The History of Legislative Apportionment in Maryland

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The Maryland legislature is faced with the necessity of reapportioning both the House of Delegates and the Senate on a population basis as a result of the case of Maryland Committee v. Tawes. This case and the other Reapportionment Cases established the constitutional principle that both houses of all state legislatures must be apportioned on the basis of population. The cases were immediately and universally recognized as instituting a new epoch in state and national governmental affairs. It is, of course, still far too early to assess accurately the final long-term impact of the decisions on American governmental affairs, but this does not preclude a comparison of the requirements of these cases as to apportionment with the historical practices of the other various states. Indeed, an examination of the historical practices with respect to apportionment discloses the invalidity of some of the more prominent defenses advanced in favor of the apportionment practices overturned by these cases. This is true, in particular, of Maryland where the existing apportionment system was vigorously defended on the basis of the "federal analogy".

I. THE COLONIAL PERIOD

Early Maryland history is inextricably intertwined with the fortunes of the Calverts. This association began in 1632 when Charles I granted George Calvert, Lord Baltimore, the land lying between the Potomac and the fortieth parallel. The charter, signed after George Calvert's death, granted to the proprietor:

"... free, full, and absolute power . . . to ordain, make, and enact laws . . . of and with the advice, assent, and approbation of the free-men of the same province, or the greater part of them, or of
Acting under this charter, Cecilius Calvert, George Calvert's son, sent a group of immigrants who colonized Saint Mary's in 1634. It will be noted that this charter did not provide that the freemen would initiate laws but only that they were to ratify legislation proposed by the proprietor.  

The first assembly convened under this charter met in 1635. No record of its proceedings exists. Two years later the second session of the ratifying body, called the General Assembly, was summoned to advise and consult on such matters as were brought before it. Leading citizens were summoned by special writs addressed to them individually. General writs went to the freemen of the hundreds directing them to come in person or to send "deputies or burgesses". If a freeman chose not to go, he was obligated to deputize another by proxy to act in his stead. A fine was imposed upon all freemen who did not appear in person or by proxy. Under such an arrangement there was, of course, no problem of public elections or apportionment of elected delegates among the hundreds. Nor, there being only one house, was there any problem of differing bases of representation for the two chambers. It is not clear how many proxy votes were represented in this 1637 session, but in any event the complaint arose that the governor controlled the assembly through selective summoning of persons to the assembly and through the use of proxies held by himself and the secretary of the colony.

The session in 1638 attempted a first step in dealing with these representational problems by passing a requirement that whenever a general assembly was called, all members of the governor's council were to be summoned and all hundreds were to be issued writs to elect one, two, or more representatives as the freemen should decide.

The question of whether the freemen should be personally present, present by proxy, or represented by elected burgesses proved a troublesome issue for years. Whereas the writs for the 1637 assembly provided for all three methods of representation, the general writs to the freemen for the 1639 session directed the freemen in each hundred to meet and select two or more burgesses to represent them. This did

5. The immediate conflict between the freemen and the proprietor over their relative roles in lawmaking, ending with full legislative powers vested in the assembly, has been chronicled earlier. See Everstine, The Establishment of Legislative Power in Maryland, 12 Md. L. Rev. 99 (1951).
6. The "hundreds" were civil divisions of the province and would correspond today with subdivisions of a county.
7. Newton D. Mereness states nineteen persons held sixty-nine proxy votes, MERENNESS, MARYLAND AS A PROPRIETARY PROVINCE 195 (1901), while Elihu S. Riley states Captain Thomas Cornwall held fifty-six proxies with the number held by other totalling far over sixty-nine. RILEY, HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND 1 (1905). The official records show the number of proxies varied from day to day. 1 ARCHIVES OF MARYLAND 3 [hereinafter cited as 1 ARCHIVES].
8. MERENNESS, op. cit. supra note 7, at 195.
9. 1 ARCHIVES 74.
10. RILEY, op. cit. supra note 7, at 8.
not, however, result in the ending of personal attendance of freemen, for Cuthbert Fennick of Saint Mary's appeared, claimed, and gained admission to the assembly on the grounds he had not assented to the election of the Saint Mary's burgesses.

A point will be noted here that many persons today find almost incomprehensible. The calls for the election of burgesses did not specify the exact number of burgesses to be elected by any hundred, other, usually, than that the number should be two or more, leaving the determination of the exact number to the discretion of the freemen. Nor was it ever consistently made clear whether burgesses had only one vote apiece or held as many votes as cast in their elections, or alternatively, as were cast in their favor. This seemingly inexplicable oversight probably can be attributed to the view current in England at the time that representatives in Parliament, and by extension representatives generally, spoke not for the citizens of the various communities electing them but for the communities, as entities, from which they came. Moreover, every member of Parliament was regarded, to the extent that he might represent citizens, as representing all of the English citizenry.

The fact that the colonists were conversant with the practice in England is shown by a provision of an act adopted by the 1638 session specifying that burgesses should “supply the places of all the freemen consenting or subscribing to such their election in the same manner and to all the same intents and purposes as the Burgesses of any burrough in England in the Parliament.”

In the context of the foregoing view disparities in representation would be of absolutely no moment. This view of representation is reflected in the act adopted by the 1638 session which provided that gentlemen personally summoned, freemen, and burgesses elected by other freemen and so supplying the places of such electing freemen would when summoned and assembled (provided always that there be at least twelve so assembled including the lieutenant general and the secretary of the province) be called the “house of Assembly.” Acts approved by the house, or the “major part of the persons assembled,” and assented to by the lieutenant general in the name of the lord proprietor were to become law. It will be noted that approval required action of a majority of those present, without stating whether they were acting individually as freemen or as elected burgesses.

The call for the session that met in July, 1642, required the freemen in each hundred to assemble and “to make election of one or two Burgesses for every hundred during the said Assembly.” The writ went to the person in charge of each hundred, requiring that he call the election and certify to the lieutenant general those elected burgesses:

11. 1 ARCHIVES 32.
12. See 1 BLACKSTONE, COMMENTARIES *159. Perhaps the explanation of this view best known today is that given by Burke in his letter to Sir Langrishe in 1792 on Ireland and Catholic emancipation. See 4 WORKS 293 (Nimmo’s ed. 1899).
13. 1 ARCHIVES 82.
14. The Governor was from time to time called the Lieutenant General or Lieutenant Governor under the proprietary government.
15. 1 ARCHIVES 82.
16. 1 ARCHIVES 82.
17. 1 ARCHIVES 127.
gesses. It will be recalled that despite the fact that the writs for the 1639 session also called for election of burgesses, Cuthbert Fennick of Saint Mary's was seated as a freeman on the grounds that he had not assented to the election of the Saint Mary's burgesses. In contrast to that earlier episode, when Richard Thompson and Robert Vaughan appeared in 1642 with proxies from the freemen of Kent and claimed admission, they were excluded on the grounds that the writs had called for the election of burgesses. Subsequently, certificates of their election as burgesses were found and they were admitted.\(^\text{18}\)

A smoldering issue, referred to earlier, burst into the open during this session. This was the problem of the relative weight of votes of individual members versus those of the elected burgesses. The claimed passage of a bill specifying what constituted lawful tender was disputed on the grounds that "the voting of this Bill . . . was not by the major part of Burgesses as it ought to be."\(^\text{19}\) The archives show that all present voted in favor of the bill except for eight burgesses. The records for the day show the assembly was "assembled as afore," which, tracing back through the records, indicates the presence of the governor, the secretary, persons summoned by special writs, and ten burgesses, so that only two of the burgesses could have voted in favor of the bill. It was determined that those present formed a house, that all present whether by special writ or as burgesses had a voice, and "that the major part of such voices present and such as they were to be Proxies for was to be judged the vote of the house."\(^\text{20}\)

As has been noted several times, when a call went out for a session of the assembly, not only were there general writs for the election of burgesses from the hundreds, but also there were special writs calling for the attendance of named individuals. As long as the governor could issue such personal writs he was in a position to name a controlling majority in the assembly. Consequently, Robert Vaughan, the same gentlemen initially refused a seat at the start of the session, requested in the name of all the burgesses that the assembly be split into two chambers composed of those personally summoned and of the burgesses, the burgesses to have a negative over the actions of the chamber composed of those individuals personally summoned.\(^\text{21}\) The Lieutenant Governor refused.

Although the writs to the freemen for the July, 1642, session, provided only for their representation through elected burgesses, the writs for a session in September of that same year called for the freemen to be at the assembly "either by themselves or their Deputies or Delegates."\(^\text{22}\) Many appeared by proxy.

A session of the assembly was called for 1646, but no summons went out to the freemen requiring their appearance either in person or by proxy. The records for the session, held at St. Inigoe's, bear the heading "In the upper howse [sic]."\(^\text{23}\) Since the freemen were not

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18. 1 Archives 129.
19. 1 Archives 141.
20. 1 Archives 141.
21. 1 Archives 130.
22. 1 Archives 167.
23. 1 Archives 209.
summoned, this amounted to an *ad hoc* division of the assembly into upper and lower bodies. The reference to the "upper howse" is the first mention of an actual division of the assembly into two chambers.

The call for the session in 1647 required that the inhabitants of the province should attend in person, by proxy, or by delegates. When the session convened the freemen jointly and unanimously protested against all laws enacted at the previous St. Inigoe's session on the grounds of that session's unlawfulness "*ffor want of due Summoning the freemen of the Province by a lawful authority.***" The lieutenant governor overruled the protest, declaring the 1646 assembly and all of its acts valid, even though apparently passed only by the "upper howse".

A measure passed by the 1647 session listed the freemen present and their proxies and provided that acts passed by "the said freemen or the major part of them" and enacted by the governor would become law. There was no mention of an upper house.

The 1650 session of the assembly proved a milestone in several respects. The call for the assembly was unusually complex. In addition to the customary special writs summoning designated individuals, the freemen were required to attend in person, by proxies, or by delegates. No freeman was to have over two proxies in addition to his own vote. Alternatively, the freemen of any hundred could chose burgesses if a majority of the freemen in the hundred so agreed. If burgesses were used, St. Clement's and St. Mary's were to be allowed one each; St. George's, St. Inigoe's, and St. Michael's one or two each; and Newtowne two or three. The freemen of St. Mary's petitioned the governor to be allowed to chose two burgesses, alleging that St. Mary's was the most ancient hundred and the first seated in the province under his Lordship's government. The petition was granted.

An act unanimously passed by the session and signed by the governor divided the assembly into upper and lower houses, the upper house being composed of the governor, the secretary, and one or more of the Governor's Council and the lower house being composed of any five or more burgesses, individually named in the act.

Until 1654 the unit of representation for burgesses was the hundred. In 1654 the proprietary government was replaced by Puritan Commissioners who changed the unit of representation to the county, where it has remained ever since. The assembly also reverted to a unicameral body for that session and for the succeeding session in 1657, returning again to bicameral body with the restoration of proprietary government in 1658.

It is well to recapitulate at this point the practices that had become established. The hardships imposed by compulsory attendance of all freemen, either in person or by proxy, at assembly sessions had been relieved by allowing attendance through delegates or elected burgesses, as specified in the writs for the individual sessions. The assembly had become bicameral. In the Upper House the members were summoned.

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24. 1 Archives 221.
25. 1 Archives 215.
26. 1 Archives 259.
27. 1 Archives 260.
28. 1 Archives 272.
by special writ and represented no geographical or political unit. In the Lower House the unit of representation was the county. The number of representatives per county had not become settled. Indeed, in the 1661 session the Lower House asked for an explanation of how the elections were conducted, saying it did not understand the procedure. The Upper House—acting in its executive role as governor and council rather than in its legislative role—explained that the decision as to the number of delegates for each county was left to the discretion of the sheriff of each county. The sheriff proclaimed the election of burgesses and the number to be elected. He could prevent electors from voting or elected burgesses from serving.29

By exercise of these powers to return large numbers of burgesses from counties favoring the administration it was possible to control the actions of the Lower House. The Lower House made an attempt in the 1661 session to end this possibility. A law enacted in that session gave to the electors of each county the right to decide the number of burgesses to be elected to represent them. Being summoned to the actual legislative session is now regarded as the inevitable result of being elected as a representative. Logically, however, the two are discrete and separable events. The governor countered the electors' control over the number of delegates by beginning the practice of summoning only part of those elected. For example, in the 1776 session the Lower House inquired why all the delegates were not summoned from Kent, Dorchester, and Somerset. The answer was that it was not desirable to burden these "poor and new erected Countys with more delegates than formerly they used to have."30

In the 1676 election the sheriffs were authorized to have four delegates selected from each county. Only two delegates, however, were summoned from each county to sit in the assembly.31 The governor was petitioned thereafter that a fixed number of delegates be elected and that they all be summoned to each assembly session. The governor, perhaps mindful of Bacon's Rebellion in Virginia and of similar unrest in Maryland, agreed.32 In the next session, in 1678, all four delegates were summoned from all the counties. An act of that session required the election of four delegates per county and that all delegates attend each session without waiting for or the need of a summons to attend the sessions.33

Despite the 1678 law the sheriffs were instructed in 1681 to have only two delegates elected in each county. The Lower House protested, but to no avail. In 1682 Lord Baltimore addressed the Assembly in person, saying that due to the frequent assemblies he thought it necessary to reduce expenses by summoning only two delegates from each county.34 The Lower House responded by sending the Upper House a bill allowing the freemen of each county to decide whether

29. RILEY, op. cit. supra note 7, at 32.
30. Id. at 48.
31. 7 ARCHIVES 118.
32. MERENESS, op. cit. supra note 7, at 201.
33. 7 ARCHIVES 60.
34. 7 ARCHIVES 334.
to have two, three, or four delegates. Lord Baltimore refused to give
the freemen this discretion. Finally in 1683, when resolution of the
dispute had proved unattainable, the Lower House gave up the struggle.

The situation continued unchanged until the province came under
royal government. Then, in the 1692 session, the assembly directed
the election of four delegates and guaranteed each county's right to
full representation at every session.\(^5\) Thenceforth, for the remainder
of the colonial period, the representation of the counties remained fixed.
The only other noteworthy event during this period was giving the
Lower House the title of "House of Delegates" in 1695.

The colonial period thus saw a transition from required direct
participation of all freemen in the legislature, to representation by
proxy or by delegate, to final representation by elected burgesses. The
basis of representation started on a pure one vote per freeman and
ended on a basis of four representatives per county without regard for
county populations. The principle also became established that all
elected representatives were to be summoned to assembly sessions. The
practice of electing the same number of representatives from all counties
but summoning only part of them could have given rise, if continued,
to problems paralleling those of apportionment. The firm establish-
ment of equal representation of all counties obviated the need to con-
sider apportionment problems.

II.

THE 1776 CONSTITUTION

The American Revolution destroyed the Charter as a valid basis
for governing Maryland and led directly to the adoption of the consti-
tution of 1776. This constitution provided for a House of Delegates and
a Senate, neither of which was apportioned on the basis of population.

The House of Delegates was founded on the basis of equal repre-
sentation of counties, each county being entitled to four delegates.\(^6\)
But this equality was qualified, for Baltimore City and Annapolis were
given the right to elect two delegates. In the case of Baltimore, there
was a provision that if the number of persons in Baltimore having the
suffrage should fall below one-half the number of voters in the least
populous county of the state for seven successive years, than Baltimore
was to cease sending its two delegates until it again had a voting popu-
lation of more than one-half of the smallest county.\(^7\) The 1776 con-
stitution thus did admit, to a slight degree, the relevance of population
to representation in the House of Delegates.

Present day attacks on malapportionment sometimes speak of
malapportionment as giving in effect multiple weight to the votes of
favored electors. The possibility of actual multiple votes was created
by the provisions of the constitution allowing Baltimore City and
Annapolis to elect two delegates, for each of these cities was an in-
tegral part of the county in which it was located. Article VI of the

\(^{35}\) 13 ARCHIVES 541.
\(^{36}\) Md. Const. art. II (1776).
\(^{37}\) Md. Const. art. V (1776).
constitution eliminated these possibilities of multiple voting with respect to Baltimore City by excluding the city voters from participation in the county elections. It was different with respect to Annapolis, however, where under article IV city voters could also participate in the Anne Arundel county elections — and thus vote twice for delegates — provided they had a freehold of fifty acres of land in the county distinct from any property holdings in the city.

Representation in the House of Delegates under the constitution of 1776 was thus based on a confusing mixture of principles: equal representation for the counties, as counties, augmented by one-half representation for Baltimore City and Annapolis, but contingent for Baltimore upon a minimum population ratio. Undue weight for these city voters was to be avoided by excluding them from the election of county delegates unless, in the case of Annapolis, minimum property qualifications in that part of the county outside of the city were also met.

Although not apportioned according to population on a statewide basis, the delegates to the lower house from each county were subject to popular control within that county. The 1776 constitution sought to prevent any degree of popular control, even at the county level, over the Senate by providing for its indirect election. This was accomplished by allowing each county to elect by popular vote two senatorial electors, Baltimore City and Annapolis being allowed to elect one such senatorial elector each. The senatorial electors were then to elect fifteen senators, nine to be residents of the western shore and six residents of the eastern shore.

An amendment in 1810 ended the right of those residents of Annapolis who owned fifty acres of land in Anne Arundel County outside of the city to vote in both the city and the county, thus terminating Maryland’s only experiment with multiple voting.

The delegates to the General Assembly and the senatorial electors were, of course, not apportioned by population. This was not too serious at first for the state’s population was not distributed grossly unevenly and there were no great population concentrations in the cities. By 1790 the most populous county, Baltimore, had about five times the population of the least populous county, Allegany, but twelve of the nineteen counties, and Baltimore City, still fell into a rather restricted common population range — 10,000 to 20,000 persons. By 1812 the political effects of different population growth rates in the counties could be easily seen. In that year the Democrats had a statewide majority of over 2,000 votes, but the Federalists, strong in the overrepresented counties, had over a 2–1 majority in both the House of Delegates and the Senate.

In succeeding years, as the situation worsened, reapportionment measures were defeated in the General Assembly. These reapportion-

38. Md. Const. art. XIV (1776).
40. Md. Const. art. XV (1810).
41. Population figures throughout this article are from the decennial censuses of the United States. Other sources are specifically cited when used.
ment measures would primarily have benefitted fast-growing and greatly underrepresented Baltimore City, which was distrusted because of its urban nature, size, and immigrant background. By 1836 less than one-fourth of the population of the state, located in the smaller counties, was able to elect a majority of the senatorial electors, and thus all of the Senate, as well as a majority of the House. The repeated demands for reform culminated in this year in a bipartisan reform convention which met in Baltimore to seek election of legislators pledged to reapportionment. The attempt did not succeed, in part because the smaller counties were largely controlled by the Whigs while the Democrats were stronger in the more populous counties. In the 1836 senatorial college election, held in September, the Whigs selected twenty-one electors and the Democrats nineteen. Since it took twenty-four senatorial electors to constitute a quorum in the electoral college, and since all reform efforts, culminating in the reform convention, had been rebuffed, the Democrats refused to attend unless the Whigs conceded to them eight Senate seats, a majority of the fifteen senators. A letter from the Democratic electors to the Whig electors explained their position:

"Of the nineteen counties and two cities, into which the State is divided, we represent the two cities and eight of the counties, having a white population of 205,922 and federal numbers of 267,669. You represent ten of the counties, having a white population of 85,176 and federal numbers of 138,002; and the vote of the remaining counties is divided. . . . we represent nearly three-fourths of the free white population, and two-thirds of the Federal numbers of the State, and very much the largest portion of its territorial extent and wealth. . . . The counties and cities we represent ought to have, upon any political principle which governs the appointment of members of a Legislature, a majority of the Senate to be formed."

The letter went on to recall the fruitless efforts for reform and stated that it would be better if "the legislative functions of the government should cease for a session," then five years, than to have continued "that oppressive dominion of a small minority over the majority, which has been so long reluctantly endured by the people of Maryland."

The Whigs refused the demanded reform and the Democratic electors, true to their pledge, boycotted the electoral college and thus prevented the selection of a Senate. This extra-constitutional situation threw the state into political turmoil. How the state would have reacted to a five year hiatus in legislative action we can only speculate, for in the November elections to the House of Delegates five counties that had elected Democratic senatorial electors chose Whigs for Dele-

43. Under Art. 1, Sec. 2, Clause 3, of the U.S. Constitution, representatives in the House of Representatives were to be apportioned among the States "according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."
44. RILEY, op. cit. supra note 7, at 341.
45. Id. at 343.
gates. The senatorial electors from these counties took the November election to be a popular repudiation of their stand and subsequently met with the Whig electors, giving a quorum and permitting the election of a Senate.

The Democrats, although they lost their attempt to prevent election of a Whig Senate, had so dramatized the situation and their potential power, if unappeased, to sabotage governmental action that electoral reform in 1837 was both inescapable and far-reaching. In this reform the indirect election of Senators was abolished, being replaced by direct popular election of one Senator from each county and Baltimore City. The 1837 amendments also provided a temporary reapportionment of the House of Delegates pending a permanent reapportionment to follow the next census. For the interim period Baltimore City, Baltimore County, and Frederick County were each to have five delegates; Anne Arundel, Carroll, Dorchester, Harford, Montgomery, Prince George’s, Somerset, Washington, and Worcester counties four delegates: Allegany, Calvert, Caroline, Cecil, Charles, Kent, Queen Anne’s, Saint Mary’s, and Talbot counties three delegates; and Annapolis city one delegate.

The permanent reapportionment to follow the 1840 census was explicitly based on population. According to the permanent formula each county was to have representation based on its federal numbers as follows:

Under 15,000 - - - - - - 3 delegates
15,000 but less than 25,000 - - - 4 delegates
25,000 but less than 35,000 - - 5 delegates
Over 35,000 - - - - - - 6 delegates

Baltimore City was to have as many delegates as the county with the largest representation on the above basis. A saving clause kept any county’s representation from being reduced below that provided by the “temporary” apportionment.

In 1840 Frederick was the largest county with 36,405 inhabitants, and a federal number just under 35,000, while Baltimore City had 102,313. Both of these consequently had five delegates, less than double the three delegates assigned to Caroline County with 7,806 inhabitants.

The sum total of the 1837 amendments was a distinct step forward however. Prior to then the counties had been represented equally in the House and in the Senate electoral college. The 1837 amendment shifted equal representation of the counties from the House to the Senate and introduced a weighted population basis for apportionment of the House. The full impact of the weighting formula could not be foreseen however. In 1840, when the weighted basis of representation was first implemented, a delegate from Baltimore City represented more...
than 7.9 times as many persons as a representative from Caroline County. Within one decade the situation changed materially. By 1850 Caroline County's population had grown by slightly less than 2,000 to a total of 9,692 persons. By contrast, Baltimore County had grown by over 9,000 to 41,592; Frederick County by over 4,000 to 40,987; and Baltimore City by over 66,000 to 169,054. Under the 1837 apportionment formula, however, Caroline County continued with three delegates while Baltimore City was given six delegates, so that a representative from Baltimore City represented 8.7 times as many persons as a delegate from Caroline County. Moreover, the differential growth rates of the counties and of Baltimore City was continuing so that the situation could only be expected to worsen rapidly. In this setting the question of framing a new constitution was put to a popular vote, and approved, in 1850.

III.

THE 1851 CONSTITUTION

With the calling of a constitutional convention in 1850 it was inescapable that it would have to devote serious attention to the apportionment problem. The delegates to the convention from Baltimore City and from the larger counties attempted to have the House of Delegates based on population. Thus Mr. Presstman, from Baltimore City, who favored a strict population basis for both the House of Delegates and the Senate but realized that this was politically impossible at the time, proposed that the House be strictly based on population with a mixed basis for the Senate. 49 The debates revealed a strong distrust of Baltimore City and an even stronger disinclination to accord it representation proportional to its population. 50 After all, it was argued, the state had prospered ever since early colonial days even though the counties had had equal representation in the House, and this was visible proof that representation did not need to be based on population at all. Furthermore, Baltimore City was the heart of Maryland so that the continued prosperity of Maryland required the continued prosperity of Baltimore, giving the counties a direct incentive to protect the city's welfare so that the city had no need to look after its own interests. It was also claimed that since Baltimore had economic dominance in the state, the counties should have political dominance as a counterforce. Aside from these practical arguments, the basic idea of representation according to population was attacked for giving insufficient protection to the minority and opening the gates to the tyranny of the majority. Other contentions were not placed on so lofty grounds. Thus the less populous slaveholding counties fought increased representation for Baltimore City for their own self-protec-

49. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION, 1851, p. 122 (M'Neir's ed. 1851).
50. Id. at 133 ff.
tion, while the right of Baltimore City to representation was attacked on the grounds that the city was full of immigrants ignorant of democratic practices and inclined toward mob violence. In the end, the proposal to base the House of Delegates strictly on population was defeated.\textsuperscript{51}

The campaign to put representation on the basis of population was not without important results, for the convention went on to draft a constitutional provision, which was eventually ratified, empowering the legislature to reapportion the House of Delegates after each decennial census on the basis of population within the restrictions that no county should have less than two delegates, that Baltimore City — which was made independent of Baltimore County — should be restricted to four more delegates than the most populous county (although it was already over four times more populous than the most populous county), and that the whole number of delegates should not be less than sixty-five nor more than eighty.\textsuperscript{52}

Further, in determining population, slaves were to be counted as full persons even though this was vigorously opposed by the Baltimore representatives who found it especially objectionable after the representation of that city had been arbitrarily limited.\textsuperscript{53} The 1837 reform with respect to the composition of the Senate was carried forward unchanged. Each county and Baltimore City was given the right to elect one Senator.

For the interim period of over ten years until the results of the 1860 census became available, the following temporary apportionment was provided: Baltimore City, 10 delegates; Baltimore and Frederick Counties, 6 delegates each: Washington, 5 delegates; Allegany and Somerset, 4 delegates; Anne Arundel, Carroll, Cecil, Dorchester, Harford, Prince George's, and Worcester, 3 delegates; and Calvert, Caroline, Charles, Howard, Kent, Montgomery, Queen Anne's, Saint Mary's, and Talbot, 2 delegates.\textsuperscript{54} This interim apportionment was itself a significant step forward. Whereas before the 1851 constitution a representative from Baltimore had represented 8.7 times as many persons as a representative from Caroline, the temporary apportionment reduced this ratio to 5.2.

The permanent apportionment systems provided by the 1851 constitution had an extremely serious weakness. This was the provision that restricted the size of the House of Delegates to a maximum of 80, guaranteed each of the twenty-one counties at least two delegates, and limited Baltimore City's representation. The continued uneven growth of population — for example, from 1850 to 1860 Caroline County increased its population by less than 1,500 while Baltimore City increased its population by over 43,300, the increase alone in Baltimore's population being about four times as much as Caroline's total population — made inevitable serious distortion of the basic provision that House seats should be apportioned according to population. This weakness of the 1851 constitution did not have time to develop, though, for the permanent apportionment provisions took effect only when the results of the 1860 census became available.

\textsuperscript{51} Id. at 118.
\textsuperscript{52} Md. Const. art. III, sec. 3 (1851).
\textsuperscript{53} M'Neir, }\textit{op. cit. supra}} note 49, at 297.
\textsuperscript{54} Md. Const. art. III, sec. 3 (1851).
IV.

THE 1864 CONSTITUTION

The Civil War broke out in January 1861. Although the Maryland legislature voted against secession, there was strong popular support for the Confederate cause. As a consequence the Union army occupied Maryland in order to ensure its continued adherence to and support of the Union. The military sought to translate its domination of the state into a corresponding political domination of the unionist forces. Consequently, "test oaths" of allegiance were imposed as a condition for voting while recalcitrant legislators were imprisoned. The effect of these and other measures was to weaken the political power of the smaller and southern oriented counties.

The changed political orientation of the state, the problems resulting from the war, and a desire to perpetuate the dominant forces in power, led to the calling of a new constitutional convention in 1864. The convention conducted an extensive debate on the proper basis of representation in the legislature. There was vigorous controversy over a proposal that the legislature should be structured on the federal analogy — representation in the House of Delegates being based on population while the counties were given equal representation in the Senate. In opposition it was contended that Baltimore City was not entitled to such representation, a large proportion of its population being rootless or "floating" without the stability essential to assumption of civic responsibilities. Specific objection was made to counting aliens in determining the representation Baltimore was entitled to, the objection extending to the counting of the "foreign born", even if naturalized.

All of the opposition from the smaller counties was not of such a nature, however. The representatives from Prince George's, a medium sized county at the time, were opposed to full representation for Baltimore not because of the number of delegates that Baltimore would be entitled to but because they were elected from multimember districts rather than single member districts: "The danger . . . all the smaller counties have to fear, is not in the number of representatives Baltimore is entitled to send here, but the fact that by the constitution of the State they are organized into a great political unit." An even more telling consideration, however, was that United States Senators were elected by the State legislatures, in accordance with Article I, Section 3, of the United States Constitution. Giving Baltimore full representation in the House would have given the city at least a veto on the selection of the State's senators.

The convention solved the apportionment problem by dividing Baltimore into three legislative districts and providing for the election

57. Id. at 1037.
58. Id. at 1044.
59. MD. CONST. art. III, sec. 2 (1864).
of delegates, on a weighted basis, from each of these districts and the counties as follows:

For each 5,000 population, or fraction thereof greater than one-half, 1 delegate until a total of five delegates was reached.

For the next 20,000 population, or fraction thereof greater than one-half, one delegate.

For each 80,000 population thereafter, or fraction thereof greater than one-half, one delegate.

It will be noted that this formula broke new ground in Maryland for it was the first apportionment formula that put no upper limit on Baltimore's representation. Conversely, the districting and the weighting ensured that the city would not dominate the House of Delegates.

Having weighted representation in the House, the convention sought to recompense Baltimore to a limited extent by giving it extra representation in the Senate where domination by the city was not even a remote threat. This was accomplished by allowing the city to elect one senator from each of its three legislative districts. Thus, having expressly rejected the federal analogy, the convention consolidated its position by refusing to establish the House on a strict population basis while simultaneously introducing a population factor into the Senate by giving Baltimore City multiple representation.

Closely tied to the question of the proper basis of apportionment of the legislature was the issue of whether Negroes should be included, as they were under the 1851 constitution, in the population counts used for determining apportionments. At the time of the 1864 constitution, the thirteenth amendment to the Federal Constitution abolishing slavery had not yet even been proposed by Congress. The 1864 constitution, though, in Article 24 of the Bill of Rights, abolished slavery within the state. Having adopted the provision to abolish slavery, the convention refused to count any Negroes, even free Negroes, for apportionment purposes. As in 1851, the issue involved was basically not the rights of Negroes as such, but the relative power of the rural slaveholding counties versus the more populous counties and Baltimore City where slaveholdings were relatively unimportant. The reversal from 1851 on counting Negroes was a direct result of the weakening of the southern oriented counties referred to earlier.

61. It also ensured that Baltimore would not control the election of Maryland's U.S. senators. In 1866 an act of Congress required that any failure of the two houses of a state legislature to agree on a choice for U.S. senator be resolved through an election conducted in a joint session of the two houses. Had the House of Delegates been apportioned on the basis of population, the Baltimore delegation would have controlled the senatorial elections. 14 Stat. 243 (1866).
64. For example, Baltimore City with almost ten times the population of Prince George's County had less than one-fifth of the number of slaves in that county.
As with previous reapportionments, the reapportionment provided by the 1864 constitution was to take effect only after the next census.\textsuperscript{66} For the interim period a temporary apportionment was again provided: Baltimore County, Frederick County, and the three districts in Baltimore City, 6 delegates each; Allegany, Carroll, and Washington, 5 delegates; Cecil and Harford, 4 delegates; Somerset and Worcester, 3 delegates; Anne Arundel, Caroline, Dorchester, Howard, Kent, Montgomery, Prince George's, Queen Anne's, and Talbot, 2 delegates; and Calvert, Charles, and Saint Mary's, 1 delegate.\textsuperscript{66} Assessing this temporary apportionment on the basis of total population, rather than white population, an astounding result appears. Baltimore with eighteen delegates and a population of 212,418 had 11,801 persons per representative. Calvert, Charles, and Saint Mary's Counties had 10,447, 16,517, and 15,213 inhabitants for their single representatives, respectively. Thus on a total population basis, Baltimore was approximately equally represented as compared to the least populous counties, a situation that never has occurred before or since.

V.

The 1867 Constitution

With the close of the Civil War and the ending of the Union Army occupation of the state, demand for revision of the 1864 constitution became irresistible. Accordingly, in 1867, another constitutional convention was called. In contrast to the long debate on apportionment in the 1864 convention, the 1867 convention spent less than a day on the subject. The composition of the Senate was continued unchanged, confirming the added representation for Baltimore City. It was different for the House of Delegates, for limitations were again placed on the total representation that could be given to Baltimore City or to any county. This was accomplished by the following weighted apportionment formula:

For each county not exceeding 18,000 population, 2 delegates.
For each county over 18,000 but less than 28,000 population, 3 delegates.
For each county of 28,000 but less than 40,000 population, 4 delegates.
For each county of 40,000 but less than 55,000 population, 5 delegates.
For each county of 55,000 or more population, 6 delegates.
For each legislative district in Baltimore City, no more delegates than the number held by the most populous county.\textsuperscript{67}

\textsuperscript{65} Since it was replaced by a different apportionment formula in the 1867 constitution, it never took effect at all.
\textsuperscript{66} Md. Const. art. III, sec. 4 (1864).
\textsuperscript{67} Md. Const. art. III, sec. 4 (1867).
As before, an interim apportionment was provided until the next census could be taken and the permanent apportionment plan implemented. The interim apportionment plan gave each of the legislative districts of Baltimore City, Baltimore County, and Frederick County, 6 delegates each; Allegany and Washington, 5 delegates; Carroll, Cecil, and Harford, 4 delegates; Anne Arundel, Dorchester, Montgomery, Prince George's, Somerset, and Worcester, 3 delegates; and Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, Saint Mary's, and Talbot, 2 delegates. It will be noted that this temporary apportionment was basically the same as that provided by the interim apportionment under the 1864 constitution, except that representation for the smaller counties was doubled from one delegate to two delegates, ending Baltimore City's equality in representation ratios.

The 1867 constitution has, of course, continued in effect until the present time, but with significant amendments insofar as apportionment is concerned. A constitutional amendment, ratified in 1901, gave Baltimore City a fourth legislative district, but Baltimore's population had almost doubled to 508,957 since the permanent apportionment formula had gone into effect following the 1870 census. Relatively speaking, the city with 43% of the total state population, had lost ground, even after the amendment, from where it stood in 1870.

In 1918 provision was made for expansion of the territorial size of Baltimore to its present boundaries. In 1920 Baltimore's population reached 733,826, an approximate 50% increase since 1900 when the city acquired its fourth legislative district, giving the city 51% of the total state population. The gross disproportionment between the city's size and its representation led to an extensive campaign to increase its representation. This succeeded in 1922 when the city was given two more legislative districts.

The amendments of 1901 and 1922, however, merely ameliorated some of the consequences of the 1867 apportionment formula. They did not strike at the roots of the problem, the weighted formula for apportionment and particularly the limitation on maximum representation for the counties and the legislative districts in Baltimore City. Thus as the smaller counties gained slowly in population, they were entitled to substantial increases in their representation in the House of Delegates. For instance, between 1940 and 1950 Caroline County's population increased by 685 persons to a total of 18,234, entitling it to three instead of two delegates, a 50% increase in representation. Similarly, a total population increase of less than 25,000 entitled Carroll, Cecil, Charles, and Howard Counties to a total of four more delegates while an increase of approximately 440,000 in Baltimore City and Anne Arundel, Baltimore, Montgomery, and Prince George's Counties did not entitle them to any increase in the number of their delegates. To prevent such losses in the relative strength of the more

68. Md. Const. art. III, sec. 3 (1867).
70. Md. Laws 1918, ch. 82, at 135.
populous counties and Baltimore City, a constitutional amendment was adopted in 1950 freezing the House of Delegates in its existing size and apportionment as established under the 1940 census.\(^7\)

The 1950 amendment marked a permanent intensification of the apportionment issue. That same year, pursuant to a constitutional requirement,\(^8\) a popular vote was taken on the question of calling a constitutional convention. Such a convention was approved by a majority of votes cast on the question. It was obvious that any constitutional convention would have to deal with the apportionment problem and that the result would inescapably be a relative decrease in the strength of the rural counties. As a result the General Assembly refused to enact any legislation providing for election of convention delegates or the setting of a convention date.\(^4\)

In the succeeding years the legislature repeatedly refused to enact any reapportionment measures. Even a relatively mild proposal introduced in 1960 failed to pass either chamber.\(^5\) This proposal would have left the Senate unchanged but would have instituted the following formula for apportionment of the House of Delegates:

Any county, irrespective of population, would have at least 2 delegates.

Any county with 50,000 population would have 3 delegates.

Any county with 75,000 population would have 4 delegates.

Any county with 100,000 population would have 5 delegates.

Any county with 150,000 population would have 6 delegates.

Any county with 200,000 population would have 7 delegates.

Any county with 300,000 population would have 8 delegates.

Any county with 400,000 population would have 9 delegates.

Any county with over 500,000 population would have 10 delegates.

It will be noted immediately that this was again a weighted formula giving a county of 50,000 population three times, proportionately, the representation given a county of 500,000 population. Moreover, the limit on maximum representation would again introduce extreme distortions as the larger counties increased in population, as had occurred under the limitations of the 1867 apportionment. Baltimore County with a 1960 population of 492,428 would soon have reached the maximum of ten delegates so that further growth would not have been accorded any recognition. Conversely, fourteen of the state’s twenty-three counties

\(^7\) Md. Const. art. III, sec. 5 (1950).

\(^8\) Md. Const. art. XIV, sec. 2 (1950).

\(^74\) In the Senate only 1 vote in favor of the necessary implementing measure was cast except for Baltimore City and the three largest counties. S.J. 1951, p. 500. In the House there were only 7 such votes. H.J. 1951, p. 233.

were under 50,000 population and so would have been the beneficiaries of the most favorable representation ratios but still could have increased their representation with minimum population increases.\(^{76}\)

With the complete failure of repeated attempts to secure even mild reforms in the progressively worsening malapportionment of the state, the issue passed from the legislative to the judicial forum. Suit was brought in the Circuit Court of Anne Arundel County challenging the apportionment of both houses of the legislature as being in violation of the equal protection clause of the fourteenth amendment.\(^{77}\) The complaint was dismissed by Circuit Judge Duckett without leave to amend. On appeal, the Maryland Court of Appeals reversed the order of the Circuit Court and remanded the case for a hearing on the merits\(^{78}\) after considering the relevance of *Baker v. Carr*.\(^{79}\) The circuit court after hearing argument did not pass on the validity of the apportionment in the Senate but did hold that the apportionment of the House of Delegates invidiously discriminated against the people of Baltimore, Montgomery, and Prince George's Counties and that the provisions of Article III, Section 5, of the Maryland Constitution, apportioning the House of Delegates, were unconstitutional. The court did not grant injunctive relief, as it had been requested to do, stating that the Maryland legislature had power both to reapportion the House and to propose a constitutional amendment for reapportionment.

A week later the legislature, in special session, enacted a "stop-gap" reapportionment.\(^{80}\) This legislation added 19 delegates to the House: 7 were given to Baltimore County, bringing its total to thirteen; 4 each were given to Prince George's and Montgomery Counties, bringing their totals to ten; 1 to Anne Arundel County for a new total of seven; 2 to the third district of Baltimore City for a new total of eight; and 1 to the fifth district of Baltimore City for a new total of seven. Under this new apportionment a delegate from Baltimore County would represent an average of 37,879 persons compared to 6,487 persons represented by a delegate from Caroline County. Such distortions in the ratios of representation permitted 36% of the state's total population to elect a majority of the House of Delegates.

It will be recalled that the circuit court after hearing argument refrained from passing on the validity of the senatorial apportionment. When the court failed to rule on senatorial apportionment, the question was appealed. The Court of Appeals remanded the case for a

\(^{76}\) These counties were Calvert, Caroline, Cecil, Charles, Dorchester, Garrett, Howard, Kent, Queen Anne's, Saint Mary's, Somerset, Talbot, Wicomico, and Worcester.

\(^{77}\) "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

\(^{78}\) 228 Md. 412, 180 A.2d 656 (1962).

\(^{79}\) 369 U.S. 186 (1962). *Baker v. Carr* held the question of whether state legislative districts were in violation of the equal protection clause of the Fourteenth Amendment was justiciable in the federal courts.

\(^{80}\) 4 Md. Cons. art. 40, § 42 (1964 Supp.). This statute was to expire on January 1, 1966, unless a constitutional amendment was submitted to the voters, and rejected, in the 1964 elections, in which case the statute was to continue in force until January 1, 1970.
decision on this point. The circuit court then found the senatorial apportionment valid, this decision being upheld by the court of appeals.\textsuperscript{81} The Court of Appeals' decision was in turn appealed to the Supreme Court, which held that the Senate apportionment and the stop-gap apportionment of the House of Delegates were both unconstitutional under the equal protection clause of the fourteenth amendment.\textsuperscript{82} The Supreme Court directed that the General Assembly be given an opportunity to enact the necessary reapportionment of both chambers, but specified that in no case should the 1966 legislative elections "be conducted pursuant to the existing or any other unconstitutional plan."

The problem of reapportionment has thus been returned to the General Assembly with a clear directive that both chambers be reapportioned on the basis of population.

In the arguments before the courts defending the existing apportionments in Maryland much was made of the "federal analogy". This analogy was, of course, to the bases of representation in the House of Representatives and in the Senate of the United States Congress. The comparability of the relationship of Maryland counties vis-à-vis the State of Maryland need not be considered here, for even a cursory examination of the history of apportionment in Maryland reveals there has never been an analogy to the federal system. In the beginning under the colonial charter all freemen had a duty to appear in the assembly in person or by proxy, not to initiate laws but to pass on laws proposed by the proprietor. A bicameral system soon evolved in which the counties were more-or-less equally represented in the Lower House while the Upper House was an aristocratic body, the Council, holding office at the pleasure of the proprietor. Following the Revolution, the counties were given equal representation in the House irrespective of population, while the Senate was indirectly elected. There was here no parallel to the system adopted under the United States constitution. The subsequent constitutions of 1851 and 1864 did not adopt the federal analogy. In fact, as noted earlier, the convention that drafted the 1864 constitution specifically rejected the federal analogy and refused to apportion the House of Delegates on the basis of population. The 1867 constitution in turn not only did not apportion the House on the basis of population but instituted limitations that increased the malapportionment under the 1864 constitution. The 1867 constitution compounded this violation of the federal analogy by recognizing a population factor in the Senate with regard to Baltimore City. Since adoption of the 1867 constitution, representation in the House has had progressively less correlation with population, while the absolute population adjustment for the City of Baltimore has increased in the Senate. But even if both houses are considered together, there has been no relevant correlation between population and total representation in the General Assembly. In the light of this history it is difficult to defend the inequities of Maryland apportionment on the alleged federal analogy.

\textsuperscript{81} 229 Md. 406, 184 A.2d 715 (1962).

\textsuperscript{82} 377 U.S. 656 (1964).
VI.

EPILOGUE

The General Assembly now has the task of apportioning both houses of the legislature on the basis of population. Never since the founding of Maryland has either chamber of the legislature been apportioned in a manner strictly proportioned to population. If the legislatures of Maryland and other states had been willing to apportion one house on the basis of population, and to reapportion that house as population patterns changed, it is probable that the Reapportionate Cases would never have arisen and that the states could have continued with one house based on counties, areas, or other nonpopulation factors. The recalcitrance of the legislatures foreclosed this possibility. The Maryland legislature is now faced with another task it finds distasteful. If it fails now to carry out its duty to reapportion fairly on the basis of population, the courts can be expected to carry out this responsibility for it, an outcome that all should wish to avoid.