case clearly holds that notice by publication is permitted only as a last resort. Where a claimant is unknown, no choice of modes of constructive service is available. Publication is the only possible method of delivery. Where a claimant is known, a limited choice of modes is present. The mails, or an equivalent, must be employed. This is true whether the claimant is a resident or non-resident. The new statutory provision should outline this position clearly. The statute also should require, at a minimum, a showing of diligent inquiry to ascertain a claimant's whereabouts, leaving it to the discretion of the courts whether such diligence has been made out.

The recent decisions applying the *Mullane* standard bear out the conclusion that the *Mullane* case represents a significant change in the law of notice. It is a change which manifests the underlying purpose of the fourteenth amendment, and gives greater substance to the due process requirement of an opportunity to be heard. Moreover, it is judicial acknowledgment that the relaxation of jurisdictional requirements necessarily must be augmented by a more demanding standard of service of notice.

REAPPORTIONMENT IN THE INDIANA LEGISLATURE: JUDICIAL COMPULSION OF LEGISLATIVE DUTY

I. *Introduction*

The concept of equality of representation has become basic to the American ideal of representative government.[1] Yet the problem of securing and preserving such equality has plagued representative governments from an early time.[2] It is apparent that the makers of the Federal

1. Perhaps the classic evidence of this evolution is to be found in Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315, 321 (1931), where the court says, "Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayer is distributed, and the power to make and measure the levy of taxes, are so essential, all-inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free, and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself."

2. Thus in England many cities that were established during the Industrial Revolution found themselves with representation in Parliament woefully disproportionate to their population. Rural regions, on the other hand, found themselves with the same number of representatives in Parliament as they had before the growth of the cities. Those regions retaining representatives out of all proportion to their population were called

Constitution were mindful of this problem, as the experience of the colonies and the writings of *The Federalist* indicate.[3] Further concern may be inferred from the language of the 13th, 14th, 15th, 17th, and 19th Amendments to the Constitution. With their extensions of the eligibility to vote the principle of equality of representation came nearer to practical reality. Provisions of the Indiana Constitutions of 1816 and 1851 indicate a similar concern for the problem by their framers. Both documents provide in mandatory terms for periodic apportionments of the state legislature based on the population of qualified males over the age of twenty-one.[4] Despite these provisions of the fundamental law designed to preserve the democratic ideal of equal representation, the "rotten borough" is still common.[5] For the most part, this is the result of repeated failures to reapportion in order to keep pace with shifts in population.[6] As the legislature is the body usually charged with the func-

"rotten boroughs." CROSS, A SHORTER HISTORY OF ENGLAND AND GREAT BRITAIN (3rd ed. 1939).

3. Colonial experience with the problem came at an early date. An example of this is the League for the United Colonies of New England, formed in 1613. Plymouth, New Hampshire, and Connecticut had a total population of 9,000 white persons, while Massachusetts had a population of 15,000. Each colony had one commissioner to represent them in the governing councils. Massachusetts, which paid the largest proportion of the taxes, demanded representation in proportion to its population. SELTZER, ROTTEN BOROUGHISM IN INDIANA (unpublished thesis in Indiana University Library 1952). Concern for the problem among the framers of the Constitution is evident from the writings of James Madison. Thus he says in Number LXII, *The Federalist*, "The equality of representation in the senate is another point which, being evidently the result of compromise between the opposite pretensions of the large and small states does not call for much discussion. If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a proportional share in the government; and that among independent and sovereign states, bound together by a simple league, the parties, however unequal in size, ought to have an equal share in the common councils; it does not appear to be without some reason, that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation." Madison's views on proportional representation are spelled out in Number LIV, *The Federalist* in his comments on the House of Representatives. There he says, "it is a fundamental principle of the proposed constitution, that as the aggregate number of representatives allotted to the several states is to be determined by a federal rule, founded on the aggregate number of inhabitants; . . ." and, "it is not contended that the number of people ought not to be the standard for regulating the proportion of those who are to represent the people of each state."

4. IND. CONST. art. 4, §§ 4, 5. See discussion and text *infra*.

5. See generally the symposium on reapportionment in 17 LAW & CONTEMP. PROB. 253 (1952).

6. Even with the assumption of a static population a practical obstacle exists. It is impossible to disregard entirely the pre-existing political subdivisions of the state and to set up the desired number of legislative districts purely on a basis of population. The difficulty of conducting elections if legislative districts are entirely divorced from other voting divisions makes the theoretically perfect system impossible. *Durfee, Apportionment of Representation in the Legislature: A Study of State Constitutions*, 43 MICH. L. R. 1091 (1945). Obstacles of this type are often manifested by constitutional requirements. Thus, the Indiana Constitution requires that senatorial or representative districts

tion of reapportioning itself, the problem becomes one of securing performance of this legislative duty.[7] Experience has shown that, left to its own initiative, the legislative branch may not be relied upon to carry out its duty.[8] Human nature dictates the conclusion that legislators can hardly be expected to vote themselves out of a seat. Moreover, voters in overrepresented districts can hardly be expected to vote for a surrender of their preferred position. Thus, little likelihood exists for a remedy via the ballot box. Constitutional amendments designed to place the responsibility for reapportionment upon officials other than the legislature offer an alternative solution. Ohio incorporated such a proposal in its 1851 constitution.[9] By its terms, the governor, auditor, and secretary of state, or any two of them are mandated to apportion the legislature following each decennial census. Such proposals, however, are usually the victims of the same forces that make a ballot box remedy ineffectual. Evidence of this fact is offered by the 1957 session of the Indiana General Assembly, wherein some eight measures on reapportionment were introduced.[10] Not one succeeded in passing both houses of the legislature, the department of the state government of Indiana that has a controlling voice in the passage of constitutional amendments.[11] A final alternative solution to the problem is the possibility of securing equality of representation through some form of judicial action.

II. *The Federal Judicial Background*

A. *Colegrove v. Green*[12]

The leading federal case, *Colegrove v. Green,* is the touchstone of current federal law on the question. The facts of the case strikingly illustrate a relatively typical picture of the problem as it exists in many states. Despite large increases in population and marked changes in its distribution, as of 1946 the legislature of Illinois had not redrawn either

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shall be composed of contiguous counties where more than one county constitutes a district. Moreover, no county is to be divided for purposes of senatorial apportionment. IND. CONST. art. 4, § 6 (1851).

7. See the excellently documented discussion in *Walter, Reapportionment of State Legislative Districts,* 37 ILL. L. R. 20 (1942).

8. Thus, the Indiana legislature has not reapportioned itself since 1921, despite a constitutional mandate calling for a reapportionment every six years. For a discussion of other states, see Walter, *op. cit. supra* note 7, and Durfee, *op. cit. supra* note 6.

9. OHIO CONST. art. 11, §§ 1-11.

10. The eight measures were H.J.R. 3, H.J.R. 8, H.J.R. 10, H.J.R. 16, S.J.R. 1, S.J.R. 5, S.J.R. 8, S.J.R. 14. All were proposed constitutional amendments.

11. IND. CONST. art. I6.

12. 328 U.S. 549 (1946).

congressional or state legislative districts since 1901.[13] Such failure to reapportion the legislature every ten years was in violation of a specific directive of the Illinois Constitution.[14] As a result of this inaction the largest congressional district had eight times the population of the smallest and the largest legislative district sixteen times that of the smallest.[15] Some eight court actions, nineteen bills in the legislature, and seven pleas by governors had been unsuccessful in correcting the situation.[16] The plaintiffs were citizens of large districts. They asked that the federal district court, by authority of the Federal Declaratory Judgment Act of 1934, (1) declare unconstitutional the Illinois Act of 1901 and (2) if necessary, give injunctive relief to enforce its judgment in the form of a restraint upon defendants from taking any proceedings for an election in November 1946 under the provisions of the 1901 statute governing congressional districts. The defendants were the governor, the secretary of state, and the auditor of the State of Illinois, as members of the Illinois Primary Certifying Board, the official body concerned with conducting the state-wide primary election that was a necessary preliminary to the general election to be held in November. The district court, feeling bound by *Wood v. Broom*,[17] reluctantly dismissed the ac-

13. 43 ILL. STAT. ANN., §§ 150-53 (Jones 1944). It is interesting to trace the legislative history of apportionment in Illinois following the *Colegrove* decision. One of the complaints cited in the *Colgrove* case was the fact that the 1901 apportionment act, *supra*, provided for 25 congressional districts whereas Illinois was allowed 26 representatives in Congress in 1946, one member being elected at-large. By an act approved on June 26, 1947, the state was apportioned into 26 congressional districts. See 43 ILL. STAT. ANN. §§ 153(1)-153(4) (Jones Supp. 1953). Following the 1950 census, Illinois lost one seat in Congress. See 97 CONG. REC. 115 (1951). Accordingly, the 1947 apportionment act was repealed by an act approved in 1951 which divided the state into 25 congressional districts. See 43 ILL. STAT. ANN. §§ 153(5)-153(8) (Jones Supp. 1953).

Legislative action with regard to apportionment in the General Assembly was not as swift. Yet in 1955, the 1901 state legislative apportionment was repealed and replaced by a new statute apportioning both senatorial and representative districts. See 43 ILL. STAT. ANN. §§ 156(1)-156(9) (Jones Supp. 1955).

14. ILL. CONST. art. 4 § 6.

15. In 1946, the 7th congressional district had a population of 914,053; the 5th district had 112,116. A like comparison of Indiana for the same year shows the 11th district with 460,926; the 9th with 241,323. See Colegrove v. Green, 328 U.S. 549 at 557 (1946). The largest legislative district of Illinois (25th) had a population of 574,791, while the smallest (17th) had only 35,534. Each elects the same number of senators (1) and representatives (3). See Note, 56 YALE L.J. 127, 132 (1946-47).

16. See Note, 56 YALE L.J. 127, 132 (1946-47).

17. 287 U.S. 1 (1932). By the reapportionment act passed by Congress in 1929, Mississippi was entitled to seven representatives in Congress instead of eight as theretofore. The Mississippi legislature had divided the state into seven congressional districts by an act passed in 1932. Complainant, a qualified voter of the state, sued to have this act declared invalid and to restrain the defendants, state officers, from holding an election pursuant to its provisions, on the grounds that the act violated Art. I, section 4 and the 14th Amendment of the Constitution of the United States as well as section 3 of the reapportionment act passed by Congress in 1911.

tion.[18] In *Wood v. Broom,* the Supreme Court held that since the reapportionment act passed by Congress in 1929[19] had omitted the requirement of the 1911 apportionment act[20] that congressional districts be composed of compact and contiguous territory having as nearly as practicable the same number of inhabitants such requirements no longer existed. Hence, the Court there held that a Mississippi districting act was valid despite discrepancies between the populations of the various districts.

The Supreme Court affirmed by a four to three decision. Three members who voted to affirm, speaking through Mr. Justice Frankfurter, denied relief on the grounds that the Reapportionment Act of June 18, 1929, as interpreted in *Wood v. Broom,* has no requirements "as to compactness, contiguity and equality in population of districts."[21] The second ground urged by Justice Frankfurter was a want of equity sufficient to ground an action for declaratory relief.[22] Justice Frankfurter pointed out that no court could affirmatively remap the Illinois districts; at best, all they could do would be to declare the existing electoral system invalid. The result, he continued, "would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a statewide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting."[23] Moreover, Justice Frankfurter continued, Congress might not seat representatives elected at large. This, he observed, makes it clear that "this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."[24] The final ground urged by Justice Frankfurter was a belief that the Constitution, by Article I,

18. 64 F.Supp. 632 (N.D. Ill. E.D. 1946).
19. 46 STAT. 26 (1929), 2 U.S.C. § 2a (1952).
20. 37 STAT. 14 (1911), 2 U.S.C.A. § 3 (1927).
21. 328 U.S. at 551.
22. In this regard Justice Frankfurter said: "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." 328 U.S. at 552.
23. 328 U.S. at 553.
24. 328 U.S. at 553.

Section 2, has given Congress alone the authority to assure fair representation and that the courts should not encroach upon this congressional function. Thus, the remedy for inequities in districting "is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress," since "the Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."[25]

The deciding vote was cast by Mr. Justice Rutledge. In a separate concurring opinion, he stated that were it not for *Smiley v. Holm*,[26] which held that the provisions of the 1911 act of Congress relating to compactness, contiguity and equality in population of congressional districts had not been expressly repealed by the Apportionment Act of 1929 and were therefore still in full force and effect, he would concur with the argument that the issues in the case were not justiciable. However, despite the concession that if the *Smiley* case stands and the court has power to afford relief in a case of this type as against the objection that the issues are not justiciable, Justice Rutledge felt that the Court should not exercise its jurisdiction in the instant case. His conclusion was grounded on the view that the cause was of so delicate a character that "jurisdiction should be exercised only in the most compelling circumstances."[27]

Mr. Justice Black, with Justices Douglas and Murphy concurring, dissented. After concluding that the district court had jurisdiction, that the complaint presented a justiciable case and controversy, and that plaintiffs had standing to sue, he grounded his opinion on two arguments. First, he maintained that the scheme of apportionment discriminated in such a way as to violate the equal protection clause of the 14th Amendment. In addition, he argued that Article 1 of the Constitution and Section 2 of the 14th Amendment imply a constitutional policy of equal representation. This, he pointed out, necessarily means that state election systems should be designed to give approximately equal weight to each vote cast. The opinion then proceeded to refute the arguments of

25. 328 U.S. at 556.

26. 285 U.S. 355 (1932). Under the reapportionment provided by the Act of Congress of 1929, *supra* note 18, Minnesota was entitled to nine representatives in Congress, one less than the number previously allotted. The Minnesota legislature accordingly passed a bill dividing the state into nine congressional districts. Petitioner, a qualified voter, sued to have the act declared a nullity in that after the veto of the governor, it was not repassed by the legislature as required by law and also in that the proposed districts were not compact and did not contain an equal number of inhabitants as nearly as practicable as required by the apportionment act passed by Congress in 1911, *supra* note 20.

27. 328 U.S. at 565.

Justice Frankfurter. Thus, Justice Black stated, "the policy with respect to federal elections laid down by the constitution, while it does not mean that the courts can or should prescribe the precise methods to be followed by state legislatures and the invalidation of all acts that do not embody these precise methods, does mean that state legislatures must make real efforts to bring about approximately equal representation of citizens in Congress."[28] The political question argument was disposed of by the observation that it is a mere play on words to refer to a controversy such as this as "political in the sense that courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot."[29]

Despite the division of the Court in the *Colegrove* case, its position has remained substantially in accord with Justice Frankfurter's opinion every time the Court has been confronted by cases raising substantially identical issues. Thus in *Cook v. Fortson,*[30] *Turman v. Duckworth,*[31] *MacDougall v. Green*[32] and *South v. Peters,*[33] the basic substantive claims were that the state election systems and the statutes creating them operated to deprive the petitioners and other voters of equal protection of law in respect to their rights of suffrage, contrary to the provisions of the 14th Amendment to the Constitution. The district courts, relying on the *Colegrove* case, dismissed the actions in all four cases. The Supreme Court affirmed the dismissals per curiam.[34]

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28. 328 U.S. at 572.
29. 328 U.S. at 573.
30. 68 F. Supp. 624 (1946), *aff'd,* 329 U.S. 675 (1946).
31. 68 F. Supp. 744 (1946), *aff'd,* 329 U.S. 675 (1946).
32. 335 U.S. 281 (1948).
33. 89 F. Supp. 672 (1950), *aff'd,* 339 U.S. 276 (1950).
34. In McDougall v. Green, *supra* note 32, Justice Rutledge, in a separate concurring opinion, stressed the fact that the case arose on the eve of a national election, thereby raising grave practical questions over whether the desired relief could be effectuated without seriously jeopardizing the entire Illinois election machinery. Consequently, he stated: "as in Colegrave v. Green, *supra,* I think the case is one in which, for the reasons stated, this Court may properly, and should, decline to exercise its jurisdiction in equity. Accordingly, but solely for this reason, I agree that the judgment refusing injunctive relief should be affirmed." 335 U.S. at 287.

In Cook v. Fortson, *supra* note 30, again in a separate opinion, Justice Rutledge again alluded to the *Colegrove* case when he said: "Obviously the appeals present questions related closely to the issues in Colegrove v. Green, but in my opinion not necessarily determined by that decision. A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. . . . Those reasons would be pertinent to a consideration of the present appeals, although not necessarily controlling in relation to the somewhat different facts and issues they involve. The issues, whether of jurisdiction, of discretion in exercising it, or of substantive right are obviously important. In my opinion, they have not been conclusively adjudicated by prior decisions of this court." 329 U.S. at 677.

B. *The Hawaiian Experience: Dyer v. Kazuhisa Abe*[35]

Despite the pronouncements of the *Colegrove* line of cases, the question arose again, this time in the Territory of Hawaii. The background of *Dyer v. Kazuhisa Abe* is in many respects analogous to that found in *Colegrove v. Green.* The Hawaiian Organic Act was enacted by Congress in 1900.[36] It provided for a territorial legislature, to be composed of two houses, namely, a house of representatives and a senate.[37] The composition of the senate is limited to fifteen members,[38] the house, thirty members.[39] For purposes of representation, the Territory was divided into four senatorial districts[40] and six representative districts.[41] Senators and representatives were apportioned among the several districts in accordance with the then existing distribution of population.[42] Provision was made for periodic reapportionment of both houses on the basis of the population of the Territory. This provision was in the form of a mandate to the legislature to accomplish such a reapportionment.[43] Since 1900, a marked population shift has occurred in the Territory. For the most part this shift has been to the island of Oahu.[44] Despite this shift, the territorial legislature had never made the reapportionment required by the Organic Act. In fact, only one bill, introduced in 1913, designed to make the required reapportionment was ever before the legislature. This bill was killed in the senate, the house in which it was introduced.[45] As a result of this inaction on the part of the legislators, the effectiveness of a vote on the island was progressively diluted. Votes in districts outside of Oahu were as much as two to six times as effective as those of the Oahu voter in 1955.[46]

Against this background the case of *Dyer v. Kazuhisa Abe* arose. The plaintiff was a duly registered voter, domiciled on the island of Oahu. The defendants were the members of the territorial legislature,

35. 138 F. Supp. 220 (1956).
36. 31 STAT. 141 (1900), 48 U.S.C. §§ 491-722 (1952).
37. 31 STAT. 144 (1900), 48 U.S.C. § 561 (1952).
38. 31 STAT. 146 (1900), 48 U.S.C. § 565 (1952).
39. 31 STAT. 147 (1900), 48 U.S.C. § 570 (1952).
40. 31 STAT. 147 (1900), 48 U.S.C. § 568 (1952).
41. 31 STAT. 147 (1900), 48 U.S.C. § 574 (1952).
42. 31 STAT. 147 (1900), 48 U.S.C. § 569 (1952) for the senate; 31 STAT. 148 (1900), 48 U.S.C. § 575 (1952) for the house.
43. "The legislature, from time to time, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory; . . ." 31 STAT. 150 (1900), 48 U.S.C. § 562 (1952).
44. 138 F. Supp. at 225.
45. See Findings of Fact and Conclusions of Law, case #1435, dated December 28, 1956, in court records of the U.S. District Court for the district of Hawaii.
46. See note 45 *supra.*

the governor of Hawaii, the secretary of Hawaii and the regional disbursing officer of the Treasury Department for the Territory of Hawaii. The action was brought under the provisions of two federal civil rights statutes.[47] The plaintiff alleged that by their inaction the defendants had violated a duty imposed upon them by the Organic Act. The plaintiff alleged that because of this dereliction of duty the effectiveness of his vote was proportionately less than that of voters in other districts. He further alleged that this geographic discrimination deprived him of the due process of law and equal protection of law guaranteed him by the Organic Act and the Constitution of the United States. Pursuant to the Federal Judicial Code, the action was brought in the United States District Court for the District of Hawaii.[48] The relief prayed for was an order requiring the legislators to reapportion themselves together with orders to the governor and disbursing agent designed to accomplish that end.[49] In the alternative, the plaintiff requested that the governor and secretary be enjoined from conducting the next election of legislators on any but an at-large basis.[50]

The defendants moved to dismiss the action upon the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. The court, in denying the motion, said that the inaction of the legislature resulted in a purposeful and systematic plan to discriminate against a geographic class of persons; and further, that the result was achieved just as effectively as if a positive statute had been passed for the same purpose. Since the result of biased inaction had the same effect as biased action, the court held it to be a denial of equal protection of the

47. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 17 STAT. 13 (1871), as amended 42 U.S.C. § 1983 (1952). This statute is commonly known as the Civil Rights Act. The jurisdiction of the court was based on another statute which reads: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 62 STAT. 932 (1948), 28 U.S.C. § 1343 (1952).

48. *Ibid.*

49. Specifically, plaintiff prayed that the governor be ordered to convene the legislature in special session for the purpose of passing a bill to reapportion, and that he be ordered to sign the bill once passed. The disbursing agent was to be restrained from paying any salary or mileage allowances to the legislators until such a bill should pass both houses of the legislature. See Amended Complaint and Summons, Case #1435, in court records of the U.S. District Court for the district of Hawaii.

50. See Amended Complaint and Summons, *supra* note 49.

law. Moreover, the arbitrary discrimination resulting from the legislature's inaction was held to be a denial of due process of law. Such denials were held sufficient to give the court original jurisdiction of the cause. The court further held that an order equivalent to mandamus would lie in aid of the original jurisdiction shown.

In an oral ruling from the bench dated 20 July 1956, the court announced its intention to award a decree entitling the plaintiff to have the appropriate authorities mandated by order of the court to conduct the next election on an at-large basis and continue to so conduct them until a reapportionment was made.[51] An oral ruling on 2 August 1956[52] substituted a declaratory decree to the effect that the plaintiff had been deprived of due process of law and equal protection of law by the inaction of the defendants.[53] This later ruling vacated the previous one, the need for which was obviated by an act of Congress signed by the President on 1 August 1956.[54] By its terms, the act reapportioned the Territory to provide equal representation and also altered the scheme for periodic reapportionment.[55] The governor of the Territory was charged with the duty of reapportioning the legislature every ten years. The act vested the supreme court of the Territory with original jurisdiction, to be exercised on the application of any registered voter, to compel the governor to perform this duty by mandamus.[56] In the wake of this enactment, no appeal has been taken from the ruling of the district court. Consequently, the effectiveness of the orders given in the case have not been tested.

It is important to note the distinction existing between the *Dyer* and *Colegrove* cases. In both cases, a United States District Court was involved. Such courts represent a level of the judiciary coordinate with the Congress of the United States. Consequently, in the *Dyer* case, the court was addressing itself to what may be termed an inferior legislative

51. See Oral Ruling by the court, case #1435, dated July 20, 1956, in the court records of the U.S. District Court for the district of Hawaii.

52. See Oral Ruling By the Court, case #1435, dated August 2, 1956, in the court records of the U.S. District Court for the district of Hawaii.

53. See Declaratory Decree, case #1435, dated December 28, 1956, in the court records of the U.S. District Court for the district of Hawaii.

54. 70 STAT. 907 (1956), 48 U.S.C.A. § 562 (1956), amending 31 STAT. 150 (1900).

55. 70 STAT. 903 (1956), 48 U.S.C.A. §§ 568-69 (1956) amending 31 STAT. 147 (1900) (Reapportionment of the senate); 70 STAT. 906 (1956), 48 U.S.C.A. §§ 574-75 (1956), amending 31 STAT. 147 (1900) (Reapportionment of the house of representatives).

56. 70 STAT. 907 (1956), 48 U.S.C.A. § 562 (1956). "Original jurisdiction is vested in the supreme court of the Territory to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the Governor to perform the above duty; and make within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment."

body: namely, the legislature of the Territory of Hawaii, which is clearly not on a level of government coordinate with that of the court. By the same token, in this fact situation Congress looms as a sort of super-legislature, since the territorial legislature owes its very existence to an enactment of the Congress. Moreover, in the same enactment in which it had created the territorial legislature, Congress had imposed upon that body the duty of accomplishing periodic reapportionments of itself. Considerable authority exists for the proposition that a federal court may mandate an inferior legislative body to perform a duty imposed upon it by laws enacted by a legislature of higher rank.[57] Since the Hawaiian legislature was such an inferior legislative body and since a duty to reapportion was clearly imposed upon it by an enactment of a superior legislative body, the plaintiff in the *Dyer* case was able to argue successfully for the imposition of judicial compulsion. In such a case, no political question is raised. The doctrine of separation of powers is not violated because one coordinate department of government is not interfering with another coordinate department. All that occurs is the enforcement of an enactment of Congress by the department of government coordinate with Congress that is customarily concerned with such enforcement. In the *Colegrove* case, the situation is somewhat altered. It is true that there also the federal district court was addressing itself to an inferior legislative body, *i.e.,* the Illinois legislature. But in that case no duty was imposed upon the inferior legislature by an enactment of Congress, which again looms as a super-legislature. Since Congress had not imposed upon the Illinois legislature the duty of reapportioning itself, any imposition of judicial compulsion by the court there would have smacked of judicial legislation. In such a case, the Court would clearly be in the realm of the political question as Mr. Justice Frankfurter observed. The only way in which this anathema might have been avoided would have been for the Court to find that the inaction of the Illinois legislature violated a directive of the Constitution of the United States. Had this been found, the political question would have been avoided since the Court would be back to the function of enforcing a law enacted by a super-legislature, *i.e.,* the Constitution, a function which it cus-

57. Connett v. City of Jerseyville, 125 F.2d 121 (7th Cir. 1941), wherein the defendants were mandated by a federal district court to pass a law with respect to an increase in water rates, the duty to perform such an act being imposed by a state statute. The decision was affirmed. See also Parrish v. Wright, 293 S.W. 659 (Tex. Civ. App. 1927), wherein the Texas state court's mandate to the mayor and other city officials directing them to pass an ordinance in accordance with a command of a state statute was upheld by the Texas Court of Civil Appeals. See also People ex rel Henderson v. Board of Supervisors of Westchester County, 147 N.Y. 1 (1895), 41 N.E. 563 (1895), and De Angelis v. Laino, 252 N.Y.S. 871 (1931), 141 Misc. Rep. 518 (1931).

tomarily performs. The Court chose not to find such a constitutional directive. This result seems logical in light of the fact that nowhere does the Constitution expressly direct state legislatures to apportion periodically so as to ensure equality of representation either in the federal House of Representatives or in their own constituent bodies. The only apparent way in which such a directive could be found would be for the Supreme Court to include equality of representation as one of the rights secured by the 14th Amendment. For the Court to do so would at best amount to a strained construction of that amendment. Moreover, actions like mandamus or similar requests for judicial compulsion would seem to be poor vehicles with which to seek such a construction since such remedies require as a *sine qua non* the existence of a strong and clear legal duty. In addition, serious questions arise as to the feasibility of enforcement of such a compulsive order; questions which are alluded to *infra*. At any rate, with the finding by Justice Frankfurter that no constitutional directive existed, the distinction between the *Colegrove* and *Dyer* cases was complete.

This distinction has been cited by the federal district courts of two states in dismissing actions brought subsequent to the *Dyer* case. In *Radford v. Gary,*[58] the plaintiff, a voter in the most populous county of Oklahoma, alleged that the failure of the Oklahoma legislature to reapportion itself in defiance of a mandate therefor in the state constitution operated to deprive him of equal protection of law as guaranteed by the 14th Amendment of the Constitution of the United States. The relief requested was a writ of mandamus to compel the legislature to reapportion itself. After holding that it had jurisdiction of the cause, the district court first reviewed the Oklahoma cases on the question, wherein the courts uniformly found that the mandate of the state constitution was addressed solely to the legislature; that in the event of failure of the legislature to act, the remedy was in the hands of the people through the exercise of their suffrage. The court then reviewed the federal cases, commencing with *Colegrove v. Green,* and in reliance thereon, dismissed the case as one involving a political question. The *Dyer* case, upon which plaintiff had relied, was distinguished on the grounds that while the relationship of the Territory of Hawaii to the federal government distinguished that case from the facts present in the *Colegrove* case, no such distinction could be drawn in the instant case.

In *Perry v. Folsom,*[59] the plaintiff, an Alabama voter, brought an action to compel the Alabama legislature to comply with provisions of

58. 145 F. Supp. 541 (W.D. Okla. 1956).
59. 144 F. Supp. 874 (N.D. Ala. S.D. 1956).

the state constitution that called for a reapportionment of the legislature following each decennial census.[60] Plaintiff alleged that by the failure of the legislature to comply with these provisions, he was deprived of due process of law, equal protection of law and of equality of representation under the laws and constitutions of the United States and the State of Alabama. After distinguishing the facts of the case from those found in the *Dyer* case, the district court, relying on the *Colegrove* line of cases, dismissed the action. Pointing out that the relation of the powers of the national government to those of the State was involved and that the issue presented was of a political nature, the court said that the matter of reapportioning a state legisalture lay in the sphere of state sovereignty in which federal courts should only proceed with the greatest of caution.

As noted, both the *Radford* and *Perry* cases arose after the decision in the *Dyer* case. *Remmey v. Smith*[61] was a similar action that arose five years before the *Dyer* case. There the action was brought to have the Pennsylvania Apportionment Act of 1921 declared unconstitutional and to compel the state legislature to reapportion representative and senatorial districts, as well as to enjoin further elections under the 1921 act until a proper and adequate apportionment law had been passed. The Pennsylvania Constitution requires the legislature to reapportion itself after each decennial census.[62] The plaintiffs alleged that the inaction of the legislature had deprived them of rights guaranteed by the 14th Amendment and the Pennsylvania Constitution. The district court agreed with the argument that a dereliction of legislative duty had resulted in practical disenfranchisement of voters in certain heavily populated districts. But it went on to say, "the remedy of the substantially disenfranchised elector, however, lies at least primarily in the general assembly and courts of Pennsylvania. . . ."[63] Since *Colegrove v. Green* forbade the exercise of equity jurisdiction as respects congressional apportionment, the court reasoned by analogy that such jurisdiction should not be exercised in cases involving apportionment of state legislatures. This, plus the consideration of the sensitive area of federal-state relations led the court to conclude that since an untried remedy may exist in the state courts, the federal courts should refuse to exercise jurisdiction since the action was at most premature.[64]

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60. ALA. CONST. art. 9 §§ 197-200.
61. 102 F. Supp. 708 (E.D. Pa. 1951).
62. PA. CONST. art. 2 § 18.
63. 102 F. Supp. at 710.
64. Lest the petitioners be misled by the leading opinion, however, the concurring judge stated that if any right to redress existed in the situation presented it was a

III. *The Indiana Factual and Judicial Background*

The democratic ideal of equality of representation has pervaded the fundamental law of Indiana since the time of the Northwest Territory.[65] Adherence to this ideal was rather strict in the legislature of the Northwest Territory.[66] With the granting of statehood came further preservation of the concept in the form of a constitutional provision to insure its perpetuation. Thus, the Constitution of 1816 said in Article III Section 2, "The General Assembly may, within two years after their first meeting, and shall, in the year eighteen hundred and twenty, and every subsequent term of five years, cause an enumeration to be made, of all the white male inhabitants above the age of twenty-one years. The number of Representatives shall, at the several periods of making such enumeration, be fixed by the General Assembly, and apportioned among the several counties, according to the number of white male inhabitants, above twenty-one years of age in each; . . . .", and at Section 6, "The number of senators shall, at the several periods of making the enumeration before mentioned, be fixed by the General Assembly, and apportioned among the several counties or districts, to be established by law, according to the number of white male inhabitants of the age of twenty-one years in each. . . ."

Despite these provisions, the decisions of the legislature between 1820 and 1850 did not reflect adherence to the apparent policy of the Constitution. Instead, apportionment became a partisan issue with its inevitable consequences.[67] With the seeds thus sown and cultivated, the prospect was slight for ameliorating action by the Constitutional Con-

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state right, not a federal right and that the remedy, if any, was exclusively in the state courts. 102 F. Supp. at 712.

65. The Ordinance of July 13, 1787 (Northwest Ordinance) established the framework of the territorial government for the newly acquired lands of the Northwest Territory. Among its provisions were those relating to the representative nature of the government contemplated. That the Ordinance intended representation in the territorial legislature to be based upon population is manifested by the wording of Article II: "The inhabitants of the said territory shall always be entitled to the benefits 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 the common law."

66. Thus the first legislature of the Northwest Territory, which convened in 1799, enacted elaborate legislation establishing the machinery for the periodical enumerations so essential to the maintenance of equality of representation. The act was implemented with severe sanctions that were to be imposed upon the county officials charged with the duty of taking the enumeration should those officials fail to perform their respective duties in the manner specified by the act. These sanctions assured that the enumeration would be properly handled. See SELTZER, ROTTEN BOROUGHISM IN INDIANA (unpublished thesis in Indiana University Library 1952).

67. History shows an endless series of political maneuvering by both Whigs and Democrats to utilize apportionment in such a way as to assure continuing control of the legislature by their respective parties. *Ibid.*

vention of 1850. The Constitution of 1851 provided in mandatory terms for periodic reapportionment by the legislature. Thus Article IV, Section 4 says, "The General Assembly shall, at its second session after the adoption of this Constitution, and every sixth year thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years;" Section 5 says, "The number of Senators and Representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, acocrding to the number of male inhabitants, above twenty-one years of age, in each: . . . ." Despite this mandate, the pattern of legislative behaviour has remained substantially unchanged. Although some twelve apportionments were enacted between 1850 and 1921,[68] it was apparent that the ideal of equal representation had been largely abused in their drafting. Th last apportionment was made by the legislature in 1921.[69] Although bills relating to apportionment have been introduced at almost every session of the legislature during the last thirty years, no positive action has been taken.[70] Thus the legislature may be said to have progressed from a policy of compliance in form but not in fact to the constitutional mandate to a policy of no compliance whatever.

Of the twelve apportionments made by the legislature between 1850 and 1921, five were declared unconstitutional by the Indiana Supreme Court. Thus the 1891 and 1879 acts were invalidated by the court in *Parker v. State ex rel Powell.*[71] The 1893 and 1895 acts were invalidated

68. Apportionment bills were enacted in 1857, 1867, 1879, 1885, 1891, 1893, 1895, 1897, 1903, 1905, 1915, 1921. For the legislative history of each bill see SELTZER, *op. cit. supra* note 66.

69. IND. ANN. STAT. §§ 34-101 - 34-104 (Burns 1949).

70. An example of the mechanics of this inaction may be found in the history of S.J.R. #1, noted at note 68 *supra,* which was introduced in the senate at the 1957 session of the Indiana General Assembly, and passed by that body only to die in committee in the house of representatives. This resolution would have amended the Indiana Constitution to leave the senatorial districts as presently constituted. House districts, on the other hand, would have been established at ten year intervals, with the federal decennial census being used as the basis for districting. A reapportionment commission would have been established to make the reapportionment if the General Assembly failed to do so at its first regular session following the release and publication of the official federal census. For a history of apportionment at other fruitless sessions of the legislature, see SELTZER, *op. cit. supra* note 66.

71. 133 Ind. 178, 32 N.E. 836 (1892). This was an action by the State on the relation of one Powell, a qualified voter of Henry County, against the clerk of the circuit court of that county, the sheriff and auditor to compel them by mandamus to hold the election of 1892 for senators and representatives in the legislature under the apportionment act of 1879 and to enjoin them from proceeding under the apportionment act of 1891. It was alleged that the apportionment acts of 1891 and 1895 were void for conflict with the state constitution in that gross inequalities of population existed between the districts created by those acts. The Henry Circuit Court issued the alternative writ of mandamus, and issued a decree enjoining the defendants from proceeding under either the act of 1885 or 1891. On the appeal, the Indiana Supreme Court affirmed the finding of the invalidity of the 1891 act. It then proceeded to find that the 1879 act was invalid

in *Denney v. State ex rel Basler*[72] and the 1903 act in *Brooks v. State ex rel Singer.*[73] The essence of the court's interpretations of the Indiana Constitution in these cases may be stated in summary fashion. The court held that the constitution was designed to secure to the electors of the state an equal voice as nearly as possible in the selection of legislators and that the duty of the legislature with respect to periodic apportionment was mandatory and not discretionary. The court then held that questions relating to the validity of apportionment acts were judicial and not political questions and that the court could pass upon the validity of apportionment acts just as effectively as it could upon all other acts of the legislature.[74] Another pertinent holding was that only one valid apportionment act could be passed for each six year enumeration period.[75] The declaration by the court that any qualified voter could bring an action to declare an apportionment act invalid regardless of whether the inequalities complained of existed in his own senatorial or representative district or another settled the question of standing to sue.[76] Finally, the court answered the question of what to do for a districting scheme on which to hold elections when a given act is invalidated. When one act falls, the court held that the state should fall back on the latest non-invalidated act for the districting so vital for the conduct of an election. This last proposition was implemented by the assertion that the court

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also. Since the relief requested could not be granted, the court reversed without considering the validity of the 1885 act.

72. 144 Ind. 503, 42 N.E. 929 (1896). The action was to enjoin the defendants, county officers of Sullivan County, from proceeding to hold the election of 1896 pursuant to the apportionment act of 1895 and for a writ of mandate to compel said officers to hold the election under the apportionment act of 1893.

73. 162 Ind. 568, 70 N.E. 980 (1904). The action was for an alternative writ of mandamus against certain officers of Ripley County requiring each to show cause why the election of 1904 should not be held pursuant to the apportionment act of 1897 instead of the act of 1903.

74. Parker v. State ex rel Powell, 133 Ind. 178, 32 N.E. 836 (1892).

75. Denney v. State ex rel Basler, 144 Ind. 503, 42 N.E. 929 (1896). The court interpreted the relevant constitutional provisions as limiting the time for making an apportionment. Thus the court held that a valid apportionment act can only be passed once for each enumeration period. The legislature had therefore erred in enacting a second act only two years after the first act was passed.

76. Brooks v. State ex rel Singer, 162 Ind. 568, 70 N. E. 980 (1904). In this regard the court said: "We entertain no doubt of the right of relator to maintain this action. Every male inhabitant of the State, over the age of twenty-one years at the time the last preceding enumeration of such inhabitants was taken has a direct interest in the constitutional apportionment of senators and representatives throughout the State, and if, by an apportionment act, his rights in this respect are denied or impaired, he may obtain redress by proper action in the Courts. It is not requisite to his right to sue that the wrong complained of should exist in his own senatorial or representative district. Over representation in other districts, or the denial of fair representation, is just as injurious to the political rights of any portion of the male inhabitants over twenty-one years of age, aggrieved thereby, as if these inequalities were found in their own district." 162 Ind. at 577.

would order the election officials to follow this procedure.[77]

The question of what happens when the only existing non-invalidated apportionment act is attacked was answered by the state supreme court in *Fesler v. Brayton.*[78] In that case, the action was to invalidate the apportionment act of 1885 which at the time was the only act left which had not been declared unconstitutional. The court held that the framers of the constitution intended that the state should never be wihout a scheme of districting and that consequently the last valid apportionment act, whether good or bad, in or out of date, must continue in force until a new one is enacted to take its place. Due to this constitutional policy, the court held in the *Fesler* case that the plaintiff had no right to challenge the validity of the 1885 act.[79]

In the foregoing cases, action taken by the legislature was invalidated by the Indiana Supreme Court for failure to comply with the constitutional policy of equal representation. No court action has been forthcoming as yet to cure the present disease that afflicts the legislature, namely its inaction for some thirty-six years in the face of what the supreme court has called a mandatory duty.

IV. *Consideration of Possible Remedies*

A. *Federal Judicial Action*

The situation in Indiana today can be distinguished readily from that which motivated the action brought in *Colegrove v. Green.* In the first place, the reapportionment problem in Indiana centers about representation in the General Assembly and not in the Congress of the United

77. Thus in the *Denney* case, the court said: "At no time in the history of the State has an assembly been chosen upon a ratio adopted by common consent further than where the legislature has failed to adopt an apportionment, elections have been held under the last preceding apportionment without objection, thereby giving construction to the constitution in accordance with the view now suggested, namely, that the act of 1885 is the last apportionment which stands unquestioned, and is that upon which the next election must be held if that law remains unquestioned." 144 Ind. at 547.

78. 145 Ind. 71, 44 N.E. 37 (1896). The action was to enjoin the defendants, officers of Marion County, from holding the election of 1896 under the provisions of the 1885 apportionment act. The Superior Court gave judgment for the plaintiff in the form of a perpetual injunction. In reversing, the Indiana Supreme Court refused to declare the apportionment act of 1885 invalid in an opinion which reasoned; (1) the amendment to the Constitution adopted in 1881 which permitted Negro as well as whites to be counted in enumerations for apportionment purposes had rendered all apportionment acts passed prior to that time invalid. As a result, the 1885 act was the only one left that did not conflict with the amendment and which had not been declared unconstitutional; (2) if the court declared the act of 1885 invalid, the State would be without a valid apportionment law upon which to elect a legislature. In this situation, the court held that the framers of the constitution intended that the valid existing apportionment law, whether good or bad, in or out of date, must continue in force until a new one is enacted to take its place.

79. *Id.* at 87, 44 N.E. at 42.

States. Consequently, the terms of the reapportionment act enacted by Congress in 1929 and interpreted by the Supreme Court in *Wood v. Broom* would have no bearing in an action brought to declare the Indiana reapportionment act of 1921 invalid. Secondly, a federal court declaration that the 1921 act was unconstitutional would not leave the state without a system of districting on which to conduct an election. The Indiana Supreme Court, besides establishing itself as competent to pass upon the validity of acts to reapportion the General Assembly, has also taken the steps necessary to ensure that the state shall never be without a system of districting merely because one apportionment act is invalidated. Besides, the very suggestion of an at-large election, as was urged by the petitioner in *Colegrove* seems repugnant to Article IV, Section 2 of the Indiana Constitution. That provision commands that legislators "shall be chosen by the electors of the respective counties or districts, into which the State may, from time to time, be divided." Finally, the Indiana Supreme Court has firmly declared in *Parker v. State ex rel Powell* that the validity of an existing apportionment act is a judicial and not a political question. Consequently, the political question anathema which the Court found so troublesome in the *Colegrove* case would not seem to be present in a declaratory judgment action to declare the present Indiana apportionment act invalid.

The contentions of Justice Frankfurter's opinion in the *Colegrove* case would thus seem inapplicable in an action for declaratory relief that is brought in a federal court.[80] Yet the problem of standing to bring such an action is yet to be coped with.[81] The Indiana Supreme Court was dealing with a right secured to the voters of Indiana by their constitution. Consequently, it must be shown that a deprivation of this state-created right results in a deprivation of a federal right before the requisite standing would appear to exist.

In this regard, the arguments made in the *Dyer* case seem apposite. As noted before, the majority in the *Colgrove* case did not base its decision firmly on a denial of the arguments on the merits. In fact an actual majority thought that the issues presented constituted a justiciable case and controversy. The vigorous dissents filed in that case, taken in conjunction with later opinions of Justice Rutledge,[82] indicate that an actual majority of the court, if not affirming, has certainly not denied the

80. 62 STAT. 964 (1948), 28 U.S.C. §§ 2201-202 (1952), as amended, 63 STAT. 105 (1949).

81. The Declaratory Judgment Act did not confer any additional jurisdiction on federal courts but applies only to controversies otherwise within the jurisdiction of such courts. See cases cited at anno. 31, 28 U.S.C.A. § 2201 (1950).

82. See note 34, *supra*.

validity of the contention that a denial of equal representation, or a reasonable approximation thereof, constitutes a deprivation of equal protection of law and due process of law under the 14th Amendment of the Federal Constitution. Moreover, the argument would seem to be bolstered by the fact that the Indiana Supreme Court has interpreted the state constitution to contain a clear policy of equal represenation in the legislature. This latter proposition is in turn reinforced by the argument raised by Justice Black in the *Colegrove* case: that there is a policy favoring equality of representation that is implicit in the Federal Constitution. Taken together, a strong argument is posed for the proposition that an apportionment act which, in effect, operates to deprive certain citizens of that equality of representation assured them by the fundamental law is within the proscription of the equal protection clause of the 14th Amendment.

Despite the considerations noted, the Supreme Court has yet to extend the concept of equal protection of law to include geographical discrimination of the type dealt with in the *Dyer* case and existing in Indiana today. In the absence of such an extension by that Court, the success of a declaratory judgment action in a fedral court is dubious, even without the additional compulsive relief prayed for in the *Colegrove* case. *Remey v. Smith, Radford v. Gary,* and *Perry v. Folsom,* all noted *supra,* point to this conclusion. As for the possibility of ending the chronic inaction of the legislature by direct compulsive relief granted by a federal court, the same considerations are again encountered. Moreover, the difficulties of enforcing compulsive orders that are directed at state officials poses an obstacle to the practical success of any action seeking solution by that means. This, plus the considerations noted below with respect to the feasibility of such remedies in state courts would seem to render them equally impracticable when applied to federal courts.

B. *Indiana Court Action*

The Constitution and statutes of Indiana do not provide the voter with a remedy specifically directed to a solution of the problem created by the failure of the legislature to reapportion itself. Consequently, the possibility of doing the job by means of existing remedies presents itself. Since the need is for a means to compel legislative action, a remedy in the nature of mandamus seems desirable. Such a remedy is direct and sure and thus would prove most efficient in a situation such as this. Indiana provides for such a remedy by statute.[83] In applying this statute the courts have followed the common law applicable to the writ of man-

83. IND. ANN. STAT. §§ 3-2201-2205 (Burns 1946).

damus.[84] Thus, no action for mandate may be pursued successfully where the cause of action involved would fail to meet the requirements essential to relief by the common law writ of mandamus.

At first blush, the reapportionment problem seems to present a cause of action competent to ground an action for mandate brought by an Indiana voter. The state supreme court has interpreted the state constitution as granting each voter the legally enforceable right to equal representation or a reasonable approximation thereof.[85] The same court has said that the legislative duty to reapportion so as to assure equal representation is mandatory.[86] No other adequate legal remedy exists for the enforcement of this duty by the voter. The relief sought would be to compel the performance of this duty by the public officers to whom it is charged, namely the individual legislators.

While a strong argument can be made for the issuance of a judicial mandate, the granting of the remedy is discretionary with the court.[87] The overwhelming weight of authority shows that the courts, exercising this discretion, have traditionally refused to mandate legislatures either directly or indirectly.[88] The courts have preferred to leave the responsibility with the legislature alone where it refused to act, even though the inaction be in direct defiance of a command of the constitution. The most common rationale given for this reluctance of the courts is the doctrine of separation of powers. The Indiana Supreme Court was doubtless mindful of this view when it stated, in *Parker v. State ex rel Powell,* that it would refuse to compel the legislature to do anything.[89]

An anomaly exists between the separation of powers argument and the traditional role of the courts in keeping the legislature within its constitutional limitations. If the legislature can escape censure for constitutional inadequacies by refusing to act, the courts would seem to be encouraging unconstitutional behaviour by that body. This argument seems especially valid where the legislative inaction is in open defiance of a literal command of the constitution. It seems just as logical for the courts to police the legislature in these cases as it does to police them with regard to overt acts resulting in legislation. In each instance the court

84. Gruber v. State ex rel Welliver, 196 Ind. 436, 148 N.E. 481 (1925); FERRIS, EXTRAORDINARY LEGAL REMEDIES § 189 (1926).

85. See note 76 *supra.*

86. See discussion and text at note 71, *supra.*

87. FERRIS, *op. cit. supra* note 84 at § 196.

88. In general see Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943), appeal dismissed 322 U.S. 717 (1944); Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926); 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); and cases cited at 136 A.L.R. 680 and 46 A.L.R. 964.

89. 133 Ind. at 189, 32 N.E. at 839.

is not usurping the legislative function. It is not substituting its discretion for that of the legislature. It is merely forcing the legislative branch to stay within the limitations placed upon it by the fundamental law of the state.

In addition to the argument that mandamus puts the judicial process in conflict with the legislative process, however, other considerations point to the impracticality of the remedy when applied to the instant problem. Thus, even if a court were to mandate the legislators, as suggested, it is difficult to see how it could ever enforce its order through the customary contempt procedures. Consequently, if the order was to be followed, adherence would have to be motivated by respect or moral support for the dignity of the judicial process. In short, any issuance of a mandate would put the court's authority on the line. Should sociological conditions be such that the court's order is respectfully obeyed, the judiciary would not suffer any loss of stature. On the other hand, should the order be defied, as it very likely could be, the judiciary would suffer since it would find itself bereft of a compliance ensuring sanction. Taken in conjunction with the separation of powers argument, the practicability of relief by mandamus appears fraught with hazards.

The required compulsion has been sought through other remedies besides mandamus, all of which have been similarly unsuccessful in achieving the desired result. Thus, courts have refused to restrain payments of legislators' salaries until a reapportionment is made;[90] have refused to grant quo warranto addressed to the legislators;[91] and have refused to grant income tax exemption to a taxpayer when sought on the basis of the alleged fact that the United States had failed to carry out its guarantee of a republican form of government in not compelling reapportionment in the state legislature.[92] Attempts at indirect compulsion through a declaration of the invalidity of all acts passed by a legislature sitting under an obsolete apportionment have likewise failed, a result which would seem inevitable by virtue of the de facto doctrine.[93]

The logical consequence of these experiences is the conclusion that enforcement of the legislative duty to reapportion by means of the direct or indirect compulsion noted is not practicable. If judicial relief is to be had, it is apparent that it must be sought by a method that will not risk putting the judiciary in conflict with the legislative department in such a glaring fashion; in short, a method which avoids the anathema of the political question.

90. Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1928).
91. People ex rel Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930).
92. Keough v. Neely, 50 F.2d 685 (7th Cir. 1931), *cert. den.* 284 U.S. 583 (1931).
93. People v. Clardy, 334 Ill. 160, 165 N.E. 638 (1929).

Although imbued with dubious possibilities of success in the federal courts, the avenue would seem clear for the successful maintenance of a declaratory judgment action by any qualified voter of the state of Indiana in the courts of that state.[94] The purpose of the action would be to have the apportionment act of 1921 declared unconstitutional, in that it is obsolete and no longer provides that equality of representation contemplated by the relevant provisions of the Indiana Constitution.[95] Should the court find the act unconstitutional as alleged, the next legislature would presumably be elected under the provisions of the 1915 apportionment, the latest act whose constitutional validity would not have been questioned.[96] The legislature thus elected would be free to take action on the subject of apportionment; in fact, they might even be encouraged to do so, for the way would otherwise seem open to a cycle of actions and the concomitant falling back on the latest non-invalidated act until the limit set by the court was reached and the legislature found itself districted according to the provisions of the act of 1885.[97] It seems extremely unlikely that the General Assembly would sit idly by and let such a possibility become reality.

The possible solution just outlined would be subject to none of the disabilities inherent in a mandamus type remedy. Nor would this solution be afflicted with the crippling political question aspect fatal to the actions brought in *Colegrove* and other cases. Yet several obstacles litter the path of such a proposed cause of action. In the first place, the language of the *Brooks* case limits the right to bring an action of this type to a voter who was qualified under the constitutional provisions at the time of the passage of the act which is attacked.[98] Read literally, this would seem to limit standing to bring the action suggested to those voters who were qualified at the time the 1921 act was enacted. Looking at the same language with a broader perspective, however, enables one to make a strong inference that the court would not construe those terms so literally. The fact that the *Brooks* case arose only one year after the passage of the apportionment act therein attacked may partially account

94. IND. ANN. STAT. §§ 3-1101-16 (Burns 1946).

95. Admittedly the more conservative route would be to adhere to the procedures utilized in the earlier Indiana cases, *i.e.* an action for mandate directed at county election officials, the merits being decided by the state supreme court on the inevitable appeal. Since the court has said that relief under the declaratory judgments act cannot be had where another established remedy is available, Hinkle v. Howard, 225 Ind. 176, 73 N.E.2d 674 (1947); Brindley v. Meara, 209 Ind. 144, 198 N.E. 301 (1935), the more conservative route might prove more prudent as a practical matter. In either case, the result would theoretically be the same, *i.e.*, invalidation of the 1921 apportionment act.

96. Ind. Acts 1915, c. 181 (house of representatives); c. 153 (senate).

97. See discussion and text at note 78, *supra.*

98. See discussion and text at note 76, *supra.*

for this unfortunate choice of language by the court. Certainly the interpretation of the state constitution found in the *Parker* case militates against any conclusion other than the proposition that every voter qualified to vote under the act complained of has standing to seek its invalidation by means of a declaratory judgment action.

Another obstacle is presented by the fact that the language of the opinions indicates that the Indiana Supreme Court has heretofore considered the validity of apportionment acts only with respect to their compliance with the policy of the state constitution at the time of their enactment. This is doubtless due in large measure to the fact that all but one of the actions cited *supra* were brought within a relatively short time after the enactment of the statute which they were attacking. But the significance of this particular inquiry lies in the fact that it presents the question of whether the court would invalidate a statute which complied with the equality of representation policy of the constitution at the time it was enacted but which subsequently fails to comply due to a shift in distribution of population occurring after its enactment. The problem thus created is pointed up by the Illinois case of *Daly v. Madison County.*[99] There the plaintiffs, citizens and taxpayers of Madison County, Illinois, sued for an injunction to restrain the expenditure of public moneys for congressional election purposes. Defendants named were the county of Madison and the county clerk, county treasurer and county auditor of that county, as well as the secretary of state, auditor of public accounts and state treasurer of the state of Illinois. The complaint alleged that the Illinois Congressional Apportionment Act of 1901, by reason of changes in the population of the districts therein, violated various provisions of the state and federal constitutions as well as certain acts of Congress under the existing distribution of population. The resulting inequality of representation, it was alleged, rendered the act void and the expenditure of public moneys for an election pursuant to its terms unlawful. The Supreme Court of Illinois affirmed a dismissal of the petition. The court reasoned that *Wood v. Broom* removed any statutory requirements that congressional districts have substantially equal populations; that the 14th Amendment to the federal constitution did not guarantee such equality; that the states were therefore free to district as they chose for congressional purposes. Moreover, the court held that the cited provisions of the Illinois Constitution regarding freedom and equality of elections were primarily addressed to the legislature and that the suit therefore involved a political question in which the courts would not intervene. It was upon this basis that the court held the

99. 378 Ill. 357, 38 N.E.2d 160 (1941).

1901 act could not be rendered invalid by changes in population that occurred after its enactment when initially it had been validly enacted.

This case can be readily distinguished from the suggested possibility in Indiana. First, the action in the *Daly* case was brought to correct congressional and not state legislative apportionment. Consequently, the petitioner failed to carry the burden of showing a standing to sue, since he could not show any right to equality of representation. On the other hand, every voter of Indiana has the requisite standing for declaratory relief from an apportionment act which denies him equality of representation in the state legislature. Finally, the relief sought in the *Daly* case included an injunction against a portion of the executive department of the Illinois state government, a level of government coordinate with that of the court. This clearly invades the realm of the political question. No such invasion would occur in the hypothesized Indiana action. There the relief would be strictly declaratory. Admittedly it might be supplemented by process enjoining county election officials from proceeding to hold an election under the 1921 apportionment.[100] But this supplementary process would be directed at an inferior level of government and thus not circumscribed by the political question anathema. Finally, there is in the constitutional provisions and supreme court decisions of Indiana a policy favoring equality of representation in the legislature that provides for invalidation of an apportionment act which denies equality because of changes in the distribution of population occurring after its enactment. Though not literally stated in the constitution, this policy can be inferred from the specific constitutional provisions and the court decisions thereon that were noted above.

In the *Denney* case the Indiana Supreme Court held that only one valid apportionment may be made in one six year period. Thus the legislature may not pass another valid apportionment until six years have expired regardless of whether a shift in population occurs during that period which renders the valid act passed at the beginning of the period ineffectual in providing that equality of representation contemplated by the constitution. It follows from this that if an aportionment act was valid at the time of its enactment it would likewise not be subject to invalidation by court action until the six year period had elapsed and the legislature had thereby been given an opportunity to correct any inequities by legislative action. On the other hand, once this six year tolling period has run, and the legislature, despite its opportunity to correct the situation, has failed to do so, a different picture is presented. Here one would seem to be able to analogize the inaction of the legislature to an

100. IND. ANN. STAT. § 3-1108 (Burns 1946).

"implied reenactment" of the now outdated act. Since the tolling period has run on the act, it would seem open to judicial attack just as it would be were the legislature to formally reenact it without making any attempt to correct the inequities resulting from the intervening shift in distribution of population. Since no formal reenactment has occurred, however, the six year tolling period for the initiation of any action would no longer seem effectual. Thus, once the initial six year period has lapsed the act would seem open to judicial attack based on any shift in population distribution *at the time* that such a shift can be shown to have occurred. The end result of this reasoning is that the 1921 Indiana apportionment act is open to judicial attack by declaratory judgment on the basis of any shift in distribution of population that has occurred either between 1921 and 1927 or at any time thereafter.

Conclusion

The Indiana Constitution provides that the state legislature shall reapportion itself every six years. No reapportionment has been made by the General Assembly since 1921. This indicates that if compliance is to be had with the constitutional directives, the task cannot be left to the initiative of the legislature. Thirty-six years of inaction should be enough to establish this as a patent fact. Remedy via the ballot box by an expression of mass public indignation is highly unlikely. The political system, once afflicted with "rotten boroughs," tends to perpetuate them. The shortcomings of human nature make such a remedy, however ideal, highly impracticable. Since the legislature controls the formulation of constitutional amendments, remedial action by that means is similarly impracticable. Resort to the judiciary through remedies affording either direct or indirect compulsion is not practicable. The undesirability of embroiling the judiciary in political questions establishes the impossibility as well as the impracticality of these remedies. Thus, the legislature seems well insulated on all sides from any forces desiring an abandonment of its long record of inaction on apportionment. Despite this insulation from judicial attack in the form of compulsive relief, the present state of Indiana law offers the possibility that the legislature could find itself districted by an act more ancient than that enacted in 1921. An action brought in the Indiana courts asking that the 1921 districting act be declared unconstitutional seems the only feasible way in which an Indiana voter may seek relief from the reluctance of the legislature to obey its constitutional mandate. Such an action would not embroil the judiciary in controversies that render other more direct remedies infeasible, since the courts would not be attempting to compel the legislators to do anything. On the contrary, the court would be

merely performing its duty of pronouncing upon the validity of a given statute. Admittedly, the end result of this course of action may be the districting of Indiana in accordance with the provisions of the 1885 districting act. It is submitted, however, that neither the conscientious legislators nor the alert voters of Indiana will permit such a possibility to become a reality.

CRIMINAL CONTEMPT: VIOLATIONS OF INJUNCTIONS IN THE FEDERAL COURTS

The courts' power of contempt has been one of the most hated and feared remedies known to our legal system. This is chiefly due to the awful potential which is inherent in a system that allows the judge, one instinctively pictured as an impartial arbiter of justice, to become a prosecutor in greater or lesser degrees depending on the nature of the contempt.[1] Other factors contributing to the potential power of the court are the possibility of penal sanction and the relaxation of the usual pro-

1. Where contempt is committed in the presence of the court, the offender may be summarily tried and punished by the judge acting on his own motion. FED. R. CRIM. P. 42(a). This is often referred to as direct contempt.

In criminal contempt committed outside the actual presence of the court, such as disobedience of injunctions, the judge may decide if contempt proceedings are to be initiated. This function is analogous to the discretion of a prosecutor in initiating criminal prosecution. FED. R. CRIM. P. 42(b). Criminal contempt committed outside the actual presence of the court need not be prosecuted by a United States attorney. The court may appoint any competent attorney to serve as "prosecutor." FED. R. CRIM. P. 42(b); Cooke v. United States, 267 U.S. 517 (1925); United States v. Lederer, 140 F.2d 136 (7th Cir. 1944); In re Eskay, 122 F.2d 819 (3rd Cir. 1941). This is justified by the reasoning that the incentive to discover this type of injury outweighs the interests of "theoretical" impartiality. But the duty of the prosecutor is to protect the innocent as well as the guilty and this duty may well be slighted where the prosecutor is the attorney who represented the defendant's opponent in the civil suit for injunction. Therefore, the desired impartiality, in this situation, seems to be something more than "theoretical." On the other hand the prosecutor is chosen, either directly or indirectly, by the people and the offense involved is one committed against the authority of the courts which are instruments of the government. Therefore, the courts' inherent power should not extend to the point of displacing one chosen by society to prosecute wrongs committed against it. Judge Learned Hand supports this position in *In re* Guzzardi, 74 F.2d 671 (2d Cir. 1935). However, he later reversed himself and followed the accepted rule that a U. S. attorney is not required to act as prosecutor in criminal contempt cases. McCann v. New York Stock Exchange, 80 F.2d 211 (2d Cir. 1935).

Where the court chooses a private attorney as prosecutor, the judge must immediately enter an order directing the attorney to criminally prosecute the contempt and include a copy of this order in the process papers. Thus the crucial factor is one of notice. The defendant must be notified of the criminal nature of the charges against him. United States v. Lederer, *supra;* McCann v. New York Stock Exchange, *supra;* United States v. Balaban, 267 F. Supp. 491 (N.D. Ill. 1939).

See Note, 25 TULANE L. REV. 266 (1951); Comment, 57 YALE L.J. 83 (1947).