S	9.8 to 1	Ohio, S	2.2 to 1
Illinois, S	9.4 to 1		

* Where districts are represented by more than one legislator, ratio is that of most to least population per legislator.
Source: PAUL T. DAVID & RALPH EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 1 (1961).

As a result, ". . . in no colony were they [the lower class] fairly represented in the legislature."[10]

In North Carolina, "a small group of seaboard gentry," a hopelessly small numerical minority, "controlled four-fifths of the representation: the coastal counties sent five members each to the legislature, while the inland counties had two apiece."[11] In Pennsylvania, the Quaker aristocracy gave the three Delaware river counties eight representatives each while the five western counties had only eleven representatives altogether. "If representation had been based either on population or on the number of taxables, the figures would have been reversed."[12]

In his *Notes on Virginia,* Thomas Jefferson found fault with the constitution of his own state of Virginia on two scores: suffrage and representation. "Among those who share the representation," he wrote, "the shares are very unequal. Thus the county of Warwick, with one hundred fighting men, has an equal representation with the county of Loudon, which has one thousand seven hundred and forty-six. So that every man in Warwick has as much influence in the government as seventeen in Loudon."[13]

In a letter to Governor William King of Maine, Jefferson praised the constitution in every respect "except that of Representation." He disapproved the granting of one seat to each town regardless of size. "Equal representation is so fundamental a principle . . . ," insisted Jefferson, "that no prejudices can justify its violation because the prejudices themselves cannot be justified."[14]

In the ferment of the Revolutionary period, malapportionment in favor of the colonial aristocracy was challenged. In 1776, the year the Declaration of Independence was signed, Pennsylvania frontiersmen, armed with whatever weapons they could grab, forced a reapportionment in the state constitution, declaring that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land."[15]

The very next year, a New England group was challenging the idea of each town sending at least one delegate to the legislature, regardless of the town's size. The practice might have been acceptable when all towns were of about equal size, when they were all more or less alike and with parallel interests, and when they were governed locally and hardly felt the weight of the colony or state. However, as towns became disparate in size, as their interests clashed, as they felt the weight of the state in taxes, in money policies, in the military levy, there were protests against unequal representation. In 1777, a group protested against the existing system of representation in Massachusetts. "Let the representatives be apportioned among

[10] *Ibid.* [11] *Id.* at 170. [12] *Id.* at 175.

[13] 2 THE WRITINGS OF THOMAS JEFFERSON 160-61 (Library ed. 1903), quoted in GORDON E. BAKER, RURAL VERSUS URBAN POLITICAL POWER 7 (1955).

[14] Papers in Archives of the Huntington Library, San Marino, California, quoted in de Grazia, *General Theory of Apportionment,* 17 LAW & CONTEMP. PROB. 256, 261 (1952); see also Robert deVore, "Gallery Glimpses," Washington Post, April 4, 1943, p. 48.

[15] BAKER, *op. cit. supra* note 13, at 7-10.

the respective counties, in proportion to the number of their freemen," they demanded.[16]

In the Northwest Ordinance of 1787, the concept of "proportionate representation" was given a high rank among the basic ideas for this huge territory west of the Appalachians:[16a] "The inhabitants of said territory shall *always* be entitled to the benefit of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of common law . . . ."

The term "proportionate representation" was then used synonymously with "equal" representation, "proportionate" referring to the concept that a bigger county should have bigger representation—but that the representation should be based on *population.*

The reapportionments effected during this period were the results of political contests between two propertied groups: those in the older and the newer settlements. The unpropertied in the cities were still out of the contest, without the right to vote.

Extension of the franchise to the propertyless in the cities posed a new problem for those vested interests usually identified with conservatism in the United States—the problem of a political population base. After the decline of Populism in the United States, such a base was discovered in the dominantly rural areas of America. Out of this development arose a new coalition—the alliance between the silk stocking districts of the cities and the rural districts of the countryside—that has been a primary pillar of political conservatism in America.

The conservative character of rural over-representation is attested in the statements of both friends and foes alike. Seymour Martin Lipset, an opponent of the system, sees malapportionment as the conservative answer to the extended franchise. In examining "rotten boroughs—twentieth century style," he writes:[17]

> In a sense, a large part of the American political system may be compared to the pattern existing in various parts of Europe before World War I. In a number of European countries middle-class and property owning voters either were given more votes than the property-less, or were explicitly allowed to elect a large part of the parliament. These devices, of course, were designed by conservatives to prevent the danger that universal suffrage would result in leftist parliamentary majorities.
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> Today in the United States, the shift of population to the large cities is, in effect, recreating on the level of state government, the favored solution of the European conservatives to the problem of yielding the vote to the property-less. The centers of trade-union strength, which are also concentrations of Negroes, Jews, Catholics, and others of recent immigrant stock, and the backbone of economic reform politics, are given much less representation than are the areas which are the centers of conservatism.

[16] *Ibid.*

[16a] Ordinance of 1787, art. II, in LAWS OF THE NORTHWEST TERRITORY, 1787-1802, at 68 (1833). (Emphasis added.)

[17] Lipset, *Rotten Boroughs—Twentieth Century Style,* 1 UNION REV. 74 (1962).

In support of the present system, *Pathfinder*—a "town journal" that describes itself as a voice of the American countryside—once more emphasizes the conservative character of existing apportionment:[18]

Do you get all steamed up when you read that some left-wing labor union is "putting pressure" on Congress to pass legislation that would be unsound?

If so, you're using up a lot of energy unnecessarily. For Congress and the state legislatures are in safe hands. They are controlled by the *conservative,* common-sense people of "Country-side America"—people who live in places of under 10,000 and on farms.

Dr. Lashley G. Harvey, after a study of practices in many states, concluded that "large taxpaying interests frequently gain from rural domination and will go to great lengths to maintain existing apportionments."[19] In a study of the California legislature, Dean McHenry found that,[20]

. . . certain business interests in the state have found it easier to make their influence felt in the legislature through senators from rural areas. Privately owned utilities, banks, insurance companies and other concerns with crucial legislative programs have discovered some "cow county" legislators more responsive to their demands and less committed to contrary points of view on key social and economic questions than are urban representatives.

A former president of the National Association of Real Estate Boards provided an ideological base for continuing inequality:[21]

Today the greatest threat to democratic institutions, to the republican form of government, and ultimately to freedom itself, lies in our big cities. They are populated for the most part with the mass-man, devoid of intelligence, and devoid of civic responsibility. He talks only about rights and has no conception of responsibilities. He will vote for anyone who offers him something for nothing. Whether it be subway fares at half-price or public housing at one-third price. . . . Our one hope of survival as a free country is that rural and semi-rural areas still dominate most of the state legislatures through their representatives and still dominate the House of Representatives at Washington. Our best hope for the future is to keep it that way.

In northern states, the conservative coalition of city wealth and rural legislator often expresses itself through the formal organization of the Republican Party. In southern states, the same coalition expresses itself through the dominant elements in the Democratic Party:

The significance of the racial aspect of malapportionment has been stressed by V. O. Key (a southerner, and professor of government at Harvard University), who observed in 1950 that "by the overrepresentation of rural counties in State legislatures, the whites of the black belts gain an extremely disproportionate strength in State lawmaking." This

[18] *Who Really Runs America?,* unpaged reprint from Pathfinder, June 1953.

[19] Harvey, *Reapportionments of State Legislatures—Legal Requirements,* 17 LAW & CONTEMP. PROB. 364 (1952).

[20] McHenry, *Urban Versus Rural in California,* 35 NAT. MUNIC. REV. 350-54, 388 (1946).

[21] August N. Renner, Legislative Reapportionment in Wisconsin (unpublished M.S. thesis in University of Wisconsin Library, 1948), quoted in Short, *States That Have Not Met Their Constitutional Requirements,* 17 LAW & CONTEMP. PROB. 377, 382 (1952).

gives excessive weight "to those areas in general the most *conservative* and in particular the most irreconcilable on the Negro issue."[22]

More recently, C. Vann Woodward (a southerner and Sterling professor of history at Yale University) has pointed to malapportionment as a major factor in placing political control "in the hands of a small and often reactionary oligarchy," thereby "killing . . . needed social legislation" and fostering "interference with local public schools and their peaceful adjustment to Federal law."[23]

Roy Harris, a veteran Georgia legislator and president of the White Citizen's Council, in telling the Columbia Broadcasting System (CBS) why he favored the county unit system, stated:[24]

> Now, here's why we're in favor of the county unit system. It keeps down the mobs of the city that Tom Jefferson talked about. It keeps down these bloc votes. The bloc vote does not exist in the rural counties or in the smaller cities. And there, it's no ward politics and no ward organization like there is in the cities. It's the difference between radical government and *conservative* government in Georgia.

Another practicing politician, Senator John Rawls of Florida, explaining the "Pork Chop Gang" in the state legislature in a colloquy with a CBS reporter noted:[25] "It's the conservative voice in the Florida state government, the better terminology being the majority bloc." This "majority," according to Rawls, represented something like "fourteen or fifteen per cent of the population."

The conservative character of the state legislatures has produced a state of mounting frustration among the urban, suburban and industrial majorities in their demands for social and economic change.

Gordon Baker, in his study of "Rural Versus Urban Political Power," writes:[26]

> The rise of cities in the nineteenth century caused the emergence of a large class of property-less laborers, whose enfranchisement alarmed men of substance, both rural and urban. After losing the battles over an extended suffrage, conservatives in a number of states sought to neutralize its effects by controlling the apportionment of legislative representatives.

Because unequal representation, is, in the first instance, an attempt to preserve the political forms and forces of the past against the socioeconomic contours of the present, this violation of democracy produced a necrocracy: a rule of the dead! The lively voice of a throbbing democracy is stifled by the crabbed claw of the past.

This, says the American Political Science Association in 1954,[27]

[22] 1961 UNITED STATES COMM'N ON CIVIL RIGHTS, REPORT 114, quoting V. O. KEY, SOUTHERN POLITICS 266 (1950). (Emphasis added.)

[23] *Id.* at 114, quoting N.Y. Times, June 18, 1961, p. 48.

[24] "The Beat Majority and the Supreme Court," a television program broadcast over the Columbia Broadcasting System as part of the "CBS Reports" series, March 29, 1962, transcript, p. 10. (Emphasis added.)

[25] *Id.* at 11-12.

[26] BAKER, *op. cit. supra* note 13, at 9.

[27] AMERICAN STATE LEGISLATURES, REPORT OF THE COMMITTEE ON AMERICAN LEGISLATURES, AMERICAN POLITICAL SCIENCE ASS'N 30 (Zeller ed. 1954).

. . . is one reason why the states have not always been able . . . to cope with the greater problems of an urbanized society, such as housing, metropolitan transportation fares, price control on foods, social insurance, and community planning beyond city limits.

This inequality, says Dayton D. McKeon in his report to the American Assembly,[28] turns out

. . . legislatures that deny or limit municipal home rule, that pass special legislation to limit the powers of particular cities, that distribute education and welfare funds to the disadvantage of the cities, [that] . . . have shown a neglect or misunderstanding of urban problems, such as slum clearance, traffic congestion, race relations.

Add to this the vast problems of labor relations, control of consumer goods monopolies, minimum wages and workmen's compensation, water pollution, conservation of natural resources, suburban development.

McKeon continues:[29] "Persons who feel that more is to be feared from governmental action than from stalemate tend to approve the situation. Those who feel that the problems that beset the states will not solve themselves tend to disapprove it."

With fine impartiality, McKeon has drawn the line: those who think America is—or should be—static, prefer do-nothing state legislatures, weighted down under the dead hand of the past; those who know that America is dynamic and demanding cannot rest content with state legislative do-nothingism.

The great majority of Americans who live in the twentieth century—politically as well as chronologically—finding themselves frustrated by their state legislatures, embarked on a political odyssey to find an appropriate channel for creative action. This political wandering—backed by the compelling pressures of millions—has worked a profound and significant evolution in American political forms—an evolution that has, as in the *Tennessee* case, reversed the roles of court and legislature in the United States.

Frustrated by state legislatures, urban dwellers have first turned for guidance to state governors. The obvious way out is to turn to the governor. His stature is greater than that of any single legislator and his visibility is higher. He can be held responsible more easily than a single member of the lower or upper house in the state capital, and he should be more potent. What is more, the governor is elected directly by the people with all votes counted equally in all states, except Georgia. The governor becomes the tribune of the people!

This shift of the electorate to the governor is hardly what the early writers of our state constitutions had in mind when they wrote the documents for their commonwealths. These early Americans feared the Executive Power, especially the governors, with whom they had some highly unpleasant dealings during the years of British rule. Early America wanted strong legislatures. But when the legislatures will not act or cannot act at a time when action is needed, the people—

[28] McKeon, *The Politics of the States*, in AMERICAN ASSEMBLY, THE FORTY-EIGHT STATES 72-73 (1955).
[29] *Ibid.*

through the immemorable process of trial and error—will turn elsewhere. It is to the governor that they turn.

One result of this is the stalemate that exists in many states in top state governments: the governor represents one party and the legislature represents another party; the governor represents one wing of the party (usually the more "modern") and the legislature represents another wing of the party (usually the more "antique").

Commenting on this in 1956, Karl Bosworth wrote:[30]

> The results are remarkable in the infrequency with which the party division in the legislature to be dealt with by the governor came even close to the party division of popular votes for governor. Ten of these governors found the opposite party in charge in at least one of the houses. Five of them who won with the respectable figure of fifty-four per cent of the votes found both houses in the hands of the opposition.

At the present time (1962), the governor's party is the minority in both houses of the legislature in ten states. In an additional seven, the governor's party is the minority in at least one house. Thus, in more than a third of the states, the governor must deal with a legislature in which one or both houses are controlled by the opposition.[31]

In eight states which elected governors in 1960 or 1961, there was a percentage point difference of ten or more, between the governor's percentage of popular vote and his party's percentage of seats in at least one house of the legislature. In two of these states, this was true of both houses.

The conflict between governor and legislature is not accidental. It is almost inevitable—and apt to become more so should unequal representation continue. The governor and the legislature are not elected by the same people—really. In voting for governor, one vote equals one! In voting for legislature, some votes equal ten and other votes equal one-tenth.

The governor is no saviour, however. He has some power, especially the power to veto (in states with a gubernatorial veto) and to use his lofty position to arouse the citizenry. But otherwise, he is frightfully limited. He can pass no laws, and it is the passage of necessary legislation, not the veto of objectionable legislation, that is primarily needed if a state is politically to stay abreast of itself. Most governors cannot even run the administrative branch of their state governments. In their anxiety to be secure against executive oppression, the constitutional scribes atomized the Executive Power, so that in many states the lieutenant-governor, the various state commissioners, and so on down the line are elected separately. The "good" governor really becomes only a voice too often mocked by his state legislature.

The people, still searching for a solution, stumble on through the governmental maze. During the last half century, the people have turned to Washington. What the states could not do, perhaps Washington could do!

[30] Bosworth, *Lawmaking in State Governments*, in AMERICAN ASSEMBLY, THE FORTY-EIGHT STATES 95 (1955).

[31] THE WORLD ALMANAC 70-74 (1962).

To record the growth of the federal power is not our purpose here. It is well known. Many factors contributed: the growth of problems that could only be handled by united action of the nation as a whole; the mounting impact of international affairs; Supreme Court decisions; mammoth grants-in-aid from Washington. But among these factors must be counted the failure of the states to do right by their own people!

There is no more authoritative voice on this subject than the Commission for Intergovernmental Relations, appointed by President Eisenhower. When it was appointed, one commentator described it as a Commission to "rewrite the Articles of Confederation," because it seemed to be headed toward a re-proclamation of "states' rights." The London *Economist* referred to the Commission as "the first official reassessment of the American federal system since its foundation in 1787." If there was any "prejudice" at all in this report, it would have been toward the "states."

Yet in its findings, the Commission had to report that the urban voters would continue to turn away from the states and to the federal government so long as the present state legislative ineptitude and inaction continue.[32]

> If states do not give cities their rightful allocation of seats in the legislature, the tendency will be toward direct Federal-municipal dealings. These began in earnest in the early days of the depression. There is only one way to avoid this in the future. It is for the states to take an interest in urban problems, in metropolitan government, in city needs. If they do not do this, the cities will find a path to Washington as they did before, and this time it may be permanent, with the ultimate result that there may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now.
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> One result of State neglect of the reapportionment problem is that urban governments have bypassed the States and made direct cooperative arrangements with the National Government in such fields as housing and urban development, airports, and defense community facilities. Although necessary in some cases, the multiplication of National-local relationships tends to weaken the State's proper control over its own policies and its authority over its own political subdivisions.
>
> Paradoxically enough, the interests of urban areas are often more effectively represented in the National legislature than in their own State legislatures.

The kind of representation that urban America gets in the national legislature is "fair" only by contrast with the crass under-representation of the cities in the state bodies. In the United States House of Representatives, an urban majority is converted into a legislative minority by the time-polished techniques of "cracking, packing, and stacking" districts. The "cracked" district is the huge metropolitan center, torn apart into separate pieces, each of which is attached to and outvoted by a surrounding rural hinterland. The "packed" district is the one with a concentrated urban population containing two or three or even four times as many inhabitants as a neighboring district. The "stacked" district is the child of the gerrymander,

[32] COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT 39-40 (1955).

a delicately carved creature, resembling nothing more than the partisan and rapacious soul of his political creator.[33]

Rochester and Buffalo, New York, and Los Angeles County, California, provide almost perfect examples of "cracked" districts. The city of Rochester has been bisected to attach each half to an outlying rural Republican area; Buffalo has been trimmed at the edges to make certain that this giant city shall not elect more than one Democrat to Congress. In California, the Republican-controlled 1951 legislature carved the Los Angeles districts so skillfully that, even though Democratic candidates received county-wide majorities in each election from 1954 through 1960, the Republicans never failed to win fewer than seven of the county's twelve congressional seats. In 1958, Democrats polled sixty-four per cent of the votes but were nevertheless able to win in only five of the districts! (California's Democratic-controlled 1961 legislature redrew the boundaries; therefore the coming decade may find the shoe on the other foot in Los Angeles.)

Atlanta, Memphis, and Indianapolis provide startling examples of "packed" districts. The first is in a congressional district which has a population of 824,000 in a state where the average district is 394,000; the second is in a district with a population of 627,000 in a state where the average is 396,000; the third is in a district with a population of 698,000 in a state where the average is 424,000.[34]

The finest example of the "stacked" districts may be found in the imaginatively defiant handiwork of the New York State legislature in carving congressional boundaries for use during the sixties. Graphically the outlines compose a geographic Rorschach. Politically, a congressional delegation that is now 22 to 21 in favor of the Democrats will probably become, without any change in the popular vote, a delegation of 25 to 16—perhaps even as much as 26 to 15—in favor of the Republicans. A similar, although aesthetically more acceptable job, was performed by the Democrats on the Republicans in California![35]

There are congressional districts, within the same state, that are four times and more larger in population than other districts. Democratic Congressman Lesinski (part of Detroit and vicinity) represents 803,000 souls while his Republican colleague Bennett from the Upper Peninsula of Michigan represents 177,000 people. The congressman from Dallas represents 952,000 people; another Texas congressman has only 210,000 constituents. The congressman from Northwest Colorado represents 654,000 people, while the congressman from Western Colorado speaks for 196,000. Table three shows the contrasts in congressional district populations under 1962 districting.[36]

[33] A fuller description of the various types of gerrymanders may be found in Tyler, *The House of Un-Representatives* (a series), The New Republic, June 21, 1954, p. 8; *id.* June 28, 1954, p. 14; *id.* July 5, 1954, p. 13.

[34] Cong. Q. Weekly Report No. 5, Feb. 2, 1962, pp. 160, 168, 161 respectively.

[35] Tyler & Wells, *Camel Bites Dachshund,* The New Republic, Nov. 27, 1961, pp. 9-10.

[36] Figures for states which have redistricted on the basis of the 1960 Census are taken from various issues of Congressional Quarterly Weekly Report, 1961 and early 1962. Figures for states which have not redistricted are taken from Congressional Quarterly Weekly Report No. 5, Feb. 2, 1962, pp. 158-69.

TABLE III

MOST POPULOUS AND LEAST POPULOUS CONGRESSIONAL DISTRICTS IN EACH STATE, 1962

State	Most Populous District	Per cent Over State Av.	Least Populous District	Per cent Under State Av.	Ratio of Most Populous to Least Populous
Michigan†	802,994	+ 95.0%	177,431	−56.9%	4.5 to 1
Texas†	951,527	+128.5%	216,371	−48.1%	4.4 to 1
Colorado	653,954	+ 49.1%	195,551	−55.4%	3.3 to 1
Maryland†	722,018	+ 86.3%	223,395	−42.4%	3.2 to 1
Ohio†	726,156	+ 79.5%	236,288	−41.6%	3.1 to 1
Georgia	823,680	+108.9%	272,154	−31.0%	3.0 to 1
Florida*	660,345	+ 60.1%	237,235	−42.5%	2.8 to 1
Tennessee	627,019	+ 58.2%	223,387	−43.6%	2.8 to 1
South Dakota	497,669	+ 46.3%	182,845	−46.3%	2.7 to 1
Indiana	697,567	+ 64.6%	290,596	−31.4%	2.4 to 1
Oklahoma	552,863	+ 42.5%	227,692	−41.3%	2.4 to 1
Connecticut	689,555	+ 63.2%	318,942	−24.5%	2.2 to 1
Wisconsin	530,316	+ 34.2%	236,870	−40.1%	2.2 to 1
California*	591,822	+ 43.1%	301,172	−27.2%	2.0 to 1
Louisiana	536,029	+ 38.3%	263,850	−35.2%	2.0 to 1
Oregon	522,813	+ 18.2%	265,164	−40.0%	2.0 to 1
South Carolina	531,555	+ 33.9%	272,220	−31.4%	2.0 to 1
North Carolina*	491,461	+ 18.7%	277,861	−32.9%	1.8 to 1
Pennsylvania*	553,154	+ 31.9%	303,026	−27.7%	1.8 to 1
Utah	572,654	+ 28.6%	317,973	−28.6%	1.8 to 1
New Jersey*	585,586	+ 44.9%	255,165	−36.9%	1.7 to 1
Kentucky*	610,947	+ 40.8%	350,839	−19.2%	1.7 to 1
Arkansas*	575,385	+ 28.8%	332,844	−25.5%	1.7 to 1
Virginia	539,618	+ 36.0%	312,890	−21.1%	1.7 to 1
Illinois*	557,221	+ 32.7%	277,169	−34.0%	1.6 to 1
Idaho	409,942	+ 22.9%	257,242	−22.9%	1.6 to 1
Montana	400,573	+ 18.7%	274,194	−18.7%	1.5 to 1
Washington	510,512	+ 25.2%	342,540	−16.0%	1.5 to 1
Kansas*	539,592	+ 23.9%	377,406	−13.4%	1.4 to 1
West Virginia*	422,046	+ 13.4%	303,098	−18.6%	1.4 to 1
Minnesota*	482,872	+ 13.2%	375,475	−12.0%	1.3 to 1
Missouri*	505,854	+ 17.1%	381,602	−11.7%	1.3 to 1
New York*	469,908	+ 14.8%	348,940	−14.8%	1.3 to 1
Iowa*	442,406	+ 12.3%	353,156	−10.4%	1.3 to 1
Nebraska	530,507	+ 12.8%	404,695	−14.0%	1.3 to 1
New Hampshire	331,818	+ 9.3%	275,103	− 9.3%	1.2 to 1
Maine*	505,465	+ 4.3%	463,800	− 4.3%	1.1 to 1
North Dakota*	333,290	+ 5.4%	299,156	− 5.4%	1.1 to 1
Rhode Island	459,706	+ 7.0%	399,782	− 7.0%	1.1 to 1

* States which have redistricted since 1960 census.
† States which have gained seats under new apportionment but have not yet redistricted.
Figures not yet available for Alabama, Arizona, Massachusetts or Mississippi.
Source: Figures for states which have redistricted on the basis of the 1960 Census are taken from various issues of Congressional Quarterly Weekly Report, 1961 and early 1962. Figures for states which have not redistricted are taken from Congressional Quarterly Weekly Report No. 5, Feb. 2, 1962, pp. 158-69.

One by-product, resulting from the juggling of congressional district population and lines, is the creation of one-party districts, a natural objective of a political party in control of a state legislature, whether Democrat or Republican. From these "safe" seats come legislators who need not be as sensitive to the social dynamics of their day as are other representatives in tightly contested districts. The safe-seat representative tends to be immunized against change, secure in the knowledge that he will be returned by the political inertia built into his district. These same representatives are also in the best position to accumulate seniority; hence, to rise in com-

mittee status and ultimately to chair decisive committees. In this way, the conservative weighting in the United States House of Representatives is even more heavily weighted in committee posts by the creation of one-party districts.

The relationship between seniority and "safeness" of districts may be seen by examining the districts represented by the committee chairmen and ranking minority members in the House of Representatives at the present time (1962). Of the twenty-one Democratic chairmen, seven have had no Republican opposition in any of the last five elections (1952-1960); four others come from districts where the Democratic vote has not fallen below seventy per cent in any of the five elections; five others are from districts where the Democratic vote has not fallen below sixty per cent; three more represent districts in which the Democratic vote has not been less than 52½ per cent; only two are from districts where the Democratic vote has been less than 52½ per cent. Of the nineteen ranking Republicans (who would become chairmen if the GOP became the majority), five are from districts where the Republican vote since 1952 has never been lower than sixty per cent; nine others are from districts where the GOP vote has not gone below 52½ per cent; only five represent districts where the Republican vote has fallen under the 52½ per cent mark.[37]

Of the twenty-one Democratic chairmen, fifteen are from predominantly rural districts; six are from predominantly urban or suburban districts. Of the nineteen ranking Republicans, fifteen are from predominantly rural districts; four are from predominantly urban or suburban districts. The combined total shows that thirty of these forty congressmen represent predominantly rural constituencies.

Since the federal legislature is hardly a model of equity in representation, the turn to Washington has been the turn to a lesser evil. At the federal level, as at the state level, the voter has tended to look more and more to the Executive—to the President of the United States—for leadership. Exactly the same kind of reasons that impelled the citizenry to turn to the governor impels them to turn to the President: greater stature, greater visibility, greater personal power vis-à-vis any single congressman, and the fact that he is more likely to represent the actual voting majority in the nation.

This, likewise, is historically paradoxical and almost a reversal of what was intended. It was the House of Representatives that was to be the more direct and *representative* voice of the people. The Senate was originally elected indirectly—often chosen by state legislatures. The President was elected indirectly, picked by an electoral college. The form of the electoral college is still preserved, but as things have worked out in virtually every national election the candidate with the popular plurality became the President. There have been no exceptions since 1888. The President of the United States, originally intended to be chosen by remote control, appears to the man of the street to be his most direct voice in Washington.

Equally ironic is the fact that the Senate, originally the instrument of the less

[37] Cong. Q. Special Report (Part 2 of Weekly Report No. 10), March 10, 1961, pp. 47-51.

populous and therefore more agrarian states to check the more populous and therefore more industrialized states, is today more responsive to the needs of the twentieth-century American than is the House of Representatives.

The reasons are double: most of the states have urban majorities; and even in rural states, the senators—since they are elected at large, with one vote counting for one vote no matter where the vote comes from—must give ear to the voting battalions of the city.

"The same shift of population which has resulted in state legislatures becoming less representative of urban areas," writes the Commission on Intergovernmental Relations, "has had the effect of making the United States Senate more representative of these areas."[38]

The indirect results of unequal representation upon the shape of American government smacks of irony and poetic justice. The state legislatures are constantly losing power to the governors, then to the federal government, then to the Senate, and then to the President of the United States. While the state legislatures cry ever louder for great power, their power wanes—because their unrepresentative character makes a mockery of their claims to represent the folks back home. Those who cry loudest for "states' rights" do the most to destroy them.

The turn of America's urban populations first to the Presidency and then to the Senate to find a more representative and hence a more responsive ear has, in the last sixty years, turned the original intent of the Constitution writers topsy-turvy. This development has also affected the composition and the decisions of the Supreme Court.

As originally conceived, the Supreme Court was hardly designed to be the direct creation and servant of the "people." The members of the Court were to be named by a President (three steps removed from the electorate) and ratified by a Senate (twice removed from the voters). The Court, then, was at least four times removed from the direct popular will.

But the sociodynamic pressures, generated by industrialization and urbanization, that changed the role of President and Senate have also changed the Supreme Court from a distant and passive arbiter into a representative and active instrument of social change. The Court is the child of President and Senate—the two great organs of public policy to which our predominantly metropolitan nation has come to look for action. Hence, the personnel and policies of the Court have come more to reflect the attitude of President and Senate than of the state legislatures and their creature, the House of Representatives.

The urban trek to the courts, state and federal, to seek fair representation is no recent trend. Before the turn of the century, the basic precedents were laid down for the *right* of the courts to intervene and for the *extent* to which the courts would intervene. Summarizing this body of precedent, David O. Walter wrote:[39]

[38] COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT 40 (1955).

[39] Walter, *Reapportionment and Urban Representation*, Annals, Jan. 1938, pp. 11-12.

In no state has the court denied that it has the power to review on the ground of failure to observe the constitutional limitations, such legislative action or the districtings by county boards. In twenty-two states the courts have exercised the power, or specifically stated that they have the power, to review such acts on the question of equality. There have been twenty-five cases in which the courts have so acted; in eight of those the acts were upheld; in seventeen they were invalidated. Since the general principles were laid down in cases decided between 1890 and 1900 there have been no changes in doctrine, but a few cases every decade call for the application of these principles.

Since then citizens have appealed repeatedly to their state courts to set aside districtings and apportionments of state legislatures, or to compel legislative bodies to act affirmatively. Although state courts have not been reluctant to act—apparently willing to assume jurisdiction and justiciability—they have not always been able to devise remedies consistent with their conclusions. "The performance of the state courts has been especially weak in fashioning remedies for the wrongful refusal of legislatures to reapportion," concluded Anthony Lewis in 1958.[40]

To the difficulties of the courts in finding feasible remedies was added the judicial inhibition contained in the opinion of the Supreme Court in *Colegrove v. Green* in 1946.[41] When the Supreme Court decided not to invalidate an Illinois congressional districting, Justice Frankfurter, in his opinion, went beyond the immediate limits of the case to lay down some broad guidelines for the courts in dealing with the total problem of proper representation. His basic admonition to the Court was to avoid this "political thicket."[42] And in so doing, he made a "political" decision that, in effect, turned over to state legislatures the *unchecked* power not only to frustrate the will of an ever-rising urban-suburban majority but also to *restructure* government further to fortify the will of an ever-diminishing rural minority. In Frankfurter's nonpolitical decision to practice judicial self-restraint in *Colegrove v. Green,* he unleashed political pressures that ultimately compelled the Court to get into the "thicket" in *Baker v. Carr.*

Had *Colegrove v. Green* been followed by state actions—whether by legislatures, conventions or referenda—to adjust representational inequities, the pressures for court action would have been eased. But quite the opposite has happened. With each succeeding decade the urban voter has become increasingly disadvantaged. The following table shows vote value by counties, assuming that "value would be 100 if seats in state legislatures were evenly distributed in proportion to county populations."[43]

	VOTE VALUE			
Counties by Population	*1910*	*1930*	*1950*	*1960*
500,000 and over	81	74	78	76
100,000 to 499,999	91	84	83	81
25,000 to 99,999	103	109	114	123
Under 25,000	113	131	141	171

[40] Lewis, *Legislative Apportionment and the Federal Courts,* 71 HARV. L. REV. 1057, 1069 (1958).
[41] 328 U.S. 549 (1946).
[42] PAUL T. DAVID & RALPH EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 3 (1961).
[43] *Id.* at 556.

During this same period, the problems typical of urbanization have grown more severe as the ratio of city dwellers increased. In 1940, there were 57,245,000 inhabitants in rural and 74,424,000 in urban areas. By 1960, rural dwellers had fallen to 54,054,000 while urban had risen to 125,269,000.[44] The well-noted rise of the suburbs has not lessened—but intensified—the sociopolitical difficulties. Our largest suburbs are primarily part of expanding urban clusters, faced with all the problems of schools, housing, traffic, transit, hospitals, clinics, water supply, smoke control, industrial relations that characterize the metropolitan complex. Solutions are made more difficult by the continuance of outmoded city and county lines, with a variety of criss-crossing townships, unincorporated areas, authorities, and districts. The rise of the metropolitan areas as a socioeconomic fact, without the corresponding establishment of metropolitan political configurations, has posed for state legislatures one of their most demanding challenges, requiring active, creative government. The continuance of conservative rural control in state legislatures becomes increasingly as frustrating to the modern suburb as it has been for decades to the older core of the metropolis.

Where citizens have tried through the use of constitutional channels to change the existing apportionment, the state legislatures have not hesitated to controvert the will of the people. In a number of states, the legislature simply refused to enforce its own constitution, as in the Tennessee circumstances leading up to *Baker v. Carr*. In Maryland, the voters approved the calling of a state constitutional convention by an overwhelming vote, but the general assembly refused to convene the convention for fear it would revise the apportionment provisions. In Florida, where the constitution calls upon the legislature to sit in special session, if necessary, to reapportion, the legislature moved to abolish this proviso when it was unable to break a deadlock with the governor. In Washington, the voters voted reapportionment through initiative, but when the legislature gathered, it "amended" the initiative statute beyond recognition. The state supreme court denied a writ of mandamus to compel the legislature to abide by the initiative statute.[45]

During the last two decades, several proposals have been offered in the Congress of the United States to weaken the status of both the President and the Supreme Court. A proposed constitutional amendment would have the President chosen by electors on the basis of one elector per congressional district. By this scheme, the state legislatures, with power to gerrymander congressional districts, could also gerrymander the Presidency. Several proposals have been made to limit the power of the Supreme Court—by statute or by constitutional amendment; the latest proposal followed immediately on the heels of *Baker v. Carr* and was specifically aimed at curbing the power of the Court in reapportionment. Should these proposals ever

[44] Figures for 1940 are from U.S. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 14 (1960); figures for 1960, THE WORLD ALMANAC 255 (1962). Although the definition of rural-urban has changed between 1940 and 1960, the basic shift to the metropolitan centers continues as a fundamental trend.

[45] Lewis, *supra* note 40, at 1092.

become law, then a minority in control of state legislatures could not only weight the House of Representatives in its favor, but could do the same with the Presidency, while curbing and coloring the character of the United States Supreme Court.

The state legislatures should have been on their guard after *Colegrove*. Justice Frankfurter did not condone maldistricting and malapportionment. He termed them "grave evils" that "offend public morality." He advised judicial restraint because "the Constitution of the United States gives ample power to provide against these evils. . . . This remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[46] Instead of reading this statement as a warning, state legislatures interpreted it as a license to distort and deny the will of the people as expressed through constitutional channels.

It became increasingly evident between 1946 and 1962 that in our system of checks and balances there is no built-in check on the power of the state legislature to compose itself, and through this power, to influence, perhaps even control, the character of Congress, President, and Court. In *Baker v. Carr*, the Supreme Court moved to restore the balance!

[46] Colegrove v. Green, 328 U.S. 549, 554, 556 (1946).