

LEGISLATIVE REAPPORTIONMENT—THE SCOPE OF FEDERAL JUDICIAL RELIEF

IN THE RECENT *Reapportionment Cases*,¹ the Supreme Court held that the equal protection clause of the fourteenth amendment requires apportionment² of both houses of a bicameral state legislature on a population basis. Consequently each state must now attempt in good faith to fashion legislative districts as nearly equal in population as practicable.³

The Court, however, significantly qualified the requirement of "equal representation for equal numbers of people"⁴ by holding

¹ *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

² The words "apportionment" and "reapportionment" are used broadly in this comment to cover three factors in representative government: the basis of representation (population, citizens, residents or voters); districting (drawing political lines around the geographical areas which a legislator or legislators will represent); and apportionment in the strict sense of the word, that is, the allocation of legislators to the various districts. Since the courts have used the term "reapportionment" in determining all three factors, the term is used in that sense here. Strictly speaking, however, apportionment and districting should be distinguished and sometimes these terms will be used separately.

³ *Reynolds v. Sims*, 377 U.S. 533, 568, 577 (1964). The opinion set forth no precise mathematical standards within which variations from exact equality will be permitted, although two tests—the minimum controlling percentage and maximum population variance ratio—are used as the chief criteria. Under the first test, equality of representation is gauged by the minimum percentage of the state's population which could elect a majority of the representatives in a particular house. The closer the percentage approaches 50%, the closer the apportionment scheme is to an exact equality of representation. 45.1% was deemed inadequate to meet the constitutional test in the cast of Colorado's house of representatives. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 727, 735 (1964). The population variance ratio compares the size of the smallest and largest districts electing the same number of representatives. A ratio of 1 to 1 would reflect perfectly equal apportionment. A ratio of 1 to 1.7 has been held constitutionally inadequate. *Ibid.* The Supreme Court has stated, however, that "mathematical exactness or precision is hardly a workable constitutional requirement," so that precise equality will not be required where it is impractical. *Reynolds v. Sims*, *supra* at 577. In *Roman v. Sincock*, 377 U.S. 695 (1964), the Court disapproved of the lower court's suggestion that ratios smaller than 1 to 1.5 would comport with minimal constitutional requisites, stating that such rigid mathematical formulas were undesirable. *Id.* at 710 n.21.

⁴ *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). Although the Court borrowed this phrase from *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), which involved apportionment of Congress, it was noted that "some distinctions may well be made between congressional and state legislative representation." *Reynolds v. Sims*, *supra* note 3, at 578. The Court rejected arguments based upon the federal analogy, *i.e.*, senators in Congress represent geographical units as well as people so that legislators in one

that the equality principle, while "controlling," was not the exclusive criterion for reapportionment.⁵ So long as population is not "submerged as the controlling factor,"⁶ deviations from the equal population principle will be constitutionally permissible if and to the extent that they are "based on legitimate considerations incident to the effectuation of a rational state policy." After briefly examining the constitutional requirement of "equal population," this comment will analyze the problems confronting federal courts in fashioning appropriate judicial relief for legislative malapportionment.

THE MEANING OF "EQUAL POPULATION"

Multimember and Floterial Districts

The equal population requirement does not compel the use of single-member legislative districts. The Supreme Court commented in *Reynolds v. Sims* that multimember or floterial districts⁸ might validly be utilized if motivated by "rational" considerations such as

state legislative chamber should also be elected upon some geographical basis. Also, neither the fact that the state follows an apportionment formula required by the state constitution which was in existence when the state entered the Union, nor the fact that counties or other political units may have to be abolished to meet the equality principle, nor the fact that the particular apportionment scheme was approved by a popular referendum were regarded by the Court as sufficient to preclude a holding that state apportionment systems were unconstitutional. *Id.* at 572-75, 581-82; *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

⁵ *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

⁶ *Id.* at 581.

⁷ *Id.* at 579. See also *Roman v. Sincock*, 377 U.S. 695 (1964), where the Court indicated that "minor deviations" were permissible, but "only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Id.* at 710. Examples of permissible deviations cited by the Court were objectives such as that of "insuring some voice to political subdivisions, as political subdivisions. . . ." *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

⁸ A multimember district is one which has more than one representative. Such districts may assume a variety of forms. Each representative may represent the entire district and thus be eligible regardless of residence at some particular place within the district. Or, as was the case in *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964), each representative may represent a particular subunit within the district and have to reside in that district.

A floterial district is one "which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned." *Davis v. Mann*, 377 U.S. 678, 686 n.2 (1964). Thus, where the ideal unit would contain 10,000 voters and three districts have been established containing 15,000, 12,000, and 13,000 voters respectively, each district could be assigned one representative and a fourth to the entire three districts. See *Baker v. Carr*, 369 U.S. 186, 256 (1962) (Clark, J., concurring). This procedure would obviate the necessity of creating four single-member districts.

regard for existing political boundaries.⁹ While seeming to disapprove the multimember units adopted in Colorado,¹⁰ the Court did not delineate the extent to which such districts would be subject to constitutional limitations.¹¹

The subsequent decision in *Fortson v. Dorsey*¹² lends solid support for the use of multimember districts. The Supreme Court there held that where the subdistricts of a multimember unit were all of substantially equal population and one representative had to reside in each subdistrict, a state could properly allow all voters in the unit to participate in the election of a representative for each subdistrict.¹³ Mr. Justice Douglas dissented on the ground that allowing voters from foreign subdistricts the power to determine a particular subdistrict's representative constituted "invidious discrimination."¹⁴

Several problems inhere in the utilization of multimember dis-

⁹ 377 U.S. 533, 579 (1964).

¹⁰ *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 731-32 (1964).

¹¹ While the Court disapproved of the practical aspects of the Colorado plan requiring all representatives from one county to be elected at large, Chief Justice Warren indicated in a footnote that the Court did not mean to "intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in such multimember counties." *Lucas v. Forty-Fourth Gen. Assembly*, *supra* note 10, at 731 n.21.

¹² 379 U.S. 433 (1965).

¹³ *Id.* at 438. A case involving a similar controversy regarding the election of district commissioners for Roads and Revenues of DeKalb County, Georgia was decided by a federal district court about three weeks before the decision in *Fortson v. Dorsey*. *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964). The commissioners constituted the governing body of the county. The four commissioners were required to be residents of different districts within the county. The fifth commissioner, the chairman, could reside in any one of the four districts. All of the commissioners were selected by an at-large election throughout the county. The plaintiff asserted that the will of *all* the residents in one district as to who should represent that district might be frustrated. The district court denied relief, holding that the basic voting unit was the whole county and since all the voters within that unit were treated equally, there was no "equal protection" problem. 237 F. Supp. at 24. The court distinguished its earlier holding in *Dorsey v. Fortson*, 228 F. Supp. 259 (N.D. Ga. 1964), *rev'd*, 379 U.S. 433 (1965), that the use of both multimember and single-member districts in the Georgia senate violated the equal protection clause.

¹⁴ *Fortson v. Dorsey*, 379 U.S. 433, 441-42 (1965) (dissenting opinion). Justice Douglas agreed with the district court that "voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute . . . is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not." *Dorsey v. Fortson*, *supra* note 13, at 263 (quoted in 379 U.S. at 441). See also *Wright v. Rockefeller*, 211 F. Supp. 460, 468 (S.D.N.Y. 1962), *aff'd*, 376 U.S. 52 (1964).

tricts. On the one hand, the practice tends to dilute individual voting strength by enlarging the eligible voting population against whose voting power the individual must compete. Conversely, it accords an individual voter the power to exercise a voice in determining the election of more than one representative, and hence accentuates the power of a bare majority within the multimember district.¹⁵ If suburb and city are combined in a multimember district, the suburbanite's vote thus may be effectively vitiated. However, the polar alternative of districting along economic, ethnic, or racial lines seems precluded by *Reynolds*,¹⁶ and in any event, the *Fortson* decision seemingly rules out challenges directed solely against the use of multimember districts.

The Criteria of "Population"

The "equal population" standard also entails a determination of the permissible bases of "population." In characterizing legislators' constituents, the Supreme Court in the *Reapportionment Cases* used the terms "voters," "residents" and "citizens" interchangeably.¹⁷ The various state constitutions specify apportionment criteria ranging from males over twenty-one¹⁸ to votes cast in the last gubernatorial election.¹⁹ Equality, therefore, is relative only to the basis employed. In a district consisting largely of retired persons, for instance, the ratio of voters to residents might be considerably higher than in a typical suburban district where a substantial por-

¹⁵ The result may thus be to deprive minorities of the voter strength which might be decisive in a single-member district. See *Dorsey v. Fortson*, 228 F. Supp. 259 (N.D. Ga. 1964), *rev'd*, 379 U.S. 433 (1965); cf. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 731-32 (1964).

¹⁶ 377 U.S. 533 at 579-80.

¹⁷ *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 953 (D. Md. 1964). Compare the statements in *Reynolds v. Sims*, 377 U.S. at 566, 568, 577.

¹⁸ IND. CONST. art. 4, § 5. See Note, *The Significance of Baker v. Carr for Indiana*, 38 IND. L.J. 240, 260 n.81 (1963). There has been some agitation to alter this requirement to include all citizens over twenty-one years of age. IND. ANN. STAT., CONST. art. 4, § 5 (Supp. Mar. 1964).

¹⁹ ARIZ. CONST. art. 4, pt. 2, § 1. Some states apportion on the basis of population as determined by the last decennial federal census. See, e.g., ORE. CONST. art. IV, § 6; PA. CONST. art. 2, § 18; W. VA. CONST. art. VI, § 7. Still others base their "population" on either state or federal enumeration. See, e.g., COLO. CONST. art. V, § 45; MONT. CONST. art. VI, § 2; WYO. CONST. art. 3, § 48. Massachusetts uses a basis of "legal voters," MASS. CONST. art. of amend. LXXI (amending art. of amend. XXI), while Tennessee's constitution specifies "qualified voters." TENN. CONST. art 2, § 5. Some states exclude from the population base aliens, N.Y. CONST. art. 2, § 4, or Indians, MINN. CONST. art. 4, § 2; N.C. CONST. art. II, § 4. Still others exclude members of the Army and Navy. WASH. CONST. art. 2, § 3; WIS. CONST. art. 4, § 3.

tion of the population is below voting age.²⁰ In rural Southern counties, where Negro registration is quite low, reapportionment on a voter basis might perpetuate racial imbalance.²¹ And even if a state decides to apportion on the basis of voters, the question remains whether to apportion on the basis of actual, registered, or eligible voters.²²

Since *Reynolds*, one federal district court in a case involving representation on a city council, has declared that "the Equal Protection Clause . . . requires that the validity of any apportionment be tested on the basis of population, rather than registered voters. . . ."²³ In that case, however, voter-based apportionment had not in fact produced equal representation even among voters.²⁴ The court acknowledged the desirability and validity of a state policy of encouraging voter registration, but held that the registration basis was impermissible where it produced large variations from population equality among the various districts.²⁵ By contrast, the district court for Hawaii, noting the rapid fluctuation in that state's sizeable transient population, approved a reapportionment scheme based on registered voters.²⁶

²⁰ Thus, if total population were the basis for apportionment, the community with retired people would not have as many representatives as it would if the basis for apportionment were qualified or registered voters.

²¹ This statement is subject, of course, to the practical effect of the Voting Rights Bill now being pressed in Congress. This type of discrimination is a subtle form of gerry-mandering, discussed *infra*.

²² See *Holt v. Richardson*, 238 F. Supp. 468, 473-74 (D. Hawaii 1965), where the court noted that the authors of the Hawaiian constitution considered various bases for apportionment, including eligible voters, registered voters and population. The Hawaiians settled upon a registered voter basis, but apparently thought that little practical difference would result from the choice. *Id.* at 473.

²³ *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 949 (D. Md. 1964).

²⁴ The Baltimore City Charter set up six districts. Each district was entitled to three members on the council if it contained 75,000 voters or less; four members were allocated to every district with more than 75,000 voters. *Id.* at 947 n.5. The court concluded that the apportionment was even more inequitable from a voter viewpoint than from a population basis. *Id.* at 949-50.

²⁵ *Id.* at 958.

²⁶ *Holt v. Richardson*, 238 F. Supp. 468 (D. Hawaii 1965). The court concluded that "[I]f total population were to be the only acceptable criteria upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence to 'the elusive "one-person-one-vote" aphorism.'" *Id.* at 474.

The court stated that the 1960 federal census included in Hawaii's population an estimated 10,000 tourists. *Id.* at 475. Approximately 10% of Hawaii's normal population is military personnel, and this figure might increase with changes in the world situation (less than 5% in 1950, over 45% in 1944). *Id.* at 474-75.

It would appear from the language of the Supreme Court that states may reapportion on either a population or a voter basis.²⁷ However, a holding that reapportionment must be based on population would seem to promote ease of application as well as guard most effectively against the possibility of subtle discrimination.

THE TIMING AND SOURCE OF RELIEF

Abstention to Avoid Constitutional Adjudication

One largely unanswered question concerning reapportionment is the extent to which federal courts should defer to state tribunals in fashioning relief from malapportionment. A federal court clearly has jurisdiction over a cause in which a party asserts that his rights under the Constitution have been violated.²⁸ The question, however, is whether it would be wise for a federal tribunal to abstain in a case in which it is apparent that a state court will be prepared to render a decision.

The doctrine of abstention requires that federal courts refrain from deciding constitutional questions when clarification of ambiguous state law might be dispositive of a case.²⁹ Where state law is unambiguous or clearly unconstitutional, abstention is inappropriate.³⁰ Accordingly, in the Virginia reapportionment case³¹ the district court characterized applicable state law as "clear" and refused to abstain.³²

Frequently, however, it may be difficult for federal courts to determine whether state law is so unclear as to warrant abstention. Prior to the Supreme Court's decision in the *Reapportionment Cases*, a federal court in Pennsylvania held invalid that state's appor-

²⁷ See *id.* at 472-73. Chief Justice Warren at one point in *Reynolds v. Sims* seemed deliberately to refrain from any decision as to permissible bases, saying that "a State [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one contains an identical number of residents, or citizens, or voters." 377 U.S. at 577. (Emphasis added.)

²⁸ 28 U.S.C. § 1331 (1958).

²⁹ See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

³⁰ See cases cited in WRIGHT, FEDERAL COURTS 171 nn. 9-10 (1963); *Dombrowski v. Pfister*, 85 S. Ct. 1116 (1965).

³¹ *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962).

³² The court felt that *Scholle v. Hare*, 369 U.S. 429 (1962), had been remitted to the state court because it originated there and not because the Supreme Court preferred the state court to a federal forum. *Mann v. Davis*, *supra* note 31, at 580. The Supreme Court subsequently agreed that the abstention issue was without merit in this case. *Davis v. Mann*, 377 U.S. 678, 690-91 (1964). Compare *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 922 (S.D.N.Y. 1965).

tionment statutes as well as the pertinent section of the state constitution.³³ In the wake of the *Reapportionment Cases*, the Pennsylvania Supreme Court also invalidated the statute under the fourteenth amendment but construed the challenged section of the state constitution in such a manner as to preserve its constitutionality under the *Reapportionment Cases*.³⁴ The federal case was remanded subsequently by the Supreme Court for consideration in light of both the intervening state court decision and the *Reapportionment Cases*.³⁵

Abstention to Avoid Administrative Conflict

Under another branch of the abstention doctrine, premised mainly on considerations of comity, federal courts have sometimes refrained from exercising jurisdiction in order to avoid conflict with the complicated administration of local law by state courts.³⁶ Where a reapportionment suit is pending in the state court at the time of similar federal action is initiated, the issue of malapportionment will usually receive consideration within a reasonable time on the state level.³⁷ If the state courts are willing to test existing apportionment by the constitutional standards imposed by the *Reapportionment Cases* and require remedial legislative action when necessary,³⁸ an abstaining federal court might avoid an unnecessary

³³ *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa.), *remanded*, 379 U.S. 40 (1964). The constitutional provision for senatorial districts stated that there were to be fifty districts as nearly equal in population as possible, but that counties were not to be divided unless entitled to more than one senator, and that no wards, boroughs, or townships were to be divided in forming a district. *Id.* at 313.

³⁴ *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).

³⁵ *Scranton v. Drew*, 379 U.S. 40 (1964). "Where . . . federal constitutional questions are closely intermingled with questions of state law, the abstention doctrine could minimize the degree of interference in the basic framework of state government and reduce the areas of possible federal-state conflict." Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 701 (1962).

³⁶ *E.g.*, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); see WRIGHT, *FEDERAL COURTS* 172-74 (1963). By and large, however, the federal courts have not allowed conversion of abstention in this area to a policy of mandatory deference in all cases. Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 372 (1963); see *Yancey v. Faubus*, 238 F. Supp. 290, 292 (E.D. Ark. 1965).

³⁷ This was the situation in the Pennsylvania suits, but the federal court chose not to abstain. *Drew v. Scranton*, 299 F. Supp. 310 (M.D. Pa.), *remanded*, 379 U.S. 40 (1964).

³⁸ The Pennsylvania Supreme Court in *Butcher v. Bloom*, 203 A.2d 556, 559 (Pa. 1964), pleaded for federal court abstention in situations where the state legislature and state courts are willing to assume the responsibility for corrective action. In *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964), the Supreme Court said: "We applaud the willingness of state courts to assume jurisdic-

and possibly abrasive decision.³⁹

While this same consideration might appear to favor federal abstention in situations where the initiation of a suit in the state courts is brought to the attention of a federal court in which an action is pending, the federal tribunals have not so responded. In such a situation an Oklahoma district went so far as to enjoin an action in the state court on the grounds that the subject matter and relief requested were identical in both federal and state actions, and that the federal court had acquired jurisdiction first.⁴⁰ The Colorado district court proceeded to decision after determining that it was not "preempted" by the fact that the state court had already heard the controversy, since the latter tribunal had not considered the issue of infringement of federal rights.⁴¹ Subsequently, however, the district court refused to enjoin a pending state court action, assuming that the Colorado court would comply with the federal court's earlier mandate.⁴²

Federal courts most frequently premise their refusal to abstain on the ground that plaintiffs lack any other expeditious remedy. Clearly this is so where it is shown that the state tribunals have not directed remedial action or that the state legislature has refused to respond to such an order.⁴³ Moreover, where no suits have been instituted in the state courts, the argument for abstention is less than compelling; a federal court could not determine whether the state tribunals would assume jurisdiction in such an action, nor the type of remedy, if any, that the state court would afford.⁴⁴ Indeed,

tion and render decision in cases involving challenges to state legislative apportionment schemes." *But see* note 44 *infra*.

³⁹ "Of course the federal courts should avoid affront to the processes of the state wherever it is possible to do so." Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 776 (1963).

⁴⁰ *Moss v. Burkhardt*, 220 F. Supp. 149 (W.D. Okla. 1963).

⁴¹ *Lisco v. McNichols*, 208 F. Supp. 471, 475 (D. Colo. 1962). When the case eventually reached the Supreme Court, *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964), the Court commended the district court for acting wisely in waiting for the Colorado Supreme Court to decide a pending reapportionment case.

⁴² *Lucas v. Forty-Fourth Gen. Assembly*, 232 F. Supp. 797 (D. Colo. 1964).

⁴³ In *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962), the federal court stated that it would not exercise its jurisdiction where the parties had an "adequate, speedy and complete" remedy in the state courts. It concluded, however, that in the instant case no adequate remedy was available in the legislature or in the state courts. This view was affirmed on appeal. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

⁴⁴ There is uncertainty as to what actions a state court can take to remedy malapportionment. At one extreme, the Colorado Supreme Court stated that it could require the General Assembly to reapportion. *Stein v. General Assembly of Colorado*,

abstention in such a situation might result in indefinite delay in relieving malapportionment.

Deference to the State Legislature

While federal courts might not in all cases be compelled to defer to the state judiciary, they must often defer to the state's political processes. Judicial relief need not and should not immediately follow a determination that a state's apportionment scheme is invalid; the Supreme Court in *Reynolds v. Sims* stated that:

[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.⁴⁵

This holding was presaged by Mr. Justice Douglas' intimation in *Baker v. Carr* that a determination of the constitutional deficiency of the existing apportionment system might suffice to stimulate remedial legislative action and obviate the necessity of judicial apportionment.⁴⁶ Cases decided before *Baker v. Carr* indicate a willingness to afford state legislatures a reasonable time within which to reapportion.⁴⁷ Since *Baker*, every district court which has faced the problem of relief has given the state legislature at least one session in which to reapportion before granting any other form of

150 Colo. 380, 374 P.2d 66 (1962). However, no state court has ever taken such action. Mitchell, *Judicial Self-Restraint: Political Questions and Malapportionment*, 39 WASH. L. REV. 761, 765 (1964). The Wisconsin Supreme Court reapportioned the state legislature by judicial decree after the legislature failed to act. *Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964).

On the other hand, some state courts will not take steps to remedy malapportionment. The Kansas Supreme Court in *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771 (1963), stated that it could declare the reapportionment plan void but could not make the legislature reapportion itself. In *Sweeney v. Notte*, 183 A.2d 296 (R.I. 1962), the Rhode Island Supreme Court invalidated the existing plan but went on to state that it could not reapportion if the legislature failed to do so. The Supreme Court in *WMCA v. Lomenzo*, 377 U.S. 633 (1964), noted that "decisions by the New York Court of Appeals indicate that state courts will do no more than determine whether the New York Legislature has properly complied with the state constitutional provisions relating to legislative apportionment in enacting implementing statutory provisions." *Id.* at 653 n.23.

⁴⁵ 377 U.S. at 586. Cf. *Hearne v. Smylie*, 379 U.S. 692 (1965); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964).

⁴⁶ 369 U.S. 186, 250 n.5 (1962) (Douglas, J., concurring). The Court in *Reynolds v. Sims* alluded to this suggestion. 377 U.S. at 585 n.66.

⁴⁷ See, e.g., cases cited by Mr. Justice Douglas, 369 U.S. 186, 250 (1962).

relief.⁴⁸ Whether a period of grace will result in prompt and corrective remedial action remains to be seen. Prior to the *Reapportionment Cases* a number of legislatures failed to respond within the periods of grace given them, perhaps feeling that final judgment of the unconstitutionality of existing apportionment should be left to the Supreme Court.⁴⁹ Indeed, it can be argued with some justification that state legislatures could not have ascertained the proper constitutional standards for reapportionment until the Supreme Court's decision in the *Reapportionment Cases*.⁵⁰ Such grounds for delay are, however, now clearly unacceptable.

⁴⁸ Hughes v. WMCA, Inc., 379 U.S. 694 (1965), affirming an unreported district court decree which was quoted in part in WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 918-19 (S.D.N.Y. 1965); Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964); Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); Buckley v. Hoff, 234 F. Supp. 191 (D. Vt. 1964), *aff'd and modified sub nom.* Parsons v. Buckley, 379 U.S. 359 (1965); Petuskey v. Clyde, 234 F. Supp. 960 (D. Utah 1964); Paulson v. Meier, 232 F. Supp. 183 (D.N.D. 1964); League of Neb. Municipalities v. Marsh, 209 F. Supp. 189 (1962), 232 F. Supp. 411 (D. Neb. 1964); Thigpen v. Meyers, 211 F. Supp. 826 (1962), 231 F. Supp. 938 (W.D. Wash. 1964) (legislature's second chance); Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa.), *remanded*, 379 U.S. 40 (1964); Butterworth v. Dempsey, 229 F. Supp. 754 (D. Conn. 1964); Stout v. Hendricks, 228 F. Supp. 568 (S.D. Ind. 1963/1964); Davis v. Synhorst, 225 F. Supp. 689, 231 F. Supp. 540 (S.D. Iowa 1964); Moss v. Burkhart, 207 F. Supp. 885 (1962), 220 F. Supp. 149 (W.D. Okla. 1963); Sincoc v. Terry, 207 F. Supp. 205, 210 F. Supp. 395 (D. Del. 1962), legislature given second chance *sub nom.* Sincoc v. Duffy, 215 F. Supp. 169 (D. Del. 1963); Mann v. Davis, 213 F. Supp. 577 (E.D. Va. 1962); Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962); Sims v. Frink, 205 F. Supp. 245, 208 F. Supp. 431 (M.D. Ala. 1962); Baker v. Carr, 206 F. Supp. 341 (M.D. Tenn. 1962); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962). The initiation of a reapportionment suit alone appears to have induced legislation in other cases, such as Kentucky and Louisiana. See 54 NAT'L CIVIC REV. 31-35 (1965). See also Lisco v. McNichols, 208 F. Supp. 471 (D. Colo. 1962) and Lisco v. Love, 219 F. Supp. 922 (D. Colo. 1963) where the lower court deferred to the state judiciary and reapportionment by popular referendum. It approved a state constitutional amendment thus adopted. The Supreme Court reversed. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964).

⁴⁹ This reasoning was the basis for Delaware's failure to reapportion, see Roman v. Sincoc, 377 U.S. 695, 700-03 (1964), and perhaps explains Oklahoma's recalcitrance. See Moss v. Burkhart, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd and remanded per curiam sub nom.* Williams v. Moss, 378 U.S. 558 (1964); Reynolds v. State Election Bd., 233 F. Supp. 323 (W.D. Okla. 1964) (on remand). In the original decision, 207 F. Supp. 885 (W.D. Okla. 1962), Judge Rizley, dissenting from the majority's decision to defer to the legislature, noted the following testimony given by a state senator: "This witness stated he would not comply with the order of this Court but only act after the law is clearly outlined by the United States Supreme Court in subsequent opinions, which may take the Lord only knows how long to convince this Senator and others like him." *Id.* at 904.

⁵⁰ The fact that the lower courts reached divergent conclusions as to the relevant standards is illustrative of this point. Some courts merely deferred all action pending a Supreme Court determination. See, e.g., Petuskey v. Clyde, 234 F. Supp. 960, 962 (D. Utah 1964). The Oklahoma district court ordered into effect its own reapportionment plan with the disclaimer that "it may well be that the affirmative relief we granted is in excess of our judicial power." Moss v. Burkhart, 220 F. Supp. 149, 155 (W.D. Okla. 1963).

A similar argument for further deference to the legislature was made in the cases decided in June 1964. On remand it was urged that since the Supreme Court had now clarified the constitutional standards, the state legislatures should be given another opportunity to act.⁵¹ The lower courts, however, ordered almost immediate reapportionment by the state legislatures.⁵² Such a practice seems eminently proper where the lower court's decision on the merits was affirmed by the Supreme Court, and where the legislatures had not availed themselves of previous opportunities to act. Expeditious judicial action was also sanctioned by the Court's approval of two district court decisions which suspended further state elections under the invalid existing systems.⁵³

In the Oklahoma case, the district court gave the legislature no further opportunity to act, but instead approved and imposed a reapportionment scheme devised by a research bureau of the state university and approved by the state attorney general.⁵⁴ Judicial impatience in the Oklahoma case may be explained by consistent legislative refusal to act coupled with the candid admission by several state officials of the existence of malapportionment and a

⁵¹ See, e.g., *Reynolds v. State Election Bd.*, 233 F. Supp. 323, 329 (W.D. Okla. 1964).

⁵² See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 232 F. Supp. 797 (D. Colo. 1964) (court said it would draw up its own plans for 1964 elections on July 15, 1964; state legislature prior to that date passed satisfactory legislation); *Davis v. Mann*, 379 U.S. 694, *affirming per curiam*, *Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964) (legislature to reapportion by December 15, 1964); *Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965), *affirming per curiam* district court decree that legislature reapportion by April 1, 1965; *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964/1965) (legislature ordered to reapportion by January 30, 1965).

⁵³ *Davis v. Mann*, 377 U.S. 678 (1964), *affirming and remanding*, 213 F. Supp. 577 (E.D. Va. 1962); *Roman v. Sincock*, 377 U.S. 695 (1964), *affirming and remanding sub nom.* *Sincock v. Terry*, 210 F. Supp. 395 (D. Del. 1962). In the latter case the Court stated: "[T]he court below did not err in granting injunctive relief after it had become apparent that . . . no further reapportionment by the Delaware General Assembly was probable." 377 U.S. at 710. See *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn. 1964), where the district court enjoined any action toward the nomination or election of state legislators unless the legislature reapportioned or an at-large election was held. The Supreme Court affirmed *per curiam* on the merits, though it remanded with respect to relief. *Pinney v. Butterworth*, 378 U.S. 564 (1964).

⁵⁴ *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964). The court noted: "We believe that by affirmance of our previous order of reapportionment in accordance with *Reynolds v. Sims*, the Supreme Court committed to us the equitable discretion to fashion a remedy for the reapportionment of the Oklahoma State Legislature to suit the exigencies of the case now before us." *Id.* at 328. The court's original decision, in which it had first framed a reapportionment plan of its own choosing, was affirmed by the Supreme Court though remanded with respect to relief in the light of *Reynolds v. Sims*, 377 U.S. 533 (1964). See *Moss v. Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd and remanded per curiam sub nom.* *Williams v. Moss*, 378 U.S. 558 (1964).

duty to remedy this deficiency.⁵⁵ Hopefully, the Oklahoma case will be atypical, and legislatures will produce the required reapportionment without necessitating invocation of judicially framed and implemented remedies. However, the policy favoring legislatively initiated reapportionment may conflict with the requirement that relief be forthcoming prior to the next election.

Timing of Relief

With respect to the time within which affirmative relief must be granted, the Court in *Reynolds* stated that:

[O]nce a State's legislative apportionment has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.⁵⁶

Given sufficient time between a determination of unconstitutionality and the next scheduled elections, a state legislature may be entitled to several attempts at reapportionment. In many cases, however, there may be considerable tension between the rule of deference and the necessity for an expeditious remedy.

The Supreme Court observed that the district court in *Reynolds v. Sims* had resolved this conflict in a "most proper and commendable manner."⁵⁷ In that case Alabama's existing apportionment scheme was declared invalid in April 1962, and the district court indicated that judicial relief would be forthcoming unless the legislature acted prior to the November 1962 elections.⁵⁸ The court subsequently found the remedial legislation defective and implemented its own interim plan for relief, consisting of several portions of the legislation which as a whole had been disapproved.⁵⁹ It thus appears that when elections are imminent a district court may properly fashion relief where a state legislature has failed to enact a constitutionally valid plan within a single legislative session.

The Supreme Court has recognized that the imminence of forthcoming elections may present special problems. In remanding the several cases in which the November 1964 elections would have been affected, the Court allowed the district courts to determine whether

⁵⁵ See *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964); *Moss v. Burkhardt*, 220 F. Supp. 149 (W.D. Okla. 1963).

⁵⁶ 377 U.S. at 585.

⁵⁷ *Id.* at 586.

⁵⁸ *Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. 1962).

⁵⁹ *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962).

immediately effective relief could be granted even though the various states' electoral machinery had been or would soon be engaged.⁶⁰ The lower courts were cautioned that in formulating relief, due consideration should be given to the mechanics and complexities of state election laws, and the disruptive effect upon the election process which the timing of relief might have.⁶¹

On substantially similar facts, the various district courts reacted differently to the Supreme Court's general admonitions.⁶² In the majority of cases no further action was taken until after the November elections, which were thus conducted under admittedly unconstitutional apportionment systems.⁶³ By contrast, three courts felt that immediate relief should be granted despite the imminence of the November elections. In a remarkable decision the Connecticut district court enjoined the 1964 elections and continued the 1963 legislature in session.⁶⁴ The district court in Colorado apparently induced prompt and valid legislative reapportionment by intimating that legislative inaction would engender a court-imposed plan.⁶⁵ Immediate relief was also forthcoming in Oklahoma, where

⁶⁰ *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

⁶¹ *Ibid.* This admonition would also apply to those cases decided per curiam on June 22, 1964, involving the states of Florida, Washington, Ohio, Oklahoma, Illinois, Michigan, Iowa, Connecticut and Idaho. Affirmed on the merits but remanded with respect to relief "consistent with the views stated in our opinions in *Reynolds v. Sims*" were: *Hill v. Davis*, 378 U.S. 565 (1964); *Pinney v. Butterworth*, 378 U.S. 564 (1964); *Williams v. Moss*, 378 U.S. 558 (1964); *Meyers v. Thigpen*, 378 U.S. 554 (1964). Reversed and similarly remanded were: *Hearne v. Smylie*, 378 U.S. 563 (1964); *Marshall v. Hare*, 378 U.S. 561 (1964); *Germano v. Kerner*, 378 U.S. 560 (1964); *Nolan v. Rhodes*, 378 U.S. 556 (1964).

⁶² The facts of the Oklahoma case may perhaps be distinguished. See notes 54-55 *supra* and accompanying text. In the other cases which were affirmed, only the Connecticut court took immediate action, see note 64 *infra* and accompanying text, while the Washington district court was content to leave the matter to the legislature again. *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964) (the legislature is to act promptly; interim relief in the form of weighted voting was omitted from the court's final decree, see note 97 *infra*). The Connecticut legislature appeared no more reluctant to do its duty than these other legislatures and each had already received one opportunity to do so. The Iowa and Delaware courts refrained from any further action, leaving the matter once again to the legislature although those legislatures had had two opportunities to reapportion. See *Davis v. Cameron*, 238 F. Supp. 462 (S.D. Iowa 1965); *N.Y. Times*, Sept. 17, 1964, § 1, p. 21, col. 1.

⁶³ See, e.g., *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 918-19 (S.D.N.Y. 1965).

⁶⁴ *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964/1965). The court approved the constitutionality of Public Acts 1 and 2 of the Special Session of the General Assembly which reapportioned the house and redistricted the senate. A constitutional convention will be called to decide upon a permanent plan of apportionment.

⁶⁵ *Lucas v. Forty-Fourth Gen. Assembly*, 232 F. Supp. 797, 799 (D. Colo. 1964), *aff'd per curiam*, 379 U.S. 693 (1965). The state supreme court subsequently held

the district court, believing the legislature incapable of the task, imposed its own reapportionment scheme for immediate and, if necessary, permanent use.⁶⁶

Even where immediate remedial action was not forthcoming, steps were taken by several district courts to insure that after 1964 no elections would be held under invalid apportionment schemes. The Virginia legislature was given until December 15, 1964 to reapportion itself,⁶⁷ and New York until April 1, 1965;⁶⁸ compliance with both mandates has since been accomplished.⁶⁹ The Vermont legislature has been directed to introduce a reapportionment bill by February 1, 1965, and approve constitutionally acceptable legislation by July 1, unless a constitutional convention is called and accomplishes the same task by September 1, 1965.⁷⁰ Arkansas must act by June 15, 1965,⁷¹ while Ohio has until November 1965 to present a valid plan to the voters.⁷² The Minnesota,⁷³ Utah,⁷⁴ North

the legislation invalid under the state constitution since in forming districts, counties may not be divided. The United States Supreme Court therefore vacated and remanded for further consideration in light of this decision. See *White v. Anderson*, 394 P.2d 333 (Colo. 1964). It appears possible that federal standards could not be met without violating existing state law, but neither the state nor the United States Supreme Court adverted to this issue.

⁶⁶ *Reynolds v. State Election Bd.*, 233 F. Supp. 323, 328 (1964).

⁶⁷ *Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd per curiam*, 379 U.S. 694 (1965).

⁶⁸ Unreported decree affirmed in *Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965), quoted in part in *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 918-19 (S.D.N.Y. 1965).

⁶⁹ 54 NAT'L CIVIC REV. 34-35 (1965). However, the newly elected New York legislature is expected to undo what a lame duck Republican-controlled special session wrought. The New York district court was able to choose between four different plans proposed by the legislature and selected for approval Plan A, which was least preferred by the legislature. *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965). Subsequently, the April 1 deadline was extended until May 5 to permit the newly elected legislature to draw up further plans. It failed to do so, and since the primary election machinery would commence operation on June 1, the district court ordered Plan A into effect for the November 2, 1965, elections, although the state courts had invalidated it as contrary to the state constitution. See *N.Y. Times*, May 11, 1965, § 1, p. 28.

⁷⁰ *Parsons v. Buckley*, 379 U.S. 359 (1965), *affirming and modifying per curiam*, 234 F. Supp. 191 (D. Vt. 1964) (original deadline of March 31, 1965).

⁷¹ *Yancey v. Faubus*, 238 F. Supp. 290 (E.D. Ark. 1965). A Reapportionment Board, comprised of the Governor, the state Attorney-General and the Secretary of State, has been ordered to perform the task of reapportionment, unless declared powerless to do so under state law by the state court. The legislature, of course, is also free to perform the same duty if it wishes.

⁷² 53 NAT'L CIVIC REV. 600 (1964).

⁷³ *Honsey v. Donovan*, 236 F. Supp. 8 (D. Minn. 1964) (the court noted that the 1965 legislature sits for 120 days and expressed the hope that it would reapportion in time for the 1966 elections).

⁷⁴ *Petuskey v. Clyde*, 234 F. Supp. 960 (D. Utah 1964), indicating relief should consist of "prompt, effective and complete reapportionment." *Id.* at 964.

Dakota,⁷⁵ Nebraska,⁷⁶ Missouri⁷⁷ and Iowa⁷⁸ courts, however, set no specific deadlines; in general terms they merely ordered the legislatures to reapportion promptly during their next sessions. The moderate approach taken by these courts, though avoiding the appearance of threatening the legislature, may pose a dilemma for prospective plaintiffs in respect to the time within which they must act, as they must allow for the prospect of appeal to the Supreme Court in order to forestall further deprivation of their rights in the face of continued legislative inaction.⁷⁹ This problem could be obviated by setting a deadline by which the legislature must act and after which, given failure of the legislature to respond, judicial relief will be imposed. The decided cases indicate the effectiveness of such a practical approach.⁸⁰

JUDICIAL REMEDIES

A consideration of the problems faced by a federal court in framing judicial relief accentuates the appropriateness of according primary responsibility for reapportionment to state legislatures. The most troublesome questions arise when a court must impose its own plan for relief from malapportionment, and in this area there is as yet little guidance from the Supreme Court.⁸¹ Clearly, however, in framing relief the district courts must carefully consider the problem of timing vis-à-vis the requirement of deference to the state

⁷⁵ *Paulson v. Meier*, 232 F. Supp. 183 (D.N.D. 1964), holding that the next regular session of the legislature "should promptly devise and pass legislation." *Id.* at 190.

⁷⁶ *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 411 (D. Neb. 1964) (legislature to reapportion, allowing ample time for the orderly filings for the primary and general elections in 1966).

⁷⁷ *Jonas v. Hearnes*, 236 F. Supp. 699 (W.D. Mo. 1964), holding that the first regular session of the legislature "should promptly devise and pass legislation." *Id.* at 709.

⁷⁸ *Davis v. Cameron*, 238 F. Supp. 462 (S.D. Iowa 1965).

⁷⁹ Sensitive to this problem, the Connecticut district court requested the litigants to suggest at what stage in the proceedings the court's decree should be made appealable. *Butterworth v. Dempsey*, 229 F. Supp. 754, 765 (D. Conn. 1964).

⁸⁰ See notes 67-69 *supra*.

⁸¹ Thus far the Supreme Court has rendered no opinion setting forth broad guidelines in the area of judicial relief. It does not appear likely to do so in the foreseeable future. "Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). See Mr. Justice Harlan's criticism of the summary disposition of three cases, decided subsequently to the *Reapportionment Cases*, which raised a number of issues concerning remedial techniques. *Parsons v. Buckley*, 379 U.S. 359 (1965). Harlan was joined by Mr. Justice Clark in *Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965); *Davis v. Mann*, 379 U.S. 694 (1965).

legislatures. They should also consider whether the proposed remedy will (1) give the plaintiffs the constitutional protection to which they are entitled; (2) avoid the necessity of embroiling the court in decisions which are essentially political in nature; (3) be susceptible of ready enforcement without inviting unseemly conflict between federal judiciary and state legislature; (4) prove a practicable solution which causes minimal disruption to state laws and political processes.

Initially, federal district courts are confronted with a choice between the imposition of permanent relief or an interim measure. Permanent relief will undoubtedly be considered only where there is sufficient time available for the court to draft or supervise drafting of its own plans or where a previously prepared reapportionment plan can be instituted during the short time remaining prior to impending elections. Where the laborious preparation inherent in drafting a reapportionment system has not been or cannot be completed within a reasonable time prior to pending elections, temporary or interim relief will in most cases be afforded. Temporary relief is also appropriate where the court desires merely to break a deadlock in the state legislature.

"Permanent" Judicial Reapportionment

Though at one time considered beyond judicial competence,⁸² permanent reapportionment by the judiciary has been cautiously approved by an increasing number of courts. Since such a scheme is usually designed for a maximum ten-year duration in order to comport with the census, it has the flexibility of a temporary remedy and can subsequently be replaced by a valid legislative program.⁸³

⁸² "Of course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid." *Colegrove v. Green*, 328 U.S. 549, 553 (1964) (Frankfurter, J.).

⁸³ The Supreme Court has not expressly approved this mode of relief, but in one case decided *per curiam* it chose not to reject the actual implementation of a judicial reapportionment plan. *Moss v. Burkhardt*, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd and remanded per curiam sub nom. Williams v. Moss*, 378 U.S. 558 (1964), discussed *supra* notes 54-55. Also, in *Parsons v. Buckley*, 379 U.S. 359 (1965), the Court approved a stipulation of the parties which provided for judicial reapportionment should the Vermont legislature fail in its duty. Mr. Justice Harlan dissented with respect to the inclusion of this item stating that "the prospect of the federal courts engaging in such a political undertaking is for me a spectacle not easy to contemplate. Whether such a course may be an inevitable ultimate consequence of *Reynolds v. Sims* is a matter which should be determined only after the fullest plenary and most deliberate consideration on the part of this Court." 379 U.S. at

It will generally afford effective relief and will meet federal constitutional requirements within the state's general pattern of representative government.⁸⁴ Moreover, since the court's mandate may be directed at state election officials rather than against legislatures, embarrassing disputes between federal courts and state law-makers may be avoided.⁸⁵ However, the initial task of drafting or supervising creation of such a plan may be so burdensome as to vitiate this remedy where a ready-made plan or proper facilities with which to prepare one is lacking.⁸⁶

A major objection to imposition of a permanent solution is the necessary involvement of the courts in essentially political functions. The process of redistricting or reapportioning necessarily entails application of standards which are not readily susceptible to judicial administration. Decisions such as whether to create multi-member or floterial districts, how and where to fix district boundaries, and preservation of the existing political subdivisions are undoubtedly "political" in nature; for this reason alone it would seem that the federal courts should be reluctant to impose such relief. While professing such reluctance, however, most federal

364. Other lower courts have indicated quite firmly that if it became necessary they would however reluctantly, undertake the task of judicially reapportioning or redistricting the state legislature. See *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964/1965 (special master appointed to prepare the plan); *Lucas v. Forty-Fourth Gen. Assembly*, 232 F. Supp. 797 (D. Colo. 1964); *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964) (such relief rejected because of lack of time); *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa.), *remanded*, 379 U.S. 40 (1964) (parties requested to submit proposed plans); *Stout v. Hendricks*, 228 F. Supp. 568 (S.D. Ind. 1963/1964). *But see Paulson v. Meier*, 232 F. Supp. 183 (D.N.D. 1964) (court rejected request for such relief, noting constitutional defects in plans submitted by plaintiffs and complexities of judicial reapportionment).

Once the court has selected a constitutionally sound plan, it may be used to serve until the legislature reapportions, or may be used later should the legislature amend the apportionment laws so as to render them unconstitutional. The plan probably would require some amendment after each census. Thus the Oklahoma district court's order of reapportionment will run until the fifteenth day after the general election in November, 1972, unless the legislature reapportions itself. *Reynolds v. State Election Bd.*, 233 F. Supp. 323, 332 (W.D. Okla. 1964).

⁸⁴ See discussion of Oklahoma case, notes 87-88 *infra* and accompanying text.

⁸⁵ See, e.g., *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964), where the court's order ran to the State Election Board, all those acting by and under its authority, and the various county election boards.

⁸⁶ These considerations appear to have influenced the district court in *Paulson v. Meier*, 232 F. Supp. 183 (D.N.D. 1964) where, in rejecting judicial reapportionment, the court noted the "detailed information and careful study and planning necessarily involved in formulating a constitutionally permissive legislative apportionment law, and the complexities of the subject matter involved." *Id.* at 189. Lack of feasibility led the Washington court to reject this remedy. *Thigpen v. Meyers*, 231 F. Supp. 938, 940 (W.D. Wash. 1964).

courts have frankly stated that judicial reapportionment may be the inevitable consequence of continuing legislative inaction.⁸⁷

Even if the courts choose to impose a permanent solution, enunciation of the criteria employed in formulating the plan may not be immediately forthcoming. The opinion of the only court which has imposed a permanent solution conspicuously fails to disclose the criteria employed by it for guidance.⁸⁸ A further disadvantage of the court-imposed plan is that it may, inadvertently or even by design, permanently disrupt a state's existing political structure. Once

⁸⁷ Though ordering its own reapportionment plan into effect, the Oklahoma district court expressed grave doubts concerning the judiciary's *power* to do so: "We know, of course, that the function of apportioning the State Legislature is essentially legislative in nature; one which the Courts have never before undertaken; and one from which we may very well be precluded, even in the face of inadequate redress for the deprivation of civil rights. We know that the judicial power to grant redress for deprivation of a civil right is usually a negative power, effected by conventional injunctive decree. It may well be that the affirmative relief we grant is in excess of our judicial power." *Moss v. Burkhart*, 220 F. Supp. 149, at 155 (W.D. Okla. 1963) (per curiam), *aff'd per curiam sub nom.*, *Williams v. Moss*, 378 U.S. 558 (1964), but remanded with respect to relief. Upon remand, the district court revised its order, but imposed its revised plan for the 1964 elections. *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964). The Connecticut district court expressed its "preference that reapportionment of the legislature be done by the legislature itself rather than by the Court. We still prefer it that way. But the hour is late. And we now believe, in view of the ample and repeated opportunities which have been afforded to the legislature to perform what is primarily its function of reapportioning itself, that we as a Court must act if the legislature does not succeed in doing so." *Butterworth v. Dempsey*, 237 F. Supp. 302, at 308-10 (D. Conn. 1964/1965). The court noted that it had been attempting to induce legislative reform on Connecticut's apportionment system since 1962. *Id.* at 309 n.2.

⁸⁸ *Moss v. Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963) (per curiam). This plan was modified by the district court in *Reynolds v. State Election Bd.*, 233 F. Supp. 323 (W.D. Okla. 1964). The court only indicates that as far as possible it implemented existing state law in matters such as selection of the number of seats in each house. How it determined the single-member district lines in Comanche, Oklahoma and Tulsa counties is not clear, nor is the selection of which counties to combine to form other districts. In *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964/1965), the court appointed a special master, pursuant to Rule 54 of the Federal Rules of Civil Procedure, to draw up a plan for reapportioning and redistricting the Connecticut legislature. The master, the Director of the Yale Computer Research Center, was, so far as the record indicates, given no instructions as to what criteria should be used in drawing the reapportionment plan. Such use of computers has been advocated as a solution to apportionment ills. Weaver & Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963). One authority has pointed out, however, that the instructions given to the computer will contain policy decisions made by the human programmer. Though the machine can reduce the burden of the required work, it cannot make the "political" decisions necessary to any reapportionment. DE GRAZIA, APPOINTMENT AND REPRESENTATIVE GOVERNMENT 1-8 (1963). In the Connecticut case, one might therefore have expected programming instructions by the court to the special master, but as in the Oklahoma Case, such clearly enunciated standards were not provided.

established, apportionment schemes tend to be difficult to alter, and representatives elected under the plan may be understandably loathe to amend it. Consequently, the political adjustments and compromises which might have been made by the legislature in response to an unquestioned mandate to reapportion may be vitiated by this remedy.⁸⁹

Temporary Judicial Relief

A. "Tinkering"

While largely free of the difficulties which beset permanent judicial reapportionment, temporary remedial measures may well be defective in other respects. One such measure, the "tinkering" method outlined by Justice Clark in *Baker v. Carr*, would consist of eliminating the most egregious discrimination by consolidating some districts and releasing some seats from the combined unit to underrepresented districts.⁹⁰ While as yet no court has adopted this approach, a related technique was utilized in *Reynolds v. Sims*. There the district court, having held the existing apportionment scheme invalid, first indicated its inclination to apply the "tinkering" approach unless the Alabama legislature reapportioned satisfactorily in time for the 1962 elections.⁹¹ The legislature then proposed both an amendment to the state constitution for submission to the electorate and an interim provision for use if the district courts invalidated the constitutional amendment.⁹² The district

⁸⁹ Illustrative of the high political stakes involved in drafting a constitutionally permissive reapportionment plan are the attempts of a Democratically-controlled New York Legislature to rewrite the state's reapportionment laws passed by the lame-duck Republican legislature, which were held valid by a federal district court. *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965). See *N.Y. Times*, May 11, 1965, p. 1, col. 6 (city ed.).

⁹⁰ 369 U.S. 186, 251 (concurring opinion). "One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and might be more effective. But the plan here suggested would at least release the strangle hold now on the Assembly and permit it to redistrict itself." *Id.* at 260.

⁹¹ *Sims v. Frink*, 205 F. Supp. 245, 248 (M.D. Ala. 1962) (per curiam), citing language quoted in note 90 *supra*.

⁹² The amendment, known as the "67-Senator Amendment," provided for a reapportionment of the Alabama senate using both population and geography as bases similar to the federal Senate. The amendment also provided for reapportionment of the house with the "equal proportions" method, so that the representation of the house came considerably closer to the constitutional requirements announced later in *Reynolds v. Sims*. In case this amendment was disapproved by the voters on the district court, the "Crawford-Webb Act" was passed. This act included a far less satisfactory apportionment of the house, but its reapportionment of the senate cor-

court found neither provision satisfactory, but from them culled apportionment plans which it found acceptable.⁹³ Consolidation and implementation of these provisions as an *interim* apportionment plan for use in the forthcoming elections was approved by the Supreme Court as an exercise of "proper judicial restraint,"⁹⁴ but both portions of the court-approved plan were held unconstitutional as permanent solutions.⁹⁵ The Alabama legislature will now be given a second chance to reapportion, but the effectiveness of the temporary "tinkering" approach in breaking the legislative deadlock remains to be determined.

B. *The Weighted Vote Plan*

Another temporary remedy proposed primarily as a wedge to break legislative deadlock is the weighted vote plan, which entails equalization of voting rights through weighting the vote of each legislator rather than by redrawing district lines.⁹⁶ Under such a plan the votes of legislators from underrepresented areas would be increased in value vis-à-vis those of representatives from previously "favored" areas.⁹⁷ The weighted vote scheme is mathematically

rected some of the "glaring discriminations" by putting smaller counties into multiple county districts and was considered a short step in the right direction. *Sims v. Frink*, 208 F. Supp. 431, 435-41 (M.D. Ala. 1962). See court's Appendices A-F, *id.* at 442-51.

⁹³ *Id.* at 442. The court used the Amendment's provisions with respect to the house, and the Crawford-Webb Act's reapportionment of the senate.

⁹⁴ 377 U.S. at 586.

⁹⁵ "[T]he District Court correctly indicated that the plan was invalid as a permanent apportionment." *Id.* at 537.

⁹⁶ See, e.g., Cormack, *Baker v. Carr and Minority Government in the United States*, 3 WM. & MARY L. REV. 282, 283 (1962); Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59, 82-85 (1963); 1964 DUKE L.J. 611, 618. See also Engle, *Weighting Legislators' Votes to Equalize Representation*, 12 WESTERN POL. Q. 442 (1959). The weighted vote was adopted by the court in *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964), though its order was never implemented. See Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 226 n.47 (1964). The remedy was also mentioned without disapproval by the court in *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 439, 180 A.2d 656, 670-71 (1962). Dissenting from a recent order in the *Lomenzo v. WMCA, Inc.*, litigation, Judge Levet proposed weighted voting as an interim solution to the problem created by the state court's invalidation of the reapportionment plan approved by the federal court. The majority preferred the temporary use of the invalid plan. See N.Y. Times, May 11, 1965, p. 28, col. 5 (city ed.).

⁹⁷ The formula proposed in *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964), was to "weight the vote of each and every member of the legislature in the same proportion as the population represented by him bears to the population norm or that figure which would result if each legislative district had the same population as every other legislative district." *Id.* at 941. The resulting equation is

simple to apply and would present few problems in tabulating votes. It is generally conceived as limited in application to the immediate solution of a reapportionment deadlock arising during special sessions held exclusively or primarily for the purpose of redistricting.⁹⁸ If extended to apply during regular legislative sessions, such a plan might impede effective committee participation by a legislator with a proportionately larger vote and engender difficulty with respect to such parliamentary devices as extended debate, quorum calls, and voice votes.⁹⁹

A more cogent objection to the weighted vote plan is that in practical effect it will not succeed in breaking a legislative deadlock. In the legislative process of drafting and negotiating a reapportionment plan, political party affiliation is likely to weigh more heavily on any given legislator than the fact that his particular district may be over or underrepresented. Consequently, further deadlock might ensue if weighted voting would significantly dilute the power to which a political party feels itself entitled, even though the party might be quite amenable to some other temporary remedy.¹⁰⁰

Another defect of the weighted vote system is that the court's mandate must be directed to the state legislature, which may be loathe to accept it. Since federal courts cannot effectively enforce

$$\frac{\text{Population presently represented}}{\text{Population norm}} = \text{Weight of vote.}$$

In the recent order in the New York apportionment case, the dissenting judge proposed a hybrid weighted voting system which would result in fractional votes. His formula was

$$\text{Weight of vote} = \frac{\text{Population of District}}{1960 \text{ Population of State}} \times \text{Number of Assembly seats.}$$

See N.Y. Times, May 11, 1965, p. 29, col. 7 (city ed.).

⁹⁸ See 1964 DUKE L.J. 611, 618.

⁹⁹ The critics of the weighted vote plan have attacked it only in the context of a regular legislative session, and their criticisms appear sound in that context. See, e.g., Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 395 n.150 (1963); Comment, 72 YALE L.J. 968, 1036-37 (1963). The court in *Thigpen v. Meyers*, 231 F. Supp. 938, 941 (W.D. Wash. 1964), found such criticisms "exaggerated and of no greater dignity than an inconvenience." However, the plan envisaged the use of the weighted vote in a regular session, and the court was subsequently persuaded that the plan was unworkable. See Dixon, *supra* note 96, at 226 n.47.

¹⁰⁰ Adoption of the weighted vote in New Jersey would have resulted in the Republican Senator from Essex County having 19 votes—all Republican votes. Yet had the county been redistricted, the Democrats could have counted on at least some of those votes, and possibly 9 of them. It is not here argued that such a result is unconstitutional. In fact, the constitutional permissibility of such seeming unfairness is guaranteed by the Supreme Court's decision in *Fortson v. Dorsey*. See text accompanying notes 12-13 *supra*. The criticism is directed at the practical consequences. See N.Y. Times, Nov. 18, 1964, p. 46, col. 1.

such an order, they may well be reluctant to impose this remedy.¹⁰¹ Moreover, acrimony between federal court and state legislature is hardly conducive to the mutual respect and cooperation required for rapid and effective reapportionment. The overall inappropriateness of the weighted vote system is suggested by the fact that it has been expressly rejected as a remedial technique with near unanimity.¹⁰²

¹⁰¹ The history of *Virginia v. West Virginia*, 246 U.S. 565 (1918) is often cited as an example of the dangers inherent in placing a state legislature under a decree to act affirmatively. Whether the reluctance of legislators to adopt a weighted vote plan lay behind the failure of the *Thigpen* court to include such a remedy in its final order is not clear. See note 99 *supra*. Legislators may well prefer some other remedial technique, and the image of a legislator wielding as many as 400 votes in the legislature probably has little popular appeal. See Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 43, 44-45, where the author argues against weighted voting and in favor of a fractional system as a permanent solution to certain representation problems. From the point of view of electioneering and constituent contact it might be desirable to have geographically small districts, although very sparsely populated, with representatives in these districts having a vote less in value than 1. It may also be desirable to preserve certain political subdivisions intact and this might be achieved by adjusting the legislator's vote upwards or downwards by some fraction, but in no case should a legislator have a vote greater in value than 2. *Id.* at 42-45. The New York legislature adopted a fractional system in two of its proposed reapportionment plans, for the reasons suggested by Auerbach. In Plans C and D, 39 or 47 members of the 147 or 170 member Assembly would have had fractional votes ranging from 1/6 to 3/4. *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 919-20 (S.D.N.Y. 1965). This system would have preserved existing county units as representative districts in the sparsely populated areas of the state. The district court conceded the validity of the purpose of the fractional system but disapproved the two plans on the ground that a representative with a fractional vote would carry influence disproportionate to his vote in the business of the legislature such as committee hearings, lobbying, party caucuses, though his vote on the floor would represent his actual political influence. *Id.* at 923. More significantly, the court views fractional voting as an attempt to preserve the traditional New York bias against voters living in the state's more populous counties, a bias which was given as one reason by the Supreme Court for invalidating the existing New York apportionment scheme. *Id.* at 923-24. It may be argued, however, that the pendulum which has favored sparsely populated areas in the past is being swung back in favor of the urban voters with a somewhat heavy hand. The considerations given by the court for disapproving fractional voting go beyond a determination of whether legislators represent equal numbers of people. The court substitutes its own judgment for that of the legislature in a matter which arguably is best left to the legislature to decide, so long as the apportionment scheme meets the basic equality of representation test. In *Fortson v. Dorsey*, 379 U.S. 433 (1965), the Supreme Court approved multimember districts. It may be argued that an at-large member does not have the same kind of political influence a single district member possesses. See note 13 *supra* and accompanying text. Arguably, this kind of inequality is no different from the inequality experienced by a representative with 1/6 vote and one with a full vote. The district court in New York had four plans to choose from and thus its decision was somewhat easier than if it would have had to decide not merely its preference, but whether fractional voting is constitutional. Except for the past tradition of overrepresentation in those areas given fractional votes in New York, the scheme may have been considered valid.

¹⁰² Though considered, the highest courts did not adopt such a measure in either

C. The At-Large Election

A third temporary remedy which has received favorable comment is the at-large election. Besides effectuating the "one man, one vote" ideal, this device shares with the weighted vote plan the advantage of avoiding judicial construction of district lines.¹⁰³ Moreover, since the court's mandate would run against state election officials, the delicate issue of placing a state legislature under federal judicial sanction is avoided. The ordering of at-large elections has precedent both in state courts¹⁰⁴ and, as a result of the Supreme Court decisions, pursuant to a federal statute.¹⁰⁵ The chief virtue claimed for this device is its utility as a temporary expedient to induce prompt and effective legislative action.¹⁰⁶ State legislators

Oklahoma or New Jersey upon a general agreement that such a plan would violate the state constitution. *Brown v. State Election Bd.*, 369 P.2d 140, 148-49 (Okla. 1962), citing *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960), and the parties' briefs therein. The New Jersey court never reached a final judgment on this point, though later a New Jersey court ruled that the adoption of the weighted vote by the New Jersey Senate was unconstitutional. 54 NAT'L CIVIC REV. 33-34 (1965). The court in *League of Neb. Municipalities v. Marsh*, 209 F. Supp. 189, 195 (D. Neb. 1962), rejected the idea, and in *New Mexico* it was held invalid. *Cargo v. Campbell, Santa Fe County Dist. Ct., N.M.*, Jan. 8, 1964, cited in *Dixon, supra* note 96, at 226 n.47.

¹⁰³ See, e.g., *Emerson, Malapportionment and Judicial Power*, 72 YALE L.J. 64, 77 (1962); *Krastin, The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549, 569 (1963); *Lewis, Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1087-89 (1959); *McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 705 (1963); *Comment*, 72 YALE L.J. 968, 1037 (1963). Two state constitutions require elections at large when the legislature fails to reapportion itself. MO. CONST. art. 3, §§ 2, 3; ILL. CONST. art. 4, §§ 7, 8. Elections at large were held in Illinois under these provisions in 1964. 53 NAT'L CIVIC REV. 379 (1964).

¹⁰⁴ See *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932), where the Supreme Court of Appeals issued a writ of mandamus compelling election officials to conduct at-large elections for the state's congressional delegation. The at-large election was required by federal statute where the state legislature failed to reapportion in accordance with law. At present, federal law provides for the election of Congressional delegations at large "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives. . . ." 55 Stat. 761 (1941), 2 U.S.C. § 2a(c)(5). Since *Baker v. Carr*, no federal district or state court has ordered at-large elections as remedy, though some have considered this mode of relief. See, e.g., *Scholle v. Hare*, 367 Mich. 176, 189, 116 N.W.2d 350, 355 (1962); *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn. 1964).

¹⁰⁵ *Smiley v. Holm*, 285 U.S. 355 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932). See also *Hume v. Mahan*, 1 F. Supp. 142 (E.D. Ky. 1932), discussed in *Lewis, supra* note 103, at 1088 n.176.

¹⁰⁶ *Lewis, supra* note 103, regards it as particularly effective in this regard and tentatively attributes to it considerable success in effecting reapportionment in Minnesota, Missouri and Virginia in 1932-33, in Illinois in 1947, and in Hawaii in 1956. In the latter case, after the trial court granted an injunction requiring elections at-large, Congress reapportioned the territorial districts for the first time in fifty years. *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956). Even the

naturally wish to avoid the political uncertainties as well as the financial hardship attendant upon such a procedure. Furthermore, opposition to legislative reapportionment may be quite effectively dispelled if, as is frequently the case, its opponents stand to lose most by an at-large election.¹⁰⁷

On the other hand, the very factors which enhance the remedial effectiveness of the at-large election may also render it undesirable.¹⁰⁸ Direction of such an election may be regarded an unnecessary judicial interference with the governmental process.¹⁰⁹ Moreover, it may produce certain unintended and objectionable effects, such as inundating minority interests and allowing one large urban center to dominate the state legislature, or leaving some areas of the state entirely unrepresented in the sense that no legislators residing in a given region may be elected.¹¹⁰ Besides generating administrative problems, the at-large election may entail a ballot so lengthy¹¹¹ as to preclude a rational, considerate choice by the

at-large election's severest critic, Dixon, *supra* note 96, would concede this potentially beneficial effect, at 228. See also, McKay, *supra* note 103, at 705; Emerson, *supra* note 103, at 77.

¹⁰⁷ If sparsely populated counties in one region of the state were overrepresented, the at-large election may well result in that region having no representatives at all. This happened in Minnesota in the congressional elections in 1932, which were held at large as a result of *Smiley v. Holm*, 285 U.S. 355 (1932). See Shumate, *Minnesota's Congressional Election at Large*, 27 AM. POL. SCI. REV. 58 (1933).

¹⁰⁸ The financial hardship and confusion engendered by an at-large election were cited as reasons for refusing such a remedy in *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 411, 414 (D. Neb. 1964).

¹⁰⁹ In *Brown v. State Election Bd.*, 369 P.2d 140, 148 (Okla. 1962), the Supreme Court of Oklahoma rejected the at-large remedy since it would be contrary to state constitutional provisions relating to the election of representatives by districts.

¹¹⁰ See note 107 *supra*. That such results are considered undesirable by courts is illustrated by the following statements used in rejecting the at-large remedy sought by plaintiff: "Elections at large would undoubtedly satisfy the constitutional requirements of legislative representation. They would, however, be chaotic insofar as the voting public is concerned and such remedy might very well produce a result far more inimical than the evils sought to be eradicated in that a legislature elected on a state-wide basis might very well produce a less representative government than now exists." *Thigpen v. Meyer*, 231 F. Supp. 938, 940 (W.D. Wash. 1964). "It is possible, in an at-large election, that a relatively small group of votes (numerically or percentage-wise) might very well, if organized, effect a voting weight out of all proportion to its number, and result in a wrong far more grievous than that which has in the past been suffered by some of the voters of this state." *Paulson v. Meier*, 232 F. Supp. 183, 188 (D.N.D. 1964).

¹¹¹ An election at large in Washington would have resulted in a ballot listing between 1600 and 3000 candidates, 52 NAT'L CIVIC REV. 325 (1963). See 1964 DUKE L.J. 611, 617. The Illinois at-large elections for members of the state house of representatives in 1964 resulted in a ballot with 236 names for 177 seats. See Baker, *A Long, Long Ballot*, 53 NAT'L CIVIC REV. 170 (1964).

electorate among the numerous candidates.¹¹² For these reasons, since *Baker v. Carr* a majority of courts has rejected this mode of relief.¹¹³

In particular cases, however, some or all of these considerations may be irrelevant. For example, in many states only one house of the legislature, sometimes the smaller of the two, is seriously malapportioned.¹¹⁴ In such a situation an at-large election would raise difficulties no more serious than those accompanying ordinary congressional statewide elections.¹¹⁵ Furthermore, the traditional objection that absent state constitutional or statutory authority for elections at-large the body so elected would be of doubtful legitimacy no longer seems persuasive in light of the Supreme Court's indication that state law cannot be allowed to delay reapportionment.¹¹⁶ Consequently, the at-large election merits serious consideration as a suitable mode of temporary relief.

Federal courts which do not foreclose themselves from imposing any or all of these remedies will possess both maximum flexibility and a distinct psychological advantage. Legislatures may be spurred to effective reapportionment by uncertainty and apprehension as to the type of judicial relief that may follow their own vacillation. Should the legislature still fail to respond, the district courts will have to choose between a permanent solution and some form of interim relief, as the exigencies of each particular case demand.

¹¹² The difficulty of informing electors was cited as a reason for denying the remedy in the Nebraska case. *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 411 (D. Neb. 1964). Under traditional notions of the selection of representatives, it is a remarkable task for a voter to weigh the relative merits of several hundred individuals vying for office. Thus the man whose name is widely known because of associations or events unrelated to this particular election often does well. In the Illinois at-large election of 1964 it is notable that an Adlai Stevenson and an Eisenhower received the largest numbers of votes. This thesis is also supported by the results of Minnesota's at-large election in 1932. See Shumate, *supra* note 107.

¹¹³ *Moss v. Burkhardt*, 207 F. Supp. 885, 891 (W.D. Okla. 1962) ("drastic and unprecedented relief" which was deemed inappropriate). See also cases cited *supra* notes 108-10.

¹¹⁴ *E.g.*, one half the states have one house with 35 or fewer members, while another 20 states have one house with 50 members or less. See NATIONAL MUNICIPAL LEAGUE, *COMPENDIUM ON LEGISLATIVE APPORTIONMENT* (1962).

¹¹⁵ Dixon, *supra* note 99, at 395, argues that the use of election at-large as a remedial device for state legislative malapportionment must be sharply distinguished from its use in congressional elections. With respect to the size of ballot, it would be no longer in half the states than a congressional ballot would in New York or California. See note 114 *supra*. Congress has specifically authorized the use of an at-large election for such large delegations. See note 104 *supra*.

¹¹⁶ See text *infra* at notes 120-22.

The Supreme Court has recognized that reapportionment is primarily a legislative responsibility, and that federal courts should defer to the state legislatures wherever possible. A reasonable compromise between the requirement that no further elections be held under the invalid existing system and the desirability of deference would entail consideration primarily of temporary judicial relief even after the legislature has failed in its initial opportunity to reapportion, at least where it seems reasonable to expect that temporary relief will break the legislative deadlock.¹¹⁷ This approach would also give the federal courts an opportunity clearly to inform the legislature of the particular constitutional defects of the existing system under the standards enumerated in the *Reapportionment Cases*. While the desirability of rapid and effective relief is evident, the rights of plaintiffs in apportionment cases appear to be in no greater need for immediate protection than those of the protagonists in *Brown v. Board of Education*,¹¹⁸ where the Court's mandate still has not been substantially complied with. The numerous problems inherent in fashioning and applying judicial relief, and manifestations of public sentiment favoring corrective action by the states themselves,¹¹⁹ seem to militate against permanent judicial reapportionment except as a last resort.

EFFECT OF STATE LEGISLATION

Effect on Legislative Action

In the *Reapportionment Cases* the Supreme Court clearly indicated that existing state constitutional and statutory provisions should not be allowed to obstruct legislative attempts at reappor-

¹¹⁷ This was the approved scheme in Alabama. See text discussion *supra* and notes 92-93. In Iowa, the district court, having given the legislature one session to act, and having disapproved the reapportionment legislation enacted there, although it was an improvement, gave the legislature a further opportunity to act, evidently on the ground that some headway was being made. *Davis v. Cameron*, 238 F. Supp. 462 (S.D. Iowa 1965) (one dissent).

¹¹⁸ 347 U.S. 483 (1954). See Dixon, *supra* note 96, at 229.

¹¹⁹ See, e.g., the attempts in Congress to strip federal courts of jurisdiction in state legislative apportionment cases, amply discussed in Dixon, *supra* note 96, at 231-38, and McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964). A number of states (16 as of Dec. 28, 1964) have petitioned Congress to call a constitutional convention, the general purpose of which would be, if not to repeal the *Reapportionment Cases*, then at least to deprive federal courts of jurisdiction. See N.Y. Times, Dec. 28, 1964, p. 24, col. 1. The same article indicates, however, that the states are accepting the decision in the *Reapportionment Cases*, though controversy centers upon who is to reapportion, and how.

tionment.¹²⁰ Regardless of the existing provisions of the state constitution, the legislature "has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements."¹²¹ Some courts have facilitated legislative apportionment by declaring state statutes or constitutional provisions prospectively invalid.¹²² In any event, it is clear that the legislature is to be accorded primary responsibility for reapportionment. Politically speaking, deference to state legislative machinery seems entirely appropriate, though perhaps overly magnanimous in view of many states' heretofore feeble response to the malapportionment problem.¹²³

Effect on Judicial Remedies

Neither should cumbersome or contrary state law be permitted to obstruct formulation of remedies by the federal judiciary. It is settled that state laws, constitutional or statutory, which have been held invalid under the fourteenth amendment's equal protection clause are to be simply ignored in considering judicial remedies.¹²⁴ Consequently, the question of the degree to which existing state law should be respected by the federal courts in fashioning relief arises only when, and to the extent that, state law is not held to be unconstitutional.

Despite the Supreme Court's broad statement in *Reynolds v. Sims* that the lower courts should attempt to reconcile the remedy

¹²⁰ *Roman v. Sincok*, 377 U.S. 695, 710-11 n.23 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964).

¹²¹ *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675-76 (1964).

¹²² See, e.g., *Buckley v. Hoff*, 234 F. Supp. 191 (D. Vt. 1964), where the district court held invalid a Vermont constitutional provision the complexity of which in practical effect prevented the legislature from enacting reapportionment legislation. The court's action was designed to free the hand of the legislature.

¹²³ The New York district court seems to have acted very properly, therefore, in ordering into use for the 1965 elections a reapportionment law which had been held invalid under the state constitution, which provides for 150 members in the state assembly, whereas the law held valid under the federal constitution provided for 165 seats. The dissenting judge, who argued in favor of conforming the apportionment laws to the state constitution through a weighted vote system, apparently ignored this aspect of the *Reapportionment Cases*; nor did the majority of the three judge panel rely on the *Sincok* or *Tawes* decisions, *supra* note 120. See N.Y. Times, May 11, 1965, p. 29, col. 6 (city ed.).

¹²⁴ See, e.g., *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn. 1964); *Valenti v. Dempsey*, 211 F. Supp. 911 (D. Conn. 1962); *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962); *Jackman v. Bodine*, 78 N.J. Super., 414, 188 A.2d 642 (1963) (state constitutional provisions struck down by the state court).

with the state constitution to the maximum extent possible,¹²⁵ the district courts appear to be exercising their own discretion as to imposition of corrective measures, sometimes in sweeping disregard of state law. In several cases the Supreme Court has approved district court action setting aside elections prescribed by state law and reducing the terms of elected representatives.¹²⁶ Even more drastic was the mandate that the 1964 elections in Connecticut be cancelled and that the 1963 legislature remain in session through 1965.¹²⁷

In some circumstances there may be good reason not to follow the existing constitutional or statutory scheme. For example, in *Roman v. Sincock*¹²⁸ adherence to the Delaware constitution would have necessitated considerable delay in reapportionment pending formulation and approval of a plan by two successive legislatures. However, the Supreme Court's pronouncement in *Reynolds* that reasonable deference to state law and political processes should characterize federal court action seemingly entails, wherever possible, a preservative approach, implementing remedies for malapportionment as consistent with the existing state law as is feasible.¹²⁹

GERRYMANDERING

While the *Reapportionment Cases* have eliminated malapportionment¹³⁰ as a means of achieving and perpetuating minority domi-

¹²⁵ "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of the state constitutions insofar as is possible." 377 U.S. 533, 584 (1964). See *Sims v. Frink*, 377 U.S. at 586-87.

¹²⁶ In *Hughes v. WMCA, Inc.*, 379 U.S. 694 (1965), the Supreme Court approved a district court order which reduced the terms of the state legislators to one year in order that new elections could be held under a valid reapportionment which was to be enacted in 1965. The Court, in the same decision, also approved the reduction of the terms of Virginia's senators, so that their terms would end in 1966 instead of 1968. The senators had been elected under an unconstitutional apportionment. Virginia's delegates to the state General Assembly, however, would be elected under a new and valid reapportionment in 1965. *Mann v. Davis*, 238 F. Supp. 453, 460 (E.D. Va. 1964), *aff'd* 379 U.S. 694 (1965). In *Davis v. Mann*, 377 U.S. 678 (1964) and *Roman v. Sincock*, 377 U.S. 695 (1964), the Supreme Court expressly approved the lower court's enjoining of further elections under invalid apportionment schemes until constitutionally acceptable legislation or other satisfactory relief was forthcoming. Some lower courts have been unwilling to cancel elections required by state law, and have restricted themselves by these provisions in formulating relief. See, e.g., *Paulson v. Meier*, 232 F. Supp. 183, 187-88 (D.N.D. 1964); *League of Neb. Municipalities v. Marsh*, 232 F. Supp. 411 (D. Neb. 1964).

¹²⁷ *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964/1965).

¹²⁸ 377 U.S. 695 (1964).

¹²⁹ See note 39 *supra*.

¹³⁰ Malapportionment is the use of districts whose population base varies from

nation of state legislatures, some commentators feel that carefully planned gerrymandering still poses a substantial threat to the goal of equal representation for all.¹³¹ For example, it can be demonstrated that a political party could perpetuate its majority in the state legislature with the votes of less than half the electorate;¹³² by carefully drawing district lines, such a party could arrange close victories for its own candidates and cause the opposition to squander many of its votes in overwhelming electoral successes.¹³³ New York, where the minority Republican Party has consistently maintained a majority of congressmen despite fairly equally-apportioned dis-

district to district, *i.e.*, a representative from one district will represent more or less citizens, voters, or people (whatever he represents) than the representative of another district. See note 2 *supra*.

¹³¹ Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 275-78 (1962); Note, 39 N.Y.U.L. REV. 264, 279-85 (1964). See Comment, 59 Nw. U.L. REV. 500 (1964); Note, 72 YALE L.J. 1041 (1963).

¹³² See HACKER, CONGRESSIONAL DISTRICTING 40-70 (1963) [hereinafter cited as HACKER]. The author directs his attention to Congressional districts, but the principles involved are very closely related to state legislative districting.

Assume a state with one million voters which has been ordered by a court to divide its fifty-member assembly among fifty districts of 20,000 voters apiece. If Party A, with the support of 40% of the electorate, has control of the legislature, it will be able to perpetuate its control in complying with the court order, even though Party B has 60% of the voters favoring a victory for B. If the population is distributed so that there are 11,000 Party A supporters in 28 districts, and 9,000 voters favoring Party B in the same districts, Party A can be relatively certain of controlling 56% of the legislature. In the remaining 22 districts, Party B will have an average of 15,818 and 2/11 members, while Party A will have only 4,181 and 9/11 voters favoring it.

The most extreme case, as visualized by Mr. Justice Stewart, would enable slightly more than 25% of the electorate to control a 100 seat legislature by tallying one-vote victory margins in 51 districts and collecting no votes in the other 49. *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 750 n.12 (1964) (dissenting opinion).

Of course, the above examples make questionable assumptions about party loyalty and the immobility of the electorate. In practice gerrymandering is subject to limitations. Overly blatant gerrymandering can create an adverse reaction among the gerrymandering party's supporters. It should be clear, however, that by careful use of the gerrymander a minority group can maintain control of the legislative body of government.

¹³³ HACKER 47-53. Professor Hacker sees three different ways to gerrymander, without regard to the shape of the district. One of the methods is the use of unequally populated districts. *id.* at 49-53, a technique now apparently forbidden, except possibly in the use of multimember and floterial districts. See text accompanying notes 8-16 *supra*. Another form of gerrymandering is the concentration of one party's voters into one district so as to cause them to cast useless "excess" votes. HACKER 47-49. The third form of gerrymandering is the distribution of the gerrymandered party's votes so as to allow them to constitute a large share of the total, but less than the total of the gerrymandering party. In this manner, the party being discriminated against is forced to cast many "wasted" votes in close districts. *Id.* at 49. The most effective gerrymandering can and will make use of all three types.

tricts, graphically illustrates the effectiveness of gerrymandering even under the "one man, one vote" requirement.¹³⁴

Moreover, subtle gerrymandering can be applied to vitiate interests other than political party affiliation.¹³⁵ For example, the fringes of large urban areas could be swallowed up by predominantly rural districts, or the bloc vote of a sizeable racial, ethnic, or economic interest group obliterated through division among neighboring districts composed of more powerful adverse interests.¹³⁶ Moreover, the evils possible in this context might be compounded by discriminatory use of multimember districts.¹³⁷ It would seem, therefore, that the vote dilution formerly accomplished by malapportioned legislative districts may still be attained by different means, making likely an eventual Supreme Court holding that the equal protection envisaged by the fourteenth amendment requires that apportionment be equal according to factors *in addition to* population.¹³⁸

¹³⁴ *Id.* at 54-57. In analyzing various recent Congressional elections in California, Hacker concludes that Republicans made more effective use of their advantages than did the Democrats in employing not only vote concentration and distribution, but also unequally populated districts. *Id.* at 59.

¹³⁵ "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, *The Implementation of Representative Government in a Democracy*, 48 IOWA L. REV. 549, 570 (1963).

¹³⁶ See *Reynolds v. Sims*, 377 U.S. 533, 579-81 (1964). Such group interests definitely may not be considered as providing any justification for deviation from the equal population standard. Whether such interests—ethnic, economic, geographical, or racial—may be considered within the context of one-man-one-vote is a problem not met by the Court. When the Court did have a chance to face the issue squarely, it preferred to uphold the lower court's finding that the plaintiffs had failed to prove that the state had considered race in drawing Congressional district lines. *Wright v. Rockefeller*, 376 U.S. 52 (1964).

¹³⁷ *Reynolds v. Sims*, 377 U.S. 533, 577, 579 (1964). *But cf.* *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 731-32 (1964).

¹³⁸ See Neal, *supra* note 131, at 280. *Reynolds* noted that "One must ever be aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination." 377 U.S. at 563. Whether this dictum can be construed broadly by implication to vitiate gerrymandering other than racial is undecided. On its face, it might seem to include all blatant gerrymandering that substantially deprives someone of a fair chance to cast an effective ballot. However, at the time the phrase was used in *Reynolds*, the Court was considering whether allocation of ten votes to one person was "simple discrimination," while the subtler form was unequally populated districts which discriminated against voters on the basis of residence. *Id.* at 562-63.

The phrase, "The [fifteenth] amendment nullifies sophisticated as well as simple-minded modes of discrimination," was first enunciated in *Lane v. Wilson*, 307 U.S. 268, 275 (1939). In that case, the Court held that Oklahoma's registration law violated the fifteenth amendment because of the inherent tendency of the law to discriminate against the Negro voter. Mr. Justice Frankfurter reiterated the phrase in *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1969), another fifteenth amendment

Although precedent furnishes no basis for characterization of gerrymandering as unconstitutional per se, in one particularly blatant incident it has been struck down by the Supreme Court. In *Gomillion v. Lightfoot*¹³⁹ the Alabama legislature had redrawn the boundaries of the city of Tuskegee so as to place outside the city limits nearly all Negro community leaders and teachers at Tuskegee Institute.¹⁴⁰ The Court acknowledged that political subdivision is unquestionably within the normal legislative prerogative,¹⁴¹ but held that the power to set political boundaries could not be invoked in order to deprive the Negro community of the right to vote in municipal elections.¹⁴² Since the purpose of racial discrimination was easily inferred from comparison of the old and new boundaries, and since it appeared that the right to vote in municipal elections had been withdrawn from Negroes alone, the majority was content to posit its holding on the fifteenth amendment guarantee of the right to vote without regard to race.¹⁴³

The invalidation in *Gomillion* of racially motivated gerrymandering was somewhat vitiated by the holding in *Wright v. Rockefeller*,¹⁴⁴ where the Court refused to interfere with the congressional districts drawn by the New York legislature. The evidence there indicated that the Seventeenth District, with a population of 94.9 percent Caucasian, had an irregular eleven-sided boundary with the predominantly Negro and Puerto Rican Eighteenth District.¹⁴⁵ Nonetheless, the district courts, ruling that the

case. See text accompanying notes 139-43 *infra*. By putting the phrase into the *Reynolds* case, the Court seems to imply that the same standards will be used in determining whether there is discrimination under both the fourteenth and fifteenth amendments.

¹³⁹ 364 U.S. 339 (1960).

¹⁴⁰ Mr. Justice Frankfurter described the allegations of the plaintiffs: "Prior to [the Act creating the new boundary lines] the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure. . . . The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. *Id.* at 341.

¹⁴¹ *Id.* at 342. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

¹⁴² 364 U.S. at 347-48 (1960).

¹⁴³ *Id.* at 342. Mr. Justice Whittaker refused in his concurring opinion to justify the result by the fifteenth amendment. He felt that that amendment gave no guarantee of a right to vote in any given municipality. Instead, he viewed the Alabama legislature's action as "an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment. . . ." *Id.* at 349 (concurring opinion).

¹⁴⁴ 376 U.S. 52 (1964).

¹⁴⁵ *Id.* at 54, 60.

plaintiffs had failed to prove that the boundary was racially inspired¹⁴⁶ was affirmed by the Court in a 7-2 decision.¹⁴⁷ Since state legislatures are rarely explicit about the underlying bases for their preference of one plan over another, the decision in *Wright* seems at once to place an extremely difficult burden of proof upon parties alleging discrimination¹⁴⁸ and to encourage legislative silence with respect to the criteria employed in reapportioning. Accordingly, two dissenters in *Wright* urged that the shape and racial composition of the Seventeenth District were at least prima facie evidence of invidious discrimination,¹⁴⁹ and that the state should be required to prove that other permissible considerations dictated its choice of boundaries.¹⁵⁰

An unarticulated but perhaps critical factor in the *Wright* decision may have been the practical difficulty inherent in formulating and securing agreement upon an alternative redistricting plan under which racial factors would be disregarded or neutralized.¹⁵¹ For example, apportionment of all of Manhattan's districts equally by racial population would produce a 62.3 percent Caucasian majority in each.¹⁵² Such an arrangement is impractical for several reasons, however. It could deprive a minority of any effective representation and lends itself to ready use of the gerrymandering devices discussed above. It would seem nearly impossible to assure equal racial and ethnic apportionment within anything resembling traditional district boundaries, or indeed within any compact and geographically balanced political subdivisions.¹⁵⁴ If other factors such as religious affiliation, political loyalties and economic interests are superimposed, the task would become hopeless.

The simple solution to these problems would be an assertion that the fourteenth amendment merely requires that the votes of all citizens be weighted equally and imports no guarantee that minority groups and interests as such will be effectively represented in the

¹⁴⁶ 211 F. Supp. 460 (S.D.N.Y. 1962).

¹⁴⁷ In affirming, the Court seemed to approve of Judge Feinberg's analysis, and affirmed the finding that the districting was not motivated by racial considerations. 376 U.S. at 56-58. Note, 78 HARV. L. REV. 143, 253-54 (1964).

¹⁴⁸ Note, 72 YALE L.J. 1041, 1056 (1963).

¹⁴⁹ 376 U.S. at 61 (Douglas, J., dissenting).

¹⁵⁰ *Id.* at 73 (Goldberg, J., dissenting).

¹⁵¹ See *Wright v. Rockefeller*, 211 F. Supp. 460, 467-68 (S.D.N.Y. 1962).

¹⁵² *Id.* at 465.

¹⁵³ See text accompanying notes 14-22 *supra*.

¹⁵⁴ DE GRAZIA, ESSAY ON APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 37 (1963).

nation's legislatures. Yet denial of just such representation was the primary factor impelling the Supreme Court in *Baker v. Carr* to accord the plaintiffs standing to sue.¹⁵⁵ To allow legislatures by gerrymandering to deprive any group of fair representation would seem to sacrifice substance for form. The use of careful studies of voting habits to construct equally populated districts in which there will be no real change in the political power structure is perhaps as sinister as legislative inaction in the face of unequally populated districts.

Unfortunately, it seems evident that the theoretical desirability of affording every group or interest proportional political representation is vastly outweighed by the administrative impossibility of doing so. Judicial attempts to alleviate any but the most blatant instances of gerrymandering will cast the courts into the thorniest recesses of the "political thicket,"¹⁵⁶ with the prospect of affording the plaintiffs a Pyrrhic victory at best.

j. l. a.

w. j. n. II

e. l. r., jr.

¹⁵⁵ 369 U.S. 186, 207-08 (1962).

¹⁵⁶ See *id.* at 266-349 (dissenting opinions).