BLACK, J. *(concurring).* At present writing 5 opinions of this case, aggregating 76 typewritten sheets, have been submitted for consideration of other members of the Court. Surely, borrowing now from Mr. Justice Clark *(Baker v. Carr,* 369 US 186, at p 251 [82 S Ct 691, 7 L ed 2d 663]), what we write bursts with too many words that go through so much and say so little. I would get back on the Federal track, the better to ascertain where we are, and where we should and so must go.

First: Palatable or not, it must be acknowledged by all that the Supreme Court of Michigan does not have the final word for the case before us. We sit now, exclusively as an inferior court, by direction of the United States supreme court, "in order that such proceedings may be had in the said cause, in conformity with the judgment of this [United States supreme] court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said appeal notwithstanding."[20] By such mandate we are told to determine the merits of a presented Federal question; not to decide whether we personally prefer—or do not prefer—the questioned amendments of our State's Constitution, and certainly not to determine whether the amount of the majority vote cast 10 years ago for such amendments is sufficient to overcome the Federal equality clause. No majority vote cast within a State, however overwhelming or even unanimous, can overcome such pre-eminent law. The reason:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Art 6 (2).

Second: With triumvirate backs turned upon what proceeds apace—under *Baker v. Carr*—in many of the States, a tuneful triphony is sung for preservation of what my Brother DETHMERS repeatedly refers to as "republican government."[21] The song is not ended. Judging by past dissertations, the political melody will linger on until all voices are stilled by that final judgment of this case which, sooner or later, will be entered upon Federal precepts. "Intervention" by the Federal supreme court seems to irritate the more, *Baker v. Carr* and Justice KAVANAGH'S opinion having applied fresh salt, as our former Chief Justice beholds what to him are the progressively lamentable doings of high court justices he has dubbed "judicial activists." (See U. S. News issue cited below, p 93.) Compare his stirring appeal today, for protection of "republican government" from the meddlement of activistic judicial officers, with what was said by him 3 years ago last December, in New York City:

"That there has been a trend toward centralization in Washington can scarcely be gainsaid. Challenged at mileposts along the way, it has advanced under the green light of judicial decisions. * * *

"These are part of the body of decisions giving rise to a concern that, by judicial construction, national powers are being too greatly and dangerously enlarged and State and local power correspondingly contracted. Of this trend, the conference of chief justices and many others have spoken with consternation. Great judicial self-restraint in this critical field of Federal-State relationships was enjoined upon the supreme court by the members of the conference. I concur."[22]

What indeed has contributed—in Michigan at least —to this trend toward "centralization" which, at Pasadena, is said to have caused so much "consternation"? Is it not, in fulsome part, due to the steady failure of many-times-elected executive officers of this and other similarly situated States (some being

presently consternated Brethren seated here) to press upon legislators—as our Governor Groesbeck did with such force and effect in 1925—their sworn oath to rearrange and reapportion every 10 years? As said in Justice KAVANAGH'S opinion, the issue before us never could have traced its way to the Potomac had the legislature of Michigan, during the decades of the 1940's and 1950's, performed faithfully according to constitutional oath. Let us, then, have done with criticism of that to which all of us, in greater or lesser degree of course, have contributed as governors, attorneys general, judges and citizens. Instead, let us turn to duty directed by the supremacy clause, the National equality clause, and our own fully concordant pledge of the protection of equal laws. And let us not report back to our superior court that we have just discovered a technical way to evade determination of the merits; such as saying that the questioned amendments cannot be judged void without destroying the law *de jure* which is creative of the office of State senator. As Justice SOURIS points out, the simple fact answer to Chief Justice CARR's "let's do nothing" motion is that original section 1 of article 5, the standing creator of the office of State senator, lives on as before unaffected by and unquestioned in this litigation. Furthermore, *Norton v. Shelby County,* 118 US 425 (6 S Ct 1121, 30 L ed 178), on which our Chief Justice presently relies, has since been confined most carefully in its proper area of fact by the United States supreme court. See *Shapleigh v. San Angelo,* 167 US 646, 658 (17 S Ct 957, 42 L ed 310), and *Tulare Irrigation District v. Shepard,* 185 US 1, 14 (22 S Ct 531, 46 L ed 773). *Shapleigh,* quoted in the margin,[23] is a fair example of such continued confinement, in the courts of the United States, of *Norton's* rule that where no law creates an office such an office cannot be occupied *de facto.*

Third: We are, I repeat, directed to consider and decide the merits of a Federal question the United States supreme court has sent back to us in the clothing of jurisdiction and justiciability. Is it not, then, exclusively due that we should look for judicial guidance to current Federal authority, and to such of our own cases as may accord therewith, rather than to the relevantly superseded scroll of the Federalists and other writings of the Colonial era? The Federalist Papers, ably conceived for times when all west of the Alleghanies was trackless and savage, were written more than 175 years ago by men who could not possibly have foreseen the Fourteenth Amendment, the seeds from which the amendment grew, and its final mandate of equal protection. The equality clause of the Fourteenth Amendment is an order directed to each State. It has nothing to do with the political structure of the National government and, in the context of our current problem, is an understandable contradiction of that structure. The clause pointedly prohibits each State from denying "to any person within its jurisdiction the equal protection of the laws." It does, under direction of our superior, put upon us a new task, that of inquiring into the merits of plaintiff's claim of denial by Michigan of Fourteenth Amendment equality of voting rights; an inquiry 3 of us resolved affirmatively in *Scholle v. Secretary of State,* 360 Mich 1.

Nothing done within the borders of Michigan, whether by constitutional provision, statute, executive proclamation, ordinance, or administrative order, may impede the execution of that task. The supremacy clause so dictates. So do the authorities cited in Justice KAVANAGH'S opinion, to which I would add *Bute v. Illinois,* 333 US 640 (68 S Ct 763, 92 L ed 986);[24] also the adjuration which, in 1899 and again in 1901, was declared and repeated in the 2 *Blythe Cases (Blythe v. Hinckley,* 173 US 501, 508 [19 S Ct 497, 43 L ed 783]; 180 US 333, 338 [21 S Ct 390, 45 L ed 557]).[25] Hence my disagreement with Justice DETHMERS' repetitious and apparently serious postulate that "An equal protection of the laws problem is not presented." That postulate I now examine, admittedly with distrust as well as curiosity.

Justice DETHMERS simply cannot be right; at least in this case where our words are not final words. If an "equal protection of the laws problem is not presented," the supreme court of the United States would not have taken jurisdiction of this case and would not have sent it back for meritorious consideration in the light of another equal protection case, *Baker v. Carr.* When in the face of such

mandate any State court judge says that the question we are directed to decide "is not presented," he surely defies higher authority. He should be challenged, with due vigor by others seated here, lest silence suggest tacit approval.

Fourth: As an understating Englishman would say, our problem is not without difficulty. No matter where we look and turn, the ominous storm of predicament gathers with warning of reprisals and conjured new reasons why this Court cannot move with affirmative firmness. To Dirksenize our judgment by telling the legislature that questioned sections 2 and 4 will be judged void, as soon as that body enacts validly under original sections 2 and 4, is to perpetuate an unconstitutional body for another 2 years (and doubtless more years depending on the outcome of 4 Supreme Court elections scheduled during the next 9 months). To delay judgment, and thus to knuckle before today's threat to obstruct Federal as well as State justice, is unthinkable. That threat, once there is an overt act, will menace the threateners only.[26] And to dismiss the case with prejudice means sure reversal; reversal for having ruled that a State constitutional provision is somehow of greater force than the Federal equality clause.

And the disunited Kellys provide no help; only more trouble. Attorney General Kelley would have us act, promptly in time for election day November 6th. Justice Kelly warns us act not at all, and even that with slow "haste." So a trouble is what man makes it, and when Kellys stir up its brew, the quaffing is man's own torment, and woe is his requiem too.

"`Here's to the Maine, and I'm sorry for Spain,' Said Kelly and Burke and Shea.* * *
" 'Wherever there's Kellys there's trouble,' said Burke.
" `Wherever fighting's the game,
Or a spice of danger in grown man's work,'
Said Kelly, 'you'll find my name.' "[27]

If what our majority does means "haste" to my veteran Brothers, so be it. They are the ones who cried "haste" when I formally moved—shortly after the opinions of *Scholle v. Secretary of State* were released April 23, 1962—that a date be set for resubmission during our June session, preferably June 11th (an available date which stayed available). That was not done, as the order quoted in Justice KAVANAGH'S opinion fully discloses, and there we find the real reason why this Court is in position where it may allot 33 days only for the enactment of that constitutional legislation original and now reinstated sections 2 and 4 do require.

Sometimes appellate judges must get down to work on one all-important case to outright exclusion of less important work. This is such a case. Whatever advices our effort will provide for the constitutional convention must be sent forth with dispatch. That assembled body is due for final adjournment 14 days hence, and its regular successor cannot be around until 1977. And we cannot legalize, even *de facto,* an unconstitutional body for any longer period of time than is fairly necessary to legislate and then elect.

Little more need be said about "haste." A liberal dose of activistic catharsis will do Michigan's judicial process no harm and, in this instance, may provide for our State a healthy new start. Some regard must be had in the course of judicial functioning for the comparative shortness of human life. And if as it seems Justices seated here must belong to one class or the other, I prefer "judicial activism" over "judicial obstructivism."

To conclude: The merits of this case presented no more difficulty 2 years ago than now. Jurisdiction to judge the merits did. Now that we have been loaned the Fourteenth Amendment "for employment in cases where the constitution or laws of a State create and insure gross inequality of voting power of citizens" *(Scholle v. Secretary of State,* 360 Mich at 120), I again, this time with justiciable authority,

"agree fully with Mr. Justice KAVANAGH'S presentation of the case and especially with his conclusions upon the admitted as well as proven facts." *(Scholle v. Secretary of State, supra,* at 123.)

ENDNOTES

[20] Mandate of supreme court of the United States.—REPORTER.

[21] Mr. Justice Frankfurter, dissenting in *Baker v. Carr,* declared (p 324) what regrettably seems to be, that "Apportionment battles are overwhelmingly party or intraparty contests." By appended footnote the justice calls attention to "an instance of a court torn, in fact or fancy, over the political issues involved in reapportionment," citing *State, ex rel. Lashly, v. Becker,* 290 Mo 560 (235 SW 1017).

Intrigued, I have reviewed the ease and discover among others this sobering confession (p 625):

"Shackled as we are with partisan bias and prejudice, it is humiliating to confess that even judges in our highest courts are unable to divorce law and politics. In emergencies, great and small, they have heard the Macedonian cry, and have not been disobedient to the call."

Yes, that Macedonian cry has been audible, all over Michigan, ever since this suit was instituted in 1959.

[22] U. S. News and World Report: "What a State Chief Justice Says About the Supreme Court," December 12, 1958, pp 88, 91, 92, address before the Congress of American Industry by "John R. Dethmers, Chief Justice, Supreme Court of Michigan."

[23] "*Norton v. Shelby County,* 118 US 425, is not to the contrary. There certain persons who undertook to act as county commissioners were adjudged to be usurpers as against others who were lawful officers, and it was held that, as the acts of the legislature which created the hoard of comissioners was unconstitutional, there were no *de jure* offices, and, therefore, no *de jure* officers. But the general rule was recognized that 'where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.' "

[24] "We recognize that the Fourteenth Amendment, as part of the supreme law of the land under article 6 of the original Constitution, supersedes `any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'," *(Bute v. Illinois,* p 658.)

[25] "The State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on the Federal questions thus intimated for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution, and if the State courts erred in judgment it was mere error, and not to be corrected through the medium of bills such as those under consideration." (180 US 338.)

[26] "Whoever, by threats or force, wilfully prevents, obstructs, impedes, or interferes with, or wilfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall he fined not more than $1,000 or imprisoned not more than one year, or both." Pub L 86-449, Title 1, § 101, May 6, 1960, 74 Stat 86 (18 USCA, 1961 Supp, § 1509).

[27] Joseph Ignatius Constantine Clarke, The Fighting Race.—REPORTER.