Notre Dame Law Review

Volume 35 | Issue 3 Article 3

5-1-1960

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Introduction

The establishment of an interim legislative committee on reapportionment at the 1959 session of the Indiana General Assembly presages a long overdue reapportionment of the Indiana legislature.[1] One might surmise that this action was taken because of the imminence of the next federal decennial census, but the federal census has no bearing on the matter because the venerable Indiana Constitution stipulates that apportionments of the legislature shall be based on a special state-administered census.[2]

It is unlikely that the legislature will reapportion itself at the 1961 biennial session. It may simply take no action, as it has done consistently since 1927. Or — more likely — it may enact a statute or propose a constitutional amendment as the prelude to reapportionment in the near future. In the latter event, actual reapportionment would not occur before the 1965 session, because an amendment to the constitution must be passed by two successive general assemblies and then be ratified in a popular referendum.[3] It seems evident, however, that the General Assembly, which has dodged this hot potato for years, now is at the end of the line and in 1961 will have to come to grips with this complex and explosive problem.

I. An Unrepresentative Legislature

To call the Indiana legislature a representative assembly seems a travesty in view of the gross disparities in the population of the districts. On the basis of 1960 population estimates calculated by the writers,[4] one House district (Parke) has a population of 14,700, whereas another (Marion-Johnson) has 729,000. One Senate district (Clay-Parke) has a population of 40,000, while another Senate district (Marion-Johnson) has 729,000. The populations of each of the districts are shown in the accompanying Maps 1 and 2 in the Appendix. It may be observed that four House districts have populations in excess of 200,000, while four others have 20,000 or less. The average population per representative is 46,856, but only a few districts approximate that figure. Eighteen districts with twenty-six representatives exceed the ratio of representation by more than 50% and four districts have less than 50% of the ratio. Comparable inequality prevails in the Senate districts. Five Senate districts exceed 200,000, while three have less than 50,000. Most districts deviate from the ratio of representation (93,712) by more than 50%.

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1 Ind. Acts 1959, ch. 410.
2 Ind. Const. art. IV, § 5.
3 Ind. Const. art. XVI, § 1.
4 These estimates are projections of the July 1, 1957 estimates for each county and major city prepared by the Indiana Department of Health. The reliability of the estimates has been sustained by recent special censuses in some large cities including Indianapolis.

Comparison of district populations is complicated by two factors: some multimember districts (two Senate and nine House) and the "joint districts." The degree of malrepresentation shown is somewhat exaggerated by the "joint districts," an unusual system of dual districts in which a second district is superimposed on the general districting pattern. Thus Marion County constitutes a House district with eleven members and with Johnson County comprises a "joint district" with one member. Similarly, Vigo County is a Senate district while Vigo and Sullivan Counties constitute another Senate district. The House and Senate districts with populations in excess of 300,000 are such "joint districts."[5] This dual district arrangement — to the writers' knowledge unique — has prevailed in Indiana for a century. It may have been devised to afford more equitable representation without dividing counties by giving fractional representation to counties which had a population substantially in excess of the ratio of representation but not entitled to a full additional representative or senator.

The joint districts make impossible any precise comparison of the representation ratios of those areas of the state with the other districts. In an attempt to make a comparison, some publications have compared the amount of representation for each county, arbitrarily prorating joint senators and representatives and those in multicounty districts. Thus, it is stated that Lake County is entitled, on the basis of its population, to 11.46 representatives and actually has 5.5, including one-half of the joint representative. That analysis appears specious. Does Vanderburgh County really have three representatives, three and one-third, or four? What bearing does the residence of the representative have? That analysis is particularly dubious when applied to ordinary multicounty districts. Thus, it may be said that Henry County with 53,800 population has one-half a representative and is slightly under-represented while Rush County with only 20,600 also has one-half a representative and is greatly over-represented.[6] Since those counties comprise a district how can the residents of Rush County have any more or less representation than the residents of Henry County? The fallacy of such analysis is the premise that counties are units of representation; the actual units are districts which in some instances coincide with one county.

The pattern of malrepresentation in this state is conspicuously different from that in several states where one or two great metropolitan areas are grossly under-represented and "outstate," "downstate," or "upstate" is correspondingly over-represented. This difference, of course, is attributable to the absence of any great metropolitan center containing upward of half of the state's population. Indiana's largest city has only 10% and its metropolitan area less than 15% of the state's population. However there is a distinct regional pattern. The block of six House districts containing twelve counties and comprising the southeastern portion of the state have an aggregate of 209,000 population and six House seats, the same number as the Lake and Lake-Porter districts with a population of 594,000. In this state, as elsewhere, representation in the legislature varies

5 The term "joint district" is used loosely by some people to designate any multi-county district. The writers apply it only to the dual districts.

6 See, *e.g.*, INDIANA CHAMBER OF COMMERCE, THE PROBLEM OF REAPPORTIONING SEATS IN THE INDIANA LEGISLATURE (1947).

inversely with population density. Each of the metropolitan areas is underrepresented except one which has had a static population for several decades. On the basis of the 1950 census, the nine standard metropolitan areas (whose rate of population growth is nearly twice that of the rest of the state) had a ratio of representation in the House of 1:52,790 while the ratio for the balance of the state was 1:32,693.[7] The extent of underrepresentation of the ten most populous counties is shown in Tables 2, 3, and 4 below.

II. Comparison With Other Legislatures

The unrepresentative character of the General Assembly does not distinguish it from most of the other legislatures. Numerous surveys have documented and numerous articles and pamphlets have inveighed against the state "houses of misrepresentatives." One by the United States Conference of Mayors disclosed that in 1947 residents of urban areas (about 70% of our population) elected only 25% of the state legislators.[8] Some states have extremes in district populations greater than those in Indiana. Thus one Connecticut district with a population of 592 has representation equal to another with 177,397 inhabitants. In Nevada one house district has 614 inhabitants while another has 50,205. Such fantastic disparities are attributable to four types of apportionment rules in state constitutions: (1) provisions which grant equal representation to political subdivisions, such as each "town" in some New England states and each county in Nevada, New Jersey, West Virginia, and Wyoming; (2) provisions which limit the amount of representation of any subdivision, like the Rhode Island maximum of six senators from any city and the county maximum of three representatives in Florida and one senator in California; (3) provisions which fix the membership total for legislative chambers and guarantee representation to each county, as in Kansas, or to each town, as in Vermont; (4) provisions which freeze the districts in the constitution, as for both chambers in Delaware and one chamber in Arizona, Michigan, and Mississippi.[9] In some states the disparities are attributable to failure to reapportion for many years. A recent pamphlet on this subject is appropriately titled *Government by Minority.*[10]

One study has measured the representativeness of the ninety-seven legislative assemblies by calculating the minimum percentage of population in districts needed to elect a majority of the members as of 1955. For the Indiana House the figure was 37% and for the Senate 39%. By that yardstick, the Indiana Senate ranked sixteenth and the Indiana House ranked twenty-fourth in representativeness.[11] A comparison of Indiana's smallest and largest districts population-wise with those in the other states also indicates that the Indiana legislature is near the middle. In one important respect Indiana is atypical: all but six

7 Reidel, Indiana Citizenship Clearing House, Hoosiers Go to the Polls, 14 (1956).

8 U.S. Conference of Mayors, Government of the People (1947).

9 Details may be found in the biennial editions of Council of State Governments, Book of the States, and numerous pamphlets such as American Municipal Ass'n, Minority Rule: Challenge to Democracy (1958); Department of Education, CIO, Government by Minority (1955).

10 Department of Education, CIO, *supra* note 9.

11 Dauer & Kelsay, *Unrepresentative States,* 44 Nat'l Munic. Rev. 571-75 (1955).

states have reapportioned one or both chambers since the last reapportionment in Indiana.[12]

III. Indiana Constitutional Provisions

Malrepresentation in Indiana is not attributable to any constitutional provisions; the democratic ideal of equality of representation has pervaded the fundamental law of Indiana from the beginning. The famous Northwest Ordinance, under which the territorial government was organized, stated: "The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature. . . ."[13] Indeed, the Indiana constitutional fathers were so concerned about equality of representation that they were not content to wait for the decennial federal census. The constitution of 1816 specified that the legislature should reapportion every five years on the basis of a special census to be taken of adult males over the age of twenty-one.[14] The 1851 constitution changed the frequency to six years in order to mesh with biennial legislative sessions. An amendment in 1881 deleted the adjective "white," thereby making the state constitution consistent with Negro emancipation and the thirteenth and fourteenth amendments to the federal constitution. Since that date the brief apportionment provisions of article IV have read as follows:[15]

> Sec. 4. The General Assembly shall at its second session after the adoption of this Constitution, and every sixth year thereafter, cause an enumeration to be made of all male inhabitants over the age of twenty-one years.
>
> Sec. 5. The number of Senators and Representatives shall, at the session next following each period making such enumeration, be fixed by law, and apportioned among the several counties, according to the number of male inhabitants, above twenty-one years of age in each. . . .
>
> Sec. 6. A Senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for Senatorial apportionment, shall ever be divided.

The one inconsistent, undemocratic, and unique element is the reference to adult males, called "polls" in local parlance, as the basis for apportionment, thereby affronting the fair sex. Numerous scholars have commented and a circuit court of Indiana has ruled that this contradicts the nineteenth amendment, the female suffrage provision of the national constitution.[16] While this feature hardly distorts the pattern of representation, it has incensed the feminists, and has created an amazing and formidable obstacle to reapportionment since 1921. Repeated efforts to correct this anachronism and remove the slight to feminine

12 Alabama, Louisiana, Minnesota, Mississippi, Vermont, and Delaware. Delaware never reapportions because the districts are specified in its constitution. Del. Const. art 2, § 2.

13 Confederate Congress, An Ordinance for the Government of the Territory of the United States, Northwest of the River Ohio, July 13, 1787. This provision was no accident. Jefferson, its principal architect, had inveighed against inequality of representation in his native Virginia.

14 Ind. Const. art. III, § 2 (1816).

15 Ind. Const. art IV, §§ 4-6.

16 Polling v. Woods, Cause No. 5899, Marion Circuit Court (March 1955).

feelings have failed. The legislature in the sessions of 1919 and 1921 passed a resolution to amend the constitution to change the apportionment base to votes cast for secretary of state in 1924 and every six years thereafter, but the proposal was rejected by the electorate. A second effort by the legislature also failed at the referendum stage. The last attempt was in 1937, but the following legislature failed to act on the resolution. So Indiana continues to enjoy the quaint distinction of being the only state which apportions its legislature on the basis of adult males.

IV. Gerrymandering and Litigation

Despite the clear mandate of the Indiana constitution, the apportionment acts have not reflected adherence to the policy of equal representation. During the period of the first constitution, apportionments became a partisan issue with its inevitable consequence — gerrymandering.[17] The practice continued under the 1851 Constitution, and became so flagrant that five of the twelve apportionment acts between 1851 and 1921 were held unconstitutional.[18] Professor Robert Seltzer states that the maps used by the legislature frequently contained not the number of "polls" in each county but election statistics. Furthermore, apportionment bills frequently were indexed in legislative journals and statutes as "the gerrymander of ———"![19] The last apportionment was in 1921; hence since 1927 the legislature has defaulted on its constitutional mandate and population trends have rendered the forty-year-old districts (the apportionment was based on a 1919 enumeration) grossly unequal and unrepresentative. Thus we have the "silent gerrymander." One commentator has summed it up: "the legislature may be said to have progressed from a policy of compliance in form but not in fact to the constitutional mandate to a policy of no compliance whatever." [20]

When faced with litigation challenging gerrymandered apportionments, the Indiana Supreme Court did not duck behind the "political question" blind as have the United States Supreme Court and the courts in several states, which have avoided this hot potato by ruling that apportionment is a political question, exclusively a prerogative of the legislature, and any court interference would violate the doctrine of separation of powers. "Courts ought not enter this political thicket" were the picturesque words of Justice Frankfurter in the famous case of *Colegrove v. Green*,[21] rejecting a suit to invalidate an old and grossly inequitable congressional districting law of Illinois, as an alleged denial of equal protection of the laws.

Conceding that courts have no power to district, the Indiana court asserted that the question of whether an apportionment law is in conformity with the constitution is a judicial matter, and proceeded to declare the apportionment acts of 1891 and 1879 unconstitutional because of flagrant gerrymandering, in

17 A detailed account of the gerrymandering is contained in Seltzer, *Rotten Boroughism in Indiana*, 1952 (unpublished thesis in Indiana University Library).

18 Apportionment laws were enacted in 1857, 1867, 1879, 1885, 1891, 1893, 1895, 1897, 1903, 1915, and 1921. The acts of 1879, 1891, 1893, 1895, and 1903 were held invalid. Citations to cases are below.

19 See, *e.g.*, Index, Ind. Acts of 1915.

20 Note, *Reapportionment of the Indiana Legislature: Judicial Compulsion of Legislative Duty*, 32 Ind. L.J. 503 (1957).

21 328 U.S. 549, 556 (1946).

the case of *Parker v. State ex rel. Powell.*[22] It adhered to that view in subsequent cases invalidating three other apportionment laws.[23] It has flinched only on one occasion: when presented with a challenge of the only apportionment law then on the statute books. Then the court denied a remedy to avoid leaving the state with no districts and thereby creating what the court regarded as a worse evil — election of all legislators at large.[24]

In adjudicating apportionment cases, the court read into the Indiana constitution the standard of equal representation, a requirement not explicitly there, because the Indiana constitution does not contain the familiar phrase "compact, contiguous districts, as nearly equal in population as practicable." The court stated that sections 4, 5, and 6 together clearly indicate two objectives: county representation and proportionate popular representation. "To secure the fullest possible local county representation with the nearest proportionate representation of the voters in each county is the approximate result to be reached by these two requirements of the constitution." [25]

A prominent element of the "political question" viewpoint is that a court is powerless to afford a litigant any effective remedy, because if it should strike down an apportionment statute, it could not compel the legislature to enact another one — not to mention an honest one, and the likely result would be no districting law and confusion compounded.[26] To this argument, the Indiana court found a facile answer: when an apportionment act is invalidated, the last preceding valid apportionment law is revived.[27] And if the preceding apportionment was repealed, even in a separate statute, on the presumption that the successor law would be valid, the repealed statute is revived.[28] But if there is no other apportionment law, the court will not strike down the existing one, because there always must be an apportionment law to effectuate the intent of the constitution.[29]

Two other significant holdings were that when an apportionment statute delegates to a county board of commissioners the responsibility for drawing districts in a multimember county, the board possesses legislative discretion,[30] and that only one valid apportionment act may be enacted on the basis of each sextennial census.[31] The latter decision was to thwart repeated gerrymandering by the legislature. Evidently the election of 1894 had reversed political fortunes; the 1895 legislature proceeded to repeal the 1893 apportionment and substitute another. The court found that both were gerrymandered and declared the law of 1885 operative.

22 133 Ind. 178, 32 N.E. 836 (1892).
23 Denny v. State *ex. rel.* Basler, 144 Ind. 403, 42 N.E. 929 (1896) (holding acts of 1893 and 1895 invalid); Brooks v. State *ex rel.* Singer, 162 Ind. 568, 70 N.E. 980 (1904) (holding the act of 1903 invalid).
24 Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37 (1898).
25 Denny v. State *ex rel.* Basler, 144 Ind. 403, 42 N.E. 929 (1896). The court held the apportionment invalid because of "joint districts" which the court regarded as gerrymandering.
26 See Colegrove v. Green, 328 U.S. 549 (1946).
27 Parker v. State *ex rel.* Powell, 133 Ind. 178, 32 N.E. 836 (1892).
28 Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37 (1898).
29 Fesler v. Brayton, *supra* note 28.
30 Board v. Jewett, 184 Ind. 63, 110 N.E. 553 (1915).
31 Denny v. State *ex rel.* Basler, 144 Ind. 403, 42 N.E. 929 (1896).

V. Compulsion of Legislative Duty

The inaction of the legislature since 1921 has produced the "silent gerrymander" and posed the familiar problem of how to persuade or compel the legislature to perform its clear constitutional duty — how to get the lawmakers to obey the law. Strangely there has been no litigation in Indiana (until just recently), but experience in neighboring Illinois and other states indicates that this problem is much like the predicament of the mice who agreed it would be fine to have a bell on the cat, but who would bell the cat?

Patently, the logical and direct remedy would be a writ of mandamus, but American courts have discreetly and almost universally declined to mandamus legislative bodies, with the exception that occasionally a mandamus is directed to municipal councils and similar inferior legislative bodies. This policy of the courts is grounded on the practical considerations of the undesirability of head-on collisions between judicial and legislative power, the inappropriateness of the customary judicial sanctions for enforcing court orders in such a situation, and the difficulty of controlling the exercise of legislative discretion. The policy of the courts is justified — or rationalized — by reference to the classical doctrine of separation of powers: it would be improper for one branch to attempt to dictate to a coordinate branch how it shall exercise its discretionary powers. Although there have been no Indiana mandamus suits, the court's dictum in the *Denny* case stated that courts cannot say how an apportionment shall be made, nor even whether any apportionment shall be made.[32]

In this context, one where the constitution imposes a clear mandate, adherence to separation of powers produces an anomaly. When a legislature violates constitutional limitations by enacting a gerrymandered apportionment, some courts, including Indiana's, will intervene to enforce the constitution. But when the legislature violates a constitutional limitation by inaction, the courts will not enforce the constitution. It would seem logical for the courts to police the legislature in both situations, and in both the courts would not appear to be usurping the legislative function.[33]

In rejecting mandamus petitions, the courts usually have buttressed the separation of powers doctrine with the "political question" argument, asserting that apportionment is one of those rare matters exclusively within the prerogative of a political branch — the legislature. The leading exposition of this argument is the famous Illinois apportionment case, *Fergus v. Marks,*[34] cited by courts all over the nation. In the *Colegrove* case and subsequently the United States Supreme Court emphasized both of those traditional arguments.

Failing to secure mandamus, ingenious attempts have been made to coerce the legislature by indirect methods, notably in Illinois where nearly every conceivable tactic has been explored — all in vain. The Illinois courts refused to

32 Denny v. State *ex rel.* Basler, *supra* note 31. Similarly, the court refused to enjoin a districting by a county board, because the board was exercising delegated legislative power and hence not subject to judicial interference. Board v. Jewett 184 Ind. 63, 110 N.E. 553 (1915).

33 Note, *Reapportionment of the Indiana Legislature: Judicial Compulsion of Legislative Duty,* 32 Ind. L.J. 503 (1957).

34 321 Ill. 510, 152 N.E. 557 (1926).

restrain payment of legislators' salaries,[35] or to grant quo warranto addressed to the legislators,[36] and have rejected the argument that all acts of a legislature sitting under an obsolete apportionment are invalid.[37] Recourse to the federal courts also has been fruitless; federal courts have rejected the argument that malrepresentation violates the guarantee of a republican form of government[38] or is a violation of equal protection of the laws. In the *Colegrove* case, three justices vigorously dissented and saw merit in the equal protection argument, but a majority elected to adhere to the "political question" position. Consequently there appears to be scant possibility of coercing the legislature by either direct or devious methods.

Recently, an action was brought in federal court to declare the Indiana gross income tax unconstitutional on the ground that acts of the legislature subsequent to 1927 are void because of the failure to reapportion in violation of the state constitution and to restrain the collection of the tax. The motion to dismiss was granted because of the adequate legal remedy of the ballot to correct any unrealistic apportionment, and because this was a purely state political question and federal sovereignty must not invade this "bulwark of State sovereignty." [39]

It has been suggested that reapportionment might be forced in Indiana by attacking the 1921 apportionment act. If it were upset, the legislature very likely would enact a substitute rather than permit a reversion to the 1915 apportionment law and a possible cycle of suits.[40] The success of this tactic is dubious, because of the Indiana Supreme Court's inference in one case that the challenger must have been a qualified voter at the time the challenged law was enacted,[41] because all preceding challenges were made shortly after enactment of the challenged apportionment — not forty years later, and, most importantly, because the precedent cases involved gerrymandered apportionments rather than an apportionment law which was fairly equitable when enacted but has become inequitable by the passage of time. The silent gerrymander would be an original question for the Indiana court and the authors are aware of only one successful attack, the recent Hawaiian case of *Dyer v. Kazuhisa Abe*.[42] There a federal court accepted the denial of equal protection argument and invalidated an antiquated apportionment, realistically observing that the inaction of the legislature amounted to a purposeful and systematic discrimination; biased inaction can be as much a denial of equal protection as biased action.[43] If this case can be distinguished from the numerous state and federal decisions to the

35 Fergus v. Kenny, 333 Ill. 437, 164 N.E. 665 (1928).
36 Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930).
37 People v. Clardy, 334 Ill. 160, 165 N.E. 638 (1929).
38 Keogh v. Neely, 50 F.2d 685 (7th Cir.), *cert. denied*, 284 U.S. 583 (1931).
39 Matthews v. Handley, 179 F. Supp. 470 (N.D. Ind.), *aff'd per curiam*, 361 U.S. 127 (1959).
40 Note, *Reapportionment of the Indiana Legislature: Judicial Compulsion of Legislative Duty*, 32 IND. L.J. 503 (1957).
41 Brooks v. State *ex rel.* Singer, 162 Ind. 568, 70 N.E. 980 (1904).
42 138 F. Supp. 220 (D. Hawaii 1956).
43 In an oral ruling the court declared its intention to mandate a reapportionment. This amazing ruling apparently was predicated on the Hawaiian Organic Act and the status of the territorial legislature as an inferior legislative body, which was violating a duty imposed by Congress. However, the ruling was vacated a few days later when Congress enacted a new apportionment for Hawaii. Note, 32 IND. L.J. 503 (1957).

contrary, it is because of the element of the Hawaiian Organic Act in which Congress had imposed the duty of periodic apportionment on the territorial legislature. It is significant that in subsequent cases challenging obsolete apportionments of two states, federal courts have declined to follow *Dyer,* dismissing the actions on the authority of *Colegrove.*[44]

VI. The Special Census Snafu

The absence of litigation against the silent gerrymander in Indiana may be explained not only by the likelihood of failure, but also by its futility. If the 1921 law were upset, reversion to the 1915 law would render the legislature even less representative. True, the legislature might be moved to action, but its substitute apportionment would have to be based on a 1931 enumeration of adult males. Such an apportionment would be about as unsatisfactory as the present one.

The antiquity of the venerated constitution of 1851 presents a formidable — if not insuperable — obstacle to reapportionment. By an ironic twist of fate, the very arrangement which was inserted in our 19th-century constitution to assure frequent and equitable reapportionment has in the 20th century become an obstacle to the realization of those goals. The sextennial census has relapsed into a limbo and hence there are no satisfactory figures for a reapportionment. The last complete census of adult males was made in 1931, but the 1933 legislature failed to use it. Subsequently local officials have ceased taking the census, apparently regarding it as useless and a waste of public funds. Probably most local officials are blissfully unaware of this old statutory duty. In 1937, thirty counties failed to enumerate; in 1943, only twenty-nine counties filed completed returns. In 1949, the state auditor tried to get compliance, but five county councils refused to appropriate funds for taking it and several others did not do it. Consequently the attorney general advised the auditor not to transmit the fragmentary returns to the 1951 General Assembly.[45]

To compound confusion, some local court orders have thwarted taking the census. In 1937, a Marion County circuit court ruled that the county auditor could not mandate township officials to act.[46] In 1943, the Marion circuit court issued a restraining order against the county auditor and some township officials. In 1955, a successor requested a ruling and the same court issued a permanent injunction.[47] It is said that the Marion circuit court ruling was based on the premise that the adult males provision is invalid as contrary to the nineteenth amendment.[48]

Consequently, since 1943 the census has been firmly stymied and the legis-

44 Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956). See also Remney v. Smith, 102 F. Supp. 708 (E.D. Pa. 1951). At this writing a federal court has accepted jurisdiction of a suit challenging an obsolete apportionment law of Minnesota. The court has deferred any ruling until after the current session of the Minnesota legislature. *U.S. Court Spurs Redistricting,* 47 Nat'l Munic. Rev. 57-58 (1958).

45 Seltzer, *op. cit. supra* note 17, at 219-20.

46 *Ibid.*

47 Polling v. Woods, Cause No. 5899, Marion Circuit Court (March 1955). The injunction order restates the 1943 injunction, but furnishes no rationale.

48 Letter from Mrs. Robert Ritchie, secretary of the Indiana League of Voters to the authors. Apparently for this reason proponents of reapportionment have not appealed the Marion County case.

lature has had a plausible excuse for its repeated defaults. Thus we have an Alice in Wonderland fantasy. The legislature cannot reapportion, because there is no census of adult males, but the legislature makes no effort to encourage or compel local officials to take the census. The local officials in turn default, because the legislature never reapportions anyway. A local court enjoins execution of the census statute instead of mandating its performance. And around the circle we go. Meanwhile all the time there are available complete and accurate federal census data, but these are not — presumably cannot — be used.

The 1959 general assembly contained some legislators who were seriously concerned about reapportionment and two strategies were proposed to surmount this snafu. The Dennis bill, backed by the Marion County delegation, proposed to establish a joint legislative enumeration commission, which should hire a director and make a strong effort to take an enumeration in 1961, a proper enumeration year.[49] Because the constitution specifies an enumeration in 1855 and every six years thereafter, it is presumed that the census can be taken only in the proper year. The Dennis bill contained sections designed to persuade township officials to perform their duty. As a model of public administration it was a monstrosity, but it was a serious effort to get the "polls." The bill passed the House easily, but was pigeonholed in the Senate which countered with a resolution to establish the reapportionment study commission.

The other tactic was the Grills bill which would have created a legislative committee which should immediately canvas the federal census of 1950 and ascertain the number of "polls" in each county, which data should be used for a reapportionment act in the 1959 session.[50] That bill posed the nice question of whether the federal census data could be substituted for the special census contemplated by the constitution. A reading of the opinions in the old reapportionment cases conveys the impression that it could not. However it is questionable whether courts would strike down a fair apportionment based on the number of "polls" shown in the federal census in today's circumstances. It would be thwarting the purposes of the constitution by a narrow, rigid adherence to its letter. In any event the Grills bill was pigeonholed in committee. A practical objection to the Grills bill was that its data would have been nine years obsolete. So why not wait until 1961 and use the fresh 1960 census? In view of the fact that any amendment of the constitution to substitute federal census data for the special census of "polls" cannot possibly be effective before the legislative session of 1967, the Grills proposal merits serious consideration at the 1961 session.[51]

VII. Proposed Constitutional Amendments

In recent years most discussion of reapportionment in Indiana has focused on proposals for amending the antiquated article IV of the Indiana constitution, rather than on how to reapportion under the existing provisions. Eight amendment proposals were introduced at the 1957 legislative session. Three pro-

49 H.B. 8, 92d Sess. (1959).
50 S.B. 21, 92d Sess. (1959).
51 Repeated efforts by the League of Women Voters to secure such an amendment have been rejected by the legislature, indicative of its attitude.

posed to substitute the federal census for the special census of "polls." [52] Had that proposal been adopted, the legislature would have been in a position in 1961 to reapportion on the basis of the 1960 census. Another proposed to delete "male" from section IV, thereby eliminating the ground for the Marion County injunction.[53] Another sought to force reapportionment by specifying that no session of the general assembly would be legally constituted unless an enumeration had been taken and reapportionment made in accordance with present constitutional provisions.[54] How that would have avoided the Marion County injunction is not clear.

Three resolutions were versions of what their sponsors call the "federal plan." One would have all senatorial districts made up of two contiguous counties with only one senator for each, with the House apportioned on the basis of population.[55] Another would have reversed the formula by allotting one representative to each county and apportioning the Senate on the basis of population.[56] A similar idea was a resolution to make the present Senate districts permanent, "freezing" them in the constitution, while apportioning the House on the basis of population.[57]

Two significant features were present in most of those proposals. Six of them would have substituted the federal census for the special census of "polls." Four provided for an apportioning agency to act in the event of legislative default, an idea which previously had been regarded as radical.

Only the three "federal plan" resolutions got out of committee, and then only because of strong outside pressure. The proposal to freeze the Senate districts naturally passed the Senate easily, but the House committee declined to give it a hearing. A few days before the session's end, the House committee reported out without recommendation the two other "federal plans," one to allocate a representative to each county and one to allocate a senator to each pair of counties. The committee acted under duress, undoubtedly to protect itself against the charge of killing reapportionment. Both proposals were handed down for debate simultaneously and the result was confusion incarnate until both resolutions were tabled.

VIII. Obstacles to Reapportionment

The experience of the 1957 general assembly points up the foremost obstacle to reapportionment. Even if there is general agreement in the legislature on the need, it is difficult or impossible to agree on a specific plan. The proponents are not consolidated behind one plan and hence tend to cancel out the respective proposals. Opponents have the stronger strategic position; they have only to sit tight and criticize each plan. They can even pay lip-service to reapportionment while actually scuttling it. In the Indiana general assembly there is not even general agreement on the desirability of reform and some of the

52 S.J. Res. 5, 90th Sess. (1957); S.J. Res. 8, 90th Sess. (1957); H.J. Res. 10, 90th Sess. (1957).
53 H.J. Res. 3, 90th Sess. (1957).
54 S.J. Res. 14, 90th Sess. (1957).
55 H.J. Res. 8, 90th Sess. (1957).
56 H.J. Res. 16, 90th Sess. (1957).
57 S.J. Res. 1, 90th Sess. (1957).

strongest opponents have been strategically located in the standing committees on reapportionment.

Although one political party (Democratic) has had reapportionment in its platform it did not pass any reapportionment legislation when it controlled the legislature in the 1930's, and it has never controlled both chambers since then. Actually most politicians in both parties appear unenthusiastic. Perhaps they are uncertain how it would affect political alignments. Furthermore each member of the legislature manifestly has a vested personal interest in the existing pattern within which he has had electoral success.

Numerous other factors have contributed to the reapportionment snafu, in addition to the obsolete census of "polls," and the aforementioned factors. Maps 1 and 2 (in the Appendix) clearly show that the bulk of the districts are below the ratio of representation, particularly the House districts. Hence a fair reapportionment would diminish the political strength of a majority of the counties and of the constituents of a majority of the members of the legislature. The communities which would receive additional representation are principally the metropolitan centers which necessarily would be at the expense of the balance of the state. Naturally the "rural" areas are unenthusiastic about reapportionment as they effectively control the legislature under the existing apportionment. "Rural" is inaccurate and misleading, because it creates the popular impression that the apportionment matter is a clash between farmers and city slickers. Actually the beneficiaries of a fair reapportionment would be the cities of over 50,000 population. Hence the "rural" group consists principally of residents of villages and small cities. The clash of interests is not accurately rural vs. urban; it is more big city vs. small town, and small town residents and farmers alike tend to view cities with a jaundiced eye.

Not to be overlooked is the vested interests of several powerfully organized pressure groups whose influence in the Indiana general assembly is augmented by the existing system of malrepresentation. These groups are principally the associations of county and township officials, the farm organizations, the chamber of commerce and the numerous allied trade and professional associations, which frequently make common cause with the farm organizations in the general assembly. A recent evaluation of the most powerful lobbyists listed the "Big Six" and fourteen other organizations with real influence in the assembly.[58] It would appear that the strong influence of five of the "Big Six" and of twelve of the other fourteen organizations is unjustly augmented by the present apportionment. Occasionally spokesmen for some of those organizations mildly endorse reapportionment, but significantly they support the "federal plan" which would continue their disproportionate influence in the assembly.

Other obstacles to reapportionment are public apathy, coupled with the disinterest or even hostility of legislators, the extreme brevity of legislative sessions, and the difficult procedure for amending the constitution. It takes strong

58 The "Big Six" are the Chamber of Commerce, Farm Bureau, Motor Truck Association, Indiana Insurers, Teachers Association, and the County and Township Officials Association, with their respective affiliates. BUREAU OF GOVERNMENT RESEARCH, INDIANA UNIVERSITY, APPORTIONMENT AND REAPPORTIONMENT IN INDIANA: POLITICAL IMPLICATIONS 3-4 (1957).

and sustained effort to push an amendment through five votes (four in the assembly at different sessions and one at the polls) over a span of three or four years. The opposition need prevail only on one vote — a fine arrangement for minority rule. The sixty-one day limit on the biennial session also is a factor; a harried legislature naturally is inclined to shelve the nasty matter of reapportionment in order to avoid passion and to get on with pressing business.

IX. The "Federal Plan"

The legislative study committee has been directed to study the "federal system" of apportionment,[59] which is the arrangement of apportioning one chamber by arbitrarily assigning equal representation to each county, irrespective of populations and presumably in perpetuity. The expression "federal plan" is a catchy slogan which is intended to be self-justifying because "that is the system we use for our federal government." That argument contains two fallacies: that the relationship of counties to the state government is the same as the relationship between the states and the national government, and that the system of representation for one is ipso facto appropriate for the other.

As any schoolboy knows, our state-national relationship is a federal one with state and national powers assigned in the Constitution, whereas the county-state relationship is a unitary one, the counties being merely artificial creations for state administrative convenience and possessing only such powers as the legislature chooses to confer on them. The equal representation of states in the Senate was largely a historical accident, one of the great compromises of 1787; it is a dubious thing and not necessarily a proper model for the structure of state legislatures. The so-called "federal plan" starts from a fallacious premise and really begs the question; it renders a disservice by seeking to close our eyes to an examination of the question of what should be the proper system of representation in state legislatures.

Proponents of the "federal plan" usually describe it as basing one chamber on population and the other on area. They really do not mean area literally, *i.e.*, a representative for so many square miles. They actually want representation per unit of local government — counties, towns, or cities. While more or less equal representation of counties, and of towns in New England, is an old practice, only recently has it been rationalized and christened the "federal plan," and pushed as a model.

There are three rather distinct variations of the "federal plan": (1) Equal or nearly equal representation of towns as in Connecticut and Vermont, or of counties as in New Jersey, California, and several states. (2) A freezing into the constitution of the existing districting pattern — one that is obsolete and has unconscionable disparities in population, as was done in Michigan. And (3) the recent Illinois districting law which apportioned Senate seats to three regions of the state; downstate, Cook County, and Chicago — to the disadvantage of Chicago. Each variation has the common elements of the perpetuation of gross disparities in district populations, pronounced under-representation of the metropolitan areas, and corresponding over-representation for the rest of the state.

59 Ind. Acts 1959, ch. 410.

Each has the common motive of retaining control of the legislature by non-metropolitan areas, and the interest groups which benefit therefrom.

The common argument for the "federal plan" is that it is the solution to the problem of rural vs. urban power or the metropolitan area vs. downstate by a "balanced legislature" in which the urban or metropolitan area will dominate one chamber and the "rural" areas will control the other, thereby formalizing a concurrent majorities system for legislation. It is fundamentally an anti-democratic scheme, intended to thwart simple majority rule, and exploits the traditional distrust and antipathy of rural and small town people toward big cities. Significantly there was no concern for such a "balanced legislature" as long as metropolitan areas were numerically in the minority; no concern then to protect the minority against tyranny by the majority. Equally significant is the fact that the "federal plan" is not sponsored by farmers only; its most vocal proponents are some "city slickers": the chambers of commerce and allied business associations, who prefer "rural," *i.e.*, non-metropolitan, control of the legislature.[60]

Observation of the "federal plan" in operation, as shown in Table 1, *infra*, indicates that, in addition to preserving minority control of one chamber — its objective — it has had two other significant results: it has increased the frequency of partisan division between the governor and one chamber of the legislature and it has handicapped the Democratic Party and associated interests to the advantage of the Republican Party and associated interests. These results are shown in the following recent elections in three states. The "federal plan" chamber is the House in Connecticut and the Senate in Illinois and Michigan.

Table 1. The Impact of the "Federal Plan" on Political Party Strengths in Legislatures

	Connecticut		*Illinois*		*Michigan*	
	Rep.	*Dem.*	*Rep.*	*Dem.*	*Rep.*	*Dem.*
Election of 1956						
*Popular vote (1,000's)	611	479	2,172	2,135	1,376	1,667
House seats	249	30	94	83	61	49
Senate seats	31	5	38	18	23	11
Election of 1958						
*Popular vote (1,000's)	360	606	1,549	1,689	1,075	1,214
House seats	138	141	86	91	55	55
Senate seats	7	29	34	24	22	12

*The vote for the leading state office up for election: senator in Connecticut in 1958, treasurer in Illinois in 1958, and governor in the other elections.

Sources: *Book of the States, 1958-59; America Votes, 1956-57; Congressional Quarterly Weekly Reports,* 1958, no. 45; *Official Vote of the State of Illinois, 1957 and 1958.*

60 The following observation about California is apropos: "Certain business interests in the state have found it easier to make their influence felt in the legislature through senators from rural areas. Privately owned utilities, banks, insurance companies, and other concerns with crucial legislative programs have discovered some 'cow country' legislators more responsive to their demands and less committed to contrary points of view on key social and economic questions that are urban representatives." McHenry, *Urban v.. Rural in California,* 35 NAT'L MUNIC. REV. 353-54 (1946).

It will be observed that the Democratic Party had the greatest popular vote in four of those six elections, but never secured a majority of the seats in the Senates of Illinois or Michigan[61] and only got a hairline majority in the Connecticut House with a landslide popular majority. Obviously the "federal plan" discriminates moderately against the Democratic Party in Illinois and viciously in Michigan and Connecticut. The experience of California has been the same; on several occasions the Democratic Party has elected the governor and a majority of the House, but only in 1958 did it finally win the Senate.

The political consequences of the "federal plan" in those states are that a Democratic governor normally, or invariably, faces a hostile majority in the "federal plan" chamber, with the attendant friction and stalemate, and in the years when the Republican Party loses the election it usually retains control of the "federal plan" chamber.[62] The payoff is that in the years that the Republican Party and its allied interests win the election, they control the governorship and both chambers and can enact the legislation they desire; in the years that they lose the election, they control one chamber and can block any legislation. It is difficult to see how such a system can be called just or representative government.

Because party strength is more evenly spread over Indiana than in the aforementioned states, the "federal plan" would have less effect on party fortunes. How much effect it would have would depend on the specific type of "federal plan" and future electoral trends. To the extent that Democratic electoral strength may continue to grow in metropolitan areas, any "federal plan" would be discriminatory.

Irrespective of the degree of discrimination between parties, any "federal plan" discriminates against metropolitan residents. The extent such would discriminate in Indiana can be ascertained by calculating the representation of the metropolitan areas under the "federal plan" resolutions considered in the 1957 general assembly. Tables 2, 3, and 4 present the data for the ten most populous counties for each of those resolutions and for possible variations of each one.

H. J. RES. 16 proposed to allocate one House seat per county, which would have reduced the representation of the ten most populous counties, which contain about 51% of the state's population, from the present 37 5/6 seats, or 41 if the joint representatives are not pro-rated, to 10 — a corporal's guard. Some discussions of "federal plans" have proposed keeping the House membership at 100 and granting the other eight seats to the populous counties — a small sop.

H. J. RES. 10 would have applied the "federal plan" to the Senate, thereby reducing the representation of the metropolitan areas from the present 18 1/6, or 22 if joint senators are not pro-rated, to only 5. Again, the Senate membership might be retained at 50 and the extra four seats granted to four counties.

S. J. RES. 1 would have frozen the present Senate districts and reappor-

61 A factor in the Illinois' elections is the staggered terms of senators, but not in Michigan where senators have two-year terms.

62 This situation has prevailed in Michigan for a decade, has generated continuous and bitter friction and stalemates, and twice has brought the state treasury to the point of bankruptcy.

Table 2. "Federal Plans" — Under Representation of Cities in the House

County	Seats Entitled to in 1960	Present Seats	Seats Under "Federal Plan" 92 Member House	100 Member House
Allen	5	3½	1	2
Delaware	2 1/3	2	1	2
Elkhart	2	2	1	1
Lake	11½	5½	1	2
LaPorte	2	1½	1	1
Madison	2 2/3	2½	1	2
Marion	14 2/3	11½	1	2
St. Joseph	5	3	1	2
Vanderburgh	3½	3 1/3	1	2
Vigo	2 1/3	3	1	2
Total	51	37 5/6*	10	18

* If joint representatives are not pro-rated, the total is 41.

tioned the House. That would slightly improve the total representation (both chambers) of the metropolitan areas from the present 56 seats, 63 if joint representatives and senators are not pro-rated, to 69, but distinctly less than the 76 to which they are entitled. Freezing the House and fairly apportioning the Senate would give those areas 63 seats, essentially what they now have.

Table 3. "Federal Plans" — Under Representation of Cities in the Senate

County	Seats Entitled to in 1960	Present Seats	Seats Under "Federal Plan" 46 Member Senate	50 Member Senate
Allen	2	1½	½	1
Delaware	1	1	½	1
Elkhart	1	1	½	½
Lake	6	3	½	1
LaPorte	1	½	½	½
Madison	1 1/3	1 1/3	½	1
Marion	7 1/3	5½	½	1
St. Joseph	2½	1½	½	1
Vanderburgh	2	1 1/3	½	1
Vigo	1	1½	½	1
Total	25 1/6	18 1/6*	5	9

* If joint senators are not pro-rated, the total is 22.

From the foregoing it is evident that the only type of "federal plan" which would not discriminate against the metropolitan areas would be the freezing of Senate districts. As time passes, their proportionate under-representation would increase with a "frozen" Senate. Numerous scholars have emphasized the lack of wisdom in freezing any pattern of representation into the constitution; it is bound to become inequitable over time and "the dead hand of the past stands as a legal block to reapportionment." [63]

Equality of representation always has been the cardinal principle of repre-

63 Harvey, *Reapportionment of State Legislatures — Legal Requirements*, 17 LAW & CONTEMP. PROB. 364, 368 (1952).

Table 4. "Federal Plans" — Under Representation of Cities
Aggregate Seats in Both Chambers

County	Seats Entitled to, 1960	Present Seats	"Federal Plan" 92 Member House	"Federal Plan" 100 Member House	"Federal Plan" 46 Member Senate	"Federal Plan" 50 Member Senate	"Federal Plan"** Freeze Present House	"Federal Plan"** Freeze Present Senate
Allen	7	5	3	4	5½	6	5½	6½
Delaware	3 1/3	3	2	3	2 5/6	3 1/3	3	3 1/3
Elkhart	3	3	2	2	2½	2½	3	3
Lake	17½	8½	7	8	12	12½	11½	14½
LaPorte	3	2	2	2	2½	2½	2½	2½
Madison	4	3 5/6	2 1/3	3 1/3	3 1/6	3 2/3	3 5/6	4
Marion	22	17	8 1/3	9 1/3	15 1/6	15 2/3	18 5/6	20 1/6
St. Joseph	7½	4½	3½	4½	5½	6	5½	6½
Vanderburgh	5½	4 2/3	3	4	4	4½	5 1/3	4 5/6
Vigo	3 1/3	4½	2	3	2 5/6	3 1/3	4	3 5/6
Total	76 1/6	56*	35 1/6	43 1/6	56	60	63	69 1/6

* If joint members are not pro-rated, the total is 63.

** The other chamber to be districted fairly on the basis of population — the Michigan arrangement. Probably these counties would actually get somewhat less than their proportionate share of seats.

sentation in the Indiana constitutions. Abandonment of that fundamental democratic principle in favor of the "federal plan" would be an unfortunate regression. The "federal plan" is a misnomer predicated on a patent fallacy and is as illogical as it is unjust. The experience of states which have it does not demonstrate that it is a superior system of representation. "One need only to study the political history of Connecticut to see how ineffectively the federal system works. . . inaction and stalemate is common." [64] The brief experience of Michigan has been similar. Its claim of a "balanced legislature" is spurious, because its purpose is to throw several weights on one side of the scales. It is utterly illogical to have the members of one chamber representing pastures, fish, or stumps. As Professor Robert Seltzer states, "The writing of Senate districts into the Indiana Constitution is a backward step. Today it is people, not land areas, which need to be adequately represented. Legislatures must meet the needs of all inhabitants, not just cornfields." [65]

X. Fear of Urban Domination

The fear that an equitable redistricting would result in domination by city groups with grievous consequences to the state has less basis in Indiana than in many states which have gargantuan metropolises. The largest metropolitan area of Indiana has only 15% of the state's population and the nine standard metropolitan areas had only 45% of the state's population in 1950. This fear appears unfounded for the foregoing reason and also because political party alignments do not coincide with urban-rural areas. The Democratic Party has strength all over the state and is normally the stronger party in many rural counties. Re-

64 *Id.*, at 365. Another commentator has said, ". . . the experience of states in which one house of the legislature represents people and one pastures has hardly justified optimism or confidence. . . ." Baker, Rural Versus Urban Political Power 14 (1955). The fact that it has been adopted by some states in recent years is not necessarily evidence of merit. In every case it came after prolonged apportionment default and may well have been enacted as the price for any reapportionment.

65 Seltzer, *op. cit. supra* note 17, at 273-74.

publican Party strength is not as widely spread, but that party is strong in most of our large cities as well as in the towns and countryside. It long has been dominant in Fort Wayne and Lafayette, and has carried Marion County (Indianapolis) in most elections of the past decade. Consequently partisan alignments in the General Assembly serve to mitigate rural-urban conflict, rather than re-enforcing it as in some states.

Table 5. Election Results in the Ten Most Populous Counties, 1950-1958
Winning Party in Elections for Governor, Senator, or Congressman*

County	*1950*	*1952*	*1954*	*1956*	*1958*	*All 5 Elections*	
Allen	R	R	R	R	D	4R	1D
Delaware	R	R	R	R	D	4R	1D
Elkhart	R	R	R	R	D	4R	1D
Lake	D	D	D	D	D	0R	5D
LaPorte	R	R	R	R	D	4R	1D
Madison	D	R	D	R	D	2R	3D
Marion	R	R	R	R	D	4R	1D
St. Joseph	D	D	D	D	D	0R	5D
Vanderburgh	R	R	R	R	D	4R	1D
Vigo	D	D	D	D	D	0R	5D
Total	6R 4D	7R 3D	6R 4D	7R 3D	0R 10D	26R	24D

* The vote for governor in 1952 and 1956, for senator in 1950 and 1958, and for congressman in 1954.

The evenness of party competition and the strong tendency of the voters to switch parties are shown by the electoral data for the ten most populous counties in Table 5. During the past decade the Republican Party has had a slight edge although the Democratic Party carried all ten counties in 1958 in a state-wide sweep. Three counties (Lake, St. Joseph, and Vigo) consistently have had Democratic majorities, but in 1956 the Democratic margin was narrow in its strongholds of Lake and St. Joseph Counties. In most counties, notably Marion, voting has been volatile with sharp swings. Clearly, many urban Hoosiers vote independently.

Proponents of the "federal plan" frequently proclaim that a straight population apportionment of the General Assembly would result in domination of the state by five, six, or seven counties. The actual figure would be ten counties which aggregate half of the state's population. This bogey presumes that the representatives and senators from those ten counties would vote solidly to advance their interests — whatever they might be — and to injure the balance of the state. The argument starts from the dubious premise that those ten cities have interests which are distinctive from the interests of the other cities and the rural areas of the state. What issues would produce a solid division of the legislators from the ten most populous counties against those from the other eighty-two counties? Labor issues? Some representatives from those ten counties vote anti-labor (see Tables 6 and 7 below), and some of the strongest pro-labor legislators are from other counties. Issues involving city government structure

and powers? There are large cities outside these ten counties; also these ten counties contain some small cities. Very little "city legislation" concerns the powers and structures of all cities. Such legislation concerns only a class of cities frequently only one city, although disguised as general legislation. Hence urban representatives do not have a solid, common interest in city legislation. Rural problems and interests? Each of the ten most populous counties — even Marion and Lake — have very substantial rural populations which a legislator would be loathe to antagonize. Issues involving industrial and commercial interests? Although those ten counties necessarily have the greatest concentration of industry and commerce, there are formidable industries and commerce in nearly every corner of Indiana, and no legislator is unmindful of such interests. Furthermore the lobbyists of industry and commerce make common cause with rural interests in the legislature far more frequently than they oppose them.

The spectre of a dictatorship by a phalanx of legislators from the big cities is exploded by a perusal of recent election statistics, noted above, and by analysis of legislative voting. The writers have made a detailed analysis of the voting behavior of the senators from those ten counties during two recent sessions, 1957 and 1951. Those sessions were selected, because the 1957 session is the most recent one for which the journals have been published and 1951 was a peak year of Democratic Party strength in the Senate, the membership consisting of 26 Republicans and 24 Democrats. In 1957, fourteen of the 22 senatorial seats from the districts containing those ten counties were held by Republicans, whereas in 1951 fifteen were held by Democrats.[66] Hence the two sessions present opposite conditions of partisan composition. The votes on third reading roll calls on all controversial bills and resolutions were posted and analyzed, and are summarized in Tables 6 and 7 below. Controversial roll calls were defined as those in which ten (20%) or more senators voted in opposition to the majority vote.[67] This standard was applied in order to eliminate the numerous non-controversial bills on which there naturally would be no significant difference in the voting of the "metropolitan senators" as compared to the other senators.

Three yardsticks were used to evaluate the voting of the metropolitan senators: the frequency with which a majority of the metropolitan group voted with a majority of the other senators, an index of cohesion of the metropolitan senators, and an index of the likeness of the two groups. The index of cohesion ranges from 0 to 100, with a unanimous vote being 100 and an evenly split vote 0. Thus the over-all index of cohesion of 41 for the 1957 session reflects an average voting pattern of 15½ to 6½, and the 37 over-all index for the 1951 session reflects an average voting pattern of 15 to 7 on the controversial roll calls.[68] The index of likeness is the complement of the difference between the

66 This included six joint senators with districts including other counties. They were included in the metropolitan group on the assumption that, irrespective of their residences, they would vote with an eye to the residents of the large city in their districts.

67 Some scholars have used a lower test or controversial roll calls, such as 10% opposition. Use of a lower test would produce a higher index of cohesion for the metropolitan senators *but also* a higher index of likeness between the two groups.

68 Index of Cohesion = 2 (% majority vote — 50). This is the frequently used index developed by RICE, QUANTITATIVE METHODS IN POLITICS 207-10 (1928).

percentage of affirmative votes of the two groups.[69] Thus the over-all index of likeness of 82 in the 1957 session and of 80 in the 1951 session indicates that the percentage of affirmative votes in the respective groups varied by 18% in 1957 and 20% in 1951.

Table 6. Analysis of the Voting of Senators from the Ten Most Populous Counties Indiana General Assembly, 1957 Session

Nature of Bills and Resolutions	*No. of Bills*	*Index of Cohesion*	*Concurrent Majorities Metro. Senators and other Senators*	*Index of Likeness of Two Groups*
Agriculture & Conservation	6	52	6	86
Alcoholic Beverage Regulation	3	59	0	53
Business & Prof. Regulation	13	47	10*	75
City Government	13	33	13	89
County & Twp. Government	3	24	2	77
Criminal Law	3	35	2	87
Education	7	53	7	81
Labor	8	27	7*	85
Motor Vehicle & Traffic	5	54	5	89
Taxation & Revenue	7	39	5*	77
Miscellaneous	8	44	7*	87
All Controversial Roll Calls	76	41.4	62	81.9

* On four other roll calls the senators of one group split their votes evenly.

In Tables 6 and 7 the controversial roll calls are classified according to subject matter, with the corresponding index of cohesion, index of likeness, and number of concurrent majorities. It will be observed that concurrent majorities prevailed on 62 of the 76 controversial roll calls in 1957 and on 41 of the 63 in 1951. On five other bills a group split its votes evenly. Such a record hardly reflects a sharp clash between the metropolitan senators and their peers. Similarly, the over-all index of likeness of 82 in 1957 and 80 in 1951 demonstrates a strong similarity in the voting behavior of the two groups.

In the 1957 session only one class of bills, those pertaining to alcoholic beverage regulation, aligned a majority of the metropolitan senators against a majority of the non-metropolitan solons. In the 1951 session there were no concurrent majorities on the three controversial bills pertaining to agriculture and conservation, but, interestingly, in 1957 concurrent majorities occurred on all six bills in that category. Hence alcoholic beverage regulation was the only category which consistently produced a metropolitan vs. non-metropolitan pattern.

Other categories in which one might anticipate such an alignment showed scant disagreement between the two groups. Thus on the ten labor bills in both sessions concurrent majorities prevailed nine times and one group split evenly on the other one. On the eighteen city government bills, seventeen concurrent majorities occurred and one group split on the other one. On the nineteen bills

69 Index of likeness = 100 — (% affirmative vote of group A — % affirmative vote of group B). RICE, *supra* note 68, at 210-15. The summary data in Tables 6 and 7 are derived from over 3,000 postings and about the same number of arithmetical calculations.

Table 7. Analysis of Voting of Senators from the Ten Most Populous Counties Indiana General Assembly, 1951 Session

Nature of Bills and Resolutions	*No. of Bills*	*Index of Cohesion*	*Concurrent Majorities Metro. Senators and other Senators*	*Index of Likeness of Two Groups*
Agriculture & Conservation	3	32	0	75
Business Regulation	6	47	5	83
City Government	5	33	4	84
Civil Law and Procedure	7	47	5*	81
County & Twp. Government	10	47	6	74
Criminal Law	4	17	2	86
Education	2	51	1	81
Labor	2	43	2	76
Motor Vehicles & Traffic	5	30	4	89
Taxation & Revenue	9	32	4	84
Miscellaneous	10	27	8	73
All Controversial Roll Calls	63	36.9	41	80.1

* Senators of one group split vote evenly on another bill.

relating to business and professional regulation, concurrent majorities occurred on fifteen bills and one group split on another. For the other categories, concurrent majorities also were the pattern, as one might expect. The index of likeness was 73 or above on all categories except alcoholic beverage regulation.

The indices of cohesion among the metropolitan group were almost uniformly low in both sessions. Even on the alcoholic beverage bills, which elicited the most cohesion, the group split 17 to 5. On labor bills the average vote was 14 to 9 in 1957 and 15½ to 7½ in 1951. On city government bills the group split on the average of 15 to 8 in both sessions, and voted with corresponding majorities of the other group on both labor and city government bills. The metropolitan group never voted solidly on anything controversial in either session.

The low indices of cohesion among the metropolitan senators, an over-all of 41 in 1957 and 37 in 1951, furnish a sharp contrast to the indices of cohesion among senators of the respective political parties. On the same controversial roll calls in 1951, the Republican members displayed an index of cohesion of 87.1 and the Democrats 89.3.[70]

The foregoing data conclusively show that political party affiliation in the Indiana General Assembly is a stronger influence than whether the solon hails from a metropolitan or a "rural" district. Rural-urban, or metropolitan vs. non-metropolitan, conflict is *not* a strong factor in the General Assembly. Metropolitan senators do not vote as a phalanx, they generally divide their votes in about the same manner as their colleagues, and the bogey of a metropolitan dictatorship in the legislature in the event of a fair reapportionment is a myth.

70 This is consistent with the results of a similar analysis of party cohesion in the Connecticut legislature which reported indices between 83 and 87. Lockhart, *Legislative Politics in Connecticut,* 48 AM. POL. SCI. REV. 166-73 (1954).

These results concur with a similar study of votes in the Illinois and Missouri legislatures, which reported:[71]

> [G]enuine metropolitan against non-metropolitan conflict in the Illinois and Missouri General Assemblies is rare. . . . Further, collision of urban-rural interests, as forwarded by legislators from those two areas, is seldom found, while conflict of interests within the urban areas frequently appears in the legislature.

The reasons for the low cohesion among the metropolitan senators are hardly obscure: the obvious one of party affiliation, which is a stronger force in the Indiana General Assembly than in some legislatures; the irrelevance of population density to the bulk of legislation, and the complexity of the political and social structure of the metropolitan community which proliferates competing interests.

The fear of urban dictatorship is the product of widespread misunderstanding, a misunderstanding which is being sedulously cultivated by the proponents of the "federal plan." Professor Gordon Baker has correctly sized up this matter:[72]

> While a granting of urban representation proportionate to population would not result in a single, cohesive urban "majority," it could effectuate a considerable shift in the pattern of political power. Some urban interests that formerly had little influence would probably gain more, while others (notably those that enjoy an advantage from an alliance with rural forces) would lose. It is this potential shift in the power equilibrium that arouses the greatest resistance from the elements benefiting from the status quo. That resistance is prompted by a fear not of *an* urban interest, but of *certain* urban interests.

XI. The Illinois Cumulative Voting System

Anyone concerned about rural-urban conflict and fearful of big city domination of the legislature might consider the cumulative voting system in Illinois. That system is unique in the United States, and perhaps the entire world, and is the most significant approach to proportional representation prevailing in this country. The essence of the system is minority party representation in every legislative district. All House districts have three members elected simultaneously on a ballot where the voter has the options of voting for one, two, or three candidates. If he votes for only one candidate, that candidate is credited with three votes; if he checks two candidates, each receives one and one-half votes unless the voter chooses to give one candidate two votes; and if he checks three candidates, each receives one vote.[73] This enables the members of a minority party in a district to concentrate their votes on one candidate and assure his election.

Thus the normal result is that the majority party wins two seats and the minority party wins one in virtually every House district. That is in marked

71 Dirge, *Metropolitan and Outstate Alignments in the Illinois and Missouri Legislative Delegations*, 52 Am. Pol. Sci. Rev. 1052 (1958).

72 Baker, *op. cit. supra* note 64, at 58-59.

73 Ill. Const. art. 4, §§ 7-8. A detailed description and analysis is presented in Blair, *Patterns of Party Allegiance*, 52 Am. Pol. Sci. Rev. 123-30 (1958).

contrast to the winner-take-all result of our customary system of single member districts, or when electing all members on a straight plurality basis in multi-member districts. It is nearly impossible for the majority party to take all three seats in the Illinois district if the minority party plunks all of its votes on one candidate. To sweep a district, the majority would have to obtain the support of over 75% of the voters of the district — a rare feat which occasionally occurs in a few districts in Chicago.

To facilitate operation of the system, the law permits political party committees in each district to determine the number of candidates to be nominated; thus the party can avoid scattering its votes. In those districts where party strength is about equal, both parties make two nominations; thus there are four candidates in the fall election for three seats. In districts where party strength is decidedly uneven, the majority makes two nominations and the minority one. This produces "set-up" tickets in November in about half of the districts. In that situation the real elections occur in the primaries, as they do in many other places in the United States. Occasionally five or more nominations are made.[74]

The system was incorporated in the Illinois Constitution of 1870 in order to mitigate sectional conflict in the legislature and to assure minority party representation.[75] Prior to that time, the southern portion of the state sent solid Democratic delegations to Springfield while the northern part sent solid Republican delegations, which exacerbated sectional feelings.[76] The intent of the cumulative voting system was to make partisan loyalties mitigate rather than reenforce sectional loyalties. The experiment worked and today is a useful device for mitigating Chicago-downstate friction in the legislature. At every session about one-third of the Chicago delegation is Republican, and at least one Democrat represents each of the suburban and downstate districts.

A recent statistical analysis of roll-call votes in the Illinois House confirms the success of the system. That study shows that Chicago Republicans vote more consistently with downstate Republicans than with Chicago Democrats, even on issues directly affecting Chicago. And conversely, downstate Democrats vote more consistently with Chicago Democrats than with downstate Republicans. As a result, there is a very low cohesion in the voting of House members from Chicagoland, less than 67% on three-fourths of the contested roll-calls from 1949 through 1957.[77]

In addition to achieving its major objectives of assuring minority representation and mitigating sectional conflict, the cumulative voting system has several other valuable results. It assures that party strength in the legislature will very closely approximate the ratio of the state-wide vote for each party; each party gets within two or three seats of the number its proportion of the vote merits. Consequently the majority party always has a clear majority of the seats and is opposed by a minority party delegation with forty percent or more of the seats, enough to be an effective opposition. There are no landslides; the relative party

74 See table in Blair, *Cumulative Voting: An Effective Electoral Device in Illinois Politics*, 34 Sw. Soc. Sci. Q. 15 (1954).

75 The idea is credited to Joseph Medill, publisher of the Chicago Tribune. See Garvey, The Government and Administration of Illinois 72-74 (1958).

76 See Blair, *op. cit. supra* note 74, at 15.

77 Dirge, *op. cit. supra* note 71.

strengths necessarily fluctuate within a range of 33% and 67% and in practice the range is between 40% and 60%. Consequently there is less turnover in personnel and in every session the bulk of the legislators are experienced.[78] These very significant merits of the system are spotlighted by the following comparison of Illinois and Indiana statistics.

Table 8. Comparison of Cumulative Voting and Straight Plurality Voting Systems

	1956		1958	
Illinois	*Rep.*	*Dem.*	*Rep.*	*Dem.*
Popular vote — percent	50	49	48	52
Members of House elected	94	83	86	91
Indiana				
Popular vote — percent	55	44	43	56
Members of House elected	76	24	21	79

Two criticisms may be made of the system: the limited number of nominations, and that three-member districts necessarily are larger geographically and in population than single-member districts, and therefore may weaken the bond between legislator and constituent. The map of Illinois districts shows that the average downstate district contains three or four counties, although one has seven and some are single counties.[79] Three or four counties is not an exhorbitantly large district, particularly when the three representatives are likely to be scattered about the district. From the population standpoint, none of the Illinois districts are nearly as large as the Marion and Lake districts of Indiana. Furthermore, the bond between legislator and constitutent is strengthened by the fact that every constituent who bothered to vote voted for at least one of the legislators from his district.

Limiting nominations to three candidates in the "set-up" districts renders the fall election superfluous, and transfers the actual election to the primaries.[80] However in that situation the members of each party have a chance to cast a significant vote in the primaries, whereas in "safe" districts under the plurality system the election also is only a formality and at the preceding primaries only the members of the dominant party have an opportunity to cast a significant vote. In those Illinois districts where four or more nominations are made (half of the districts) voters at the general election have a much wider range of choices than voters in single-member districts.

The disadvantages do not appear nearly as consequential as the many advantages of the system. It is noted that the Illinois system continues to be one of those things, like the Nebraska unicameral legislature, which is frequently admired but has never been copied. It remains virtually unknown even in adjacent Indiana, and possibly would be viewed with suspicion as a dangerous novelty — perhaps "un-American," although ninety years would appear to be an adequate experimental period. Clearly the Illinois cumulative voting system merits consideration as a practical system of minority representation, which

78 See the table 1 in Blair, *op. cit. supra* note 74.
79 See maps in Blair, *op. cit. supra* note 73.
80 An incidental effect of the system would appear to be the strengthening of party control over elections and of party discipline in the legislature.

avoids the common criticism of proportional representation as productive of splinter parties, since it squeezes out minor parties. Significantly, when Illinois reapportioned in 1954-55 it chose to retain cumulative voting.

XII. Single-Member Districts or Multimember Districts?

The standard system of representation in this country always has been the single-member district, but the Indiana legislature contains several multimember districts. Currently the Marion House district has eleven members, the Lake district has five members, and nine other House and Senate districts have two or more members. Under a fair apportionment, the Marion House district would have fifteen members, the Lake district twelve, two districts would have five members, and seven other House districts would have two, three, or four members. Presently the constitution bars division of a county for Senate districts but not for House districts. Briefly, 1915 to 1921, single-member districts were universal for the House; the 1915 apportionment law directed county boards in multimember counties to draw districts.[81]

Since a fair reapportionment would result in about twenty-one senators and fifty-six representatives from multimember districts, which is half of the membership of the Legislature, and since amendment of the apportionment sections of the constitution is now contemplated, the reapportionment study commission ought to examine the question of whether multimember districts should be continued.

Multimember districts are not unique to Indiana. A recent survey found multimember Senate districts in sixteen states and multimember House districts in thirty-six states.[82] Since that survey at least one state (Michigan) has abandoned them. Their existence would appear attributable to the feeling that a community — a city, county, or New England town — is a proper, natural unit for representation in the legislature. That feeling is expressed in and enforced by numerous constitutional provisions similar to the Indiana prohibition against dividing counties for Senate districts. Multimember districts are the prevailing pattern in Europe because of the use of various systems of proportional representation, but they are something of an anomaly in the United States with our straight plurality elections and tradition of single-member districts. Most American political scientists, and probably most citizens, seem to regard the single-member district as the superior system, but Professor Maurice Klain states that this assumption has never been intensively investigated or confirmed by empirical evidence.[83]

The following arguments have been advanced from time to time in favor of multimember districts: (1) A natural community ought not be divided. (2) Multimember districts have larger populations, hence a wider field from which to draw higher quality representatives. (3) In a large multimember district the representative may be less vulnerable to pressure groups. (4) It is theoretically possible to get a mathematically more equitable apportionment with multimember districts. (5) It has been said that single-member districting offers

81 Ind. Acts. 1915, ch. 181.
82 Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal,* 49 Am. Pol. Sci. Rev. 1105-19 (1956).
83 *Ibid.*

greater opportunity for gerrymandering. (6) The representative from the single-member district may be more parochial than one from a large district. (7) The representatives from a multimember district are of the same political party under our election system, with rare exceptions, and hence will be more likely to present a united front on behalf of the community's interests, than under a single-member system which usually results in a partisan division among the community's representatives.

Manifestly some of the foregoing arguments are contradictory, particularly points six and seven. A major weakness of the argument for integral treatment of communities is the dubious character of counties as natural communities. Cities are more nearly communities, but it is counties which are the multi-member districts. The argument that multimember district representatives may be of better quality and less parochial is not confirmed by empirical observation; in fact the evidence indicates the contrary.

The really substantial and incontrovertible argument is, in the writers' judgment, the partisan unity of members from such districts. Indubitably this is advantageous to any large city and probably has operated to offset partially the effect of underrepresentation of cities. Consequently if multimember districts were abolished, cities would suffer and justice would require that cities be given their full, proportionate representation. To abolish multimember districts and simultaneously short-change cities by some version of the "federal plan," as has occurred recently in Michigan, would add insult to injury.

The arguments for single-member districts fall into three categories: (1) the advantages accruing from small constituencies, (2) the assertion that one-member elections foster two-party politics, and (3) the greater opportunity for minority party representation in delegations from populous communities. The force of these arguments is directly proportional to the size of the alternative multimember district. The bond between member and constituent in a single-member district may not be significantly stronger than in a two or three-member district, but contrast it with that between representative and constituent in a fifteen-member district containing 700,000 residents. How can the representative personally know many of his constituents?

A major defect of the large multimember district is the problem of intelligent voting. How can the voter intelligently evaluate the merits of fifty candidates in the primary of a fifteen-member district? And what of his problem in coping with thirty names at the following election, not to mention the other offices? The situation is made to order for machine politics and even venal politics. The machine's slate can easily carry the primary, and in the general election the conscientious and discriminating voter is thwarted, one party slate or the other wins. Some people defend this as "responsible party government," but the writers' observations are that it often is irresponsible and some of the poorest legislators are from such districts. In the marginal multi-member districts another serious disadvantage is the excessive turnover; with each shift in party fortunes every incumbent is swept out and the entire delegation changes, as in Marion County in 1948, 1950, and 1958.

Another indictment of the multimember district is the inequitable distribu-

tion of the seats party-wise. It is a winner-take-all arrangement, with no minority party representation. Thus in the last election in Marion County, the 111,000 Democratic votes elected twelve representatives and six senators, while 103,000 Republican votes elected not a single Republican. If that county consisted of twelve House districts and six Senate districts, such a party sweep would be a very remote possibility.

It is the writers' judgment that the merits of single-member districts far outweight those of multimember districts, which have such conspicuous defects. Multimember districts, particularly large ones, ought to be abolished. That would pose the complex and ticklish task of drawing districts within counties and cities, a difficult task at best with manifold opportunities for gerrymandering. Consequently the districting function should not be assigned to the county commissioners, as was done in 1915, but ought to be performed by a state districting or apportionment commission with a competent and impartial staff. The foregoing remarks of course do not apply to the Illinois multimember districts with the cumulative voting system.

In construing the apportionment sections of the constitution, the Indiana Supreme Court has objected to one type of multimember district, one comprising three or four counties. Such "double districts" were the basis for the court's invalidation of the 1895 apportionment act.[84] It objected to a district of three counties with an aggregate of 22,400 "polls" which had been assigned two senators. From the standpoint of population, *i.e.*, "polls," the district was entitled to two senators, but the court stated that since not one of the three counties had enough "polls" to be entitled to a senator, it was improper to create a district in which the residents would be permitted to participate in the election of two senators. In addition, the court held that such a district violated the constitutional standard of "local county representation." The court implicitly rejected the pro-rating viewpoint. That decision seriously handicaps the task of designing an equitable districting pattern.

XIII. Districting Models

To what extent is equitable representation, *i.e.*, equality of district populations, possible with single-member districts? The writers have worked out the districting patterns in Maps 3 and 4 in the Appendix. The estimated 1960 population for each district is shown, except in populous counties which should contain more than one district. In the latter case the average population of districts within a county is shown.

It will be observed that the bulk of the districts in these models have populations within 10% of the ratio of representation. Only three Senate districts (Madison, Delaware, and Grant-Blackford) deviate more than 15% from the ratio, but the Madison district deviates 33%.

A greater relative dispersion exists in the House districts. Seven districts exceed the ratio of representation by more than 15% and twelve districts are more than 15% below. Only one district is more than 20% below, but five are more than 20% above, and one (Howard) deviates by 42%.

84 Denny v. State *ex rel.* Basler, 144 Ind. 503, 42 N.E. 929 (1896).

Students of congressional districting have prescribed 15% as the reasonable maximum deviation for congressional districts.[85] That desirable standard is much more difficult of achievement in legislative districting and patently is unattainable in Indiana on the basis of single-member districts which do not cut across county lines.

Greater equality of district populations than in these models might be obtained by three methods. One would be the creation of a few "double districts," *i.e.*, composed of two or three counties and each having two senators or representatives. Creation of a few such districts would provide very satisfactory population ratios, but this method is barred by the Indiana Supreme Court's decision in the *Denny* case.[86]

Another approach would be the "joint district" device, placing some counties in two different districts. That would correct the underrepresentation for the few large districts in Maps 3 and 4, but not the overrepresentation of the dozen small House districts. Also, while this is an old practice in Indiana, it is open to serious objections. It makes any logical comparison of district populations impossible, as explained above. It opens the door to endless wrangling, and possibly gerrymandering, because there is hardly any limit to the various combinations that might be drawn with such "joint districts." Furthermore it runs the risk of being declared unconstitutional, if challenged, as occurred in the *Parker* case.[87]

The third possibility would be to disregard county lines, partially, and have a few districts straddling county lines. Thus the Howard County House district (Map 3, Appendix) could be reduced to a reasonable population by attaching a portion of that county to one of the districts in Grant County, resulting in three districts of about 48,000 population. This approach is contrary to the long tradition of county integrity, but it is difficult to see any genuine disadvantages, beyond some additional work in printing election ballots. Within the framework of single-member districts it really would not injure the private citizen; each person has one representative, who may live in an adjacent county, which is now a common occurrence. Possibly county officials would object, but actually they would benefit; thus Howard County officials would have two spokesmen in the House. This approach, however, is barred by the constitution for Senate districts and the opinions of the Indiana Supreme Court in the reapportionment cases, which emphasized county integrity, suggest that any such House districts might be held unconstitutional.

Consequently it appears that the models in Maps 3 and 4 are about the closest possibility to equal representation within the limits of the present provisions of the constitution, without resorting to the confusion of dual "joint districts." Although the disparities are not horrendous, it might be desirable to amend the constitution to permit greater equality. Such an amendment should delete the prohibition against splitting counties for Senate districts and authorize the creation of districts across county lines as well as within a county. The amend-

85 The standard proposed by a committee of the American Political Science Association and sponsored in Congress as the well-known Cellar resolution. See Cellar, *Congressional Apportionment — Past, Present, and Future*, 17 LAW & CONTEMP. PROB. 268, 274 (1952).

86 Denny v. State *ex rel.* Basler, 144 Ind. 503, 42 N.E. 929 (1896).

87 Parker v. State *ex rel.* Powell, 133 Ind. 178, 32 N.E. 836 (1892).

ment might be drafted in a manner which would permit adoption of the Illinois cumulative voting system.

The default of the Indiana legislature and similar defaults by legislatures of other states points up the problem of securing regular and equitable reapportionments. Nineteenth-century state constitutions universally vested this function in the legislature and mandated reapportionment at specified intervals. The assumption that the legislature would honor its obligation has proved wrong in the twentieth century, when our society has become more diversified and complex and greater pressures have come into play. There are three obvious reasons why legislatures default: the members personally have a strong vested interest in the existing districting pattern, powerful interest groups also have vested interests in the existing apportionment, and when a legislature is sincerely interested in performing its duty it often cannot reach agreement on any reapportionment. Under present circumstances it is almost utopian to expect the legislature to reapportion regularly.

To correct this situation some states have amended their constitution in recent years to establish a reapportionment commission, usually empowered to reapportion *if* the legislature defaults. The commission or board normally is an ex-officio body of state administrative officials, but in Michigan it is the state board of canvassers, a bipartisan body appointed by the governor, and in Illinois it is a special commisssion appointed by the governor from nominations submitted by the major parties. The assumption appears to be that the special commission rarely, if ever, will come into operation, because the legislature will act rather than permit reapportionment to pass from its hands. This arrangement currently prevails in California, Illinois, Michigan, Oregon, South Dakota, and Texas.[88]

Four states have gone a step farther and completely removed the function from the legislature. In Arizona the house districts are revised by county boards of supervisors. In Arkansas it is performed by a board of apportionment, comprising the governor, secretary of state, and attorney general, and subject to judicial review. In Missouri the senate is reapportioned by a special commission appointed by the governor, while the secretary of state reapportions House seats among the counties and county boards draw districts within counties. In Ohio the function is vested in the governor, secretary of state, and auditor, or any two of them.[89]

The latter arrangement appears preferable, because the legislature ought not be obliged to become involved in this ticklish and somewhat technical matter. Not only is it likely to consume much of the legislature's valuable time and engender animosities, but members have such a direct personal interest that they ought not, and should not be expected, to do it. Reapportionment ought to be done by an agency which has no personal or political interest and which is as insulated as possible from political pressures of any kind. The arrangements in Arizona, Arkansas, Missouri, and Ohio are defective, because, although reapportionment has been removed from the legislature, the alternative boards

88 12 BOOK OF THE STATES 5-55 (1958-59).
89 *Ibid.*

consist of political partisans who cannot be relied upon to take an entirely detached and objective view.

Reapportionment should be executed not by a bipartisan board (and the aforementioned states do not even assure that) but by an "unpartisan" agency. This logical approach has been adopted by the United States Congress and the British Parliament. Under the automatic apportionment act of 1929, the reapportionment of House seats is calculated after each census by the Census Bureau, which transmits the results to the House, and the new apportionment applies automatically to the subsequent Congress.[90] The House of Commons has delegated this task to special "boundary commissions," consisting of lay experts appointed by the Speaker of the House. "Mr. Speaker," a paragon of neutrality, is chairman and the only ex-officio member.[91]

No existing agency in state government appears qualified to perform this delicate function. It has been suggested that it be assigned to the state appellate court, or that it appoint the members of a commission, but that proposal is open to two criticisms: state appellate courts often are staffed by politicians, or at least ex-politicians, and this is a nonjudicial function which courts might properly dislike.

Consequently it would be better to assign, by constitutional stipulation, this function to a special apportionment commission composed of detached and qualified people, and appointed by persons who also are nonpolitical, rather than by the governor. The commission should hire a professional director and such technical personnel as needed. The commission, of course, would be subject to mandamus and its work might properly be subject to judicial review. The purpose should be not merely to secure regular reapportionment but to secure good reapportionment. As Professor Seltzer states, "Action is not the keynote of reform in reapportionment, but rather disinterested treatment of an extremely important and vital problem."[92] Such a commission might properly be charged also with redrawing congressional districts each decade.

XIV. A Proposed Constitutional Provision

Consistent with the foregoing observations and data, the authors submit the following proposal for amending the constitution of Indiana.

> Sec. 4. The congressional districts and the districts for representation in the House and Senate of the Indiana General Assembly shall be revised in the year following the adoption of this amendment, and subsequently every decade following each federal decennial census, by a State Redistricting Commission.
>
> Sec. 5. The State Redistricting Commission shall consist of one person designated by the presidents of each of the four state universities and colleges from their respective faculties, of one person designated by the president of the League of Women Voters of Indiana, and of one person designated by the president of the Indiana Bar Association. Commission members shall be designated without reference to political party affiliation, and solely on the basis of

90 2 U.S.C. § 2a (1958).
91 House of Commons (Redistribution of Seats), 1948-49, 12, 13 & 14 Geo. 6, c. 66.
92 Seltzer, *Rotten Boroughism in Indiana,* 1952 (unpublished thesis in Indiana University Library).

professional ability and impartiality. Commission members shall receive compensation of $25 per day of actual service and shall hire a professional director and such other personnel as needed, and fix their compensation. The General Assembly shall appropriate an amount adequate to enable the Commission to perform its duties effectively, provided that the appropriation for each redistricting shall be not less than $50,000, and any unexpended amount shall revert to the state general fund.

Sec. 6. The Commission shall redistrict on the basis of federal census data and shall establish from 47 to 50 senatorial districts and from 95 to 100 house districts, each district to have only one senator or one representative. Congressional and House and Senate districts shall be formed of contiguous and compact territory. Each class of districts shall be of equal population so far as possible, and no congressional district shall deviate more than 15%, and no legislative district more than 25%, from the average population of districts in its class. The Commission shall file with the Secretary of State maps showing the new districts, which shall take effect at the following election. The redistricting plans shall be subject to judicial review to assure compliance with the aforementioned standards, provided that no redistricting plan shall be subject to judicial restraint pending or during litigation. In the event any redistricting plan shall be held invalid by the Supreme Court, the Commission promptly shall prepare a substitute plan. Half of the senators elected at the first election following a redistricting shall serve two year terms. The Commission shall designate either the odd-numbered or the even-numbered districts for two year terms. If the state legislature shall adopt any system of proportional representation or cumulative voting, the Commission may establish multimember districts.

Possibly alternative methods for constituting the commission could be devised. The authors have selected the four presidents and the Bar Association and League of Women Voters because of their impartiality. Any other state officials or associations are unlikely to have as much objectivity. An even-numbered commission compels some agreement within the commission.

This proposal retains the two chambers at the present memberships; any larger would tax the physical facilities; but allows some adjustment to facilitate evenly populated districts. It eliminates multimember districts, for the reasons stated above, except in the event the legislature should choose the Illinois cumulative voting system or any variant of proportional representation. The standard of a maximum deviation of 15% for congressional districts is not a difficult one, but is difficult for legislative districting. Consequently a maximum deviation of 25% is permitted for legislative districts, although few need deviate more than 10%. Beyond this point it seems inadvisable to bind the discretion of the commission.

XV. The Consequences of Mal-Representation

The theory of equal representation has been concisely stated by a state jurist thusly:[93]

Equality of representation in the lawmaking tax levying bodies

93 Stiglitz v. Schardien, 239 Ky. 812, 40 S.W. 2d 315 (1931).

> is a fundamental requisite of a free government, and no unbiased, fair, or just man has any right to claim a greater share of the voting power of the people than is granted to every other man similarly situated. It is vain for the people to hope for reform of abuses or righteous results in legislation if the legislative bodies are not fairly representative of the spirit, purpose, and will of all the people, without discrimination.

The theory is grounded on the democratic concept of the moral equality of all persons in a free government as expressed in the familiar expression "one man, one vote." That democratic ideal, that all citizens should have equal representation, was developed in a bygone era of Jeffersonian individualism. This is the era of group politics, but the notion still has relevance. The most obvious and significant consequence of patterns of mal-representation in legislatures is the unfair advantage afforded to favored groups to the disadvantage of other groups. The system of representation is the distribution of the keys to power. It is evident that in Indiana the keys presently are not distributed equitably, and proposals like the "federal plan" to make the legislature even less representative would distribute the keys even less fairly.

The critical importance of an equitable distribution of the keys to power in this age of group politics has been well stated as follows:[94]

> If it is true that in today's society the multiplicity of special interests of the citizen is increasingly promoted and represented through associations and organizations then it becomes even more important that we have legislative bodies elected by voters of equal weight so that one man's vote is no less or greater than that of any other man. For if the Third House [lobbying] promotes the special welfare of the individual then somewhere someone must promote the general welfare. With all of its imperfections a legislature comprised of men of good will and elected from equal districts by voters of multiple interests is apt to know best how to compromise special interests into the general welfare.

The foremost consequence of mal-representation then is its relation to the policies enacted into law by the legislature. Politics is the process which determines who gets what, when, where, and how, and the system of representation very largely determines who gets what. Even a casual observer of the Indiana legislature in recent sessions can perceive the bearing of the existing pattern of mal-representation on many of the most important decisions of the General Assembly.

There are other important consequences of mal-representation which may not be as obvious. One of the serious consequences in several states has been its damage to the two-party system. To the extent that party alignments may correlate with the areas which are over-represented as against those which are under-represented, it is evident that one party is at a permanent disadvantage. That party is doomed to being a minority permanently, or if it occasionally surmounts the handicap, its legislative strength will be less than its proportionate popular vote. The rationale of the two-party system is that the parties compete for popular favor on an even basis. How meaningful is an election if one party

94 BUREAU OF GOVERNMENTAL RESEARCH, INDIANA UNIVERSITY, APPORTIONMENT AND REAPPORTIONMENT IN INDIANA: POLITICAL IMPLICATIONS 5 (1957).

is guaranteed in advance control of the legislature, or of one chamber, even if a substantial vote is cast against it? "Yet such a result occurs in several American states with sufficient frequency to raise serious questions for a people that supposedly profess democracy as a value system."[95] Two related consequences are the impact of mal-representation on intraparty structures and on executive-legislative relations. Areas and interests which are underrepresented in the legislature are likely to suffer a corresponding disadvantage in party councils and nominations. States with pronounced mal-representation, such as the "federal plan," virtually assure that the handicapped party will never control both chambers, and governors from that party always will face a hostile senate or house, thereby compounding the normal amount of friction inherent in the separation of powers system.

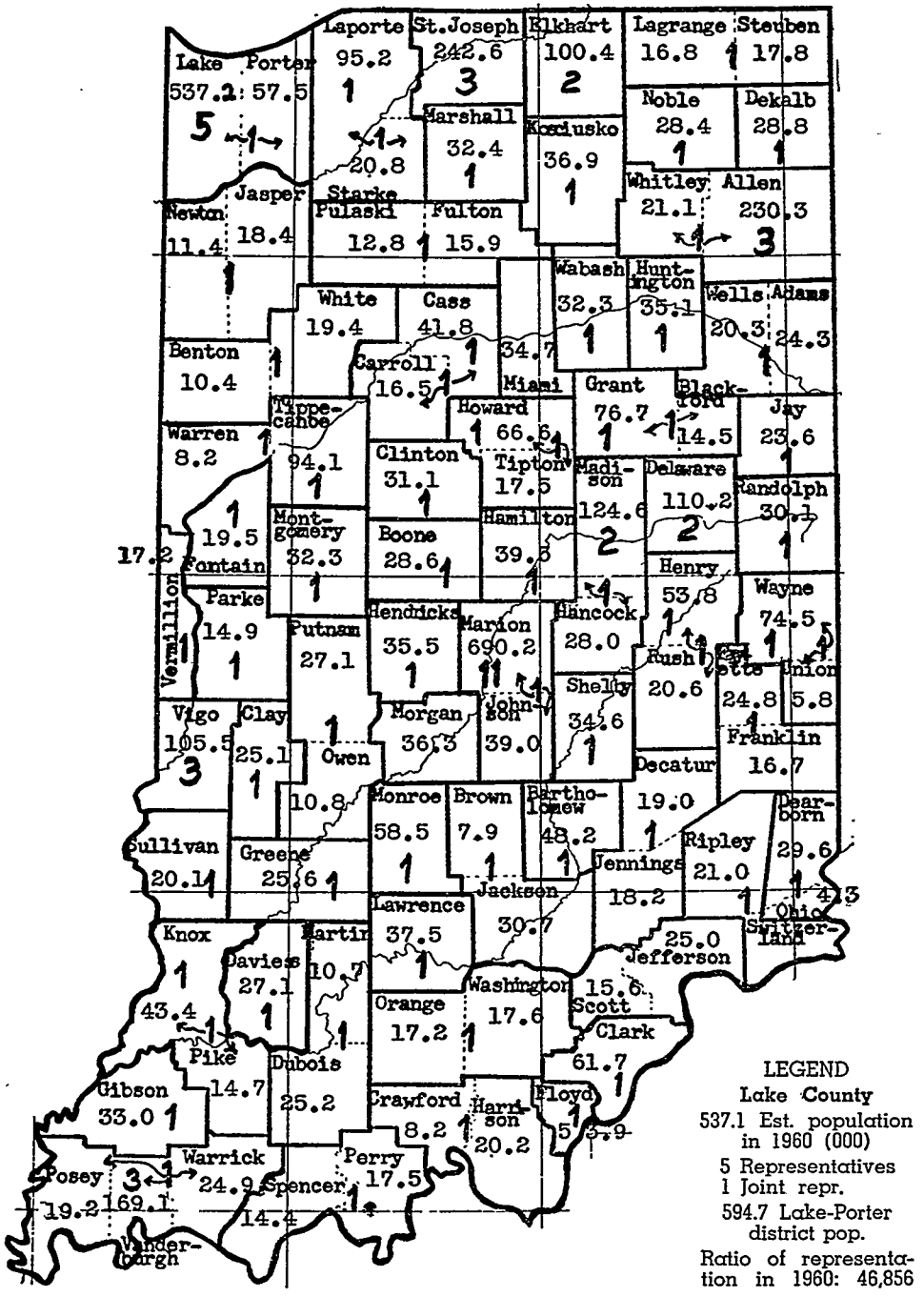
Less tangible but of critical importance is the effect of mal-representation on public confidence in state government. An unrepresentative legislature is less responsive to public needs and wishes. While its influence cannot be segregated or measured, indubitably this is one of the major reasons for the conspicuous failure of state governments to adapt to contemporary needs, and the general decline in the prestige of state legislatures. Movements for legislation to meet the needs of our urban-industrial society, for constitutional revision, and for reform of the archaic structure of local government all too frequently have been stymied in legislatures. Consequently in some states the public frequently has made use of the initiative and referendum.

The other recourse available to the public is to turn to our national government. The unresponsiveness of state legislatures has contributed mightily to the centralization trend, as interest groups, usually urban, have found Congress more responsive. This fact led the recent federal Commission on Intergovernmental Relations to urge "fair and equitable" reapportionment of legislatures, stating, "The problem of reapportionment is important in the area of study of this Commission because legislative neglect of urban communities has led more and more people to look to Washington for more and more of the service and controls they desire."[96]

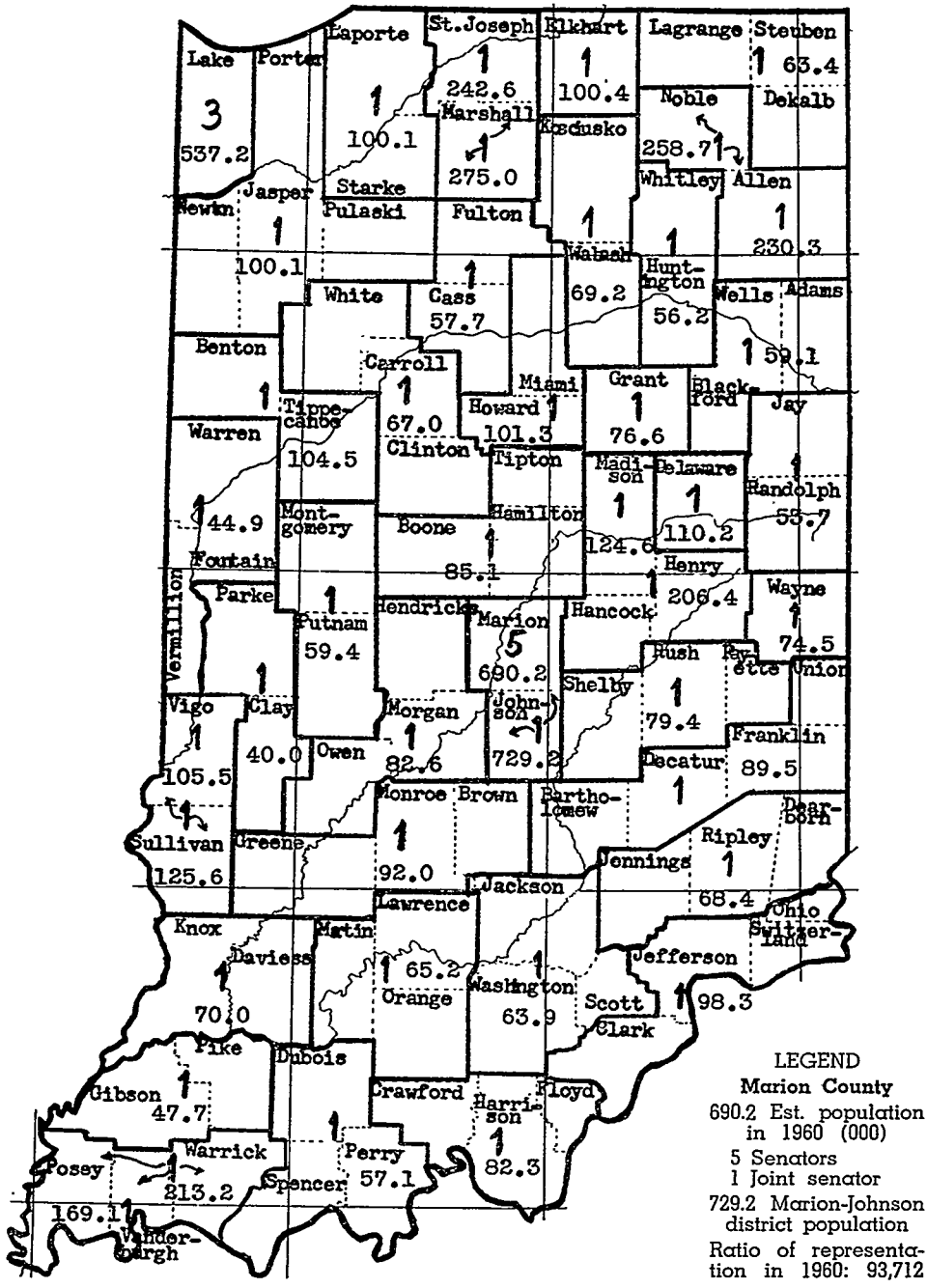
At this juncture some strong voices are urging by a specious appeal to tradition that the Indiana legislature be made even less representative — permanently. It might be wiser for Hoosiers to adhere to their constitutional tradition, dating from the Northwest Ordinance, of equality of representation.

95 BAKER, *op. cit. supra* note 64, at 21.
96 H.R. Doc. No. 198, 84th Cong., 1st Sess. 39 (1955).

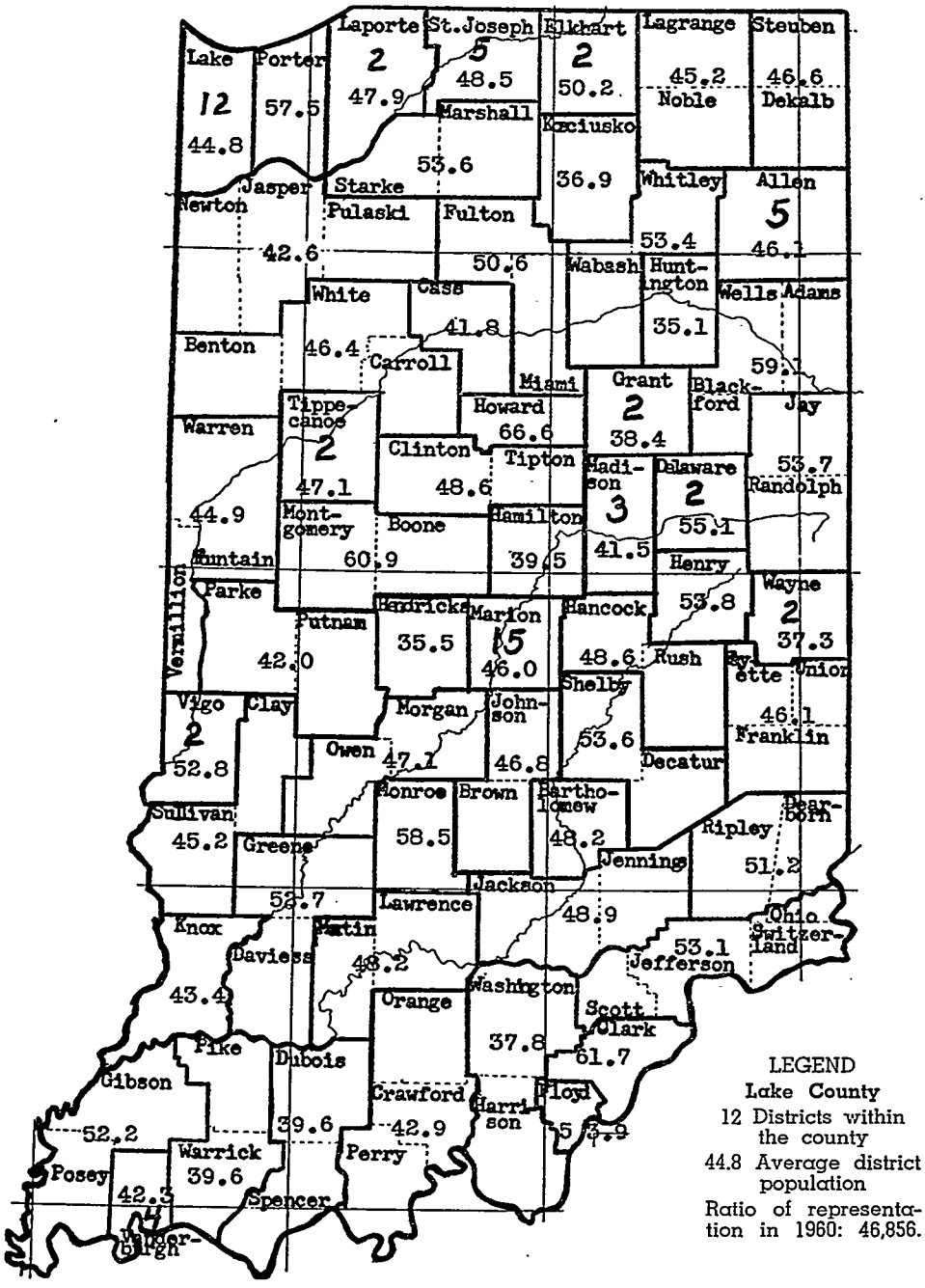
APPENDIX



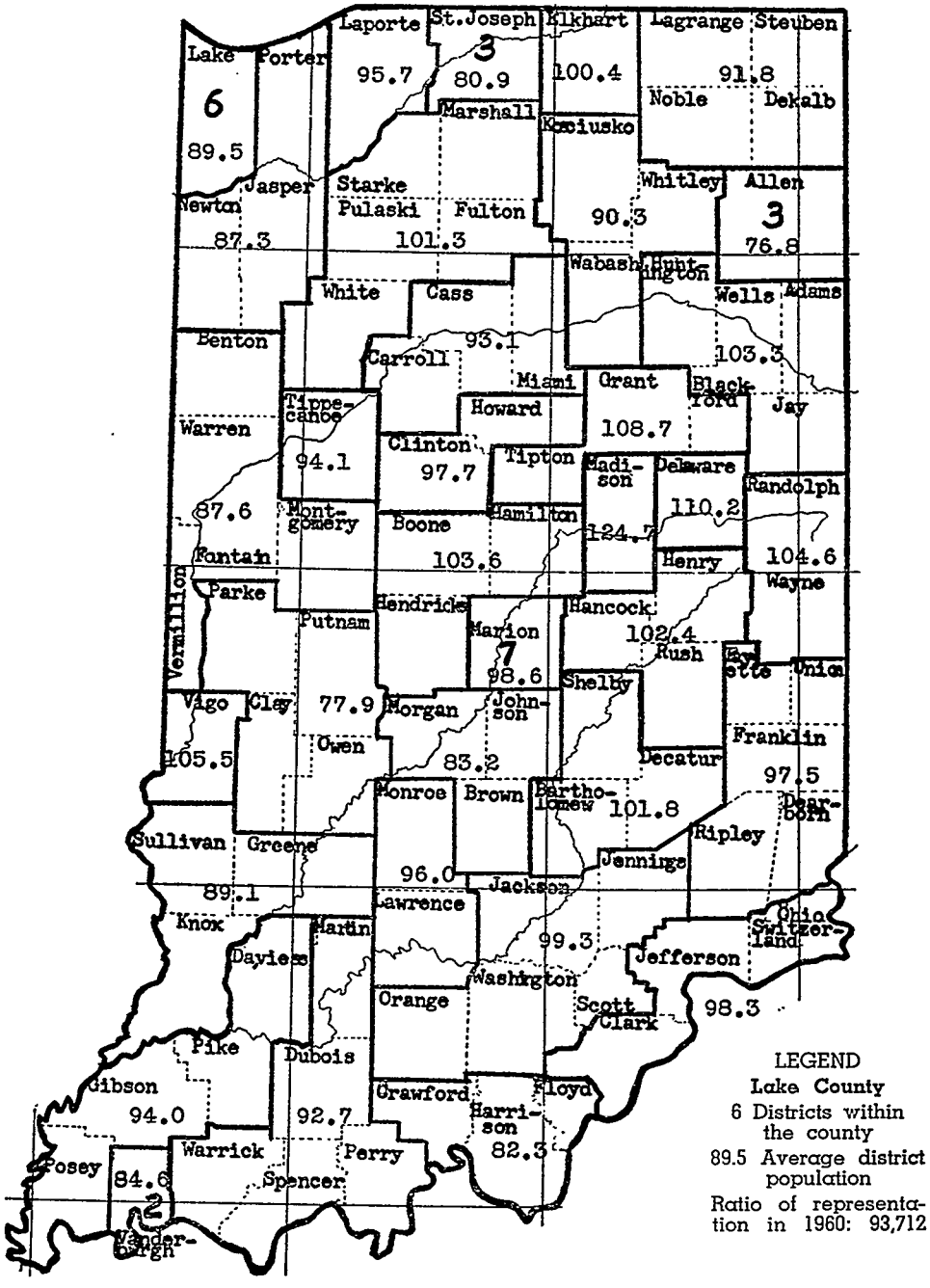
Map 1.—Present House Districts. 1960 population estimates.



Map. 2.—Present Senate Districts. 1960 population estimates.



Map 3.—Redistricted House on basis of 1960 population single member districts.



Map 4.—Redistricted Senate on basis of 1960 population single member districts.