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INTRODUCTION

During the past generation the problem of state legislative apportionment or "malapportionment" has become increasingly important due to population shifts. As America develops into a predominantly urban nation[1] the apportionment schemes set up ten to sixty years ago in the various states become more burdensome. Today, majorities in the senates of thirty-three states represent fewer than forty per cent of the states' populations and the situation is virtually the same in the lower houses.[2] The Colorado Constitution requires, as do most state constitutions, that the legislature reapportion its seats after every federal census.[3] However, this type of constitutional mandate is frequently ignored by state legislatures. Thus, the problem arises that many legislators in our state governments are elected on an apportionment scheme based on the population-area ratio of their state as it existed around the turn of the century.

The purpose of this paper is to examine decisions of the courts regarding reapportionment and to note their underlying philosophy. Looking briefly at the matter from an historical viewpoint, the problem in the early 1900's was of a different nature from that which confronts us today. State legislatures were then equitably apportioned since their population centers had not changed radically from the time of the most recent apportionment legislation. However, in the past fifty years our country has experienced a great population shift. This shift has occurred not only from one area of the country to another, but from one part of a state to another. Apportionment laws of the various states have not been amended so as to reflect these changes.

Earlier cases which challenged the validity of an apportionment act were of two types. First, suits were brought against a recently enacted apportionment law. Such suits have always succeeded when the new act was found discriminatory.[4] Secondly, actions were frequently brought against individual election officials, seeking to restrain them from holding the next election under the new apportionment act. These officials were usually enjoined and directed to hold the election under an older act which had presumably not been repealed.[5]

The problem today is of a different nature. Many of our state legislatures have failed to reapportion since the 1910 or 1920 federal censuses. Thus, the voter is confronted with a type of silent gerry-

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1 106 Cong. Rec. 13827 (daily ed. June 29, 1960).

2 *Id.* at 13828. Indeed, seventy percent of our population now resides in cities or urban areas.

3 Colo. Const. art. 5, §45.

4 Stiglitz v. Schardien, 239 Ky. 799, 40 S.W. 2d 315 (1931); Ragland v. Anderson, 125, Ky. 141, 100 S.W. 865 (1907); Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892).

5 Attorney General v. Suffolk County Apportionment Comm'n, 224 Mass. 598, 113 N.E. 581 (1916); Board of Supervisors v. Blacker, 92 Mich. 638, 52 N.W. 951 (1892); State *ex rel.* Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892). See also, People *ex rel.* Baird v. Board of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893), wherein the court issued a writ of mandamus ordering the Kings County Board of Supervisors to divide the county into legislative districts of equal population.

mandering resulting from legislative inaction. This problem often occurs because the present-day plaintiff does not seek to invalidate a recently enacted apportionment law, but seeks to compel the passage of a new act or have an old one invalidated. Historically the plaintiff sought relief through the medium of a writ of mandamus. A typical early example was the case of *Fergus v. Marks*,[6] wherein the plaintiff sought to compel the legislature to pass appropriate legislation in accordance with a constitutional mandate directing that "the general assembly shall reapportion" after every federal census.[7] The court refused to grant such relief, basing its reasons on the separation of powers doctrine and stating that the duty to reapportion was upon the legislature and the remedy for its failure to perform lay with the people, not the courts. This gave rise to a series of other cases in Illinois where by varying methods, the same ends were sought.[8] All met the same fate as the original *Fergus* decision. These cases emphasized the court's philosophy of refusing to allow a plaintiff to do by indirect means that which was disallowed by direct methods. A novel question raised by one of these Illinois cases[9] was whether legislators elected under an invalid apportionment act were qualified to continue in office. The same question has arisen in other states and it is generally conceded that the legislature is the sole judge of the election returns and the qualifications of its members.[10] Courts usually hold that such legislators are *dejure* members and not merely *de facto*.

It should be noted that the courts are dealing with apportionment acts which were valid when passed, but which became discriminatory due to population shifts. Courts are not hesitant to test the validity of a new apportionment act, but they are reluctant when an old act is challenged as having become invalid as a result of a population shift. This is true even though the constitutional mandate to reapportion is violated.[11]

Some of the reasons advanced by the federal courts for denying relief have been: (1) such cases involve questions of a "peculiarly political nature" which should be left to the legislature;[12] (2) a decision which compelled a legislature to reapportion would violate the separation of powers doctrine;[13] and (3) federal court interference violates state sovereignty.[14]

6 321 Ill. 510, 152 N.E. 557 (1926).

7 Ill. Const. art. 4, §6 (a provision common to many state constitutions).

8 Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1928) (action to enjoin the state treasurer from paying the salaries of legislators on grounds that failure to reapportion prevented the legislature from being a legally constituted body); People *ex rel.* Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930) (quo warranto seeking to oust legislators on ground that they had been elected under an unconstitutional act); People v. Clardy, 334 Ill. 160, 165 N.E. 638 (1929) (a convicted criminal sought to have statute under which he was convicted declared void on grounds that it was passed by a legislature elected under an invalid apportionment act); Daly v. Madison, 378 Ill. 357 38 N.E.2d 160 (1941) (injunction sought against the expenditure of public funds to carry on election under invalid apportionment act).

9 Fergus v. Kinney, *supra* note 8.

10 People v. Clardy, *supra* note 8; Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37 (1896); *In re* Sherrill, 188 N.Y. 185, 81 N.E. 124 (1907); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1944); State ex rel Sullivan v. Schnitger, 16 Wyo. 479, 95 Pac. 698 (1908).

11 Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), *prob. juris. noted*, 81 Sup. Ct. 230 (1960); Colegrove v. Green, 328 U.S. 549 (1946); Butcher v. Rice, 397 Pa. 150, 153 A.2d 869 (1959).

12 Colegrove v. Green, *supra* note 11.

13 Radford v. Gary, 352 U.S. 991 (1957), *affirming* 145 F. Supp. 541 (W.D. Okla. 1956); Remmey v. Smith, 102 F. Supp. 708 (E.D.Pa. 1951), *aff'd per curiam*, 342 U.S. 916 (1952); Colegrove v. Green, *supra* note 11; Perry v. Folsom, 144 F. Supp. 874 (N.D.Ala. 1956); *accord*, Smith v. Holm, 220 Minn. 486, 19 N.W.2d 914 (1945).

14 South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Green, *supra* note 11; *but cf.*, Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959), *rev'd*, 81 Sup. Ct. 125 (1960), wherein the Court of Appeals felt bound by the *Colegrove* philosophy, but the Supreme Court reversed. See generally, Greenfield, Ford and Emery, *Legislative Apportionment: California in National Perspective* 24 (Bureau of Public Administration, University of California 1959).

In addition to these objections, state courts have introduced a variety of ideas: (1) invalidating one apportionment act and then falling back upon an earlier act;[15] (2) requiring an election-at-large until the legislature draws up valid districts;[16] (3) invoking the doctrine of laches, in that the act should have been attacked when passed and it is now too late;[17] and (4) refusing to recognize that the passage of time could invalidate a previously valid act.[18]

I. COURT DECISIONS

A. The United States Supreme Court

The Supreme Court's reaction to the apportionment problem has been somewhat typical of all courts. An early decision, *Smiley v. Holm*,[19] involved a suit by a Minnesota citizen challenging an act of the Minnesota Legislature[20] which apportioned the state into nine congressional districts. The house directed that the bill be lodged with the Secretary of State, notwithstanding the governor's veto. The Minnesota district court dismissed the case, the state supreme court affirmed. The U.S. Supreme Court reversed, holding the act void. The Supreme Court took jurisdiction in spite of the political nature of the case with the view that to allow the election to proceed under the act without the governor's signature would not only enforce an invalid law, but would deny the plaintiff his federal constitutional rights.[21] The Court held the act invalid and ordered election-at-large of the state's congressmen. The companion cases of *Koenig v. Flynn* [22] and *Carroll v. Becker*[23] involved identical questions (although arising in different states) which were decided at the same time and under the same authority as the *Smiley* case.

15 See, e.g., Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907); Giddings v. Blacker, *supra* note 4. See also Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1068 (1958).

16 Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932). This is not an entirely inappropriate relief since it at least allows every voter to have an equally powerful vote. The Supreme Court has also approved this type of relief. See, e.g., Smiley v. Holm, 285 U.S. 355 (1932). But see Lamson v. Secretary of the Commonwealth, 168 N.E.2d 480 (Mass. 1960), wherein the Massachusetts court disapproved of the election-at-large as a method of forcing the legislature to act.

17 Adams v. Bosworth, 126 Ky. 61, 102 S.W. 861 (1907).

18 Daly v. County of Madison, *supra* note 8; Smith v. Holm, *supra* note 13.

19 285 U.S. 355 (1932).

20 Minn. Laws 1931, p. 640.

21 U.S. Const. art. 1, § 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state, by the Legislature thereof, ..." It was held that since the state constitution provided for the governor's signature or an overriding vote an act of the legislature was not complete without one or the other.

22 285 U.S. 375 (1932).

23 285 U.S. 380 (1932).

Colegrove v. Green,[24] the leading reapportionment case, involved an inequitable congressional districting law passed in 1901, wherein the plaintiffs, voters of Cook County, sought to restrain officers of the state from conducting an election pursuant to the act. The federal district court[25] stated that the denial of a citizen's right to choose a representative on terms of equality is prohibited by the federal constitution, but held that it was bound by the decision of *Wood v. Broom*,[26] which determined that a 1911 Mississippi apportionment act was valid. A majority affirmed the case on other grounds, although the Court was badly split. Mr. Justice Frankfurter, with Justices Reed and Burton concurring, felt that the Court should withhold jurisdiction since the Constitution conferred upon Congress the exclusive authority to secure fair representation by the states in the House.[27] Perhaps the real reason for Justice Frankfurter's holding is that portrayed by his statement that "the Court ought not to enter this political thicket."[28] Justice Rutledge concurred specially on the ground that jurisdiction to grant relief arose under *Smiley v. Holm*,[29] but that the case was of such a delicate political nature that the Court should avoid it. Mr. Justice Black, with whom Justices Douglas and Murphy joined dissenting, reasoned that the complaint stated a justiciable case and controversy and that the Court had jurisdiction to act under the rule that the federal courts will not hesitate to grant relief, where there has been a federally protected right invaded. The dissenters stated that: "The equal protection clause of the Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens to deny them the right to vote at all."[30] In conclusion, Mr. Justice Black distinguished *Wood* on the ground that it merely decided that the Mississippi Reapportionment Act did not violate the Congressional Reapportionment Act of 1929. Therefore, the case did not preclude the granting of equitable relief here since the question in *Colegrove* had never been decided (whether the Court should take jurisdiction and grant relief in such a political issue). A majority in the *Colegrove* case felt that the Court had jurisdiction, but Mr. Justice Rutledge, siding with the majority, decided that the Court should not act due to the political nature of the problem. It is important that this factor be kept in mind since all the later apportionment cases cite *Colegrove* as authority.

The next case, involving an analogous political problem, was *MacDougall v. Green*.[31] There the plaintiff, the Progressive Party, attacked the validity of an Illinois statute requiring a certain number of signatures from each county to form a new political party.

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24 *Supra* note 11.

25 64 F. Supp. 632 (N.D.Ill. 1946).

26 287 U.S. 1 (1932). The case held that the Reapportionment Act of August 8, 1911, as amended by the Reapportionment Act of June 18, 1929, did not require that congressional election districts be ". . . contiguous and compact territory and as nearly as possible equal population . . . ." Therefore, the Mississippi reapportionment act in question was valid. This being the case, the Court said that it would not consider relief in equity nor the justiciability of the questions in controversy. Four justices felt that it was not necessary to decide the validity of the 1911 Reapportionment Act since the case could be dismissed for mere want of equity. Thus, the political aspects of the case were never considered.

27 U.S. Const. art. 1, §2.

28 328 U.S. 549, 556 (1945).

29 285 U.S. 355 (1932).

30 328 U.S. 549, 569 (1945). As authority for this statement Justice Black cited Nixon v. Herndon, 273 U.S. 536, 541 (1927) and Nixon v. Condon, 286 U.S. 73 (1932).

31 355 U.S. 281 (1948).

The plaintiffs charged that the statute discriminated against the most populous counties and challenged its validity under the fourteenth amendment as well as sections 1 and 2 of the seventeenth amendment.[32] The Court decided that since suit was brought on the eve of the Illinois election, relief should not be granted so as to disrupt the State's political system. Justices Black, Douglas and Murphy dissented on much the same grounds as they did in *Colegrove*, stating that here some citizens would have much more voting power than other citizens; therefore, the act was violative of the fourteenth amendment.

In *South v. Peters*,[33] plaintiffs challenged the Georgia county unit system for determining the outcome of primary elections as unconstitutional under the fourteenth and seventeenth amendments. The Court refused to exercise its equity powers on the ground that the problem was of a political nature and that states retained the power to distribute their electoral strength as they chose. Although the case can be distinguished on the basis that a state has always been able to choose the manner in which it distributes its electoral strength, the Court admittedly followed its prior conservative pattern.

Kidd v. McCanless,[34] involved an outmoded 1901 apportionment act. The plaintiff sought to have the act declared invalid on the ground that it had become unconstitutional under the fourteenth amendment and in the alternative requested the issuance of a writ of mandamus to compel an election-at-large. The state supreme court held that the *de facto* doctrine did not apply to members of the general assembly in office. Consequently there could be no existing legislature if the present act were struck down since there was no prior act upon which to rely. The alternative relief was also refused because the state constitution did not provide for an election-at-large. The United States Supreme Court dismissed the appeal, evidencing the *Colegrove* attitude not to enter such "political thickets."

There is some evidence, however, that the Supreme Court may be preparing to do an about face. The Court recently held that an Alabama statute reducing the boundaries of the city of Tuskegee was in violation of the fifteenth amendment.[35] The statute in question redefined the city's boundaries so as to exclude all Negroes in the district from voting. The lower court held that although the statute might be violative of the fourteenth or fifteenth amendments, the motives of the legislature could not be questioned since they had the exclusive power to redefine municipalities' boundaries.[36] Due to the political nature of the matter the court refused to grant relief. The Supreme Court reversed, basing its holdings on the fifteenth amendment's guarantee of the right to vote, regardless of color. Mr. Justice Douglas concurred on the grounds of his dissent in *Colegrove*. Mr. Justice Whittaker concurred on the

32 U.S. Const. amend. XIV, §1, which provides that ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. Const. amend. XVII is concerned with the qualifications of Senators from each state and the executive authority to fill vacancies.

33 339 U.S. 276 (1950).

34 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956).

35 Gomillion v. Lightfoot, 364 U.S. 339 (1960).

36 270 F.2d 594 (5th Cir. 1959).

ground that the equal protection clause of the fourteenth amendment controlled, and that the fifteenth was applicable only when one or a part of a group's voting rights had been abridged. Here, petitioner enjoyed the same voting rights as all other voters in the new district, but the voting rights of all of the voters had been abridged.

In a Tennessee case,[37] indistinguishable from *Colegrove* on the facts, a three-judge federal district court found that due to population shifts the Tennessee apportionment act, in force since 1901, violated both state and federal constitutions.[38] However, the reasoning of *Colegrove* was followed. The court reiterated that the remedy did not lie in the courts. Perhaps the fact that the Supreme Court noted probable jurisdiction of *Baker* indicates that *Colegrove* will be reconsidered.

B. The Lower Federal Courts

The history of apportionment cases in the lower federal courts has been analogous to the Supreme Court decisions, although there is now evidence that the *Colegrove* doctrine is weakening in some jurisdictions. Three cases arose during the early and middle fifties[39] in which the plaintiffs sought to have old existing apportionment acts declared invalid and an injunction or mandamus issued to compel the legislatures to pass new apportionment acts in accordance with ignored constitutional mandates. In each of these cases relief was specifically denied on "political nature" grounds. During this same period another case was decided by the federal district court in Hawaii, departing from the traditional view.[40] The action was brought under the Federal Civil Rights Act[41] upon the claim that a failure to reapportion, as required by Organic Act of Hawaii,[42] for a period of fifty-five years amounted to a denial of the petitioner's rights as guaranteed by the fifth and fourteenth amendments. The court found a deprivation of equal protection and declared the apportionment act invalid. This case has often been distinguished by the fact that it involved only a federal-territorial relationship. However, strong dictum indicated that the court would have decided the same way regardless of the relationship involved.[43]

In 1958, a case decided by the Federal District Court of Minnesota seemed to indicate a break with the strict *Colegrove doctrine*.[44] A three-judge court took jurisdiction of the controversy, cited the school segregation cases, and noted that the old Minnesota Appor-

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

38 Tenn. Const. art. 2, §§ 4-6 (1870).

39 Radford v. Gary, *supra* note 13; Remmey v. Smith, *supra* note 13; Perry v. Folsom, *supra* note 13.

40 Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D.Hawaii 1956).

41 Rev. Stat. §1979 (1875), 42 U.S.C. § 1983 (1959).

42 31 Stat. 141 (1900), as amended, 48 U.S.C. §§ 491-723 (1959), as amended, 48 U.S.C. §§ 536-723 (Supp.1, 1959).

43 "We believe there should be a broader ground for sustaining the action of this Court than the special nature of territorial-federal relations. The Supreme Court has stricken any attempts to discriminate in elections because of race, creed or color . . . . The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment . . . ." 138 F. Supp. 220, 226. As authority for this last statement the court cited Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), a leading case concerning federal intervention in the area of segregation and discrimination.

44 MaGraw v. Donovan, 159 F. Supp. 901 (D.Minn. 1958), *per curiam*, 163 F. Supp. 184 (D.Minn. 1958). The Court determined it had jurisdiction, but refrained from acting in the second case to afford the legislature a full opportunity to "heed the constitutional mandate to redistrict."

tionment Act of 1913 violated the fourteenth amendment. Jurisdiction was retained and decision deferred until the legislature could have further opportunity to act. Apparently the case caused some consternation in the legislature for a new apportionment act was quickly passed and the pending suit dismissed upon motion by the petitioner.[45]

It is significant that these later federal cases involved actions seeking to have the existing apportionment acts declared invalid while the prior three cases sought to compel the legislatures to pass new apportionment acts. It therefore becomes clear why the courts absolutely refused relief in the earlier cases and granted it in the latter two, where plaintiff's requested relief was within the court's power to grant.

C. The State Courts

State apportionment cases have followed the federal pattern. New apportionment acts which are discriminatory in nature have almost always been struck down.[46] Old acts are presumed valid, and the courts will generally refuse to invalidate them.[47] The cases here discussed should be distinguished from those involving actions against special apportionment agencies or boards. A court will usually feel free to compel such agencies or boards to act since there is no constitutional problem of separation of powers involved.[48] These cases, in practically every instance, involve a new act and hence are not precedent for overturning an old apportionment act.

In *Donovan v. Holzman*,[49] the Illinois Court upheld the validity of a recent reapportionment act, but stated:

> At the outset, we think it clear that this court has the power to strike down an apportionment act which is violative of the clear requirements of the constitution. . . . The mere fact that political rights and questions are involved does not create immunity from judicial review.[50]

This language appears to fly in the face of *Colegrove*, although it can be reconciled on the basis that a new apportionment act was involved. In *Asbury Park Press, Inc. v. Woolley*,[51] the New Jersey Court took jurisdiction of an action in which the petitioner sought to have the old apportionment act declared unconstitutional

45 MaGraw v. Donovan, 177 F. Supp. 803 (D.Minn. 1959).

46 Cases cited note 4 *supra*.

47 Butcher v. Rice, *supra* note 11; Smith v. Holm, *supra* note 13; Daly v. County of Madison, *supra* note 8.

48 Preisler v. Doherty, 365 Mo. 460, 284 S.W.2d 427 (1955) (invalidation of a redistricting order made by a reapportionment agency); Pickens v. Board of Apportionment, 220 Ark. 145, 246 S.W.2d 556 (1952) (the court not only invalidated the board's action, but prescribed an entirely new reapportionment of the state's election districts as it was constitutionally authorized to do); Smith v. Board of Apportionment, 219 Ark. 611, 243 S.W.2d 755 (1951) (court ordered board to give one county an additional senator and drop one seat elsewhere); State *ex rel.* Herbert v. Bricker, 139 Ohio St. 499, 41 N.E. 2d 377 (1942) (board compelled by mandamus to reapportion); Shaw v. Adkins, 202 Ark. 856, 153 S.W.2d 415 (1941) (court shifted seats in reapportionment). See People *ex rel.* Baird v. Board of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893), one of the earliest cases in which a court ordered a board to reapportion the legislative districts of the state.

49 8 Ill. 2d 87, 132 N.E.2d 501 (1956).

50 *Id.* at 93, 132 N.E.2d at 506. *Accord*, Board of Supervisors v. Pratt, 47 Ariz. 536, 57 P.2d 1220 (1936).

51 33 N.J. 1, 161 A.2d 705 (1960).

under the state and federal constitutions and to restrain the holding of any primary or general election until a new statute was passed. The court retained jurisdiction but gave the legislature one more chance to act. However, its language was meaningful:

> The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people. . . . But when legislative action exceeds the boundaries of the authority delegated by the Constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the court. . . . However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.[52]

The court also suggested that *Colegrove* was no roadblock to their decision since that case did not involve the mandatory requirements of a state constitution. It would seem, however, that such a distinction merely begs the question whether courts should enter this "political arena" at all, regardless of which constitution is involved.

II. POSSIBLE MEASURES OF JUDICIAL RELIEF

The heart of the problem centers around the possibilities of relief that our judicial system can logically and reasonably give. Whether redress will be granted in any particular case, depends upon the type of relief being sought.[53] However, providing that the objections which were outlined in the first part of this paper are overcome, the courts could grant the following types of relief: (1) Mandamus the legislature. This will undoubtedly never be done, since to do so would quite clearly infringe upon the delegated powers of the legislature and violate the departmental scheme of government.[54] (2) Judicially declare that an outdated act is unconstitutional and rely upon the legislature to reapportion. The danger here is that the legislature might fail to act or might pass an equally disproportionate act. In other words, such relief provides no complete remedy.[55] (3) A court could declare an act invalid and decree that until a new reapportionment act is passed, all elections be held on an "at-large" basis.[56] This method can certainly not be said to discriminate against certain groups; however, two apparent criticisms of this relief are that by an indirect mandatory

52 *Id.* at 7, 161 A.2d at 710.

53 This fact is often overlooked by critics of the decisions which have denied relief. One plaintiff categorized all of the apportionment cases in his brief in an attempt to show why most of them were not precedent for the court to rely on, should they choose to deny him the particular relief he sought, viz, have the present apportionment act declared unconstitutional and enjoin the secretary of state from conducting an election pursuant to it. Brief for Plaintiff, pp. 36, 37, MaGraw v. Donovan, 163 F. Supp. 184 (D. Minn. 1958). Of course, the first question which a court must decide is whether or not it wishes to enter such a "political arena."

54 State *ex rel.* Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40 (1912); People *ex rel.* Woodyatt v. Thompson, 155 Ill. 451, 40 N.E. 307 (1895). See Comment, 17 La. L. Rev. 593, 616 (1957).

55 See, *e.g.*, Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (1956), *appeal dismissed*, 352 U.S. 920 (1956).

56 Hume v. Mahan, 1 F. Supp. 142 (E.D.Ky. 1932), *dismissed as moot*, 287 U.S. 575 (1932) (dismissed because the case did not reach the Court until after the election-at-large had been held); Smiley v. Holm, 285 U.S. 355 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932). This method of relief (election-at-large) has been discredited by a recent Massachusetts decision wherein the court stated that to order such " . . . could not be a means of securing action at the session specified in the constitution." Lamson v. Secretary of the Commonwealth, 168 N.E.2d 480 (Mass. 1960). In other words, such extraordinary relief does not guarantee that the legislature will act — at least that was the Court's view.

injunction it forces the legislature to reapportion (assuming that they would be dissatisfied with the status quo) and it might be construed as a violation of the separation of powers doctrine.[57] Nonetheless, this seems to be an effective remedy and one which has already been approved by the Supreme Court.[58] (4) A court might enjoin the holding of an election under the old apportionment statute and require the secretary of state to notify each election district of the correct number of candidates which it could elect. This remedy would be appropriate only in states where such a task was delegated to the Secretary of State. It was used by a recent New Jersey court.[59] (5) A court could compel non-legislative redistricting agencies in states where such agencies existed.[60]

III. OTHER SOLUTIONS

Several state have attempted to reapportion by popular initiative action of the people, as is allowed in their constitutions. This method, however, is far from being the panacea which it might appear to be at first glance. In some instances the initiative is of no value whatsoever. For example, in Missouri and Washington successful initiative measures were nullified by subsequent amendments of the legislature.[61] In Massachusetts the initiative was declared inapplicable to apportionment problems.[62] The Maryland Constitution provides that there shall be submitted to the voters every twenty years a proposal for a constitutional convention to be called by the General Assembly if the voters approve.[63] In 1950 the voters overwhelmingly endorsed a convention, but the malapportioned assembly refused to call one for fear it might pass new apportionment provisions.[64] The Colorado Constitution gives its citizens the power of initiative action,[65] and in 1932 this power was

57 See Comment, 17 La. L. Rev. 593, 616 (1957).
58 Smiley v. Holm, *supra* note 56.
59 Asbury Park Press, Inc. v. Woolley, *supra* note 51.
60 Cases cited note 48 *supra*. See Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L. Rev. 277, 293 (1956).
61 See State *ex rel.* Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910); State *ex rel.* O'Connell v. Meyers, 51 Wash. 2d 454, 319 P.2d 828 (1957) (Mandamus seeking to require use of the initiative measure was denied). *Legislators Mangle Districting Plan*, 46 Nat'l Munic. Rev. 245 (1957).
62 *In re* Opinion of the Justices, 254 Mass. 617, 151 N.E. 680 (1926).
63 Md. Const. art. 14, § 2.
64 Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L. Rev. 292 (1956).
65 Colo. Const. art. 5, § 1.

used to pass a new reapportionment act and repeal the old. Although attempts by the legislature to repeal the initiated act failed,[66] it should be borne in mind what a tremendous task such initiative action requires. Strong political and moneyed interests are always against such changes and these factors make a difficult job almost impossible.[67]

Other states have adopted or proposed constitutional provisions which would take apportionment responsibilities away from the political branch. The methods used in taking this responsibility from the legislature vary. Some states have adopted or proposed that special boards be given the power to reapportion.[68] Other states give or plan to give the duty to the secretary of state.[69] In our two newest states the duty of reapportionment lies with the governor.[70] The advantage of giving a "non-political" group the power to reapportion lies in the fact that a commission or board, whose sole responsibility and purpose for being is to periodically reapportion, can be compelled to perform by a writ of mandamus.[71] The same can be said as to a secretary of state or a governor. On the other hand, it is a fundamental concept that a court cannot compel the legislature to pass legislation (although some have tried[72]), even though there is a constitutional mandate commanding the legislature to act.[73] The states which have reapportionment provisions are fortunate. While the problem grows more acute in the remaining states, the possibility of legislative relief grows more remote. Without federal intervention or relief from the courts it would seem that the voters are remediless. It is too much to ask of most legislators that they vote for a reapportionment scheme which might cost them their job.

IV. A Specific Plan

The methods for reapportionment proposed by Alaska and Hawaii were recently considered by the United States Senate. Senator Joe Clark of Pennsylvania proposed that a Constitutional amendment be adopted providing that each state must reapportion its legislature after every decennial census.[74] He also proposed a senate bill outlining methods for implementing this amendment. Roughly, the provisions of the proposed bill were:

1. A state must reapportion if the legislative representation in either house of one district exceeds by fifty (50) per cent the legislative representation in that house by any other one district.
2. If the legislature fails to act within two years after the census or if any action within that time is declared invalid by the courts, it shall then become the duty of the

66 Armstrong v. Mitten, 95 Colo. 425, 37 P.2d 757 (1934).

67 For a discussion of the present situation in Colorado see Roos, *Colorado Legislators Agree Reapportionment Due*, The Denver Post, Nov. 18, 1960, p. 26, col. 1; Roos, *Three Counties in Denver Area Entitled to Double Representation*, The Denver Post, Nov. 10, 1960, p. 29, col. 1.

68 Ark. Const. amend. 23; Cal. Const. art. 4, § 6; Ill. Const. art. 4, § 8; Mich. Const. art. 5, § 4; Mo. Const. art. 3, §§ 7, 8 (for the senate); Ohio Const. art. 11, § 11; S.D. Const. art. 3, § 5; Tex. Const. art. 3, § 28. See generally, Lewis *supra* note 14, at 1089.

69 Ariz. Const. art. 4, pt. 2, § 1; Mo. Const. art. 3, §§ 2, 3 (for the lower house); Ore. Const. art. 4, § 6 (should the legislature fail to reapportion on schedule).

70 Alaska Const. art. 6, §§ 3, 8, 10; Hawaii Const. art. 3, § 4.

71 Cases cited note 48 *supra*.

72 Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926).

73 Cases cited notes 39, 54 *supra*.

74 106 Cong. Rec. 13827 (daily ed. June 29, 1960).

governor of that state to establish a board of citizens whose duty it shall be to submit a plan for reapportionment to the governor within ninety (90) days which shall comply with the requirements.

3. Within one hundred-twenty (120) days following the establishment of such board the governor shall prescribe by executive order such changes in territorial limits of the election districts of the state and such changes in the legislative representation in the state legislature as he shall determine is required to bring the legislative representation of the state into the requirements.
4. If the above action has not been taken within three years after the date in which the legislature should have acted, it becomes the right of any citizen of the state to bring an action in the highest court of that state.
5. The court shall determine whether the present legislative apportionment act complies with the requirements and if it does not, the governor may be compelled by mandamus to provide the required apportionment.
6. The highest court in the state may also determine the validity at any time of any legislative reapportionment act or any promulgation by the governor, upon the appropriate suit being brought by a state citizen.[75]

Instead of asking the state legislatures to ratify the proposed constitutional amendment (which they would probably never do since they now refuse to reapportion their own states), Senator Clark proposed that the amendment be adopted in the states by a constitutional convention held in each state solely for that purpose. Delegates to the convention would be elected at large from throughout the state, as was done to repeal the twenty-first (prohibition) amendment. This would allow the city and urban areas to elect their proportionate share of the delegates and thus protect their interests. It would seem that if the courts continue to refuse relief in these matters such an amendment could become a very real possibility. Increased litigation shows that there is a growing realization of the nature of the problem by people in all parts of the country.[76]

CONCLUSION

Our judicial system has been hesitant to strike down apportionment acts which were valid when enacted, but became invalid due to population shifts. This philosophy has to a great extent evolved from the *Colegrove* decision. Until the last twenty years few litigants attempted to raise federal jurisdiction by asserting an act's unconstitutionality under the fourteenth amendment. Perhaps the reason for this is due to several factors. First, it has only been within the last twenty to thirty years that our states have experienced a noticeable population shift within their borders. Second, in the last decade our Supreme Court has strongly asserted its power over

75 *Id.* at 13835.
76 For a discussion of the problem in nationwide perspective see series of articles, Merry, The Christian Science Monitor, Oct. 2, 6, 9, 13, 16, 1958.

matters which were formerly viewed as belonging to the states,[77] viz, that the segregation cases broke through the "political thicket" first is due to the fact that traditionally segregation is a better known issue and lends itself to more public sympathy. The American press has always been quick to publicize segregation issues, but not until recently has much attention been devoted towards portraying the voter whose vote is diluted by an old apportionment law.

The state legislative reapportionment problem becomes more serious each year. Indeed, one writer has pointedly stated:

> The effects of malaportionment are much graver today than they were a century ago . . . the federal and state governments spend a third of the national income . . . [and] are relied upon to regulate every respect of a complex industrial civilization . . . The rapid growth of our population and change in its character make even more urgent the need for regular, equitable adjustment of representation.[78]

Our courts could and should grant some remedy. No one can deny that there is need for some type of relief when "the streams of legislation . . . become poisoned at the source."[79] It has always been the rule that when a federally protected right is invaded the federal courts will provide a remedy.[80] Further, the mere fact that a problem concerns a political right should not shield it from judicial review.[81] Federal jurisdiction can be based on Article I[82] and the fourteenth amendment of the federal constitution.[83] It is generally believed that the most appropriate relief which a federal court could grant would be the striking down of the unconstitutional state apportionment acts. In conjunction with this relief the court could enjoin the holding of any election under the invalid act or order an election-at-large of the state's legislature. Such forms of relief are not beyond the power of a court to grant.[84]

It is suggested that while the above forms of relief may be entirely proper they do not provide remedies complete in all aspects. The challenged act is only eliminated, not replaced. Indeed, it cannot be guaranteed that the state legislature will not pass another act equally as offensive or fraught with injustice. Thus, while such judicial relief may be entirely necessary or appropriate it does not provide a fully satisfactory solution to the problem. The solution lies only in a constitutional amendment such as that proposed by Senator Clark. Only then could every voter be assured of preserving a right which is constitutionally his.

77 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

78 Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1095 (1958).

79 Chafee, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1016 (1929).

80 Hague v. C.I.O., 307 U.S. 496 (1939); *Ex parte* Young, 209 U.S. 123 (1908); Neal v. Delaware, 103 U.S. 370 (1880).

81 Snowden v. Hughes, 321 U.S. 1 (1944); Marbury v. Madison, 5 U.S. (1 Cranch 37) 137 (1803).

82 United States v. Saylor, 322 U.S. 385 (1944); United States v. Classic, 313 U.S. 299 (1941).

83 Baker v. Carr, 179 F. Supp. 824 (D. Tenn. 1959), *prob. juris. noted*, 81 Supp. Ct. 230 (1960); MaGraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1958), *per curiam*, 163 F. Supp. 184 (D. Minn. 1958).

84 Cases cited note 83 *supra*; Smiley v. Holm, 285 U.S. 355 (1932); Dyer v. Kazuhisa Abe, *supra* note 40.