KELLY, J. *(dissenting).* I not only concur with but completely indorse the opinions of Chief Justice CARR and Justice DETHMERS. Plaintiff states that this "may well be the most significant case ever to come before this Court," and with that thought I do not disagree and because of its importance and significance I am making the following addition to what has already been presented by Chief Justice CARR and Justice DETHMERS.

The former attorney general of Michigan (PAUL L. ADAMS, now Supreme Court Justice, who has disqualified himself because he was attorney general at the time of the original hearing) took an opposite position at the original hearing to the position taken by our present attorney general, Frank J. Kelley, at this rehearing, as is evidenced from Justice KAVANAGH'S 1960 opinion setting forth the following as the contention of the secretary of State and the attorney general (360 Mich, pp 11, 12) :

2) Senatorial districting on a basis of area does not deny a republican form of government.

3) The equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution is not violated, since—

a) There is no discrimination within a unit;

b) Area representation is proper and valid;

c) The Negro voting cases do not apply to the question; and

d) Constitutions of States seeking admission to the Union, and providing for legislative apportionment on some basis other than population, have been approved by congress and the president subsequent to the adoption of the Fourteenth Amendment to the United States Constitution.

"(4) The due process clause of the Fourteenth Amendment to the United States Constitution is not violated as—

a) Area representation does not violate the due process clause of the United States Constitution; and

b) Area representation conforms with our democratic traditions.

"(5) To forbid area representation would require the elimination of similar representative methods throughout our democratic system such as representation on—

a) The county board of supervisors;

b) City precincts; and

c) Other levels of area representation.

"(6) The relief prayed for by plaintiff cannot be granted for the following reasons:

"(a) If this Court declares the 1952 amendment to article 5 of the Michigan Constitution (1908) invalid, there will remain no legislative body either *de jure* or *de facto* with power to rearrange senatorial districts and reapportion the legislature;* * *

"(e) The plaintiff has an adequate remedy by seeking amendment of the State Constitution by vote of the electors."

I agree with the attorney general and secretary of State's position and with the development of the point by Chief Justice CARR, namely, that if this Court declare the amendment invalid, "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."

While Attorney General Kelley joins plaintiff and petitioner in his request that this Court declare that

article 5, § 2, of the Michigan Constitution, violates the equal protection clause of the Fourteenth Amendment, he disagrees with plaintiff-petitioner as to the remedy or relief that should be granted.

Plaintiff-petitioner requests this Court as follows :

"We fervently pray for immediate relief, as above and earlier discussed—that a writ of mandamus issue, commanding the defendant not to issue 1962 election notices for State senators * * * pending an opportunity for enactment of timely, valid reapportionment legislation by the 1962 Michigan legislature, in failure of which the defendant further be directed to declare and conduct the 1962 elections for State senators on an at-large basis."

Attorney General Kelley, evidently realizing the injustice to the voters and the confusion that would result from granting petitioner's request, makes plain to this Court that he disagrees with petitioner by stating:

"The attorney general cannot subscribe to the request of petitioner that the August 1962 primary be enjoined for the reason that the legislature should be given sufficient time to reapportion the senate and to allow judicial review to be sought by an aggrieved party."

Endeavoring to sustain his contention that the majority opinion (360 Mich 1) did not decide "on the merits," plaintiff states: (1) "In short, that Justice EDWARDS did not express a majority judgment on the merits of this cause that the districts were valid under the tests of the Fourteenth Amendment"; and (2) "If Justice EDWARDS' remarks are now taken to have been on the merits, they obviously express erroneous conclusions."

I disagree with both of plaintiff's contentions and direct attention to the following from Justice EDWARDS' opinion (pp 92, 93, 96-98, 101, 103–106):

"The interpretation of the Fourteenth Amendment equal protection clause contended for herein would forbid any State from having a constitutional scheme for legislative representation in either house on any basis other than one which results in substantial voting equality.

"No matter what the future may bring in relation to this contention, it certainly was not the interpretation of the Fourteenth Amendment placed thereon by the States which ratified it. Nor is it that adopted by the United States congress subsequently in admitting States to the Union. Nor is it the interpretation current among the majority of the 50 States of the Union at present.* * *

"Of the 37 States in the Union in 1868, nine had constitutional provisions for election of representatives to at least 1 of the houses of their legislatures which based representation on constitutionally described legislative districts with constitutionally allocated representation without any pretense of guarantee of equality of popular representation. These States are Vermont, Rhode Island, Connecticut, New Hampshire, New Jersey, Delaware, Maryland, South Carolina, and Nevada.

"The resulting disproportion in popular representation was in some instances far greater than that complained of herein. In the instances of Vermont, Connecticut, and Rhode Island (all States which ratified the Fourteenth Amendment), representation in 1 house was based upon a political unit, with geographic boundaries, known as a town or city. * * *

"Without taking into account the major factor of disproportion occasioned by failure of legislatures to follow State constitutional commands to reapportion, or such relatively minor constitutional factors of disproportion as moiety clauses, it still appears that 20 of the 37 States constituting the Union at the time of the adoption of the Fourteenth Amendment had in their own constitutions provisions which prevented at least 1 legislative house from being based upon the principle of equality of popular representation.

"Between 1868 and the present time, 13 additional States have entered the Union.

"As a prerequisite to such entry, the US Const, art 4, § 3, requires congressional approval. Historically, congress has required States applying for admission to submit their proposed constitution. See *Coyle v. Smith*, 221 US 559 (31 S Ct 688, 55 L ed 853). Typical of the form of approval is the statute by which the constitution of the proposed State of Hawaii was approved and Hawaii was admitted. * * *

"Of the 13 States whose constitutions were approved for admission, 8 such constitutions (for the States of Arizona, Alaska, Hawaii, Idaho, Montana, New Mexico, Oklahoma, Utah) contained provisions for election of at least 1 legislative house which fell into 1 of the 3 categories of disproportion discussed above. * * *

"The recent congressionally approved constitutions of the new States of Alaska and Hawaii contain State senatorial provisions which call for specific districts described largely on a geographic basis, with a resulting substantial inequality of popular representation. In Alaska, the newly elected State senator from the Anchorage-Palmer district represents 87,748 constituents, as compared with the senator from Barrow-Kobuk who represents only 5,705–a ratio of 15:1. * * *

"Thus a majority of the States of the Union in 1868, a majority of the States which joined the Union subsequently, and a majority of the States at the present time, had, or have, in their constitutions provisions as to 1 legislative house which have the effect of denying substantial equality of voting strength to some voters (generally in more populous areas), as compared to other voters (generally in thinly populated areas).

"Many, if not most, of such provisions in other States are directly comparable in constitutional principle and resulting disproportion to the 1952 amendments to Michigan's Constitution.

"What the 1952 amendments did was to draw senatorial electoral districts based on geographic areas described in terms of counties, or groups of contiguous counties, or subdivisions of a single county. As we have seen, this has many parallels in the history of other States from the time of the adoption of the Fourteenth Amendment down to date. The system employed appears to be a variation of the 1-senator-per-county system which is common to many other States.

"We note the suggestion that the 1-senator-per-county system may be a constitutional classification where the variation is not. We reject this reasoning, however. The 1-senator-per-county system would in Michigan produce ratios of disproportion exceeding 1,000:1. We do not think the Fourteenth Amendment may be regarded as forbidding a variation from the 1-per-county system in the direction of popular representation.

"The real attack upon the classification of Michigan voters resulting from the 1952 senate amendments, however, is upon its purpose and its result. It seems clear to us that the general purpose of the disproportionate constitutional provisions which we have reviewed was, and is, to seek to give more thinly populated areas of a State a specific check upon the concentrated political power of the more populous areas. Considering that the amendment with which we deal in this case was adopted at an election wherein another amendment (Proposal No 2), designed to provide equality of popular representation in the Michigan senate, was defeated, it seems clear that this likewise was the purpose of the majority of Michigan voters in 1952.

"This Court does not determine the wisdom of the decisions made by the people of Michigan in adopting their Constitution. By its terms, all political power is inherent in them (Mich Const [1908], art 2, § 1), subject only, of course, to the United States Constitution.

"However distasteful to some of us the rationale of the majority of voters in 1952 may be as support for the classification of senatorial districts which resulted from the 1952 amendment, it clearly has been regarded to date as acceptable under the United States Constitution by the United States supreme court.

"The United States supreme court, in a case in which the classifications in a tax statute and ordinance were attacked as violative of the equal protection clause of the Fourteenth Amendment, established this test as to classification:

"`Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. *Cf. Dominion Hotel, Inc., v. Arizona,* 249 US 265 (39 S Ct 273, 63 L ed 597); *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 US 412 (57 S Ct 772, 81 L ed 1193, 112 ALR 293); *New York Rapid Transit Corp. v. City of New York,* 303 US 573 (58 S Ct 721, 82 L ed 1024); *Skinner v. Oklahoma, ex rel. Williamson,* 316 US 535 (62 S Ct 1110, 86 L ed 1655).' *Walters v. City*

of St. Louis, 347 US 231, 237 (74 S Ct 505, 98 L ed 660).

"In *MacDougall,* 335 US 281 (69 S Ct 1, 93 L ed 3), the court said (p 284):

"`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.'

"In the face of this history and this precedent, we find no way by which we can say that the classification we are concerned with herein is `wholly arbitrary,' and hence repugnant to the Fourteenth Amendment of the United States Constitution as the United States supreme court has construed it to this date."

Plaintiff requests this Court to notify the legislature that unless it enacts "timely, valid reapportionment legislation" the 1962 elections for State senators will be conducted on an at-large basis.

Plaintiff asks this Court to issue a writ of mandamus "commanding the defendant not to issue 1962 election notices for State senators," evidently realizing that he is asking this Court to emasculate and render powerless the Michigan election laws, and more particularly CLS 1956, § 168.163, as amended by PA 1957, No 125 (Stat Ann 1961 Cum Supp § 6.1163), which provides:

"That the secretary of State and the various county clerks shall receive nominating petitions for filing in accordance with the provisions of this act up to 4 o'clock, eastern standard time, in the afternoon of the seventh Tuesday preceding the August primary."

Plaintiff is asking this Court to declare null and void the people's mandate as expressed in their Constitution that their senators be elected from senatorial districts.

Why this haste? Why this drastic action? Why ask this Court to not only declare null and void the present plan of apportionment adopted almost 10 years ago by the people of our State by the overwhelming majority of 294,000, but, also, to order an election that will be contrary to the constitutional mandate? A plan that was directed in the same direction as now urged by plaintiff was defeated by over 490,000.

Repeated references have been made to *Baker v. Carr,* 369 US 186 (82 S Ct 691, 7 L ed 2d 663). Plaintiff asks the question whether Michigan can be distinguished from Tennessee, and states: "Justice Harlan, for example, would have distinguished *Scholle* from *Baker* on several counts."

I wholeheartedly agree with Justice Harlan because: (1) Plaintiff's claim concerns only one body of the legislature while the Tennessee claim was in regard to both; (2) Plaintiff attacks affirmative action of Michigan voters, while the Tennessee attack was on legislative inaction; (3) Michigan's apportionment conforms to the Michigan Constitution while Tennessee's legislation apportionment conflicts with the Tennessee constitution.

The Tennessee plaintiff had much greater reason to complain than our present Michigan plaintiff—and yet, the Federal judges in the Tennessee case of *Baker v. Carr* refused to do what plaintiff is asking this Court to do, as is ably set forth in Chief Justice CARR'S opinion.

Tennessee will hold an election under the Tennessee election laws in 1962, but plaintiff insists that that must not happen in Michigan. I do not agree with plaintiff's contention in this regard.

I concur with Chief Justice CARR and Justice DETHMERS' opinions in their entirety and with their conclusion that plaintiff's petition should be dismissed.

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