CARR, C. J. *(dissenting).* This case involves an attack by plaintiff on the validity of article 5, § 2, of the State Constitution (1908), as amended by vote of the people at the November election in 1952. Said section relates specifically to the State senate and the election of the members thereof by single districts. The amendment was proposed and submitted to popular vote on the basis of petitions filed by qualified and registered electors of the State as provided in article 17, § 2, of the State Constitution as amended at the general election of April 7, 1941. At the 1952 election there was also submitted a proposed amendment requiring that the members of both houses of the legislature be selected on the basis of a legislative apportionment in accordance with population. The latter amendment was defeated while the adoption of the amendment here in question was carried by a substantial vote.

The amendment now attacked was submitted on the ballot as "Proposal No 3", its purpose being declared to be "to establish senatorial districts and provide for decennial reapportionment of representatives." (PA 1953, p 438.) Considering the amendment in its entirety as relating to the election of the members of the bicameral legislature, it was obviously the intention of the people that members of the house of representatives should be selected from districts which shall contain "as nearly as may be an equal number of inhabitants." Insofar as the senate was concerned the people undertook by the amendment to divide the State into 34 districts, from each of which a member of the senate should be elected. Said districts were specifically set forth in article 5, § 2. Senatorial districts as previously existing were materially changed, and the number increased from 32 to 34. That the factor of population was not overlooked is indicated by the provision of said section that senatorial districts within a county shall contain, as nearly as may be, an equal number of inhabitants. Unquestionably the basic plan of the people as set forth in the amendment was to divide the State into designated districts, the geographic division being adopted as stated. The provision in the Federal Constitution for 2 senators from each State may have served to suggest such method.

It must be assumed, and it clearly appears, that the people in making these provisions for selection of members of the house and senate sought a general plan for the legislative department of the State government that would best serve the State as a whole. While population is the controlling factor as far as representatives are concerned, it was obviously deemed that the rights of the people living in different sections of the State would be best protected by the adoption of a geographical basis, in part, of apportionment as to the senate. It is, of course, apparent that if the members of both houses are selected on a strictly population basis the urban industrial centers, having the largest number of inhabitants, would be enabled to dominate the legislative department of the State government. It was this kind of a situation that the framers of the amendment now in question here, and the people adopting it, had in mind at the time. The question now presented is, was such plan irrational? Must it be said that it constitutes an "invidious" attempt to deprive any section of the State, or any portion of its inhabitants, of their just rights under the fundamental laws of the State and of the Nation?

In attacking article 5, § 2, of the Constitution, as amended, plaintiff insists that it violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. In his petition for a writ of mandamus to prevent the secretary of State, defendant herein, from issuing election notices for State senators to be chosen at the 1960 general November election the claim is advanced that senatorial districts must be established on the basis of population. Obviously it is the claim that in electing members of a bicameral legislature population must be the sole criterion to be followed, and that any plan involving an attempt to protect the interests of the less densely populated sections of the State is invalid because not affording equal protection to residents in heavily populated urban centers. We are not in accord with such theory.

The case was instituted in this Court by petition for a writ of mandamus against the secretary of State

requiring that official to refrain from acting under the Michigan election law with reference to the election of State senators. Said petition does not specifically allege wherein plaintiff or others whom he claims to represent have actually been prejudiced as a result of State senators being chosen in Michigan at the last 4 general November elections in accordance with the amendment of 1952. There is no showing that as a result of such method of senatorial selection improper legislation has been enacted to the prejudice of plaintiff or of others. In view of the record of the Michigan legislature there would seem to be no basis for any possible argument that the State of Michigan has suffered, or that any segment of its population has been prejudiced. The realistic situation presented is that no section of the State has suffered from legislative discrimination. There is no showing that either house of our legislature has failed to discharge its responsibilities to the public generally, or that the basic principle of equal protection of the laws has been violated because of the plan adopted by the people acting in their sovereign capacity at the 1952 election.

When the controversy first came before this Court in 1960 a majority of the justices concluded that under prior decisions of the United States supreme court, including *Colegrove v. Green*, 328 US 549 (66 S Ct 1198, 90 L ed 1432), and other decisions of like import cited by Mr. Justice EDWARDS in his opinion, the nature of the issue did not bring it within the scope of the jurisdiction of this Court, and that such issue was not a justiciable one. Accordingly, plaintiff's petition was denied (360 Mich 1), and his subsequent application for rehearing was also denied. Thereupon plaintiff sought to appeal to the supreme court of the United States.

Thereafter the case of *Baker v. Carr*, 369 US 186 (82 S Ct 691, 7 L ed 2d 663), was submitted to the Supreme Court for determination. The case was an appeal from the decision of a Federal district court rejecting an attack on legislative apportionment statutes of Tennessee. In that case the State constitution required reapportionment at regular intervals, but the legislature had not taken action since 1901. In other words, there was no compliance by the State legislature with the mandate of constitutional provisions by which it was bound. The supreme court, Justices Frankfurter and Harlan dissenting, concluded that a justiciable question was involved and remanded for further consideration of the controversy on its merits. In taking such action attention was called (p 193) to the fact that the fundamental law of Tennessee did not provide for the exercise of the power of the initiative or the referendum on the part of the electors of the State. It was suggested that under said circumstances no remedy was available other than by appeal to the court. Obviously such is not the situation in Michigan. Here the power to initiate, by petition, legislation and constitutional amendments (as well as the referendum) is reserved to the people by the express language of our Constitution.

Following the action taken in the Tennessee case the supreme court of the United States remanded the present controversy to this Court, directing by mandate received under date of May 29, 1962, that we give the case further consideration in the light of *Baker v. Carr*. We do not understand from the opinions filed by members of the court of last resort of the Nation that any question was determined other than that the controversy is justiciable. In consequence, we are now confronted by the question whether it must be said that the plan adopted in 1952 by the people of this State with reference to the selection of members of its bicameral legislature offends the equal protection clause of the Fourteenth Amendment.

In *MacDougall v. Green*, 335 US 281 (69 S Ct 1, 93 L ed 3), the court refused to hold invalid an Illinois statute relating to the nomination of candidates for a new political party, it being contended, as in the case before us, that the Fourteenth Amendment was violated. Commenting on the issue involved and the arguments advanced, it was said (pp 283, 284):

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. *Colegrove v. Green*, 328 US 549 (66 S Ct 1198, 90 L ed 1432), and *Colegrove v. Barrett*, 330 US 804 (67 S Ct 973, 91 L ed 1262)."

We note that in the opinion of Mr. Justice Stewart, who concurred in the holding of the majority in *Baker*

v. Carr, supra, reference was made to the above quoted case, it being said that (pp 265, 266):

"In *MacDougall v. Green*, 335 US 281 (69 S Ct 1, 93 L ed 3), the court held that the equal protection clause does not `deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' 335 US, at 284. In case after case arising under the equal protection clause the court has said what it said again only last term—that `the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan v. Maryland,* 366 US 420, 425 (81 S Ct 1101, 1153, 1218, 6 L ed 2d 393). In case after case arising under that clause we have also said that `the burden of establishing the unconstitutionality of a statute rests on him who assails it.' *Metropolitan Casualty Ins. Co. v. Brownell,* 294 US 580, 584 (55 S Ct 538, 79 L ed 1070).

"Today's decision does not turn its back on these settled precedents. I repeat, the court today decides only: (1) that the district court possessed jurisdiction of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing."

Reference to the *MacDougall Case* was also made in the opinions of other justices. We have before us, therefore, the question hereinbefore stated, that is, whether the plan adopted by the people in the 1952 amendment to the Constitution is irrational and discriminatory to a degree requiring its expunging from the fundamental law of this State on the ground that it violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Applying the principle announced in *MacDougall v. Green, supra*, we submit that such question must be answered in the negative. Such plan was adopted in the light of circumstances prevailing in the State of Michigan, with reference to varied conditions existing in different parts of the State, and for the proper purpose of protecting the rights of the people in the more sparsely settled sections. It was not intended to perpetrate an undue hardship or an injustice on any part of our population, *nor has it operated to do* so. The burden of proof to establish that a provision of the fundamental law of the State is invalid rests on the plaintiff, and that burden has not been sustained. The 1952 amendment now in question was not challenged immediately following its adoption, nor has any attempt been made to change it by the orderly process of amendment to the Constitution by resort to the same method of procedure that brought about the submission and adoption of said amendment.

If a majority of the members of this Court grant the relief sought in plaintiff's petition and hold invalid the 1952 amendment to article 5, § 2, of our Constitution, an unfortunate situation will result. It must be borne in mind that the attack here is not on the right of the present members of the State senate to hold their offices but, rather, goes to the right of existence of those offices themselves as established under the amendment. The people by their action in 1952 created additional senatorial districts, and the new districts created were not in many instances identical with those fixed under the prior apportionment statute. If the amendment is adjudged invalid, the senatorial districts created thereby become non-existent, and for obvious reasons the members of the Senate elected from said districts cannot be deemed *de facto* officers for any purpose. There cannot be a *de facto* officer unless there is a *de jure* office. The law in this respect was rather succinctly stated as follows in the opinion of the supreme court of the United States in *Norton v. Shelby County,* 118 US 425, 441, 442 (6 S Ct 1121, 30 L ed 178):

"The doctrine which gives validity to acts of officers *de facto,* whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing

else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In accord with the holding above quoted are: *Carleton v. People,* 10 Mich 250; *People v. Payment,* 109 Mich 553; *Kidd v. M*cCanless, 200 Tenn 273 (292 SW 2d 40).[11] If this Court enters judgment in accordance with plaintiff's demand that article 5, § 2, of the State Constitution is and has been from its inception a nullity, then the State of Michigan will necessarily be left without a State senate and, hence, without a legislature that can function under the Constitution. Striking from the fundamental law of Michigan the provision for designated senatorial districts will obviously terminate the existence of such districts. This Court is without power to give to those previously elected therefrom the status of *de facto* incumbents of offices that no longer exist.

It is interesting to note that the district court of the United States for the middle district of Tennessee, to which the supreme court remanded *Baker v. Carr* for further consideration, came to the conclusion (206 F Supp 341) that the apportionment acts passed by the legislature of Tennessee were invalid, but declined to enter a judgment in accordance with its opinion. The court decided to withhold final action on the issues presented, including any declarations of invalidity or the issue of injunctive process, in order to permit the selection of a State legislature, under the alleged invalid statutes, to act at its 1963 session, the members of such legislature to be elected during the current year. It was pointed out that such method of procedure would obviate the possibility of the State being left without a legislative body, under the holding in *Kidd v. McCanless, supra,* as the result of a judgment of invalidity. The court obviously realized the situation that would be presented in the event of a judgment entered without affording a reasonable opportunity for the State legislature to act.

It was apparently recognized also that the 1962 legislature, which had enacted apportionment statutes during the pendency of the litigation and considered therein pursuant to stipulation of the parties, but which the Court deemed invalid, could scarcely be expected to enact a statute that would be sustained. For such reason it was deemed to be a realistic solution of the problem to withhold entry of judgment, allowing a new legislature to be elected and giving it a reasonable opportunity to adopt proper statutes that would not offend against constitutional provisions. Commenting on the procedure to be observed, it was said in part (p 350):

"This will permit the election of a State legislature under the 1962 statutes with full authority and power to discharge validly and legally the legislative functions of the State. It will enable the general assembly to act with the express sanction of the court to effect the necessary remedial measures and consequently in `good faith' as far as its authority is concerned. Under such conditions the restrictive view of the *de facto* rule announced in *Kidd v. McCanless* will not apply. If it should be argued that this is a somewhat technical method to circumvent the ruling in that case, the answer is threefold: First, *Kidd v. McCanless* itself represents a rather technical effort by a court to avoid entering an area which courts then generally regarded as involving political and non justiciable issues, a view now undercut by the supreme court's decision in this case. Second. This remedial method has the advantage of avoiding a far more drastic form of relief which could conceivably entail a direct intrusion into State affairs. Third. It is justifiable on the basis of the wide latitude of discretion resting in the court in devising remedies in cases of this type.

"Accordingly, an order will be entered reserving final judgment herein on all issues until the 1963 general assembly constituted and elected under the 1962 statutes has had an opportunity at its regular 1963 session to act on the matter of legislative apportionment, but not later than June 3, 1963. After that date, or after the date of adjournment of the general assembly if occurring prior to June 3, 1963, the case may be reopened upon application of any party or upon the court's own motion. However, notwithstanding such time limits for reopening, full jurisdiction is retained, and the order will provide that if necessary or proper for any reason, the action may be reopened at any time hereafter, either upon the court's own motion or upon the application of any party."

Obviously the course pursued by the Federal district court in Tennessee is adapted to the prevention of a chaotic condition in the State government, and to obviate also the adoption of some method of apportionment by the Court that might be subject to question as to the requisite authority therefor. What was said by the Federal district court in determining the appropriate procedure in *Baker v. Carr* is, in large measure, applicable in the controversy before us. In view of the situation existing in Michigan, it clearly appears that a

like course is imperative here, if a majority of this Court finally concludes that article 5, § 2, of our present Constitution is invalid.

In the judgment proposed by Mr. Justice KAVANAGH immediate action is obviously contemplated. If the proposed order is entered as the judgment of a majority of the members of this Court participating in the case the obvious result would be a chaotic condition entailing the exercise of doubtful powers of this Court, interfering with the election laws of the State, and, likewise, interrupting the orderly course of legislative proceedings.

The procedure adopted by the Federal district court in *Baker v. Carr* found support in prior decisions cited therein. In *McGraw v. Donovan* (DC Minn, July 10, 1958),163 F Supp 184, the Federal district court of Minnesota, third division, was asked to hold invalid a statute enacted by the Minnesota legislature in 1913 establishing legislative districts throughout the State. It was asserted that the act was in violation of the State constitution. There, as in the case at bar, it was urged that the equal protection clause of the Fourteenth Amendment to the Federal Constitution was also violated. The court deferred decision on the issues presented to it in order to give the 1959 legislature, the members of which were to be elected on November 4, 1958, an opportunity to take action. The following comment in the opinion indicates the reason for such deferment (p 188):

"It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State legislature, it should not take place unless and until it can be shown that the legislature meeting in January, 1959, has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."

The supreme court of New Jersey in *Asbury Park Press, Inc., v. Woolley,* 33 NJ 1 (161 A2d 705), likewise withheld determination of the questions raised in a case challenging a reapportionment act, adopted by the legislature of the State, in order to afford a reasonable opportunity for legislative action. The ease was cited by the supreme court of Colorado in its recent decision (rendered July 6, 1962) in the case of *Stein v. General Assembly of the State of Colorado,* 150 Colo — (374 P2d 66). After discussion of the practical problems involving legislative reapportionment of senators and representatives, the court, referring specifically to the decision of the supreme court of New Jersey, declined to intervene until the next general assembly of the State, the members of which will be chosen at the November election in 1962, has a reasonable opportunity to consider the issues raised with reference to reapportionment. The attitude of the court is indicated by the following excerpt from its opinion:

"We believe there should be no judicial intrusion into the legislative and executive affairs of the State, and we should be ever mindful of the necessity of preserving the integrity and independence of the coordinate branches of government. We should, therefore, exercise an appropriate degree of restraint to see if they will carry out their duties. Only if both they and the people fail to act will it become a judicial function to step into the void.

"It has been called to our attention that in Tennessee on June 22, 1962 (USDC No 2724 Nashville Div, 206 F Supp 341) a 3-judge Federal court acting pursuant to the mandate of *Baker v. Carr, supra* (the landmark case from which flows all current reapportionment litigation) decided to retain jurisdiction to give the Tennessee legislature `an opportunity at its 1963 session to enact a fair and valid reapportionment'. As authority for so doing the court cited similar procedures in *McGraw v. Donovan* (DC Minn, 1958), *supra, Toombs v. Fortson* (ND Ga, May 25, 1962), 205 F Supp 248 (involving the legislature of Georgia); and the recent Alabama case of *Sims v. Frink* (DC Ala), 205 F Supp 245."

It is somewhat significant that the Colorado court in its opinion discussed at some length the suggested procedure involving the election of members of the legislature at large, and in doing so pointed out practical objections to such course. It will be noted also that the decisions of State and Federal courts emphasize the necessity for deliberate action in dealing with legislative enactments claimed to be in violation of constitutional provisions. The situation in the controversy before us is far more complicated in that the attack is made on an amendment to the State Constitution, initiated by petition and adopted by the people of the State. If the section providing for senatorial districts and the election of senators therefrom is stricken from the Constitution obviously extremely grave questions will thereby be raised. It must be said also that there is no emergency or threatened crisis rendering hasty action imperative. No reason has been or can be assigned for the contemplated refusal to adopt the realistic method of procedure suggested by the decisions of other

courts, above cited.

Attention has been directed to the situation that will be created if this Court enters immediately a judgment, as proposed by Mr. Justice KAVANAGH in his opinion, striking from the Constitution the apportionment of senatorial districts within the State. As before pointed out, the amendment of 1952 increased the number of senators from 32 to 34 and materially changed the limits of districts. In the 4 elections that have followed since the adoption of that amendment senators have been chosen from the districts as so specified, including, of course, the members of the present senate. No possible claim can be made that they represent districts created by act of the legislature in accordance with the original provisions of the Constitution of 1908. If the existing districts are abolished, a result necessarily following expunging article 5, § 2, from the fundamental law of the State, the conclusion cannot be avoided that the offices the present senators were chosen to fill will no longer exist.

The proposed judgment set forth in Mr. Justice KAVANAGH'S opinion provides for the issuance of an injunction against the defendant secretary of State to restrain the primary election of candidates for the office of State senator, which election is now set under the general law of the State for August 7, 1962. Such an injunction will clearly rest on the theory, if the proposed judgment is entered, that the office of State senator as now existing is abolished. However, the proposed judgment would continue in office the present members of the senate until December 31, 1962, and the senate would be permitted to function as a *de facto* body. It thus appears that the members of the *de facto* senate will, under the proposed judgment, be acting not by virtue of their election by the people of the various senatorial districts created under the amendment of 1952 but by fiat of the majority of the members of this Court participating in the decision of the case. The query naturally suggests itself as to the authority of this Court to thus create one of the houses of the State legislature. The proposed judgment entry is not consistent with any possible theory that an incumbent of an office existing under a law adjudged to be invalid may continue to function on the ground that he may be regarded as a *de facto* official. The general rule of law unquestionably is that there can be no *de facto* officer unless there is a *de jure* office.

The decision of the supreme court of the United States in *Norton v. Shelby County,* 118 US 425 (6 S Ct 1121, 30 L ed 178), above cited, declares the general rule of law on the issue with reference to the status of a prior incumbent of an office previously existing under a statute adjudged unconstitutional. Decisions involving the status of one assuming to perform the duties of an existing office obviously are not in point. Mr. Justice SOURIS directs attention to *Attorney General, ex rel. Dingeman, v. Lacy,* 180 Mich 329, in support of the claim that an adjudication that an act creating a particular office is invalid does not prevent the incumbent from continuing to act with a *de facto* status. The Court did not so hold in that decision. Involved was an act of the State legislature undertaking to create a domestic relations court in counties having a population of more than 250,000. It applied to Wayne county only and was adjudged invalid because in conflict with article 5, § 30, of the State Constitution (1908) forbidding local acts if a general act can be made applicable and further requiring the approval of all local acts by electors of the district to be affected. It was also held that the provisions of the State Constitution relating to the jurisdiction of circuit and probate courts were violated. The purpose of the act was to relieve the circuit court of Wayne county of a portion of its burden. The domestic relations court had functioned for some time prior to adjudication, and the Court declined to hold invalid *prior* judicial acts within the scope of the circuit court jurisdiction. The gist of the decision in this respect is indicated (p 342) in the following statement:

"Inasmuch as respondent, under the authority of a legislative enactment, assumed to exercise a portion of the jurisdiction of the circuit court, which is a constitutional court, we are of opinion that such of his judicial acts as are within the jurisdiction of the circuit court should be considered as those of a *de facto* judge, not open to question upon jurisdictional grounds."

It will be noted that only acts that might have been performed by a circuit judge were declared to be valid. Furthermore, the Court did not hold that the defendant judge was entitled to *continue* to act on the theory of a *de facto* status. When the judgment was entered declaring nonexistent the office that the defendant had held his functions ceased. He was a *de facto* judge as to prior acts only. The case is not authority for any possible claim that if judgment enters invalidating the section of the Constitution under which the present senators were chosen such members may continue to act for the purpose of creating a *de facto* senate. Such a claim has no basis in either law or logic.

We have called attention to certain aspects of the proposed judgment as set forth in Mr. Justice

KAVANAGH's opinion for the purpose, among others, of emphasizing the serious nature of the problem with which we are confronted. Judicial interference, as emphasized in decisions above cited, in controversies of the nature here involved, should if possible be avoided. Careful consideration and action are imperative. It must be borne in mind that we are dealing with an attempt to strike from our Constitution provisions that have been placed there by the people of the State in whom all political power is inherent. Bearing in mind the origin of the amendment of 1952, is there any basis for a suggestion that there was any purpose of "invidious discrimination" involved?

As hereinbefore stated, the purpose of the people in the adoption of the amendment in question was the formulation of a definite plan deemed proper for the protection of the people of the State and of all sections of the State. The fundamental law of the State, like that of the nation, involves a series of checks and balances essential in all representative government. The underlying purpose and plan of the amendment must be determined by reference to all of the provisions thereof. Provision was made that members of the house of representatives, 110 in number, should be selected from districts established on the basis of population. Such provision insured that the more populous sections of the State should not be discriminated against by unfair legislation, nor is there any claim that such has occurred. Protection from such discrimination was assured to plaintiff and others in like situation. On the other hand it was recognized that the more thinly populated sections of the State should not be overlooked. It has been repeatedly declared, and is not denied in this case, that in the interests of the general welfare the situation with respect to all parts of the State in any plan for the election of members of the legislature should be given due consideration.

Mr. Justice SOURIS asserts that the present senatorial districts were established without any conceivable or rational basis. We disagree. How could such a plan be formulated other than by consideration of geographic divisions? The people of Michigan in adopting the amendment recognized the situation existing in different sections of the State, recognized the necessity for protecting all sections and all people against possible injustice, recognized the necessity for a definite plan that would accomplish that purpose, and acted accordingly. A bicameral legislature renders feasible such a plan. Plaintiff's objections to it are predicated in the final analysis on the desire to create a situation by virtue of which the legislature of the State may be controlled by numbers. The argument is that no apportionment act is valid unless resting on the population basis. It must be conceded, and it cannot be denied, that population alone is not the controlling factor. To effect a desired and proper result there may be departure therefrom, a situation that obtains in government, national, State, and local. The underlying purpose sought to be obtained through the relief sought by plaintiff in this case is the obtaining of power on the basis of numbers. May the equal protection clause of the Fourteenth Amendment be successfully invoked to accomplish that purpose? We think not. Such was not the intent of the people of this country in the adoption of that amendment to the fundamental law of the nation.

There is no question here involved as to any violation of the Constitution of the State of Michigan. Justices KAVANAGH and SOURIS have cited *Giddings v. Secretary of State,* 93 Mich 1 (16 LRA 402); and *Williams v. Secretary of State,* 145 Mich 447. Each of said cases involved a statute, enacted by the legislature, found to be in conflict with the State Constitution. In neither case was any question raised as to the denial of the equal protection of the law.

In remanding the case to this Court for consideration and decision it is clear that the supreme court of the United States did not pass on the merits of the justiciable issue found to be present. The various opinions filed in *Baker v. Carr* may not be so construed. It is crystal clear that the purpose of the remand was to enable this Court to pass on the question whether plaintiff has made out a case entitling him to the relief sought. The burden of proving such right is, of course, on plaintiff. Such burden has not been borne. The people of Michigan may not be adjudged guilty of denying to plaintiff the equal protection of the laws.

For the reasons stated the validity of the provision of the Michigan Constitution assailed by plaintiff should be sustained and the petition for writ of mandamus should be dismissed.

DETHMERS and KELLY, JJ., concurred with CARR, C. J.

ENDNOTES

[11] Appeal dismissed, 352 US 920 (77 S Ct 223, 1 L ed 2d 157).—REPORTER.