

CONSTITUTIONAL LAW: A REMEDY FOR LEGISLATIVE MALAPPORTIONMENT

By declining to reach the merits in *Baker v. Carr*,¹ the Supreme Court avoided a decision as to which judicial remedy, if any, could be applied to correct an unconstitutionally apportioned state legislature.² A recent district court decision in *Hearne v. Smylie*³ intimates that there is no appropriate form of judicial relief and, thus, that a decision on the constitutional merits is precluded.⁴

As a consequence of *Baker*, the court in *Hearne* was compelled to accept jurisdiction over the plaintiffs' claim of unconstitutional apportionment.⁵ However, the majority argued that since it could not affirmatively reapportion the Idaho legislature,⁶ elections under the present scheme could not be enjoined without depriving the people of a de jure government in violation of the guaranty clause of the United States Constitution.⁷ Thus, the action was dismissed without consideration of the constitutional merits because, among other reasons,⁸ of the asserted inability to grant relief.

¹ 369 U.S. 186 (1962).

² "[I]t is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." 369 U.S. at 198.

³ 225 F. Supp. 645 (D. Idaho 1964).

⁴ In federal courts, a case may be dismissed for "failure to state a claim upon which relief can be granted." FED. R. Civ. P. 12 (b), (d).

⁵ 225 F. Supp. at 648. At the time *Hearne* was filed, 17% of the voting population could elect a majority of the Idaho senate, and 33% could elect a majority of the house of representatives. Since the Idaho constitution requires every county to have at least one representative in each house, the disparity in district population ranged from 915 to 93,460 in the senate, and 915 to 16,719 in the house. 52 NAT'L CIVIC REV. 97 (1963). In *Caesar v. Williams*, the state supreme court refused to consider the constitutionality of this apportionment. 84 Idaho 254, 371 P.2d 241 (1962) (3-2 decision).

⁶ 225 F. Supp. at 655.

⁷ *Id.* at 651, 655-56. "The United States shall guarantee to every State . . . a Republican Form of Government . . ." U. S. CONST. art. IV, § 4.

⁸ The majority cited two other reasons for dismissing the suit. First, it was urged that there are no constitutional standards to determine whether Idaho's legislative apportionment violates the fourteenth amendment. 225 F. Supp. at 650-51. Secondly, under the doctrine of equitable abstention, a federal court "should decline to interfere in the State process" until plaintiffs' claim is adjudicated by the courts. *Id.* at 652.

Although the Supreme Court has not yet decided the issue of constitutional standards for a state legislature, no other federal court has refused on this ground to proceed to the constitutional merits. See, e.g., *Daniel v. Davis*, 220 F. Supp. 601, 605 (E.D. La. 1963); *Germano v. Kerner*, 220 F. Supp. 230 (N.D. Ill. 1963); *Lisco v. Love*, 219 F. Supp. 922 (D. Colo. 1963); *Sobel v. Adams*, 214 F. Supp. 811, 812 (S.D. Fla. 1963); *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962); *Toombs v. Fortson*, 205

Standing in direct contrast to the *Hearne* decision are three cases in which district courts have already imposed judicial reapportionment in their respective states.⁹ Various other courts have expressed their duty to do likewise if the legislature should fail to enact corrective measures within a reasonable period.¹⁰

It would appear safe to assume, moreover, that the power of the judiciary to grant relief in reapportionment cases is not an issue dividing the present Supreme Court. In *Baker*, the majority opinion by Mr. Justice Brennan stressed the Court's confidence that

F. Supp. 248 (N.D. Ga. 1962); See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 659-700 (1963); Comment, 72 YALE L.J. 968, 970-1029 (1963). The Court in *Baker* stated that "judicial standards under the Equal Protection Clause are well developed and familiar . . ." 369 U.S. at 226.

On the other hand, the question of deferring to the state court process raises an unresolved problem in the context of legislative reapportionment. The better view would seem to be that abstention is not required. Compare *Mann v. Davis*, 213 F. Supp. 577, 585 (E.D. Va. 1962), and *Toombs v. Fortson*, *supra* at 253, with *Lein v. Sathre*, 201 F. Supp. 535 (D.N.D. 1962), *approved*, *Lein v. Sathre*, 205 F. Supp. 536 (D.N.D. 1962). See generally 1964 DUKE L.J. 155.

The dissenting opinion in *Hearne* tacitly stated that none of the majority's reasons justified judicial dismissal of a "problem touching such a fundamental right as that of legislative representation." 225 F. Supp. at 656.

⁹ *Baker v. Carr*, 222 F. Supp. 684, 694 (M.D. Tenn. 1963); *Moss v. Burkhardt*, 220 F. Supp. 149, 155 (W.D. Okla. 1963), 49 VA. L. REV. 1209; *Sims v. Frink*, 208 F. Supp. 431, 441-42 (M.D. Ala. 1962).

¹⁰ *Davis v. Synhorst*, 225 F. Supp. 689, 694 (S.D. Iowa 1964); *Sincock v. Duffy*, 215 F. Supp. 169, 190-92 (D. Del. 1963); *Mann v. Davis*, 213 F. Supp. 577, 585-86 (E.D. Va. 1962); *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W.D. Wash. 1962); *League of Neb. Municipalities v. Marsh*, 209 F. Supp. 189, 196 (D. Neb. 1962); *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 188 (W.D. Wis. 1962); *Sobel v. Adams*, 208 F. Supp. 248, 259 (N.D. Ga. 1962).

In *Nolan v. Rhodes*, the district court held that judicial relief would be precluded in Ohio because the electorate could alter the existing apportionment by popular initiative and referendum. 218 F. Supp. 953, 958-59 (S.D. Ohio 1963); see *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring). In *Nolan*, however, the court found the legislative apportionment constitutional; hence the question of relief was moot. The better view would seem to be that since the referendum is a costly, cumbersome, and time-consuming process, realistically it is not an effective remedy. *League of Neb. Municipalities v. Marsh*, *supra* at 192-93; *Dixon, Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 372 (1963); *Emerson, Malapportionment and Judicial Power*, 72 YALE L.J. 64, 70 (1962); *Sindler, Baker v. Carr: How to Sear the Conscience of Legislators*, 72 YALE L.J. 23, 32 (1962); cf. *Davis v. Synhorst*, 217 F. Supp. 492, 499-500 (S.D. Iowa 1963). But see *McCloskey, Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 73-74 (1962). Furthermore, even an apportionment adopted by a majority of the voters may be unconstitutional. *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962).

Although generally more reluctant to act than federal courts, state courts have also recognized a duty to grant relief in reapportionment cases. See, e.g., *Scholle v. Hare*, *supra*; *Mikell v. Rousseau*, 123 Vt. 139, 183 A.2d 817, 822-23 (1962). One state judiciary has decided the constitutional merits despite an inability to grant relief. *Sweeney v. Notte*, 183 A.2d 296, 303 (R.I. 1962).

district courts would be able to fashion relief if violations of constitutional rights were found.¹¹ Indeed, the Court's finding of justiciability and jurisdiction over the subject matter would seem to dispose of any doubts as to the existence of an appropriate remedy.¹² This conclusion was explicitly affirmed in the concurring opinions of Justices Douglas¹³ and Clark.¹⁴ Even Mr. Justice Harlan, who dissented in *Baker*, has unequivocally stated that if a violation of the fourteenth amendment exists, it is the duty of federal courts to vindicate the constitutional right.¹⁵ Therefore, it is clear that federal courts have equitable power to grant relief, and contrary to *Hearne*, the unresolved issue is a matter of determining which judicial remedy is "appropriate" to correct legislative malapportionment.

A judicial remedy should be forthcoming once legislators have manifested their inability or unwillingness to reapportion according to the requirements of the fourteenth amendment.¹⁶ It is agreed that the initial form of action is to enjoin future elections under the

¹¹ 369 U.S. at 198.

¹² *Id.* at 198-204, 208-37. In *Baker* the Court held that a malapportionment suit does present a justiciable claim; the majority opinion stated that one test of justiciability is to determine "whether protection for the right asserted can be judicially molded." *Id.* at 198. Jurisdiction of the subject matter was found to exist under the Constitution and under 28 U.S.C. § 1343 (3); this latter provision grants original jurisdiction to district courts "to redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution" (Emphasis added.) The entire tenor of the majority opinion was summarized in the statement: "The right asserted is within the reach of judicial protection under the Fourteenth Amendment." 369 U.S. at 237.

¹³ *Id.* at 245-50. Mr. Justice Douglas felt that relief could be "fashioned in the light of well-known principles of equity." *Id.* at 250. Although several examples were cited, most deal with the problem of equitable abstention and not affirmative judicial action. *Id.* at 250 n.5.

¹⁴ *Id.* at 251, 258-60. Mr. Justice Clark stressed the argument that if the federal courts were incompetent to grant relief, the case would have been properly dismissed without a decision on the constitutional merits.

¹⁵ 32 U.S.L. WEEK 3190 (Nov. 26, 1963). This statement was made by Mr. Justice Harlan in response to oral argument that *Baker* merely created a "right without a remedy." The other dissenter in *Baker*, Mr. Justice Frankfurter, is no longer on the Court.

¹⁶ Under the theory of equitable abstention, every district court to date has initially stayed relief for a "reasonable period" to enable the legislature to reapportion itself. See, e.g., *Davis v. Synhorst*, 217 F. Supp. 492, 504 (S.D. Iowa 1963); *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W.D. Wash. 1962); *Mann v. Davis*, 213 F. Supp. 577, 585 (E.D. Va. 1962); Comment, *supra* note 8, at 1030-35. But in many cases, legislative cooperation will be destined to failure because, in the words of Mr. Justice Clark, "the majority of the voters have been caught up in a legislative strait jacket." *Baker v. Carr*, 369 U.S. 186, 259 (1962).

invalid scheme.¹⁷ *Hearne* logically submits, however, that a prohibitive injunction of this nature is an incomplete remedy.¹⁸ Continued legislative inaction would leave the state without the constitutional means of selecting its representatives. To comply with the mandate of *Baker v. Carr* it is therefore necessary that federal courts have at their disposal an affirmative remedy to supplement the injunction.¹⁹

However, the need for affirmative judicial relief should not automatically legitimize every alternative suggested to the courts.²⁰ An "appropriate" remedy²¹ must be presumed to imply one that is constitutionally within the *competence* of federal courts,²² as well as one which is reasonably adapted to the *practical* considerations²³ of the representative process.

In determining whether a remedy is within the competence of the federal judiciary, one must refer to the guidelines of *Baker v. Carr*. There the Court reaffirmed the historic dogma that federal courts cannot decide "political questions."²⁴ A political question was said to be presented: (1) when there is a lack of "judicially discoverable and manageable standards" for resolving an issue,²⁵ or (2) when it cannot be decided without "an initial policy determination of a kind clearly for nonjudicial discretion."²⁶

¹⁷ See, e.g., *Thigpen v. Meyers*, *supra* note 16, at 832; *Mann v. Davis*, *supra* note 16, at 585; *Dixon*, *supra* note 10, at 391; *Emerson*, *supra* note 10, at 76.

¹⁸ 225 F. Supp. at 651, 655-56. See *Friedelbaum*, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 690 (1962); *Lucas*, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases*, 38 NOTRE DAME LAW. 401, 411-14 (1963).

¹⁹ See *Dixon*, *supra* note 10, at 388; *Emerson*, *supra* note 10, at 77. *But see* *Bickel*, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 44-45 (1962); *Lucas*, *supra* note 18, at 413-14.

²⁰ In the words of Professor Neal, "courts have granted such relief with an almost complete lack of concern about the foundations of their authority." Neal, *Politics in Search of Law*, 1962 SUP. CR. REV. 252, 327. See *Krastin*, *The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549, 570-71 (1963); *McCloskey*, *supra* note 10, at 67-70.

²¹ See note 2 *supra*.

²² See *Black*, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13, 14-16 (1962); *Krastin*, *supra* note 20, at 569-71; *McCloskey*, *supra* note 10, at 60, 67-70; *Neal*, *supra* note 20, at 327.

²³ See *Dixon*, *supra* note 10, at 390-97; *Friedelbaum*, *supra* note 18, at 699-700; *Katzenbach*, *Some Reflections on Baker v. Carr*, 15 VAND. L. REV. 829 (1962); *Krastin*, *supra* note 20, at 569; *Lucas*, *supra* note 18, at 407-14; *Comment*, *supra* note 8, at 1035-38.

²⁴ 369 U.S. at 210-17. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1, 7-11 (1849).

²⁵ 369 U.S. at 217.

²⁶ *Ibid.* A political question also exists when there is "found a textually demon-

In light of these two tests, the validity of several remedies which have been utilized by lower federal courts becomes questionable. In Oklahoma, the court relocated existing district lines;²⁷ in Tennessee, the federal judiciary "consolidated" overrepresented districts and awarded the extra legislators to underrepresented areas;²⁸ and in Alabama, the court combined parts of two unconstitutional legislative proposals.²⁹ All of these remedies necessitated the judicial alteration or obliteration of existing districts.

The division of a state into legislative districts is the accepted mode of implementing representative government in the United States.³⁰ However, the fourteenth amendment requires such division to be based, at the very least, upon some rational state policy.³¹ Even if this requires nothing less than equal population among districts,³² there still exists a wide variety of possibilities by which districting may be accomplished.³³ These plans, most of which are constitutionally apportioned,³⁴ will materially differ with respect to the representation of certain political, social and economic interests, depending upon whether a faction is accorded or denied majority voting power within a particular district. Any decision, therefore, must ultimately reflect policy determinations which may totally deny a legislative voice to specific local interests.³⁵ Consequently, it is

strable constitutional commitment of the issue to a coordinate political department." *Ibid.* This means the federal judiciary cannot decide an issue whose ultimate resolution is delegated to either the legislative or executive branch of the federal government.

²⁷ *Moss v. Burkhardt*, 220 F. Supp. 149, 155 (W.D. Okla. 1963), 49 VA. L. REV. 1209. The court expressed considerable doubt as to its constitutional power to redistrict. 220 F. Supp. at 155.

²⁸ *Baker v. Carr*, 222 F. Supp. 684, 693-94 (M.D. Tenn. 1963). This remedy was explicitly suggested in the concurring opinion of Mr. Justice Clark in *Baker*. 369 U.S. at 260.

²⁹ *Sims v. Frink*, 208 F. Supp. 431, 441-42 (M.D. Ala. 1962).

³⁰ See, e.g., Dixon, *supra* note 10, at 397; Sindler, *supra* note 10, at 29.

³¹ *Baker v. Carr*, 369 U.S. at 253-58 (Clark, J., concurring).

³² Apportionment based solely upon population has been required for the election of representatives to the Federal House of Representatives. *Wesberry v. Sanders*, 372 U.S. 630 (U.S. Feb. 17, 1964) (decided on the basis of U.S. CONSR. art. I § 2). See also *Gray v. Sanders*, 372 U.S. 368 (1963). Although these cases left the problem of state legislative apportionment unresolved, it is not inconceivable that the Court may apply the same standard. See *Gray v. Sanders*, *supra* at 381.

³³ Black, *supra* note 22, at 15-16.

³⁴ A few plans consistent with the concept of equal population may be unconstitutional with respect to other nonapportionment factors. See, e.g., *Wright v. Rockefeller*, 372 U.S. 676 (U.S. Feb. 17, 1964) (racial gerrymandering).

³⁵ "A value determination is inevitably made by the adoption of any 'system' for establishing district boundaries. . . . [T]he gerrymander can be, and in some instances imperceptibly so, negative as well as affirmative." Krastin, *supra* note 20, at 570. See Black, *supra* note 22, at 15. If the federal courts are to select one of several possible

clear that "redistricting" presents a political question because the judiciary possesses no standards by which such policy judgments can be purposively or arbitrarily made.³⁶

The Tennessee remedy of "consolidating" overrepresented districts³⁷ presents identical problems. This process of erasing certain district lines does not obviate the necessity of judicially determining whether district *A* is to be combined with district *B*, *C*, or *D*. Although masquerading as an expression of legislative choice, the Alabama remedy³⁸ of combining fragments of different legislative proposals is also objectionable.³⁹ To the extent that this patchwork reapportionment does not adopt any legislative scheme in its entirety, it is nothing more than judicial picking and choosing. Thus, it seems that *judicial* modification of existing district lines should be precluded by the *Baker* definition of political questions.

Certain remedies, however, may not present political questions. These include the at large election, the writ of mandamus, the adoption of a prior legislative apportionment, increasing the size of a legislature, and the weighted vote. To be "appropriate," however, a remedy must be practical as well as constitutional. Thus the remedy must be: (1) susceptible of application without placing an undue burden upon the electorate or the state; and (2) endowed

plans, they cannot avoid the situation posed by Mr. Justice Clark: "The federal courts are of course not forums for political debate, nor should they resolve themselves into state constitutional conventions or legislative assemblies." *Baker v. Carr*, 369 U.S. at 259-60.

³⁶ Neal, *supra* note 20, at 327; see Black, *supra* note 22, at 15-16; Dixon, *supra* note 10, at 369-70, 389; McCloskey, *supra* note 10, at 67-70; cf. Bickel, *supra* note 19, at 44-45. *Contra*, Cox, *Current Constitutional Issues*, 48 A.B.A.J. 711, 713 (1962); McKay, *supra* note 8, at 703; Comment, *supra* note 8, at 1039-40. Notably, the Oklahoma court failed to articulate what standards it employed in relocating districts. *Moss v. Burkhardt*, 220 F. Supp. 149 (W.D. Okla. 1963).

³⁷ *Baker v. Carr*, 222 F. Supp. 684, 693-94 (M.D. Tenn. 1963).

³⁸ *Sims v. Frink*, 208 F. Supp. 431, 441-42 (M.D. Ala. 1962).

³⁹ See Dixon, *supra* note 10, at 392. *But see* McKay, *supra* note 8, at 703. The Alabama remedy is also defective as a general form of relief in that the requisite bases (alternative legislative proposals) rarely exist and could be easily avoided by a reluctant legislature.

The court argued in *Sims*, that the remedy need only apply for the limited purpose of permitting the legislature to reapportion itself. *Sims v. Frink*, *supra* note 38, at 441-42. While this argument might cure a remedy with practical defects, it is unacceptable in the context of an unconstitutional remedy. The basic objection to judicial redistricting is the necessity of effectuating underlying policy decisions. Thus, to apply such a remedy for even a temporary period is to neglect the consideration that interim representative interests will determine the composition of the permanent legislature. The policy decision remains, although its effect is indirect rather than direct.

with the potential of ultimately providing adequate relief from the deprivation of constitutional rights.

The at large election of all representatives to the state legislature fails to meet the first requirement. It is possible, for example, that the Washington legislature will be elected at large in the near future.⁴⁰ Should this materialize, every voter would be presented with a ballot listing between sixteen hundred and three thousand candidates.⁴¹ Moreover, as applied to a state legislature, it would appear that this remedy also presents a political question. Since an at large election effectuates only statewide majority interests, it may effectively deny a legislative voice to certain minority groups previously represented.⁴²

A use of the writ of mandamus against one or all functions of the state government is nullified as an appropriate judicial remedy by a number of considerations. Prominent among these are the difficulty of enforcement⁴³ and the fact that imprisoning reluctant legislators for contempt is not a satisfactory solution to the fundamental problem of reapportionment.

Likewise, the adoption of some antecedent apportionment act under the "relation back" theory is patently impractical. Even assuming that a state possesses a prior act consistent with the require-

⁴⁰ *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W.D. Wash. 1962).

⁴¹ 52 NAT'L CIVIC REV. 325 (1963).

⁴² As one author has stated, elections at large "would be tossing the representation baby out with the equal protection bath." Dixon, *supra* note 10, at 394. *Lisco v. Love*, 219 F. Supp. 922, 925 (D. Colo. 1963); *Wisconsin v. Zimmerman*, 209 F. Supp. 183, 188 (W.D. Wis. 1962); Black, *supra* note 22, at 15; Krastin, *supra* note 20, at 569; Comment, *supra* note 8, at 1037-38; see Friedelbaum, *supra* note 18, at 690. *Contra*, *League of Neb. Municipalities v. Marsh*, 209 F. Supp. 189, 195 (D. Neb. 1962); *Cox*, *supra* note 36, at 713; *McKay*, *supra* note 8, at 705; see *Emerson*, *supra* note 10, at 77; *Katzenbach*, *supra* note 23, at 835.

The Supreme Court has sanctioned the use of at large elections in lieu of federal congressional districts. *Smiley v. Holm*, 285 U.S. 355, 374-75 (1932); *Carroll v. Becker*, 285 U.S. 380, 382 (1932). However, the at large election is a less cumbersome device in the case of electing a few representatives to Congress as opposed to electing an entire state legislature. The latter would also necessitate disregarding state constitutional provisions requiring election by districts.

⁴³ The sorry history of *Virginia v. West Virginia* would seem sufficient to condemn federal mandamus against a legislature as an appropriate remedy. 246 U.S. 565 (1918). Black, *supra* note 22, at 15; Lucas, *supra* note 18, at 401-05, 407-09. *But see* Friedelbaum, *supra* note 18, at 699, 701-02; *McKay*, *supra* note 8, at 704-05.

In every state except Alaska, apportionment is a duty delegated to the legislature; mandamus directed to the state judiciary or executive would therefore require action in violation of the state's separation of powers. *Sweeney v. Notte*, 183 A.2d 296, 303 (R.I. 1962); Lucas, *supra* note 18, at 406-07; see *Radford v. Gary*, 145 F. Supp. 541, 542-44 (W.D. Okla.), *aff'd per curiam*, 352 U.S. 991 (1956).

ments of equal protection, outdated apportionment plans seldom reflect the needs of contemporary political society.⁴⁴

The simple addition of legislators to underrepresented districts does not present a political question, for it does not require a judicial determination that will deny a legislative voice to existing represented interests. It merely equalizes the voting power of currently represented interests by reference to some ascertainable standard, such as population within comparative districts. In most cases, however, this remedy would place an undue burden upon the legislative process. In most malapportioned states, a substantial increase in the size of a legislature would be required to provide adequate relief.⁴⁵

The weighted vote is one form of relief which may be deemed "appropriate" because it responds to practical considerations without presenting a political question. Under this procedure, the legislator from an underrepresented district is entitled to cast a greater number of votes than his colleagues from over-represented districts. Critics of this system have urged that as a matter of legislative procedure, it would be difficult to allocate committee memberships and speaking time on the basis of weighted votes.⁴⁶ Voice votes and quorum calls would be more time consuming. However, these are long-term procedural problems of a speculative nature.⁴⁷ They would be obviated if the weighted vote were applied for the transitory purpose of voting on the reapportionment issue. As a temporary measure, it provides a precise means of constitutional apportionment in conformance with existing districts, while at the same time releasing the legislature from its "strait jacket" with respect to the reapportionment problem.

⁴⁴ *Davis v. Synhorst*, 225 F. Supp. 689, 691 (S.D. Iowa 1964); see Comment, *supra* note 8, at 1035-36. But see *Davis v. Synhorst*, 217 F. Supp. 492, 509 (S.D. Iowa 1963) (dissenting opinion). There is also the objection that current statutes constitute an express legislative rejection of prior apportionment schemes. *Mann v. Davis*, 213 F. Supp. 577, 585 (E.D. Va. 1962).

⁴⁵ Another objection is the likely possibility of conflict with a maximum membership clause of the state constitution. See, e.g., IDAHO CONST. art. III, § 2.

⁴⁶ *Dixon*, *supra* note 10, at 394; Comment, *supra* note 8, at 1036.

⁴⁷ One court has refused to consider the weighted vote because it may contain "unknown evils." *League of Neb. Municipalities v. Marsh*, 209 F. Supp. 189, 195 (D. Neb. 1962). On the other hand, several authors have intimated that weighted voting would be appropriate even as a permanent remedy. Cormack, *Baker v. Carr and Minority Government in the United States*, 3 WM. & MARY L. REV. 282, 283 (1962); see Emerson, *supra* note 10, at 77; Katzenbach, *supra* note 23, at 835. Upon the recommendation of political scientists, the New Mexico legislature recently adopted weighted voting as a permanent means of correcting its malapportioned house of representatives. 53 NAT'L CIVIC REV. 35 (1964).

The *Hearne* decision is correct in that some judicial remedies designed to supplement a prohibitive injunction are not within the realm of judicial competence. Other remedies not expressly considered by the court are defective for practical reasons. But in erroneously concluding there is no appropriate remedy, *Hearne* failed to recognize that a limited use of the weighted vote may be easily applied in any state without practical or constitutional objection.*

* After this casenote went to press, the United States Supreme Court decided *Sims v. Frink*, 32 U.S.L. WEEK 4535 (U.S. June 15, 1964). This case settles the question of constitutional standards. See notes 8 & 32, *supra*. While the Court did not reach the issue of appropriate judicial remedies generally, it did approve the Alabama apportionment plan discussed at 615-16, *supra*. 32 U.S.L. WEEK at 4549-50.