LEGISLATIVE REPRESENTATION—WITH SPECIAL REFERENCE TO NEW YORK

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INTRODUCTION

In 1955, President Eisenhower's Commission on Intergovernmental Relations pointed out that our state legislatures were the most powerful and influential instruments of government in the United States when the average citizen could look primarily to his state legislature for initiative and wisdom in the formulation of public policy on domestic issues. Today, however, the Commission's report continued, American state legislatures are overshadowed by the governor and the national government, primarily because the legislatures have failed to solve the more difficult problems of our rapidly changing society. The legislature's failure to meet these problems, the Commission argued, has been caused largely by the legislature's unrepresentative character.[1]

Although urban inhabitants outnumber rural dwellers in a majority of our states, rural voters control one or both houses of the legislature in most states. Although Massachusetts probably has the most representative state legislature in the United States, yet a majority of neither house represents a popular majority.[2] In California, a senatorial majority represents less than twelve per cent of California's population, while a majority in Connecticut's House comes from districts where less than ten per cent of Connecticut's people live.[3] Although New York's Legislature may be highly representative in comparison with California's Senate or Connecticut's House, a majority of New York's senators will represent only thirty-eight per cent of New York's citizen population after the Reapportionment of 1963, while a majority of New York's assemblymen will come from districts where only 36.5 per cent of New York's citizen inhabitants live.[4]

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[1] COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 38 (1955). See also *Rural Over-representation Acute in State Legislatures,* 20 CONG. Q. WEEKLY REP. 170-78 (1962).

[2] A majority of Massachusetts state senators come from districts having 44.6% of the state's population while a majority of the lower house is elected in districts with 45.3% of the state's population. Goodwin, *Massachusetts,* in NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT Mass.-1 (2d ed. 1962).

[3] *Ibid.* See also Dauer & Kelsay, *Unrepresentative States,* 44 NAT'L MUNIC. REV. 571 (1955); MacNeil, *Urban Representation in State Legislatures,* 18 STATE GOV'T 59 (1945).

[4] Computed by the author from citizen population statistics supplied by the U.S. Bureau of the Census.

Not only does this situation enable a minority of voters to elect a legislative majority, but, as the Commission on Intergovernmental Relations pointed out, it has often meant legislative neglect of urban—and especially metropolitan—problems. This neglect of urban communities has led city governments to bypass the states and make direct cooperative arrangements with the national government in such fields as housing, urban renewal, airports, and civilian defense. The multiplication of national-local relations does, of course, weaken the state's proper control over its own policies and its authority over its own political subdivisions. The Commission correctly pointed out that the national government is often more responsive to urban needs, because urban interests are frequently more effectively represented in Congress than in their own state legislatures. The same shift in population which has made our state legislatures less representative has made the Congress more representative of urban areas. For, unlike most state legislatures, the national House of Representatives has been reapportioned after almost every decennial census. Moreover, since United States Senators are elected at large, they have become increasingly dependent on urban voters for their election to the Senate.[5]

The President's Commission on Intergovernmental Relations concluded that the role of the states in our federal system depends on the state legislatures' being reasonably representative of all the people.[6] Similarly, the legislature's role in state government depends on its representing all of the people of the state. The march from various city halls to the governor's office and to Washington is not likely to abate if the legislature fails to use its authority to solve urban problems. Thus, the future of the states in the American federal system and of the legislature in state government is closely tied to the representative character of the legislature.

Legislative representation involves four closely related problems: (1) the bases of representation, (2) apportionment, (3) districting, and (4) remedies for malapportionment, gerrymandering, and failure to reapportion and redistrict.

I

THE BASES OF REPRESENTATION

The first rather obvious question relates to the basis or bases of representation. What is or what should be the apportionment base: total population, citizens, electors, votes, area, political subdivisions, or taxes? The literature on apportionment generally talks about two apportionment bases: population and area. The term "population" is misleading, because it has been used to cover total population, citizen population, electors, and votes cast. Therefore, more precise terms—"popular base" and "representative population" or "representative inhabitants"—should be used. The term "area," which is found throughout the literature on apportionment, is also misleading. Although the territorial extent of certain sparsely populated districts has been offered as a reason for deviating from the popular base in apportioning

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[5] COMMISSION ON INTERGOVERNMENTAL RELATIONS, op. cit. supra note 1, at 38, 40.
[6] Ibid.

legislators to these districts, no one has ever seriously advocated the apportionment of legislators according to acres or square miles or any other such territorial measure. Rather, the term "area" or "territory" is used in the literature on apportionment to refer to the use of a political or civil subdivision as an apportionment base. The statement that Vermont's lower house has a territorial apportionment base, for example, actually means that each of Vermont's inhabited towns has one and only one member regardless of population or area.

In a majority of states, representative population is the principal basis of representation in both houses. But, in many cases, the popular base has been modified by providing for a certain minimum or maximum number of representatives per county or per town. New York's Constitution, for example, guarantees at least one assemblyman to every county except Hamilton, gives two assemblymen to certain counties, and provides that the remaining members shall be apportioned among the most populous counties according to citizen population. Thus, it is said that there are two bases for apportioning assemblymen: an area base and a popular base. In 1821, when New York's population was more evenly distributed among the several counties, the area base did not seriously modify the popular basis of apportionment. As cities and suburban areas have grown more rapidly than rural areas, however, this area base has greatly limited the popular base and has increasingly favored the rural areas.

The more sophisticated defenders of a territorial base do not invoke the sanctity of county lines or cite mere statistics on the acreage of various counties. In New York's 1894 Convention, for example, Henry J. Cookinham contended that the area base should not be considered merely in terms of acreage but also in terms of the proximity of communities to each other and the means of communication between them.[7] Benjamin S. Dean argued that the great essential of representative government is a territorial constituency which has a well established "community of interests, political, social, economic and business." Dean maintained that a representative "carries with him into the legislative body the force, integrity and character of his own district." Dean thought that the question of mere numbers of inhabitants is of "the most incidental importance" when the other conditions of representation are fixed and well established.[8]

Elihu Root defended the alleged over-representation of the rural areas on similar grounds. He argued that the more sparsely populated portions of the state have diverse interests and, therefore, should have relatively more legislators to represent these various interests. Although a great city may have more inhabitants, he continued, it has a unified interest and, consequently, requires fewer legislators to represent that interest in Albany. All of Manhattan's twelve senators represent the same interest and the same political organization, Root argued, while twelve rural

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[7] 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPT. 29, 1894, at 8 (1900).

[8] 3 id. 1156-57.

senators represent twelve different political organizations and an even greater number of different interests.[9]

Similarly, New York's proposed senatorial apportionment of 1935 has been criticized on the ground that, in giving priority to population equality between districts, the legislature failed to give the proper weight to the essential ingredients of the area base. F. Morse Hubbard, Research Counsel to the Joint Legislative Committee on Reapportionment, complained that territorial extent, lack of convenient communication, and differences in social and economic characteristics had been ignored in grouping upstate counties into senatorial districts. He pointed out, for example, that the proposed thirty-seventh senatorial district (Delaware, Otsego, and Herkimer counties) was a long narrow district running north and south. Not only would the northern and southern extremities of such a district be remote from each other, but they are not connected by direct routes of communication since the highways and railroads cut across these counties from east to west or from southeast to northwest.[10]

In summary, the more serious arguments in favor of an area base run something like this: The problem of providing adequate representation for Manhattan, where there are 72,003 citizens per square mile, is quite different from that of providing adequate representation for counties having less than a hundred citizens per square mile. One might reasonably argue, for example, that one senator from Manhattan can more effectively represent his 396,017 constituents living in an area of approximately 5½ square miles than is possible for a senator representing four counties such as Fulton, Hamilton, Herkimer, and Montgomery (now district No. 41), with his 176,572 constituents living in seventy-six cities, towns, and villages spread over 4,095 square miles and separated by mountains.[11] Similarly, for more than 180 years, it has been argued that Staten Island's peculiar geographic position justifies giving separate legislative representation to Staten Island whether Staten Island has the requisite number of representative inhabitants or not.

In addition to these more sober defenders of the area base, of course, others argue that government should always be controlled by rural citizens. In New York's 1894 Convention, for example, Edward Lauterbach pleaded for area representation on the ground that many urbanites are "unfitted for citizenship" and that rural people have "greater intellect."[12] Similarly, Henry J. Cookinham argued that the average citizen in the rural district is superior to the average citizen of a great city—superior in intelligence, morality, and the art of self-government. In defense of his value judgment, Cookinham alleged that the number of criminals and political subversives and the corruption of political machines were far greater in large cities.[13] It is often

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[9] 3 *id.* 1223-34. [10] N.Y. LEGIS. DOC. No. 31, at 15-18 (1950).

[11] *Id.* at 11, 77-78; 1 U.S. BUREAU OF THE CENSUS, 1957 CENSUS OF GOVERNMENTS (No. 1) 43-44; N.Y. LEGIS. DOC. No. 98, at 14A (1953). Under the 1960 census, Manhattan (New York County) has 1,584,069 citizen inhabitants and will receive four senators at the 1963 reapportionment. See note 4 *supra*.

[12] 4 REVISED RECORD OF THE N.Y. STATE CONSTITUTIONAL CONVENTION, *op. cit. supra* note 7, at 87.

[13] *Id.* at 10-11. See also Michael J. Mulqueen's defense of urban people, *id.* at 20-21, 24.

contended that rural people are better citizens not only because they conform better to "American ideals" but also because they are more likely to be natives of the state. Moreover, the argument continues, the genius of the American system lies in the defense it affords to minorities, and use of an area base gives the rural minority protection against the voracious fiscal appetite of urban areas. Finally, apportioning the members of at least one chamber on an area base has been defended by analogy to the United States Senate, where each state—regardless of population—has two and only two senators.[14]

In reply to these arguments, opponents of the area base contend that objective studies show that the average rural citizen is inferior to the urban citizen in intelligence, education, health, and emotional stability.[15] The virtue of democracy, the reply continues, lies in a democratic system's ability to reflect majority opinion. Minority rights are protected by specific constitutional guarantees, and such rights do not—or should not—include the right of a rural voter to have his ballot equal to two or six or more urban ballots. Although a majority of state expenditures often go to urban areas, this argument continues, a still larger majority of state taxes are collected in these same urban areas. Finally, it is answered, the federal analogy is fallacious, because counties are mere creatures of the state and are not quasi-sovereign units entitled to political equality in a federal union of counties.[16] Exponents of this position generally conclude either that the popular base should have relatively more weight and that the area base should have relatively less importance in the apportionment formula than is now the case or that the popular base should be the only base used for apportioning the members of one or both houses.[17]

Like New York, a majority of American states have both a popular and a geographic base for representation in their respective legislatures. Of the forty-seven states having a popular base for apportioning the members of one or both houses, thirty-three use total population as that base.[18] Nine state constitutions exclude certain classes of inhabitants from the representative population while five employ an even more narrow base. Minnesota's Constitution excludes only untaxed Indians, which, in practice, means that total population is also the apportionment base in Minnesota.[19] Washington and Wisconsin exclude military personnel on

[14] DOUGLAS S. GATLIN & BRUCE B. MASON, REAPPORTIONMENT: ITS HISTORY IN FLORIDA (Public Admin. Clearing House of the Univ. of Fla., Civic Information Series No. 23) 1-2 (1956).

[15] For an example of such a study, see ELI GINZBERG ET AL., THE INEFFECTIVE SOLDIER (3 vols., 1959), based on an analysis of draft-board rejections and on case studies of thousands of American soldiers who collapsed under the strain of active service during the Second World War. See also a popular article summarizing several such studies, Bliven, The City Boy vs. The Country Boy, N.Y. Times, Aug. 16, 1959, § 6 (Magazine), p. 20+.

[16] GATLIN & MASON, op. cit. supra note 14, at 2.   [17] N.Y. LEGIS. DOC. No. 57, at 23-24 (1957).

[18] For both houses in Alabama, Colorado, Connecticut, Florida, Iowa, Kansas, Kentucky, Louisiana, Missouri, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, and Wyoming; for the lower house in Arkansas, Georgia, Illinois, Maryland, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, South Carolina, Texas, and West Virginia; for the Senate in Vermont. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1960-61, at 54-58 (1960); GORDON E. BAKER, REAPPORTIONMENT AND REDISTRICTING OF STATE LEGISLATURES 9n (1959).

[19] Administrative and judicial decisions have held that the phrase "Indians not taxed" means Indians not subject to taxation and, since all Indians are now subject to some form of taxation, there are no

active service while Alaska limits the apportionment base to civilian population—a particularly reasonable limitation in Alaska where large numbers of service personnel are concentrated in a few districts.[20]   While California excludes only aliens who are ineligible for naturalization, New York and three other states exclude all aliens from the popular base for representation.[21]   There is good reason for excluding aliens in any state where the ratio of aliens to total population is not approximately the same in every county, because apportioning on the basis of total (rather than citizen) population in such a state magnifies the electoral power of voters who live in counties where a large number of aliens reside. In New York, however, such an uneven distribution of aliens no longer exists so that it makes relatively little difference whether the popular base be total or citizen population.[22]

Similarly, if the ratio of voters to population is approximately the same in every county, it is inconsequential whether population or voters be the popular base. But, if electoral participation varies greatly from county to county, apportioning on the basis of population magnifies the electoral power of voters who live in counties where a large number of non-voters reside. This is apparently the reason for five states' using voters rather than population as the popular base for apportioning the members of one or both houses of their respective legislatures.[23]   Because New York is

longer any "Indians not taxed" in the constitutional sense. MINNESOTA LEGISLATIVE RESEARCH COMMITTEE, LEGISLATIVE REAPPORTIONMENT 14n (1954).

[20] Alaska's upper house has what amounts to fixed apportionment. ALASKA LEGISLATIVE COUNCIL, LEGISLATIVE DISTRICTING AND APPORTIONMENT IN ALASKA 4-7, 15 (1956). Washington and Wisconsin also exclude untaxed Indians—an archaic provision apparently no longer having any force. See note 19 *supra*. WISCONSIN LEGISLATIVE REFERENCE LIBRARY, REAPPORTIONMENT OF THE STATE LEGISLATURE IN WISCONSIN 4 (1954); BAKER, *op. cit. supra* note 18, at 17.

[21] Maine excludes aliens and untaxed Indians from the senatorial apportionment base but excludes only aliens from the apportionment base for the lower house. Nebraska excludes only aliens. Although the *Book of the States* shows that New York excludes only aliens, the 1931 amendment would seem to also exclude untaxed Indians. N.Y. CONST. art. III, § 4 (McKinney 1954). North Carolina excludes both aliens and untaxed Indians. BOOK OF THE STATES, *op. cit. supra* note 18, at 55-56.

[22] Inclusion of aliens in the apportionment base in 1953 would not have transferred a single senator or assemblyman from one county to another. 2 RUTH C. SILVA, LEGISLATIVE APPORTIONMENT (N.Y. Temporary Commission on Revision and Simplification of the Constitution, Staff Report No. 33), at IV-21, IV-44-46 (1960). Inclusion of aliens in the 1960 apportionment base, however, would mean one more senator for Manhattan and one less for the Upstate at the next reapportionment. It would also mean one more assemblyman for Bronx County and one less for Onondaga County (Syracuse). The citizen percentage of the total population in 1960 ranged from 93.3 in Manhattan to 99.7 in Schuyler and Yates counties while the citizen percentage of the total population was 96.8 for the state as a whole. See note 4 *supra*.

[23] "Legal voters" for both houses of the Massachusetts Legislature; "qualified voters" for the senate but population for the lower house in Rhode Island; "qualified voters" for both houses of the Tennessee legislature; "qualified electors" for the senate but population for the lower house in Texas. BOOK OF THE STATES, *op. cit. supra* note 18, at 55-57. Hawaii apportions members of the lower house "on the basis of the number of voters registered at the last preceding general election . . . computed by the method known as the method of equal proportions. . . ." The Hawaii Senate has fixed apportionment. House Comm. on Interior and Insular Affairs, *Hawaii Statehood*, H. REP. No. 32, 86th Cong., 1st Sess. 32-33 (1959); Senate Comm. on Interior and Insular Affairs, *Statehood for Hawaii*, S. REP. No. 80, 86th Cong., 1st Sess. 42-43 (1959); KENNETH K. LAU, REAPPORTIONMENT OF THE TERRITORIAL LEGISLATURE (Univ. of Hawaii Legis. Ref. Bureau Report No. 2) 15-25 (1958) and the supplement prepared by Takaaki Izumi, *id*. at 1-9. The law admitting Hawaii to the Union did not modify the apportionment provisions of the Constitution approved by the Hawaiian voters on Nov. 7, 1950. Pub. L. No. 3, 86th Cong., 1st Sess. (March 18, 1959). There seems to be little reason for Indiana's using male inhabitants

not one of these five states and because electoral participation varies greatly from county to county, the weight of one popular vote cast in some counties has more weight than one popular vote cast in certain other counties.[24]   But the use of voters rather than citizens as the popular base would be difficult in New York because of the difficulty in enumerating actual voters.   The use of non-personal registration in many areas means that a large number of non-voters are listed on the registration rolls.   Therefore, the use of registration as the popular base would not result in apportioning legislators among the counties according to the number of actual voters and would discriminate against those areas having personal registration.[25]

Arizona has attempted to solve the problem of enumerating voters by basing the apportionment of seats in its lower house on the number of votes cast for governor at the last preceding election.   While a great deal may be said in favor of using the gubernatorial vote as the popular base for apportionment in Arizona,[26] use of such a popular base in New York would result in inequitable apportionment; for New York's gubernatorial elections occur in non-presidential years, and voter participation in presidential years does not increase over that in gubernatorial years at a uniform rate throughout the state.   Apportioning legislators according to the gubernatorial vote would underrepresent New York City in relation to the remainder of the state. Apportioning legislators on the basis of the presidential vote, on the other hand, would favor New York City over the upstate metropolitan areas.   Therefore, if the aim is to equalize the number of votes cast per senator and per assemblyman in New York's seventeen most populous counties, the popular base for apportionment should be the number of votes cast for assemblymen at the last two regular elections, which would include one gubernatorial and one presidential year.[27]   Whatever popular base is used, two inter-related problems remain: (1) the relation of the popular base to the territorial base and (2) the apportionment methods or formulae employed.

II

APPORTIONMENT

A systematic investigation of legislative representation requires one to make a distinction between apportionment and districting.   Apportionment relates to the

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over twenty-one as the popular base since this includes some non-voters while it excludes approximately half of the state's actual electorate.

[24] See, for example, the comments of Elon R. Brown, William C. Osborn, William D. Dickey, and Stephen S. Blake, 3 REVISED RECORD OF THE N.Y. CONSTITUTIONAL CONVENTION, *op. cit. supra* note 7, at 1022-23, 1042-43, 1150, and 1179, respectively. In the four senatorial elections held under the present apportionment (1954-60), the average number of voters per hundred citizens ranged from 20.5 in the eleventh senatorial district (part of Brooklyn) to 86.1 in the third senatorial district (part of Nassau County). As a result, one popular vote cast for senator in Manhattan and Brooklyn had 1.8 times the weight of one popular vote cast for senator in Nassau County. Computed by the author on the basis of election statistics published in various editions of the New York *Legislative Manual*.

[25] 2 SILVA, *op. cit. supra* note 22, at IV-22-24.   [26] Baker, *op. cit. supra* note 18, at 11-12.

[27] 2 SILVA, *op. cit. supra* note 22, at IV-24-31. The seventeen most populous counties are the five in New York City (Bronx, Kings, New York, Queens, and Richmond), the three New York City suburban counties (Nassau, Suffolk, and Westchester), and Albany, Niagara, Oneida, Dutchess, Orange, Erie (Buffalo), Monroe (Rochester), Onondaga (Syracuse), and Broome (Binghamton).

distribution of legislators among the several counties or among the various areas of the state, while districting is concerned with the redrafting of district lines. In the case of assembly representation, New York's Constitution makes a sharp distinction between apportioning and districting by vesting the two functions in different bodies. The legislature has the sole power to apportion assemblymen, but the local authorities have the exclusive power to divide their respective counties into assembly districts.[28] In the case of the New York Senate, however, the legislature has the power not only to apportion but also to district. Indeed, apportionment and districting are inseparably joined in the method prescribed for distributing senators to the less populous areas of the state.[29]

Since some of New York's senatorial districts consist of two or more counties,[30] many of the problems relating to senatorial representation in New York are districting rather than apportionment problems. Two extremely important apportionment problems are involved, however, in New York's senatorial representation: (1) the formula for apportioning senators to the more populous areas and (2) the size of the senate.

The first step in apportioning the New York Senate is to find the ratio, which the constitution stipulates shall be obtained by dividing the state's total number of citizen inhabitants by fifty.[31] The census of 1960 shows a total citizen population of 16,240,786, so that the ratio will be 324,816. The next step is to apportion one senator for each full ratio to each county that has at least six per cent of the state's citizen population. When this is done in 1963, twenty-six senators will be apportioned to six counties having a total of 9,519,316 citizen inhabitants:[32]

[28] Each county is entitled to at least one assemblyman. A county having only one assemblyman constitutes one assembly district by itself and, therefore, cannot be divided into assembly districts. "In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall . . . divide such counties into assembly districts. . . ." N.Y. CONST. art. III, § 5 (1894).

[29] The New York legislature actually performs four functions in senatorial apportionment and districting: (1) apportions senators to each county that has at least 6%ʹ of the state's total citizen population; (2) divides each of these counties into a number of senatorial districts equal to the number of senators to which that county is entitled; (3) determines the total number of senators to be apportioned; (4) divides the remainder of the state into a number of senatorial districts equal to the number of senators yet to be apportioned. The first and third are essentially apportionment functions. The second involves only districting. The fourth function involves both apportionment and districting, because the legislature apportions senators to the less populous areas of the state by dividing these areas into senatorial districts.

[30] Seven states give one and only one senator to each county and, thereby, have no popular base for senatorial apportionment: Idaho, Maryland, Montana, Nevada, New Jersey, New Mexico, and South Carolina. The Maryland Constitution does, however, allow the city of Baltimore to have six senators. Nine other states have no real popular base because they have what amounts to fixed apportionment which, in most cases, can be altered only by constitutional amendment: for Arizona, Alaska, Arkansas, Hawaii, Illinois, and Michigan senates; for both houses in Delaware and Mississippi; and for the lower house in Vermont. BOOK OF THE STATES, op. cit. supra note 18, at 54-57.

[31] N.Y. CONST. art. III, § 4 (1894).   [32] See note 4 supra.

Bronx	4
Erie	3
Kings	7
Nassau	3
New York	4
Queens	5
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In order to limit the senatorial representation of Manhattan (New York County) and Brooklyn (Kings County),[33] the constitution requires the legislature to follow three mandatory rules in apportioning senators to these six most populous counties: (1) No county shall have four or more senators unless it shall have a full ratio for each senator. (2) No county shall have more than one-third of all the senators. (3) No two counties or the territory thereof as organized in 1894, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.[34] The second and third rules have never been applicable, and population trends indicate that there never will be occasion to apply them. The first rule, however, has operated not only against New York and Kings counties but also against Bronx, Erie, Nassau, Westchester, and Queens, and has been one of the two major causes for the Senate's unrepresentative character.

The second major cause for the New York Senate's unrepresentative character is the provision for enlarging the Senate. After apportioning senators to the six counties that each have three or more ratios, the Legislature must determine the size of the Senate. The New York Constitution provides:[35]

. . . The senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

Although there has been a great deal of controversy about the meaning of this constitutional provision,[36] it seems to be established that the number of "additional

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[33] Eleven other states also place a maximum on the representation of the more populous counties or towns. Alabama, California, Florida, Georgia, Iowa, and Texas allow no county to have more than one senator. The Pennsylvania Constitution allows no city or county to have more than one-sixth of the whole number of senators—a limitation which the Pennsylvania Commission on Constitutional Revision recommends be excised, REPORT 90-91 (1959). The Maine Constitution permits no county to have more than five senators and no town to have more than seven members of the lower house. Rhode Island sets the maxima per city or town at six senators and one quarter of the whole number of representatives. Oklahoma permits no county to have more than seven representatives. Although the Maryland Constitution allows the city of Baltimore to have thirty-six representatives, no other county may have more than six. BOOK OF THE STATES, op. cit. supra note 18, at 54-58. See note 30 supra.

[34] N.Y. CONST. art. III, § 4 (1894). The court of appeals also laid down four mandatory and three directive rules for districting, Sherrill v. O'Brien, 188 N.Y. 185, 205, 81 N.E. 124, 129 (1907).

[35] N.Y. CONST. art. III, § 4 (1894).

[36] 1 SILVA, op. cit. supra note 22, at II-29-47. Oklahoma appears to be the only other state which has a similar provision: "The Senate shall always be composed of forty-four senators, except that in the event any county shall be *entitled* to three or more senators at the time of any apportionment

senators" shall be determined by comparing the number of senators to which each
of the most populous counties is entitled under the.new apportionment with the
number apportioned to it in 1894.[37] This means that the total number of senators
under the apportionment of 1963 will be fifty-seven:

All counties now having three or more full ratios	Number of Senators apportioned by Convention of 1894	Number of Senators according to census of 1960	Additional Senators
New York⎫ .... Bronx ⎭	12	⎰4⎱ ⎱4⎰	—
Erie.........................	3	3	0
Kings.......................	7	7	0
Nassau⎫ .... Queens⎭	1	⎰3⎱ ⎱5⎰	+7
		Additional Senators Basic number of Senators	+7 50
		Total number of Senators	57

Since no reduction in the total number of senators results from New York
County's loss of four senators,[38] these four senators are transferred to the Upstate
while the Senate is enlarged to provide representation for New York City's rapidly
growing suburban areas.

The third step in apportioning New York's senators will be the distribution of
thirty-one senators to the remaining counties that have only 6,721,470 citizen in-
habitants. This means that the citizen population per senator in these less populous
counties will be only 216,822, while the citizen population per senator in the six
most populous counties will range from 342,052 in New York City's Bronx County to
425,267 in suburban Nassau County. When the Legislature conforms to the district-
ing rules that are also commanded by the constitution, the range will be even

such additional senator or senators shall be given such county in addition to the forty-four senators and
the whole number [of senators] shall be increased to that extent." OKLA. CONST. art. V, § 9a (1907).
(Emphasis and bracketed words supplied.) Use of the word *entitled* rather than *having* clarifies which
counties are subject to this provision. It is not clear, however, which senators are to be considered "addi-
tional senators." If the clause means in addition to forty-four apportioned in 1907, the 1950 census
would have produced a senate of fifty-four members. If this clause means in addition to three senators,
however, then a senate of only forty-nine could have been justified. If the University of Oklahoma's
Bureau of Government Research is correct in saying that this clause means in addition to the maximum
of two senators apportioned to a county in 1907, then a senate of fifty-one members would have been
proper under the census of 1950. Since the Oklahoma Senate has never been reapportioned, the state still
has forty-four senators, and this provision has been neither applied nor subject to judicial interpretation.
BUREAU OF GOV'T RESEARCH, LEGISLATIVE APPORTIONMENT IN OKLAHOMA 8, 10, 12-13, 27-28 (1956).
    [37] *In re* Fay, 291 N.Y. 198, 213, 52 N.E.2d 97, 101 (1943); N.Y. LEGIS. Doc. No. 98, at 7-8 (1953).
    [38] Neither Bronx nor Nassau counties existed in 1894, but it has been held that Queens and Nassau
should be considered as having been a single county in 1894 while New York and Bronx should be
lumped together as one county for determining the number of additional senators. *In re* Fay, 291 N.Y.
198, 212, 52 N.E.2d 97, 101 (1943); N.Y. LEGIS. Doc. No. 57, at 12 (1942).

greater—probably from 166,715 citizen inhabitants in the Essex-Saratoga-Warren (now the thirty-ninth) district to approximately 426,000 in Nassau's most populous senatorial district.[39]

The range will be even greater in the case of assembly districts—from 14,974 citizen inhabitants in Schuyler County to approximately 216,000 in Suffolk County, a suburb of New York City. The constitution sets the size of the Assembly at 150 members and provides that the ratio for apportioning assemblymen shall be determined by dividing the state's total citizen population by this number. The constitution also divides the state's sixty-one counties (with Fulton and Hamilton treated as one county) into three classes: (1) those having less than one per cent of the state's citizen population, (2) those having from one to 1⅓ per cent of the state's citizen population, and (3) those having more than 1⅓ per cent. The first step in apportioning assemblymen is to assign one assemblyman to each of the forty-four counties in the first class. Two assemblymen will then be assigned to each of the seventeen other counties. This will leave seventy-two assemblymen to be apportioned among the fourteen third-class counties, and this will be done roughly according to citizen population.[40]

The application of this constitutional procedure in 1963 will mean that forty-four seats will be assigned—not apportioned, but assigned—to the forty-four least populous counties, which have a total citizen population of only 2,761,656 or 62,765 citizen inhabitants per assemblyman. Six seats will be assigned to the three intermediate counties with 93,478 citizen inhabitants per assemblyman. The remaining one hundred seats will be apportioned to the fourteen most populous counties, which have a total citizen population of 12,918,265 or 129,183 citizen inhabitants per assemblyman.[41]

A combination of two factors makes the New York Assembly even less representative of the popular base than the New York Senate is—the guarantee of at least one assemblyman to each county while the total number of assemblymen is frozen at 150. This arrangement would not seriously violate the popular principle if New York's representative population were more evenly distributed among the various counties. But, with thirty-eight of the sixty-one counties below the ratio, thirty-eight assemblymen must be assigned wholly on the territorial base without regard to the popular base. With a total of only 150 assemblymen, this leaves only seventy-five per cent of the assemblymen to be distributed among twenty-three counties that contain eighty-eight per cent of the state's citizen population—and only sixty-seven per cent of the assemblymen to be distributed among the fourteen most populous counties that have almost eighty per cent of the state's citizen population.[42] As is true of one or both legislative chambers in a majority of the states, the New

[39] See note 4 *supra*.

[40] N.Y. CONST. art. III, § 5 (1894); 1 SILVA, *op. cit. supra* note 22, at III-19-63.

[41] See note 4 *supra*. The three second-class counties are Broome, Dutchess, and Orange. The other counties listed in note 27 *supra*, are the fourteen most populous (third-class) counties.

[42] See note 4 *supra*.

York Assembly can be made to reflect the popular base in one of three ways: (1) reduction of the number of counties, (2) abolition of the rule that guarantees separate assembly representation to each county,[43] or (3) increasing the total number of assemblymen so that more assemblymen can be apportioned to the more populous counties.

Since neither a reduction in the number of counties nor the combination of two or more counties into one assembly district is politically feasible in New York, the New York Assembly can actually be made to reflect the popular base more accurately only by enlarging the Assembly. While an assembly of more than one thousand members would be required to bring every one of New York's counties above the ratio, a relatively equitable apportionment could be made on the basis of only two hundred assemblymen[44] if a mathematically sound method were used to apportion these two hundred seats to the several counties.[45]

Contrary to the popular notion, not all unequal representation is caused by gerrymandering. Use of an area base—such as the New York Constitution's guarantee of at least one assemblyman to each county, for example—is not gerry-mandering but results in districts that are unequal in population. Similarly, New York's constitutional provisions for senatorial apportionment result in unequal representation and may be called "misapportionment." Yet, since this apportionment of senators involves no abuse of legislative discretion, it is neither "malapportion-ment" nor "gerrymandering." Abuse of legislative discretion in apportioning legislators in order to give unfair advantage to an area or to a political party is "mal-apportionment" while "gerrymander" refers to the abuse of discretion in drawing the boundaries of legislative districts.

[43] Thirty states guarantee the least populous counties a certain minimum representation in one or both houses of their respective legislatures: At least one representative in *each house* is guaranteed to each county (or town) in Connecticut, Idaho, New Jersey, New Mexico, Rhode Island, South Carolina, Vermont, and Wyoming. At least one *senator* is guaranteed to each county (or town) in Maine, Montana, and Nevada. Each county (or town) is guaranteed at least one representative in the *lower house* of Alabama, Arkansas, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma (in practice), Pennsylvania, Utah, and West Virginia. Arizona guarantees that no county shall have fewer representatives in the lower house than it would have if representatives were apportioned on the basis of the 1930 gubernatorial vote. Kentucky allows no more than two counties to be joined into one legislative district for the lower house. Maryland gives one senator and guarantees at least two members of the lower house to each county and to each of the six districts of Baltimore City. BOOK OF THE STATES, *op. cit. supra* note 18, at 54-58. The Mississippi Constitution also divides the state's several counties into three groups—"Three Great Divisions"—and guarantees each group that it shall have a certain proportion of the representation in the senate and in the lower house regardless of changes in population. EDWARD H. HOBBS, LEGISLATIVE APPORTIONMENT IN MISSISSIPPI 6, 13-17, 49-58, 61, 82-85 (1956). See notes 30 and 33 *supra*.

[44] I SILVA, *op. cit. supra* note 22, at III-63-76.

[45] The so-called "Brown formula," which is used to distribute "remaining members" among the most populous counties certainly is not a mathematically sound formula although it has received judicial approval. Matter of Dowling, 219 N.Y. 44, 59, 113 N.E. 545, 549 (1916) (dictum). One of the impediments to use of a more sound formula appears to be the inability of the legislators to understand the arithmetic involved in using a better formula. I SILVA, *op. cit. supra* note 22, at III-30-63. For a discussion of the two best modern methods of apportionment, "major fractions" and "equal proportions," see Willcox, *Last Words on the Apportionment Problem*, 17 LAW & CONTEMP. PROB. 290 (1952); Schmeckebier, *The Method of Equal Proportions, id.* at 302.

III

DISTRICTING

A "gerrymander" may be defined as "the formation of election districts, on another basis than that of single and homogeneous political units as they existed previous to the . . . [districting or redistricting], with boundaries arranged for partisan advantage."[46] Thus, gerrymandering involves the creation of artificial districts with arbitrary boundaries, which are consciously drawn for partisan advantage. There are two methods of gerrymandering: (1) spreading the opposition party's vote among the various districts so that the opposition can carry few, if any, districts; (2) concentrating the opposition party's vote in a few districts so that the opposition's popular support will be dissipated in the form of large electoral margins in these few districts.[47] Gerrymandering seems always to have offended the average citizen's sense of fairness and political morality. Consequently, most state constitutions now contain certain districting rules, which were designed to prevent or restrict gerrymandering.

New York's Constitution contains seven such rules that the legislature is to follow in drawing the boundaries of senatorial districts.[48] The constitution also lays down ten districting rules that were designed to prevent the local authorities from gerrymandering assembly districts.[49] These rules may or may not have re-

[46] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 21 (1907). Although the term gerrymander was coined in Massachusetts in the spring of 1812, the practice of gerrymandering appears to have been devised by William Penn in 1705, when he separated the city of Philadelphia from its county and thereby enhanced the influence of the rural districts. *Id.* at 26-29, 120-121. But, as Griffith noted, Pennsylvania was also the first state to adopt constitutional provisions designed to restrict gerrymandering. *Id.* at 44-46, 121.

[47] *Id.* at 15-21.

[48] The rules are as follows: (1) Each district shall consist of contiguous territory. (2) No county shall be divided in the formation of a senatorial district except to make two or more senatorial districts wholly in such county. (3) No town, except a town having more than 2% of the state's citizen population, and no city block enclosed by streets or public ways shall be divided in the formation of senatorial districts. (4) No senatorial district shall contain a greater excess of population over an adjoining district in the same county than the population of a town or block therein adjoining such district. (5) Each senatorial district shall contain, as nearly as may be, an equal number of citizen inhabitants. (6) Each senatorial district shall be in as compact form as practicable. (7) Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to equalize the number of citizen inhabitants in the two districts. N.Y. CONST. art. III, § 4 (1894, as amended in 1945).

[49] The rules are as follows: (1) The number of assembly districts in a county shall be equal to the number of assemblymen to which that county is entitled—that is, a multi-member county shall be divided into single-member districts. (2) Each assembly district shall consist of contiguous territory. (3) Each assembly district shall be wholly within the same senatorial district. (4) In a county having more than one senatorial district, the same number of assembly districts shall be placed in each senatorial district, unless the assembly district can not be evenly divided among the county's senatorial districts, in which case one more assembly district shall be placed in such county's most populous senatorial district, or one less assembly district shall be put in that county's least populous senatorial district. Populous, of course, is to be measured in terms of citizen population. (5) No town, except a town having more than 1% of the state's citizen population, and no city block enclosed by streets or public ways shall be divided in the formation of assembly districts. (6) No assembly district shall contain a greater excess of population over an adjoining assembly district in the same senatorial district than the population of a town or block therein adjoining such assembly district. (7) Towns or blocks which, from their location, may be included in either of two assembly districts shall be so placed as to equalize the number of citizen inhabitants in the two districts. (8) Each assembly district in the same county shall contain, as nearly as may be, an equal number of citizen inhabitants. (9) Each

stricted the gerrymander, but the most casual inspection of a senatorial district map or of an assembly district map suggests that gerrymandering is still a well developed art in the state of New York, while a comparison of election returns from adjacent legislative districts confirms this suspicion. Moreover, in actual cases, these rules often not only conflict with each other[50] but also compel the Legislature and local agencies to create districts that are unequal in population.

The New York Constitution provides that senatorial districts shall be composed of contiguous territory and that no county shall be divided in the formation of senatorial districts except to form two or more districts *wholly in the same county*. These two rules have created a real problem in dealing with Staten Island (Richmond County). According to the State Enumeration of 1905, each of the state's senatorial districts should have had approximately 140,000 citizen inhabitants, but Richmond had only 66,441. New York and Kings counties were the only counties which, by any stretch of the imagination, could be considered as "contiguous" to Richmond. New York County was entitled to twelve senators and had a surplus of 105,172 citizen inhabitants while Kings County was entitled to eight senators with a surplus citizen population of 48,702. The obvious solution would seem to be the creation of a senatorial district composed of Richmond and the southwest corner of Kings and/or New York counties. But, since the county rule made this solution unconstitutional, the Legislature joined Richmond with the non-contiguous County of Queens in the second senatorial district, which had a total citizen population of 246,187. In *Sherrill v. O'Brien*,[50a] the court of appeals invalidated the Act of 1906 on the ground that there was an unconstitutional population differential of 109,012 between this district and the first district (Nassau and Suffolk counties), which had only 137,175 citizen inhabitants. The court also ruled that Richmond could not constitutionally be joined with Queens, since Queens was entitled to a senator without Richmond.[51]

The Legislature solved the Richmond problem by joining Richmond in a senatorial district with Rockland County. The most direct routes of travel from the southern to the northern part of this district—from Richmond to Rockland—ran through New Jersey or through New York and Bronx and Westchester counties, but the Richmond-Rockland district remained until 1943, when Richmond was given its own senator although Richmond had from 84,000 to 137,000 fewer citizen inhabitants than New York City's other senatorial districts had. One might ask why the court

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assembly district shall consist of convenient territory. (10) Each assembly district shall be as compact as practicable. N.Y. CONST. art. III, § 5 (1894, as amended in 1945). The first six rules appear to be mandatory while the last four seem to be merely directive.

[50] The court of appeals has said that the first four rules listed in note 48, *supra*, are mandatory, while the other three are merely directive. A mandatory rule takes precedence over a directive rule, but the districting agency has discretion in choosing the rule to be followed when two mandatory or two directive rules conflict. Sherrill v. O'Brien, 188 N.Y. 185, 205, 81 N.E. 124, 129 (1907). See also note 49 *supra*.

[50a] *Supra* note 50.

[51] Queens citizen population = 179,746. The court also held that the thirteenth district in New York County was not "in as compact form as practicable." 188 N.Y. 185, 81 N.E. 124 (1907).

of appeals gave precedence to the county rule of 1894 over the contiguity rule, which dates back to 1821. Why should this county rule take precedence over the venerable rule of 1777 relating to population equality?[52] Moreover, what sense of locality or what community of interest did Richmond and Rockland counties have? Is Rockland, like Richmond, a part of New York City? Are county boundaries a more important part of the territorial base than are locality, contiguity, and common interest?

The so-called Richmond problem is not the only one presented by the county rule. Suffolk County, for example, is out on the tip of Long Island and is contiguous only to Nassau County. The Acts of 1906, 1907, 1916, and 1917 joined these two counties into one senatorial district. The census of 1930, however, showed that Nassau was entitled to its own senator without Suffolk and had over 83,000 surplus citizen inhabitants. While each senatorial district should have had approximately 189,600 citizen inhabitants, Suffolk had only 145,841. The obvious solution would have been the formation of a senatorial district composed of Suffolk and the eastern end of Nassau. But, since the county rule forbids this solution, the Legislature proposed to give Suffolk and Nassau one senator each, although there was a population differential of 126,773 between the two counties. There simply was no constitutional alternative.[53]

The county rule produces large population differentials not only between the metropolitan districts and between the suburban districts but also between the multi-county districts upstate. It is virtually impossible, for example, to reduce the population differential (144,992) between the thirty-third and the thirty-ninth senatorial districts,[54] because the county rule requires that an entire county be added to or removed from a district. The rule does not permit reducing the population of the thirty-third by adding part of Orange County to the thirty-fourth or the thirty-fifth district. Nor does it permit adding parts of Rockland County to the thirtieth and thirty-first districts. Similarly, the population of the thirty-ninth could not be increased by adding a part of one or several adjoining counties to the district. The thirty-ninth district could be enlarged only by adding an entire county to the district—and the addition of an entire county would create still greater population inequalities between the several districts.

Not only has treating the county as a unit produced great population inequalities between senatorial districts, but it has produced even greater population inequalities between assembly districts. According to the 1960 census, for example, only 14,974 citizens live in the least populous assembly district while the state-wide average is 108,272 citizens per assemblyman.[55] There is no reason to burden the reader

[52] See notes 48 and 50 *supra*.

[53] New York State Legislature, Executive Session of the Joint Legislative Committee on Reapportionment, March 13, 1935, pp. 10-11.

[54] Thirty-third (Orange and Rockland) = 311,707; thirty-ninth (Essex, Saratoga, and Warren) = 166,715. See note 4 *supra*.

[55] See note 4 *supra*.

with a longer catalog of examples of problems created by the constitutional rules that require the county to be treated as a unit in providing legislative representation in New York. The illustrative cases presented are sufficient to indicate the type of problem caused by the so-called county rules in a majority of the fifty states.

It should not be implied that the county rules are the only rules that make it constitutionally impossible in New York to create legislative districts having an equal number of citizen inhabitants. The original Constitution of 1894 provided that no town could be divided in the formation of senate or assembly districts. This town rule created a problem in 1943, for example, when Nassau County was apportioned four assemblymen but had only three towns, one of which contained almost sixty-five per cent of the county's citizen population. In 1943, the Nassau County Board divided the county into four assembly districts that ranged in citizen population from 50,362 to 127,980. This districting ordinance was declared unconstitutional on the ground that the entire town of Hempstead had not been placed in one district.[56] In 1944, the County Board redistricted to comply with the court's ruling. The reconstituted districts, however, ranged from 8,422 to 247,243 citizen inhabitants:[57]

First.	Town of Hempstead	247,243
Second.	City of Long Beach	8,422
Third.	Town of North Hempstead	77,239
Fourth.	Town of Oyster Bay & City of Glen Cove	50,362
	Nassau County	383,266

The contiguity rule precluded the joining of Long Beach with any city or town other than Hemsptead, which already was the most populous of the four districts. Consequently, there seemed to be no alternative to making Long Beach an assembly district by itself. The only possible way of equalizing the population of the four districts involved an unconstitutional division of Hempstead among at least three districts and the splitting of North Hempstead or Oyster Bay between at least two districts.

In 1945, the voters adopted a constitutional amendment that permits the division of a town if that town has at least one per cent of the state's total citizen population.[58] Since Hemptsead was the only town in Nassau with at least 124,014 citizen inhabitants,[59] only Hempstead could be divided in the formation of assembly districts. Therefore, even after the 1943 districts were re-established following adoption of the

[56] *In re* Tishman, 293 N.Y. 42, 55 N.E.2d 858 (1944).

[57] N.Y. LEGISLATIVE MANUAL 1944, at 899.

[58] "No town, except a town having more than a ratio of apportionment and one-half over . . . shall be divided in the formation of assembly districts. . . ." Since one assembly ratio equals 1/150th of the state's total citizen population, 1½ ratios is 1% of the state's citizen population. The amendment also authorized the division of a town between senatorial districts if that town's citizen population amounts to at least one ratio. Since a senate ratio equals the state's citizen population divided by fifty, one ratio is 2% of the state's citizen population. N.Y. CONST. art. III, §§ 4-5 (1894, as amended in 1945).

[59] One per cent of 12,401,329 = 124,013.29 = 1½ ratios. N.Y. LEGIS. Doc. No. 57, at 51 (1942).

1945 constitutional amendment, the disparity between Nassau's most populous and least populous assembly districts still amounted to 77,618 citizen inhabitants:[60]

    First.   Part of Hempstead...................................127,685
    Second. Long Beach & remainder of Hempstead...............127,980
    Third.   North Hempstead....................................77,239
    Fourth. Oyster Bay & Glen Cove.............................50,362

                                        Nassau County....383,266

Nor did the 1950 census permit the Nassau County Board to adhere to all of the various districting rules prescribed by the constitution without creating assembly districts that ranged from 81,361 to 137,201 citizen inhabitants.[61]

Perhaps the Nassau County Board could have created districts that were more nearly equal in population if the contiguity and town rules had not been confounded by the rule that requires all of an assembly district to be placed in the same senatorial district. While a combination of these three rules produced a population differential of 55,840 between Nassau's most populous and least populous districts, the senatorial district rule alone often produces even greater inequalities between assembly districts in counties entitled to a number of assemblymen that cannot be evenly divided among that county's senatorial districts. In such a case, the constitution requires one more assembly district to be placed in the county's most populous senatorial district or one less assembly district to be placed in the county's least populous senatorial district.

Monroe County, which contains the city of Rochester, for example, will receive three senators and five assemblymen under the apportionment of 1963. Since the constitution requires an assembly district to lie wholly in one senatorial district, one assemblyman must be elected in Monroe's least populous senatorial district while each of Monroe's other two senatorial districts must be divided into two assembly districts. Since Monroe's three senatorial districts must each have approximately the same number of citizen inhabitants, one of Monroe's assemblymen will have approximately twice as many constituents as each of the other four will have. And this rule, which precludes an assembly district from being split between two senatorial districts will be responsible for similar population inequalities between assembly districts in Bronx, Erie, Kings, Nassau, Queens, and Suffolk counties as well as in Monroe County.[62]

Adherence to the districting rules discussed in the Richmond, Nassau, Monroe, and similar cases must necessarily result in population inequalities between legislative districts. Although somewhat smaller, population inequalities are also made inevitable by New York's constitutional barrier against dividing any city

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[60] N.Y. LEGIS. MANUAL 907-09 (1946).

[61] The fourth district = 81,361; the third = 137,201. Statistics supplied by Mr. C. Burr Reed, former chief clerk to the New York Joint Legislative Committee on Reapportionment.

[62] See Table I.

TABLE I
ASSEMBLY DISTRICTS IN ALL COUNTIES ENTITLED TO TWO OR MORE SENATE DISTRICTS
UNDER CITIZEN CENSUS OF 1960

County	Total Number of Senate Districts	Total Number of Assembly Districts[a]	Number of Senate Districts	Number of Assembly Districts in Each Senate District	Approximate 1960 Citizen Population in Each Assembly District[b]
Bronx..........	4	10	—	—	136,821
			2	3	114,017
			2	2	171,026
Erie............	3	8	—	—	129,956
			2	3	115,516
			1	2	173,275
Kings..........	7	19	—	—	132,553
			5	3	119,929
			2	2	179,894
Monroe.........	3[c]	5	—	—	114,206
			2	2	95,172
			1	1	190,343
Nassau.........	3	10	—	—	127,580
			2	3	141,756
			1	4	106,317
New York......	4	12	4	3	132,006
Onondaga.......	2[c]	4	2	2	103,693
Queens.........	5	13	—	—	133,314
			3	3	115,539
			2	2	173,308
Suffolk.........	3[c]	5	—	—	130,022
			2	2	108,352
			1	1	216,704
Westchester.....	3	6	3	2	130,363

a Apportioned according to the Brown formula. N.Y. LEGIS. Doc. No. 98, at 11-12 (1953); Matter of Dowling 219 N.Y. 44, 59 (1916).
b Data on 1960 citizen population supplied by the U.S. Bureau of the Census.
c Since 1894 it has been the practice in each of the five apportionments (excluding those of 1906 and 1916 which were held invalid) to give an additional senator for a major fraction of a second ratio. N.Y. LEGIS. Doc. No. 31, at 77-91 (1950); id. No. 98, at 14A-14B (1953). Under the five apportionments from the time single-member districts were first adopted in 1846 until 1894, it was the practice to give an additional senator for every major fraction of a constitutional ratio—the one and only ratio under the Constitution of 1846. 3 LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 182-90 (1906); N.Y. LEGIS. Doc. No. 31, at 92-101 (1950).

block between two senatorial or between two assembly districts. The constitution does, however, attempt to limit the magnitude of these population disparities in the most populous counties by providing that no senatorial district shall contain a greater excess of population over an adjoining district in the same county than the population of a town or city block therein adjoining such districts. The constitution also provides that counties, towns or blocks which, from their location, may be included in either of two senatorial districts shall be placed to equalize the number of citizen inhabitants in the two districts. The constitution places similar limitations on the population disparity between two adjoining assembly districts that lie in the same

county and in the same senatorial district.[63] Yet, these limitations do not prevent some of the most serious population inequalities between districts.

The limitations relating to senatorial districts apply only to adjoining districts in the same county. They will not prevent creation of the Essex-Saratoga-Warren district with only 166,715 citizens while a Nassau district will have 425,267 citizens.[64] Similarly, the limitations relating to assembly districts apply only to those that lie in both the same county and the same senatorial district. It will not prevent one of Monroe's assembly districts from being approximately twice as populous as any one of Monroe's other four. It will not prevent Schuyler County from having its own assembly district with only 14,974 citizen inhabitants while one of Suffolk County's will have approximately 216,704 citizen inhabitants.[65]

Since New York's districting rules have prevented neither gerrymandering nor population inequalities between legislative districts and have, indeed, caused some of these inequalities, perhaps New York's legislators and constitution makers should look for substitutes for these districting rules—substitutes that might actually reduce gerrymandering without requiring the population disparities that adherence to the present rules produces.[66] Although alternatives to New York's present districting rules are beyond the scope of this article, it still may be in order to suggest that sataisfactory alternatives will not be found in the constitutions of the forty-nine other states. For the districting rules of the other states are similar to—and, in many cases, identical to—New York's.

IV

JUDICIAL REMEDIES

The New York Constitution specifically provides that any apportionment statute or districting ordinance "shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe."[67] In the absence of legislative regulation for judicial review of such cases, a court has jurisdiction to proceed according to usage adopted in similar cases.[68] The constitution also directs any court before which an apportionment or districting case may be pending to give precedence to that case over all other causes and proceedings and, if the said court be not in session, to convene promptly for the dis-

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[63] See notes 48, 49, and 50 *supra.*   [64] See note 4 *supra.*

[65] See Table I and note 4 *supra.*

[66] For a discussion of such alternatives, see 1 SILVA, *op. cit. supra* note 22, at I-24-29; 2 *id.* at V-8-12, V-33-34.

[67] N.Y. CONST. art. III, § 5 (1894). There has been some question about what are "reasonable regulations." In 1918, for example, the Legislature passed a bill (Int. No. 324, Print No. 646) which provided that such a proceeding must start within six months after an apportionment act is passed and that such a statute must be challenged within thirty days after it becomes operative. Governor Whitman vetoed the bill on the ground that the thirty-day provision was not a "reasonable regulation" and, therefore, was unconstitutional. STATE OF NEW YORK, THE PUBLIC PAPERS OF GOVERNOR CHARLES SEYMOUR WHITMAN 1918, at 99-100 (1919).

[68] People *ex rel.* Smith v. St. Lawrence County Board of Supervisors, 148 N.Y. 187, 42 N.E. 592 (1896).

position of such cases.[69]   As a matter of history, New York's highest court has invalidated two so-called apportionment statutes[70] and several districting ordinances,[71] all on the ground that certain mandatory districting rules had been violated in the formation of legislative districts.   The courts of other states have also occasionally invalidated apportionment and districting acts that conflicted with their respective state constitutions.[72]   When state courts have nullified an apportionment or districting act, they have usually used mandamus[73] or injunction[74] to order ministerial officers to refrain from carrying out the provisions of the invalid statute.

Although state courts have occasionally invalidated a recent apportionment or districting act, they have generally taken jurisdiction in apportionment and districting cases only when the challenged statute has not yet been used as the basis of an election.[75]   Similarly, state courts have consistently refused to invalidate the statute in cases where the statute was valid when enacted but has become unfair only through a shift of population and a failure to reapportion and redistrict.[76]

Although most state constitutions require decennial reapportionment and redistricting, failure to reapportion and redistrict is the major cause for the unrepresentative character of state legislatures in the United States.[77]   While such legislative inaction is not a cause for the New York Legislature's unrepresentative

[69] N.Y. CONST. art. III, § 5 (1894).

[70] Act of 1906, Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Act of 1916, Matter of Dowling, 219 N.Y. 44, 113 N.E. 545 (1916).

[71] For example: In re Tishman, 293 N.Y. 42, 55 N.E.2d 858 (1944); People ex rel. Baird v. Board of Supervisors of Kings County, 138 N.Y. 95, 33 N.E. 827 (1893). The court has been reluctant, however, to enforce mere directive rules (note 49 supra) and has held that the burden of proving unconstitutionality rests with the petitioner who challenges the ordinance. In re Richardson, 307 N.Y. 269, 121 N.E.2d 217 (1954).

[72] For example: Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (1931); Donovan v. Suffolk County Apportionment Commissioners, 225 Mass. 55, 113 N.E. 740 (1916); Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907); Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892); State v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); id., 83 Wis. 90, 53 N.W. 35 (1892). See Annot., 2 A.L.R. 1337-39 (1919).

[73] For example: State v. Scott, 56 S.D. 114, 227 N.W. 572 (1929); Donovan v. Suffolk County Apportionment Commissioners, 225 Mass. 55, 113 N.E. 740 (1916); State ex rel. Harte v. Moorehead, 99 Neb. 527, 156 N.W. 1067 (1916); People ex rel. Baird v. Board of Supervisors of Kings County, 138 N.Y. 95, 33 N.E. 827 (1893); State ex rel. Morris v. Wrightson, 56 N.J.L. 126, 28 Atl. 56 (1893); Kiddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892).

[74] For example: Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (1931); Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907); State v. Cunningham, 81 Wis. 440, 51 N.W. 724, (1892); id., 83 Wis. 90, 53 N.W. 35 (1892). See also Walter, Reapportionment of State Legislative Districts, 37 ILL. L. REV. 20, 34-35 (1942).

[75] The N.Y. Court of Appeals refused to entertain a taxpayer's action testing the validity of the Act of 1907 and held that the petitioners were barred by laches in waiting until four general elections had been held under the Act before challenging its validity. Matter of Reynolds, 202 N.Y. 430, 441-42, 96 N.E. 87, 416 (1911). See also Adams v. Bosworth, 126 Ky. 61, 102 S.W. 861 (1907).

[76] For example: Smith v. Holm, 220 Minn. 846, 19 N.W.2d 914, 30 MINN. L. REV. 37 (1945); Daly v. Madison County, 378 Ill. 357, 38 N.E.2d 160 (1941); State ex rel. Warson v. Howell, 92 Wash. 540, 159 Pac. 777 (1916).

[77] Because population has not grown at the same rate in every county of those states whose legislatures have failed to reapportion, the most unrepresentative legislatures are now produced by apportionment and districting statutes, which may have provided a reasonably equitable apportionment when they were enacted. For a tabulation of the most recent apportionment in each of the fifty states, see NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (2d ed. 1962).

character today,[78] it was a major cause for the New York Legislature's unrepresenta-
tive character during the inter-war period.[79]   When a judicial remedy was sought,
the New York Court of Appeals held that the state courts had power neither to
order the election of senators and assemblymen at large until a new apportionment
was enacted nor to enjoin the Secretary of State and local boards of election
from conducting elections for the choice of senators and assemblymen until after
the Legislature reapportioned nor to mandamus the Secretary of State and local
boards to permit a county to elect the increased number of senators and assemblymen
to which that county would be entitled under the most recent census.[80]

This decision is in conformity with the decisions of the courts in most other states.
State courts have consistently refused to reapportion or redistrict[81] or to order the
legislature to do so.[82]   Not only have state courts refused to directly compel re-
apportionment or redistricting, but they have also declined to do so indirectly by
refusing to order the state treasurer to withhold legislators' salaries until the legis-
lature reapportions and by refusing to permit the legislature's action or inaction to
be tested in quo warranto proceedings.[83]   Because the state courts have been re-
luctant to grant relief in apportionment and districting cases, allegedly aggrieved
citizens have turned to the federal courts.

The United States Supreme Court's decision in *Colegrove v. Green* was a four-to-
three decision.   Justices Frankfurter, Burton, and Reed found that the Court
lacked power to grant relief on the ground that districting was a political question
since Congress has the exclusive power to remedy a legislature's unfairness in
dividing a state into *congressional* districts.   Justices Black, Douglas, and Murphy
thought not only that jurisdiction existed and should be exercised but also that the
Court could grant equitable relief.   The deciding vote was cast by Mr. Justice Rut-
ledge, who thought that the Court had jurisdiction over the subject matter but
should dismiss the case for want of equity.   Thus, four of the seven Justices thought

[78] The seats were apportioned and the state was redistricted after the census of both 1940 and 1950.
N.Y. Sess. Laws 1943, ch. 359, amended by N.Y. Sess. Laws 1944, chs. 530, 725, and 733; N.Y. Sess.
Laws 1953, ch. 893, amended by N.Y. Sess. Laws 1954, chs. 2 and 821. Since the state has paid the
U.S. Bureau of the Census approximately $400,000 to have the 1960 citizen population tabulated, it
appears that the Joint Legislative Committee on Reapportionment contemplates proposal of a reapportion-
ment act in 1963.

[79] Csontos, History of Legislative Apportionment in New York 136-203 (manuscript in New York
State Library, 1941); Silverman, The Struggle for Reapportionment in New York State (unpublished
thesis in New York State Library, 1949). As is true today, upstate Republicans and New York City
Democrats were reluctant to give up seats to the rapidly growing suburban areas. See N.Y. Times, March
19, 1962, p. 24, cols. 3-5 (city ed.); *id.*, March 21, 1962, p. 1, cols. 3-4; *id.*, March 21, 1962, p. 30, cols.
6-8; *id.*, March 22, 1962, p. 34, cols. 3-4.

[80] Burns v. Flynn, 268 N.Y. 601, 198 N.E. 424 (1935).

[81] For example: Romang v. Cordell, 200 Okla. 369, 243 P.2d 677 (1952); Waid v. Pool, 255 Ala.
441, 51 So.2d 869 (1951); Latting v. Cordell, 197 Okla. 369, 172 P.2d 397 (1946); Jones v. Freeman,
193 Okla. 554, 146 P.2d 564 (1943).

[82] For example: Fergus v. Marks, 321 Ill. 510, 152 N.E. 557, 46 A.L.R. 960 (1926); State *ex rel.*
Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40 (1912); People v. Thompson, 155 Ill. 451 at 475, 40
N.E. 307 (1895). See Annot., 46 A.L.R. 964-66 (1927); Moore, *Legislative Apportionment*, 1949 Wis.
L. Rev. 761, 762-63.

[83] For example: People v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1931); Fergus v. Kinney, 333 Ill.
437, 164 N.E. 665 (1928).

that the federal courts have jurisdiction in districting cases but that, in the discretion of the Court, equity jurisdiction should not be exercised. Since four Justices agreed not to exercise the Court's equity power, they also declined to pass on the question of whether the fourteenth amendment forbids the kind of geographical discrimination that is involved in apportionment and districting cases.[84]

Since the segregation cases have so greatly extended the scope of the equal protection clause of the fourteenth amendment,[85] the strength of the *Colegrove* precedent has been repeatedly challenged.[86] But the Supreme Court has consistently refused to exercise its equity power in apportionment, districting, and related cases.[87] Consequently, in a five-to-three decision, the Michigan Supreme Court recently argued that the United States Supreme Court had repeatedly held that the fourteenth amendment does not prohibit a state from establishing legislative districts which result in substantial inequality of popular representation. Since all courts are bound by the United States Supreme Court's interpretation of the United States Constitution, the Michigan Supreme Court held that the fourteenth amendment was not violated by an amendment to the Michigan Constitution which permanently established the state's senatorial districts virtually as they existed in 1925 and which, therefore, obviated the necessity for reapportionment in accord with the previously extant constitutional mandate. In a dissenting opinion, Justice Kavanagh argued that Michigan's permanent senatorial districts violated the equal protection clause of the fourteenth amendment, because statistical evidence proves that this districting provision gives greater weight to one elector's vote for state senator than it gives to another elector's vote cast for state senator in a different district.[88]

By deciding *Gomillion v. Lightfoot*[89] on the basis of the fifteenth amendment, the United States Supreme Court avoided accepting or rejecting Justice Kavanagh's

[84] 328 U.S. 549 (1946). This suit was brought by three qualified voters who challenged the constitutionality of the Illinois Law of 1901 dividing the state into congressional districts, which were alleged to have become unfair by a shift of population and by the Legislature's failure to redistrict. See Comment, *The Role of the Judiciary in Legislative Apportionment*, 52 MINN. L. REV. 617 (1958).

[85] Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); and subsequent "equal protection" cases digested under *Const. Law 214-25* in most recent edition of Cumulative Annual Pocket Part to 5 U.S. SUP. CT. DIGEST.

[86] Magraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1959); Hartsfield v. Sloane, *cert. denied*, 357 U.S. 916 (1958); Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1957); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1957); Dyer v. Abe, 138 F. Supp. 220 (D. Hawaii 1956), *rev'd on other grounds*, 256 F.2d 728 (9th Cir. 1958).

[87] For example: Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, *appeal dismissed*, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, *ibid*.

[88] Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960), *remanded per curiam* on basis of Baker v. Carr, 369 U.S. 186 (1962). The Marion County (Indiana) Superior Court recently held that the Legislature's failure to reapportion for forty years not only violates the equal protection clause of the fourteenth amendment but also violates the Northwest Ordinance's guarantee of "proportionate representation of the people in the legislature" as well as the congressional guarantee of "a republican form of government" made by various Acts of Congress organizing the Indian Territory and admitting Indiana to the Union. Grills v. Anderson, Cause #S59-600, Book 1030, pp. 203-09 (1961); 29 U.S.L. WEEK 2443 (U.S. March 28, 1961).

[89] 364 U.S. 339 (1960).

view that gerrymandering is the kind of discriminatory classification which the fourteenth amendment forbids. In *Gomillion,* the Court invalidated an Alabama statute which altered the boundaries of the city of Tuskegee so that ninety-nine per cent of the city's Negroes were gerrymandered out of the city. The state's affirmative action—passage of the statute—was held to single out a racial minority and to deprive that minority of the right to vote in municipal elections in violation of the fifteenth amendment. Mr. Justice Frankfurter, who had written the opinion for the quasi-majority in *Colegrove,* was careful to distinguish this case from *Colegrove* on two grounds: (1) While the petitioners in *Colegrove* had rested their case on the fourteenth amendment, *Gomillion* was decided on the basis of the fifteenth. (2) The alleged discrimination in *Colegrove* resulted from the Legislature's failure to act while *Gomillion* involved affirmative legislative action. In a concurring opinion, Mr. Justice Whittaker argued that *Gomillion* should have been decided on the basis of the equal protection clause of the fourteenth amendment, because the Legislature's action amounted to unconstitutional segregation.[90]

Citing *Gomillion v. Lightfoot,* a three-judge federal statutory court recently dismissed a New York apportionment case for want of a substantial federal question on the ground that the fourteenth amendment does not cover geographical discrimination and that the petitioners neither alleged nor proved that the New York Constitution's apportionment formulae discriminated against Negro voters (fifteenth amendment) or women voters (nineteenth amendment). Although Judge Waterman found that *Colegrove* was still controlling so that apportionment and districting questions were still non-justiciable political questions, Judges Levet and Ryan denied the motion to dismiss for lack of jurisdiction but did dismiss the complaint both for want of a federal question and for want of equity in the relief sought.[91]

It is difficult to understand how Judges Levet and Ryan were able to find jurisdiction without also finding that the matter set forth in the complaint raised a federal question. For, as the Supreme Court recently pointed out in the Tennessee apportionment case, jurisdiction depends on the existence of a federal question that is covered by a jurisdictional statute.[92] In *Baker v. Carr,* the petitioners claim that, among other things, the Tennessee legislature's failure to reapportion since 1901 deprives them—as residents of underrepresented Davidson County—of an equal vote and, therefore, of equal protection of the laws. Since the Civil Rights Act of 1957

[90] *Id.* at 349.

[91] WMCA Inc. v. Simon, 202 F. Supp. 74 (S.D.N.Y. 1962), *vacated and remanded,* 370 U.S. 190 (1962). The petitioners, WMCA *et al.,* sought declaratory and injunctive relief under the Civil Rights Act, REV. STAT. §§ 1979, 722 (1875), 42 U.S.C. §§ 1983, 1988 (1958), and 28 U.S.C. § 1343(3) (1958), and alleged that the apportionment and districting provisions of the N.Y. Constitution deny them both due process and equal protection contrary to the fourteenth amendment to the United States Constitution. See also Judge Levet's decision and order to convene the three-judge court pursuant to 28 U.S.C. § 2281 (1958). WMCA Inc. v. Simon, 196 F. Supp. 758 (S.D.N.Y. 1961).

[92] Baker v. Carr, 369 U.S. 186, 198 (1962). A three-judge federal statutory court was convened pursuant to 28 U.S.C. § 2281 (1958), 175 F. Supp. 649 (M.D. Tenn. 1959), and dismissed the complaint on the ground that the federal courts lacked jurisdiction over the subject matter and that the complaint had failed to state a claim for which there was a feasible remedy. 179 F. Supp. 824 (M.D. Tenn. 1959).

expressly gives the federal courts equity jurisdiction in cases arising under any Act of Congress providing for the protection of civil rights, including the right to vote,[93] since the right to vote includes the right to have one's vote counted fairly,[94] and since unfair apportionment and districting prevent the votes in underrepresented districts from being counted fairly,[95] the Court found that the subject matter set forth in the new complaint relates to equal protection, falls under section 1343(3) of the Civil Rights Act of 1957, and, consequently, raises a federal question.[96] Therefore, the Court held that the federal courts have equity jurisdiction over the subject matter since the allegations, if proved, constitute denial of equal protection of the laws contrary to the fourteenth amendment.[97]

Like jurisdiction, the appellants' standing in *Baker* depended on the existence of a federal question. Since the Supreme Court found that the right asserted falls within judicial protection under the fourteenth amendment, the Court also found that the petitioners have legal rights at stake so that they were held to have standing to maintain the suit and to challenge Tennessee's apportionment and districting statutes.[98]

In the New York apportionment case, Judges Levet and Ryan dismissed the complaint not only for want of a federal question but also for want of equity in the relief sought. As the Supreme Court pointed out in *Baker*, justiciability depends partially on the existence of an equitable remedy for the alleged deprivation.[99] Therefore, by holding that *Baker* presented a justiciable question,[100] the Court tacitly found that the federal courts are able to grant relief in apportionment and districting cases, although Justice Brennan did not go into the matter of possible remedies. He merely said: ". . . [W]e have no cause . . . to doubt [that] the District Court will be able to fashion relief if violations of constitutional rights are found. . . ."[101]

Presumably, the federal courts cannot enjoin or mandamus a governor or a legislature or a state supreme court.[102] It would appear, however, that the federal courts can enjoin election officials from conducting legislative elections in districts or can mandamus such ministerial officers to conduct legislative elections at large

[93] 28 U.S.C. § 1343(4) (1958).

[94] United States v. Classic, 313 U.S. 299, 315 (1941); United States v. Mosley, 238 U.S. 383, 384 (1915).

[95] In Tennessee, for example, Moore County has 3,454 inhabitants and one representative while Davidson County (Nashville) has 399,743 and six representatives or 66,624 inhabitants per representative. Consequently, the petitioners in *Baker* contend that one popular vote cast for representative in Moore County has more than nineteen times the weight of one popular vote cast for representative in Davidson County where they reside. This contention is correct, however, only if the ratio between inhabitants and votes cast for representative is the same in Moore County as in Davidson County. See note 24 *supra*.

[96] 369 U.S. 186, 199 (1962).   [97] *Id.* at 204.
[98] *Ibid.*   [99] *Id.* at 198.
[100] *Id.* at 237.   [101] *Id.* at 198.

[102] In 1957, the Supreme Court found a want of equity in the relief sought by the appellants in an Oklahoma case and affirmed the federal district court's refusal to mandamus the governor to call a session of the legislature, mandamus the legislature to reapportion, and mandamus the state supreme court to reapportion if the legislature failed to do so. Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956), *aff'd per curiam*, 352 U.S. 991 (1957).

until a statute providing fair representation is enacted.[103] Indeed, thirty years ago, the United States Supreme Court ordered the election of congressmen at large in Minnesota, New York, and Missouri.[104] Since no rural legislator is likely to wish to entrust his electoral fate to metropolitan voters, passage of a fair apportionment and districting statute is likely to follow immediately a court order requiring all of a state's legislators to be elected in the state-at-large. At least, prompt passage of reapportionment and/or redistricting legislation has followed whenever a court has ordered or even tacitly threatened to order the election of all legislators at large.[105]

Justiciability depends not only upon the existence of an equitable remedy but also upon the case's presenting a justiciable question. In *Baker,* the Supreme Court held that a justiciable question was presented since the petitioners claim that Tennessee's districting statutes disfavor them vis-à-vis voters in irrationally favored counties and since the United States Constitution protects a citizen's right to vote against a state's arbitrary action.[106] The Court rejected all of the arguments that had been urged in support of the proposition that *Baker* presented a "political" and, therefore, a non-justiciable question. For example, the Court rejected Tennessee's contention that since the petitioners might have made a claim under article four, section four, of the Constitution—the guarantee clause guaranteeing a "republican form of government" —and since such a claim would have been nonjusticiable, they were also precluded from seeking judicial relief based on the fourteenth amendment right to equal protection.[107] Similarly, the Court found the political-question argument of *Colegrove* to be irrelevant in *Baker,* because the power to decide questions relating to the apportionment and districting of *state legislatures* is not vested in a political branch of the federal government.[108] The Court likewise rejected the contention that *Baker* presented a political question on the alleged ground that judicial standards are insufficiently precise for a court to determine whether the discrimination involved in apportionment and districting cases is arbitrary and capricious.[109]

[103] Roberts v. United States, 176 U.S. 221, 231 (1900); Work v. McAlester-Edwards Co., 262 U.S. 200, 208-09 (1923); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 318-19 (1930). See also scores of cases digested under *Injunctions,* particularly Injunctions 74, 75, 80, and 85(2) in 8 U.S. SUP. CT. DIGEST.

[104] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

[105] Smiley v. Holm, *supra* note 104, and Carroll v. Becker, *supra* note 104; Abe v. Dyer, 256 F.2d 728 (9th Cir. 1958) *reversing* Dyer v. Abe, 138 F. Supp. 220 (D. Hawaii 1956); Magraw v. Donovan, 177 F. Supp. 803 (D. Minn. 1959), *dismissing* 163 F. Supp. 184 (D. Minn. 1958), 159 F. Supp. 901 (D. Minn. 1958); 48 NAT'L CIVIC REV. 415-16 (1959); Hume v. Mahon, 1 F. Supp. 142 (E.D. Ky. 1932); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960); Application of Lamb, 67 N.J. Sup. 39, 169 A.2d 822, 825-26 (1961); Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); Lewis, *Legislative Apportionment and the Federal Courts,* 71 HARV. L. REV. 1057, 1070, 1087-89 (1958); N.Y. Times, Feb. 2, 1961, p. 1, col. 2+ (late city ed.).

[106] 369 U.S. 186, 228 (1962).   [107] *Id.* at 226.

[108] Since each house of Congress is the judge of the election and qualification of its own members (U.S. CONST. art. I, § 5), Justice Frankfurter had used a separation-of-powers argument to defer to Congress—a co-equal branch of the federal government—in the matter of *congressional* districts. Colegrove v. Green, 328 U.S. 549, 554 (1946).

[109] 369 U.S. 186, 226 (1962).

In *Baker v. Carr,* the Supreme Court did not rule on the constitutionality of Tennessee's legislative districts but remanded the cause to the district court to determine whether Tennessee's legislative districts actually do violate the fourteenth amendment. Since the district court has already found that the Tennessee Legislature's failure to reapportion violates the fourteenth amendment,[110] the district court presumably will translate this earlier finding into a judicial ruling. It is quite possible, although unlikely, that the Supreme Court may reverse such a district-court decision—either on the ground that there is a rational explanation for these inequalities of representation so that they do not constitute the kind of "invidious discrimination" which the fourteenth amendment forbids[111] or on the ground that Tennessee's districts have become unfair not through affirmative legislative action but only through the passage of time.[112] If the Supreme Court should overrule the district court's next decision in *Baker* on the latter ground, it does not necessarily follow that the Supreme Court will dismiss the New York case, for the New York apportionment formulae were consciously designed to discriminate against voters in New York and Kings counties.[113]

[110] 179 F. Supp. 824 (M.D. Tenn. 1959).

[111] Writing for the Court, Justice Brennan merely spoke of "arbitrary and capricious" districting as violating the United States Constitution but did not define "arbitrary and capricious." In his concurring opinion, Justice Clark argued that numerical equality of representation is not required and that inequality is not unconstitutional if there is a rational explanation for these inequalities. Clark contended, however, that the magnitude and frequency of the inequalities in Tennessee admit of no rational policy whatever. 369 U.S. 186, 254. Justice Stewart, on the other hand, expressly withheld his views on the merits. *Id.* at 266. In their dissents, Justice Harlan argued that Tennessee's districts were not sufficiently "irrational" to be unconstitutional (*id.* at 334-40) while Justice Frankfurter offered an historical defense for basing representation on geographic subdivisions with little or no regard for population. *Id.* at 293-97, 300-30.

[112] See notes 76 and 89 *supra.*

[113] 3 N.Y. CONSTITUTIONAL CONVENTION, *op. cit. supra* note 7, at 1008-09, 1178, 1182; 4 *id.* at 10-11, 87; and elsewhere throughout the debates of New York State's Constitutional Convention of 1894.