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Citation: 72 Yale L.J. 968 1962-1963



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NOTES AND COMMENTS

BAKER V. CARR AND LEGISLATIVE APPORTIONMENTS: A PROBLEM OF STANDARDS

[T]here is nothing judicially more unseemly nor more self-defeating than for this Court to make in *terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J. dissenting).

IN *Baker v. Carr*¹ Tennessee's legislative apportionment was challenged as violating the equal protection clause of the fourteenth amendment. Although Tennessee's Constitution requires legislative reapportionment every ten years on the basis of population,² the state legislature had not reapportioned since 1901.³ In the ensuing sixty years Tennessee's considerable population growth and redistribution created large population disparities among legislative districts. The plaintiffs, residents of the most populous districts, which were generally of an urban character, for years had attempted unsuccessfully to obtain greater representation in the legislature through the political processes. Finally they turned to what they considered their last recourse, the federal courts.⁴ Their constitutional claim was based on an asserted right to equal, or at least more equal, representation in the legislature.⁵ The Supreme Court in a

1. 369 U.S. 186 (1962).

2. The House of Representatives is to be apportioned "according to the number of qualified voters." TENN. CONST., art. 2, § 5. The Senate is to be apportioned "according to the number of qualified electors." TENN. CONST., art. 2, § 6.

3. Record, p. 10, *Baker v. Carr*, 369 U.S. 186 (1962). Other states also have long neglected reapportionment, contrary to explicit state constitutional provisions. *E.g.*, Alabama (last apportionment in 1901), Connecticut (1903), Indiana (1921), and Mississippi (1916). THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1962-63, at 58-62. See generally Dauer & Kelsay, *Unrepresentative States*, 44 NAT'L MUNIC. REV. 571-75 (1955).

4. The plaintiffs in their complaint cited the frequent refusals of the legislature to reapportion. Record, pp. 14-16, *Baker v. Carr*. See also *id.* at 126-60. The Tennessee Supreme Court had also refused to compel reapportionment in accordance with the State Constitution. *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956). An attempt to obtain relief through a constitutional convention had likewise been unsuccessful. 369 U.S. at 193 n.14. And Tennessee has neither the initiative nor the referendum. 369 U.S. at 259.

5. Record, pp. 12-13, *Baker v. Carr*. The plaintiffs also alleged discrimination in the allocation of state finances, but the Court interpreted this allegation as merely offering evidence of a discriminatory apportionment, and held that the question of whether such evidence was relevant to the plaintiff's cause was "for the District Court in the first instance to decide." 369 U.S. 194 n.15.

landmark decision,⁶ held that the district court⁷ had erred in interpreting previous decisions to require dismissal on the ground of nonjusticiability,⁸ and remanded the case to the district court for consideration on the merits.⁹

Baker v. Carr only held that the issue of legislative apportionment was a justiciable one; the question of what constitutes an unconstitutional apportion-

6. "[I]t must . . . be guessed that 1962 will appear to historians of the Supreme Court as the Year of the *Reapportionment Case*." McCloskey, *The Supreme Court 1961 Term, Foreward: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962). To another commentator it was the "most important decision since *Marbury v. Madison*," Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581 (1962).

7. See *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959). An earlier motion to dismiss had been denied and the questions raised held sufficiently substantial to require a decision by a three-judge court. *Baker v. Carr*, 175 F. Supp. 649 (M.D. Tenn. 1959).

8. Mr. Justice Brennan cited *Smiley v. Holm*, 285 U.S. 355 (1932), *Koenig v. Flynn*, 285 U.S. 375 (1932), and *Carroll v. Becker*, 285 U.S. 380 (1932), as "settling" the issue in favor of justiciability of questions of congressional redistricting." 369 U.S. at 232. See also *Colegrove v. Green*, 328 U.S. 549, 564-65 (1946) (Rutledge, J., concurring); *id.* at 573-74 (Black, J., dissenting). Those cases, however, did not involve questions of a state's weighing of its electoral strength, but rather whether Article I, § 4 of the United States Constitution exempted congressional redistricting acts from the normal legislative processes. In each case the state legislature had attempted to enact such measures without the governor's approval. The Supreme Court held that the Constitution accorded congressional redistricting measures no special status, and, since in the three states involved gubernatorial approval was needed to enact normal legislation, all three acts were invalidated, but on the basis of state, not federal, law. See Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 340-43 (1962); *Baker v. Carr*, 369 U.S. at 284-85 (Frankfurter, J., dissenting).

Nevertheless, the majority opinion, albeit on the basis of strained interpretations of previous cases, did hold that questions involving congressional districting were justiciable. Two courts, however, have recently held to the contrary. *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), *appeal docketed*, 31 U.S.L. WEEK 3147 (Oct. 12, 1962) (No. 507); *Lund v. Mathas*, 31 U.S.L. WEEK 2215 (Fla. Oct. 24, 1962). In both cases the courts argued that questions of congressional redistricting were textually committed to Congress, see Article I, §§ 2, 4, and 5, and Article IV, § 2 of the Constitution, and therefore involved a political question as described by Mr. Justice Brennan in *Baker v. Carr*, 369 U.S. at 217.

Neither case, however, appears to be good law. Although misinterpreting previous cases, the majority opinion in *Baker* explicitly stated that despite these constitutional provisions, questions of congressional redistricting were justiciable. 369 U.S. at 232. Moreover, there are several factors which would seem to make congressional redistricting more susceptible to judicial review than state legislative apportionments. See Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 325-26 (1962); Comment, 63 COLUM. L. REV. 98 (1963). And several district courts have indicated that congressional districting cases present problems no more difficult than state legislative apportionment cases. See, e.g., *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962).

9. One commentator, however, has interpreted the Court's remand as only an invitation to the district court to examine more extensively the reasons why this issue might be non-justiciable. Neal, *supra* note 8, at 253. This clearly is a minority view, and post-*Baker* district courts have generally disposed of the issue of justiciability in one sentence by citing that decision. E.g., *Sims v. Frink*, 205 F. Supp. 245, 247 (M.D. Ala. 1962). Cf. *Scholle v. Hare*, 369 U.S. 429 (1962), *remanding for reconsideration in light of Baker v. Carr*, 360 Mich. 1, 104 N.W.2d 63 (1960).

ment was left unresolved.¹⁰ Nevertheless, the reasoning of the Court does offer some guidance on that question. As the Court observed, one of the characteristics of a nonjusticiable issue is the unavailability of judicially meet and workable standards to resolve it.¹¹ The Court found that legislative apportionment was not to be deemed such an issue:

Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar. . . .¹²

This Comment will seek to determine what those "well developed and familiar" standards are, and how they might be applied in apportionment cases.

THE SEARCH FOR A STANDARD

Some Interpretations of Equal Protection in Apportionment

The initial test in applying the equal protection clause is one of minimum rationality—are the classifications created by a particular statute, in light of contemporary knowledge and social conditions, reasonably related to the objects of the statute?¹³ In dealing with apportionment statutes, this question takes the form of whether the differentiation among voters reflects the application of any intelligible policy and if so, whether that policy is consistently applied.¹⁴ Today, however, the equal protection clause embodies other

10. At least two Justices, however, thought the majority opinion held not only that the case presented a justiciable issue, but also "sub silentio" that an apportionment like that alleged in *Baker* was unconstitutional, and that the only purpose in remanding the case to the district court was to determine whether the factual allegations were correct. 369 U.S. at 261 (Clark, J., concurring), *id.* at 331 (Harlan, J., dissenting). See also *Baker v. Carr*, 206 F. Supp. 341, 345 (1962), *on remand from Baker v. Carr*, 369 U.S. 186 (1962). A careful reading of the majority opinion, however, does not support this conclusion. The decision was expressly made "in light of the District Court's treatment of the case," 369 U.S. 197, and that court dismissed the claim because it thought the issue a political question. *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959). See Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 110-113 (1962); Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81 (1962). Cf. *Scholle v. Hare*, 369 U.S. 429 (1962); *W.M.C.A., Inc. v. Simon*, 370 U.S. 190 (1962).

11. 369 U.S. at 217.

12. 369 U.S. at 226.

13. For a general discussion of the equal protection clause and its application by courts, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); HARRIS, *THE QUEST FOR EQUALITY* (1960). See also Dixon, *supra* note 8, at 360-66.

For a more specific discussion of the minimum rationality test, with emphasis on under-inclusive and over-inclusive classifications, see Tussman & tenBroek, *supra* at 344-53. See also notes 138-48 *infra* and accompanying text, where the problem of determining what classifications are reasonably related to the nature of apportionment is discussed. Most state economic and social regulations are held only to the requirements of the minimum rationality test. See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Goesart v. Cleary*, 335 U.S. 464 (1948). *But see* *Morey v. Doud*, 354 U.S. 457 (1957).

14. See *Baker v. Carr*, 369 U.S. at 253-58 (Clark, J., concurring); *Scholle v. Hare*, 116 N.W.2d 350, 353-54 (Mich. 1962).

social values besides reasonableness;¹⁵ therefore it also tests whether the policies applied are legitimate,¹⁶ or, although legitimate in themselves, whether as applied they effectuate excessive inequalities.¹⁷ Thus, in *Griffin v. Illinois*¹⁸ the Court prohibited a state from classifying on the basis of wealth for purposes of criminal appeals although certainly that classification satisfied the minimum rationality test, *i.e.*, Illinois chose not to appropriate tax moneys for forma pauperis appeals. The decision in *Baker v. Carr* fails to make clear whether the Court under this second inquiry will declare any apportionment policies illegitimate, or whether it will in any way limit the inequalities effectuated by such policies. If, however, it should not, *Baker* will not instigate the "drastic alteration in the balance of power on the state political scene"¹⁹ that some have foreseen, for many apportionments satisfying the minimum rationality test nevertheless create gross population disparities between districts; in fact they often are specifically designed to do so.²⁰ However, if the Court should prohibit certain policies or limit the inequalities resulting from otherwise permissible policies, the problem becomes one of finding a substantive standard for making these determinations. Such a standard should deal adequately with the social and political problems posed by legislative mal-apportionment, should be consonant with the proper role of the Court in

15. Some commentators have argued that questions of the legitimacy of the policies applied are more appropriately due process than equal protection questions. See Dixon, *supra* note 8, at 362-63; *Griffin v. Illinois*, 351 U.S. 12, 34-39 (1956) (Harlan, J., dissenting). Be that as it may, it is clear that the Court, for reasons largely historical, is today deciding many issues under the equal protection clause that were formerly thought to fall under the due process clause. See Tussman & tenBroek, *supra* note 13, at 361-65. Cf. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

16. See, *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). See also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

17. Thus, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court struck down an Oklahoma statute providing for sterilization of habitual criminals but exempting those convicted of embezzlement and certain other crimes. The Court held that, although the State could classify crimes, in particular larceny and embezzlement, it violated the equal protection clause to treat larceny and embezzlement, crimes intrinsically of the same nature, so differently as to provide for sterilization, a severe and irremediable punishment, in one case but not the other. *Id.* at 538-41. Although arguably this case stands only for the proposition that there are no distinctions between larceny and embezzlement reasonably related to sterilization, while such distinctions do exist for other purposes, certainly this case at least indicates that courts will examine more closely what is reasonably related to the object of the statute where the consequences are great. And compare *Betts v. Brady*, 316 U.S. 455 (1942), with *Griffin v. Illinois*, 351 U.S. 12 (1956).

18. *Supra* note 17. See also *Burns v. Ohio*, 360 U.S. 252 (1959); Shafer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

19. Israel, *supra* note 10, at 107. See Note, 15 VAND. L. REV. 985 (1962).

20. For example, Georgia's apportionment certainly satisfies the minimum rationality test, see notes 187-89 *infra* and accompanying text, and, although perhaps not originally designed to reduce the representation of the urban areas, that clearly was the motivation for retaining the apportionment. See GOSNELL & ANDERSON, *THE GOVERNMENT AND ADMINISTRATION OF GEORGIA* 51-52 (1956); notes 190-92 *infra* and accompanying text.

formulating constitutional doctrine, and should be within the competencies of judicial institutions to administer. Stated differently, the standard should be effective, judicially meet, and workable.

Several commentators and some district courts since *Baker v. Carr* have found that the equal protection clause not only ensures minimum rationality in apportionment schemes but also requires that all apportionments conform to an equal population, or one man-one vote, principle.²¹ Advocates of this position argue that equal representation in the legislature is a fundamental societal value of such importance that the equal protection clause should be deemed to require it.²² Discrimination in legislative representation on the basis of geography, political units, insular minorities, and other historically familiar factors, the advocates argue, is no less condemnable than discrimination on the basis of race or religion.²³ Any deviations from absolute equality, to the advocates, are justified only if required by the practicalities of apportionment, such as the need to follow county, ward, or precinct lines.²⁴

21. See, e.g., *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962); *Mann v. Davis*, 31 U.S.L. WEEK 2263 (E.D. Va. Nov. 28, 1962); Hanson, *Courts in the Thicket: The Problems of Judicial Standards in Apportionment Cases*, 12 AM. U. L. REV. 51 (1963); American Civil Liberties Union Weekly Bulletin, Mar. 20, 1961, pp. 1-2.

22. The right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self government. However, to recognize and guarantee equality to vote in the selection of representatives and then to take away that equality in the voice of the representative in the legislative body . . . is to make the first equality meaningless and just as effectively denies equality as if the vote for representative had been given unequal weight.

Memorandum Brief for Intervenor, pp. 13-14, *Sims v. Frink*, 205 F. Supp. 421 (M.D. Ala. 1962).

Any citizen, if asked, would in all probability admit to a sense of outrage at the suggestion that his vote be counted for less in the election of legislative representatives than the vote of any other citizen. The principle that a vote cast be counted of equal value to any other is so fundamental to our understanding of democracy as to pass unchallenged. Yet in practice, the system of legislative representation in one American state after another shows a tenacious disregard for this rudimentary requirement of political equality.

LARSON, REAPPORTIONMENT AND THE COURTS iii (1962), as quoted in Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90 n.4 (1962). See also BAKER, RURAL VERSUS URBAN POLITICAL POWER 5-10 (1955).

23. See *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 236 (D. Hawaii, 1956). Cf. *Gomillion v. Lightfoot*, 270 F.2d 594, 612-13 (5th Cir. 1959) (Wisdom, J., concurring):

I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, blue-stocking voters, industrial workers, urban citizens, or other groups who are euchered out of their full suffrage because their bloc voting is predictable and their propensity for propinquity or their residence in certain areas, as a result of social and economic pressures, suggests the technique of partial disfranchisement by gerrymander or malapportionment.

24. Apportionment, in the technical sense, refers solely to the process of allocating legislators amongst several areas or political subdivisions while districting entails the actual drafting of district lines. Thus, Congress "apportions" Representatives amongst the states while the states "district" by actually drawing the congressional district lines. See

Other commentators, whom we shall collectively refer to as the critics,²⁵ have concluded that the Court in *Baker* could have intended to apply only the minimum rationality test to apportionment statutes. They conclude that there is no basis consistent with the competency and functions of judicial institutions by which a court could hold that the equal protection clause prohibits a state from pursuing policies other than population in legislative apportionment.²⁶ More specifically, the critics reject the contention that equal representation in the legislature is such a fundamental societal value that the Court should impose it on the states. First, they point out, such a principle has never been uniformly or even predominantly followed in America; nor was it accepted in England before the American Revolution.²⁷ Furthermore, they argue, the structure of Congress, with the Senate apportioned exclusively on a non-

generally Silva, *Apportionment in New York*, 30 *FORDHAM L. REV.* 581, 595-96 (1962). In keeping with common usage, however, the total process shall be referred to as "apportionment" in this Comment. See note 125 *infra*.

Since district lines necessarily embody geographic areas, and since the single-member district predominates in United States electoral arrangements, some inequality between districts is inevitable unless district lines are to run through backyards. Ordinarily for reasons of administrative convenience a state will place a whole precinct, or a whole county, in a single legislative district and, since precincts or counties are never equal in population, this will necessitate inequality. See note 277 *infra*. And if natural boundaries, such as the demographic division of the state into regions or communities of interest, are also taken into consideration when drawing district lines, much greater disparity between districts will result. See Israel, *supra* note 10, at 115-17. For example, if a state has two representatives and one urban area with sixty percent of the population, it would seem logical to give the urban area one representative and the balance of the state the other. See Lewis, *Legislative Apportionment and the Federal Courts*, 71 *HARV. L. REV.* 1057, 1085 (1958). The existence of geographical barriers may produce similar inequalities. For example, it seems reasonable to make all of Colorado west of the Rocky Mountains one congressional district although that area has 55.4% less population than the average Colorado congressional district. *CONG. Q. SP. REP., CONGRESSIONAL DISTRICTING*, Sept. 28, 1962, p. 1619.

25. See Israel, *supra* note 10; Bickel, *The Durability of Colegrove v. Green*, 72 *YALE L.J.* 39 (1962). Cf. McCloskey, *supra* note 6; Neal, *supra* note 8.

Professor Bickel, to be sure, would apply a further test than that described here as the critics' approach, for he would require a legislature, at least in some circumstances, to enact a new reapportionment, even if that amounts only to reenacting the existing apportionment. Bickel, *supra* at 44. This is not entirely inconsequential, for it is doubtful that if forced to act the legislature in reapportioning would create greater inequalities, and it quite possibly might reduce the magnitude of the inequalities. It would also give the majoritarian governor a chance to use his powers, including the veto, to bargain with the legislature for greater urban representation. But because the test Bickel would apply to the substance of an apportionment is solely lack of arbitrariness, he is classified here as a critic.

26. See Israel, *supra* note 10, at 134-37; Bickel, *supra* note 25, at 41-43; Neal, *supra* note 8, at 275-300.

27. However desirable and however desired by some among the great political thinkers and framers of our government, [one man, one vote] has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly

population basis, demonstrates that the inclusion of non-population factors in legislative apportionments is "rooted in reason" and therefore satisfies equal protection requirements.²⁸ In addition, they find that the results of implementing such a principle in society today would often not be desirable. Apportionment, the argument runs, is only one of the many ways in which power in the governing process is allocated. It may be desirable to overrepresent some interests in the legislature through apportionment in order to compensate for the underrepresentation of those interests elsewhere in the government.²⁹ This position, applied to another aspect of the electoral process, was enunciated by the Supreme Court in *MacDougall v. Green*, a case decided in 1948:

To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. . . . 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.³⁰

practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today.

Baker v. Carr, 369 U.S. at 301 (Frankfurter, J., dissenting). See generally *id.* at 301-23. England's present apportionment, however, is in substantial accord with the one man-one vote principle. See Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 106 (App. C.) (1962).

28. See Israel, *supra* note 10, at 120-24.

Many, particularly advocates of the one man-one vote principle, have argued that the apportionment of Congress can not properly serve as an analogy for apportionment in state legislatures, because a state contains no "sovereign" counterpart to states in a federal system. This argument was most quotably stated by Judge Black of the Michigan Supreme Court.

Every schoolboy knows the historic reason for the "built-in" right of each State to 2 Senators. The Federalists reluctantly consented to such feature of the national legislative structure for recorded reasons of fully debated compromise. . . . But this provision became a part—and an exclusive part—of the National edifice only. The Fourteenth Amendment, on the other hand, did not become a part of the Constitution until 78 years later. Section 1 of that amendment. . . was and now is a "built-in" order directed to each State; an order that no state shall deny "to any person" within that state the equal protection of the laws. . . . Article 1 (supported later by amendatory article 17) guarantees *inequality* of the representative value of a man's vote so far as concerns the National senate; whereas the Fourteenth Amendment guarantees a *substantial approximation of the very opposite* within the framework of the government of each State.

Scholle v. Hare, 360 Mich. 1, 123, 104 N.W. 2d 63, 126-27 (1960) (concurring opinion). See also notes 154-58 *infra* and accompanying text.

29. See Neal, *supra* note 8, at 277-82; Bickel, *supra* note 25, at 41-42.

30. 335 U.S. 281, 283-84 (1948). This case involved an Illinois statute which required a new party, in order to be placed on the ballot, to obtain at least 200 signatures from each of 50 counties. In 1948, the Progressive Party, seeking a place on the ballot, obtained more than the total number of signatures required but were unable to meet the dispersal requirements.

Finally, some of the critics argue that any determination that the one man-one vote principle is embedded in the Constitution necessarily involves interpretation of that clause in the Constitution which guarantees each state a republican form of government.³¹ Since this clause has never been interpreted by the Court and issues arising under it have been traditionally held non-justiciable,³² these critics maintain that interpretation of that clause, even if only to obtain a principle for adjudicating an equal protection claim, is impermissible.³³

The critics have similar difficulties with an apportionment standard that would allow reasonable deviations from the equal population principle but would in some manner limit those deviations. Sundry variations of a reasonable deviations standard have apparently emerged as the favorites of both the commentators and the district courts since *Baker*.³⁴ For example, some courts

31. U.S. CONST. art. IV, § 4.

32. See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). But see Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

33. Israel, *supra* note 10, at 135-37.

This rather formalistic objection to the one man-one vote principle would seem to be the weakest of the critics' arguments, and indeed some of them do not advance it. See Bickel, *supra* note 25. See also notes 99-102 *infra* and accompanying text.

34. See, e.g., Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 70-75 (1962); Lewis, *supra* note 24.

Although generally not viewed in this manner, it is both accurate and helpful to view most post-*Baker* cases as adopting a rational deviations standard. See Israel, *supra* note 10, at 124-30; notes 35-36 *infra* and accompanying text.

For a fairly complete review of the early post-*Baker* cases, see McCloskey, *supra* note 6, at 56 n.14. Some additions to this list are: *Colorado*. A federal district court held that it had jurisdiction to hear a challenge of the State's legislative apportionment even though the State Supreme Court in a similar suit had stayed the proceedings but retained jurisdiction. The federal court, however, stayed its proceedings until after the November, 1962, elections at which two reapportionment measures were on the ballot. *Lisco v. McNichols*, 203 F. Supp. 471 (D. Colo. 1962). One of these measures was adopted in the November elections. N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 6. *Florida*. The district court, after holding the existing apportionment unconstitutional, expressed the opinion that a constitutional amendment proposed by the legislature would provide the State with a valid apportionment. *Sobel v. Adams*, 203 F. Supp. 316, 319 (S.D. Fla. 1962). The amendment was defeated in the November, 1962 elections, however. See note 96 *infra*. *Kentucky*. A congressional redistricting statute was challenged on the grounds of inordinate population disparities and of excessive gerrymandering. In a decision delivered the same day as *Baker v. Carr*, the Kentucky Court of Appeals rejected both claims. *Watts v. Carter*, 355 S.W.2d 657 (Ky. 1962). *Missouri*. A claim that the congressional redistricting statute invidiously discriminated against the St. Louis metropolitan area was rejected. *Priesler v. Hearnies*, 31 U.S.L. WEEK 2304 (Mo. Dec. 11, 1962). *Nebraska*. The apportionment of Nebraska's unicameral legislature was challenged on the ground of excessive population disparities. A district court denied immediate relief but retained jurisdiction of the cause. *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962). In the November, 1962 elections Nebraska voters approved a measure changing the constitutional basis of representation from solely population to a weighted formula of 20% to 30% area and the balance population. N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 6. *New York*. The

have allowed deviations from the population principle for only one house of a bicameral legislature.³⁵ The Solicitor General's broad formulation of this test in the Government's *amicus curiae* brief in *Baker* was that whenever inclusion of non-population factors in apportionment results in gross population disparities, a court should carefully scrutinize the state's reasons for including these factors and that, if these reasons fail to justify that inclusion, a court should invalidate the apportionment.³⁶ Some critics object to a reasonable deviations standard, however formulated, both because it requires a judgment that equal population is a favored principle or norm, and because neither received learning nor widely shared values support the formulation of any rational deviations standard which would determine the extent of permissible deviations from the population norm.³⁷ Moreover, almost all the critics voice the fundamental objection that, even if a judicially meet reasonable deviations standard could be formulated—one that represents a principled judgment—it cannot be applied to test existing apportionments in a way consistent with the institutional capacities of courts—the standard would not be a workable one.³⁸ These conclusions, they point out, and not without reason, are amply

congressional redistricting of Manhattan was challenged on the grounds that racial criteria were used in forming the 18th Congressional District. A three-judge court, with one judge dissenting, rejected the claim, although two of the judges stated that, if it could be shown that race was the basis of representation, it would be unconstitutional. *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962). *North Dakota*. Prior to *Baker v. Carr* the district court directed the plaintiffs, who were challenging the state legislative apportionment, to seek relief in the state courts before returning to the federal courts. *Lein v. Sathre*, 201 F. Supp. 535 (D. N.D. 1962). Subsequently the North Dakota Supreme Court held that the existing apportionment violated the State Constitution because it had been invalidly enacted. Rather than awarding affirmative relief, however, the court ruled that the previous apportionment was still in effect. *Lein v. Sathre*, 113 N.W.2d 679 (N.D. 1962). Thereafter the district court again denied relief but retained jurisdiction pending possible legislative action. *Lein v. Sathre*, 205 F. Supp. 536 (D. N.D. 1962). *Virginia*. A three-judge court declared unconstitutional the state legislative apportionment, which contained disparities as great as four to one, but it stayed the effective date of an injunction pending possible legislative action. *Mann v. Davis*, 31 U.S.L. WEEK 2263 (S.D. Va. Nov. 28, 1962). *Washington*. A challenge of Washington's congressional districting was rejected on the merits. However, the district court did hold that it had jurisdiction even though an initiative measure to redistrict the State's congressional districts had been defeated in the November elections. *Thigpen v. Meyers*, 31 U.S.L. WEEK 2305 (W.D. Wash. Dec. 13, 1962).

35. See, e.g., *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962); *Maryland Committee for Fair Representation v. Tawes*, 31 U.S.L. WEEK 2155 (Md. Sept. 25, 1962). Another rational deviations standard formulated in several cases limits the ratio between the largest and smallest districts. See *Scholle v. Hare*, *supra* note 14; *Sweeny v. Notte*, 183 A.2d 296 (R.I. 1962).

36. Brief for the United States as *Amicus Curiae* on reargument, pp. 25-35, *Baker v. Carr*, 369 U.S. 186 (1962).

37. See *Israel*, *supra* note 10, at 124-35; *Neal*, *supra* note 8, at 275-91. Those critics who object to imposition of a one man-one vote standard because it requires interpretation of the guaranty clause usually object to imposition of the rational deviations standard on the same basis. See notes 31-33 *supra* and accompanying text.

38. Room [in apportionment] continues to be allowed for weighting [of nonpopulation factors]. This of course implies that geography, economics, urban-rural conflict, and

borne out by a perusal of the post-*Baker* apportionment cases.³⁹ Thus, when one court ruled that the limit to deviations was that the ratio of population disparities between districts could not be greater than four-to-one, one critic asked why four-to-one and not five-to-one or three-to-one.⁴⁰ Having discovered no grounds upon which judicial approval or disapproval of apportionment policies might be justified, the critics conclude that the Court in *Baker* must have meant that the only standard to which apportionments should be held is one of minimum rationality.

Baker v. Carr Analyzed

Although the Supreme Court in *Baker* gave no express indication whether the equal protection clause prohibits or limits the scope of various policies that might be followed in legislative apportionment, there are passages in the various opinions which may be read to endorse the critics' interpretation. The "crazy quilt" test applied by Mr. Justice Clark to Tennessee's apportionment is such a passage.⁴¹ And Mr. Justice Harlan apparently agrees that if in fact Tennessee's apportionment was a "crazy quilt," it would violate the equal protection clause, although he differs with Mr. Justice Clark on what constitutes a sufficient showing of an absence of any rational policy.⁴² Even the majority opinion contains one passage which seems to support the critics' interpretation. In discussing whether apportionment cases involve "policy determinations for which there are no judicially manageable standards," Mr. Justice Brennan stated:

[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.⁴³

Despite these indications, however, it is difficult to accept this reading of *Baker*. It seems unlikely that Mr. Justice Frankfurter would have written a 63 page dissent if the majority was merely suggesting that apportionments

all the other nonlegal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in federal courts of state reapportionments. To some extent—aye, there's the rub.

369 U.S. at 269 (Frankfurter, J., dissenting). See McCloskey, *supra* note 6, at 73,

39. See Neal, *supra* note 8, at 300-26; Israel, *supra* note 10, at 126-30. Compare Toombs v. Fortson, *supra* note 35, with Sweeny v. Notte, *supra* note 35.

40. Israel, *supra* note 10, at 128-29. The case referred to is Sweeny v. Notte, *supra* note 35. For the subsequent history of this case, see Opinion to the Governor, 183 A.2d 806 (R.I. 1962).

41. *Baker v. Carr*, 369 U.S. 186, 253-58 (1962).

42. Although Mr. Justice Harlan in his dissent emphasized the absence in Tennessee's apportionment of a "capricious" classification, such as one based on race, he did indicate that the total absence of a rational basis for that apportionment would be sufficient grounds to invalidate it. *Id.* at 334-35. But he concluded:

Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation . . .

Id. at 336. Cf. notes 133-38 *infra* and accompanying text.

43. *Id.* at 226.

must reflect the application of some rational policy;⁴⁴ or that Mr. Justice Brennan would have woven his way through so many precedents in order to conclude that apportionments are subject only to a requirement that they reflect some rational policy;⁴⁵ or that three concurrences would have been written to confirm that fact.⁴⁶ Rather it appears that the most probable conclusion that can be drawn from the varying opinions in *Baker* is that a majority of the Court was at that time unwilling or unable to commit themselves on the question of standards. No doubt many of them are still uncertain as to whether any "substantive" standards—standards requiring at least limited adherence to a population principle—can be formulated in a manner consistent with the proper role of judicial institutions and constitutional canons of decision-making. Mr. Justice Harlan clearly agrees with the critics that they cannot.⁴⁷ Judging from their past opinions, Justices Black and Douglas not only believe that such standards exist but are willing to embrace a standard closely resembling a one man-one vote principle.⁴⁸ Justices Clark and Stewart have renounced the one man-one vote principle, but they have not committed themselves on whether they will accept another substantive standard requiring a lesser degree of adherence to the population principle.⁴⁹ The other Justices have yet to commit themselves even to this extent.⁵⁰

44. *Id.* at 266-330.

It could be argued that Mr. Justice Frankfurter was concerned primarily with the difficulties involved in showing the absence of a coherent policy, as illustrated by the dispute between Justices Clark and Harlan, and consequently, in order to avoid this "mathematical quagmire," *id.* at 268, he thought it better to deny jurisdiction altogether. But certainly this is not the main thrust of his opinion, which is largely devoted to showing that the Court could not require a state to adhere in any degree to the equal population principle in its apportionment.

45. *Id.* at 211-37.

46. Justices Douglas, Clark, and Stewart all wrote concurring opinions. The fact that all three concurrences appear to disagree with each other may suggest that the Court did not agree on *any* approach to standards.

47. See 369 U.S. at 334-35.

48. In *Colegrove v. Green*, 328 U.S. 549, 570 (1946), Mr. Justice Black, dissenting, stated:

[T]he Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.

And Mr. Justice Douglas, dissenting in *MacDougall v. Green*, 335 U.S. 281, 290 (1948), stated:

The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

See also *South v. Peters*, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting).

49. Mr. Justice Clark's opinion might be read to embrace the critics' approach exclusively, particularly in view of his apparent approval of the Georgia county unit cases, such as *South v. Peters*, *supra* note 48. See *Baker v. Carr*, 369 U.S. at 253. But other parts of his opinion indicate that it would be premature to attribute such a position to him. *Id.* at 261-62.

50. Nothing is known of the views of Justices White and Goldberg since they have only recently joined the Court. Perhaps some idea of the views of Mr. Chief Justice

Some criticism of the critics

Although one may be uncertain as to what standards courts will or should apply to future apportionment cases, it cannot be doubted that state legislative malapportionment is a pressing contemporary problem.⁵¹ Mass migration to the cities in the past half century⁵² has created considerable social problems in urban areas. Yet state legislatures, many elected on the basis of a population distribution of fifty or more years ago,⁵³ have been unable or unwilling to make serious attempts to solve these problems. The results have been twofold. The magnitude of the problems has increased to such an extent that one student of metropolitan government predicts "these amorphous urban complexes" will soon be unfit for human occupancy.⁵⁴ And urban areas, in self defense against the states' indifference and their limited resources, have bypassed state governments by appealing for aid directly to Washington,⁵⁵ where they are more adequately represented.⁵⁶ The federal government has responded to these appeals through direct cooperative arrangements with the cities designed to arrest urban decay. Both the cause and the effect of ignoring the states in areas traditionally reserved to them in our federal system have not gone unnoticed. The United States Commission on Intergovernmental Relations has commented:

One result of State neglect of the reapportionment problem is that urban governments have bypassed the States and made direct cooperative arrangements with the National Government in such fields as housing and urban development . . . Although necessary in some cases, the multiplica-

Warren and Mr. Justice Brennan can be obtained from their dissent in *Hartsfield v. Sloan*, 357 U.S. 916 (1958), where a motion for leave to file a petition for a writ of mandamus to convene a three-judge court in order to hear a challenge of Georgia's county unit system was denied. It is doubtful, however, that much weight should be attached to these votes.

51. In recent years political commentators have with increasing frequency written about the unfortunate consequences of malapportionment. See, e.g., Merry, *Minority Rule: Challenge to Democracy*, *Christian Science Monitor*, Oct. 2, 1958, § 2, p. 13; Strout, *The Next Election is Already Rigged*, *Harper's Magazine*, Nov. 1959, p. 35. Nor is this solely a contemporary problem. See, e.g., Ahl, *Reapportionment in California*, 22 *AM. POL. SCI. REV.* 977 (1928).

52. From 1920 to 1961 farm population as a percentage of the total population dropped from 30.1% to 8.1%. 83 U.S. DEP'T OF COMM., *STATISTICAL ABSTRACT OF THE UNITED STATES* 608 (1962).

53. See note 3 *supra*.

54. Luther Gulick, as quoted in *The New Republic*, April 23, 1962, p. 27. See also Clark, *To Come to the Aid of Their Cities*, *N.Y. Times*, April 30, 1961, § 6 (Magazine), p. 11.

55. See Schattschneider, *Urbanization and Reapportionment*, 72 *YALE L.J.* 7, 9-10 (1962); Lewis, *supra* note 24, at 1056-66. It should be emphasized that the limited revenues available to the states is an important reason for the increase in federal aid, and that, even if state legislatures were responsive to urban areas, substantial federal aid would undoubtedly still be needed. See KEY, *AMERICAN STATE POLITICS: AN INTRODUCTION* 4, 7-9 (1956).

56. To be sure, rural areas are overrepresented in Congress, but not nearly to the extent they are in many states today. See *CONG. Q. WEEKLY REP.*, Feb. 2, 1962, at 153-78; Tyler, *Court Versus Legislature*, 27 *LAW & CONTEMP. PROB.* 390, 393, 402 (1962).

tion of National-local relationships tends to weaken the State's proper control over its own policies and its authority over its own political subdivisions. . . .

[T]he more the role of the States in our system is emphasized, the more important it is that the State legislatures be reasonably representative of all the people.⁵⁷

But however desirable apportionment "reasonably representative of all the people" may be, the unfortunate truth is that the problem is largely insoluble without substantial intervention by the federal judiciary. State legislators have such a vested interest in the status quo that they are usually unwilling or unable to reapportion to achieve this end.⁵⁸ And with few exceptions state courts have also shown themselves unwilling to deal with the problem, at least until the federal courts lead the way.⁵⁹

As a cursory review of the amicus curiae briefs clearly indicates, the Court, in deciding *Baker v. Carr*, was aware of this background of urban decay and receding federalism.⁶⁰ And the Court must also have been aware that any decision it made would be interpreted as an attempt to solve that problem. After all, this was essentially the same Court which in the *School Segregation Cases*⁶¹ made a frontal attack on another social problem seemingly insoluble except by the federal judiciary. Moreover, the Court has traditionally viewed its most important role as ensuring that the democratic machinery of government functions smoothly.⁶² In the words of Dean Eugene Rostow:

[T]he work of the Court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominant-

57. U.S. COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 40 (1955). For some examples of services now provided by the federal government to localities, see *id.* at 176-84, 221-32, 256-65.

58. See Lewis, *supra* note 24, at 1091-93; Aumann, *Rural Ohio Hangs On*, 46 NAT'L MUNIC. REV. 189 (1957). Cf. notes 309-11 *infra* and accompanying text.

59. See, e.g., *Waid v. Pool*, 255 Ala. 441, 51 So.2d 869 (1951); *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564 (1943), *appeal dismissed and cert. denied*, 322 U.S. 717 (1944). *But see* note 296 *infra*.

60. In addition to the United States, amicus curiae briefs were filed by the President of the Michigan AFL-CIO, the Governor of Oklahoma, the National Institute of Municipal Law Officers, several residents of Nassau County, New York, the City of St. Mathews, Kentucky, and several residents of urban areas in Mississippi. Nearly all of these briefs alluded to the effects of malapportionment on urban areas.

As a practical matter, a rural upstate legislator is not faced with the problems which are attendant on explosive growth of population such as has taken place in the suburbs. He has not been and will not be sympathetic to these problems This will inevitably mean either that these problems will find no solution or that suburban eyes will turn increasingly to the Federal Government.

Brief for English, *et al.*, residents of Nassau County, N.Y., as Amicus Curiae, p. 3, *Baker v. Carr*, 369 U.S. 186 (1962). For a discussion of the role and effect of amicus curiae briefs, see Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

61. 347 U.S. 483 (1954).

62. See, e.g., *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (per Frankfurter, J.); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (per Stone, J.),

ly democratic forces of American life. The historic reason for this . . . is that American life in all its aspects is an attempt to express and to fulfill a far-reaching moral code. . . . The prestige and authority of the Supreme Court derive from the fact that it is accepted as the ultimate interpreter of the American code in many of its most important applications.⁶³

Furthermore, the general public has interpreted *Baker* as an attempt to resolve the problems created by malapportionment,⁶⁴ as one of those decisions in which the Court exercises its power "to help keep the other arms of government democratic in their procedures."⁶⁵ The recent flood of litigation challenging apportionments in nearly every state amply testifies to this conclusion.⁶⁶ But in order to fulfill this role, the Court will have to adopt some standard of equal protection more rigorous and substantial than the minimal requirement of rationality. Although the rationality test might require legislation in those states whose existing apportionments reflect no policy,⁶⁷ that legislation would not likely result in significant reallocations of political power. If disparities, however large, can be justified on the ground that they reflect the pursuance of some policy, malapportioned legislatures will surely and easily meet that requirement to avoid interference by the federal judiciary.⁶⁸ Consequently *Baker* would have little impact, if any, on the social and political problems created by malapportionment.

If the Court does not adopt a substantive standard of equal protection, that is, if it adheres to the critics' standard of minimum rationality, its action not only will leave these malapportionment problems unaffected, but indeed might aggravate them. As Professor Bickel, himself a critic, has noted, a minimum rationality standard is likely to lead the Court to uphold many apportionments containing gross population disparities.⁶⁹ But to declare these apportionments consistent with constitutional principle, Bickel convincingly argues, would be a mistake; it would be committing "Plessy v. Ferguson's Error" by imbuing with the Court's prestige and moral authority—"legitimizing"—many apportionments, or malapportionments.⁷⁰ In other words, approval of existing arrangements would make a part of that "American Code" entrusted to the Court's care a principle that allows gross deviations from the population

63. ROSTOW, *THE SOVEREIGN PREROGATIVE* 170 (1962). Cf. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 8-13 (1955). But see THAYER, *JOHN MARSHALL* 103-07 (1901).

64. See, e.g., *Politics, Not as Usual*, 76 *COMMONWEAL* 339 (1962); Lewis, *Decision on Reapportionment Points Up Urban-Rural Struggle*, *N.Y. Times*, April 1, 1962, § 4, p. 3, col. 1.

65. ROSTOW, *op. cit. supra* note 63, at 173.

66. See note 34 *supra*.

67. See notes 124-38 *infra* and accompanying text.

68. That "rational" apportionments containing gross disparities can be designed cannot be doubted. See note 20 *supra*.

69. Bickel, *The Durability of Colegrove v. Green*, 72 *YALE L.J.* 39, 44-45 (1962). See notes 19-20 *supra* and accompanying text.

70. Bickel, *supra* note 69, at 44-45. For further discussion on the legitimating function of Supreme Court decisions, see BICKEL, *THE LEAST DANGEROUS BRANCH* 29-33 (1962). See generally BLACK, *THE PEOPLE AND THE COURT* (1960),

principle if they reflect some rational policy. The effect of such legitimation would be to generate consent for, or approval of, many existing expedient arrangements which, although not unconstitutional under a minimum rationality test, are largely responsible for the problems of urban decay and receding federalism.⁷¹ Bickel argues that recognition of this should lead the Court to stay its hand and thus to let such apportionments be, but not to declare them constitutional.⁷² But in light of the spate of litigation since *Baker* and the disarray of lower court decisions, it seems unlikely that the Court can avoid formulating standards, and in that process declaring certain apportionments valid or invalid.⁷³ If that is so, it is hoped that the Court, aware of the harm caused by the original sin of *Plessy v. Ferguson*, would not make that mistake again by failing to adopt a substantive standard, particularly in an area that has attracted so much attention and commentary. Mr. Justice Frankfurter insisted that relief from malapportionment "must come through an aroused popular conscience that sears the conscience of the people's representatives."⁷⁴

71. Professor Black has written at length on the effects of the Court's validation of government action in generating popular approval of that action. He argues that not until the New Deal Court validated, and hence legitimated, New Deal legislation was the nation confident of the government's moral right to adopt such legislation. See BLACK, *THE PEOPLE AND THE COURT* 34-86 (1960).

72. Bickel, *The Durability of Colegrove v. Green*, 72 *YALE L.J.* 39, 44-45 (1962).

73. For examples of the disarray of lower court decisions, see note 34 *supra*. In view of this disarray and in view of the manifold and far reaching consequences of a district court's declaration of unconstitutionality of a state's apportionment, it would seem improvident for the Court not to hear some of these cases on appeal or not to set some guidelines for the district courts. Although the Court in many circumstances can make valuable use of its arsenal of devices by which it can stay its hand, see Bickel, *The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961), it would seem that the Court would destroy the very thing it is seeking to maintain by staying its hand, public confidence in the Court as an institution, if it allows this proliferation of inconsistent constitutional decisions to continue unchecked. Some states, for example, have been directed to reapportion on an equal population basis, see *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962), while other states have been permitted to retain large population disparities in their apportionments, see *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962). Does not the Court have a responsibility, or perhaps more importantly, does not the public view the Court as having the responsibility, of imposing some rational order on this disarray where the possible consequences are of such magnitude—a drastic alteration of the composition of state governments? If so, the Court should face up to that responsibility.

Not only does it appear that the Court will be unable to avoid setting some standards, but it also appears that the Court should do so soon. Serious problems would arise if the Court, in delaying such a determination, should allow a lower court declaration of unconstitutionality to stand and then in a subsequent case promulgate standards at variance with the lower court's decision. Would the first decision have *res judicata* effect on the state? If so, and it seems that it should, how does one justify requiring a state to drastically alter its apportionment in accordance with a decision based on an "erroneous interpretation" of the Constitution? What should a court do if a state is recalcitrant in complying with the lower court decision, a course of action for which the state is likely to have considerable public support in view of the Supreme Court's subsequent decision?

74. *Baker v. Carr*, 369 U.S. at 270. *But see* Brief for August Scholle as Amicus Curiae, pp. 14-15, *id.* There are instances where the consciences of legislators have been "scared,"

But legitimating malapportionments will more likely seal those consciences. Only a substantive standard is likely to have any other effect, and then only because the legislators will consider it more desirable to be masters of their own destiny than at the mercy of a federal court.

Not only has there been general agreement among the public that the Court was striking out at the problem of malapportionment, but of even greater importance there has been general approval of its action. As characterized by one commentator, the early public reactions to *Baker* "may warrant the conjecture that the Court here happened to hit upon what the students of public opinion might call a latent consensus."⁷⁶ And this should not be surprising. It was observed 150 years ago by De Tocqueville that the distinctive characteristic of America was a constant striving for equality.⁷⁶ Legislative apportionment on other than an equal population principle has typically been referred to by the general public and political scientists alike as "malapportionment," and "misrepresentation," a choice of terms indeed indicative of widely shared values. As Professor Sindler has observed, the "opponents of legislative malapportionment have enjoyed a virtual monopoly in ideological warfare."⁷⁷ These indications of general approval of a judicial attempt to solve the apportionment problem are important. As Mr. Justice Frankfurter has frequently reminded us, the "Court's authority . . . ultimately rests on sustained public confidence in its moral sanction."⁷⁸ But the expressions of approval, the activation of the "latent consensus," and the existence of the problems caused by malapportion-

although it is not clear whether a response to public pressure or a fear of judicial intervention was the motivating cause. See 102 CONG. REC. 5233-34 (1956) (Remarks of Sen. Douglas). Cf. Lewis, *supra* note 24, at 1088-89.

75. McCloskey, *The Supreme Court 1961 Term, Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 59 (1962).

76. The more I advanced in the study of American society, the more I perceived that the equality of conditions is the fundamental fact from which all others seem to be derived.

DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1 (Reeves ed. 1858).

77. Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 YALE L.J. 23, 29 (1962).

Viewed as a strategy in the conduct of group conflict, this exclusive stress on an equalitarian quantitative definition of the apportionment problem makes excellent sense. If anything said on the problem can "arouse the conscience" of the electorate and can "sear the conscience" of legislators, surely it would be the persistent reiteration of the incompatibility of malapportionment with widely-shared democratic values.

Ibid. Sindler also noted, however, that if relief can come only from legislators themselves, "the prospects . . . remain slim." *Id.* at 28-29.

Not all the commentary on *Baker v. Carr* has been favorable, however. See *The Sixteenth General Assembly of the States*, 36 STATE GOV'T 2, 4-9 (1963). The General Assembly proposed an amendment to the United States Constitution removing from the jurisdiction of federal courts any case concerning state legislative apportionment. *Id.* at 12-13. Such proposals, however, often follow constitutional decisions, and equally as often they meet the same fate—they are forgotten about. The only apparent exception was the adoption of the eleventh amendment.

78. *Baker v. Carr*, 369 U.S. at 267.

ment, all indicate that if judicially manageable substantive standards can be found, the Court not only will be able to adopt them without impairing its position "as the ultimate organ of 'the supreme Law of the Land,'"⁷⁹ but also might reasonably be expected to do so.

One commentator, Professor McCloskey, recognized that the *Baker* Court was striking out at these problems and feeling for a solution,⁸⁰ and that it had considerable public support in that effort.⁸¹ And he also apparently recognized that limiting the standard as the critics propose would not suffice to meet the problems. But McCloskey was unable to counter the legal objections made by the critics to a substantive standard. To adopt such a standard, he argued, would be "*Lochneresque*"⁸² (after the case in which the Court invalidated a state maximum hours of work law).⁸³ As in *Lochner*, it would be to make a judgment based upon a proposition of at best arguable validity—a legislative judgment. Consequently he suggested the Court adopt an alternative standard, one which he believed would go far towards solving the existing problems and yet avoid the critics' legal objections. This proposal, which he denominated a "procedural" standard, essentially would require a state either periodically to submit its organic reapportionment principles to a referendum vote, or to provide means whereby these principles could be submitted to a referendum vote if a substantial number of citizens so desired, *i.e.*, provide for the initiative. As McCloskey formulated this test:

If there has been a significant passage of time since the last constituent decision on apportionment, and if population shifts in the interval have substantially altered the distribution of legislative seats, and if the channels of popular access to the issue are obstructed—the present apportionment might be held to violate the fourteenth amendment.⁸⁴

This standard undoubtedly would somewhat alleviate the apportionment problem, for in many states today the underrepresented urban areas contain a majority of the state's population and in a statewide referendum would

79. *Ibid.* While in this country an electoral system based primarily on population is both feasible and desirable, there are countries, usually those containing several antagonistic communities, where such a system could only have severe diversive effects. Such countries consequently will usually adopt a system of communal representation whereby each community elects its own representatives to the legislative body. See MACKENZIE, *FREE ELECTIONS* 32-37 (1958).

80. McCloskey, *supra* note 75, at 70-71.

81. *Id.* at 58-59.

82. *Id.* at 73.

83. *Lochner v. New York*, 198 U.S. 45 (1905). McCloskey cites this case as an outstanding example of the employment of criteria which were not "standards meet for judicial judgment." McCloskey, *supra* note 75, at 68.

84. *Id.* at 71. In view of the myriad possible apportionments consistent with just one apportionment policy, McCloskey must mean by a "constituent decision on apportionment" a decision on the basic apportionment principles and not on an actual apportionment itself. For example, the difficulty in popularizing such a complex issue as the merits of a specific apportionment was one reason given by California Republicans for not demanding a referendum vote on the recent reapportionments in that state. See CONG. Q. SP. REP., *supra* note 24, at 1613.

be able to vote themselves a more equitable apportionment.⁸⁵ And, McCloskey argued, none of the legal objections to substantive standards would apply. It would involve no judgment as to the substantive nature of the apportionment "if the popular will had expressed itself or possessed adequate means for doing so."⁸⁶ The objection to a one man-one vote standard—that it is not an appropriate constitutional doctrine—would not apply, the author argues, for it is "beyond doubt" that the principle of consent to the form of government qualifies as a constitutional principle.⁸⁷ Thus, his "procedural" standard is an attempt to solve the problems of malapportionment while sidestepping the critics' legal objections to the solution of substantive standards.

The consent test, however, is not nearly as free from objections as its author would lead one to believe. The notion that consent of the governed in the form of a referendum is a prerequisite for, or a legitimation of, government action has never been a widely acclaimed theory of government in this country, as a look at the organization of our governmental institutions readily demonstrates.⁸⁸ Nor does tradition indicate that democracy based upon public opinion polls was ever considered, at least within the experience of the United States, a sound form of government. Thus, such a principle cannot easily be found to be rooted in the Constitution.⁸⁹

85. There is no guarantee, however, that a statewide referendum will give an underrepresented area containing a majority of the state's population greater representation. In both 1948 and 1962 initiative measures in California to increase the representation of the larger counties in the State Senate failed to pass; and the very urban areas standing to benefit by the measures cast a majority of their votes in opposition to the change. See BAKER, RURAL VERSUS URBAN POLITICAL POWER 24-25, 64 (1955); N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 7.

86. McCloskey, *supra* note 75, at 71. For a discussion of the referendum and initiative, see note 292 *infra*.

87. *Id.* at 71.

88. For example, there is no way a majority, or even a two-thirds majority, can amend the apportionment of the United States Senate, unless each state denied equal suffrage there should consent. U.S. CONST. art. V.

Furthermore, as McCloskey himself observed, a "claim that state governmental forms violated the guaranty of a republican form of government . . . [has] been uniformly held non-justiciable." *Id.* at 61. Among such cases are *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916) (challenging Ohio's power to submit reapportionment legislation to a referendum vote), and *Pacific Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (challenging Oregon's power to enact legislation by initiative). Yet McCloskey would not only make such questions justiciable, but he would *require* a state to enact certain legislation by either referendum or initiative.

89. Another difficulty with McCloskey's proposal is that it cannot be applied within the confines of the equal protection clause, which the Court in *Baker v. Carr* indicated was applicable to apportionments. See note 12 *supra* and accompanying text. Before the equal protection clause can become operative, a state must classify its citizenry in some manner so that a court can determine whether the classification is based on actual or merely arbitrary differences. See note 13 *supra* and accompanying text. But in terms of the consent test all citizens are treated alike; those residing in overrepresented legislative districts are as equally deprived of their "right" to consent to their apportionment as are those residing in underrepresented districts. Nor would there seem to be anyone who could show the requisite individual harm to establish standing under McCloskey's test, for the harm would be suffered by the state as a polity. Cf. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

Furthermore, this test ignores the function of apportionment—to insure all constituents of society an adequate voice in government—by subjecting some interests' representation to the whims of a majority, quite possibly composed of interests alien to the underrepresented one.⁹⁰ Although this criticism may not apply to many existing malapportionments, under which a majority of the voters are underrepresented, there are nevertheless some interest groups which do not constitute a numerical majority in a state, but which are grossly underrepresented under existing apportionment schemes.⁹¹ In these circumstances it is not likely that a referendum will afford "equal" protection to such groups.⁹² May a majority approve and thereby insulate an apportionment which gives forty percent of the population only ten percent of the representation? This fallacy in the consent test was inadvertently pointed to by McCloskey himself. By means of an analogy he attempts to justify applying his "procedural" standard rather than a "substantive" one. "It is comparable," he says, to "asking whether a man had a fair hearing before he was

90. This objection basically goes to the point that a state, even by referendum, could not completely deprive some group of representation, a possibility seemingly consistent with the consent test. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shoemaker v. Lawrence*, 31 Pa. D. & C. 681 (Dauphin Co. 1938), where the court invalidated a Pennsylvania apportionment which failed to place several townships in any district at all.

91. For example, the apportionment of the Michigan State Senate, which grossly underrepresents the Detroit metropolitan area and was recently declared violative of the fourteenth amendment by the Michigan Supreme Court in *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350 (1962), *execution stayed pending appeal*, 31 U.S.L. WEEK 1017, 1018 (U.S. July 31, 1962), *petition for cert. filed sub nom. Beadle v. Scholle*, 31 U.S.L. WEEK 3139 (U.S. Oct. 15, 1962) (No. 517), was approved by a majority in a referendum vote held in 1952. Wayne County, which includes Detroit, in 1960 contained only 35% of Michigan's population. MICHIGAN MANUAL 1961-62, pp. 376-79 (1962). And a majority of the electorate in Nebraska recently approved a constitutional amendment to provide for apportionment based twenty to thirty per cent on area and the balance on population. Formerly apportionment had been based solely as population. N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 6. In 1950, 53.1% of Nebraska's population resided in rural areas. NEBRASKA BLUE BOOK 1960, p. 564 (1960).

92. The equal protection clause has often been viewed as protecting minorities from arbitrary and discriminatory action by majorities.

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation . . . [t]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

For a general discussion of the theoretical problems of majoritarian tyranny and attempts to avoid it, see DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956). For a penetrating historical discussion, see DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275-94 (Reeves ed. 1858)

hanged . . . [or] asking whether it was just to hang him at all."⁹³ The former, he asserts, a court is well-equipped to handle; the latter involves questions of policy which are indistinguishable from legislative judgments. But the analogy is improperly drawn. Apportionment is comparable not to a decision to hang a man, but rather to asking whether the man had a fair hearing. It is the "procedural" device by which substantive decisions are made, namely government policy made by the apportioned legislature together with the governor and other organs of government, just as a fair hearing is the "procedural" device for reaching the substantive decision of whether it is just to hang the man.⁹⁴ Thus, both establish only the rules of the game, both seek only to establish fair procedures.⁹⁵

A more fundamental objection to the consent test, however, is that in every case it would require a judicial determination for which judicially manageable standards are clearly not available. Not every referendum on apportionment submitted by the legislature would satisfy this test, for it is possible, indeed often probable, that the legislature would submit proposals which at best afforded a substantial element of the population a choice between the lesser of two evils.⁹⁶ A court would be forced in every case to make the substantive judgment of whether *appropriate* proposals—ones which give all the interests in the state an opportunity to express their actual preferences in apportionment—had been submitted for constituent approval.⁹⁷ For example, a court could not

93. McCloskey, *supra* note 75, at 74.

94. Thus, if a legislature did not have a significant role in the legislative process, if it were, for example, like the British House of Lords, we would not be concerned with its apportionment, for there would be no relationship between apportionment and ultimate substantive decisions.

95. This is not to say that states should not have considerable discretion in establishing "fair" apportionments, for there are many different arrangements by which to accomplish that end. And similarly the states are given discretion in establishing their criminal procedures. See Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

96. For example, a proposed amendment to the apportionment provisions of Florida's Constitution was recently rejected in a statewide referendum, primarily because of the opposition of urban areas. Although the amendment would have increased the representation of urban areas, the urban voters apparently felt it was not a sufficient improvement. N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 7.

The amendment had been proposed in response to a federal district court ruling that the existing apportionment, under which seventeen per cent of the State's population elected a majority to both houses, was unconstitutional. *Sobel v. Adams*, 208 F. Supp. 316 (1962). And the same court had ruled that the amendment, if ratified in accordance with the State's Constitution, would have provided Florida with a constitutional apportionment. *Id.* at 319.

97. In *Thigpen v. Meyers*, 31 U.S.L. WEEK 2305 (W.D. Wash. Dec. 13, 1962), the district court rejected defendant's argument that the court should decline jurisdiction over a suit challenging Washington's legislative apportionment because in the 1962 general elections the electorate had rejected an initiative measure to reapportion the legislature.

We have no way of knowing whether the measure was defeated because a majority did not desire reapportionment or whether they didn't approve of the proposed method or whether they didn't understand it (there were numerous other complicated matters on the ballot) or whether the opponents were better organized than the proponents.

Ibid.

interpret a negative vote on a referendum proposal to alter existing apportionment principles as indicating approval of the present scheme, for many of the negative votes undoubtedly would be cast not from a desire for the status quo but rather from a desire for a different proposal.⁹⁸ Thus, a court would have to examine not only the merits of the existing apportionment scheme but also the benefits and detriments of the ones submitted in a referendum. McCloskey objects that any substantive apportionment standard which might be adopted would require a court to act as a legislature, but his proposal would apparently have a court act as a second Gallup Poll.

The failures of the consent test suggest that it is impossible to sidestep the critics' legal objections to substantive standards and at the same time meet the malapportionment problem. Apparently only substantive standards can do the latter. Yet the critics' objections raise serious questions about the role of the Court and the nature of constitutional decision-making that cannot be ignored. Serious as the malapportionment problem is, it is not worth sacrificing the integrity of judicial institutions to solve it. Therefore, an attempt must be made to formulate a substantive standard which meets the social and political problems posed by malapportionment and at the same time overcomes the critics' objections, which they claim apply to all possible substantive standards.

Meeting the Critics' Objections

Some critics argue that formulating substantive standards necessarily involves interpretation of the guaranty clause, a path foreclosed to the Court by its previous decisions.⁹⁹ But this is really a spurious objection. As Mr. Justice Brennan pointed out in *Baker*, "Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."¹⁰⁰ If this is so, it follows that constitutional claims for which those elements which define a "political question" are lacking either must not involve interpretation of the guaranty clause, or, if they do, they must pose justiciable guaranty clause claims.¹⁰¹ The only apparent element of a "political

98. See note 96 *supra*.

99. See notes 31-33, 37 *supra* and accompanying text. For an account of the historical development of the guaranty clause, see Bonfield, *The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

100. 369 U.S. at 218.

101. See Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 66-68 (1962); Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 246-52 (1962).

This conclusion is supported by Mr. Justice Brennan:

When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" have rested on claims of constitutional deprivation which are amendable to judicial correction, this Court has acted upon its view of the merits of the claim.

369 U.S. at 229. See, *e.g.*, *Foster v. Kansas ex. rel. Johnston*, 112 U.S. 201 (1884). Similarly cases challenging limitation of the suffrage based on claims which are justiciable have been adjudicated. See, *e.g.*, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). *Cf. United States v. Classic*, 313 U.S. 299 (1941).

question" present in apportionment cases is a lack of a standard meet for judicial judgment.¹⁰² Thus, when the critics object to a one man-one vote standard because it involves interpretation of the guaranty clause, they are actually arguing that this standard fails to meet one criterion of a judicially meet standard, that it be arrived at through a principled judgment that has some basis in tradition or contemporary and significant social values. If such a standard can be formulated for apportionment cases—and it is the thesis of this Comment that it can—then that standard must either not involve interpretation of the guaranty clause, or else involve a justiciable guaranty clause claim, for no element of a "political question" would then be involved. On the other hand, if one rejects that argument, then the standard may involve a nonjusticiable guaranty clause claim. In this case, however, the problem becomes academic for then the standard has already been rejected as not meet for judicial judgment.

The critics object to the imposition of an equal population, or one man-one vote, standard, or to any other standard which makes population a dominant factor in apportionment, because such standards cannot follow from the kind of principled judgment that the court should make in formulating constitutional doctrine. These principles, they argue, are neither a part of our heritage nor widely held today, as is well illustrated by the United States Senate apportionment.¹⁰³ More importantly, they point out, it is not even desirable, given contemporary political arrangements, to apply uniformly this principle in every state. Apportionment is only a part, albeit an important part, of the total governing process. Underrepresentation in other parts of that process might quite properly be rectified through overrepresentation in the legislature.¹⁰⁴ It is conceded here that these arguments preclude adoption of the one man-one vote principle. But these arguments cannot properly be extended to preclude adoption of equal population as a favored principle, or a norm. That is to say, one man-one vote is not an absolute which alone decides cases, but it can provide a touchstone for measuring deviations, and thus a starting point for determining

102. For other elements which might make an issue a "political question," see *Baker v. Carr*, 369 U.S. at 217. See also POST, *THE SUPREME COURT AND POLITICAL QUESTIONS* (1936).

Congress, of course, could legislate in this area, since U.S. CONST. amend. XIV, § 5, gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." This, however, does not constitute a textually demonstrable commitment of the issue to another governmental branch. If it did, the Court would be precluded from all enforcement of the equal protection clause. Cf. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955).

103. See notes 26-28 *supra* and accompanying text.

104. See notes 29-30 *supra* and accompanying text.

Despite the persuasiveness of the critics' argument on this point, most suggested standards have so considered it. See, e.g., Brief for United States as Amicus Curiae on re-argument, pp. 25-35, *Baker v. Carr*, 369 U.S. 186 (1962); Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64 (1962); Hanson, *Courts in the Thicket: The Problems of Judicial Standards in Apportionment Cases*, 12 AM. U. L. REV. 51 (1963). Cf. *Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962); *Scholle v. Hare*, *supra* note 91.

whether those deviations are reasonable ones.¹⁰⁵ Certainly our heritage is one which views equality generally, and particularly in the area of political rights, as a desired end. Besides the observations of such astute observers of the American scene as De Tocqueville,¹⁰⁶ the views of Jefferson and Madison¹⁰⁷ amply testify to this conclusion. Indeed Jefferson thought equality in legislative representation so important that he noted as one of the chief defects of his State's Constitution that it provided for some inequalities in this regard.¹⁰⁸ And the federal House of Representatives, if not the Senate, indicates that our federal government subscribes to equal population as a favored principle. Clearly a judgment that population ought to be a substantial factor in any apportionment is consistent with, if not required by, both our traditions and presently held values. And the recently activated latent consensus supporting the Court's decision in *Baker* may be viewed as evidence of the viability of this value.¹⁰⁹ Surely more is not necessary for the Court, in accordance with its proper governmental role, to adopt equality of representation, not as an absolute, but as a working principle or norm.

Indeed the Supreme Court indicated in *Baker* that it views equal population as a norm, deviations from which might be subject to question. The equal protection clause can only be invoked when a state treats its citizens differently—when it classifies—which logically implies the possibility of equal treatment. In *Baker* the Court assumed that a one man-one vote apportionment would constitute equal treatment and that classifications arose when the state de-

105. The distinction drawn here is that between a standard and a norm. A standard is a principle to which a court requires adherence; substantial deviations from it are necessarily unconstitutional. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting). A norm, on the other hand, is only a favored principle, adherence to which is required only in the absence of other justifiable factors. The restrictions imposed on deviations, however, will vary depending upon the importance of the favored principle or norm. Compare *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring), with *id.* at 581 (Douglas, J., dissenting).

106. See note 76 *supra*.

107. See de Grazia, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROB. 256, 261 (1952); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 562 (Farrand ed. 1937).

108. 2 THE WRITINGS OF THOMAS JEFFERSON 160-61 (Library ed. 1903), quoted in BAKER, RURAL VERSUS URBAN POLITICAL POWER 7 (1955).

109. See McCloskey, *supra* note 75, at 59. Cf. Prothro & Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. POLITICS 276 (1960).

Professor Sindler has defended equal population as a favored principle by appealing to the common sense of the matter.

If both chambers of a State legislature were apportioned in accord with the equal-population principle, no ruralist could reasonably expect the Court to support his claim that the absence of area representation invidiously discriminated against him. But if both chambers were apportioned in accord with a consistent application of area principles, an urbanite could expect the Court to hold that one house, at least, must conform to the equal-population criterion.

Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 YALE L.J. 23, 33 (1962).

parted from that principle.¹¹⁰ It could have assumed that equal representation for each county or township, or for each square mile, or the uniform application of some other familiar factor would have been the apportionment which treated all alike, or it could have held that there were no norms in apportionment and consequently that there could be no classifications.¹¹¹ But it did not, and as a result the Court *sub silentio* made the equal population principle some sort of norm.¹¹²

Population as a favored principle in apportionment is not inconsistent with the argument that strict adherence to a one man-one vote principle in legislative apportionment is undesirable. Implicit in the argument that the composition of the legislature should be viewed in the light of the composition of other governmental institutions would seem to be the notion that the total governing process should not so limit the overall electoral power of groups in a community that they are unable through participation in the political process to compel governmental responsiveness to their needs and interests. Indeed such a notion—the ability to compel electorally responsiveness to the interests and needs of the people—would appear to underlie a democratic philosophy of government. Certainly the notion of a government that reflects and responds to diverse interests was embraced at the time of the adoption of the Constitution,¹¹³ and is widely held today.¹¹⁴ Rather than refuting a substantive standard which would limit deviations from an equal population norm by the fundamental principle that the governing processes as a whole be responsive to all elements of the community, the critics' argument that legislative apportionment cannot be viewed *in vacuo* appears to bolster it. Thus, this fundamental principle bears those characteristics that render it meet for judicial judgment; it can properly be espoused as a constitutional doctrine.¹¹⁵ And requiring ad-

110. For example, in holding that the plaintiffs had standing to attack Tennessee's apportionment, Mr. Justice Brennan discussed the "arbitrary impairment" of the plaintiff's votes and the "inequality" of treatment between the plaintiffs and people residing in other counties. 369 U.S. at 204-08. Yet the plaintiff's lived in counties which would be discriminated against only if population were the base from which deviations were measured.

111. Stated otherwise, people are treated differently only in reference to some manner of equal treatment. If no such reference point, or norm, is established, there can be no basis for determining whether people are treated differently, and hence there can be no classifications.

112. Mr. Justice Frankfurter, however, apparently recognized the concession the majority was making when he argued that one could not discuss equal protection without first deciding the republican form issue. 369 U.S. at 299-300.

113. For example, in the Declaration of Independence, the justification for forming an independent country was expressed in a long list of actions by the King of Great Britain, all indicating, apparently, that he was not responsive to the Colonies' needs and desires.

114. Political scientists, for example, regularly criticize division of party control in state governments because it tends to make the total governing processes less responsive to the changing desires of the electorate. See, e.g., Key & Silverman, *Party and Separation of Powers: A Panorama of Practice in the States*, 5 PUBLIC POLICY 382 (1954).

115. Although in recent years many have attempted to define standards meet for judicial judgment, it is still safe to conclude that a consensus has yet to be reached. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959);

herence to a substantive standard embodying this principle would seem to go a long way towards meeting the social problems attributed to malapportionment.

Thus, the substantive standard proposed here would establish equal population as a favored principle, deviations from which would be permitted so long as they did not substantially deprive some element of the citizenry of their ability to compel through the electoral process governmental responsiveness to their interests.¹¹⁶ Application of this standard will involve more than an

Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960). Cf. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960). Nevertheless, all would agree that certain principles are judicially meet, and it is here asserted that this is one of them.

116. This standard is intended to apply only to state legislative apportionment. The impossibility of even estimating the possible mitigating effects of the President's influence in a particular area of a state makes this standard inapplicable to congressional districting. Theoretically, however, this standard could be applied to the apportionment among the states of seats in the House of Representatives, for determining the President's mitigating influence on the underrepresentation of whole states in that body would be essentially similar to the determination made in state legislative cases. See notes 168-69 *infra* and accompanying text. Congress has, however, provided for an automatic reapportionment after each census which, except for the provision that each state shall have at least one representative, U.S. CONST. art. I, § 2, is to be according to the equal population principle. 2 U.S.C. § 2a (1958). Consequently, there will be little need to apply this standard to such apportionments in the foreseeable future.

Since the standard proposed here cannot be applied to the state's allocation of its Representatives among districts, one might conclude that congressional districting cases are still nonjusticiable for lack of judicially manageable standards, or alternatively that the only applicable standard is the one the critics' propose. But the first conclusion is controverted by the Court's explicit statement in *Baker* that such questions are justiciable, see note 8 *supra*, while the second would require the Court to legitimate many undesirable apportionments. See notes 69-73 *supra* and accompanying text. Cf. *Colegrove v. Green*, 328 U.S. 549 (1946).

Another possibility would be for the court to delay any resolution of this question in the hope that Congress might exercise its powers under Article I, Section 4 of the Constitution and provide the Court with standards. But however desirable this solution appears, and although Congress at one time regularly exercised these powers, Comment, 63 COLUM. L. REV. 98, 102 n.39 (1963), there is little likelihood that they will do so today. Cf. Celler, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROB. 268 (1952).

The other and most plausible possibility would be to apply a one man-one vote standard to congressional districts. While not applicable to state legislative districts, it is possible to imply such a standard for congressional districts from the form of Congress itself.

As to Congress . . . it is at least tenable to conclude that representation of the relevant constituent political units, without regard to population base, is wholly taken care of in the Senate, and that the House, which is to be elected by the people *pro rata*, is to represent the popular principle fully and effectively. Surely it would not be strange to find that one part of one branch of a democratic government lives under that requirement.

Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 17 (1962). And there would be little problem in applying such a standard. See *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932); *Hume v. Mahan*, 1 F. Supp 142 (E.D. Ky.), *rev'd per curiam* 287 U.S. 575 (1932).

analysis of the legislature and its potential responsiveness to the various interests in a state. The other elements of the governing process, such as the governor, political parties, and demographic composition of the state, must also be considered.¹¹⁷ The judgment required is not that government programs do in fact respond to the needs and interests of all elements of the citizenry—in Professor McCloskey's terms to ask whether it is just to hang the man at all¹¹⁸—but rather that within the political processes all elements have the *potential electoral power* to compel that responsiveness. This judgment will require a court to analyze the political structure of a state, to apply a "rule of reason" to the governing processes, in order to determine whether the requisite electoral power exists.¹¹⁹

This substantive standard is supplemental to, not an alternative for, the more conservative test proposed by the critics. The equal protection clause under this approach would still require legislative apportionments to meet the minimum rationality test.¹²⁰ Thus, deviations from the equal population norm would be limited not only in extent by a substantive standard, but also in kind in that they would have to reflect a consistent application of some bases of representation reasonably related to the nature of apportionment.¹²¹

The critics quite properly have objected to all previous formulations of a rational deviations standard, such as the Solicitor General's,¹²² because they cannot be applied to decide cases in a manner consistent with the institutional competence of the judiciary.¹²³ As they point out, a perusal of the post-*Baker* district court decisions amply demonstrates the unworkability of these formulations. It is contended here that the rational deviations standard proposed above is capable of application to concrete fact situations in a manner con-

For an excellent analysis of the extent of malapportionment among congressional districts today, see CONG. Q. WEEKLY REP., Feb. 2, 1962, at 153-78.

117. See notes 250-64 *infra* and accompanying text.

118. See text accompanying note 93 *supra*.

119. This proposed standard is only applicable to population disparities between districts. On the other side of the apportionment coin is the problem of gerrymandering. That a clever gerrymander can greatly effect the political composition of a legislature is too well documented to be doubted. See BAKER, *op. cit. supra* note 103, at 45-47. Cf. CONG. Q. WEEKLY REP., Nov. 17, 1961, at 1868-74. For a discussion of possible standards to deal with the gerrymandering problem, see Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 YALE L.J. 1041 (1963). Cf. *Watts v. Carter*, 355 S.W.2d 657 (Ky. 1962).

120. See notes 13-20 *supra* and accompanying text.

121. One commentator, who might be called a "super-critic," has even objected to applying the minimum rationality test to apportionments. The gist of his argument is that since apportionment is a product of legislative compromise rather than rational deliberation, it is ludicrous to expect to find a principled, or even coherent, basis for it. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 289-90 (1962). But this argument is equally applicable to virtually all legislation. It would appear that Mr. Neal's objection is not so much against application of the minimum rationality test as against the equal protection clause itself.

122. See note 36 *supra* and accompanying text.

123. See notes 38-40 *supra* and accompanying text.

sistent with the institutional competence of courts. Most of the balance of this Comment will attempt to demonstrate the validity of this contention.

APPLYING THE STANDARD

Is the Apportionment a Crazy Quilt?

An apportionment is not the consistent application of a rational policy, reflects "no policy,"¹²⁴ is a "crazy quilt," when a state has either adopted no bases of representation or applied inconsistently the bases of representation adopted, thus creating districts arbitrarily.¹²⁵ In other words a state may not give county X twice the representation of county Y without explaining what differences between the counties account for the differences in representation. Frequently the bases of representation underlying an apportionment will be contained in the state's constitution, but this will not always be so. For example, if there were any bases of representation underlying the apportionment in Tennessee, and Mr. Justice Clark has made a convincing showing that there were not, they certainly were not the ones prescribed by Tennessee's Constitution, which basically requires apportionment on the basis of population.¹²⁶

Exact conformance to some bases of representation is, of course, not required of apportionments; to require such would be to make the fourteenth amendment, in the words of Justice Holmes, a "pedagogical requirement of the impracticable."¹²⁷ But reasonable adherence to some basis is required.¹²⁸ The ap-

124. See note 43 *supra* and accompanying text.

125. When a state legislature reapportions, its first step is to determine the bases of representation of the apportionment, that is, the value preferences to be served, such as population, political units, area, or more likely some combination of these and other factors. It then creates districts by applying these value preferences to the demography and geography of the state. If the state contains all single-member districts, this is all there is to apportionment. But most states contain some multi-member districts. See Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1106-10 (1955). In those districts the legislature must allocate a specific number of representatives to each district, either using as a basis of allocation the previously determined value preferences or different ones. In some states, for example, New York, see note 244 *infra*, these last two steps are reversed. The districts in these states, typically counties, are predetermined. The state first allocates a number of representatives to each of these districts on the basis of their original value preferences, and then creates single-member districts within each of these predetermined districts, either on the basis of the original value preferences or on different ones.

126. TENN. CONST. art. II, §§ 4-6. Mr. Justice Clark showed that Tennessee's apportionment was not only inconsistent with the state constitutional basis of representation, but also with a basis of favoring rural over urban areas. 369 U.S. at 255-58.

127. *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265, 268 (1919).

128. The test of reasonable adherence is not unlike that applied by many state courts in enforcing state constitutional apportionment provisions. Frequently these provisions call for apportionment on the basis of equal population. Many state courts, however, recognizing that it is impossible to achieve absolute equality, see note 24 *supra*, have interpreted these provisions as establishing an abuse of discretion test. See, *e.g.*, *Rogers v. Morgan*, 127 Neb. 456, 461, 256 N.W. 1, 3 (1934); *Brown v. Saunders*, 159 Va. 28, 36, 166 S.E. 105, 107 (1932);

portionments which this test will most frequently invalidate are ones like that involved in *Baker* where, although subsequent population shifts have made obsolete the original bases of representation, the state had failed to reapportion for many years.¹²⁹ But this is not its exclusive operation. Recently passed apportionments may sometimes be successfully challenged in this manner,¹³⁰ and many present day city council districts, it would appear, will be particularly vulnerable to this test.¹³¹ Furthermore, if a part of a statewide apportionment can be separated from the whole without in any way upsetting the balance of the apportionment, that part can be subjected to challenge on these grounds.¹³²

Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1084-86 (1958).

Other state courts, however, have adopted the more rigorous test of requiring the districts to be as nearly equal as practicable. See, e.g., *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892); *City of Lansing v. Ingham County Clerk*, 308 Mich. 560, 14 N.W. 2d 426 (1944). Compare *Attorney General v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916) and *Donovan v. Suffolk County Apportionment Comm'rs*, 225 Mass. 55, 113 N.E. 740 (1916), with *Brophy v. Suffolk County Apportionment Comm'rs*, 225 Mass. 124, 113 N.E. 1040 (1916).

129. See, e.g., *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962). Although the constitutional amendment invalidated was adopted in 1952, that amendment in effect froze permanently the then existing Senate districts, which had not been reapportioned for many years. MICH. CONST. art. V, § 2.

130. See, e.g., *Baker v. Carr*, 206 F. Supp. 341, 346-48 (M.D. Tenn. 1962), where the district court characterized as a crazy quilt a new reapportionment hurriedly passed by the Tennessee legislature after the Supreme Court had remanded this case to the district court for consideration on the merits.

131. The apportionment of city and county councils were unsuccessfully challenged several times before *Baker v. Carr*. See, e.g., *Tedesco v. Board of Supervisors*, 43 So.2d 514 (La. 1949), *appeal dismissed*, 339 U.S. 940 (1950); *State ex rel. South St. Paul v. Hetherington*, 240 Minn. 298, 61 N.W.2d 737 (1953). Since *Baker*, however, one such challenge has already been successful, although the case was not decided on equal protection grounds. See *Washington Post*, June 21, 1962, p. 8, col. 2.

Even if a city council apportionment meets the crazy quilt test, however, it should still be subjected to the responsiveness test. For an excellent analysis of the government of New Haven, Connecticut, indicating many of the considerations that would be involved in applying the responsiveness test to city governments, see DAHL, WHO GOVERNS? (1961).

132. This situation will usually occur in states with one large urban area. For example, Milwaukee County, Wisconsin, is apportioned into twenty-four Assembly and eight Senate districts all of which are completely contained within that county and therefore could be upset without effecting the balance of the State's apportionment, which apparently is constitutional. See notes 274-88 *infra* and accompanying text. Consequently, it would be permissible to apply the crazy quilt test to Milwaukee County's apportionment.

Furthermore, it appears that if such an attack were made, it would be successful. Within Milwaukee County, Assembly districts range from 24,973 (the Fourth Assembly District of that County) to 83,769 (the Nineteenth District) while Senate districts vary from 83,333 (the Ninth Senatorial District) to 189,059 (the Fifth District). WISCONSIN BLUE BOOK, 1962, at 352, 354. Although these districts are clearly inconsistent with an equal population principle—which is the general apportionment principle followed in Wisconsin, see notes 279-81 *infra* and accompanying text—the State could have adopted a different basis for Milwaukee County's apportionment. But no such principle capable of explaining the disparities from a population standard is readily apparent. Although it is true that most of the overpopulated districts are in the outlying residential areas, there are also substantial

A major problem in applying this test lies in determining what constitutes a sufficient showing that there is no intelligible principle explaining the classifications made by the apportionment. In *Baker* Mr. Justice Harlan argued that in the absence of an affirmative showing of a "capricious classification," the apportionment must always be considered the legislative determination of the proper balance among the myriad of interests in a state.¹³³ This approach, however, effectively nullifies the equal protection requirement that classifications in an apportionment statute be rational, and the policies of the statute consistently applied. Mr. Justice Clark, on the other hand, found the apportionment involved in *Baker* irrational, a "crazy quilt," because it was inconsistent with any value preferences which occurred to him as ones the state might have applied.¹³⁴ The problem with this approach is that, as Mr. Justice Clark would undoubtedly admit, there were many value preferences Tennessee might have adopted, the possibility of which had not occurred to him. The problem, then, becomes one of preserving some vitality in this test while at the same time retaining the presumption made in constitutional cases that a legislature adopted whatever principles would explain the classification.¹³⁵ The obvious answer is to require a state, when its legislative apportionment is challenged, to indicate which of the myriad of possible principles it has followed.¹³⁶ But in order to conform to the traditional application of burden of proof in constitutional cases, the plaintiff should first be required to show that the apportionment is inconsistent with any of the typical or obvious bases of representation, as Mr. Justice Clark did in *Baker*.¹³⁷ Once this is

differences in population between adjacent residential Assembly districts. For example, Milwaukee's Fifteenth Assembly District contains a population of 78,742 while the adjacent Twentieth District contains only 36,934 residents. *Id.* at 352. Thus, from appearances the apportionment in Milwaukee County is a crazy quilt. At the very least, one challenging Milwaukee County's apportionment should be able to force the State to suggest some basis of representation which might justify what otherwise appears to be a crazy quilt. See notes 136-38 *infra* and accompanying text.

133. 369 U.S. at 334-36.

134. 369 U.S. at 254.

135. See, *e.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961).

136. This is consistent with the requirement courts have often placed on themselves of stating some policy upon which a statute could be based before dismissing an equal protection claim. Thus, in *Goesaert v. Cleary*, 335 U.S. 464 (1948), Mr. Justice Frankfurter found it necessary to justify an exception for the wives and daughters of male tavern operators from a blanket prohibition of female bartenders by referring to a possible legislative belief that the supervision assured through ownership of the tavern by the barmaid's husband or father "minimizes hazards that may confront a barmaid without such protecting oversight." *Id.* at 466. See also *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1940), where the court stated,

. . . respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function [other than exclusion of the Negro race from municipal elections] which Act 140 was designed to serve.

In *Mann v. Davis*, 31 U.S.L. WEEK 2263 (E.D. Va. Nov. 28, 1962), the court stated that the mere showing of substantial population disparities was sufficient to place the burden on the defendants to produce other possible explanations for the apportionment.

137. 369 U.S. at 255-58.

shown, the state should be required to come forward with possible principles to explain its classifications and to introduce at least some evidence showing that these principles are plausible bases of the apportionment. The ultimate burden of showing that the apportionment is inconsistent with these principles, however, should remain with the plaintiff.¹³⁸

Are the Apportionment Principles Legitimate?

A rational policy may be consistently applied and yet the apportionment may fail because the policy applied was not one the state could legitimately adopt. For example, Alabama did not invoke a permissible preference when it redrew the municipal boundaries of the City of Tuskegee along racial lines, although clearly they applied that principle consistently.¹³⁹ But, as Mr. Justice Frankfurter's historical data indicates, most preferences which states adopt in their apportionments can not be considered invalid *per se*.¹⁴⁰ Of course, the prefer-

138. For a more extensive discussion of this problem, see Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 YALE L.J. 1041 (1963).

139. *Gomillion v. Lightfoot*, *supra* note 136. For an extensive discussion of this case, see TAPER, *GOMILLION VERSUS LIGHTFOOT* (1962).

140. *Baker v. Carr*, 369 U.S. at 302-23.

According to the various state constitutions, the 99 state legislative bodies in the United States (Nebraska has a unicameral legislature) are to be apportioned as follows: 32 solely on the basis of population; 8 on population but with weighted ratios; 45 on a combination of population and area; 8 on equal representation of political units; 5 on a fixed constitutional formula; and 1 on direct taxes paid. BAKER, *STATE CONSTITUTIONS: REAPPORTIONMENT* 5-14 (1960).

Many people, of course, question the legitimacy of some or all of these bases of representation. Perhaps the basis of representation most frequently questioned on constitutional grounds is wealth. See, e.g., Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 74 (1962). One court was recently faced with this issue when the apportionment of the New Hampshire Senate on the basis of direct taxes paid was challenged, and that court upheld wealth as a basis of representation. *Levitt v. Maynard*, 104 N.H. 243, 182 A.2d 897 (1962). It would seem that this case was correctly decided. If it is permissible to favor rural over urban areas in apportionment, and if history is at all relevant it is permissible, there appears to be little reason to prohibit a state from favoring other economic interests in apportionment. Certainly there is a reasonable basis for favoring wealth in apportionment. No state desires to see all its wealthy citizens leave, or become destitute. To help avoid such a possibility the state might ensure that the interests of the wealthy are not overlooked when government policy is formulated by giving those citizens greater than proportional representation in the legislature. And if wealth is a permissible basis for apportionment, there was no other basis on which to invalidate the New Hampshire Senate apportionment. The basis of representation, direct taxes paid, was consistently applied, *ibid.*, and the disparities from the equal population norm were not large. See Tyler, *Court versus Legislature*, 27 LAW & CONTEMP. PROB. 390, 391, 393 (1962).

It would also appear that most of the other factors cited by Mr. Justice Frankfurter as historically familiar in apportionment are legitimate policies. See *Baker v. Carr*, 369 U.S. at 302-23. For example, it cannot be said that it is unreasonable or unrelated to the nature of apportionment to apportion on the basis of political units. Certainly a county has interests in government policy which the state might wish to protect. Similarly a state would seem to have sufficient interest in its land to justify an apportionment on the basis of area. In *Baker*, Mr. Justice Harlan suggested that stability of government might be another policy a state

ences must be of the type that are capable of expression through apportionment, that is, they must be of the type that can be expressed by favoring one geographical area over another. For example, a state cannot express a preference for savings and loan institutions over banks through apportionment, although it might express a preference for farmers over city-dwellers in that manner.

More is required, however, than that the policies be capable of expression through apportionment. In the words of Mr. Justice Brandeis, they must be policies "which an informed, intelligent, just minded, civilized man could rationally favor."¹⁴¹ Thus, certain policies would appear clearly impermissible.

could validly pursue in its apportionment and on that ground he sought to justify Tennessee's failure to reapportion for over 60 years. Although a state might justify a failure to reapportion for a limited period of time on those grounds, it would seem alien to the nature of apportionment to allow a state to fail to reapportion for the length of time Tennessee failed. See note 245 *infra*.

For a more extensive discussion of specific policies which might serve as bases of apportionment, see Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 275-86 (1962).

There is a general policy which encompasses all the possible specific bases of representation discussed above that a state may elect to follow when reapportioning. That policy can be generally described as one of reflecting in the legislature the general sociological composition of the state. The argument in favor of adopting this policy is basically that a democratic government not only should be responsive to its constituents' needs and desires, a requirement here asserted to be mandatory, but also should *reflect* in its personnel the various communities of interest in its constituency. If this latter condition is satisfied, the argument runs, a greater feeling among the populace of actual participation in the government results, because nearly every citizen of the state will be able to identify with someone active in the governmental decision-making process. To achieve this end of reflection, a state could draw its district lines so that districts generally contain a single community of interest. Then, it is hoped, a member of that community will be elected to the legislature and consequently the general composition of the state will be reflected in at least the legislature. See de Grazia, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROB. 256 (1952).

As a general policy reflection is certainly a valid, indeed a desirable, policy. An attempt to reflect a certain community of interest, however, necessarily establishes the identifying feature of that community as a basis of representation, at least in the area of the state in which that community is located. Thus, if in following a policy of reflection a state should divide a certain area of the state into three districts, one consisting primarily of wealthy citizens, another of middle class citizens, and the third of destitute citizens, the state would simultaneously establish wealth as a basis of representation for that area. Consequently the validity of following a reflection policy in that area will depend on whether it is valid to use wealth as a basis of representation.

In *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962), a similar question was raised where race was allegedly used as a basis of representation. The northern half of Manhattan Borough in New York City had been divided into two congressional districts, one generally Negro in composition and represented in Congress by a Negro, and the other generally white. Although in a two-to-one decision a three-judge district court upheld this districting, two of the judges stated that if it could be shown that the district lines were drawn on the basis of race, the districting would be unconstitutional. For a comprehensive discussion of this case, see Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 YALE L.J. 1041 (1963).

141. *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406 (1928) (dissenting opinion).

Mr. Justice Black's example of apportioning twenty-three Congressmen to Illinois' smallest county and one to all the rest would be one of these.¹⁴² And it would seem that a policy of guaranteeing control of a legislative body to a particular party is another. Elections, not apportionments, are designed to express preferences for political parties in our system. If a party is guaranteed victory before an election is held, it will not find it necessary to adapt its policies to the desires of the electorate; changing public opinion will have fewer means of expression. It has been argued that such a policy might be justified as a means of preserving the two party system.¹⁴³ But to preserve the two party system by guaranteeing a single party control of a legislative house is to destroy the purpose of that system—to provide a choice between competing points of view.¹⁴⁴ On the other hand, an apportionment that attempts to ensure both parties at least a substantial minority in the legislature would seem to be a permissible means of preserving the two party system. For by ensuring that there will always be some minority party representation in the legislature, the state would be encouraging competition between opposing points of view, and avoiding what many view as the evils of a one party system.¹⁴⁵

Some commentators have argued that the policies expressed in a state's apportionment must be consistent with the apportionment principles embodied in its constitution.¹⁴⁶ Thus, if a state's constitution required that both houses of the legislature be apportioned solely on the basis of population, these com-

142. *Colegrove v. Green*, 328 U.S. 549, 571-72 (1946) (dissenting opinion). See also, Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 138 (1962).

143. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 43 (1962).

144. It is well known, of course, that many apportionments, even though substantially based on equal population, in effect guarantee some party a majority in at least one house of the legislature, and it is not asserted here that all these are bad. Apportionments must, however, be explainable as the application of some value preference other than guaranteeing a majority for a particular party, regardless of the legislature's real motives in enacting the apportionment. An example of a highly partisan apportionment so explainable is the recent reapportionment of California's House of Representatives. Although highly favorable to the Democratic Party, that reapportionment is generally regarded as a respectable adaptation of the equal population principle. See CONG. Q. WEEKLY REP., July 21, 1961, at 1280-85. For an analysis of a similar apportionment in New York, see CONG. Q. WEEKLY REP., Nov. 10, 1961, at 1868-74.

145. Another way states encourage the two party system is adoption of the single member district system. See LAKEMAN & LAMBERT, *VOTING IN DEMOCRACIES* 26-28 (1956). See generally, *id.* at 25-73.

146. See, e.g., Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 252-54 (1962); Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 699 (1962). This standard has been discussed by several district courts since *Baker* and generally rejected. See, e.g., *Toombs v. Fortson*, 205 F. Supp. 248, 257-58 (N.D. Ga. 1962). *But see*, *Moss v. Burkhardt*, 207 F. Supp. 885, 893 (W.D. Okla. 1962).

The plaintiffs in *Baker* made this argument in their original brief. Brief for Appellants, pp. 23-25. The Solicitor General, however, did not adopt this approach. See Brief for the United States as Amicus Curiae on Reargument, pp. 45-46.

mentators would have the federal courts enforce that requirement by declaring any deviation from it unconstitutional. They contend that such deviations are analogous to state officials administering state law in a discriminatory manner.¹⁴⁷ But this argument is of dubious validity. The analogy with discriminatory enforcement of state law is not a tenable one, since in the latter case it is the manner of enforcement of state law, not any deviation from it, that constitutes the violation of the equal protection clause.¹⁴⁸ Where the state fails to conform to the standards provided in its constitution, however, there is nonenforcement, no application of state law, and therefore no discriminatory administration. Moreover, even if total nonenforcement can be viewed as purposive discriminatory application of state law, in many states today, including Tennessee, it is fictive to regard the state's constitutional apportionment provisions as the existing law; rather the settled state practice, in Tennessee's case settled for over sixty years, is the "living" law of the state.¹⁴⁹ If that practice in itself violates the equal protection clause, as it may in Tennessee,¹⁵⁰ it should be declared unconstitutional not because it violates the state's constitution, but because the practice creates arbitrary or unreasonable discriminations. Furthermore, a long line of cases in numerous other contexts establish that state constitutional or statutory standards as a measure of arbitrariness or unreasonableness are irrelevant to the criteria of equal protection.¹⁵¹ Thus, for federal courts to utilize such considerations in apportionment cases would be anomalous.

Although state constitutional standards might often provide a ready standard under the equal protection clause, policy considerations also dictate that federal courts should not hold a state to the apportionment provisions contained in its constitution.¹⁵² In this area of delicate federal-state relations it is desirable, if possible, that the states assume the burden of conforming their apportionments to the requirements of the equal protection clause, and, if enforcement

147. See, e.g., *Snowden v. Hughes*, 321 U.S. 1 (1944).

148. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

149. "Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940). *But see* *Neal*, *supra* note 140, at 296-99.

A further legal difficulty federal courts would face if they attempted to enforce state constitutional provisions is that in many states these provisions have never been interpreted by the state courts, due to the latter's refusal to entertain suits challenging apportionments. See cases cited in note 59 *supra*.

150. See *Baker v. Carr*, 369 U.S. at 253-58 (Clark, J., concurring); *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962).

151. See *Nashville, C. & St. L. Ry. v. Browning*, *supra* note 149. See also *Castillo v. McConnico*, 168 U.S. 674 (1898); *Coulter v. Louisville & N.R. Co.*, 196 U.S. 599, 608-09 (1905).

152. The same arguments made here would apply to the utilization of the clean-up doctrine, or pendant jurisdiction, in these cases. See *Hurn v. Oursler*, 289 U.S. 238 (1933); *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949) (Magruder, J., concurring); *Schulman and Jaegerman*, *Some Jurisdictional Limitations on Federal Procedure*, 45 *YALE L.J.* 393 (1936).

of state constitutional provisions are left solely to the state judiciary, that practice will be encouraged. Furthermore, if the federal courts should enforce these provisions, the situation would not infrequently arise where a federal court enforced a state constitutional provision which the state judiciary had expressly held unenforceable, a situation rarely conducive to harmonious federal-state relations. This would, for example, be the case in Tennessee.¹⁵³

Other commentators, and some courts, have argued that a legislative apportionment analogous to the apportionment of Congress—for example, one house of a bicameral legislature apportioned solely on the basis of population with the other containing one representative per county—is immune from constitutional attack.¹⁵⁴ Surely, they argue, the Constitution would not provide for such an apportionment in one place and provide for its invalidity in another. But the use of the congressional analogy in this manner is improper. It was pointed out earlier that the congressional analogy does demonstrate the rationality of including non-population factors in a state apportionment.¹⁵⁵ But the analogy in no way establishes any standard for limiting the extent of these factors. The precise form of Congress is only an accident of history, a compromise made necessary in 1789 by the need to reach a consensus between thirteen “sovereign” states.¹⁵⁶ Presumably Congress also would have to satisfy the requirement of responsiveness if this compromise had not been explicitly written into the Constitution. But one can hardly deduce from that compromise’s inclusion in the Constitution an intent on the part of the framers that the compromise also serve as a model for state legislatures.¹⁵⁷

Furthermore, the congressional apportionment in all likelihood does satisfy the responsiveness test. The effect of the United States Senate apportionment is quite different from the effect of a similar state senate apportionment. Primarily because the recent breakdown of political sectionalism has resulted in nearly every element of the national community being represented within most states, the present federal Senate probably does not deny respon-

153. See *Kidd v. McCannless*, 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956). In *Sims v. Frink*, 208 F. Supp. 431, 437-38 (M.D. Ala. 1962), however, the court invoked the clean-up doctrine to enforce Alabama’s constitutional provisions on apportionment despite a previous state decision holding those provisions judicially unenforceable. *Waid v. Pool*, 255 Ala. 441, 51 So. 2d 869 (1951).

154. See, e.g., *Maryland Comm. for Fair Representation v. Tawes*, 31 U.S.L. WEEK 2155 (Md. Sept. 25, 1962), *appeal docketed*, 31 U.S.L. WEEK 3146 (U.S. Oct. 24, 1962) (No. 554). See also Krock, *Apportionment Test*, N.Y. Times, May 27, 1962, § 4, p. 13, col. 1. Cf. Bonfield, *supra* note 146, at 259-62, where it is suggested that the disparities of the United States Senate apportionment might be an appropriate standard under the guarantee clause.

155. See note 28 *supra* and accompanying text.

156. For some of the debate which led to this compromise, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 436-571 (Farrand ed. 1937).

157. If such a deduction were correct, it would follow that the framers, in guaranteeing every state a republican form of government, intended every state to adopt such an apportionment. *But see* note 156 *supra*.

siveness to any segment of the national community.¹⁵⁸ Today, in fact, the "more representative" House of Representatives is the bastion of minority interests.¹⁵⁹ The same is not true for the states. Although a state may contain all elements of society, these elements generally are not so diffused throughout a state that a one-per-county apportionment will assure responsiveness to all elements. The essential difference is that a United States Senator, representing a whole state, represents many interests, while a state Senator, representing a single county, frequently represents a single, or at best a few, interests. Thus, a state may establish a federal-type apportionment, but only if it satisfies the requirement of all state apportionments, that it be responsive to all elements. It is not immune to that requirement because it has an analogy in Congress.

Does the Apportionment Effectively Deny Responsiveness?

Even if deviations from an equal population norm are the result of a consistent application of a rational policy that a state may legitimately adopt, it still must be determined whether the deviations are sufficiently great as to effectively deprive some element of the citizenry of the ability to compel through the exercise of the vote governmental responsiveness to their interests. This involves a determination first of the responsiveness of the governmental institutions which participate in the decision-making process, particularly of the governor and the legislature,¹⁶⁰ and second, of the way these institutions interact in reaching governmental decision. In making these determinations the important consideration is access to the governmental processes and not the decisions actually made; if the latter were relevant, a court would be forced to judge the merits of legislation, in Professor McCloskey's terms to ask whether it was just to hang the man at all.¹⁶¹ Furthermore, some elements of the electoral processes, such as campaigning and related activities, will frequently afford equal access to all; thus, since they usually will not create differences in the ability to compel responsiveness, such factors will generally not be relevant to these determinations.¹⁶² But such elements as the demographic character, the party structure, and the conflicting interest groups of the state

158. See BAKER, *RURAL VERSUS URBAN POLITICAL POWER* 40-41 (1955). See also KEY, *AMERICAN STATE POLITICS: AN INTRODUCTION* 82-83 (1956); HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 43-45 (1950). For an examination of the effect of the seventeenth amendment on the changing nature of the United States Senate, see Riker, *The Senate and American Federalism*, 49 *AM. POL. SCI. REV.* 452 (1955).

159. See BAKER, *op. cit. supra* note 158, at 41-49.

160. The institutions for which this determination must be made are primarily those which have an independent electoral base—elective rather than appointive office. Since most state institutions other than the governor or the legislature are appointed and controlled by one of these two, their responsiveness will generally correspond to that of the governor or legislature.

161. See note 93 *supra* and accompanying text.

162. Such factors could be relevant, however. For example, wealth typically affects one's ability to participate effectively in campaigning activities. Thus, if the wealthy class can be geographically defined—is located in a particular area—this factor should enter the determination of responsiveness.

will clearly effect the access of various groups to the governmental processes and consequently will be relevant.¹⁶³ A substantial number of Negro voting and jury exclusion cases demonstrate that the assessment of such factors as the allocation of political power and the interaction of political parties is not beyond the ken of judicial competence. Thus, the capacity of courts to evaluate such factors can clearly be seen in such cases as *Terry v. Adams*,¹⁶⁴ where a special pre-primary election regularly held by the Jaybird Democratic Association, an organization consisting of all the white voters in Fort Bend County, Texas, was challenged. Although Texas did not regulate the Jaybird election, and although the Democratic primary ballot in no way indicated which candidate had won the Jaybird primary, that winner, frequently running unopposed, almost always won both the primary and the general election.¹⁶⁵ Looking past the facade of a private organization, the Court found that the Jaybird primary was an integral part of the election process, and that Texas violated the fifteenth amendment by condoning a device so obviously designed to frustrate the Negro's right to vote.¹⁶⁶

Because the factors involved in this determination are far from uniform nationwide, however, no precise rule or mathematical criterion for determining responsiveness can be formulated to test the constitutionality of apportionments; ascertaining responsiveness will have to be done on an individual state by state basis. Of course, the guiding standards and the techniques of analysis should be uniform, and here the Supreme Court can provide leadership,¹⁶⁷

163. Often the effects of malapportionment in the legislature permeate party organizations. See *BAKER, op. cit. supra* note 158, at 21-23. And while lobbying is theoretically open to all, a malapportioned legislature will be more susceptible to lobbying by some groups than by others.

164. 345 U.S. 461 (1953). The concurring opinion by Mr. Justice Frankfurter is a particularly illuminating illustration of how a court might probe beneath the surface to discover working realities. *Id.* at 470. See also *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd mem.*, 336 U.S. 933 (1949); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). *But cf. Giles v. Harris*, 189 U.S. 475 (1903).

165. *Terry v. Adams*, *supra* note 164, at 462-63.

166. *Id.* at 469.

167. Several recent cases have been appealed to the Supreme Court, any of which could become the vehicle for the Court's pronouncement of standards. More probably, however, the Court will choose to decide each case on its particular facts, thus formulating an overall standard on an ad hoc basis.

Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962), *petition for cert. filed sub nom. Beadle v. Scholle*, 31 U.S.L. WEEK 3139 (U.S. Oct. 15, 1962) (No. 517), is widely reputed to be the case which will require the Court to either accept or reject the one man-one vote standard. In that case the Michigan Supreme Court had initially upheld the State Senate apportionment, 360 Mich. 1, 104 N.W.2d 63 (1960), but the United States Supreme Court vacated that judgment and remanded the case to the Michigan court for reconsideration in light of *Baker v. Carr*, *Scholle v. Hare*, 369 U.S. 429 (1962). The Michigan Court thereupon invalidated the Senate apportionment and ruled that in order to meet constitutional standards any new apportionment must not contain disparities greater than two to one. 116 N.W.2d at 355-56.

A careful reading of the Michigan Court's opinion, however, reveals that the two to one disparity standard there promulgated was not based on interpretation of the fourteenth

but in the actual application of the responsiveness standard the burden will lie with the district courts, who have a greater familiarity with the local setting. And the district courts will necessarily be limited to considering the influence of groups on government policy, and more particularly to groups which can be defined in terms of the geographic areas in which they reside. This latter requirement results from the nature of apportionment; a judgment concerning a group not so defined, *e.g.*, school teachers,¹⁶⁸ cannot be made, whereas a judgment about a group contiguously located, *e.g.*, those living in New York City, can. The former requirement, that the test concern only the influence of groups and not individuals, is necessitated by the nature of the judgment to be made; it would be impossible for a court to discern the influence of individuals in governmental decisions.¹⁶⁹ To be sure, determining whether responsiveness exists may sometimes involve disputable political science judgments. This only

amendment. The court held that the existing apportionment, established in 1952 by constitutional amendment, was a crazy quilt and therefore invalid, and that as a consequence the previous constitutional apportionment provisions, which required approximate equality, came back into force. It was on these provisions, which had previously been interpreted to impose a two to one standard, that the Michigan court based its decision. *Id.* at 353-56. See *Giddings v. Blacker*, 93 Mich. 1, 52 N.W. 944 (1892); *Williams v. Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906).

Thus, since the two to one standard promulgated in this case was based on state law, it will not be reviewable by the United States Supreme Court. The only federal question up for review will be whether the constitutional amendment as applied to today's population distribution was in fact a crazy quilt.

Other appeals have also been filed in *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 363 (S.D.N.Y. 1962), *appeal docketed*, 31 U.S.L. WEEK 3132 (Sept. 26, 1962) (No. 460); *Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. 1962), *appeal docketed sub nom. Reynolds v. Sims*, 31 U.S.L. WEEK 3147 (Oct. 12, 1962) (No. 508); *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), *appeal docketed*, 31 U.S.L. WEEK 3147 (Oct. 12, 1962) (No. 507); *Maryland Comm. for Fair Representation v. Tawes*, *supra* note 154; *Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962), *appeal docketed sub nom. Price v. Moss*, 31 U.S.L. WEEK 3213 (Dec. 21, 1962) (No. 688); *Mann v. Davis*, 31 U.S.L. WEEK 2263 (E.D. Va. Nov. 28, 1962), *appeal docketed*, 31 U.S.L. WEEK 3253 (Feb. 7, 1963) (No. 797); and *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), *prob. juris. noted*, 370 U.S. 921 (1962), *argued*, 31 U.S.L. WEEK 3234 (U.S. Jan. 17, 1963).

168. Another group which is becoming more and more dispersed throughout society is labor union members. See *Zon, Labor in Politics*, 27 LAW & CONTEMP. PROB. 234, 236 (1962).

169. Because these groups, or more accurately areas of a state, will not hold unanimous views on even one issue of public moment, it has been argued that use of such groups in apportionment cases is improper. The only proper consideration, the argument runs, is that all points of view be represented, and the points of view of urbanites might be as effectively represented by rural as by urban representatives. See *Neal, supra* note 140, at 279. *Cf. Derge, Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations*, 52 AM. POL. SCI. REV. 1051 (1958). But the standard proposed here does not concern itself with ensuring representation of all points of view, although that might be the effect of its application. Rather this standard demands that all be *capable* of electorally compelling responsiveness by the government to their points of view, regardless of whether the government is in fact responsive to those views, and regardless of what those views are. And to assist the application of this standard groups, or areas of the states, are utilized only as analytic devices.

implies, however, that in some cases no determination of the constitutionality of an apportionment can be made, for the presently available tools of political science analysis are not sufficiently precise to lead one to any conclusion as to responsiveness.¹⁷⁰ But, as will be shown, in some states the available tools of analysis are sufficiently precise, a sufficient consensus as to the working realities of the political processes can be reached, to allow a decision on the merits.¹⁷¹

Since it is the constitutionality of a *legislative* apportionment with which we are concerned, it is essential to determine initially whether it is the legislature itself which is at least in part responsible for any existing lack of responsiveness. A lack of responsiveness in the total governing process due to imbalance not in the legislature but elsewhere in the governing process is not remediable in a suit challenging legislative malapportionment.¹⁷² Therefore, if an apportionment does not create a substantial lack of responsiveness within the legislature itself, the claim should be denied without examination of other governmental institutions. But if the apportionment creates a substantial lack of responsiveness in the legislature itself, or if there is doubt whether it does or not, it then becomes necessary to examine the other governmental institutions—the executive and administrative branch of government, the party structure, the demographic composition of the state, and the interaction of these factors—to determine whether the total structure is unresponsive. If the finding is that a substantial lack of responsiveness exists within the total structure, the apportionment becomes a suspect classification.¹⁷³ The justifications for deviations from an equal population standard must then be examined closely to determine their germaneness and importance to the particular state and these factors balanced against the interest in keeping the government responsive to all elements. Here the availability of alternative apportionments capable of protecting the interests the state seeks to protect but also permitting greater responsiveness becomes a crucial factor.¹⁷⁴ The paramount factor in the balance, however,

There can be, of course, no set criteria for determining what areas should be utilized in this manner. A district court, with its knowledge of the local setting, should use its discretion in choosing those areas most helpful to reaching a decision. In some states it may be appropriate to use several different divisions of the state. For example, in New York it is helpful in some parts of the analysis to divide the state into the areas of New York City and "upstate," but for other parts of the analysis "upstate" can usefully be divided into its many components. See notes 240-73 *infra* and accompanying text.

For a case which apparently adopted a group analysis approach similar to that advocated here, see *Preisler v. Hearnese*, 31 U.S.L. WEEK 2304 (Mo. Dec. 11, 1962).

170. See notes 269-73 *infra* and accompanying text.

171. See notes 206-39, 282-88 *infra* and accompanying text.

172. This is not to intimate that such imbalances would be irremediable. Cf. *Sanders v. Gray*, *supra* note 167, where Georgia's county unit system of nominating gubernatorial candidates was invalidated. But these institutions would have to be challenged in separate causes of action, and to some extent different issues would be involved.

173. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 356 (1949). Cf. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

174. Thus, a court might find that a state could adequately protect its more sparsely populated rural areas by overrepresenting them in only one house of a bicameral legislature rather than in both. See *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962); *Toombs v.*

is lack of responsiveness. If the degree of unresponsiveness is too extensive, the deficiency becomes overwhelming and no amount of other factors can justify it; in other words at some point an apportionment becomes a forbidden classification.¹⁷⁵

THE STANDARD IN PRACTICE

In order to illustrate the manner in which the suggested substantive standard would be applied, an attempt will be made to apply it to the existing apportionments in Georgia, New York, and Wisconsin.¹⁷⁶ It is hoped that this exercise will illustrate that the proposed standard is in fact a workable one.

Georgia

Georgia was one of the first states to entertain malapportionment litigation following *Baker*. Suits were filed challenging both Georgia's county unit system of nominating statewide and congressional candidates¹⁷⁷ and its legislative apportionment.¹⁷⁸ Until the decision in the first of these cases invalidated the

Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Maryland Comm. for Fair Representation v. Tawes, 31 U.S.L. WEEK 2155 (Md. Sept. 25, 1962).

175. See Tussman & tenBroek, *supra* note 173, at 353-56.

176. Our purpose in choosing these states is twofold. First, these states furnish examples of apportionments which it is believed are respectively clearly invalid, on the borderline of unconstitutionality, and clearly valid. Second, in all three states there have been major apportionment suits in recent months, which enables us to compare our analysis with that of the respective courts involved.

177. Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962), *prob. juris. noted*, 370 U.S. 921, *argued*, 31 U.S.L. WEEK 3234 (U.S. Jan. 17, 1963).

The Supreme Court very recently affirmed the district court's holding that the county unit system was unconstitutional. Sanders v. Gray, 31 U.S.L. WEEK 4285 (U.S. March 18, 1963). Unfortunately the recent date of this decision makes a full consideration of it in the text or footnotes of this Comment impossible.

The Court disagreed with the standard established by the district court limiting the disparities under a county unit system. See note 205 *infra* and accompanying text. Instead the Court held that once a geographical unit—the State of Georgia—which was to elect governmental officials, *i.e.*, the governor and other statewide officers, had been established, the one man-one vote principle applies and no classifications can be made. Since the Court's opinion is limited to the situation where the representative district has already been established, it does not apply to the usual apportionment case where it is the establishment of those representative districts that is being challenged. Nevertheless that opinion is at variance with the subsequent analysis in this Comment of the county unit system. Nothing in the Court's opinion, however, appears to seriously question the soundness of this analysis.

178. Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962). If it had applied the standard here advocated the district court would have joined this case with Sanders v. Gray, *supra* note 177, since both cases involved institutions crucial to a determination of responsiveness, requiring essentially identical judgments to be made. The court would then have had greater freedom in determining what, if any, relief should be granted.

A third suit was filed challenging Georgia's congressional districts, Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962), but it was dismissed on the grounds that: 1) the legislature, which would be more equitably apportioned as a result of the decision in Toombs v. Fortson, *supra*, might correct the present inequalities in the congressional districts on its own initiative, and 2) questions of congressional districting were still non-justiciable, *Baker* having only distinguished *Colegrove v. Green*. See note 8 *supra*. This latter ground is criticized in Comment, 63 COLUM. L. REV. 98 (1963).

county unit system, Georgia, in employing that system, was the only state which effectively elected her governor other than by a popular majority vote.¹⁷⁰ Under the county unit system, as it existed for many years prior to a legislative amendment enacted during the litigation,¹⁸⁰ each county received the number of units equivalent to twice the number of representatives it had in the Georgia House, with the candidate receiving a plurality in any county winning all that county's units.¹⁸¹ The candidate winning a majority of the county units won the nomination, and, for all practical purposes in Georgia, the election. Thus, in form, the county unit system bore considerable resemblance to the electoral college system of electing the President. But unlike the electoral college, the county unit system was not apportioned substantially on the basis of population, for the Georgia House apportionment strongly favored the smaller counties. The 8 largest counties received three representatives, the 30 next largest, two representatives, and the remaining 121, one representative.¹⁸²

179. Two other states have procedures similar to the county unit system. In Maryland, major party candidates for statewide office are nominated at party conventions, at which the delegates, who are bound to vote for the candidate who carried their district in the primary, are apportioned in accordance with the apportionment of the State House of Representatives. MD. CODE ANN. art. 33, §§ 79-80 (1957). But since Maryland is a two party state, the convention outcome is not normally dispositive of the general election.

Mississippi applies a unit system, with legislative districts as the base, to its general elections. MISS. CONST. art. 5, §§ 140, 143. But in the primaries, which, as in Georgia, are the only effective elections, a candidate must win a popular majority to receive the nomination. MISS. CODE ANN. § 3109 (1957).

180. The Georgia legislature, in an apparent last minute attempt to save the county unit system, see N.Y. Times, April 28, 1962, p. 13, col. 4, amended the apportionment of units among counties on the day before *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), was argued. Although retaining the basic principle of the county unit system, the amendment did give much greater recognition to the population principle. Every county received at least two units, those between 15,000 and 20,000 in population received three units, those between 20,000 and 30,000, four units, and one additional unit was given for each 15,000 in population in excess of 30,000. GA. CODE ANN. § 34-3212 (1962). But there were still large disparities, with one-third of the population controlling a majority of the county units. *Sanders v. Gray*, *supra* at 170 n.10.

In *Sanders v. Gray* the district court devoted its analysis primarily to the county unit system as it existed prior to this amendment, before concluding that, even though the amendment was an improvement, it did not go far enough in correcting the population disparities. *Id.* at 170-71. Similarly this Comment will devote its analysis to the pre-amendment system.

181. The county unit system applies only to primaries. Although originally effectuated by a rule of the Democratic Party, the county unit system was enacted into law in 1917. GA. LAWS, 1917, p. 183. In 1950 and 1952 attempts were made to make the county unit system a constitutional requirement, and in 1950 an attempt, also unsuccessful, was made to apply the unit system to general elections. See Cornelius, *The County Unit System of Georgia: Facts and Prospects*, 14 WESTERN POL. Q. 942, 945 (1961).

182. GA. CONST. art. 3, § 2-1501. For a general history of the county unit system, see *Sanders v. Gray*, *supra* note 180, at 160-64. The system's apportionment was amended while the instant case was pending. See note 180 *supra*.

The county unit system had been frequently attacked in the courts, always unsuccessfully. See *Cook v. Fortson*, 68 F. Supp. 624 (N.D. Ga.), *appeal dismissed*, 329 U.S.

Thus, 22 ½ per cent of Georgia's population elected a majority of the House, and consequently could also control a gubernatorial primary.¹⁸³

The Georgia Senate, largely as a result of a rotation plan for electing Senators, was even more malapportioned. Under this plan, to qualify for office a Senator had to reside in a particular county within the senatorial district, and this county was rotated among the three counties constituting each district.¹⁸⁴ Thus, each county in a district supplied the Senator once every three terms. In the primary only those living in the county in which the Senator had to reside were eligible to vote. Thus, even in a Senate district containing a populous county that would normally dominate the district, that county could effectively elect a Senator in only one out of three elections.¹⁸⁵ Consequently it was possible under this system for as little as 6 per cent of Georgia's population to elect a majority of the Senate.¹⁸⁶

675 (1946); *South v. Peters*, 89 F. Supp. 672 (N.D. Ga.), *aff'd per curiam*, 339 U.S. 276 (1950); *Cox v. Peters*, 208 Ga. 498, 67 S.E.2d 579 (1951), *appeal dismissed*, 342 U.S. 936 (1952); and *Henderson v. State Democratic Executive Comm.*, 198 F. Supp. 360 (N.D. Ga. 1961).

183. *Toombs v. Fortson*, 205 F. Supp. 248, 251 (N.D. Ga. 1962).

184. GA. CODE ANN. § 47-102.1 (1961).

The Georgia Constitution establishes no criteria for the Senate apportionment other than limiting the size of that body to fifty-four. GA. CONST. art. 3, § 2-1401. The legislature, however, has created districts which, with two exceptions, all consist of three contiguous counties. Fulton County is a district in itself, and Chatham County is combined with only one other county to form a district. GA. CODE ANN. § 47-102 (1961). Since Fulton County is the largest in population and Chatham was the second largest at the time this apportionment was made, these two exceptions can be explained as a slight concession to the population principle.

185. GA. CODE ANN. §§ 34-3219-3222 (1939). See GOSNELL & ANDERSON, *THE GOVERNMENT AND ADMINISTRATION OF GEORGIA* 51-52 (1956). The rotation system was repealed subsequent to the decision in *Toombs v. Fortson*, *supra* note 183, and control of State Senate primaries placed exclusively in the hands of the party committees. GA. CODE ANN. § 34-3239 (1962).

186. *Toombs v. Fortson*, *supra* note 183, at 251. These statistics, of course, are incapable of showing the effects of such things as party structure and, therefore, considered alone, are an inadequate means of measuring governmental responsiveness. But statistics can be indicative; that is to say, if statistics show there is a gross inequality of population between districts, one should at least be alerted to the possibility of unresponsiveness.

The ratio of the largest district to the smallest has been perhaps the most frequently cited statistical criterion in post-*Baker* cases. See, *e.g.*, *Scholle v. Hare*, 367 Mich. 176, 182, 116 N.W.2d 350, 355 (1962) (ratio not greater than two to one). But this statistic is greatly inflated by aberrations which have little effect on responsiveness. Often in fact such aberrations are required by constitutional provisions intended to curtail gerrymandering. Consequently this statistic has little general usefulness. See note 277 *infra*.

Another statistical criterion frequently cited is the minimum percentage of the population necessary to elect a majority to a given legislative body. While this figure is a better indication of the inequalities in the total system than the ratio figure, it fails to indicate what areas of the state are substantially underrepresented, which, of course, is crucial for purposes of our test.

What is needed, therefore, is a figure which indicates the underrepresentation of *areas* of a state.

Georgia's apportionment system seems to have met the requirements of the "crazy quilt," or minimum rationality, test; the deviations from the equal population norm in both the legislature and the governorship appear to have reflected a consistent application of a rational and legitimate policy. Unlike the apportionment in Tennessee, where there were no easily discernible bases of representation underlying the apportionment,¹⁸⁷ the principle basis of the Georgia House and Senate apportionments was equality of representation for political units. In the Senate this was the sole policy applied;¹⁸⁸ in the House, and therefore the governorship, the basic policy of representation of political units was combined with the population principle. Nevertheless these policies were combined consistently.¹⁸⁹ It was argued in the district court that, because the apportionment formula in Georgia had a historical basis, it was impervious to attack. In reply the district court argued that the formula was historically an attempt to reflect adequately population, which it clearly no longer did, and that therefore history did not protect the apportionment.¹⁹⁰ Both these arguments, however, are irrelevant. An apportionment is not immune to constitutional attack, even if it were originally constitutional,¹⁹¹ merely because it has an historical basis, nor is that apportionment necessarily un-

Perhaps best in this regard is a figure which indicates the relative representation of each county. To arrive at this figure one would divide a county's actual representation by its ideal representation under an equal population formula. Thus, if a county had four representatives where it would be entitled to only two under an equal population formula, its relative representation would be two; if the same county had only one representative, its relative representation would be one-half. To determine the underrepresentation of an area one would then need only sum the figures for the counties which comprise that area. Compare the figures used by Justices Clark and Harlan in *Baker v. Carr*, 369 U.S. at 256-58, 262-64, 340-49 (1962).

For an evaluation of the various statistical methods used to measure malapportionment, see Clem, *Legislative Malapportionment and the Mathematical Quagmire*, (paper presented at the annual meeting of the Midwest Conference of Political Scientists, held at the University of Notre Dame, South Bend, Indiana, on April 27, 1962). For some statistical analyses of legislative apportionments, see DAVID & EISENBERG, *DEVALUATION OF THE URBAN & SUBURBAN VOTE* (1961); NATIONAL MUNICIPAL LEAGUE, *COMPENDIUM ON LEGISLATURE APPORTIONMENT* (Childs ed. 1960); Dauer & Kelsey, *Unrepresentative States*, 44 NAT'L MUNIC. REV. 571 (1955).

For discussion of the related problem of the best mathematical formula by which to distribute United States Representatives among the states after each census, see Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015 (1929); Willcox, *Last Words on the Apportionment Problem*, 17 LAW & CONTEMP. PROB. 290 (1952); Comment, *Apportionment of the House of Representatives*, 58 YALE L.J. 1360 (1949).

187. *Baker v. Carr*, 369 U.S. at 253-58 (1962).

188. Fulton and Chatham counties were exceptions to this general rule, but they could be rationally explained. See note 184 *supra*.

189. If the counties receiving three representatives had not been the eight largest but rather say the 1st, 2d, 4th, 7th, 8th, 11th, 19th and 23d largest, perhaps the question of "crazy quilt" would then have arisen, although conceivably the seeming inconsistency in application of the population principle could have been explained as the application of yet another policy.

190. *Toombs v. Fortson*, 205 F. Supp. 248, 255 (N.D. Ga. 1962).

191. See note 253 *infra* and accompanying text.

constitutional because it no longer reflects its original policy. It may now consistently reflect some other policy, such as representation of political units, in which case the legislature must be presumed to have intended that result.¹⁹²

Assuming that Georgia's apportionment passes the "crazy quilt" test, and since there are substantial deviations from the population norm, the responsiveness of the governorship and the legislature must be compared to what the responsiveness of those institutions would have been if they had been apportioned on the basis of the equal population norm in order to determine whether the institutions here challenged were themselves sufficiently unresponsive. The equal population norm is utilized as the basis for comparison because, if the responsiveness of the challenged institutions is substantially equivalent to that which would exist under that norm, then any unresponsiveness in the total process must be due to inequities in other institutions.¹⁹³ Making this comparison in Georgia leads to the conclusion that the apportionments of both the governorship and the legislature created a substantial lack of responsiveness within these institutions. The eight most populous counties containing 41 per cent of the state's population elected only 11.7 per cent of the members of the House, and consequently accounted for only 11.7 per cent of the county units.¹⁴⁰ The twelve most populous Senate districts containing 55.8 per cent of the population elected only 22.2 per cent of the Senators, and even less if account is taken of the rotation system.¹⁹⁵ Apportionment on an equal population principle certainly would have substantially increased the influence of these counties in both institutions.¹⁹⁰

The next judgment is whether the total governing structure of Georgia substantially deprived some elements of the populace of their ability to compel electorally governmental responsiveness to their interests. Such a judgment requires first a determination of the responsiveness of the various institutions in the governing process, and then a determination of how these institutions interact in reaching decisions.¹⁹⁷ In Georgia this judgment seems an easy one.

192. On the other hand the historical basis of an apportionment may be useful in determining whether the apportionment is based on some policy or whether it is a crazy quilt.

193. This will not, of course, prevent a legislature from overrepresenting an area in the legislature in order to compensate for that area's underrepresentation elsewhere in the government. Such an apportionment would not satisfy this part of the test, but it would pass the total responsiveness test. See notes 160-63 *supra* and accompanying text.

194. *Toombs v. Fortson*, *supra* note 190, at 251.

195. *Ibid.*

196. Representation on the basis of equal population would entitle the eight most populous counties to sixty additional members in the House of Representatives. The extra membership which would thereby be given these counties on legislative committees, where many of the legislative decisions are made, would by itself substantially increase their influence. See GOSNELL & ANDERSON, *op. cit. supra* note 185, at 56-64.

197. For the type of evidence relevant to determinations of responsiveness, see notes 162-63 *supra* and accompanying text. In determining how the various institutions interact, perhaps the most important factor is empirical evidence. But this alone cannot be determinative. Consideration must also be given to the formal powers of each branch, see notes 215-21 *infra* and accompanying text, and to party considerations which may affect the relationships, see notes 206-14 *infra* and accompanying text.

Although there were a variety of institutions in the governing process, in Georgia, as in most states, many of these institutions were at least partly under the control of either the governor or the legislature,¹⁹⁸ and we have already determined that these latter institutions were substantially unresponsive. To be sure, some administrative officers in Georgia were elected, but they also were elected under the county unit system.¹⁹⁹ As a result it appears that every institution of Georgia's government through which the citizens of the more populous counties might have been able to compel responsiveness through the electoral process were apportioned in such a manner as to deny these groups that power.²⁰⁰ And for the same reasons, factors, such as the party structure of the state, which effect the manner in which these institutions interact to reach decision could not operate to allow greater responsiveness than existed in either the governorship or the legislature.²⁰¹ If all the institutions are substantially unresponsive to the same groups, the result of their interaction is unlikely to be greater responsiveness. Moreover, the degree of unresponsiveness of the total governing process to the interests of the urban areas seems so great as to make it unnecessary to balance the state's interest in the classifications; the degree of unresponsiveness is so great as to be overwhelming in the balance, which is to say, the apportionments involved created a forbidden classification.²⁰² It seems clear, therefore, that the district court should have

198. Most state officers are appointed by either the legislature or the governor. GOSNELL & ANDERSON, *op. cit. supra* note 185, at 93. And even those elected independently must rely for finances on either the governor or the legislature.

199. GA. CODE ANN. 34-3212(a) (1955).

200. Actually these institutions are even less responsive to large, urban counties than the statistics indicate. Under the county unit system the candidate who gains a plurality in a county wins all that county's units. Consequently, election campaigns, and gubernatorial programs, focus on those counties where the result is in doubt, which in Georgia tends to be the smaller, two-unit counties. See KEY, SOUTHERN POLITICS IN STATE AND NATION 121-23 (1949). This phenomenon is much like that which occurs in Presidential elections where attention is focussed on the large, urban states, the doubtful districts in those elections. See Sindler, *Presidential Election Methods and Urban-Ethnic Interests*, 27 LAW & CONTEMP. PROB. 213 (1962).

Thus one commentator has concluded:

So long as the [county unit] system prevails it will exert a profound influence on the character of the state's politics. Fundamentally its effect is that only those candidates for state office who can win pluralities in the small, rural, two-unit-vote counties have a reasonable expectation of success. The necessity for a specialized sort of rural appeal deprives the state of a great body of potential leadership and places the election of governing officials in the hands of a segment of the population presumably no better qualified to govern than any other.

KEY, *op. cit. supra*, at 121.

201. Furthermore, even the Democratic Party in Georgia is infected by malapportionment. The state convention, which is held after each gubernatorial primary, is apportioned identically to the county unit system. The convention delegates then elect the State Executive Committee, the principle organ of the Party. See GOSNELL & ANDERSON, *op. cit. supra* note 185, at 34-36. See also Cornelius, *supra* note 181, at 954-55.

202. For an analysis of the factors entering into the balance, concluding that even with a majoritarian governor Georgia's legislative apportionment is unconstitutional, see notes 231-39 *infra* and accompanying text.

required at least one of the two institutions challenged, probably the governorship,²⁰³ to be reapportioned more in accord with the equal population principle. The court, in fact, eventually required both to be reapportioned.²⁰⁴

A court need not, however, have required Georgia to abandon completely the county unit system. As long as a county unit system meets the minimum standard of responsiveness, Georgia should be allowed to classify its citizenry for purposes of gubernatorial elections. And consistent with this proposition the district court held only the *existing* county unit apportionment unconstitutional and not the system itself.²⁰⁵

Once Georgia's governorship became straight-out majoritarian,²⁰⁶ there still remained the question whether the governor, now clearly responsive to the more populous and urban counties, sufficiently mitigated the unresponsiveness existing in the legislature. Because both the governor and the legislature have a veto if they choose to exercise it, this judgment could not be made merely by averaging the varying degrees of responsiveness of the institutions involved. The status quo, the usual result of a veto, is not typically neutral but usually favors one group or another.²⁰⁷ Therefore, the actual decision-making process must be examined and here the party structure of the state

203. Requiring at large gubernatorial elections would seem the most feasible form of initial relief. Not only would this be in accord with the general practice in the United States, but it would also be a simple form of relief to administer—merely enjoining the appropriate election and party officials from counting the ballots in any other manner than on a statewide basis. See *Sanders v. Gray*, 203 F. Supp. 158, 171 (N.D. Ga. 1962). On the other hand there are many practical objections to elections at large for the entire legislature, see notes 328-31 *infra* and accompanying text, and any judicial attempt to affirmatively reapportion the legislature to the extent required should the governor continue to be elected under the county unit system would be far more difficult. See notes 336-39 *infra* and accompanying text.

204. The 1962 gubernatorial primary in Georgia was held at large, with the victorious candidate, Carl Sanders, apparently aided to a large degree by the abolition of the county unit system. See *N.Y. Times*, Sept. 13, 1962, p. 1, col. 8; *N.Y. Times*, Sept. 14, 1962, p. 3, col. 4. The defeated candidate, Marvin Griffin, had in 1954 won a gubernatorial election primarily because of the inordinate strength of the rural counties under the county unit system. See Cornelius, *supra* note 181, at 947.

The demise of the county unit system as applied to congressional districts led to the defeat of segregationist Congressman James Davis by a moderate, Charles Weltner, from Fulton County. If the county unit system had been in effect, Davis would have been elected. *N.Y. Times*, Sept. 28, 1962, § 1, p. 24, col. 1.

205. The district court held that the county unit system would be unconstitutional unless the disparities were no greater than existed in the electoral college allocation for Presidential elections, a standard which would change with each new census. *Sanders v. Gray*, *supra* note 203, at 170. This standard, primarily because there is no basis for drawing an analogy between the county unit system and the electoral college, has been subject to much criticism. See, e.g., Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 *YALE L.J.* 23, 35-36 (1962).

206. This was the result of *Sanders v. Gray*, *supra* note 203.

207. For an excellent discussion of the theoretical justifications for the existence of a veto power, as well as other features of our governmental system, see DAHL, A PREFACE TO DEMOCRATIC THEORY 124-51 (1956).

becomes important. It is this structure which in our system of separation of powers is designed to coordinate government policy.²⁰⁸ Thus, in a two party competitive state where the same party controls both the legislature and governorship, we expect substantial cooperation between these two institutions, with any differences of opinion between them, perhaps due to their different constituencies, compromised in some manner.²⁰⁹ The responsiveness of the total governing process in these states will not be equivalent to the responsiveness of either of these institutions but somewhere in between.

In one party states, however, while some cooperation may exist between the governor and the legislature, each institution is freer to act without regard to party pressures.²¹⁰ Thus the legislature in a one party state is likely to respond to a greater degree to the interests of its malapportioned constituency, and consequently to make the total governing process less responsive to the areas underrepresented in the legislature, than is a malapportioned legislature in a two party state.²¹¹ This leads to the conclusion that one party states should generally be required to conform more closely to the equal population norm than two party states.²¹² On the other hand, in some nominally one party states

208. See KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 702-64 (4th ed. 1958).

209. The failure of political parties to perform this role has evoked much criticism recently. See, e.g., ZELLER, *AMERICAN STATE LEGISLATURES* 189-213 (1954). Frequently this failure is attributed to malapportionment which ensures divided party control of the government. See notes 263-64 *infra* and accompanying text. Another contributing factor is a demonstrated lack of party cohesion in most state legislatures. See, e.g., Jewell, *Party Voting in American State Legislatures*, 49 *AM. POL. SCI. REV.* 773 (1955); Keefe, *Party Government and Lawmaking in Illinois General Assembly*, 47 *Nw. U. L. REV.* 55 (1952); Keefe, *Parties, Partisanship, and Public Policy in the Pennsylvania Legislature*, 48 *AM. POL. SCI. REV.* 450 (1954). Cf. Patterson, *The Role of the Deviant in the State Legislative System: The Wisconsin Assembly*, 14 *WESTERN POL. Q.* 460 (1961). But see Lockard, *Legislative Politics in Connecticut*, 48 *AM. POL. SCI. REV.* 166 (1954).

210. For a description of party organization in some one party legislatures, see ZELLER, *op. cit. supra* note 209, at 207-11.

211. One leading commentator has characterized the politics of many one party states as "friends and neighbors politics." KEY, *op. cit. supra* note 200, at 37, 131. Where there are no well-defined statewide factions, as in Alabama and South Carolina, each statewide candidate finds it necessary to build his own following, typically basing it in his home area, and finds it nearly impossible to transfer the support of his following to another candidate. *Id.* at 44-45. Furthermore, primaries, which are the only effective elections in one party states, generally do not afford the voter as clear a choice between competing policy preferences as do elections involving two well-organized competitive parties. See KEY, *AMERICAN STATE POLITICS: AN INTRODUCTION* 85-168 (1956). For a different view, see Rhyne, *Political Parties and Decision Making in Three Southern Counties*, 52 *AM. POL. SCI. REV.* 1091 (1958).

212. Today, however, some one party states are among the worst apportioned in the country. For example, one recent study found Florida, Georgia and Alabama legislatures to be among the ten most unrepresentative states. DAVID & EISENBERG, *op. cit. supra* note 186, at 5.

One study in 1952 classified the following as one party states: Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Louisiana, Maine, Mississippi, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia. ZELLER, *op. cit. supra* note 209, at 202. It would seem that today at least Maine, North Dakota, and South Dakota should be deleted from this list.

there are strong factions within the dominant party which play the role of parties.²¹³ However, for these factions to be effective in that role they must operate not only in gubernatorial elections but also on the legislative level. Otherwise the governor, presumably affiliated with a faction, will have no faction in the legislature with whom to identify and over whom to exert something resembling party leadership. Although Georgia is a one party state which has a mild factionalism at the gubernatorial level, this factionalism does not permeate to the legislative level.²¹⁴ Consequently the governor of Georgia is inhibited in his attempts to compromise with a legislature responsive primarily to the smaller and more rural counties.

Even if unable to use party or faction leadership over the legislature, a governor does have other weapons, primarily the formal and structural powers of the governorship. In some states, for example, the legislature meets only biennially and then for a limited session, and consequently, hampered by limited access to information and little time for deliberation, it will have little opportunity to initiate its own proposals, typically doing little else than approving or disapproving the governor's proposals.²¹⁵ On the other hand, in states with annual legislative sessions the legislature will be able to superintend government operations more closely. In Georgia the legislature meets annually but its sessions are limited to forty calendar days.²¹⁶ Georgia also has the executive budget, and, while the legislature must approve and may amend the governor's proposed budget, the governor also has the item veto on these measures.²¹⁷ As a result, the governor, in addition to his general initiating powers, has almost sole control over the budget. Furthermore the veto power of Georgia's governor historically has been almost impossible to override.²¹⁸

213. Of the eighteen one party states listed in note 212, half are described as having a well-organized dual factions: Arizona, Arkansas, Georgia, Kansas, Louisiana, North Dakota, Oklahoma, Tennessee, and Virginia. ZELLER, *op. cit. supra* note 209, at 208 n.35. Of course, the degree of factionalism, like the degree of party competition, varies greatly from state to state. See also Sindler, *Bifactional Rivalry as an Alternative to Two-Party Competition in Louisiana*, 49 AM. POL. SCI. REV. 641 (1955).

214. Georgia originally had a system of "friends and neighbors" politics, but the advent of Eugene Talmadge onto the state political scene in 1926 led to a dual factionalism which could be best described as pro-Talmadge versus anti-Talmadge. As one might expect in a State permeated with malapportionment, these factions also had an urban-rural flavor. Although Talmadge was occasionally able to transfer his factional support to a candidate for statewide office, rarely was this the case on the legislative level. See KEY, *op. cit. supra* note 200, at 107-16.

With the death of Eugene Talmadge and the elevation of his son, Herman, to the United States Senate, Talmadgism has declined as a factor in Georgia politics. A mild factionalism has been retained, however, through the increasing urban-rural cleavage.

215. See ZELLER, *op. cit. supra* note 209, at 89-94. For a compilation of the length and frequency of state legislative sessions, see THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1962-1963, at 42-43.

216. GA. CONST. art. 3, § 2-1603 (1961). See also GOSNELL & ANDERSON, *op. cit. supra* note 185, at 52-53.

217. *Id.* at 130-31. For a general review of Georgia's bugetary system, see *id.* at 123-33.

218. *Id.* at 89-90. For a general discussion of the remarkably effective gubernatorial veto in the South, see Prescott, *The Executive Veto in Southern States*, 10 J. POLITICS 659

Extensive patronage power also supplies the governor with leverage in his dealings with the legislature.²¹⁹ In the past, therefore, the governor of Georgia has been almost completely successful in getting legislative approval of his proposals.²²⁰ To a large extent, however, this success appears to have been due to the near identity of the governor's constituency with that of the legislature.²²¹ With a majoritarian governor elected from a substantially different constituency and therefore responsive to different interests, largely urban in character, the legislature could be expected to be less receptive to the governor's proposals. Thus, while a Georgia governor did, and still does, have extensive formal powers and undoubtedly would be able to mitigate somewhat the lack of responsiveness to urban interests found in the legislature, it is unlikely that the governor, unable to exercise party or faction leadership, would be able to ensure the urban interests adequate representation in the total governing process.

Municipal home rule has been suggested as another factor which might mitigate some of the urban underrepresentation in state legislatures.²²² But while home rule does give urban areas control over some purely local issues which would otherwise be determined by the legislature,²²³ it generally does little to alter the balance of power on the many crucial statewide issues which necessarily must be resolved by the state government, and in which all elements of the citizenry should have an effective voice. Furthermore, in many states home rule is established by statute, rather than by the state constitution, which leaves with the state, by threatening to remove or alter home rule powers, the power to exert some control on even those issues of strictly local

(1948). Every state except North Carolina places a veto power in the hands of its governor. RICH, *STATE CONSTITUTIONS: THE GOVERNOR* 21 (1960). See generally *id.* at 20-22.

219. Georgia has fifty-five boards and commissions, many members of which are appointed by the governor. In addition there are several administrative positions to which he has appointive power. GOSNELL & ANDERSON, *op. cit. supra* note 185, at 84-85. Today, however, most state employees are hired under a merit system that has been in force since 1939. *Id.* at 137-41.

Other factors of this nature affecting the relationship of the governor and the legislature are the existence and role of legislative councils, the effectiveness of the committee system, the existence of interim committees between sessions, and the availability of reference aids for legislators. See generally ZELLER, *op. cit. supra* note 209, at 89-104, 124-62.

For a general discussion of the role of the governor in the legislative process, see LIPSON, *THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER* 206-38 (1939); RICH, *op. cit. supra* note 218, at 17-29.

220. See GOSNELL & ANDERSON, *op. cit. supra* note 185, at 78-80, 90.

221. See generally KEY, *op. cit. supra* note 200, at 117-29. Cf. Cornelius, *supra* note 181, at 942-45.

222. Bickel, *The Durability of Colegrove v. Green*, 72 *YALE L.J.* 39, 42 (1962).

223. For a discussion of the allocation of powers between municipality and state under home rule, see MCGOLDRICK, *LAW AND PRACTICE OF MUNICIPAL HOME RULE* 317-51 (1933). For a discussion of the advantages of home rule, see MOTT, *HOME RULE FOR AMERICA'S CITIES* 11-12, 53-56 (1949).

concern.²²⁴ Generally, therefore, the existence of home rule will not be an important consideration in the determination of responsiveness. In Georgia, however, the lack of municipal home rule²²⁵ may have the effect of increasing governmental responsiveness to urban areas. Without home rule much of the legislation enacted by the General Assembly are local bills²²⁶ which in the past has enabled the governor to use his veto power over these measures to coerce legislators to support his program.²²⁷ With a majoritarian governor this power might be more extensively employed for the benefit of the urban areas. In recent years, however, the veto has been infrequently used in this manner; if the legislators from the affected area can agree, local bills are usually adopted as a matter of courtesy.²²⁸ Consequently, the effect of home rule, or lack of it, on governmental responsiveness in Georgia must be considered minimal.²²⁹

The preceding analysis suggests that even with a majoritarian governor, the Georgia state government substantially deprives the more populous and urban counties of their ability electorally to compel governmental responsiveness to their interests.²³⁰ However, because the governor undoubtedly performed some mitigating functions, this deprivation does not appear severe enough in itself to have created a forbidden classification. Consequently, it is

224. Another problem with statutory home rule is that state courts have at times declared it an excessive delegation of legislative power and hence unconstitutional. See, e.g., *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N.W. 20 (1912). See generally Annot., 43 L.R.A. (N.S.) 339 (1913). Even where there is constitutional home rule the states wield considerable influence in local affairs merely by exercising the general powers they retain. See, e.g., *Local 876, Int'l Bhd. of Elec. Workers v. State Labor Mediation Bd.*, 294 Mich. 629, 293 N.W. 809 (1940); *City of Phoenix v. Kidd*, 54 Ariz. 75, 92 P.2d 513, *rev'd on other grounds on rehearing*, 54 Ariz. 123, 94 P.2d 428 (1939).

225. In 1952 Georgia did adopt an effective home rule law, see Ga. Laws 1951, p. 116 as amended by Ga. Laws, 1952, p. 46, but it was declared unconstitutional a year later. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E. 2d 723 (1953). To get around the constitutional barrier, a constitutional amendment was adopted in 1954, GA. CONST. art. 15, but all attempts to enact another enabling act have been unsuccessful. See Gosnell, *Small Counties Rule*, 47 NAT'L MUNIC. REV. 332, 333-34 (1958).

226. Generally over half the measures enacted by the General Assembly in any session are local bills. GOSNELL & ANDERSON, *op. cit. supra* note 185, at 69.

227. Admittedly the veto power has been used in this manner only by a very few governors, see *id.* at 89, but the power to use it in this manner may be sufficient to convince some legislators of the advisability of supporting the governor's program.

228. See Gosnell, *supra* note 225, at 333.

229. In *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962), the court, in ruling that a proposed constitutional amendment would, if enacted, provide Florida with a constitutional apportionment, *cf.* note 96 *supra*, held that the lack of home rule in Florida justified significant departures from a population standard. It reasoned that without home rule much of the legislation enacted by the legislature were local bills, often affecting only a single county, and that each county's consequent need to be effectively represented justified an apportionment using the county as its base. *Id.* at 321-24.

230. Although this conclusion can be asserted with some certainty, there are factors leading to the conclusion that a court would be best advised to abstain from entering any immediate decision in this case. See notes 300-04 *infra* and accompanying text.

necessary to balance the state's interest in preserving its classifications. The balancing to be undertaken is not unlike that which takes place when a court considering the constitutionality of a state tax affecting interstate commerce balances the state interest in taxation against the national interest in free flow of interstate commerce.²³¹ The paramount interest in state tax cases is the free flow of interstate commerce;²³² the paramount interest in apportionment cases is responsiveness to all the elements of the citizenry. As in the state tax cases, the availability of alternative means by which to attain state objectives is an important factor in the balance.²³³ It may be argued that the analogy is not apt, since the court decisions in the state commerce clause cases, although formally constitutional ones, do not have the finality of ordinary constitutional decisions—Congress can always reverse the Court through legislation.²³⁴ But neither will decisions in apportionment cases ordinarily be as final as most constitutional decisions. Usually the state will be able to favor the same interests that were advanced under the invalidated apportionment statute, so long as it does it in a manner more consistent with the responsiveness principle.²³⁵

The primary state interest in Georgia's apportionment appears to have been one of protecting rural interests. Yet clearly 41 per cent of the state's population residing in the eight most populous counties could have been allocated more than 11.2 per cent of the seats in the House without sacrificing that interest. The same conclusion can be drawn about the Senate apportionment, and in particular about the rotation system. The other interest the state may have sought to protect in its apportionment is representation of political units. Since Georgia has so many counties (159), it is difficult, without causing considerable deviation from the equal population norm and considerable unresponsiveness to the more urban counties, to give each county representation in a particular house and still keep that house at a manageable size.²³⁶ Yet

231. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49 (1940). See generally POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 180-215 (1956).

232. See *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944).

233. Compare *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951).

234. See BICKEL, *THE LEAST DANGEROUS BRANCH* 228-34 (1962); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *YALE L.J.* 219 (1957).

235. Professor Freund has suggested that like commerce clause cases, civil liberties cases might also be interpreted as only insisting that a state use proper means in regulating certain activities and not as prohibiting regulation altogether. See Freund, *The Supreme Court and Civil Liberties*, 4 *VAND. L. REV.* 533 (1951). Thus, he suggests, a state is prevented from leveling a license tax on the distribution of literature by Jehovah's Witnesses, but the state may still level other taxes on Jehovah's Witnesses, e.g., an income tax. *Id.* at 553. Compare *Watchtower Bible & Tract Soc. v. Los Angeles County*, 181 F.2d 739 (9th Cir. 1950), with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

236. The existence of many small counties has been the cause of severe malapportionment in several states. Generally the state constitutions in these states provide that each county shall be apportioned at least one representative. Since these constitutions also limit the size of each house, the number of representatives that can be apportioned according to popula-

there seems to be little justification for protecting this interest in both houses of the legislature, and it may very well have been possible to protect this interest adequately through the creation of districts containing two or three of the less populous counties. And because of the substantial lack of responsiveness existing under the challenged apportionment, this possibility seems attractive, even if it provided slightly less protection for each political unit.²³⁷ On balance, therefore, even with a majoritarian governor Georgia's apportionment should have been adjudged unconstitutional.²³⁸ This was also the district court's opinion, although for different reasons.²³⁹

tion after each county has been allocated one representative is often too few to accommodate the population differentials between counties. Examples of states with this problem are Kansas, 105 counties with a maximum of 125 representatives, Iowa, 99 counties with a maximum of 108 representatives, and North Carolina, 100 counties with a maximum of 120 representatives. BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT 4-5, 8 (1960). See generally Jewell, *Constitutional Provisions for State Legislative Apportionment*, 8 WESTERN POL. Q. 272 (1955).

237. Cf. *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962); *Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. 1962).

238. Other states where the legislative apportionments, as they existed prior to the recent flurry of judicial action, at first glance appear susceptible to constitutional attack are Alabama, Florida, Idaho, Iowa, Kansas, Maryland, Mississippi, Nevada, and Tennessee; states where a more doubtful case might be brought include Alaska, California, Connecticut, Delaware, New Mexico, Oklahoma, and Texas. It must be emphasized, however, that these lists were prepared without engaging in the extensive analysis necessary to reach a conclusion about an apportionment's constitutionality. Nor does this list attempt to include those apportionments which might be classified as crazy quilts. See notes 124-32 *supra* and accompanying text. Rather this list, which is neither inclusive nor exclusive, is an attempt to give some indication of the extent to which the responsiveness standard here proposed would reach.

239. The district court applied a standard they had formulated in deciding the case challenging the constitutionality of the county unit system, *Sanders v. Gray*, 203 F. Supp. 158, 168-70 (N.D. Ga. 1962). Factors important in determining the existence of invidious discrimination, the court stated, include the rationality or arbitrariness of the state policy, the apportionment's historical basis, and the absence of a state political remedy. Georgia's apportionment, the court held, failed on all counts and consequently was invalid. *Toombs v. Fortson*, 205 F. Supp. 248, 254-56 (N.D. Ga. 1962). For the same reasons the court also found the rotation system of nominating State Senators unconstitutional. *Id.* at 257.

Before adjourning in the spring of 1962 the Georgia House of Representatives, perhaps in anticipation of the forthcoming litigation, established an interim committee for the purpose of studying possible changes in the General Assembly apportionment. After the decision in *Toombs v. Fortson*, *supra*, the Committee undertook the task of proposing reapportionments which, they hoped, would meet the court's standards of constitutionality. The Committee's majority report recommended the adoption of a constitutional amendment that increased the size of the Senate to 100 members and apportioned them on the basis of equal population, and that changed the apportionment of the House of Representatives to one representative per county. A minority report was filed recommending that the Senate be kept at its present size but reapportioned on the basis of equal population and that the existing apportionment of the House of Representatives be retained, all of which could be accomplished without a constitutional amendment.

At the request of the parties the district court ruled on the constitutionality of these two proposals before the legislature reconvened. They unanimously held that the minority report

New York

The legislative apportionment of New York, like that of Georgia, departs substantially from the equal population norm. But the deviations are not nearly as extensive. While the value of a vote in a county of less than 100,000 is somewhat over 173 per cent of the statewide average, there are few such counties in New York. And the value of the vote in counties over 500,000 is 86 per cent of the statewide average.²⁴⁰ However, it takes only 40.9 per cent of the population to elect a majority to the State Senate and 37.1 per cent to the State Assembly.²⁴¹ And because of New York's peculiar demographic and political structure, this weighting does have a substantial effect, as is evidenced by the many complaints by New York City residents of discrimination in the state government.²⁴² Nevertheless a federal district court recently concluded that New York's apportionment was constitutional.²⁴³

Although the apportionment formula contained in New York's Constitution is complex, if accurately applied by the legislature it appears to satisfy the

would provide Georgia with a constitutional apportionment. With one judge dissenting they also held that the majority's proposal would provide the State with a constitutional apportionment, establishing as their standard that an apportionment would be invalid if the disparities it created were substantially greater than those created by the federal apportionment of Congress. Since the majority's proposal required a constitutional amendment, however, it could not be effectuated before 1965, and to this the court strongly objected. Consequently, they recommended acceptance, at least as an interim measure, of the minority report's plan. *Toombs v. Fortson*, Civ. A. No. 7883, N.D. Ga., Sept. 5, 1962.

The legislature convened late in September and after much debate finally adopted a reapportionment closely resembling that recommended in the minority report. The reapportionment retained the existing House of Representatives' apportionment and reapportioned the Senate so that the nine largest counties received 23 of the 54 seats.

The effects of this reapportionment were seen almost immediately. One of the features of both Georgia's legislative apportionment and county unit system had been to minimize the effect of fairly extensive Negro suffrage in Fulton County. See Bernd & Holland, *Recent Restrictions Upon Negro Suffrage: The Case of Georgia*, 21 J. POLITICS 487 (1959); *South v. Peters*, 339 U.S. 276, 277 (1950) (Douglas, J., dissenting). See also *TAPER, GOMILLION VERSUS LIGHTFOOT* 15 (1962). As a result of Fulton County's increased representation in the Senate, however, a Negro was elected to the General Assembly for the first time in fifty years. *N.Y. Times*, Nov. 7, 1962, p. 44, col. 4.

240. *DAVID & EISENBERG*, *op. cit. supra* note 186, at 50-51.

241. *Tyler, Court Versus Legislature*, 27 *LAW & CONTEMP. PROB.* 390, 391 (1962) (1950 census).

242. The frequent complaints by elected officials of New York City of discrimination in state financial aids are familiar to all who live in the area. For a description of one of the many city-state conflicts on this issue, see *BAKER, RURAL VERSUS URBAN POLITICAL POWER* 32-39 (1955). See also *N.Y. Times*, April 1, 1962, § 1, p. 64, col. 4.

243. *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y.), *on remand from*, 370 U.S. 190 (1962), *vacating and remanding*, 202 F. Supp. 741 (S.D.N.Y. 1962).

The test applied by the *Simon* court called for examination of the rationality of the state policy, the historical basis, if any, of the apportionment, the existence of a possible political remedy, the applicability of geographical factors in the apportionment, and whether it was necessary to invalidate a "solemnly enacted" state law or constitutional provision. They concluded that New York's apportionment survived each of these examinations. 208 F. Supp. at 374-80. For a similar test, see note 239 *supra*.

requirement that an apportionment be the consistent application of a rational policy that a state may legitimately adopt. In addition to representation on the basis of population, New York's apportionment reflects a combination of many policies, the principal ones being greater representation of the less populous counties, and prevention of any populous county or group of counties from gaining substantial control of the legislature.²⁴⁴ Clearly these are policies a state may legitimately adopt. The fact that they are embodied in complex mathematical formulae in no way reflects any lack of coherency or consistency; on the contrary the formulae express in a rational manner the many policies New York chooses to apply. And since the legislature has applied these formulae accurately,²⁴⁵ it is impossible to call New York's apportionment a "crazy quilt."

244. The New York Assembly has 150 members with each county guaranteed at least one assemblyman. Since there are 61 counties (for purposes of apportionment Fulton and Hamilton counties are treated as one county), this requirement alone necessitates substantial inequality. See note 236 *supra*. For purposes of apportioning the balance of the Assemblymen, a ratio is established by dividing the number of Assemblymen (150) into the State's population excluding aliens. An additional assemblyman is then apportioned to every county with a population greater than $1\frac{1}{2}$ ratios. The balance of the 150 Assemblymen are then distributed on the basis of population among the counties containing over two ratios. In those counties entitled to more than one assemblyman local authorities divide the county into the appropriate number of districts. N.Y. CONST. art. 3, § 5. For an analysis of the Assembly apportionment formula, its history, and recent proposals to alter it, see Silva, *Apportionment of the New York Assembly*, 31 *FORDHAM L. REV.* 1 (1962).

The apportionment formula for the New York Senate is even more complex. The initial step in this apportionment is to obtain a ratio by dividing the population of the State, again excluding aliens, by fifty. Then one Senator for each full ratio is apportioned to each county containing a population equal to three or more ratios. The next step is to individually calculate by county the number of additional Senators apportioned to these counties as compared to the number apportioned to them in 1894. These sums are totaled, without taking account of Senators lost since 1894 by any of these counties, and that sum is added to fifty to arrive at the size of the Senate for the particular apportionment being made. The balance of the revised number of Senators is then apportioned among the remaining counties on the basis of population. N.Y. CONST. art. 3, § 4, as interpreted in *In re Dowling*, 219 N.Y. 44, 113 N.E. 545 (1916), and *In re Fay*, 291 N.Y. 198, 52 N.E. 2d 97 (1943). See generally Silva, *Apportionment in New York*, 30 *FORDHAM L. REV.* 581, 595-650 (1962).

245. Since New York has not reapportioned since 1953, subsequent population shifts have caused some departures from these formulas. But to justify holding New York's apportionment a crazy quilt on these grounds would be essentially requiring a state to constantly reapportion to adapt to population shifts, a requirement which would negate the state's interest in stability in government. On the other hand a state's stability interest should not be allowed to justify a total failure by a state to adapt its apportionment to a changed population distribution. *But see* Neal, *Baker v. Carr: Politics in Search of Law*, 1962 *SUPREME COURT REVIEW* 252, 282-84 (1962); *Baker v. Carr*, 369 U.S. at 336 (Harlan, J., dissenting). The way out of this dilemma seems to be to require the legislature to exercise reasonable discretion in deciding when to reapportion. In determining whether such discretion has been exercised two rules of thumb should guide a court. First, a state should not ordinarily be required to reapportion more than once between each federal census, and second, where the state constitution provides for reapportionment at reasonable intervals, courts should not require it more frequently. Since the New York Constitution provides that the legislature shall reapportion within a six year period after each federal census, which here would

The next step, therefore, is to determine if there is any lack of responsiveness in the legislature itself. In making this judgment in New York it is necessary to take into account the demography and conflicting interests of that state. Certainly such factors are important to this determination. For example, in a hypothetical state in which 80 per cent of the population lived in one metropolitan area a reduction of that area's legislative representation to 60 per cent of the seats very well may have little or no effect, but the reduction in the representation of a metropolitan area containing only 50 per cent of a state's population to 40 per cent of the seats likely will have a substantial effect, at least within the legislature.²⁴⁶ And in a state where representation based solely on population would result in a fine balance between that state's interest groups in the legislature, weighting the apportionment in favor of one or more of these groups will also have a substantial effect on the legislature's responsiveness to other groups. In New York State a delicate balance of just this nature exists between the conflicting interest groups—"the City" and "upstate,"—each of which contains approximately half the State's population.²⁴⁷ Because the City's size creates a constant threat that it will control the entire State government this conflict is to be expected. Moreover, since the City is predominantly Democratic while upstate is predominantly Republican,²⁴⁸ the conflict is underscored by political party competition. Thus, the apportionment, which favors the less populous counties, all of which are upstate counties, gives a substantial majority of the seats to both upstate and Republicans. If apportionment were according to the equal population norm, the representation of upstate and the City would be ap-

be by 1966, N.Y. CONST. art. 3, § 4, a federal court should not declare New York's present apportionment a crazy quilt before then. See also *Stein v. General Assembly*, 374 P.2d 66 (Colo. 1962).

246. This is not to suggest that merely because an area containing a majority of a state's population also has a majority of the representation, there could never be a lack of responsiveness. There may be, for example, conflicting interests that require that area to be treated as two or more areas. See note 169 *supra*.

247. See CALDWELL, *THE GOVERNMENT AND ADMINISTRATION OF NEW YORK* 37-38 (1954); BAKER, *op. cit. supra* note 242, at 32-33.

248. In the 1958 gubernatorial elections the Republican candidate polled 2,115,115 votes upstate while the Democratic-Liberal polled only 1,232,127 there. But in the City the Democratic-Liberal polled 1,321,768 while the Republican polled only 1,011,814. *NEW YORK LEGISLATIVE MANUAL* 1961-62, p. 1084. For a description of the Liberal Party of New York and its relationship to the Democratic Party, see CALDWELL, *op. cit. supra* note 247, at 41-42.

The separate party allegiances of upstate and the City seem to be a product of their other conflicts. As the City's percentage of the total statewide vote has risen, the Democratic percentage of the upstate vote has consistently fallen. MUNGER & STRAETZ, *NEW YORK POLITICS* 56-57 (1960). The cause and effect relationship here has been noted:

There is . . . one common thread that effects the politics of [upstate New York] . . . influencing [it] toward support of the Republican Party. That common thread is fear of and hostility toward New York City.

Id. at 55.

proximately equal and the party balance more even.²⁴⁹ Since the City would then have substantially greater influence than it now has in the legislature, one is forced to conclude that there is a substantial lack of responsiveness to the City in the legislature itself.

This conclusion necessitates an examination of the other governmental institutions, primarily the governorship, to determine the responsiveness of the total governing process. In New York the governor is peculiarly a representative of the City, for with nearly half the state's population being City residents, no governor can expect to be elected or reelected without substantial City support:

[T]he central fact is that the peculiar electoral position of the governor makes him, whether a Republican or a Democrat, a representative particularly of metropolitan New York City. A Democratic governor's dependence on New York City support is apparent; less obvious, but equally real, is the necessity for a Republican governor to cultivate a following within the city that will serve to reduce the Democratic pluralities.²⁵⁰

The City's ability substantially to influence the outcome of gubernatorial elections, thereby insuring the governor's responsiveness to the City's interests, is due largely to sheer numbers; as a matter of arithmetic no candidate can afford to do poorly there. But in addition the City is also to a very limited extent a swing area in New York elections.²⁵¹ A swing area is one which tends to vary in the percentage of the vote it gives to each party in statewide elections while the rest of the state remains relatively stable in this regard. If such an area exists in a competitive state, it will frequently determine the outcome of an election, and the governor will correspondingly be more responsive to that area. But such areas seldom exist; if a state has a swing vote, it generally will be a social or economic class which cannot be geographically defined.²⁵² Moreover, in determining whether a state has a swing area it is essential that only long term relationships be considered. The constitutionality of apportionments can hardly be made to depend on the many temporary fluctuations of the political world. Of course, long term relationships may change

249. Although New York is a two party state, because of the uneven geographical distribution of party strength, an equal population apportionment might still favor the Republicans. While statewide the Democrats can expect to draw about half the legislative vote, they will win many districts by large margins. The Republican's winning margins on the other hand are generally more modest. See *NEW YORK LEGISLATIVE MANUAL 1961-62*, at 1124-42. Consequently even under an equal population apportionment the Republicans could be expected to win a majority of the districts.

A similar phenomenon has been observed in Wisconsin. See EPSTEIN, *POLITICS IN WISCONSIN* 122-25 (1958).

250. MUNGER & STRAETZ, *op. cit. supra* note 248, at 62.

251. See note 254 *infra*.

252. For an excellent analysis of the many factors which lead people to vote for one party or the other, see CAMPBELL, GURIN & MILLER, *THE VOTER DECIDES* (1952). For a detailed analysis of Connecticut voting patterns, concluding that the swing vote in that state is not geographically centered, see Beizer, *Election Politics in Connecticut: 1930-60*, pp. 60-65, March 1961 (unpublished thesis in Widener Library, Harvard University).

and thus an apportionment constitutional at one time may be unconstitutional at another, but so it is with many constitutional principles applicable to changing social conditions.²⁵³ New York, however, appears to be one of those few states which has in the City a relatively permanent and recognizable swing area, and consequently the influence of the City in the governorship is further increased.²⁵⁴ Finally the fact that the gubernatorial nominating conventions are so apportioned that the City has substantial influence in both major party's conventions also serves to make the governor primarily a representative of the City.²⁵⁵

The judgment thus reduces itself essentially to determining whether the governor, who is thoroughly responsive to the City, sufficiently compensates for the legislature's unresponsiveness to the City, and this determination depends on how these two institutions interact in the decision-making process. In making this determination we are concerned only with the City's access to influence in that process, and not with the results of that process—the decisions made. If the latter were relevant, the courts would be forced to judge the merits of legislation, a task for which they are ill-suited.²⁵⁶ Moreover, in assessing the interaction of the governor and the legislature, uninstitutionalized factors, such as the lack of influence of a weak-willed governor who is dominated by a Senate majority leader, are irrelevant. But the governor's patronage power,

253. [T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).

In cases involving constitutional issues [like due process, equal protection, burden on interstate commerce] . . . this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may . . . "depend altogether on the force of the reasoning by which it is supported."

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

See also Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935); Abie State Bank v. Bryan, 282 U.S. 765 (1931); McGowan v. Maryland, 366 U.S. 420 (1961).

254. Following are the election percentages of the Republican and Democratic gubernatorial candidates from upstate and the City in the 1954, 1958 and 1962 elections:

	1954		1956		1958	
	GOP	DEM	GOP	DEM	GOP	DEM
% of upstate vote	60.8	37.5	61.8	36.2	61.1	38.9
% of the City vote	33.1	63.2	42.3	55.2	45.7	54.3

(totals are less than 100 due to minor party vote and void ballots) Compiled from NEW YORK LEGISLATIVE MANUAL, 1961-62, at 1034; *id.*, 1958, at 1070; and the N.Y. Times, Nov. 8, 1962, § 1, p. 24, col. 1.

255. See MÜNGER & STRAETZ, *op. cit. supra* note 248, at 60-61. Frequently in the Democratic convention an absolute majority of the delegates come from the City. *Ibid.*

256. Not even the frequently cited figures of per capita state aid to localities can be conclusive evidence of discrimination, for such factors as higher administrative expenses might amply justify greater per capita aid to smaller localities. For a recitation of such statistics for Connecticut, see LOCKARD, NEW ENGLAND STATE POLITICS 275 (1959).

which often enables him to influence legislators' votes, is highly relevant, for that is a permanent part of the institutions involved; to the extent that patronage power describes the governor's potential influence in the decision-making process, it also describes the City's access to influence in that process.^{256a}

Perhaps the most important factor determining the relationship between the governor and legislature is the highly competitive two party structure in New York, creating intense party loyalty in the legislature, a legislator rarely voting against his party.²⁵⁷ Since the governor typically serves as leader of his own party, he can therefore count in his party's support for his legislative program. With the Republicans essentially guaranteed a majority in both houses of the legislature because of the malapportionment,²⁵⁸ a Republican governor will experience little difficulty in steering his proposals, usually responsive to City interests, through the legislature.²⁵⁹ A Democratic governor, of course, will face greater obstacles, for the party considerations which dictated Republican legislative support for a Republican governor's proposals will also dictate that they oppose or at least attempt to modify a Democratic governor's proposals. But a Democratic New York governor is not without powerful weapons. His veto power is high absolute,²⁶⁰ and he has extensive appointive and patronage powers. Furthermore it appears likely that a Democratic governor's initial proposals, perhaps in anticipation of forthcoming modification, will be more favorable to the City than a Republican's. Moreover, the Republican legislative majority is not entirely free to oppose a Democratic governor's proposals, for they too must appear, for purposes of

256a. This is not to say, of course, that uninstitutionalized factors are without potency in the allocation of influence in the governing processes. In fact there is a substantial school of political scientists who believe such factors are the most important. See DAHL, *WHO GOVERNS?* (1961). But not even this school believes that elections have no role to play in distributing power in the governing process. If that were the case, the entire controversy over *Baker v. Carr* and "the apportionment problem" would be one grand indulgence in procrastination, for apportionment is only significant to the extent that it channels the effects of elections on the decision-making processes.

Ideally all factors, institutionalized or not, should be considered in determining responsiveness. However, the ephemeral character of what is herein called uninstitutionalized factors renders their consideration in a constitutional context extremely difficult and probably improper.

257. See MUNGER & STRAETZ, *op. cit. supra* note 248, at 61.

258. *Ibid.* Only once in the past forty years, in 1935, have the Democrats controlled both houses of the legislature. CADWELL, *op. cit. supra* note 247, at 88-89. *But cf. id.* at 37.

259. For a description of how Governor Dewey cooperated with Republican legislative leaders in the enactment of legislation, see Breitel, *Some Aspects of the Legislative Process*, 21 N.Y.S.B.A. BULL. 271 (1949). For a general description of the role of New York's governor in the legislative process, see MUNGER & STRAETZ, *op. cit. supra* note 248, at 62-63; CADWELL, *op. cit. supra* note 247, at 84-92.

260. Because in New York the bulk of legislation is enacted at the end of the legislative session, thus removing the possibility that the governor's veto will be overridden, the veto power has proved perhaps the most significant factor in the legislative process. Governors have at times vetoed over thirty percent of the bills passed by the legislature. See Solomon, *The Governor as Legislator*, 40 NAT'L MUNIC. REV. 515 (1951).

the party's image in the next gubernatorial election, responsive to the City.²⁶¹ Despite these factors, however, in New York the total governing process is apparently more responsive to the City with a Republican governor than with a Democratic governor.²⁶²

This raises the problem of politically divided government, a problem which exists in many other states besides New York.²⁶³ In states like New York where divided government is a periodic phenomena, the differences in responsiveness when the government is unified and when it is divided will not ordinarily be sufficiently substantial to cause a court to find an apportionment constitutional in one case and not in the other; the burden of proof on one seeking to establish the invalidity of the apportionment is probably too great to allow for such fine lines. Furthermore, even if such lines could be drawn, the requirement that the factors considered include only long term relationships precludes consideration of such transitory differences. However, in some states divided government is relatively permanent, usually because their apportionments guarantee opposite parties a majority in the two legislative houses.²⁶⁴ In such a case, where the opposing party control is institutionalized, whatever lack of responsiveness is caused by divided government can and should enter into a court's deliberations about the constitutionality of an apportionment.

Because New York's governor, whether Republican or Democrat, is responsive to the City, and because he plays such a prominent role in the legislative process, it is reasonable to conclude that he substantially mitigates the lack of

261. Other factors increasing the governor's influence in the governmental process are nearly complete control over the budget, see CALDWELL, *op. cit. supra* note 247, at 86-88, short legislative sessions, *id.* at 58, exclusive authority to call special legislative sessions together with the power to limit the issues before such a session, *ibid.*, and the growth of administrative agencies which do much of the law-making. *Id.* at 57-58.

262. The most recent study of New York politics came to this conclusion. MUNGER & STRAETZ, *op. cit. supra* note 248, at 63.

263. Primarily because it prevents a party from enacting a coordinated legislative program, see note 209 *supra*, political scientists have long lamented the evils of divided government. See KEY, *AMERICAN STATE POLITICS: AN INTRODUCTION 52-74 (1956)*. Malapportionment is perhaps the most frequently cited cause of divided government, particularly when that malapportionment operates to guarantee control of the legislature to one party. See Key & Silverman, *Party and Separation of Powers: A Panorama of Practice in the State*, 5 *PUBLIC POLICY* 282 (1954).

264. From 1930 to 1950, for example, Massachusetts, Nevada, and Connecticut all had divided government over 70% of the time. Connecticut is perhaps the most interesting example. With 9.6% of the population able to elect a majority, their House of Representatives is one of the most malapportioned in the country. The Senate, however, is one of the few legislative houses in which the apportionment actually favors the larger cities, and consequently the Democrats. The result has been that in only eight of the last thirty years has Connecticut had unified government. See LOCKARD, *op. cit. supra* note 235, at 271-77. A suit was recently filed in the district court challenging Connecticut's apportionment. *Wallace v. Dempsey*, Civ. A. No. 9571 (D. Conn.) (complaint filed Dec. 27, 1962).

For the effects of divided government in Connecticut, see Beizer, *Election Politics in Connecticut: 1930-60*, pp. 114-26, March 1961 (unpublished thesis in Widener Library, Harvard University).

responsiveness to the City existing in the legislature itself. Moreover, the institutional power and influence the City acquires because of its sheer size and political organization, with a budget larger than New York State's and a mayor purporting to speak for seven million people,²⁶⁵ would appear further to mitigate the lack of responsiveness in the state legislature. Thus, although the existence of home rule will not typically be a significant factor,²⁶⁶ since it generally will not be accompanied with institutional power, in respect to New York City it clearly seems relevant. Consequently it appears doubtful that one challenging New York's legislative apportionment could sustain his burden of proof of demonstrating a substantial lack of responsiveness in the total governing process. Furthermore, balancing whatever lack of responsiveness exists against the interests sought to be protected by New York through its legislative apportionment also leads to the conclusion that the apportionment's invalidity cannot be sufficiently demonstrated. Upstate New York actually consists of many and diverse interests. To represent adequately all these, such as the suburban New York City areas, the upstate urban areas, the agricultural southern belt area, the resort areas, and so forth, may very well require some overrepresentation of upstate as a whole.²⁶⁷ And it was made clear by those who originally adopted New York's apportionment provisions that one of their purposes was to prevent control of the legislature by New York City.²⁶⁸ Moreover, since the overrepresentation given these interests is not inordinately excessive, there is no readily apparent alternative apportionment which protects them while affording greater responsiveness to the City. On balance, therefore, the combination of these interests, and the inconclusiveness of any attempt to show a substantial deprivation of responsiveness strongly imply that New York's apportionment should not be invalidated.

But this does not ineluctably imply that a court should declare New York's apportionment constitutional. Where an apportionment substantially deviates from the equal population norm, as in New York, a judgment of constitutionality should be based on a finding that the total governing process *is* responsive to the underrepresented areas.²⁶⁹ In the light of contemporary knowledge and

265. New York City's budget passed the billion dollar mark in 1947 and has exceeded the State's budget since long before then. CALDWELL, *op. cit. supra* note 247, at 157. See generally *id.* at 155-58, 229-53. The City's population according to the 1960 census was 7,781,984. NEW YORK LEGISLATIVE MANUAL, 1961-62, at 978. For a general description of the City's municipal government, see CALDWELL, *op. cit. supra*, at 147-73.

266. See notes 222-29 *supra* and accompanying text.

267. For a description of upstate and its political propensities, see MUNGER & STRAETZ, *op. cit. supra* note 248, at 34, 40-41, 50.

268. For a report of the purposes of the 1894 Constitutional Convention when they adopted the present apportionment formulas, see Silva, *Apportionment in New York*, 30 *FORDHAM L. REV.* 581, 597-616 (1962); Silva, *Apportionment of the New York Assembly*, 31 *FORDHAM L. REV.* 1, 2-24 (1962).

269. Where an apportionment does not substantially deviate from the equal population norm, a judgment of constitutionality can be made, for whatever unresponsiveness does exist results not from the legislative apportionment but from other aspects of the governing process. See note 193 *supra* and accompanying text.

presently available tools of analysis, such a finding cannot be made in regard to New York. Perhaps, if more precise analytic tools were available, the total governing process in New York might be found sufficiently unresponsive to warrant invalidating the present apportionment scheme. Since the apportionment may result in some harm to the City, and since this cannot be ascertained, a court would be well advised to let it be, and to avoid deciding its constitutionality by drawing on the array of weapons a court has at its disposal to stay its hand.²⁷⁰ To declare the apportionment constitutional would be to legitimate it solely because it cannot be known if it is consistent with principle.²⁷¹ Thus, a court should hold that a suit challenging New York's apportionment is not ripe—that a better record might be made when better analytic tools are available²⁷²—or that it raises a political question—that it requires policy determinations for which a judicially workable standard is lacking.²⁷³

Wisconsin

Although Wisconsin was recently the scene of a celebrated apportionment case,²⁷⁴ Wisconsin's legislative apportionment, paradoxically enough, follows the equal population principle more closely than nearly any other state.²⁷⁵ The value of the vote in those counties most underrepresented in Wisconsin, those

270. Professor Bickel has suggested that in another situation, benign housing quotas, the Court might stay its hand because of the unavailability of the information needed to reach a principled decision. The principle of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), Bickel states, clearly extends to benign housing quotas. On the other hand such legislation may very well have temporary beneficial effects; it may actually further the realization of the ideal of the *School Segregation Cases*. If that is the case, Bickel argues, the Court should stay its hand and in that way avoid contradicting the principle of *Brown* while allowing the expedient and beneficial result. Yet, Bickel asks, given the present state of our knowledge can it be said that benign quotas are beneficial? May it not be a form of racism practiced by those who wish to retain as much compulsory segregation as possible? The answers, he suggests, are that we do not know. Thus, Bickel argues, the Court should stay its hand, not because the quotas are beneficial, but because not enough evidence has been gathered to determine whether the principle of *Brown* should be suspended temporarily for the sake of expediency. If later the evidence shows that benign quotas, as a temporary expedient, are beneficial, then the Court should continue to stay its hand but for a different reason. If, however, the evidence shows malevolent effects, then the Court should apply the principle of *Brown* immediately and rigorously. BICKEL, *THE LEAST DANGEROUS BRANCH* 60-72 (1962). *But see* Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387 (1962). For a discussion of the same issue in the context of the racial gerrymander, see Note, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof*, 72 *YALE L.J.* 1041 (1963).

271. See notes 69-72 *supra* and accompanying text.

272. See BICKEL, *op. cit. supra* note 270, at 143-50; *Lathrop v. Donohue*, 367 U.S. 820 (1961).

273. See *Baker v. Carr*, 369 U.S. at 211-26; BICKEL, *op. cit. supra* note 270, at 183-98. *Cf. Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

274. *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962).

275. One recent study listed Wisconsin as one of the only two states that clearly provide urban citizens equal representation in the legislature. BAKER, *RURAL VERSUS URBAN POLITICAL POWER* 15-17 (1955). See also DAVID & EISENBERG, *DEVALUATION OF THE URBAN & SUBURBAN VOTE* 5 (1961).

between 100,000 and 500,000 in population, is nearly 87 per cent of the statewide average.²⁷⁶ The deviations which exist are the result primarily²⁷⁷ of the legislature's failure to reapportion since the 1960 census.²⁷⁸ This failure to reapportion colorably opens Wisconsin's apportionment to attack as a "crazy quilt." The only policy which, consistently applied, would explain that apportionment is equal population, as modified by the admittedly valid state constitutional requirements,²⁷⁹ and that policy offers no explanation for the deviations resulting from the failure to reapportion. But reasonable, not exact, adherence to some rational policy is the "crazy quilt" test, and certainly Wisconsin's apportionment reasonably adheres to an equal population policy even though its legislature has not been reapportioned since the 1960 census.²⁸⁰ To hold otherwise would be truly to make the fourteenth amendment a "pedagogical requirement of the impracticable."²⁸¹

Apart from the "crazy quilt" test, there seems little else upon which to base an attack on Wisconsin's apportionment. The most underrepresented area of the state, the Milwaukee metropolitan area, would be entitled in a new apportionment to only four more seats in an Assembly of 100 members,²⁸² and, since that area already has over one-fourth the seats,²⁸³ this would not

276. *Id.* at 67.

277. Another factor necessitating some inequality is the requirement of the Wisconsin Constitution that Assembly districts be bound by county lines unless the district is entirely included within a county apportioned two or more Assemblymen, and that Senate districts be composed of whole Assembly districts. WIS. CONST. art. 4, §§ 4-5, as interpreted in *State ex. rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). For example, Calumet County contains only 56% of the population of an average Assembly district, yet because it is bordered on all sides by counties entitled to two or more Assemblymen and therefore cannot constitutionally be joined with any of them, it must be an Assembly district by itself. Information compiled from WISCONSIN LEGISLATIVE REFERENCE LIBRARY REPORT, WISCONSIN LEGISLATIVE APPORTIONMENT, Informational Bull. No. 217, June, 1962, pp. 12-14, 17-18 (copy on file at Yale Law Library). For an example of a similar phenomenon in California, see Pitchell, *Reapportionment as a Control of Voting in California*, 14 WESTERN POL. Q. 214, 223-24 (1962).

278. Wisconsin last reapportioned in 1954 at which time, after considerable litigation, the apportionment adopted approached equality about as closely as the state constitution would permit. See *State ex. rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W. 2d 903 (1952); *State ex. rel. Thompson v. Zimmerman*, 264 Wis. 644, 60 N.W. 2d 416 (1953); Comment, 1955 Wis. L. REV. 125. The 1960 census, however, showed that population shifts had created some inequalities. See text accompanying note 282 *infra*.

279. See note 277 *supra*. The purpose of these provisions is to limit the possibilities for partisan gerrymandering, and this purpose clearly must be considered legitimate state policy. See *State ex. rel. Attorney General v. Cunningham*, *supra* note 277, at 515, 51 N.W. at 740.

280. See note 278 *supra* and accompanying text.

281. See note 127 *supra* and accompanying text.

282. Summary of Conclusions of 1959-61 Reapportionment Committee, Legislative Council of Wisconsin, June 21, 1962, p. 4 (copy on file at Yale Law Library).

283. Of the 100 members in the Wisconsin Assembly, twenty-four come from Milwaukee County alone. In addition adjacent counties containing suburbs within the Milwaukee metropolitan area have three assemblymen. Milwaukee County is also apportioned eight of the thirty-three Senators. See 1958 THE WISCONSIN BLUE BOOK 297-300.

substantially increase Milwaukee's influence in that body. Therefore a suit challenging the Wisconsin legislative apportionment should fail for a lack of unresponsiveness in the legislature itself. Should one doubt this conclusion, however, examination of the total governing process in Wisconsin leads to the same result. Wisconsin is now a two party state²⁸⁴ with the size of the Democratic plurality from the Milwaukee metropolitan area often being determinative of a gubernatorial election.²⁸⁵ The resultant responsiveness of the governor to the interests of the Milwaukee area would certainly appear adequate to compensate for any lack of responsiveness in the legislature to that area.²⁸⁶ Moreover, because Wisconsin's apportionment conforms so closely to the equal population norm, there is little reason not to declare the apportionment constitutional, that is, to legitimate it.²⁸⁷ Here the tools of analysis are sufficiently precise to demonstrate that all areas in Wisconsin can electorally compel governmental responsiveness to their interests.²⁸⁸

284. Traditionally Wisconsin was a one party state with a high degree of factionalism within the dominant Republican Party. See generally EPSTEIN, *POLITICS IN WISCONSIN* 33-34 (1958). In the last few years, however, a strong two party competition has emerged, so that today Wisconsin has a Democratic governor and two Democratic United States Senators. CONG. Q. WEEKLY REP., Nov. 9, 1962, pp. 2128, 2132. See Epstein, *Two Party Wisconsin?* 18 J. POLITICS 427 (1956).

285. In both 1960 and 1962, for example, the governor was elected on the strength of his plurality in Milwaukee County.

286. Furthermore, the governor plays a substantial role in the legislative process. See Carley, *Legal and Extra-Legal Powers of Wisconsin Governors in Legislative Relations* (pts. 1-2), 1962 WIS. L. REV. 3, 280. But for some limitations on his powers, see EPSTEIN, *op. cit. supra* note 284, at 26.

287. Thus, the new category of political questions proposed earlier—apportionments which do not comport with the consensus but which nevertheless cannot be held to be unconstitutional—would apply only to apportionments like that of New York. See notes 269-73 *supra* and accompanying text.

288. In *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962), however, the district court avoided ruling on the apportionment's constitutionality. Instead the court dismissed the complaint for want of equity because any relief which might be awarded to the plaintiffs would disrupt the electoral machinery already in motion for the 1962 elections. *Id.* at 187-88.

The history of the recent apportionment litigation in Wisconsin is interesting. Prior to the decision in *Baker v. Carr* the Attorney General of Wisconsin had sought in the State Supreme Court a writ of mandamus against the legislature and the Secretary of State directing that the State be reapportioned. The court denied the writ but suggested that the Attorney General renew his petition in June, 1963 if the legislature had not then reapportioned. *State ex rel. Reynolds v. Zimmerman*, Civ. A. No. 3540, Wis. Sup. Ct., March 8, 1962. When the decision in *Baker v. Carr* was handed down, the Attorney General immediately began proceedings in the federal courts to force reapportionment. The federal court held initially that the State itself did not have standing to sue. *Wisconsin v. Zimmerman*, 205 F. Supp. 673 (W.D. Wis. 1962). The Attorney General then joined five individual plaintiffs from the most underrepresented districts and proceeded with the suit. *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 184 (W.D. Wis. 1962). The court subsequently addressed a letter to the Governor of Wisconsin requesting him to call a special session of the legislature for the purpose of reapportioning, which the Governor promptly did. N.Y. Times, June 15, 1962, p. 30, col. 8. Because of a partisan dead-lock between the Democratic Governor and the Republican-controlled legislature, however, no reapportionment legislation was enacted.

REMEDIES

Despite expressions to the contrary by some pre-*Baker* courts,²⁸⁰ the equity powers of federal courts, as is well demonstrated in the desegregation cases,²⁸⁰ are clearly sufficient to provide effective relief in apportionment cases. Consequently, the problems involved in framing remedies are primarily administrative in nature. A court must determine in each case which remedy will most effectively correct the malapportionment and yet at the same time exhibit a proper regard for both the state's prerogatives in legislative apportionment and the delicate nature of the federal-state relationship.

Because of these considerations, perhaps the most desirable solution to the remedies problem would be one which would allow a state through use of its own procedures, with as little interference by a federal court as possible, to conform its apportionment to constitutional standards. In other words, the doctrine of equitable abstention, that is, exhaustion of state remedies, seems particularly applicable to this area.²⁹¹ Thus, if an apportionment conceivably might violate the state constitution but has not recently been challenged in the state courts, or if the state legislature has not had adequate time to reapportion since the last census, an apportionment suit should be dismissed and the plaintiff directed to exhaust his state remedies before returning to the fed-

N.Y. Times, July 4, 1962, p. 1, col. 1. At the suggestion of the Attorney General the district court then appointed a master to hold hearings and making findings and recommendations. *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 184 (W.D. Wis. 1962). After holding several hearings, the master recommended that the case be dismissed both on the merits and for want of equity because of the proximity of the approaching elections. N.Y. Times, Aug. 2, 1962, p. 14, col. 6. The district court decided to dismiss solely on the second ground.

289. See, e.g., *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564, *appeal dismissed and cert. denied*, 322 U.S. 717 (1944); *State ex. rel. Sullivan v. Schnitger*, 16 Wyo. 479, 95 Pac. 698 (1908). See also *Baker v. Carr*, 179 F. Supp. 824, 827-28 (M.D. Tenn. 1959), *rev'd and remanded*, 369 U.S. 186 (1962), where the district court justified its dismissal for lack of jurisdiction because of the inappropriateness of granting any relief.

290. For a summary of the actions taken by a district court in order to desegregate the New Orleans public schools, see *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916, 920 n.1 (E.D. La. 1960). See also *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961). For the decree in this case, see 6 RACE REL. L. REV. 197-99 (1961).

291. The doctrine of equitable abstention is usually applied by federal courts when they feel that several issues of state law which are crucial to a decision in the case are better decided by the state courts. In such cases a federal court will direct the parties to litigate in the state courts either the entire case or those issues involving state law before returning to the federal court. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960); Kurland, *Towards a Co-operative Judicial Federalism*, 24 F.R.D. 481 (1959); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, 59 COLUM. L. REV. 749 (1959). When this doctrine is applied to force the plaintiffs to exhaust their possible state remedies before seeking relief from the federal courts, the possible state remedies available typically lie in the state courts. But, because of the unique nature of apportionment cases, it seems desirable to expand the doctrine in this area to include possible relief from other sources, such as the legislature. *But see Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962), where the probability of relief coming from either the legislature or the state courts did not deter a federal district court from taking jurisdiction.

eral courts.²⁹² Not only will this procedure serve the cause of federalism, but, since the state court may find that the apportionment violates the standards of the state constitution, it will often obviate the necessity of a federal court determining whether the apportionment is unconstitutional under the equal protection clause.²⁹³ To be sure, application of the equitable abstention doctrine assumes that state courts will assume jurisdiction in reapportionment cases, whereas in the past fifteen years most state courts, following the federal example set by *Colegrove v. Green*,²⁹⁴ have declined jurisdiction.²⁹⁵ But recent cases indicate that state courts will continue to follow the federal example and therefore assume jurisdiction today.²⁹⁶ And, if they should not, the aggrieved

292. One pre-*Baker* court invoked this doctrine as the basis for dismissing a complaint. *Remmey v. Smith*, 102 F. Supp. 708 (E.D. Pa. 1951). Since *Baker*, several courts have invoked it. See, e.g., *Lein v. Sathre*, 201 F. Supp. 535 (D. N.D. 1962); *Lein v. Sathre*, 205 F. Supp. 536 (D. N.D. 1962).

In *Baker* Mr. Justice Clark intimated he thought the presence of the initiative or referendum would be sufficient grounds for dismissing an apportionment suit. 369 U.S. at 258-59. Since the legislature initiates a referendum, clearly the referendum offers no greater opportunity for relief than the possibility that the legislature might itself reapportion. An initiative measure, however, can be enacted without the concurrence of the legislature and therefore might present the plaintiffs with a possible political remedy. On the other hand initiated reapportionment measures have not met with a great deal of success in the past. See *BAKER, RURAL VERSUS URBAN POLITICAL POWER* 63-64 (1955). And even where such measures have been successful the legislature has sometimes attempted to amend them so as to substantially preserve the pre-existing apportionment. See *Armstrong v. Mitten*, 95 Colo. 425, 37 P.2d 757 (1934) (amendment invalidated); *State ex. rel. O'Connell v. Meyers*, 51 Wash. 2d 454, 319 P.2d 828 (1957) (amendment sustained). These and other problems have led most courts and commentators since *Baker* to reject the initiative as an adequate political remedy. See, e.g., *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 192-93 (D. Neb. 1962); *Sindler, Baker v. Carr: How to "Scar the Conscience" of Legislators*, 72 *YALE L.J.* 23, 32-33 (1962). See also Brief of J. Howard Edmondson, Governor of the State of Oklahoma, as Amicus Curiae, pp. 14-17, *Baker v. Carr*, 369 U.S. 186 (1962).

Summary rejection of the initiative as an inherently inadequate form of relief, however, is premature. In some states, e.g., California, initiated measures have often been successful. See *CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA* (1943); *Radin, Popular Legislation in California*, 35 *CALIF. L. REV.* 171 (1947). The proper test, therefore, would appear to be whether the initiative in fact offers the plaintiff a feasible opportunity to obtain relief through the political processes. Of course, the fact that an initiated apportionment measure is defeated in the statewide vote should not preclude judicial relief, see notes 90-95 *supra* and accompanying text, but a plaintiff at least in some states ought to first exhaust this remedy before coming to the federal courts.

293. As was argued elsewhere, the federal courts should not themselves enforce state constitutional standards. See notes 146-53 *supra* and accompanying text.

294. 328 U.S. 549 (1946).

295. See note 289 *supra*.

296. Since *Baker* no state court has refused to take jurisdiction of an apportionment suit. See, e.g., *Mikell v. Rousseau*, 183 A.2d 817 (Vt. 1962); *Cesar v. Williams*, 371 P.2d 241 (Idaho 1962). See also *Sweeny v. Notte*, 183 A.2d 296, 303-04 (R.I. 1962) where the state court appeared to hold that the separation of powers precluded it from declaring the apportionment unconstitutional. In a subsequent opinion, however, the court clarified this point stating that their previous opinion did hold the apportionment invalid. *Opinion to the Governor*, 183 A.2d 806, 807-08 (R.I. 1962).

plaintiffs, having then exhausted their state remedies, may still return to the federal courts.

In deciding whether to adjudicate an apportionment suit, a federal court should also consider the extent to which a decree upsetting a state's apportionment will disrupt electoral machinery that may already be in motion.²⁹⁷ Rather than disrupt that machinery, in many cases thereby requiring a special primary,²⁹⁸ courts, though retaining jurisdiction of the cause, generally will be well-advised to decline to enter a decree on the apportionment until after the election has been completed. There may, however, be factors working in favor of an immediate decree, as when a delay will effectively deny the plaintiffs relief from unconstitutional conditions for at least two more years. Should such factors be persuasive, a court might find that the balance of equities has shifted sufficiently to warrant entering an immediate decree.²⁹⁹

Georgia provided a good example of factors which might lead a court to apply the doctrine of equitable abstention.³⁰⁰ Georgia's county unit system of nominating governors had just been invalidated³⁰¹ and the State government had not yet had a chance to function with the resultant majoritarian governor. And since the State was fully aware of the judicial power now available to alter apportionments, this arrangement might have led to voluntary compliance with federal standards. Therefore, in the absence of any pressing equities³⁰² requiring immediate correction of the malapportionment,³⁰³ this would have been an appropriate case to invoke the abstention doctrine.³⁰⁴

297. See *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962). Considerations of this nature led Mr. Justice Rutledge to cast the deciding vote in favor of dismissal in *Colegrove v. Green*, 328 U.S. 549, 565 (1946). See also *MacDougall v. Green*, 335 U.S. 281, 284 (1948) (Rutledge, J., concurring).

298. For example, when in *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), the court affirmatively reapportioned Alabama, it was necessary to hold a special primary in those districts altered by the reapportionment. See *CONG. Q. WEEKLY REP.*, Aug. 3, 1962, p. 1305.

299. See *Sanders v. Gray*, 203 F. Supp. 158, 171 (N.D. Ga. 1962). In *Sims v. Frink*, note 298 *supra*, the fact that Alabama has four year legislative terms, ALA. CONST. art. 4, § 46, and that failure to grant relief prior to the 1962 elections would have precluded any relief before 1966, may have influenced the court to award immediate relief.

300. The defendants in *Toombs v. Fortson*, 205 F. Supp. 248, 252 (N.D. Ga. 1962) argued that the district court should abstain from determining the constitutionality of the rotation system for nominating State Senators until the Georgia Supreme Court interpreted the statutory provisions establishing the system. However, not only was the rotation system responsible for a gross debasement of the vote, a fact no reasonable statutory interpretation by the State Court could have alleviated, but also it had been settled State practice for many years. Considering the ease with which a federal court could here grant relief, the equities seemed to favor an immediate decision on that part of Georgia's apportionment, and indeed that was the course followed by the district court. *Id.* at 253.

301. *Sanders v. Gray*, *supra* note 299. See notes 198-205 *supra* and accompanying text.

302. See note 299 *supra* and accompanying text.

303. Apparently the district court felt such equities were missing for they did not require compliance with the standards they promulgated before the November, 1962 elections. Although the court's initial opinion might be read to require reapportionment by then, *Toombs v. Fortson*, *supra* note 300, at 258-59, in a subsequent opinion the court disclaimed

Assuming it is appropriate for a federal court to assume jurisdiction, and once a decision has been made that the apportionment is unconstitutional, the problem becomes one of determining the most appropriate remedy for a federal court to apply. The remedy ordinarily most consistent with the state's prerogatives, and the one uniformly adopted by district courts up to now,³⁰⁵ is to refrain from granting direct relief for a brief period to allow the state legislature another opportunity to apportion in accord with the demands of the federal constitution.³⁰⁶ Once the court has entered a decree that the existing ap-

any intention to imply that no legally constituted legislature would exist if reapportionment was not effectuated prior to the 1963 legislative session. *Toombs v. Fortson*, Memorandum Opinion, Civ. A. No. 7883 (N.D. Ga.), July 18, 1962.

Nevertheless, the legislature did reapportion prior to the 1962 elections. See note 239 *supra*.

304. It might be argued that this is in effect what the court did by not compelling reapportionment before the 1962 elections. See note 303 *supra*. But if this was the court's intention, it should have refrained from entering any decree in order to avoid touchy problems of federal-state relations.

New York also presents a situation where the federal court might employ the equitable abstention doctrine. A primary cause of the large population disparities between State Senate districts is the interpretation given the constitutional formula by the New York Court of Appeals in *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943). See *Silva, Apportionment in New York*, 30 *FORDHAM L. REV.* 581, 623-28 (1962). Today, however, there appears to be a good possibility that, if the question were presented to them, the Court of Appeals would overrule that case and reinterpret the formula in a manner more consistent with the equal population principle. *Id.* at 637-38. Consequently in *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962), the court probably should have directed the parties to litigate the issue of the correct interpretation of the formula in the state courts before it ruled on the apportionment's constitutionality.

305. See, *e.g.*, *Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. 1962); *Mann v. Davis*, 31 U.S.L. WEEK 2263 (E.D. Va. Nov. 28, 1962).

306. The interpretation given to the *de facto* doctrine by some state courts has led them to reject this or any other form of relief in apportionment cases. By their interpretation of this doctrine there cannot be a *de facto* legislature, even for the purposes of enacting a new apportionment, once its *de jure* validity has been ascertained. Since these courts also have rejected the possibility of elections at large or judicial reapportionment, see notes 325-39 *infra* and accompanying text, these courts have concluded that invalidating the existing apportionment would leave the state with no governmental body having the authority to reapportion and thereby reconstruct the legislature. Quite properly wishing to avoid such chaos these courts have therefore refrained from adjudicating the constitutionality of apportionments. See *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956); *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 23 N.W. 2d 610 (1946). Other state courts, however, have not interpreted the *de facto* doctrine so narrowly, and consequently have been more willing to review apportionments. See, *e.g.*, *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350, 356-57 (1962).

Even in those states narrowly interpreting the *de facto* doctrine, however, it appears that federal courts will be able to refrain from granting immediate relief in order to give the legislature another opportunity to reapportion. In *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962), the district court circumvented the holding in *Kidd v. McCanless*, *supra*, by withholding until the legislature had a reasonable opportunity to reapportion not only any immediate relief but also a final decree that the apportionment was unconstitutional. *Id.* at 350-51.

portionment is invalid and has indicated that, if the legislature does not act, the court will, the legislature is given a potent incentive to reapportion, if for no other reason than that in this way the legislators retain some control over their own destiny.³⁰⁷ The recent flurry of special sessions of state legislatures and of reapportionment referendums, and these despite the fact that in many cases a court had not yet rendered a decision on the state's apportionment, testifies to the validity of this conclusion.³⁰⁸ Moreover, the court's willingness to review apportionments is likely to accelerate the establishment of non-legislative bodies, frequently called apportionment commissions,³⁰⁹ vested with either sole authority to reapportion or authority to do so if the legislature does not. Since each time a legislature attempts to reapportion it must overcome considerable conflicts between the political ambitions of its members and the need to adjust the apportionment to shifts in population, placing this duty in non-legislative hands usually ensures that some, and probably a more disinterested,³¹⁰ apportionment will be made.³¹¹

Every legislature thus far confronted by a threat of judicial apportionment has at least attempted to reapportion, although several have not been able to

307. This remedy has been successful on many occasions. *E.g.*, *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962). See note 239 *supra*. Three pre-*Baker* courts successfully invoked remedies similar to this. *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958), *dismissed as moot*, 177 F. Supp. 803 (D. Minn. 1959); *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960); *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956), *rev'd and dismissed as moot*, 256 F.2d 728 (9th Cir. 1958). See Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1088-90 (1958).

308. See N.Y. Times, Aug. 6, 1962, p. 23, col. 1; *id.* Oct. 21, 1962, § 1, p. 71, col. 1.

309. Apportionment Commissions now exist in fifteen states. The most recent addition to the list was Oklahoma which adopted a constitutional amendment in the 1962 elections vesting exclusive power to reapportion in a three-man commission consisting of the Attorney General, Secretary of State, and State Treasurer, N.Y. Times, Nov. 18, 1962, § 1, p. 54, col. 1. Of the fourteen states previously establishing apportionment commissions, seven had placed exclusive authority to reapportion in the commission's hands (Alaska, Arizona, Arkansas, Hawaii, Missouri, Ohio, and New Jersey), while seven vested such authority in the commission only if the legislature should fail to reapportion within certain period after each census (California, Illinois, Michigan, North Dakota, Oregon, South Dakota and Texas). THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1962-63, at 34.

310. The conflict of interest experienced by legislators when they reapportion, and the felt need in many cases for a more disinterested apportioning body, form the basis for one possible interpretation of *Baker v. Carr*. According to this interpretation, legislatures have now become institutionally incapable of reapportionment, and consequently, unless the legislature delegates the task to a nonlegislative body, the courts, who are presumptively disinterested, will assume the duty of reapportionment. Appealing as this interpretation of *Baker* may be, it seems less than realistic to expect courts to actually assert themselves so completely into a field historically left to the legislature.

311. Furthermore, courts generally have been quite willing to review the work of apportionment commissions, and even, in some cases, to issue writs of mandamus compelling action by such bodies. See, *e.g.*, *Pickens v. Board of Apportionment*, 220 Ark. 145, 246 S.W. 2d 556 (1952) (the court revised the Board's apportionment and ordered the revised version into effect); *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 41 N.E.2d 377 (1942). *But cf. State ex rel. Levin v. Sathre*, 113 N.W.2d 679 (N.D. 1962).

do so,³¹² or have not done so in a manner satisfactory to the court.³¹³ However, the possibility exists that the legislature will not act, or if it does act that the resultant reapportionment will not meet constitutional standards. The court will then be faced with another decision regarding relief, and possibly will have to declare another legislative act invalid. In this area, where the delicacy of the federal-state relationship is omnipresent, repeated decisions of such a nature should be avoided.³¹⁴ Furthermore, if an election should take place while the legislature has a new apportionment under consideration, the delay in immediate relief will deny the plaintiffs their constitutional rights for at least two more years. Thus, if the probability of favorable legislative action is remote, a court should undertake to grant immediate and final relief. In determining whether the situation merits refraining from this course, a court has no alternative but to weigh the possibilities of favorable state legislative action against the urgency of plaintiff's demands for immediate action. Such decisions, however, are not unknown to district courts. In many school desegregation cases courts weigh the possibilities of cooperation by the school board or legislature against the effects of undue delay in drawing up a desegregation plan.³¹⁵ The problem is one of balancing, and in most cases the balance will fall in favor of giving the legislature an opportunity to correct its own apportionment.

If a court finds that the legislature's response to the court's abstention from granting immediate relief is no action or invalid action, or if the court deems it unwise to allow the legislature another opportunity to reapportion, it must then face the problems of granting affirmative relief. State courts have often faced this problem in the past.³¹⁶ Some have held that when the existing apportionment is declared unconstitutional, the previous apportionment comes back into effect.³¹⁷ But the infirmities of this type of relief are obvious. Usually the

312. See, e.g., *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 186 (W.D. Wis. 1962), where a political conflict between the governor and the legislature prevented any apportionment legislation.

313. See, e.g., *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962); *Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. 1962).

314. The history of *Virginia v. West Virginia*, 246 U.S. 565 (1918) sufficiently demonstrates the hesitancy with which a federal court should enter into a prolonged colloquy with a state legislature. See Powell, *Coercing a State to Pay a Judgment: Virginia v. West Virginia*, 17 MICH. L. REV. 1 (1918).

315. Compare *Calhoun v. Latimer*, 188 F. Supp. 412 (N.D. Ga. 1960) with *Bush v. Orleans Parish School Bd.*, 5 RACE REL. L. REP. 378 (E.D. La. May 16, 1960).

316. The leading pre-*Baker* commentator thought that the "performance of the state courts has been especially weak in fashioning remedies. . ." Lewis, *supra* note 307, at 1069. See generally *id.* at 1066-70.

317. See, e.g., *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931); *Rogers v. Morgan*, 127 Neb. 456, 256 N.W. 1 (1934). But see *Jones v. Freeman*, 193 Okla. 554, 562-63, 146 P. 2d 564, 572-73 (1944). And frequently state courts then proceeded to hold the previous apportionment they had resurrected immune from constitutional attack. See, e.g., *Adams v. Bosworth*, 126 Ky. 61, 102 S.W. 861 (1907); *Williams v. Secretary of State*, 145 Mich. 447, 103 N.W. 749 (1906); *Daly v. County of Madison*, 378 Ill. 357, 38 N.E. 2d 160 (1941).

previous apportionment will create greater disparities when applied to contemporary population distribution than the act declared unconstitutional. And there may be little incentive for the legislature to improve on the previous apportionment.³¹⁸ Other state courts have simply enjoined use of the existing apportionment, apparently assuming the legislature would enact a new apportionment before the next election.³¹⁹ This assumption has usually been borne out, but unfortunately it seems too much to expect that it would be in many states today.³²⁰

Weighted voting is another form of relief sometimes suggested.³²¹ Under this procedure, instead of the court actually altering the existing apportionment, the court simply weights the legislators' vote in the legislature according to the population of their districts or according to the size of the vote in the last election in their districts.³²² But this remedy also has deficiencies. Aside from substantially altering our usual notions of representation, it would create serious difficulties in the staffing of legislative committees and allocating speaking time on the floor of the legislature.³²³ Moreover, because under this plan a legislator would vote for all his constituents whether they voted for him or not, more extensive gerrymandering than exists today would be possible. By placing a large group of minority party adherents, whose votes ordinarily would be sufficient to elect several of that party's candidates, into a district with an even greater

318. *But see* Note, 32 *IND. L.J.* 489, 505-14 (1957). This Note recommends that the Indiana Supreme Court declare that State's legislative apportionment invalid, forcing the next election to be held under the last previous act. If the legislature again fails to reapportion, the Note suggests the court repeat the process until such time as the legislature and/or the electorate become sufficiently aroused by the absurdity of the situation to force reapportionment.

319. See, e.g., *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892).

320. The plaintiffs in several pre-*Baker* state cases have argued that a state's mandatory constitutional apportionment provisions were self-executing. According to this argument whenever a new census showed that application of these mandatory provisions to the new population distribution would entitle certain areas or counties to additional legislative representation, those areas or counties should automatically receive that extra representation with or without legislative action. The courts, however, have unanimously rejected this contention. See, e.g., *Burns v. Flynn*, 155 Misc. 742, 281 N.Y. Supp. 494, *aff'd mem.*, 245 App. Div. 799, 281 N.Y. Supp. 497, *aff'd mem.*, 268 N.Y. 601, 198 N.E. 424 (1935); *Latting v. Cordell*, 197 Okla. 369, 172 P.2d 397 (1946).

321. *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 18, 161 A.2d 705, 714 (1960).

322. Thus, if twice as many votes were cast in district A as in the average district, the legislator from district A would be entitled to two votes in the legislature. For a more extensive examination of this mode of relief, see Engle, *Weighting Legislators' Votes to Equalize Representation*, 12 *WESTERN POL. Q.* 442 (1959); Cormack, *Baker v. Carr and Minority Government in the United States*, 3 *WM. & MARY L. REV.* 282 (1962).

323. While conceivably the number of committees to which a legislator was appointed might be based on his weighted vote, purely human limitations would prevent a legislator from carrying say five times the normal number of committee assignments. Similar problems would arise in any attempt to allocate speaking time on the floor of the legislature on the basis of the weighted votes,

number of majority party adherents, the minority party votes would in effect benefit the majority party.³²⁴

Elections at large, also a form of relief granted in some state courts³²⁵ and a favorite among pre-*Baker* commentators,³²⁶ seems a more feasible form of direct relief. Its chief advantage is the overwhelming incentive it would give to legislatures to reapportion themselves and to do so before the next election. In view of the wholesale replacement of incumbents that would result from an at large election, the incentive is understandable and would certainly be greater than that generated by refraining from awarding any relief.³²⁷ In addition the court would not be performing the peculiarly legislative function of weighing the various claims of interest groups to extra representation. An election at large results in absolute equality between voters, a perfect application of the one man-one vote principle. Yet the legislature would still have the power to weigh those interests. Indeed the objective of this form of relief is that it does so before another election is held.

But the remedy of elections at large has one large drawback. They may actually occur. Not only would an election at large create seemingly insurmountable problems of administration, but it would also result in a legislative body not conforming to our usual notions of representation.³²⁸ Instead of one hundred representatives, each representing some part of the state, there

324. One way of circumventing this problem would be to elect two representatives in every district, one from each party, and then apportion a district's weighted vote between its two representatives according to the votes each received. Although eliminating any gerrymandering possibilities, such a plan would in essence establish a system of proportional representation. While the advantages and disadvantages of proportional representation are beyond the scope of this Comment, it seems unlikely that any court would impose such a system on a state in the name of relief from an unconstitutional apportionment.

325. See, e.g., *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932). Although the United States Supreme Court ordered elections at large in *Smiley v. Holm*, 285 U.S. 355 (1932), they were not in that case awarding such relief as a matter of judicial discretion. On the contrary, since they held that Minnesota's congressional redistricting act was improperly enacted, see note 8 *supra*, and since Minnesota had lost a Representative in the preceding apportionment, it followed from a federal statute that the elections be held at large. *Id.* at 373-75.

326. See e.g., *Lewis*, *supra* note 307, at 1087-90.

327. Several courts since *Baker* have ordered elections at large, but in every case the order was stayed pending appeal. See, e.g., *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350 (1962), *execution stayed pending appeal*, 31 U.S.L. WEEK 1018 (July 31, 1962); *Mann v. Davis*, 31 U.S.L. WEEK 2263 (E.D. Va. Nov. 28, 1962), *execution stayed pending appeal*, *New Haven Register*, Dec. 20, 1962, p. 32, col. 1.

328. See Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 15 (1962).

This objection to elections at large would not apply in congressional districting cases. The basic theory of representation in the House of Representatives, that states are to be represented according to their population, would not be violated if at large congressional elections were held in a state. See, *id.* at 16. And many of the other objections to at large legislative elections, see note 329 *infra* and accompanying text, are similarly inapplicable. In most states the number of offices to be elected will not be so large that voters would be unable to make rational choices, or that election administration would be unmanageable. See Schumate, *American Government and Politics: Minnesota's Congressional Election at*

would be a legislature more akin to one hundred governors, with many interests having no representative they could call their own. And it would be folly to expect most voters to make a rational choice for each candidate in such elections. Furthermore, there is a real probability that the candidates elected would all come from a single political party or from a single area of the state leaving substantial segments of the population without any representative to reflect their interests.³²⁹ Finally it is quite possible that a legislature elected in an at large election would itself be unwilling to reapportion the state into districts, since, if all or nearly all the legislators come from one area of the state, some would necessarily lose their jobs as a result of redistricting.³³⁰ The court would then have put itself in the unenviable position of having been the cause of the dissolution of the state's policy of legislative districts in the name of equitable relief.³³¹

Affirmative reapportionment is a more attractive alternative available to a court than elections at large.³³² There are two approaches which this form of relief might take. That advocated by Mr. Justice Clark in *Baker* is to improve

Large, 27 AM. POL. SCI. REV. 58 (1933). *But cf.* *Colegrove v. Green*, 328 U.S. 549, 564 (1946) (Rutledge, J., concurring). Moreover, since the state legislature reapportions congressional districts, there is little possibility that at large congressional elections would become a permanent institution. Thus, in congressional districting cases elections at large frequently may be the appropriate remedy.

329. Furthermore, with over one hundred offices to be filled and at least twice that number of candidates, voting machines could not be used, it would be weeks before the results could be tabulated, and the printing expense of the ballots would be prohibitive. Commenting on forecasts such as this, one court stated:

Such a reapportionment would only cause chaos and confusion. It would defeat the very object of this suit and benefit no one. In fact, when we think of the chaos and confusion, we throw up our hands in utter despair.

Fortner v. Barnett, No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi, June 7, 1962, pp. 1-2. The court then stated that it would effect a reapportionment of the state if the legislature did not in the near future. See Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 95-96 (1962).

330. For example, Illinois and Massachusetts, because of a political deadlock on congressional redistricting, seriously considered holding their 1962 congressional elections at large. N.Y. Times, March 7, 1961, p. 28, col. 3 (Mass.); *id.*, July 9, 1961, § 1, p. 46, col. 1 (Ill.).

331. Occasionally those challenging apportionments have argued that an apportionment by its terms exists only ten years, and if at the end of that ten year period the legislature has failed to provide for a new apportionment, elections at large have to be held since there are no established districts. See *Preisler v. Doherty*, 365 Mo. 460, 284 S.W. 2d 427 (1955) (argument sustained); *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (1956) (argument rejected). While state courts might sustain such an argument on the basis of state law, clearly the equal protection clause cannot be used to reach this result. See notes 146-53 *supra* and accompanying text.

332. Ample precedent for exercising this mode of relief is found in the desegregation cases. If a court can create a school desegregation plan, see *Bush v. Orleans Parish School Bd.*, 5 RACE REL. L. REP. 378 (E.D. La. May 16, 1960), or direct the affairs of a voter registration board, see *United States v. Alabama*, 6 RACE REL. L. REP. 189, 197-99 (M.D. Ala. March 17, 1961), it arguably should also be able to reapportion. *But cf.* *Silva, Apportionment in New York*, 30 FORDHAM L. REV. 581, 591-92 (1962).

somewhat the existing unconstitutional apportionment by eliminating some of the grossest disparities, although generally adhering to the existing district lines.³³³ The theory behind this approach is that the resulting improvement in responsiveness, together with the threat that the court will more thoroughly reapportion the next time, will be sufficient to "break the stranglehold" of the minority areas in the legislature and after the next election to enable that body to reapportion itself.³³⁴ The obvious advantage to this approach is that a court will not thereby become seriously involved in weighting the various claims to representation. The most egregious disparities will generally be obvious;³³⁵ and the apportionment is only intended to last for one election. This type of relief will not, however, afford the aggrieved citizens speedy relief. Certainly they will have to wait at least two years for complete relief, and possibly longer. Moreover, it will further extend what by this time has undoubtedly been considerable interplay between the court and the legislature.

Both these drawbacks can be avoided if courts adopt the other approach to active reapportionment and affirmatively reapportion the state without regard to the existing apportionment scheme. In making this apportionment a court should use as its basis of representation equal population with allowance for valid state constitutional provisions.³³⁶ If a court were to exercise its discretion in determining the proper basis of representation for the apportionment, it would most likely be the subject of highly partisan appeals, and its decision the object of partisan attack.³³⁷ By initially limiting its discretion a court would be able to avoid much of this. But even though the basis of representation is established, a court must still draw the district lines, and those lines admittedly can have an important effect in the party composition of the legislature.³³⁸ A court could partially meet this objection by appointing a master and then inviting the parties to the suit and all other interested individuals to submit reapportionment plans.³³⁹ The task of the master would

333. 369 U.S. at 259-61.

334. See *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). Cf. *Sobel v. Adams*, 203 F. Supp. 316 (S.D. Fla. 1962).

335. In *Sims v. Frink*, *supra* note 334, the court adopted parts of two reapportionment plans enacted in the alternative by the legislature, although they had held both plans in themselves invidiously discriminatory. *Id.* at 441-42.

336. Making allowance for the valid state constitutional provisions here is not using those provisions as a standard of equal protection. See notes 146-53 *supra* and accompanying text. Rather all that is proposed is that a federal court allow a state to continue to apply those constitutional provisions the court has found valid using an independent standard of constitutionality.

337. *Wisconsin v. Zimmerman*, 205 F. Supp. 673 (W.D. Wis. 1962); 209 F. Supp. 183 (W.D. Wis. 1962), is a good example of an apportionment case where the court became embroiled in a partisan debate and the subject of partisan attack. See, e.g., *N.Y. Times*, June 20, 1962, p. 19, col. 4; *id.* July 4, 1962, p. 1, col. 1.

338. See *Black*, *supra* note 328, at 15-16. Cf. *Colegrove v. Green*, 328 U.S. 549 (1946). For some of the problems involved in drawing district lines, see *Vickery, On the Prevention of Gerrymandering*, 76 *POL. SCI. Q.* 105 (1961).

339. See *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962); note 228 *supra*.

not be to draw up a reapportionment but to decide which of the plans submitted is most in accord with the basis of representation decided upon by the court, which will usually be population as modified by valid state constitutional provisions. Although judicial reapportionment will still necessitate judgments having partisan effects, the legislature would have the opportunity to amend within constitutional limits a court's plan before the next election and thereby make these partisan judgments for itself. And judicial apportionment of this nature, in addition to ending speedily any existing unconstitutional deprivation, also ends what may be a protracted interplay between the court and the legislature.

CONCLUSION

A major effect of malapportionment is the aggravation of existing social and political problems—problems of decaying urban areas and receding federalism. If *Baker v. Carr* means only that state legislative apportionments must meet the test of minimum rationality, the decision is quixotic. Not only is it doubtful that such a test will induce self-interested legislators substantially to change existing apportionments or malapportionments, but because the Supreme Court's constitutional decisions play a legitimating role in our society, the application of a rationality test will ultimately legitimate many malapportionments, however gross. *Baker v. Carr*, rather than being the first step toward solution of a serious societal problem, would merely add another and an undesirable dimension to it.

Such a result, admittedly regrettable, is also unnecessary. In addition to the traditional test of arbitrariness, a substantive standard—equal population as a norm with deviations limited by the requirement of responsiveness to the underrepresented interests within the total governing process—has been developed and applied in three states. It is believed that this test meets the requirements of a judicially meet and workable standard, that is, it is the result of a principled judgment, and that applications of this standard, although by no means a mechanical operation, are within the institutional competence of courts. Moreover its application by the courts alone is likely to constitute a threat substantial enough to induce the legislatures to heed equality in apportionment. Whether one agrees or disagrees with the substantive standard proposed here, it should be recognized that only a substantive standard of some sort can both meet the problem posed by malapportionment and satisfy to some degree the demand of equality of representation.