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Cover Page Footnote

Professor of Political Science at The Pennsylvania State University. Miss Silva served as special consultant on legislative apportionment to the State of New York Temporary Commission on the Revision and Simplification of the Constitution, which was chaired by Nelson Rockefeller before he became Governor in 1959 and was chaired by former Judge David W. Peck from 1959 until the Commission expired in 1961.

APPORTIONMENT IN NEW YORK

RUTH C. SILVA*

PART ONE: THE LEGAL ASPECTS OF REAPPORTIONMENT AND REDISTRICTING: BAKER v. CARR

WHEN the United States Supreme Court recently announced its decision in the Tennessee apportionment case,¹ the Court probably handed down its most important decision since *Marbury v. Madison*.² While *Dred Scott*,³ the *Slaughter-House Cases*,⁴ and the segregation cases⁵ affected social relations, *Baker v. Carr* will affect the governmental power structure by shifting the balance of state legislative power from rural conservatives to city and suburban voters who tend to be sympathetic toward social change and governmental intervention.⁶ Precisely to what extent the *Baker* decision will ultimately shift legislative power from the rural areas is still uncertain, because the Supreme Court declined to say how unrepresentative a state legislature must be before a federal court will hold its apportionment and districting to be unconstitutional. It is possible, nevertheless, to find in *Baker* certain guideposts which, though less certain than any mathematical formulae, will necessarily

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1. *Baker v. Carr*, 369 U.S. 186 (1962). The petitioners contended that, among other things, the Tennessee Legislature's failure to reapportion since 1901 denied them, as residents of under-represented districts, an equal vote and, therefore, equal protection of the laws. A three-judge district court met to decide the constitutionality of the Tennessee statute (28 U.S.C. § 2281 (1958) requires that a district court, to enjoin the enforcement of a state statute on constitutional grounds, must be composed of three judges) 175 F. Supp. 649 (M.D. Tenn. 1959). The court 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) (per curiam).

2. 5 U.S. (1 Cranch) 137 (1803).

3. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

4. 83 U.S. (16 Wall.) 36 (1873).

5. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

6. See Knowles, *Study Details Rural Domination of Most Legislatures in Nation*, N.Y. Times, March 28, 1962, p. 22, col. 1; Krock, *Apportionment Debate*, N.Y. Times, April 3, 1962, § 4, p. 11, col. 1; Lewis, *Decision on Reapportionment Points Up Urban-Rural Struggle*, N.Y. Times, April 1, 1962, § 4, p. 3, col. 1; Reston, *Rural Areas Facing Loss of Political Dominance*, N.Y. Times, March 27, 1962, p. 1, col. 6. See also National Municipal League, *Compendium on Legislative Apportionment* (2d ed. 1962); *Rural Over-Representation Acute in State Legislatures*, 20 Cong. Q. Weekly Rep. 170-78 (Feb. 2, 1962).

be relied upon by subsequent courts faced with the constitutional aspects of legislative apportionment.

While Mr. Justice Brennan, speaking for the majority in *Baker*, did not say that legislative districts must be equal in population in order to be constitutional, he did speak of "arbitrary and capricious" districting as violating the United States Constitution and remanded the case to the district court to determine whether Tennessee's legislative districts actually do violate the fourteenth amendment.⁷ In his concurring opinion, Mr. Justice Clark argued that numerical equality of representation throughout the State is not required by the fourteenth amendment, that geographic and other interests as well as population may be given consideration in apportionment and districting statutes, and that unequal representation does not present a case of "invidious discrimination" if there is a rational explanation for such inequality.⁸

The Supreme Court did not rule on the constitutionality of Tennessee's legislative districts. It merely held: (1) that the federal courts have jurisdiction over the subject matter of legislative apportionment and districting, (2) that a justiciable cause of action was stated upon which the petitioners would be entitled to appropriate relief, and, (3) that the petitioners were competent to challenge the Tennessee apportionment and districting statutes.

To gauge the probable ramifications and effects of the tripartite *Baker* decision, it is necessary to explore each of its three points (federal jurisdiction, the constitutional cause of action, and the parties entitled to relief) in the light of prior decisions in federal and state courts. It is appropriate to consider, as well, the ancillary problems created by the type of relief to be granted.

I. JURISDICTION

In holding that the federal courts have jurisdiction over the subject matter, the Supreme Court found that the case raises a federal question based upon allegations of a denial of equal protection of the laws contrary to the fourteenth amendment.⁹ Such a ruling merely represented

7. U.S. Const. amend. XIV, § 1 provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

8. — U.S. —. Mr. Justice Clark contended, however, that the magnitude and frequency of the inequalities in Tennessee admit no rational policy whatever. Consequently, he favored the Court's passing on the constitutionality of Tennessee's districts, which he described as a "crazy quilt without rational basis." *Id.* at 254. Mr. Justice Stewart, on the other hand, expressly stated that he wished to imply no views on the merits since the trial court was the proper place for such a finding of fact. *Id.* at 266. In his dissent, Mr. Justice Harlan argued that Tennessee's districts were not so "irrational" as to be unconstitutional. *Id.* at 340. Mr. Justice Frankfurter's dissent, on the other hand, offered a historical defense for basing representation on geographic subdivisions with little or no regard for population statistics. *Id.* at 266-330.

9. *Id.* at 237.

a logical and consistent extension of existing law since the Court had previously exercised jurisdiction in several cases involving state laws which divided a state into congressional districts.¹⁰ Moreover, the Supreme Court had never ruled that the federal courts lack jurisdiction over the subject matter of apportionment or districting.¹¹

Colegrove v. Green,¹² decided by the Supreme Court in 1946, 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 and that Congress had the exclusive power to remedy a state legislature's unfairness in dividing the state into congressional districts.¹³ Justices Black, Douglas, and Murphy thought not only that jurisdiction existed and should be exercised, but also that the Court could grant equitable relief.¹⁴ The dispositive vote was cast by Mr. Justice Rutledge, who thought that the Court had jurisdiction over the subject matter but should not exercise its equity power because, among other reasons, the imminence of the 1946 congressional elections precluded adoption of corrective measures before the election.¹⁵ Thus, four of the seven Justices thought that the federal courts have jurisdiction over the subject matter but decided, in the exercise of their equitable discretion, to withhold relief.¹⁶

In various per curiam decisions since *Colegrove*, the Supreme Court declined, for various reasons, to exercise its equity power in apportionment, districting, and related cases, but never did it dismiss any of these cases for *want of jurisdiction* over the subject matter. Two companion cases were dismissed because they had become moot.¹⁷ The Court dismissed three other cases, either because it exercised its discretion not to review the case, or because there was a want of equity in

10. E.g., *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). The Court expressly refused to dismiss such a redistricting case "in view . . . of the subject-matter of the controversy and the Federal characteristics which inhere in it . . ." but upheld the districting law on its merits. *Id.* at 570. In three cases, the Court not only assumed jurisdiction but ordered the election of congressmen in the state at large. *Carroll v. Becker*, 285 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932).

11. For a discussion of the difference between apportionment and districting, see note 87 *infra* and accompanying text.

12. 328 U.S. 549 (1946).

13. *Id.* at 552. "Each house shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ." U.S. Const. art. I, § 5. Thus, Mr. Justice Frankfurter used a separation-of-powers argument to defer to Congress, a co-equal branch of the federal government, in the matter of congressional districts. 328 U.S. 554.

14. *Id.* at 566-74 (dissenting opinion).

15. *Id.* at 565-66.

16. Thus, *Colegrove* was dismissed on alternative grounds: want of equity and exclusive congressional power to deal with the problem. *Id.* at 553-54.

17. *Cook v. Fortson*, 329 U.S. 675 (1946) (per curiam).

the relief sought.¹⁸ Four cases were dismissed for want of a substantial federal question since the Court presumably found a rational justification for the challenged law.¹⁹ Finally, the Court found in two other cases that adequate state grounds barred review.²⁰ Certainly, none of these per curiam decisions held that the federal courts lacked jurisdiction over the subject matter.

Only two years after *Colegrove*, the Supreme Court, after taking jurisdiction in a case which involved districting, held that the challenged statute represented a rational state policy so that the petitioner's claim was without merit.²¹ In 1950, the Court affirmed a lower court's dismissal of a case involving Georgia's county-unit system on grounds, however, that assumed the lower court's jurisdiction over the subject matter under the Civil Rights Act.²² This decision simply involved the Court's refusal to exercise its equitable discretion.²³

Besides the Supreme Court's assumption of jurisdiction in various apportionment, districting, and related cases, two lower federal courts have taken jurisdiction in legislative apportionment cases²⁴ and have

18. *Matthews v. Handley*, 179 F. Supp. 470 (N.D. Ind.), aff'd per curiam, 361 U.S. 127 (1959); *Hartsfield v. Sloane*, 357 U.S. 916 (1958) (memorandum decision); *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956), aff'd per curiam, 352 U.S. 991 (1957).

19. *Cox v. Peters*, 342 U.S. 936 (1952) (per curiam); *Tedesco v. Board of Supervisors*, 339 U.S. 940 (1950) (per curiam); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (per curiam). In *Remmey v. Smith*, 342 U.S. 916 (1952) (per curiam) (appeal dismissed for lack of federal question) the district court had dismissed because of lack of equity and because the case had been prematurely brought since the petitioners had failed to seek a remedy in the state courts. 102 F. Supp. 708 (E.D. Pa. 1951). Failure to seek a remedy in the state courts presumably will not bar the federal courts from taking jurisdiction in *W.M.C.A., Inc. v. Simon*, 196 F. Supp. 758 (S.D.N.Y. 1962) because the New York courts will not hear challenges to the fairness of an apportionment on grounds other than the legislature's violation of the state constitution's mandatory rules relating to apportionment and districting. In *re Burns*, 268 N.Y. 601, 198 N.E. 424 (1935) (memorandum decision). For a discussion of which rules are mandatory and which are merely directive, see *In re Richardson*, 307 N.Y. 269, 121 N.E.2d 217 (1954); *In re Tishman*, 293 N.Y. 42, 55 N.E.2d 858 (1944); *In re Sherrill*, 188 N.Y. 185, 205, 81 N.E. 124, 130 (1907). Nor will a state court's inability to grant relief bar a federal court from assuming jurisdiction to inquire into an alleged deprivation of a federal constitutional right. Cf. *Magraw v. Donovan*, 163 F. Supp. 184, 187 (D. Minn. 1958) (per curiam); *Magraw v. Donovan*, 177 F. Supp. 803 (D. Minn. 1959), aff'd sub. nom *Rosso v. Magraw*, 288 F.2d 840 (8th Cir. 1961); *Smith v. Holm*, 220 Minn. 486, 19 N.W.2d 914 (1945).

20. *Kidd v. McCannless*, 352 U.S. 920 (1956) (per curiam); *Anderson v. Jordan*, 343 U.S. 912 (1952) (per curiam).

21. *MacDougall v. Green*, 335 U.S. 281 (1948) (per curiam).

22. The federal district court has been granted original jurisdiction in a civil action to redress the deprivation by state law of any right of a citizen of the United States secured by the United States Constitution or by federal statute. 62 Stat. 932 (1948), 28 U.S.C. § 1343(3) (1958).

23. *South v. Peters*, 339 U.S. 276 (1950) (per curiam).

24. *Magraw v. Donovan*, 159 F. Supp. 901 (D. Minn. 1958); *Dyer v. Abe*, 138 F. Supp. 220 (D. Hawaii 1956).

retained jurisdiction until the question was made moot by legislative compliance. In 1956, the federal district court in Hawaii held that it had equity jurisdiction under the Civil Rights Act²⁵ to grant relief in a case involving the Hawaiian Territorial Legislature's failure to reapportion. That court, however, distinguished judicial intervention in the apportionment of a state legislature and of a territorial legislature.²⁶ Later, in 1959, the federal district court in Minnesota assumed jurisdiction in a case in which the plaintiffs argued that the Minnesota Legislature's failure to reapportion and redistrict violated the fourteenth amendment and the Civil Rights Act.²⁷ Although the court withheld decision in order to give the 1959 session of the legislature an opportunity to reapportion and redistrict, it did retain jurisdiction and instructed the parties that they might petition the court for the proper remedies within sixty days after the legislature adjourned. Thereafter, when the legislature enacted a new reapportionment and districting statute, the plaintiffs asked for dismissal, thereby depriving the United States Supreme Court of an opportunity to pass on the propriety of the lower court's assumption of jurisdiction.²⁸ Finally, on January 11, 1962, in an action in the district court for

25. 62 Stat. 932 (1948), 28 U.S.C. § 1343(3) (1958).

26. *Dyer v. Abe*, 138 F. Supp. 220, 234 (D. Hawaii 1956). On August 1, 1956, Congress amended the Hawaiian Organic Act, enacted a reapportionment, declared that the existing apportionment should continue in force for the 28th (1955) and 29th (1957) legislatures, and deleted from the Organic Act that portion of § 55 which directed the legislature to reapportion its membership. On August 2, 1956, the federal district court, *sua sponte*, took judicial notice of this congressional action and determined that the basis for the court's prior order had been repealed. But the court also granted Dyer a declaratory decree of his rights as they had existed prior to the amendment of the Organic Act. The decree, with findings of fact and conclusions of law, was entered on December 28, 1956. On June 10, 1958, the ninth circuit court of appeals, ruled that the congressional enactment of the reapportionment on August 1, 1956 had made Dyer's controversy over reapportionment "moot," reversed the district court's declaratory decree, and ordered the complaint dismissed without prejudice. *Abe v. Dyer*, 256 F.2d 728 (9th Cir. 1958) (*per curiam*). See Lau, Reapportionment of the Territorial Legislature (Univ. of Hawaii Legis. Reference Bureau Rep. No. 2) 9-11 (1958).

27. 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1958). See *Magraw v. Donovan*, 159 F. Supp. 901 (1958).

28. *Magraw v. Donovan*, 177 F. Supp. 803 (D. Minn. 1959). The seats were last reapportioned and the state redistricted in 1913 on the basis of the 1910 census. From 1910 to 1950, the state's population had grown more than 43%. The population of some counties had grown as much as 185% while several counties had actually lost population. As a result, in 1950, senatorial districts ranged from 16,878 to 153,455 inhabitants (a ratio of 9:1) while representative districts ranged from 7,290 to 107,246 (a ratio of almost 15:1). Minn. Legis. Research Comm., *Legislative Reapportionment* (Publication No. 63, 1954). On the basis of the 1950 census, the new senatorial districts range from 27,716 to 70,492 while the number of inhabitants per representative ranges from 10,150 to 36,235. Short, *Minnesota Adopts Reapportionment Act*, 48 Nat'l Civic Rev. 415-16 (1959).

the southern district of New York by a taxpayer challenging the state constitutional provisions for apportionment, Judges Levet and Ryan denied the motion to dismiss a New York apportionment case for lack of jurisdiction.²⁹ Thus it is apparent, by way of the foregoing examples, that the federal courts have not considered themselves wanting in jurisdiction to decide the equities involved in districting and apportionment cases although they have most frequently declined to exercise it.

Any doubts about the federal courts having equity jurisdiction in apportionment and districting cases should have been resolved in favor of jurisdiction after passage of the Civil Rights Act of 1957.³⁰ Since this statute 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;³¹ since the right to vote includes the right to have one's vote counted fairly;³² and, since inequitable apportionment and districting prevent the votes in under-represented districts from being counted fairly,³³ apportionment and districting cases now clearly fall within the equity jurisdiction of the federal courts.³⁴

29. Judges Levet, Ryan, and Waterman all agreed to dismiss the complaint, however, both for want of a federal question and for want of equity in the relief sought. *W.M.C.A., Inc. v. Simon*, 196 F. Supp. 758 (S.D.N.Y. 1962). On appeal, a statement regarding jurisdiction was filed with the United States Supreme Court. *N.Y. Times*, April 4, 1962, p. 1, col. 2. See also Judge Levet's decision and order to convene the three-judge court. 196 F. Supp. 758 (S.D.N.Y. 1961).

30. Civil Rights Act of 1957, 71 Stat. 634, as amended, 5 U.S.C. § 295-1 (1958), 28 U.S.C. §§ 1343, 1861 (1958), 42 U.S.C. §§ 1971, 1975, 1975 a-e, 1995 (1958) (Supp. II, 1959-1960).

31. 71 Stat. 637 (1957), 28 U.S.C. § 1343(4) (1958).

32. *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Mosley*, 238 U.S. 383, 384 (1915) (argument for United States).

33. In Tennessee, for example, Moore County has 3,454 inhabitants and one representative while Shelby County (Memphis) has 627,019 inhabitants and eight representatives or 78,377 inhabitants per representative. U.S. Census of Population: 1960, Tennessee, Final Rep. PC(1)-44B, at 29; Tennessee Blue Book 1960, at 196. Therefore, the petitioners in Baker argued that one popular vote cast for a representative in Moore County has approximately twenty-two times the weight of one popular vote cast for a representative in Shelby County. Their contention is correct, however, only if the ratio of voters to inhabitants is approximately the same in Moore as in Shelby County. In New York, for example, the average number of votes cast per hundred citizens in the four senatorial elections held under the present apportionment (1954-1960) ranged from 20.5 in the eleventh senatorial district (part of Brooklyn) to 86.1 in the third senatorial district (part of Nassau County). Because the ratio of voters to citizens is not the same in every county, one popular vote cast for state senator in Manhattan and Brooklyn had 1.8 times the weight of one popular vote cast for state senator of Nassau. (Computed by the author on the basis of election statistics published in various editions of the New York Legislative Manual.) If one popular vote in a district is to be equalized with one popular vote in any other district, New York's apportionment would have to be based on electors rather than on citizen population.

34. *Baker v. Carr*, 369 U.S. 186 (1962).

II. FEDERAL QUESTION

The Supreme Court's finding of jurisdiction in *Baker* depended partially on the Court's preliminary finding that the matter set forth in the complaint presents a federal question.³⁵ Since four of the seven Justices participating in *Colegrove* agreed not to exercise the Court's equity power, that Court did not reach the constitutional question of whether the fourteenth amendment protects against the kind of geographical discrimination that is involved in apportionment and districting cases.³⁶ Because the Supreme Court rather consistently declined to exercise its equity power in apportionment, districting, and related cases that arose after *Colegrove*,³⁷ the Michigan Supreme Court concluded incorrectly 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.³⁸

In deciding the case of *Gomillion v. Lightfoot*³⁹ on the basis of the fifteenth amendment, the United States Supreme Court bypassed the question of whether flagrant gerrymandering is the kind of "invidious discrimination" which the fourteenth amendment forbids. In *Gomillion*, the Court held invalid 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 in passing the statute was held to deprive Negroes of the right to vote in municipal elections in violation of the fifteenth amendment.⁴⁰ Mr. Jus-

35. *Id.* at 199-200. The Court found that the subject matter set forth in the complaint relates to denial of equal protection and falls under 28 U.S.C. § 1343(3).

36. 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 Note, The Role of the Judiciary in Legislative Reapportionment, 42 Minn. L. Rev. 617 (1958).

37. See notes 17-20 *supra*.

38. *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960). Consequently, 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 violate the equal protection clause of the fourteenth amendment, because statistical evidence proves that this arrangement gives greater weight to one elector's vote cast for state senator than it gives to another elector's vote cast for state senator in a different district. 360 Mich. at 1, 104 N.W.2d at 63. On appeal, a statement regarding jurisdiction was filed with the United States Supreme Court. 29 U.S.L. Week 3199 (Dec. 12, 1960).

39. 364 U.S. 339 (1960).

40. In a concurring opinion, Mr. Justice Whittaker argued that *Gomillion* should have been

tice Frankfurter, who had written the opinion for the "bob-tailed majority" in *Colegrove*, carefully distinguished *Gomillion* from *Colegrove* on two grounds: (1) While the petitioners in *Colegrove* had invoked 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.⁴¹ Citing *Gomillion*, a three-judge federal statutory court recently dismissed a New York apportionment case for want of a federal question on the ground that the fourteenth amendment does not protect against geographical discrimination, and that the petitioners did not allege that the New York constitution's apportionment formulae and districting rules discriminated against either Negro voters (fifteenth amendment) or women voters (nineteenth amendment).⁴²

On the other hand, in 1956, the federal district court in Hawaii had ruled that the Hawaiian Territorial Legislature's failure to reapportion denied equal protection to voters in the more populous legislative

decided on the basis of the fourteenth amendment since the legislature's action amounted to unconstitutional segregation. He also argued that no voting rights were abridged since Negroes continue to vote and have their votes counted in the district where they live. *Id.* at 349. Mr. Justice Whittaker did not participate in *Baker*, but Mr. Justice Frankfurter used his line of reasoning to argue that voting rights were not impaired in *Baker*. 369 U.S. 186, 298-300.

41. State courts have consistently refused to invalidate an apportionment or districting statute that was valid when enacted but became unfair only through the passage of time. E.g., *Daly v. Madison County*, 378 Ill. 357, 38 N.E.2d 160 (1941); *Smith v. Holm*, 220 Minn. 486, 19 N.W.2d 914, 30 Minn. L. Rev. 37 (1945); *State ex rel. Warson v. Howell*, 92 Wash. 540, 159 Pac. 777 (1916). Similarly, 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. The New York Court of Appeals, for example, refused to entertain a taxpayer's action testing the validity of the act of 1907 and held that the petitioner was barred by laches in waiting until four general elections had been held under the act before challenging its validity. *In re Reynolds*, 202 N.Y. 430, 441-42, 96 N.E. 87, 89 (1911). See also *Adams v. Bosworth*, 126 Ky. 61, 102 S.W. 861 (1907). But state courts have occasionally invalidated a recent apportionment or districting statute which violated state constitutional mandates. E.g., *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315 (1931); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907); *Donovan v. Suffolk County Apportionment Comm'rs*, 225 Mass. 55, 113 N.E. 740 (1916); *Giddings v. Blacker*, 93 Mich. 1, 52 N.W. 944 (1892); *In re Tishman*, 293 N.Y. 42, 55 N.E.2d 858 (1944); *In re Dowling*, 219 N.Y. 44, 113 N.E. 545 (1916); *In re Sherrill*, 188 N.Y. 185, 81 N.E. 124 (1907); *People ex rel. Baird v. Board of Supervisors*, 138 N.Y. 95, 33 N.E. 827 (1893); *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932); *State v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 83 Wis. 90, 53 N.W. 35 (1892).

42. The petitioners sought declaratory and injunctive relief under the Civil Rights Act, 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 New York constitution denied them both due process and equal protection contrary to the fourteenth amendment to the United States Constitution. See note 29 *supra*.

districts.⁴³ Similarly, a superior court in Indiana recently held that the Indiana Legislature's failure to reapportion for forty years violates the equal protection clause of the fourteenth amendment.⁴⁴ As a matter of fact, the federal district court in *Baker v. Carr* thought that the Tennessee Legislature's failure to reapportion violates the fourteenth amendment but dismissed the complaint on other grounds.⁴⁵ By finding that failure to reapportion raises a federal question and by remanding the *Baker* case to the district court, the Supreme Court has now given the district court an opportunity to convert its views on the constitutionality of Tennessee's legislative districts into a judicial ruling.

III. JUSTICIABILITY AND STANDING

Because the judicial power of the United States extends only to cases and controversies,⁴⁶ the federal courts cannot decide nonjusticiable political questions. In *Baker v. Carr*, the Court reasoned that a "political question" was not presented merely because the appellants sought to protect "political rights" against a state's "political action." The Court went on to conclude that the case involved a bona fide controversy—whether "political action" was depriving the appellants of a constitutionally protected right. Since the petitioners alleged 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 impairment by arbitrary state action, the Court held that a justiciable question was presented.⁴⁷

Of course, the federal courts cannot enforce the constitutional clause which guarantees to the states "a republican form of government."⁴⁸ Because the petitioners in *Baker* might have based their claims on the guaranty clause and because reliance on the guaranty clause would have made their cause nonjusticiable, it does not follow that the pe-

43. *Dyer v. Abe*, 138 F. Supp. 220 (D. Hawaii 1956).

44. The Marion County Court held that the legislature's failure to reapportion violates not only the fourteenth amendment but also the Northwest Ordinance's guarantee of "proportionate representation of the people in the legislature" as well as the congressional guarantees of "a republican form of government" made by various acts of Congress organizing the Indiana Territory and admitting Indiana to the Union. *Grills v. Anderson*, 29 U.S.L. Week 2443 (March 28, 1961).

45. *Baker v. Carr*, 369 U.S. 186.

46. U.S. Const. art. III, § 2.

47. 369 U.S. at 207-08.

48. U.S. Const. art. IV, § 4. See *Highland Farms Dairy Inc. v. Agnew*, 300 U.S. 603, 612 (1937); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374 (1930); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 79-80 (1930); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *O'Neill v. Leamer*, 239 U.S. 244 (1915); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); see note 44 supra.

tioners may not be heard on an equal-protection claim.⁴⁹ In previous cases, the nonjusticiability of a claim resting on the guaranty clause did not bar the justiciability of the same claim when it was presented under the fourteenth amendment if the claim of constitutional deprivation was amenable to judicial correction.⁵⁰ Nor would the Court accept Mr. Justice Frankfurter's argument in *Baker* that the Court could not determine the equal-protection issue without first determining what constitutes a "republican form of government."⁵¹

The Court rejected not only the guaranty-clause argument but all other arguments that had been offered in support of the proposition that *Baker* presented a "political question." The Court found, for example, that the "political-question" argument of *Colegrove* was 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.⁵² Further, the Court contended that the issue in *Baker* was not a political one, because the judicial standards under the equal protection clause are sufficient to allow a court to determine, on the particular facts, whether the discrimination reflects a reasonable state policy or is simply arbitrary and capricious.⁵³

In order to be a "case or controversy" in the constitutional sense, not only must a justiciable question be presented, but the proceeding must have bona fide litigants who have legal rights at stake. Since the right asserted in *Baker* was found to be within judicial protection under the fourteenth amendment, the Court argued that the petitioners have a substantial personal stake, sufficient to assure the adverse interests necessary for a "case or controversy." Consequently, the appellants were held to have standing sufficient to maintain the suit and, therefore, to be entitled to a trial and a decision on the merits. According to Mr. Justice Brennan, *Colegrove v. Green* "squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue."⁵⁴

Thus did *Baker v. Carr* dispose of the questions of a possible violation of the fourteenth amendment by state districting and apportioning, of the Court's jurisdiction to consider such a violation, and of the standing

49. 369 U.S. at 209-10.

50. The Court cited the following examples: *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892); *Foster v. Kansas ex rel. Johnston*, 112 U.S. 201 (1884); *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480 (1876).

51. 369 U.S. at 228-29.

52. See note 14 supra.

53. 369 U.S. at 209.

54. *Id.* at 206.

necessary for a party to be entitled to relief. The Court did not consider, however, what was to be the nature and extent of the relief so that any prognosis of what form such relief is to take must come from a consideration of prior cases identical with, or analogous to, the situation presented in *Baker*.

IV. REMEDIES

The majority in *Baker* did not consider the question of possible remedies; it simply stated: "We have no cause . . . to doubt [that] the District Court will be able to fashion relief if violations of constitutional rights are found. . . ." ⁵⁵ The petitioners prayed that, unless and until the Tennessee Legislature enacts a valid reapportionment and redistricting statute, the district court either order the defendants to conduct legislative elections at large or reapportion by arithmetic application of the Tennessee constitution's apportionment formula to the 1960 census figures. In his concurring opinion, Mr. Justice Clark suggested that the district court might do some redistricting as well as some reapportioning. He proposed that the district court might start with the existing districts, consolidate some of them, and assign the seats thus released to the most under-represented counties. ⁵⁶ (Without further prompting, a Vermont court immediately began to partially reapportion the Vermont Senate.) ⁵⁷

Concomitant with the Court's assumption and exercise of equity jurisdiction in apportionment and districting cases is its power to rule upon the constitutionality of any substituted districting or apportionment plan. From Mr. Justice Clark's language, it would seem that the Court might be willing to take a more active role and might engage itself in actual apportionment and redistricting. At the very least, the *Baker* decision has made it clear that the federal courts will act in a supervisory way in restraining or enforcing any such plan by way of injunction.

The Supreme Court's mistake in establishing the federal judiciary as the "Nation's school board," ⁵⁸ however, is no valid argument for trans-

55. *Id.* at 198.

56. *Id.* at 251-64.

57. He not only enjoined two counties from electing state senators until the Vermont Senate is reapportioned but also ordered the transfer of one senator from Chittenden County to Rutland County, thereby reducing Rutland's senators from four to three and increasing Chittenden's from four to five. *N.Y. Times*, March 30, 1962, p. 14, col. 4.

58. *Brown v. Board of Educ.*, 349 U.S. 294 (1955). Moreover, since racial segregation is unconstitutional (see note 5 *supra*), one may question the constitutional propriety of a district court's presiding over the perpetuation of even partial segregation while the local school authorities formulate and implement plans for "a prompt and reasonable start toward" gradual desegregation with "all deliberate speed." *Id.* at 300-01.

forming the federal courts into the "Nation's apportionment commission." To restrain school boards, apportioners, and districters from violating the fourteenth amendment is a valid judicial function. But to supervise desegregation, to reapportion, and to redistrict are quite different functions. In cases where the state constitution prescribes an apportionment formula such as major fractions or equal proportions that admits no discretion, the courts may be able to engage in some reapportioning without becoming involved in the "mathematical quagmire,"⁵⁹ of which Mr. Justice Frankfurter spoke. But if the courts reapportion in states where the apportionment formula is not so precise or where the apportionment formula itself is discriminatory or if the courts themselves begin to redistrict, they are certain to become trapped in the "political thicket,"⁶⁰ against which Mr. Justice Frankfurter also warned.

Although the constitutions of Arkansas,⁶¹ Oregon,⁶² and Texas⁶³ expressly provide for state judicial participation in reapportionment and redistricting, the courts of other states have consistently and wisely refused to reapportion or redistrict⁶⁴ or to order the legislature to do so.⁶⁵ In the six states where reapportionment and redistricting are vested in a nonlegislative agency, however, the state courts can use mandamus or injunction, not only to compel reapportionment and redistricting, but also to compel such an agency to adhere to standards of fair representation—Alaska,⁶⁶ Arizona,⁶⁷ Arkansas,⁶⁸ Hawaii,⁶⁹ Missouri,⁷⁰ and Ohio.⁷¹

59. 369 U.S. at 268.

60. *Colegrove v. Greene*, 328 U.S. 549 (1946).

61. Ark. Const. amend. XXIII, § 5 empowers the state supreme court to revise an apportionment or districting made by the State Board of Apportionment. The Arkansas Supreme Court exercised this power in 1941 and again in 1952. *Pickens v. Board of Apportionment*, 220 Ark. 145, 246 S.W.2d 556 (1952); *Shaw v. Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941). See also *Butler v. Democrat State Comm.*, 204 Ark. 14, 160 S.W.2d 494 (1942); *Sears, Methods of Apportionment* 25-30 (1952).

62. Ore. Const. art. IV, § 6.

63. Texas Const. art. III, § 28.

64. E.g., *Waid v. Pool*, 255 Ala. 441, 51 So. 2d 869 (1951); *Romang v. Cordell*, 206 Okla. 369, 243 P.2d 677 (1952); *Latting v. Cordell*, 197 Okla. 369, 172 P.2d 397 (1946); *Jones v. Freeman*, 193 Okla. 554, 146 P.2d 564 (1943).

65. E.g., *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 475, 40 N.E. 307, 314 (1895); *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912). See Comment, *Legislative Reapportionment*, 1949 Wls. L. Rev. 761, 762-63. State courts have also declined to compel indirectly reapportionment and redistricting by refusing to order the state treasurer to withhold legislators' salaries until the legislature reapportioned and by refusing to permit the legislature's action or inaction to be tested in quo warranto proceedings. *People ex rel. Fergus v. Blackwell*, 342 Ill. 223, 173 N.E. 750 (1930); *Fergus v. Kinney*, 333 Ill. 437, 164 N.E. 665 (1928).

66. Alaska Const. art. VI, § 11.

67. Arizona's Secretary of State performs the ministerial function of apportioning members of the lower house according to the constitutional formula while the County Boards of

It appears quite obvious that the federal courts cannot enjoin or issue a writ of mandamus against a governor or a legislature or a state supreme court. By way of example, in 1957, the United States 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 issue a writ of mandamus to compel the Governor to call a session of the legislature, to compel the legislature to reapportion, and to compel the state supreme court to reapportion if the legislature failed to do so.⁷² When the state courts have nullified an apportionment or districting act, they have usually used mandamus⁷³ or injunction⁷⁴ to order *ministerial* officers to refrain from carrying out the provisions of the invalid statute.⁷⁵

Supervisors divide their respective counties into representative districts. Ariz. Const. art. IV, pt. 2, § 1. Board of Supervisors v. Pratt, 47 Ariz. 536, 57 P.2d 1220 (1936). There is no constitutional provision for senatorial reapportionment and redistricting.

68. Ark. Const. amend. XXIII, § 5. Smith v. Board of Apportionment, 219 Ark. 611, 243 S.W.2d 755 (1951); Bailey v. Abington, 201 Ark. 1072, 148 S.W.2d 176 (1941). See also Carpenter v. Board of Apportionment, 218 Ark. 404, 236 S.W.2d 582 (1951).

69. Hawaii Const. art. III, § 4.

70. Missouri's Secretary of State performs the ministerial function of apportioning representatives while the local authorities divide their respective counties into representative districts. Mo. Const. art. III, §§ 2-3. The Senatorial Apportionment Commission combines the less-populous counties into senatorial districts but merely apportions senators to the more-populous counties. Any city or county entitled to more than one senator is divided into senatorial districts by the local authority in said town or county. Mo. Const. art. III, §§ 7-8. See Preisler v. Doherty, 365 Mo. 460, 284 S.W.2d 427 (1955). On use of mandamus in such cases, see State ex rel. Donnell v. Osburn, 347 Mo. 469, 147 S.W.2d 1065 (1941).

71. Ohio Const. art. XI, § 11. See State ex rel. Herbert v. Bricker, 139 Ohio St. 499, 41 N.E.2d 377 (1942).

72. Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956), *aff'd per curiam*, 352 U.S. 991 (1957).

73. E.g., Donovan v. Suffolk County Apportionment Comm'rs, 225 Mass. 55, 113 N.E. 740 (1916); Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892); State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916); State ex rel. Morris v. Wrightson, 56 N.J.L. 126, 28 Atl. 56 (Sup. Ct. 1893); People ex rel. Baird v. Board of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893); State ex rel. Peterson v. Scott, 56 S.D. 144, 227 N.W. 572 (1929).

74. E.g., 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, 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. When the New York Legislature failed to reapportion for more than two decades, 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 elections 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. In re Burns, 268 N.Y. 601, 198 N.E. 424 (1935) (memorandum decision).

It would appear that mandamus and injunction would be available to federal courts also, at least to the same extent and with the same effectiveness as they have been used by state courts. Thus the federal courts presumably can enjoin election officials from conducting legislative elections in districts or can issue writs of mandamus compelling such ministerial officers to conduct legislative elections at large until a statute providing fair representation is enacted.⁷⁶ For example, in three instances, the United States Supreme Court has ordered the election at large of congressmen in a state.⁷⁷ Since no legislator is likely to be anxious to entrust his fate to the tender mercies of a statewide electorate, a court order requiring all of a state's legislators to be elected at large would doubtless induce a delinquent legislature to reapportion and redistrict in short order. This appears to have been the result in states, not only where a court has actually ordered the election at large of all legislators,⁷⁸ but also where the mere possibility of such a court order threatened.⁷⁹

Mr. Justice Clark's concurring opinion in *Baker* suggested that the Court would not, or should not, intervene in states where popular initiative and referendum provide the voters with a "practical opportunity" for correcting an existing "invidious discrimination."⁸⁰ Twenty states have provisions for passage of legislation by popular initiative and referendum.⁸¹ Although the *constitutional* initiative has occasionally been used to revise the so-called apportionment article of a state constitution without the legislature's consent,⁸² the *statutory* initiative has been used successfully to force reapportionment and redistricting on an unwilling

76. Cf. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 318-19 (1930); *Work v. United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200, 208-09 (1923); *Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 231 (1900).

77. See note 10 *supra*.

78. *Carroll v. Becker*, 285 U.S. 380 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); *Hume v. Mahan*, 1 F. Supp. 142 (E.D. Ky. 1932); *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932); see Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1070, 1087-89 (1958).

79. See notes 26 and 28 *supra*; *Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960); *N.Y. Times*, Feb. 2, 1961, p. 1, col. 2.

80. 369 U.S. at 258-59.

81. Thirteen states have popular initiative for proposing both statutes and constitutional amendments: Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon. Seven states have popular initiative for proposal of statutes only: Alaska, Idaho, Maine, Montana, South Dakota, Utah, and Washington. *Baker, Reapportionment and Redistricting of State Legislatures* 94 (National Municipal League 1959). One might question whether initiative and referendum could be used to reapportion and redistrict in those states where the power to reapportion and redistrict is not vested in the legislature.

82. *Id.* at 89-92.

legislature only twice: in Washington in 1930⁸³ and in Colorado in 1932.⁸⁴

Washington's popularly initiated measure of 1930 corrected serious inequalities that had arisen during thirty years of the legislature's refusal to reapportion and redistrict. But a similar popularly initiated and ratified reapportionment occurring in 1956 was amended radically by the legislature, and the Washington Supreme Court upheld the legislature's reapportionment over the popularly initiated one.⁸⁵ In Colorado, on the other hand, the state supreme court upheld the popularly initiated apportionment over the legislature's subsequent reapportionment. Despite these two successful uses of popular initiative and referendum to force reapportionment and redistricting on a reluctant legislature, the failure of most such efforts⁸⁶ raises a serious question; namely, whether popular initiative and referendum actually do provide the voters with a "practical opportunity" for correcting "invidious discrimination."

PART TWO: APPORTIONMENT OF THE NEW YORK SENATE

The 1960 census tabulations of New York State's citizen population are completed, and the 1963 session of the legislature will have the duty of reapportioning the State's fifty or more senators among the several counties. This raises certain questions about the meaning of article III of the New York constitution relating to representation in the legislature. A systematic investigation of legislative representation requires one to distinguish between apportionment and districting. Since this article is concerned with apportionment, it deals with the rules that govern the distribution of senators among the counties, between the upstate and the downstate, and among the urban, suburban, and rural areas. A districting study, on the other hand, would be concerned largely with the rules governing and the practices followed in drawing the boundaries of legislative districts.

Perhaps this distinction between apportionment and districting can best be explained by the use of several illustrations. The present constitutional provision precluding a county from having four or more senators unless such county has at least two per cent of the state's citizen population for each senator, is, for example, an apportionment rule. The present constitutional prohibition against a senate district's containing

83. See *State ex rel. Miller v. Hinkle*, 156 Wash. 289, 286 Pac. 339 (1930).

84. *Armstrong v. Mitten*, 95 Colo. 425, 37 P.2d 757 (1934).

85. *State ex rel. O'Connell v. Meyers*, 51 Wash. 2d 454, 319 P.2d 828 (1957). See also *State ex rel. Donohue v. Coe*, 49 Wash. 2d 410, 302 P.2d 202 (1956).

86. *Baker*, *Reapportionment and Redistricting of State Legislature 92-95* (National Municipal League 1959).

parts of two counties, on the other hand, is a districting rule. In the case of assembly representation, the present constitution makes a sharp distinction between apportionment and districting by vesting the two functions in different bodies. The legislature has the sole power to apportion assemblymen, but the local authorities have exclusive power to divide their respective counties into assembly districts.⁸⁷ In the case of the 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.

The legislature actually performs four functions with respect to senatorial apportionment and districting: (1) apportions senators to each county that has at least six per cent 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, and (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 functions are essentially apportionment functions. The second involves only districting. But the fourth function involves both apportionment and districting. That is, the legislature apportions senators to the less populous areas of the State by dividing them into senatorial districts.

Contrary to popular notion, not all unequal representation is caused by gerrymandering—that is, by abuse of legislative discretion in drawing the boundaries of legislative districts. Use of an area base, such as the guarantee of at least one assemblyman to each county, for example, is not gerrymandering but results in districts that are unequal in population. As this article will show, a combination of the present constitutional provisions with the simple laws of arithmetic requires that some senatorial districts have at least fifty per cent more inhabitants than others, but this practice presumably is constitutional and certainly cannot be called gerrymandering.⁸⁸ Since the present article is concerned only with

87. 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 [of the Assembly], 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).

88. 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." Griffith, *The Rise and Development of the Gerrymander* 21 (1907). Thus, gerrymandering involves the creation of arbitrary districts with artificial boundaries, which are consciously drawn for

apportionment, the abuse of legislative discretion in drawing the boundaries of senatorial districts will not be considered. While constitutional provisions relating to districting are only of marginal interest, an examination of the apportionment rules found in New York's first three constitutions is essential to an understanding of the present constitution's provisions relating to apportionment.

I. THE CONSTITUTIONS OF 1777, 1821, AND 1846

The constitution of 1777 established a senate of twenty-four members,⁸⁹ divided the State into four great senatorial districts, and distributed the senators among them, giving nine to the southern, six to the middle, six to the western, and three to the eastern district.⁹⁰ The constitution provided for a census of senate electors to be taken as soon as possible after the expiration of seven years following the end of the war and directed the legislature to reapportion the senators among the districts so that the number of senators would be "justly proportioned" to the number of electors in each district.⁹¹

In 1791, following the first census, the districts were altered and the seats reapportioned.⁹² The legislature was also authorized to give an additional senator to a district whenever a septennial census showed that the number of electors in that district had increased one twenty-fourth part of the whole number of electors as established by the first census.⁹³ Consequently, after the second census, the senate was increased to forty-three members, the districts redrawn, and the senators apportioned to the four newly constituted districts.⁹⁴ Five years later, in 1801, the legislature again redistricted but did not reapportion.⁹⁵

Later that year, a constitutional amendment fixed the number of senators at thirty-two and directed the legislature to apportion these

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 margins in these few districts. *Id.* at 15-21.

89. N.Y. Const. art. X (1777); 2 Poore, *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States* 1334 (2d ed. 1878) [hereinafter cited as 2 Poore, *The Federal and State Constitutions* (2d ed. 1878)].

90. N.Y. Const. art. XII (1777).

91. *Ibid.*

92. N.Y. Sess. Laws 1791, ch. 4.

93. N.Y. Const. art. XII (1777). Senate electors were "the freeholders of this State, possessed of Freeholds of the value of one hundred pounds over and above all Debts and Incumbrances thereon." 1 Lincoln, *The Constitutional History of New York* 516 (1906). See also Dougherty, *Constitutional History of the State of New York* 50-51 (2d rev. ed. 1915).

94. N.Y. Sess. Laws 1796, ch. 19.

95. N.Y. Sess. Laws 1801, ch. 125.

senators among the four districts "as nearly as may be, according to the number of electors qualified to vote for senators."⁹⁶ Therefore, in 1802, the legislature apportioned on the basis of thirty-two senators but did not redistrict.⁹⁷ In 1808, the legislature again reapportioned without redistricting.⁹⁸ When the legislature attempted to gerrymander the senate districts in 1809, the council of revision vetoed the bill on the ground that the constitution said nothing about the formation of new districts.⁹⁹ The constitution did not say, the council argued, "that the districts shall be apportioned to the senate, but that senators shall be apportioned amongst the great districts," presumably as these districts stood.¹⁰⁰ After the next census, however, the legislature not only reapportioned but also redistricted.¹⁰¹

During the forty-four years from 1777 to 1821, a census was taken five times—1790, 1795, 1801, 1807, and 1814. The legislature passed six so-called reapportionment acts, redistricted on four occasions, reapportioned the seats on five occasions, and added forty-one new counties to the various districts as those counties were created.¹⁰² Although the acts of 1791 and 1801 made the number of the senators quite disproportionate to the number of electors, these electors were too few to be statis-

96. N.Y. Const. amend. III (1801); 2 Poore, *The Federal and State Constitutions* 1340 (2d ed. 1878).

97. N.Y. Sess. Laws 1802, ch. 81, § 1, which apportioned the eight senators to be chosen at the next election, giving one to the southern, two to the middle, and five to the western district.

98. N.Y. Sess. Laws 1808, ch. 90, § 1, which apportioned the nine senators that were to be chosen at the next election, giving two to the southern, one to the middle, one to the eastern, and five to the western district.

99. N.Y. Const. amend. IV (1801).

100. The census was taken in 1807 and the senate reapportioned in 1808. To the surprise of the Democrats, both the middle and eastern districts voted Federalist in the elections that followed. Consequently, the Democratic legislature proposed to move Federalist Albany and Rensselaer from the eastern to the middle district. The bill also provided for transferring Montgomery, Herkimer, St. Lawrence, Lewis, Jefferson, and Oneida from the western to the eastern district in order to make the latter Democratic. Thus, the middle district would have been overwhelmingly Federalist and the other three would have been safely Democratic. In addition to objecting on the constitutional ground, the council also objected on two grounds of policy: (1) that the senate had been reapportioned only the preceding April and (2) that the eastern district had obviously been arranged to elect Democratic senators. The council noted that the counties proposed to be unified (Washington, Saratoga, Essex, Clinton, Franklin and the six listed above) were distant from each other, had separate local interests, and had never been united. As a matter of history, the assembly failed to re-pass the bill by a vote of 46 to 51. Griffith, *The Rise and Development of the Gerrymander* 59-61 (1907).

101. N.Y. Sess. Laws 1815, ch. 160, which apportioned the eight senators whose terms expired July 1, 1815, giving two to the middle, four to the eastern, and two to the western district. N.Y. Sess. Laws 1815, ch. 208 redrew the districts.

102. 3 Lincoln, *The Constitutional History of New York* 168-75 (1906).

tically significant. While the last three apportionment acts made the number of senators relatively proportional to the number of electors in each district, this fact does not necessarily mean that the districts may not have been drawn for partisan advantage.¹⁰³ In any case, no area was consistently discriminated against. If any area was favored, it was the eastern—Washington, Saratoga, Warren, Essex, *etc.* If any district was under-represented, it was the western—Madison, Oneida, *etc.* In terms of the relation between the number of senators and the number of electors, certainly the downstate (southern district) was neither over-represented nor under-represented.

The constitution of 1821 changed the basis of senatorial representation from electors to "inhabitants, excluding aliens, paupers, and persons of colour not taxed."¹⁰⁴ The constitution continued the number of senators at thirty-two but increased the number of senatorial districts from four to eight and, by assigning four seats to each district, deprived the legislature of its authority to apportion senators among the districts.¹⁰⁵ The legislature was authorized, however, to redistrict at the first session after each decennial census so "that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, paupers, and persons of colour not taxed. . . ."¹⁰⁶

103. In his catalog of gerrymanders from 1705 to 1840, Griffith lists no gerrymanders of senatorial districts in New York except one unsuccessful attempt. Griffith, *The Rise and Development of the Gerrymander* 59-61 (1907). The legislature was skillful, however, at the art of gerrymandering congressional districts. In passing the Congressional Districting Act of 1789, N.Y. Sess. Laws 1789, ch. 12, the Federalist senate gerrymandered Dutchess and Westchester (second and third districts) to prevent anti-Federalist Dutchess from electing a congressman. After inspecting the election returns, the legislature reconstituted the congressional districts in 1792 and again in 1797. After the federal census of 1800, the legislature seems to have been seized by a mania for congressional redistricting and altered these districts in 1801, 1802, 1804, and 1808. After studying the election returns for 1808, the Democrats attempted a congressional gerrymander par excellence in 1809 but failed to get their bill enacted. See note 100 *supra* and accompanying text. Following the federal census of 1810, the Democratic legislature combined the noncontiguous counties of Madison and Herkimer into the seventeenth congressional district. It also established a double-member district (the first) which included Suffolk, Queens, Kings, Richmond, and the first two wards of New York City. The Democratic counties were counted on to offset the Federalist vote in the city and, thereby, insure the election of two Democratic congressmen. As a matter of fact, from 1801 to 1812, Federalist New York City was consistently represented in Congress by Democrats, because the various wards of the city were joined with Democratic counties and placed in different congressional districts. Griffith, *The Rise and Development of the Gerrymander* 42-43, 56-59, 77-79 (1907).

104. N.Y. Const. art. I, § 6 (1821); 2 Poore, *The Federal and State Constitutions* 1341 (2d ed. 1878).

105. N.Y. Const. art. I, § 5 (1821). This was apparently designed to limit the temptation to gerrymander. See Griffith, *The Rise and Development of the Gerrymander* 97, 123 (1907).

106. N.Y. Const. art. I, § 6 (1821); 2 Poore, *The Federal and State Constitutions*

Although the convention used the federal census of 1820 as a basis for dividing the State into senatorial districts, the constitution provided for a state enumeration in 1825 and every ten years thereafter.¹⁰⁷ The legislature passed three redistricting laws under the second constitution—one in 1826,¹⁰⁸ another in 1836,¹⁰⁹ and a third in 1846.¹¹⁰ From the standpoint of population as a basis of representation, the senate districts were drawn quite equitably—probably as equitably as possible since the districts had to be composed of contiguous territory and since counties could not be split between districts.¹¹¹ While these two rules may have limited or prevented gerrymandering, they also prevented the legislature from creating districts that were precisely equal in population. Again, there seems to have been no discrimination against the downstate districts (first and second districts) in favor of the more rural areas.¹¹²

1341 (2d ed. 1878). See also Dougherty, *Constitutional History of the State of New York* 113-14 (2d rev. ed. 1915).

107. N.Y. Const. art. I, § 6 (1821); 2 Poore, *The Federal and State Constitutions* 1341 (2d ed. 1878).

108. N.Y. Sess. Laws 1826, ch. 289.

109. N.Y. Sess. Laws 1836, ch. 436.

110. N.Y. Sess. Laws 1846, ch. 328.

111. N.Y. Const. art. I, § 6 (1821); 2 Poore, *The Federal and State Constitutions* 1341 (2d ed. 1878).

112. SENATE REDISTRICTING UNDER CONSTITUTION OF 1821^a

District	Number of Senators ^a	Number of Inhabitants (excluding aliens, paupers, and colored persons not taxed) per Senator ^b			
		1821 ^c	1826	1836	1846
First	4	40,690	47,429	64,782	77,019
Second	4	42,477	50,306	60,881	76,682
Third	4	42,146	45,300	62,621	77,735
Fourth	4	41,088	46,513	64,287	80,009
Fifth	4	41,338	48,044	66,335	74,260
Sixth	4	42,297	49,073	65,238	74,985
Seventh	4	40,876	46,430	62,354	66,810
Eighth	4	38,750	49,819	64,139	72,389
Total Ratio ^d	32	41,176	47,864	63,829	74,986
Variation ^e	00	3,727	5,006	5,454	13,199
Per cent variation ^f	00	9.05%	10.5%	8.5%	17.6%

^a The constitution provided for eight districts and assigned four senate seats to each. Thus, the legislature had power to redistrict but not to reapportion.

^b Computed from statistics in 3 Lincoln, *The Constitutional History of New York* 177-81 (1906).

^c Districts drawn by constitutional convention.

^d Ratio equals state's representative population divided by 32.

^e Difference between largest and smallest number of electors per senator.

^f The variation divided by the ratio.

The constitution of 1846 departed from the traditional rule by providing for single-member rather than multi-member districts. The convention divided all of the State outside New York County into twenty-eight districts, apportioned the other four senators to New York County, and directed the County Board of Supervisors to divide that county into four senatorial districts. Thus, there were thirty-two districts, each having one senator.¹¹³ The legislature had two pertinent powers under this constitution: the power to apportion senators to the counties entitled to more than one senator and the power to divide these counties and the rest of the state into single-member districts.¹¹⁴ The legislature apportioned senators to the multi-member counties and redistricted the state in 1857,¹¹⁵ 1866,¹¹⁶ 1879,¹¹⁷ and again in 1892.¹¹⁸

Although the constitution provided that each senatorial district should contain, as nearly as may be, an equal number of representative inhabitants, there were greater population differences between the districts created by these statutes than there had been under previous constitutions.¹¹⁹ These population differences, however, resulted from districting

113. N.Y. Const. art. III, § 3 (1846); 2 Poore, *The Federal and State Constitutions* 1354 (2d ed. 1878).

114. N.Y. Const. art. III, § 4 (1846), which actually empowered the legislature only to alter the senatorial districts after the return of each enumeration and said nothing about apportionment to the counties entitled to more than one senator. Since New York County was the only county entitled to more than one senator in 1846, § 3 authorized only the New York County Board of Supervisors to divide the county into senatorial districts and to do so only on or before May 1, 1847. Nothing was said about the authority of any County Board of Supervisors to redistrict in the future. Sections 3 and 4 were interpreted to mean that the legislature was not only empowered to apportion senators to such counties but also to divide these counties into senatorial districts. Consequently, the legislature redistricted New York, Kings, and Erie counties under this constitution. See also 2 Poore, *The Federal and State Constitutions* 1354-55 (2d ed. 1878).

115. N.Y. Sess. Laws 1857, ch. 339.

116. N.Y. Sess. Laws 1866, ch. 805.

117. N.Y. Sess. Laws 1879, ch. 208.

118. N.Y. Sess. Laws 1892, ch. 397.

119. SENATE DISTRICTS UNDER THE CONSTITUTION OF 1846

Explanation	Number of Inhabitants (excluding aliens and colored persons not taxed) per Seat ^a				
	1846 ^b	1857	1866	1879	1892
Largest District	91,062	103,561	134,364	180,703	229,005
Smallest District	58,671	61,811	84,378	101,327	152,357 ^c
Variation ^d	32,391	41,750	49,986	79,376	76,648
Ratio ^e	74,986	87,419	106,041	136,584	180,965
Per cent of Variation ^f	43.2	47.8	47.1	58.1	42.4

(Continued at bottom of next page)

rather than from misapportionment. All five apportionment acts passed under this constitution gave every county having one or more ratios a senator for each ratio and any major fraction thereof. No such county was combined with another county unless such combination made the population per senator in such counties closer to the statewide average.¹²⁰

While some of the disparity between the population of various districts may have been due to gerrymandering, much of it was due to the districting rules prescribed by the constitution itself. Since the constitution made single-member districts mandatory, the legislature could not equalize representation by apportioning to each district a number of senators commensurate with that district's population. The best that the legislature could do was to try to establish districts that were as nearly equal in population as possible. Yet, the legislature was compelled by a rule which proscribed the splitting of a county unless such county were "equitably entitled to two or more senators" to create districts which were unequal in population.¹²¹

^a Tabulated from statistics in 3 Lincoln, *The Constitutional History of New York 181-92* (1906).

^b Made by constitutional convention.

^c In 1892, Erie had a representative population of 304,713 and was given two seats, making a representative population of 152,357 per seat.

^d The difference between the largest and the smallest districts.

^e The State's total representative population divided by 32 (the total number of seats).

^f The variation divided by the ratio.

120. The following table includes all counties having one or more senate ratios at the time of any of the five apportionments.

		1846	1857	1866	1879	1892
Albany:	Number of Ratios	1.13 ^a	1.06	0.98	1.01	0.87
	Seats Apportioned	1	1	1	1	1
Erie:	Number of Ratios	0.92	1.08	1.27	1.32	1.68
	Seats Apportioned	1	1	1	1	2
Kings:	Number of Ratios	0.82	1.68	2.39	3.40	5.06 ^b
	Seats Apportioned	1	2	2	3	5
Monroe:	Number of Ratios	0.85	0.84	0.87	1.10 ^c	1.00 ^f
	Seats Apportioned	1	1	1	1	1
New York:	Number of Ratios	3.94	4.42	5.33	6.89 ^b	8.66 ^d
	Seats Apportioned	4	4	5	7	9
Oneida:	Number of Ratios	1.05	1.01	0.91	0.79	1.09 ^e
	Seats Apportioned	1	1	1	1	1

^a Included Schenectady.

^b Included Richmond.

^c Included Orleans.

^d Included Westchester and Putnam.

^e Included Lewis and Otsego.

3 Lincoln, *The Constitutional History of New York 182-90* (1906).

121. N.Y. Const. art. III, § 4 (1846); 2 Poore, *The Federal and State Constitutions 1354-55* (2d ed. 1878).

Analysis of the first three constitutions shows that they contained little in the way of direction to be followed in reapportioning senators. The first constitution simply directed the legislature to proportion the senators to the number of electors in each district. Whatever problems arose in connection with senatorial representation under the second and third constitutions were largely redistricting rather than reapportionment problems. For the second constitution deprived the legislature of all power to reapportion senators among the districts while the third limited this power to apportioning senators to those counties that received two or more senators. The constitution of 1846 provided no rule to be followed in apportioning these senators to the multi-member counties except the directive implied in the districting provision that "each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, and persons of color not taxed"¹²²

II. THE 1894 APPORTIONMENT FORMULA

In contrast to the simplicity of the first three constitutions, the constitution of 1894 added five new elements which govern senatorial apportionment today:

- (1) The method for obtaining the ratio was prescribed.
- (2) The method for enlarging the senate was also prescribed.
- (3) It established the rule that no county may have four or more senators unless it has a full ratio for each senator.
- (4) It established the rule that no county may have more than one-third of all senators.
- (5) It established the rule that no two adjoining counties may have more than one-half of all senators.¹²³

The first step in apportioning the senate is to find the ratio, which the constitution stipulates "shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty. . . ."¹²⁴ The census of 1950, for example, showed a total citizen population of 14,203,449. This number divided by fifty gave a ratio of 284,069. The next step is to apportion one senator for each full ratio to each county having a citizen population equal to or in excess of three full ratios, *i.e.*, to each county having at least six per cent of the state's citizen population. When this was done in 1953, twenty-seven senators were apportioned to five counties having a total citizen population of 8,131,810.¹²⁵ The final step is to subtract

122. *Ibid.*

123. N.Y. Const. art. III, § 4 (1894); 5 Revised Record of the Constitutional Convention of 1894 of the State of New York 743 (1900).

124. N.Y. Const. art. III, § 4 (1894).

125. N.Y. Leg. Doc. No. 98, pp. 7-8 (1953). Kings (9); New York (6); Queens (5); Bronx (4); and Erie (3).

the number allotted to the most populous counties from the whole number of senators to find the number of senators to be given to the remaining counties. In apportioning senators to the populous counties, however, the legislature must follow three mandatory rules that permit no legislative discretion.¹²⁶

The First Rule

The first of these rules is that "*no county shall have four or more senators unless it shall have a full ratio for each senator.*"¹²⁷ This provision is derived from the proposal introduced in the convention of 1894 by Elon R. Brown of Jefferson County: "An additional senator shall not be apportioned to any county on less than one-half the ratio; and, if any county be entitled to three senators, an additional senator shall not be apportioned to such county on less than the full ratio."¹²⁸ The Committee on Legislative Organization and Apportionment changed this clause to read:

An additional senator shall not be apportioned to any county on less than one-half the ratio, nor shall an additional senator be apportioned to any county on less than the full ratio when the average number of inhabitants, excluding aliens, in the districts in such county would not otherwise be one-tenth more than the ratio.¹²⁹

In its report, the committee dismissed the first part of this clause simply by saying: "The . . . provision that an additional senator shall not be apportioned on less than one-half the ratio is so manifestly proper that it demands no explanation."¹³⁰ The committee's report devoted more attention, however, to the second half of the clause and used an example

126. The New York Court of Appeals also laid down four mandatory and three directive rules for districting, which are beyond the scope of this article. If a mandatory rule conflicts with one that involves discretion, the discretionary rule must yield to the mandatory one. If two mandatory or two discretionary rules conflict, the choice of the rule to be followed rests with the Legislature. In re Sherrill, 188 N.Y. 185, 205, 81 N.E. 124, 130 (1907). See N.Y. Leg. Doc. No. 98, pp. 8-9 (1953); N.Y. Leg. Doc. No. 57, pp. 13-14 (1942).

127. N.Y. Const. art. III, § 4 (1894). (Emphasis added.)

128. 3 Lincoln, *The Constitutional History of New York* 216 (1906). Under the constitution of 1846, it had been the practice not to apportion an additional senator on less than one half of a ratio. An overture introduced by Edward Lauterbach, which was "pigeon-holed" in the committee, contained a similar limitation on the senatorial representation of the most populous counties. It provided for apportioning one senator for a half ratio, two senators for one and three-fourths ratios, three senators for three full ratios, and an additional senator for each additional full ratio. *Id.* at 207.

129. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 56-57 (1900).

130. 5 Revised Record of the Constitutional Convention of 1894 of the State of New York, Doc. No. 65, at 709 (1900).

to explain it: If seven senators were apportioned to Kings, there would have been a remainder of 58,264 citizens or just slightly more than one-half the ratio.¹³¹ This would mean that the average citizen population per senator in that county would have been 124,140 or only 8,323 over the ratio. If an eighth senator were apportioned to Kings, however, the average citizen population per senator in that county would have been only 108,623 or 7,194 below the ratio.¹³² In the committee's opinion, it was neither wise nor just to allow the average representative population to fall uniformly below the ratio when so many senators are apportioned to a single county. The committee argued that the inequality caused by preserving county lines would operate harshly against the less populous counties if the more populous counties were permitted to have senators on less than the ratio.¹³³

Stephen S. Blake of New York City objected to the so-called one-tenth rule and pointed out that it would prevent New York and Brooklyn from receiving an additional senator unless the fractional remainder equals one-tenth of the ratio *for each district* in the county.¹³⁴ To put it another way, the remainder required for the apportionment of an additional senator to a county would equal one-tenth of a ratio multiplied by the number of full ratios that county had. Since New York had twelve full ratios and since one-tenth of a ratio was 11,582 in 1894, New York could not have received an additional senator on a remainder of less than 138,984. This meant that New York could not have received a senator on less than the full ratio which was 115,817. At the same time, the one-tenth rule would have allowed Albany, Oneida, Monroe, Onondaga, and other such counties to have received an additional senator on a remainder of only 11,582 if the one-half rule had not raised the minimum to 57,909.¹³⁵ Blake alleged that this was "cunningly contrived" in order to "prevent New York and Kings from ever . . . obtaining a fraction of the rights of which they have been . . . robbed. . . ."¹³⁶

131. *Ibid.* The state's total citizen population according to the census of 1892 was 5,790,865. This number divided by 50 yields a ratio of 115,817. Dividing the citizen population of Kings (868,983) by the ratio (115,817) gives a quotient of 7 with a remainder of 58,264. This remainder represents only 6.7% of King's total citizen population.

132. King's citizen population of 868,983 divided by 7 equals 124,140; 124,140 less 115,817 equals 8,323. And 868,983 divided by 8 equals 108,623; 108,623 less 115,817 equals —7,194.

133. 5 Revised Record of the Constitutional Convention of 1894 of the State of New York, Doc. No. 65, at 708-10 (1900).

134. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1178 (1900). (Emphasis added.)

135. Author's computations on the basis of the 1892 census as in N.Y. Leg. Doc. No. 59, pp. 32-33 (1942).

136. 3 Revised Record of the Constitutional Convention of 1894 of the State of New

In answer to Blake and other objectors, Elihu Root argued that the system really would discriminate against the less densely populated areas. Grouping districts within a single county gives that county an enormous advantage, he argued, because these districts can combine their remainders to gain an additional senator. The remainders in the rural districts, however, can not be added together, because these remainders are not all in the same county. An upstate surplus would be of no avail, Root pointed out, unless it equalled at least a half ratio. Therefore, he argued, twelve rural districts might have surpluses totaling more than five ratios without gaining a thirteenth senator.¹³⁷ Root contended that the question of remainders is not merely a question of the absolute size of the remainder but a question of how large a proportion of the district's population that remainder represents. He pointed out that New York County's remainder of 34,000 was only two per cent (actually 2.4 per cent) of the county's population while Oneida's remainder of 8,000 (actually 1,208) and Onondaga's remainder of 27,000 (actually 26,241) represented approximately fifteen per cent (actually 10.6 per cent) of their population. Therefore, he argued, New York County has only two per cent of its population unrepresented while Oneida and Onondaga have fifteen per cent (actually 1.03 per cent and 18.5 per cent, respectively) of their population unrepresented. In Root's opinion, the only fair rule for apportioning senators on remainders would be to give the extra senators to the districts whose surpluses constitute the largest percentage of the population of the district.¹³⁸

York 1178 (1900). Also, arguing on the basis of the 1892 census, Michael J. Mulqueen, another delegate from New York City, pointed out that New York County could have a remainder of 114,000 [actually 115,816] and Brooklyn a remainder of 114,000 [actually 81,073] without receiving an additional senator. But four rural counties can each have a remainder of 57,000 [actually 57,909] or 230,000 [actually 231,636] in all and be entitled to four additional senators. "Gentlemen . . . just think of the fraud on the cities you are asked to commit —230,000 [actually 231,636] inhabitants residing in the rural districts will have four more senators, but New York and Kings may increase 228,000 [actually 196,889] in population and have no additional Senators. And this is what you have called justice to cities." 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 23 (1900). Bracketed numbers are the correct ones supplied by the author.

137. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1226-228 (1900). Similarly see 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 1251, 1254-255 (1900), where the convention, in its address to the people followed a similar line of reasoning.

138. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1229 (1900). The numbers in parenthesis are the correct ones supplied by the author. Root's rule can be illustrated by the following example: Assume that the ratio is 100,000. If county A has a population of 1,030,000, its remainder of 30,000 would represent 2.9% of that county's population. If county B has a population of 104,000, its remainder of 4,000 would represent 3.8% of B's population. Therefore, an additional senator would be apportioned to B in preference to A although A's remainder is $7\frac{1}{2}$ times as large as B's.

Apparently to meet the objections of Elihu Root, John I. Gilbert,¹³⁹ and others who thought that the large cities would have undue representation in the legislature, Tracey C. Becker, delegate from Erie and chairman of the Committee on Legislative Organization, proposed to substitute the following for the clause previously reported by the committee: "Every county having four or more senators shall have a full ratio for each senator. . . ."¹⁴⁰ This motion was carried,¹⁴¹ and the Brown plan with the Becker amendment was adopted by a vote of eighty-four to fifty-four¹⁴² and sent to the Committee on Revision. The clause was reported by the Committee on Revision and passed on the third reading by a vote of ninety-six to sixty in the form found in the constitution today: "No county shall have four or more senators unless it shall have a full ratio for each senator."¹⁴³

It will be noted that the Becker amendment made two changes: First, the provision requiring at least one-half ratio for the apportionment of an additional senator was deleted. This change was, of course, in line with Root's argument in behalf of the less densely populated districts. As a matter of history, this change has meant the apportionment of four senators on a remainder of less than a half ratio.¹⁴⁴ Second, the four-or-more rule was substituted for the one-tenth rule. While the one-tenth rule would only have prevented the possibility of senators' being apportioned on fractions to counties having more than ten ratios, the rule adopted prevented the apportionment of such senators to all counties having more than three ratios. In 1894, the Becker rule limited the senatorial representation only of New York and Kings. The census of 1905 added Erie to the list. The census of 1915 added Bronx while the census of 1925 added Queens. Thus, the rule now operates against five

139. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1074-75 (1900).

140. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 61 (1900).

141. *Id.* at 62-63.

142. *Id.* at 96.

143. N.Y. Const. art. III, § 4 (1894).

144. In its Address to the People, the convention said that the "smaller counties may receive a Senator, or an additional senator, on a major fraction of a ratio." 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 1254 (1900). In 1943, however, Westchester was apportioned three seats on 2.2 ratios. In 1953, Nassau was apportioned three seats on 2.3 ratios, Westchester three seats on 2.1 ratios, and Onondaga two seats on 1.2 ratios. Although the court of appeals confused the question, it approved the 1943 apportionment of three senators to Westchester on 2.2 ratios and two to Nassau on 1.5 ratios. *In re Fay*, 291 N.Y. 198, 218, 52 N.E.2d 97, 104 (1943). These counties did, however, have a full "second ratio" or major fraction thereof for each seat apportioned. See note 256 *infra*.

counties.¹⁴⁵ Since the census of 1960 is certain to add Nassau to the list, it has been suggested that the rule be changed from "four or more" so that it would read: "No county shall have more than four senators unless it shall have a full ratio for each senator . . ." ¹⁴⁶ This proposed change is designed to permit the apportionment of a fourth senator to a county on less than a full ratio and, thereby, "to give more adequate representation to the essentially urban counties outside of New York City."¹⁴⁷

The Second and Third Rules

The second mandatory rule is that "no county shall have more than one-third of all the senators . . ." ¹⁴⁸ The third rule provides that "no two counties or the territory thereof as now [in 1894] organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators."¹⁴⁹ These two limita-

145.

SENATE-SEAT REMAINDERS IN ALL COUNTIES HAVING THREE OR MORE FULL RATIOS

	1892	1905	1915	1925
NEW YORK CITY	92,444	153,874	182,839	373,618
Bronx	—	—	9,564	146,914
Kings	58,264	48,702	151,701	58,148
New York	34,180	105,172	21,574	103,599
Queens	—	—	—	64,957
REMAINDER OF STATE	—	14,797	23,413	57,265
Erie	—	14,797	23,413	57,265
Nassau	—	—	—	—
CONSTITUTIONAL APPORTION- MENT RATIO	115,817	141,260	161,190	193,356
	1930	1940	1950	1960
NEW YORK CITY	558,945	515,837	435,652	707,547
Bronx	177,803	1,134	241,905	68,943
Kings	161,306	175,241	38,566	244,798
New York	142,421	127,818	91,312	284,805
Queens	77,415	211,644	63,869	109,001
REMAINDER OF STATE	40,988	20,992	26,295	366,553
Erie	40,988	20,992	26,295	65,200
Nassau	—	—	—	301,353
CONSTITUTIONAL APPORTION- MENT RATIO	221,811	248,027	284,069	324,816

146. N.Y. Leg. Doc. No. 31, p. 73 (1950).

147. Id. at 56. F. Morse Hubbard, Research Counsel to the Joint Legislative Committee on Reapportionment, mentions Erie, Monroe, and Westchester as possible beneficiaries of his proposal. Ibid.

148. N.Y. Const. art. III, § 4 (1894). (Emphasis added.)

149. Ibid.

tions on New York City's representation are derived from the Becker amendment, which originally provided:

[N]o city or county shall have more than one-third of all the senators, unless the counties of New York and Kings, or the cities of New York and Brooklyn, are consolidated, in which case the city or county so formed shall have no more than one-half of all the senators.¹⁵⁰

After this proposal was adopted,¹⁵¹ Andrew H. Green, a delegate from New York City, pointed out that there was to be a vote on the consolidation of New York, Brooklyn, part of Westchester, all of Richmond, and part of Queens. He argued that the Becker amendment would be an impediment to consolidation, because, he said, these counties would have one-sixth less senatorial representation if they consolidated than they would have if they did not.¹⁵² Since New York and Kings were apportioned only nineteen senators and the area now contained in the five New York City counties were together apportioned only forty-three per cent of the fifty senators in 1894, it is difficult to see how the Becker rule would have reduced their representation. In any case, Charles Z. Lincoln, delegate from Cattaraugus County and a member of the Committee on Legislative Organization, proposed a change which, he said, was designed to avoid embarrassing New York and Brooklyn and which expressed the ideas of Andrew H. Green, Elihu Root, John I. Gilbert, and various other delegates concerning the large cities' ultimate share in senatorial representation:

No county shall have more than one-third of all the senators, and no two counties of the territory thereof as now organized, which are adjoining counties or which are separated only by public waters, shall have more than half of all the senate.¹⁵³

There has never been occasion to apply the two rules contained in the Lincoln amendment, because no county has ever been constitutionally entitled to one-third of the senators, and no two adjoining counties have ever been constitutionally entitled to one-half of the senators. It appears that this provision would not prevent apportioning a majority of senators to the six counties whose territory was largely encompassed by New York, Kings, Queens, and Richmond counties in 1894. It would, of course, prevent apportioning a majority of senators to the territory included in any two of these four counties, with Bronx included as part of New York and Nassau as a part of Queens.¹⁵⁴ Since this provision

150. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 57, 61 (1900).

151. *Id.* at 62-63.

152. *Id.* at 82-83.

153. *Id.* at 357, 369, 372-73.

154. If there should ever be occasion to apply the latter provision, the phrase "of the territory thereof as now organized" would raise some difficult questions. In 1953, the Joint

would not prevent the five counties of New York City (New York, Bronx, Kings, Queens, and Richmond) from having a majority of the senate, the 1938 convention proposed that the provision be amended to read: "Counties wholly within the boundaries of a city shall not have together more than one-half of the total number of senators."¹⁵⁵

While the second and third mandatory rules have never been applicable, the four-or-more-senator rule has limited the senatorial representation not only of New York, Kings, and Bronx counties but also of Erie and Queens. In 1894, when Erie had only 2.6 ratios, Tracey C. Becker apparently did not realize that his amendment would ever limit his own county's senatorial representation. Certainly, no one seemed to think that the provision might ever apply to Queens,¹⁵⁶ not to mention

Legislative Committee on Reapportionment said: "Present Bronx and New York Counties comprise substantially the same territory as New York County in 1894. Present Queens and Nassau Counties comprise substantially the same territory as Queens County in 1894." N.Y. Leg. Doc. No. 98, p. 8 (1953). The fact is that the present Bronx is composed of territory, more than half of which was in Westchester county in 1894. Moreover, parts of Queens were annexed to Kings in 1915 and 1925 while part of Kings was annexed to Queens in 1925. Thus, present Kings, Queens, and Nassau comprise the same territory as Kings and Queens in 1894.

155. Journal of the New York State Constitutional Convention of 1938, Doc. No. 16, p. 49 (1938); New York State Constitutional Convention of 1938, Doc. No. 18, p. 8 (1938); 4 Revised Record of the 1938 New York State Constitutional Convention 2866 (1938). In 1950, the research counsel to the Joint Legislative Committee on Reapportionment proposed an amendment providing that counties wholly within the boundaries of a city shall not together have more than one half of all senators and assemblymen. He argued that no city, regardless of how many counties it contains, should determine the policies for the rural areas which have neither political cohesion among themselves nor a voice in the councils of that city. N.Y. Leg. Doc. No. 31, pp. 53-55, 73-74 (1950). In the convention of 1915, Mr. D. Nicoll summarized the history of attempts to limit New York City's legislative representation. He noted that the 1821 convention committee on the legislature recommended basing representation on population. Samuel Young of Saratoga moved to substitute electors for population. Ogden Edwards of New York City objected because electors included not only taxpayers and those who served in the militia but also those who worked on roads. Since many rural citizens, but virtually no city citizens worked on roads, Edwards pointed out, the Young substitute would discriminate against New York City. After Edwards made an eloquent defense of the city's role in the State, the convention adopted Jacob Radcliffe's motion to base representation on population. Nicoll said that the conventions of 1846 and 1867 made no attempt to limit New York City's representation. He then outlined the 1894 convention's alleged discrimination against the city and objected to the 1915 convention's perpetuation of this discrimination. 1 Revised Record of the Constitutional Convention of 1915 of the State of New York 646-58 (1916).

156. In the argument before the court of appeals in *In re Sherrill*, 188 N.Y. 185, 81 N.E. 124 (1907), Elon R. Brown, counsel for appellants, said that the limitations on the senatorial representation of counties having more than three senators "have no application either in word or principle to Queens and Richmond as parts of Greater New York." *Id.* at 193 (points of counsel).

Nassau. All three rules were both attacked and frankly defended as though they would apply only to New York and Brooklyn.

Gilbert argued that the Brown-Becker-Lincoln amendment did not go far enough in limiting New York City's and Brooklyn's senatorial representation.¹⁵⁷ Elihu Root defended placing limitations on New York City's representation by saying that all of the city's representatives were responsible to the same political organization and represented the entire city rather than their separate districts. Since representatives from the city do not represent their locality, their artificial districts, but rather the whole city, Root argued, they are a more effective power in the legislature than an equal number of representatives from widely separated counties. Therefore, Root contended, New York City's twelve senators could not be compared with twelve other senators who represent entirely different interests and who are responsible to entirely different constituencies. If population were the only basis of representation, he feared, New York and Brooklyn would soon dominate the entire State.¹⁵⁸ Following a similar line of reasoning, the Report of the Committee on Legislative Organization said:

Inasmuch as every senator from a county, in a broad sense, represents the entire county, our proposed rule can never work any real injustice. The rule regarding county lines makes inequality as between the rural counties of the State and the city counties of the State inevitable to a certain degree, and, we think, that this inequality should not be increased as against the rural counties, and in favor of the counties of the State embracing the great cities which are incorporated entities, unified in interest, and with a small area of population.¹⁵⁹

Stephen S. Blake, delegate from New York City, agreed that the preservation of county lines caused inevitable inequalities. He saw no reason, however, why the county rule should be supported by other rules that increased these inequalities. Why, he asked, should not New York, Kings, Erie, and Monroe have more senators than the other counties if they have a larger population? Why shouldn't the other counties have less senators if they have a smaller population? He contended that the committee had devised a rule to cheat the cities of their fair and just representation and had tried to cloak this injustice with "the sophistical and dishonest plea that each senator from one of these counties represents in a broad sense—in a broad sense, mark you the word, sir—in a broad sense the county, and, therefore, the rule

157. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 374 (1900).

158. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1223-26 (1900).

159. 5 Revised Record of the Constitutional Convention of 1894 of the State of New York 710 (1900).

works no injustice."¹⁶⁰ The logical conclusion to this line of reasoning, Blake argued, was that New York County should have only one senator who could represent the whole county "in a broad sense."

Delegate Mulqueen protested that, although New York and Brooklyn then paid two-thirds of the state's taxes and might some day have eighty per cent of the population and pay three-fourths of the taxes, they must always be ruled by a legislature elected outside these cities.¹⁶¹ John M. Bowers¹⁶² and DeLancey Nicoll,¹⁶³ also delegates from New York City, and others likewise protested against these rules. Benjamin S. Dean, a member of the majority representing Allegany, Cattaraugus, and Chautauqua Counties, also protested and proposed a substitute, which provided that each senate district should be composed of "a contiguous territory [and] shall approximate, with the greatest possible degree of accuracy, the ratio . . ."¹⁶⁴ established by dividing the State's citizen population by the total number of senators. Dean's proposal specifically provided that this principle should apply not only to the multi-county districts but also to the districts in a single county entitled to more than one senator.¹⁶⁵

After defeating the Dean plan by a vote of ninety-four to fifty-three,¹⁶⁶ the convention adopted the Brown-Becker-Lincoln plan. In its "address to the people," the convention frankly met the attack on this provision:

Before another Constitutional Convention presents its work to the people, it is probable that the cities of New York and Brooklyn, or the greater city formed by their union, will contain a majority of the inhabitants of the State. If the present system continues, they will be able to elect the Governor, the State officers, a majority of the senate and a majority of the assembly. Both by the force of numbers and by the multiplied power of compact organization and cohesion among the representatives from a single county, responsible to a single local political organization, they will be able absolutely to control the government of the State. What will be the consequence of compelling the vast region extending from the city of New York to the St. Lawrence and to Lake Erie, with its varied interests, sentiments and opinions, not over well understood by the inhabitants of the city, to submit to such a domination? Would such an arrangement conduce to the permanent welfare of the State? Our opinion is that it would not; and that the provision which secures to the whole State outside of the city a bare half of one house of the legislature, leaving to the city such control as its members [numbers?] may give over the other

160. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1174-75 (1900).

161. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 20-26 (1900).

162. *Id.* at 662-64.

163. *Id.* at 650-52.

164. *Id.* at 646.

165. *Ibid.*

166. *Id.* at 667-68.

house and over the executive department, is a slender enough safeguard against so unfortunate a result.

We believe the provision to be sound in principle, that somewhere in every representative government there should be a recognition of variety of interest and extent of territory as well as of mere numbers united in interest and location.¹⁶⁷

The convention told the people that, even with these limitations, "the advantage is still greatly on the side of the city as against the country districts on account of their small territory, and the fact that all their representatives stand for the entire city."¹⁶⁸ The apportionment article, which was submitted separately, was approved by a popular vote of 404,335 to 350,625.¹⁶⁹ Thus, were adopted the three mandatory rules limiting the senatorial representation of counties having more than three ratios. While numerous proposals for abolishing these rules have been introduced, the legislature has never passed such a measure and, consequently, none has ever been submitted to popular vote.¹⁷⁰ The convention of 1915 proposed no significant change in these rules,¹⁷¹ but the convention of 1938 recommended that they be altered to further limit New York City's senatorial representation.¹⁷² Since the apportionment proposals of both conventions were rejected at the polls,¹⁷³ the three mandatory rules stand unaltered.

167. *Id.* at 1255.

168. *Ibid.*

169. This may be compared with the vote of 410,697 for and 327,402 against the revised constitution. N.Y. Leg. Manual 169 (1925). The vote of 754,960 on the apportionment amendment may be compared with the 1894 gubernatorial vote of 1,257,671, the 1892 presidential vote of 1,336,772, and the 1896 presidential vote of 1,423,876. Burnham, *Presidential Ballots 1836-1892*, at 633 (1955); Robinson, *The Presidential Vote 1896-1932*, at 275 (1947). According to the federal census of 1890, the State's male citizen population over 21 was 1,504,482. Abstract of the Eleventh Census of 1890, at 63, 83 (2d ed. 1896).

170. For the texts of such proposals introduced from 1895 to 1937, see 2 New York State Constitutional Convention Committee of 1938, *Amendments Proposed to New York Constitution 1895-1937*, at 132-36, 142, 151 (1938). Two of the proposals would have repealed only the second and third rules but one of these would have added, "Each county having a full ratio for each senator shall have the same proportion of all the senators as the amount of the expenses of the state paid by such county bears to the total expenses of the state." *Id.* at 134, 136. Another would not only have repealed the three rules but would also have added, "No county nor group of counties shall have more senators than another county or group of counties having a greater number of inhabitants, excluding aliens not taxed." *Id.* at 135. Proposals introduced in the legislature since 1937 have been of these same general types.

171. The only alteration proposed was that the phrase "as now organized" in the third rule be changed to "as organized on the first day of January, one thousand eight hundred and ninety-five." 4 Revised Record of the 1915 New York State Constitutional Convention of 1915 of the State of New York 4244 (1916).

172. See note 155 *supra*.

173. The vote in 1915 was 371,588 for the proposal and 891,337 against it; the 1938 vote was 848,367 to 1,425,344. N.Y. Leg. Manual 288, 295 (1958).

III. SIZE OF THE SENATE

After apportioning senators to the counties having more than three ratios, the next step is to determine the total number of senators. The present constitution says: "The senate shall consist of fifty members, except as hereinafter provided. . . ."¹⁷⁴ The constitution of 1777 had set the size of the senate at twenty-four but provided for an increase up to one hundred as the state's electors increased. In 1796, the senate was enlarged to forty-three members, but the convention of 1801 reduced the number to thirty-two. Although the conventions of 1821 and 1846 held the senate at thirty-two members, there was considerable sentiment in the 1846 convention to enlarge the senate allegedly to provide more adequate representation and to allow a more equitable apportionment.¹⁷⁵

In 1846, New York, Kings, Monroe, and Erie had been apportioned only seven of the thirty-two senators. By 1892, however, the representative population of these four counties had grown to the point where they had been apportioned half of the entire senate.¹⁷⁶ As senators were drawn from the rural areas to the large cities, the territorial extent of the rural districts was increased. The largest district in 1847 was the combination of Franklin and St. Lawrence Counties with 4,457 square miles while the largest district in 1892 consisted of seven counties with 8,516 square miles. Consequently, there was strong sentiment in the 1894 convention to increase the number of senators in order to be able to apportion more senators to the rural areas and thereby reduce the territorial extent of the rural districts.¹⁷⁷

The Committee on Legislative Organization reported the Brown plan, which called for a senate of fifty members. The committee defended this increase on the ground that the size of the senate had been set in 1821, when the State's population was little more than one-fifth of the population in 1892. The committee argued that the rural districts had grown so large geographically that rural senators had lost their sense of locality. The committee pointed out that the eight multi-member districts had been replaced by thirty-two single member districts in 1846 to give senators a closer tie to their constituents. The committee contended that a senate of fifty would restore to the rural areas approxi-

174. N.Y. Const. art. III, § 2 (1894).

175. 2 Lincoln, *The Constitutional History of New York* 127-28 (1905).

176. N.Y. Leg. Doc. No. 31, pp. 92-93, 100-101 (1950).

177. Overtures introduced by Commodore P. Vedder and William J. Mantayne provided for enlarging the senate above thirty-two. John Bigelow's proposal provided for a senate of thirty-five. Henry J. Cookingham's, John C. Davies' and Elon R. Brown's all provided for a senate of fifty. James S. Porter's called for sixty, Edward Lauterbach's for seventy, and Mirabeau L. Town's for 160 senators. 3 Lincoln, *The Constitutional History of New York* 207-11 (1906).

mately the same number of senators they had had in 1846, with the eighteen additional senators going to the great centers of population.¹⁷⁸

Tracey C. Becker, Nathan A. Woodward, Henry J. Cookinham, and others defended the increase on much the same grounds used by the committee.¹⁷⁹ Elihu Root argued that the area of a rural senate district had become so large that a senator could not properly represent all of the people in his district. Root contended that a senate of fifty would be small enough to permit it to be a deliberative body but would have enough senators for the districts to be sufficiently small so that a senator could really represent his constituents.¹⁸⁰ Elon R. Brown pointed out that this enlargement had permitted a reduction of the territorial extent of the rural districts so that eleven of the upstate districts were identical to eleven districts drawn in 1846.¹⁸¹ Charles S. Mereness, who identified himself as a Republican farmer, noted with satisfaction that eleven of the eighteen new senators were to be apportioned to the area above the Harlem River.¹⁸²

George H. Bush, delegate from Ulster, objected to this increase and said that one senator can intelligently represent a geographically large area since railroads, the telegraph, and newspapers make it possible to hear from every quarter of any district in a half hour. Bush proposed a senate of forty and said that a forty member senate would be evenly divided between the two major parties, that a fifty member senate would have a Republican majority while a sixty member senate would be controlled by the Democrats. "And now you know," he said, "why they take fifty in preference to any other divisor."¹⁸³ Although a Republican, Benjamin S. Dean also opposed enlarging the legislature on the ground that the increase appeared to be designed to give the Republican Party a majority.¹⁸⁴ Jacob M. Maybee objected to enlarging the legislature not only because it would increase the cost but also because it would mean smaller districts.¹⁸⁵ William Sullivan thought an increase in population simply required an increase in the ratio rather than enlargement of the legislature.¹⁸⁶ Not only did the convention reject three motions to

178. 5 Revised Record of the Constitutional Convention of 1894 of the State of New York 711 (1900). See also N.Y. Leg. Doc. No. 31, pp. 90-91, 100-101 (1950).

179. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 998-1002, 1166, 1237 (1900).

180. *Id.* at 1210-11.

181. *Id.* at 1029-31.

182. *Id.* at 1182.

183. *Id.* at 1007-08. He said the senate would be divided with twenty-eight or twenty-nine Republicans to twenty-one or twenty-two Democrats.

184. *Id.* at 1155-60.

185. *Id.* at 1162-63.

186. *Id.* at 1103.

keep the senate at thirty-two members, but it also adopted a motion allowing the senate to be enlarged to more than fifty members.¹⁸⁷

In order to prevent the more populous counties from gaining senatorial representation at the expense of the less populous counties in the future, delegates Becker¹⁸⁸ and Lincoln¹⁸⁹ submitted two proposals which the Committee on Revision combined into the clause found in the constitution today:

[T]he 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.*¹⁹⁰

Since this clause was not introduced until late in the debate, it was not discussed at any length. In fact, George H. Bush, the minority leader, was the only delegate who attempted to interpret it on the floor of the convention. Bush pointed out that New York County was given twelve senators by the proposed constitution. If New York were entitled to fifteen after the next census, he continued, these three additional senators would be apportioned to New York but would be given in addition to the fifty so that the less populous districts would not be changed. "In other words," he said, "this scheme contemplates simply that the present apportionment may always remain. . . ." He argued that the senate could never be reapportioned "but you may add on until New York may have sixteen senators. . . ."¹⁹¹

The first question raised by the constitutional provision for enlarging the senate is whether "such additional senator or senators" are to be determined by comparing the number of senators to which such county is entitled under the new apportionment with the number it had under the last apportionment or with the number given to it by the constitution in 1894. When the first reapportionment act was passed in 1906, this question was not presented since the last apportionment was the one made by the convention of 1894. When the counties entitled to three or more senators under the new apportionment were compared with the number of senators such counties had under the previous apportionment,

187. Motions by William H. Cochran, Stephen S. Blake, and Benjamin S. Dean. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 44-48, 55-56, 645-46, 667-68 (1900).

188. *Id.* at 57, 61.

189. *Id.* at 369.

190. N.Y. Const. art. III, § 4 (1894). (Emphasis added.)

191. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 648 (1900).

only Kings showed an increase.¹⁹² Therefore, Kings was given the eighth senator in addition to the fifty senators, and the whole number of senators was increased from fifty to fifty-one. As obiter dictum in *In re Sherrill*, Judge Emory A. Chase approved of the enlarged senate: "[A]nd the county of Kings was entitled to one senator more than the number specifically provided therefor by the Constitution as adopted in 1894, and under the new constitutional provision it increased the full number of senators in the state from 50 to 51."¹⁹³ After the act of 1906 was declared unconstitutional for reasons having nothing to do with the size of the senate,¹⁹⁴ the legislature passed another reapportionment act, which also provided for a senate of fifty-one members.¹⁹⁵

The census of 1915 clearly presented the question. Kings had eight senators under the act of 1907 and was still entitled to eight under the new apportionment. If the number of senators to which Kings was entitled were compared to the number Kings had under the previous apportionment, there was no increase, and the total number of senators would revert to fifty. But, if Kings' eight senators were compared to the seven given to Kings in 1894, the eighth senator was an "additional" senator, and the senate would be composed of fifty-one members. The Special Committee on Apportionment recommended a senate of fifty-one.¹⁹⁶ The committee pointed out that the constitution required Westchester and Queens each to be given two senators under the census of 1915 while they had each had only one under the apportionment of 1894. These two additional senators for Westchester and Queens had

192.

County	1894	1905	Gain
Kings	7	8	+1
New York	12	12	0
Erie	3	3	0

193. *In re Sherrill*, 188 N.Y. 185, 209, 81 N.E. 124, 132 (1907).

194. *Ibid.* The act of 1906 (N.Y. Sess. Laws 1906, ch. 431) was held unconstitutional on three grounds: (1) The thirteenth senatorial district was not "in as compact form as practicable" as required by the constitution; (2) Richmond had been unconstitutionally joined to Queens since Queens was entitled to a senator without Richmond; (3) The population difference of 109,012 between the first district's 137,175 and the second district's 246,187 was held to violate the constitutional requirement that "each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens. . . ." N.Y. Const. art. III, § 4 (1894).

195. N.Y. Sess. Laws 1907, ch. 727. This law was challenged in 1911, but the court of appeals refused to pass on its constitutionality because of the objector's laches in waiting until after four elections had been held under the act before challenging its validity. *In re Reynolds*, 144 App. Div. 458, 129 N.Y. Supp. 629 (1st Dep't), aff'd, 202 N.Y. 430, 96 N.E. 87 (1911). This act became N.Y. Consol. Laws of 1909 art. VIII, § 120. Theoretically, all subsequent senatorial reapportionments are amendments to art. VIII, § 120.

196. N.Y. Sen. Doc. No. 46, p. 24 (1916).

to be taken from the forty-eight rural counties, which had nineteen senators under the act of 1907. Therefore, the committee continued, these forty-eight counties will have only seventeen and would have only sixteen senators if the total number were reduced from fifty-one to fifty. If the 1925 apportionment should increase the senators to fifty-seven, the reduction from fifty-seven to fifty at the next apportionment would leave these forty-eight counties with only nine senators. The committee thought that such an interpretation of the clause would be contrary to the intention of the constitutional convention. In the committee's opinion, "the safeguard provided against such a contingency was permanent and not [merely] for a ten year period."¹⁹⁷

In a minority report, Robert F. Wagner and Thomas H. Cullen contended that the eighth senator in Kings had been an "additional" senator in 1906 and 1907 but ceased to be so in 1916 since Kings gained no additional senator over the number apportioned in 1906 and 1907. Wagner and Cullen thought the language of the constitution is clear: "The senate shall always be composed of fifty members . . ."¹⁹⁸ They argued that, after a census, there should be fifty senators "to be increased only when some county with three or more senators is entitled at the time of the apportionment to an additional senator or senators."¹⁹⁹ Additional to what? "In addition to the number of senators such county had under the existing apportionment."²⁰⁰ Any other interpretation, they continued, would ignore the important adverb "always." The two dissenters thought their interpretation was further supported by the constitutional provision which says that the ratio shall always be found by using fifty as the divisor. If the majority's interpretation were correct, they argued, "the divisor would have been the existing number of senators" rather than fifty.²⁰¹

The act of 1916 provided for a senate of fifty-one members.²⁰² Although the statute was declared unconstitutional on other grounds, Judge Chase said in *In re Dowling*²⁰³ that the new number of senators to which

197. *Id.* at 23-24. The hypothetical case was as follows:

	1894	1907	1916	1925	1935
14 urban counties	31	32	34	41	41
48 rural counties	19	19	16	16	9
Total	50	51	50	57	50

198. N.Y. Const. art. III, § 4 (1894).

199. N.Y. Sen. Doc. No. 51, pp. 1-2 (1916).

200. *Ibid.*

201. *Ibid.*

202. N.Y. Sess. Laws 1916, ch. 373.

203. 219 N.Y. 44, 51-56, 113 N.E. 545, 546-47 (1916).

Kings was entitled should be compared with the number of senators given to Kings by the constitution of 1894 and not with the number Kings had just before the reapportionment in 1916. After saying that this question had not been involved in the *Sherrill* case ten years earlier, he reviewed the records of the convention to show that the provision was intended to allow increased senatorial representation for the most populous counties without taking it from the rural areas. Judge Chase concluded that this purpose could not be realized unless the comparison be made with the apportionment of 1894. Whether the number apportioned in 1916 should be compared with the number apportioned in 1907 or with the number apportioned in 1894 was a question, clearly presented, fully argued in the briefs, and discussed at length in Judge Chase's opinion. Since the court disposed of the case on other grounds, however, it has been contended that Judge Chase's views on the size of the senate are mere dicta.²⁰⁴

Whether Judge Chase's views were dicta or ruling, the act of 1917 conformed to them by providing for a senate of fifty-one members.²⁰⁵ And, since no reapportionment was enacted until after the census of 1940, this statute stood until 1943.²⁰⁶ Following the census of 1935, William J. O'Shea, counsel to the Joint Legislative Committee on Reapportionment, argued that Judge Chase's statement in the *Dowling* case was mere dictum and that the number of senators to be apportioned to the most populous counties should be compared with the number they then had—which meant the number they had been given by the act of 1917.²⁰⁷ Accordingly, O'Shea recommended a senate of fifty-

204. Four issues were presented: (1) Had the legislature violated the constitution by making one district in New York County unduly larger than an adjoining district in the same county? (2) Should the senate be composed of 50 or 51 members? (3) Did any of the districts violate the rule of compactness? (4) Was the Brown formula proper for assembly apportionment? Although Judge Chase expressed his views on all four issues, seven judges unanimously held the statute to be unconstitutional solely on the basis of the first question. The headnote in the *New York Reporter* says, however, that a senate of 51 was "held" to be constitutional. 219 N.Y. 44 (1916).

205. N.Y. Sess. Laws 1917, ch. 798.

206. A reapportionment bill passed in 1926 was vetoed by Governor Alfred E. Smith. Two bills passed in 1929 and 1930 were vetoed by Governor Franklin D. Roosevelt. Another bill was introduced in 1935 but failed to pass in the Legislature. N.Y. Sen. Dec. No. 46, p. 27 (1916).

207.

County	1917	1935	Gain
Kings	8	9	+ 1
New York	9	6	—
Bronx	3	4	+ 1
Erie	3	3	—

two.²⁰⁸ While the assistant counsel, Jasper W. Cornaire, thought the new number of senators should be compared with the number given in 1894,²⁰⁹ a senate of fifty-two would have resulted from either comparison.²¹⁰

The same question arose after the census of 1940. William F. Bleakley, the new counsel to the Joint Legislative Committee on Re-apportionment, contended that the comparison was to be made with the apportionment of 1894.²¹¹ Assistant counsel O'Shea, on the other hand, again argued that the comparison should be made with the then existing apportionment of 1917.²¹²

If the size of the senate had been set merely on the basis of this issue, Bleakley's interpretation would have led to a senate of fifty-two while O'Shea's would have meant a senate of fifty-three.²¹³ In *In re Fay*,²¹⁴ Judge Pierce H. Russell held that O'Shea's method of comparison was the proper one. This supreme court ruling was reversed, however, by the court of appeals, which cited the *Dowling* case as authority and held that the apportionment of 1894 was the only constitutional basis for comparison.²¹⁵

Whether one agrees with the ruling of the court of appeals on this

208. N.Y. Leg. Doc. No. 85, pp. 13-14 (1935).

209. Cornaire actually recommended a senate of 56 but did so on other grounds. N.Y. Leg. Doc. No. 89, pp. 9-17 (1935).

210.

County	1894	1935	Gain
Kings	7	9	+ 2
New York & Bronx	12	10	—
Erie	3	3	—

211. N.Y. Leg. Doc. No. 57, pp. 8-12 (1942):

County	1894	1942	Gain
Kings	7	9	+ 2
New York & Bronx	12	11	—
Erie	3	3	—

212. N.Y. Leg. Doc. No. 59, pp. 7-25 (1942):

County	1917	1942	Gain
Kings	8	9	+ 1
New York	9	6	—
Bronx	3	5	+ 2
Erie	3	3	—

213. The act of 1943, N.Y. Sess. Laws 1943, chs. 359, 725, 733, provided for a senate of 56 but did so on other grounds.

214. 179 Misc. 1062, 1069, 43 N.Y.S.2d 787, 792 (Sup. Ct. 1943).

215. *In re Fay*, 291 N.Y. 198, 213, 52 N.E.2d 97, 101-02 (1943).

point or not, the question apparently has been settled. In 1953, the Joint Legislative Committee on Reapportionment simply cited the *Dowling* and *Fay* cases and then proceeded to determine the size of the senate by comparing the number of senators to be apportioned to the most populous counties with the number allotted to them in 1894.²¹⁶ The act of 1953 was based on this interpretation of the constitutional clause.²¹⁷

Even if the answer to this question is settled, the constitutional provision for enlarging the senate presents a second question. The constitution states: "[I]f 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. . . ."²¹⁸ Does "any county having three or more senators at the time of any apportionment" mean: (1) a county having three or more senators under the apportionment of 1894? (2) one having three or more just before the new apportionment? (3) one entitled to three or more under the new apportionment? (4) one having three or more under any valid apportionment since 1894?

Since delegate Bush used New York County to illustrate his point, his explanation of the clause in the 1894 convention throws no light on this question, because New York had twelve senators and was not likely to be entitled to less than three according to any census in the foreseeable future. In this regard Charles Z. Lincoln, co-author of the clause, commented:

The last sentence, authorizing an increase in the number of senators above fifty, is *at present* applicable only to the counties of New York, Kings, and Erie. If the senate ratio for the whole state under the enumeration of 1905, or any subsequent enumeration, should show that a county *in this class* is entitled to an additional senator, the number of senate districts in that county will be increased accordingly, and the whole number of senators will be correspondingly increased.²¹⁹

Does the phrase "in this class" refer only to New York, Kings, and Erie? Or, does the phrase "at present" imply that subsequent enumerations may add other counties to "this class"?

The enumerations of 1905 and 1915 did not raise this question since the only county entitled to an additional senator was Kings, which had had more than three senators ever since the constitution was adopted in 1894. Although this issue was really not involved, in his brief attacking

216. N.Y. Leg. Doc. No. 98, pp. 7-8 (1953).

217. N.Y. Sess. Laws 1953, ch. 893. In 1954, ch. 2 clarified and corrected the description of the 12th, 13th, and 16th districts while ch. 821 did the same for the 5th and 6th districts. See N.Y. Sess. Laws 1954, chs. 2, 821.

218. N.Y. Const. art. III, § 4 (1894).

219. 4 Lincoln, *The Constitutional History of New York* 345 (1906).

the act of 1906, Elon R. Brown seemed to say that the only counties covered by the clause were those three which had more than two senators under the apportionment of 1894: "The purpose of these provisions was . . . to prevent future apportionments from taking representatives from the smaller counties to fill up the senatorial quota of New York, Kings and Erie, with their enormous growth."²²⁰ He then added that it would be "whimsical in the extreme" to claim that this clause had any "application whatever" to Queens and Richmond.²²¹ Did Brown mean that this clause never could apply to Queens and Richmond because they did not have at least three senators under the apportionment of 1894? Or, did he merely mean that the clause did not then apply to Queens and Richmond because they did not have more than two senators either before or after the apportionment of 1906?

Ten years later in his brief defending the act of 1916, Brown seemed to say that the clause applied only to a county which had three or more senators before the new apportionment and which was entitled to an additional senator under the new apportionment:

It therefore becomes perfectly clear that the language of the exception, providing for an additional senator or senators, must and does have reference to a situation where a county having three or more senators has a full ratio of population entitling it to an additional senator in excess of the number of senators to which it was entitled under some preceding apportionment. . . .

Under the present apportionment it so happens that no county, having three or more senators, has so increased in population as to entitle it to an additional senator over and above the number fixed by the apportionment of 1907, but the County of Kings is still entitled to eight senators or one additional senator in excess of what it had under the constitutional apportionment of 1894. In other words, every county, having three or more senators, stands precisely in the same situation as respects its right of senatorial representation as it did in 1907.²²²

Although Bronx became entitled to three senators under the act of 1916, the above quotation would imply that Brown did not view Bronx as a county "having three or more senators at the time of any apportionment." It is true, of course, that Bronx had been a part of New York in 1907 and, therefore, perhaps was not a county entitled to an "additional" senator. Later in his brief, Brown seemed to say that the clause in question was limited to Kings and New York, which were the only counties having three or more full ratios in 1894: "In providing for 'additional' senators in such counties the convention must have regarded senators to be apportioned upon any future apportionment to Kings and New York as 'additional' to those provided in the Constitution itself."²²³

220. Brief for Appellant, p. 21, *In re Dowling*, 219 N.Y. 44, 113 N.E. 545 (1916).

221. *Ibid.*

222. *Ibid.*

223. *Id.* at 33.

Was Brown simply saying that the senators to which Kings was entitled in 1916 should be compared with the seven senators given to Kings in 1894 (a question before the court) or was he saying that the clause applied only to Kings and New York (a question not before the court)?

At one point in his decision in the *Dowling* case, Judge Chase seemed to say that the clause applied only to a county having at least three senators immediately before the reapportionment. He said that the senate could be enlarged above fifty "for one, and only for one purpose, and that is to prevent counties having three or more senators from obtaining a larger number of senators at the expense of the counties . . . not having three or more senators."²²⁴ Later, however, he said:

*When at the time of any apportionment the number of senators by the ratio . . . is determined all the counties then entitled to three or more senators are to have the number of senators to which they are so entitled compared with the number of senators given to such county by the Constitution of 1894, and if by the ratio any county is entitled to an additional senator or senators such additional senator or senators must be given to such county, and the number of senators in the state must be increased accordingly.*²²⁵

Whether all of Judge Chase's second statement was dictum or not may be debatable. But the italicized part was certainly dictum since the only county involved was Kings, which had more than three senators not only under the act of 1916 but also under the apportionments of 1894 and 1907.

Regardless of Judge Chase's dictum, three later legislatures interpreted the clause to apply only to counties having three or more senators before the reapportionment rather than to counties entitled to three or more senators under the new apportionment. The acts of 1926, 1929, and 1930 all provided for a senate of fifty-two, whereas Judge Chase's interpretation would have called for a senate of fifty-four.²²⁶ Although the governors vetoed the acts of 1926, 1929, and 1930,

224. In re *Dowling*, 219 N.Y. 44, 51, 113 N.E. 545, 551 (1916). (Emphasis added.)

225. Id. at 56, 113 N.E. at 549. (Emphasis added.)

226.

County	1894	1926, 1929, & 1930	Gain
New York &			
Bronx	12	10	—
Kings	7	9	+2
Erie	3	3	—
Gain in all counties having three or more senators.			+2
Queens	1	3	+2
Gain in all counties entitled to three or more according to census of 1925.			+4

they did so not because of the number of senators but because the districts allegedly were gerrymandered.²²⁷ Before the first bill was passed in 1926, Senator John Knight asked Attorney General Albert Ottinger, "Is the number of senators to be increased from fifty-one to fifty-two under the Census of 1925?" In his reply, Ottinger wrote:

By applying this ratio to the citizen population of the county of Kings. . . , it appears that that county is entitled to nine senators, which is an addition of two over the number apportioned to it by section 3 of article III of the constitution and, this being a county *now* having three or more senators, the additional two senators to which it is entitled are to be added to the fifty provided for by section 3, increasing the number in the State to fifty-two.²²⁸

Although Ottinger pointed out that Queens County had become "entitled to three senators," he did not suggest that this should enlarge the senate above fifty-two members.²²⁹ Jasper W. Cornaire apparently accepted Ottinger's opinion when he prepared the 1926 bill and introduced the 1930 bill since both provided for a senate of fifty-two members.

In 1935, however, Cornaire argued that the clause applied not only to the counties actually having at least three senators in 1935 but also to those counties entitled to three or more senators under the proposed reapportionment. Therefore, as assistant counsel to the Joint Legislative Committee on Reapportionment, Cornaire recommended a senate of more than fifty-two members.²³⁰

In his defense of a larger senate, Cornaire argued that all of Judge Chase's statement in the *Dowling* case²³¹ was a valid ruling of the court

227. Public Papers of Governor of New York State Alfred E. Smith 1926 (S. Intro. No. 1538, Pr. No. 2012) 411-12 (1929); Public Papers of Governor of New York State Franklin D. Roosevelt 1929 (S. Intro. No. 1491, Pr. No. 2004) 252-53 (1930); Public Papers of Governor of New York State Franklin D. Roosevelt 1930 (Ass. Intro. No. 1552, Pr. No. 2329) 252-53 (1931).

228. 1926 N.Y. Att'y Gen. Rep. 84-86 (1927). (Emphasis added.)

229. *Id.* at 85.

230. N.Y. Leg. Doc. No. 89, pp. 9-17 (1935).

County	1894	1935	Gain
Kings	7	9	+ 2
New York & Bronx	12	10	—
Erie	3	3	—
Gain in all counties having three or more senators in 1935.			+ 2
Queens	1	4	+ 3
Gain in all counties entitled to three or more senators according to census of 1930.			+ 5

231. 219 N.Y. 44, 113 N.E. 545 (1916).

of appeals and, therefore, was binding on the legislature.²³² The committee's counsel, William J. O'Shea, took a contrary view and argued that all of the statement was mere dictum. Even if it be conceded that Chase's views relative to comparing the new number of senators to the number apportioned in 1894 were ruling, O'Shea continued, the remainder of the statement was obiter dictum, because Kings was not a county having less than three senators either before or after the apportionment of 1916. Since O'Shea thought that the clause applied only to a county having three or more senators before reapportionment, he recommended a senate of fifty-two members. He pointed out that a larger senate would mean that more senators would be apportioned to the less populous areas and, therefore, would increase the population differential between the more populous and the less populous districts.²³³

Although no reapportionment was passed in 1935, the whole issue arose again after the census of 1940. As assistant counsel to the Joint Legislative Committee on Reapportionment, O'Shea again recommended fifty-two senators and took the same position he had taken in 1935.²³⁴ The new counsel, William F. Bleakley, adopted Cornaire's position and advised the apportionment of fifty-six senators.²³⁵ The 1943 bill provided for a senate of fifty-six. Motions to reduce the number from fifty-six to fifty-two were defeated in both houses, and the act passed in the senate by a vote of forty-four to seven and in the assembly by a vote of 113 to thirty-three.²³⁶

During the first round of litigation in the *Fay* case, Judge Russell held that a senate of fifty-six was unconstitutional because, among other reasons, the provision for enlarging the senate applies only to counties having at least three senators *before* the reapportionment.²³⁷ A unanimous court of appeals, however, held the act to be constitutional and ruled that the provision applied to all counties entitled to at least three senators *after* the reapportionment. Five judges agreed that the *Dowling* case was binding precedent and stated that the problems presented in the *Dowling* case were "substantially the same as those in the present case."²³⁸ The fact is, of course, that the problems were not "substantially the same," because Kings had at least three senators

232. N.Y. Leg. Doc. No. 89, pp. 9-17 (1935).

233. N.Y. Leg. Doc. No. 85, pp. 13-14 (1935).

234. N.Y. Leg. Doc. No. 59, pp. 7-25 (1942).

235. N.Y. Leg. Doc. No. 57, pp. 8-12 (1942).

236. Although there was a partisan division on the votes to reduce the number of senators, the bill was passed by bipartisan majorities in both houses. N.Y. Times, March 22, 1943, p. 34, col. 2; N.Y. Times, March 17, 1943, p. 1, col. 4.

237. In re *Fay*, 179 Misc. 1062, 1070, 43 N.Y.S.2d 787, 792 (Sup. Ct. 1943).

238. In re *Fay*, 291 N.Y. 198, 213-15, 52 N.E.2d 97, 101-03 (1943).

both before and after the apportionment of 1916 whereas Queens did not have three senators before the apportionment of 1943.

In a concurring opinion, two judges argued that Judge Chase's statement in the *Dowling* case was dictum but that the dictum had become a part of the constitution because "the Constitutional Convention of 1938 had seriously before it the question of revision of the constitutional provision of 1894 relating to reapportionment, as well as its construction in this court through the dictum in the *Dowling* case and made no change and the People ratified the act of the Convention."²³⁹ It is a fact, however, that the 1938 convention did propose changes in the constitutional provisions relating to reapportionment, and the people rejected these proposals at the polls. Moreover, the 1938 proposals deleted the provision for enlarging the senate so that this case could not possibly have arisen if the voters had ratified these proposals.²⁴⁰

If the number of senators to be apportioned to the most populous counties must be compared with the number allotted to them in 1894, another problem arises: Bronx and Nassau did not exist in 1894. The constitutional phrase "the territory thereof as now organized" relates to the rule limiting the number of senators which two adjoining counties may have. Moreover, this phrase is found in the second paragraph of section 4 whereas the provision for enlarging the senate is at the end of the third paragraph. Consequently, Judge Russell had a reasonable basis for ruling that the phrase does not apply to the clause dealing with enlargement of the senate and, therefore, that Queens and Nassau were not to be lumped together for determining the number of "additional" senators.²⁴¹ This was no academic question, because Queens alone showed an increase of only three senators while the two counties together showed an increase of four. Moreover, Nassau alone was a county neither having nor entitled to at least three senators. If Judge Russell's ruling on this point were adopted, with what could Bronx's five senators be compared? Both the legislature and the court of appeals solved the problem by reading "the territory thereof as now organized" into the third paragraph and, therefore, combining New York and Bronx on the ground that they were "a single county in 1894 and had twelve senators."²⁴² The actual fact is that Bronx is composed of forty-one

239. Judges Harlan W. Rippey and Albert Conway in an opinion written by the former. *Id.* at 219, 52 N.E.2d at 104-05. (Italics added.)

240. The 1938 convention recommended an apportionment article that set the size of the senate at 53. New York State Constitutional Convention of 1938, Doc. No. 16, at 10, 49-52 (1938). For an excellent and thoughtful criticism of the Fay decision, see N.Y. Leg. Doc. No. 31, pp. 37-43 (1950).

241. *In re Fay*, 179 Misc. 1062, 1067-068, 43 N.Y.S.2d 787, 791 (Sup. Ct. 1943).

242. N.Y. Leg. Doc. No. 57, p. 12 (1942); *In re Fay*, 291 N.Y. 198, 212, 52 N.E.2d 97, 101 (1943).

square miles, twenty-one of which were in Westchester and twenty of which were in New York in 1894.²⁴³

While the *Fay* decision may be criticized on grounds of both logic and law, Warren Moscow may be correct in saying that the court of appeals upheld the act of 1943 simply as a matter of public policy because it was the first reapportionment in twenty-seven years.²⁴⁴ Nevertheless, the legislature has accepted the *Fay* decision as establishing the proper procedure for enlarging the senate:

First, the State's total citizen population is divided by fifty to obtain the ratio for apportioning senators to each county that has at least six per cent of the State's citizen population.

Second, each such county is allotted one senator for each full ratio.

Third, the number of senators so allotted to each of these most populous counties is then compared with the number given to it in the constitution of 1894. Where a county has been divided since 1894, the number of senators allotted to the counties comprising "substantially the same territory as was contained in such original county is compared with the number of senators given such county in the constitution of 1894. . . ."²⁴⁵ The decision in the *Fay* case would seem to indicate that the legislature has some discretion in deciding what constitutes "substantially the same territory."

Fourth, any increase resulting from such comparison is then added to fifty to give the whole number of senators.²⁴⁶

Thus, in 1953, the legislature decided that the senate should be composed of fifty-eight members.²⁴⁷

243. N.Y. Sess. Laws 1895, ch. 934; N.Y. Sess. Laws 1912, ch. 548; see note 154 supra.

244. *Politics in the Empire State* 157-58 (1948).

245. N.Y. Leg. Doc. No. 98, p. 7 (1953).

246. *Ibid.*

247. *Id.* at 8.

County	1894	1953	Gain
Kings	7	9	+ 2
New York } Bronx }	12	{6} {4}	—
Queens } Nassau }	1	{5} {2}	+ 6
Erie	3	3	0
	23	29	+ 8
Remainder of state	27	29	
Total senators	50	58	+ 8

Since no reduction in the total number of senators results from a populous county's loss, the effect is not to reduce the size of the senate by the amount of the loss but to transfer these senators to the smaller counties while continuing to enlarge the senate for the growing counties. Although the senate has increased by eight, the largest counties have gained only six. In short, New York County's loss of two senators was not used to give additional senators to Kings, Queens, and Nassau. Rather, these two senators were transferred to the less populous areas while Kings, Queens, and Nassau have gained their additional senators by enlarging the senate. This will be no academic point in 1963, when it becomes apparent that New York County's loss of two senators will mean two more senators for upstate.²⁴⁸

IV. APPORTIONMENT TO COUNTIES HAVING LESS THAN THREE RATIOS

The next step in apportioning senators is to subtract the number allotted to the most populous counties from the whole number of senators in order to find the number that are to be given to the remaining counties. In 1953, for example, twenty-seven senators were apportioned to the five counties that were each entitled to three or more senators. Since the total number of senators was set at fifty-eight, there were thirty-one senators to be distributed among the other fifty-seven counties.²⁴⁹ Although the constitution says that "*the ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty,*"²⁵⁰ the actual procedure for apportioning senators *inevitably* results in apportioning senators to the less populous areas on a *second and smaller ratio*.

Since the more populous counties are required to have a full ratio for

248.

County	1894	1960 Census	Gain
Kings	7	7	—
New York } Bronx }	12	{4} {4}	—
Queens } Nassau }	1	{5} {3}	+ 7
Erie	3	3	—
	<u>23</u>	<u>26</u>	+ 7
Remainder of state	27	31	
Total senators	<u>50</u>	<u>57</u>	+ 7

249. N.Y. Leg. Doc. No. 98, pp. 9-10 (1953).

250. N.Y. Const. art. III, § 4 (1894). (Emphasis added.)

each senator, the average citizen population per senator in these counties must always exceed the ratio. In 1953, for example, the ratio was 284,069, but the average citizen population per senator in the five largest counties was 301,178. Moreover, because senators are apportioned to the large counties on the basis of a fifty-member senate while the actual senate is larger, the *de facto* ratio for apportioning senators to the other counties must necessarily be considerably smaller than the constitutional ratio.²⁵¹ In 1953, for example there were fifty-eight senators, thirty-one of whom were distributed to counties having a total citizen population of only 6,071,639. This meant that the average citizen

251.

SENATE RATIOS AND AVERAGES

Year	Counties	Citizen Population	Number of Senators	Citizen Population Per Senator
1960	Six largest counties	9,519,316	26	366,128
	All other counties	6,721,470	31	216,822 ^a
	Entire State	16,240,786	57	284,926
	Constitutional ratio	16,240,786	50	324,816 ^b
1953	Five largest counties	8,131,810	27	301,178
	All other counties	6,071,639	31	195,859 ^a
	Entire State	14,203,449	58	244,887
	Constitutional ratio	14,203,449	50	284,069 ^b
1943	Five largest counties	7,233,558	27	267,910
	All other counties	5,167,771	29	178,199 ^a
	Entire State	12,401,329	56	221,452
	Constitutional ratio	12,401,329	50	248,027 ^b
1917	Four largest counties	3,913,622	23	170,157
	All other counties	4,145,893	28	148,068 ^a
	Entire State	8,059,515	51	158,030
	Constitutional ratio	8,059,515	50	161,190 ^b
1907	Three largest counties	3,417,651	23	148,594
	All other counties	3,645,337	28	130,191 ^a
	Entire State	7,062,988	51	138,490
	Constitutional ratio	7,062,988	50	141,260 ^b
1894	Two largest counties	2,292,967	19	120,682
	All other counties	3,497,898	31	112,835 ^a
	Entire State	5,790,865	50	115,817 ^b

^a = second ratio ^b = first ratio

Above chart computed from statistics published in N.Y. Leg. Doc. No. 98, pp. 14-15 (1953); N.Y. Leg. Doc. No. 31, pp. 77-91 (1950), and data on 1960 citizen population supplied by the U.S. Bureau of Census.

population for each of these thirty-one senators was only 195,859. Thus, this second ratio was almost one-third smaller than the constitutional ratio and was more than one-third smaller than the average citizen population per senator in the five largest counties. If the senate had been composed of only fifty members, however, there would have been only twenty-three seats to distribute among these less populous counties. Therefore, the second ratio would have been 263,984—only twelve per cent smaller than the average in the five most populous counties and less than ten per cent smaller than the constitutional ratio. In other words, the larger the senate, the greater the difference between the first and second ratios.

The use of a second and smaller ratio for apportioning senators to the less populous counties has twice been approved by the court of appeals.²⁵² Indeed, a contrary holding would have made it impossible for the legislature to adhere to the full ratio rule and to the rules for enlarging the senate. In the *Sherrill* case, the court of appeals held that Richmond could not constitutionally be joined with Queens because the latter had a full ratio and was, therefore, entitled to its own senator without Richmond. Since Queens had more than a full constitutional ratio, the question of a second ratio was not actually involved. Nevertheless, Judge Chase outlined a procedure for figuring the second ratio and then seemed to say that this second ratio should be used for apportioning senators to Queens and all other counties having more than one second ratio but less than four constitutional or first ratios.²⁵³

Since the disparity between the first and second ratios has grown, some counties are now receiving additional senators on the basis of full second ratios or major fractions thereof, which do not constitute a major fraction of the constitutional ratio. In 1943, for example, the court of appeals approved apportioning three senators to Westchester on the ground that Westchester had three full second ratios although it had only 2.2 constitutional ratios.²⁵⁴ In fact, the court said that the first

252. In re Fay, 291 N.Y. 198, 52 N.E.2d 97 (1943); In re Sherrill, 188 N.Y. 185, 81 N.E. 124 (1907).

253. In re Sherrill, 188 N.Y. 185, 209, 81 N.E. 124, 132 (1907). The constitutional ratio was 141,260; the second ratio, 130,191; Queens, 179,746. Judge Chase listed six other counties which were "entitled to . . . at least one Senator." Since two of these fell below the constitutional ratio, they were not alone "entitled to at least one Senator" unless they were so entitled on the basis of the second ratio: Oneida = 131,393 and Rensselaer = 118,732. Attorney General Ottinger likewise approved the use of a second ratio for apportioning senators to all counties having less than four constitutional ratios. 1926 N.Y. Att'y Gen. Rep. 85-86 (1927).

254. In re Fay, 291 N.Y. 198, 213, 218, 52 N.E.2d 97, 101-02, 104 (1943).

ratio was to be used only for apportioning senators to counties having more than three full first ratios and that the second ratio was to be used for apportioning senators to all other counties.²⁵⁵ Consequently, in 1953, the legislature apportioned three senators to Nassau on 2.3 first ratios, three to Westchester on 2.1 first ratios, and two to Onondaga on 1.2 first ratios.²⁵⁶ Thus, counties actually are receiving an additional senator on a minor fraction of the constitutional ratio in spite of the statement of the 1894 convention's committee: "[T]hat an additional senator shall not be apportioned on less than one-half the ratio, is so manifestly proper that it demands no explanation."²⁵⁷

The 1938 convention proposed that no county alone should be allotted a senator unless it had at least two-thirds of a ratio.²⁵⁸ Adoption of such a provision presumably would not prevent the creation of a multi-county district that had less than two-thirds of a ratio. If this kind of a provision had been operative in 1953, interpreted to mean two-thirds of a first ratio, and applied to second and third senators as well as to a first senator, then the three additional senators could not have been apportioned to Nassau, Westchester, and Onondaga. This simply would have meant that these three senators would have had to be apportioned to the less populous multi-county districts. While this would be almost necessary to allow compliance with the 1938 convention's further proposal that no senate district should contain more than four counties,²⁵⁹ it would also increase the population disparity between the most and the least populous districts.²⁶⁰

Once use of a second ratio is accepted, there arises the question of whether the apportionment of three senators to a county on the basis of

255. *Id.* at 213, 52 N.E.2d at 102.

256. Nassau = 3.3 second ratios, Westchester = 3.1 second ratios, and Onondaga = 1.7 second ratios. See note 144 *supra*.

257. 5 Revised Record of the Constitutional Convention of 1894 of the State of New York, Doc. No. 65, at 709 (1900).

258. Journal of the New York State Constitutional Convention of 1938, Doc. No. 16, p. 50 (1938). The proposal also would have changed the basis of representation from citizen population to votes cast for the governor at the last election.

259. *Id.* at 49. In 1950, Hubbard urged adoption of the four-county rule. N.Y. Leg. Doc. No. 31, p. 73 (1950).

260. This would be the effect of adopting the "two-thirds" rule by itself. But, since the 1938 proposal would also have eliminated the provision for enlarging the senate, the disparity between the first and second ratios theoretically would have been reduced. The "four county" rule, the "two-thirds" rule, and other such proposals, however, may well have increased the actual disparity between the most-populous and the least populous districts even if the difference between the two ratios was reduced.

the second ratio can be used to enlarge the senate. If so, then a senate of sixty-one members could have been justified in 1953.²⁶¹

Since the legislature did not use Nassau's and Westchester's second-ratio senators as a basis for further enlarging the senate, the *Fay* case really did not involve the question of using a second ratio for enlarging the senate. Nevertheless, Judge Russell "ruled" that the apportionment of three senators to a county on the basis of the second ratio cannot be used to enlarge the senate.²⁶² The court of appeals confirmed this part of Russell's decision by "ruling" that the number of senators apportioned to counties having three or more *first* ratios should be compared with the number allotted to them in 1894. Although the court approved of using the first ratio for Queens and Nassau together in figuring the size of the senate, the court held that the second ratio should be used for the actual apportionment of senators to Nassau since Nassau had less than three first ratios.²⁶³ Thus, the court said that it was proper to use both ratios in dealing with Nassau—the first ratio to enlarge the senate by an additional seat and the second ratio to apportion an additional senator to Nassau.

In summary, the ratio obtained by dividing the State's citizen population by fifty is not "the ratio for apportioning senators." Rather, it is a ratio used for three purposes: (1) for apportioning senators to counties having three or more full ratios, (2) for enlarging the senate, and (3) for determining whether a town may be split in the formation of senate districts.²⁶⁴ "The ratio for apportioning senators" to counties having less than three constitutional ratios is one that is not even mentioned in the constitution but one that the simple laws of arithmetic required the courts to approve if the four-or-more senator rule and the provision for enlarging the senate were to be preserved.

261. See note 144 supra.

County	1894	1953	Gain
Queens & Nassau	1	8	+ 7
Kings	7	9	+ 2
New York & Bronx	12	10	—
Westchester	1	3	+ 2
Erie	3	3	0
Gain in all counties entitled to three or more senators on basis of first or second ratio.			+ 11

262. *In re Fay*, 179 Misc. 1062, 1071-72, 43 N.Y.S.2d 787, 795 (Sup. Ct. 1943).

263. *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943).

264. An amendment adopted in 1945 provides that no town, except a town having more than a full ratio, shall be divided in the formation of senate districts. See N.Y. Leg. Doc. No. 31, pp. 14 n.14, 35-37 (1950).

V. CONCLUSIONS ON THE 1894 FORMULA

Excluding the original apportionment of 1777, the New York State Senate has been reapportioned or the districts have been redrawn twenty-two times. Under the first two constitutions, the variation between the number of representative inhabitants per senator in the most under-represented district and in the most over-represented district never exceeded 38.5 per cent except in 1791. Under the third and fourth constitutions, however, this variation always exceeded forty-two per cent, and the general trend has been upward.²⁶⁵ While some of this increased variation under the third constitution may have been due to gerrymandering and to the creation of single-member districts, most of this increased variation was made inevitable by certain districting rules prescribed by the constitution.

Excluding the apportionment of 1917, the variation of 58.1 per cent in 1879 looks small compared with the variations between the most and least populous districts since 1894. Even the 1935 legislature, which sacrificed certain other *desiderata* in favor of population equality between districts, proposed an apportionment having a variation of 61.4 per cent. Although a part of these large variations is due to certain districting rules, most of this increased variation has been caused by the apportionment rules prescribed by the constitution of 1894. In 1953, for example, Bronx could be given only four senators although its citizen population equalled 4.9 ratios, because the constitution forbids the apportionment of a fifth senator on less than a full ratio. Therefore, the average senatorial district in Bronx County had to have 344,545 citizen inhabitants. The legislature simply had no discretion in creating districts in the Bronx which were forty-one per cent more populous than the statewide average of 244,887. Meanwhile, the second ratio was only 195,859. Under the rulings in the *Fay* case, the legislature may have had no discretion about the size of the second ratio.²⁶⁶ Then, when the legislature attempted to conform to the various districting rules that are also prescribed by the constitution, some of the districts would

265.		PER CENT OF VARIATION					
1st Constitution		2nd Constitution		3rd Constitution		4th Constitution	
1791	63.8	1821	9.1	1846	43.2	1894	60.6
1796	11.1	1826	10.5	1857	47.3	1906	107.2
1801	38.5	1836	8.5	1866	47.1	1907	69.7
1802	12.8	1846	17.6	1879	58.1	1917	49.9
1808	29.5			1892	42.4	1943	77.3
1815	11.5					1953	80.8

See notes 112 and 119 supra for an explanation of "per cent of variation."

266. 291 N.Y. 198, 218, 52 N.E.2d 97, 104 (1943).

inevitably be smaller than the second ratio. Thus, the thirty-ninth district had only 146,666 citizen inhabitants or forty per cent less than the statewide average. Consequently, the range of variation was almost eighty-one per cent.²⁶⁷ Or, to put it another way, the citizen population in an average Bronx district was two and one-third times as large as in the thirty-ninth district. Even if the districting rules had allowed the legislature to make the smallest district one that had 195,859 citizen-inhabitants, this district would still have been forty-three per cent less populous than the average district in the Bronx. Therefore, even if all districting rules had been deleted from the constitution, the apportionment rules alone would have required the most populous district to have at least 344,545 citizen inhabitants and the least populous district to have no more than 195,859 under the census of 1950.

There are two apportionment provisions that inevitably lead to such great discrepancies. The first and now less important is the rule requiring the most populous counties to have a full ratio for each senator.²⁶⁸ The second and more important is the court of appeal's interpretation of the provision for enlarging the senate.²⁶⁹ Not only do

Explanation	SENATE DISTRICTS UNDER CONSTITUTION OF 1894							
	1894	Citizen Population per Seat ^a						
Largest District	156,748	246,187	202,650	194,470	272,614	300,938 ^e	344,545 ^f	425,267 ^g
Smallest District	86,507	97,717	106,103	115,575	141,631	129,666	146,666	166,715
Variation ^h	70,241	148,470	96,547	78,895	130,983	171,272	197,879	258,552
Average ^h	115,817	138,489	138,489	158,030	213,280	221,452	244,887	284,926
Per cent of Variation ⁱ	60.6	107.2	69.7	49.9	61.4	77.3	80.8	90.7

^a 1894-1944 tabulated from statistics published in N.Y. Leg. Doc. No. 31, pp. 77-91 (1950). 1953-1954 tabulated from N.Y. Leg. Doc. No. 98, p. 14-15 (1953).

^b Held invalid as was the act of 1916.

^c Also act of 1916, which was held invalid.

^d Proposed but not passed.

^e Queens had a citizen population of 1,203,752 and was given four seats, making a citizen population of 300,938 per seat.

^f Bronx had a citizen population of 1,378,181 and was given four seats, making a citizen population of 344,545 per seat.

^g Difference between largest and smallest district.

^h State's total citizen population divided by the number of seats.

ⁱ The Variation divided by the Average.

^j Nassau had a citizen population of 1,275,801 and will be given three seats, making a citizen population of 425,267 per seat.

268. N.Y. Const. art. III, § 4 (1894).

269. *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943).

these two rules create large variations between the most and the least populous districts, but they also discriminate consistently against the most populous metropolitan counties and allow the least populous areas to elect a senatorial majority.²⁷⁰

Even if the rule requiring the most populous counties to have a full ratio for each senator is retained, the disparity between the senatorial representation of the most populous counties and that of the other counties could be greatly reduced simply by abolishing the provision for enlarging the senate.²⁷¹ This provision, as interpreted by the court of appeals in the *Fay* case, means that the greater the population of a metropolitan county becomes, the more over-represented the less populous counties become. This is a matter of simple arithmetic. Whenever the population of one of the most populous counties increases so that it is entitled to more senators than it had in 1894, these additional senate seats are not taken from the less populous counties although the percentage of the state's citizen population in the less populous counties may actually have decreased. Rather, the number of seats held by these less populous counties not only remains constant regardless of their loss of population, but their number of seats actually increases whenever New York, Bronx, Kings, or Erie becomes entitled to fewer seats

270. Percentage of citizen population and senators in counties having:

Apportionment	Three or more ratios		Less than three ratios	
	Population	Senators	Population	Senators
1960	58.6	45.6	41.4	54.4
1953	57.3	46.6	42.7	53.4
1943	58.3	48.2	41.7	51.8
1935	57.4	50.0	42.6	50.0
1917	48.6	45.1	51.4	54.9
1907	48.4	45.1	51.6	54.9
1894	39.6	38.0	60.4	62.0

All computations were made from statistics published in N.Y. Leg. Doc. No. 31, pp. 77-91 (1950); N.Y. Leg. Doc. No. 98, pp. 14-15 (1953); and data on 1960 citizen population supplied by the U.S. Bureau of the Census. The 1935 reapportionment was proposed but not passed.

271. See note 270 supra. Average Number of Citizen Inhabitants Per Senator:

Apportionment	Counties having three or more ratios	Remainder of State	
		In 50-member Senate	In actual Senate
1960	366,128	280,061	216,822
1953	301,178	263,984	195,859
1943	267,910	224,686	178,199
1935	244,885	196,814	181,674
1917	170,157	153,552	148,058
1907	148,595	135,012	130,191
1894	120,682	112,835	112,835

than it had in 1894.²⁷² Therefore, abolition of the provision for enlarging the senate would make the most populous counties' senatorial representation more nearly commensurate with their citizen population. If the act of 1953, for example, had created a senate of fifty rather than fifty-eight members, the five counties then having 57.3 per cent of the state's citizen population (Kings, New York, Queens, Bronx, and Erie) would have received fifty-four per cent rather than 46.6 per cent of the state's senators.²⁷³

272. In practice, this provision for enlarging the senate has operated much like the so-called "Vedder" plan. 1 Revised Record of the Constitutional Convention of 1894 of the State of New York 26 (1900). In the 1891 session of the legislature and again in the convention of 1894, Senator Commodore P. Vedder introduced a proposal to permanently preserve the senate districts established by the convention. These districts were not to be changed except for the formation of new districts within an original district whenever that district's population increased by a full ratio. If a district's population increased to three ratios, for example, the district was to be subdivided into three districts without altering its original boundaries. 3 Revised Record of the Constitutional Convention of 1894 of the State of New York 1153-154 (1900). Although Charles Z. Lincoln co-authored the provision for enlarging the senate, he roundly condemned the Vedder plan: "This plan accentuated the disparity between districts, preserving the smaller and diminishing districts without the possibility of reorganization, and refusing the additional representation to which the larger districts might have been entitled by reason of their increased population, and would have required a district to continue to be represented by only one senator until it had . . . [two full ratios of] inhabitants, while a neighboring district, with a population less than the ratio might also continue to be represented by one senator. This was a departure from the established policy of dividing the state into senate districts on the basis of population, and it applied to the senate the principle which lies at the foundation of assembly representation: namely, that each fixed locality [in assembly representation, the county, and in the senate, district] as then established should be the unit of representation, and each be entitled to one representative." 2 Lincoln, *The Constitutional History of New York* 579 (1905).

273.

Per cent of citizen population and of senators
in all counties having three or more ratios:

Apportionment	Actual number of senators	Senators		
		Population	50-member senate	Actual senate
*1960	*57	58.6	52.0	*45.6
1953	58	57.3	54.0	46.6
1943	56	58.3	54.0	48.2
*1930	*56	57.4	52.0	*46.4
*1925	*54	54.5	50.0	*46.3
1917	51	48.6	46.0	45.1
1907	51	48.4	46.0	45.1
1894	50	39.6	38.0	38.0
1892 ^a	32	42.9 ^a	—	43.8 ^a

* No reapportionment act passed. Apportioned by the author on the basis of the census in conformity with *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943). Citizen population was used in all cases.

^a Includes Richmond, which was combined with Kings, and Putnam and Westchester, which were combined with New York under the apportionment of 1892.

Thus, the obvious first step toward making the most populous counties' senatorial representation proportionate to their population would be elimination of the provision for enlarging the senate. While this could best be accomplished by constitutional amendment,²⁷⁴ perhaps the same objective might be accomplished by reinterpreting this constitutional provision. Various possible interpretations of this provision in 1953 could have yielded a senate ranging from fifty-one to sixty-one members. If the clause had been held to apply to all counties having three senators *before* the reapportionment and if the "additional" senators had been determined by comparing the number of senators to which a county was entitled with the number it then had, a senate of fifty-one members would have resulted.²⁷⁵

In 1943, the court of appeals approved an interpretation of the clause that resulted in a senate of fifty-eight in 1953.²⁷⁶ But the court approved this interpretation, in upholding the first reapportionment that had been made in twenty-seven years. Moreover, the court did not say that it would not have approved any other interpretation of the clause. Therefore, if the legislature would interpret the clause in a way to allow a senate of fifty members after the 1960 census, it is conceivable that the courts would uphold a reapportionment act based on this interpretation,²⁷⁷ and if the legislature follows this interpretation when it enacts the next reapportionment, the new senate will have fifty members,

274. See notes 173 & 240 *supra* and accompanying text. Other proposals for repealing the provision for enlargement of the senate have also been introduced in the Legislature. See notes 70, 242 & 262 *supra* and accompanying text.

275.	County	1943	1953	Gain
	Queens	4	5	+ 1
	Kings	9	9	0
	New York	6	6	0
	Bronx	5	4	—
	Westchester	3	2	—
	Erie	3	3	0
	Additional senators			+ 1

276. *In re Fay*, 291 N.Y. 198, 52 N.E.2d 97 (1943).

277.	County	1953	1960 Census	Gain
	Nassau	3	3	—
	Queens	5	5	—
	Kings	9	7	—
	New York	6	4	—
	Bronx	4	4	—
	Westchester	3	2	—
	Erie	3	3	—
	Additional senators			0

and the six most populous counties having 58.6 per cent of the state's citizen population will have fifty-two per cent of the seats in the senate. While this might be accomplished by statutory construction of the provision for enlarging the senate, a constitutional amendment would be necessary if the senate were to be made still more representative.

VI. CONSTITUTIONAL AMENDMENT

If the senate is to remain a chamber of less than two hundred members without doing violence to the principle of apportionment according to population, some senatorial districts must continue to be composed of two or more counties.²⁷⁸ If two or more counties are to be combined into one senatorial district, many of the problems relating to senatorial representation are districting rather than apportionment problems. Two extremely important apportionment problems are involved, however, in senatorial representation—problems that must be solved before the constitution's districting provisions can be intelligently rewritten: First, the present mandatory rules for senate apportionment and second, the size of the senate.

The present constitution contains three mandatory rules, which the legislature must follow in apportioning senators to the most populous counties. One rule is that "no county shall have more than one-third of all the senators." Another rule provides that "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."²⁷⁹ These two rules should be excised

278. 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. 13 *Book of the States 1960-1961*, at 55-57 (1960). Nine other states also have no real popular base because they have what amounts to fixed apportionment which, in most cases, can be altered only by constitutional amendments: The Arizona, Alaska, Arkansas, Hawaii, Illinois, and Michigan Senates; for both houses in Delaware and Mississippi; and for the lower house in Vermont. *Id.* at 54-57. A number of states have attempted to reconcile the territorial and popular bases by adopting the so-called federal principle, whereby the apportionment of one house is based largely on the area while the other has a popular base. California, Illinois, and Michigan are examples of such states. *Id.* at 54-57. In the 1915 convention, Edgar T. Brackett made a similar suggestion, i.e., that the Senate should represent counties while the Assembly should represent population. 1 *Revised Record of the Constitutional Convention of 1915 of the State of New York* 616-17 (1916). Brackett's analogy to the federal House and Senate has little merit because, unlike the states in the Union, counties are not quasi-sovereign bodies entitled to political equality in a New York union. On the contrary, they are legal creatures of the legislature.

279. N.Y. Const. art III, § 4 (1894). See also notes 149 & 150 *supra* and accompanying text. Eleven other states also place a maximum on the representation of the more populous counties or towns. 13 *Book of the States 1960-1961*, at 54-58 (1960).

from the constitution because, among other reasons, there never has been occasion to apply them, and population trends indicate that there never will be any occasion to apply them. No county ever has been entitled to one-third of all the senators, and no two counties—adjoining or otherwise—have ever been entitled to one-half of all the senators. These two rules arose from a fear that New York and Kings counties would some day contain a majority of the State's population and electorate.²⁸⁰ Not only has this fear never been realized, but the number of inhabitants and the number of voters in New York City are declining both relatively and absolutely. In short, these two rules are just so much useless verbiage.

The last mandatory rule provides that "no county shall have four or more senators unless it shall have a full ratio for each senator." Like the other two mandatory rules, this rule was designed to limit the senatorial representation of New York and Kings counties. The fact is, however, that the rule has operated not only against Bronx, New York, and Kings, but also against Queens and Erie. Moreover, at the next reapportionment, it will limit the senatorial representation of Nassau as well. This rule has been one of the two major causes for growing population differentials between senate districts. As the suburban counties grow and become entitled to three or more senators, this rule will have an increasingly important effect on the senate's representative character. Therefore, if senators are to be apportioned exactly according either to the number of people or to the number of popular votes cast, this rule will have to be excised from the constitution.

The second major cause for population differentials between senatorial districts is the present constitutional provision for enlarging the senate.²⁸¹ Therefore, if the senate is to accurately reflect either population or voters, the last fifty-seven words in the third paragraph of article III, section 4 will also have to be excised.²⁸²

280. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 1255 (1900).

281. "[E]xcept 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." N.Y. Const. art. III, § 4 (1894).

282. *Ibid.* Oklahoma is the only other state to have a similar provision: "[T]he Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment 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, § 9(a). Since the Oklahoma Senate has never been reapportioned, the State still has forty-four senators, and this provision has been neither applied nor subjected to judicial interpretation. The use of the

Plan One

If the provision for enlarging the senate and the full ratio rule are removed from the constitution, an equitable senatorial apportionment can be made. Senators could then be apportioned to all counties on the basis of the same ratio—the constitutional ratio. If these two provisions are not deleted, however, arithmetical necessity will continue to require the apportionment of senators to the less populous counties on a second and smaller ratio.

Excision of the provision for enlarging the senate does not mean that a senate of only fifty members is necessary to give the metropolitan counties senatorial representation commensurate with their population. What is required is to apportion senators to all counties on the basis of the same ratio. This might be accomplished by setting the size of the senate at fifty or sixty or any other such number, obtaining the ratio by dividing the State's *population*²⁸³ by that same number, and abolishing the provision for enlarging the senate beyond that number. One might well argue that, as long as the provision for enlarging the senate is eliminated, the senate might well be frozen at a number exceeding fifty.²⁸⁴ A larger senate would allow the most populous counties to have their proportionate share of senators without enlarging the territorial extent of the rural districts. Moreover, the State's growth of population has been accompanied by a multiplication of social and economic interests. And a larger senate would permit this increased number of varied interests and points of view to be represented.

Plan Two

A second alternative would be adoption of a constitutional provision containing a fixed ratio similar to the following: The ratio for apportion-

word "entitled" rather than "having" clarifies which counties are subject to this provision. However, it is not clear which senators are to be considered "additional senators." If this clause means in addition to those apportioned in 1907, the 1950 census would have produced a senate of fifty-four members. 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 be proper under the 1950 census. Bureau of Government Research (Univ. of Okla.), *Legislative Apportionment in Okla. 10, 12, 27-28* (1956).

283. For the italicized word "population," the words "number of votes cast for assemblymen at the last two regular elections" may be substituted. The reason for using votes rather than population as the popular base for apportionment is that non-voters do not bear a uniform relation to total population in every county.

284. For the text of such a proposal, see 2 *New York Constitutional Convention Committee* (1938), *Amendments Proposed to the New York Constitution 1895-1937*, at 136-37 (1938). Senates in other states range in size from Delaware's seventeen to Minnesota's sixty-seven. 13 *Book of the States 1960-1961*, at 37 (1960).

ing senators shall always be *three hundred thousand inhabitants*.²⁸⁵ Each county having one or more full ratios shall be apportioned one senator for each full ratio *or major fraction thereof*.²⁸⁶ The remaining counties shall be combined into senatorial districts so that each district shall contain, as nearly as may be, an equal *number of inhabitants*.²⁸⁷

Plans one and two are both premised on the assumption that county lines are to be preserved in senatorial districting and apportionment. Respecting county lines does, of course, make some inequality between districts inevitable. It is doubtless desirable, nevertheless, to place some constitutional limit on the degree of inequality that will be permitted. One possible way of limiting this inequality would be adoption of a constitutional provision similar to the one suggested by Benjamin S. Dean in the 1894 convention, to the effect that each senate district shall be composed of a compact and contiguous territory and shall approximate, with the greatest possible degree of accuracy, the ratio established by dividing the State's total *population* by the total number of senators.²⁸⁸ Such a provision probably would allow some discretion with respect to what constitutes "the greatest possible degree of accuracy."

If the apportionment agency's discretion is to be placed within more precise limits, several alternatives are available. One rather minimal but desirable limitation was contained in a proposed constitutional amendment first introduced in the assembly more than forty years ago: "No county nor group of counties shall have more senators than another county or group of counties having a greater *number of inhabitants*. . . ."²⁸⁹ A second possible limitation, based on a proposal made by the 1938 convention, is that no senate district shall contain less than two-thirds of a ratio or more than one and one-third ratios.²⁹⁰ This, however, would still allow one district to be twice as large as another. That is, it would permit a variation of sixty-seven per cent. While this

285. The italicized words may be replaced by the words "two hundred fifty thousand votes cast for Assemblymen at the last two regular elections." See note 283 supra and accompanying text.

286. For the italicized words, the following may be substituted: "and an additional senator for a surplus population (or votes) exceeding three-fifths of a ratio." The three-fifths requirement probably should be substituted if a minimum of four fifths of a ratio is to be required for the other senatorial districts. See note 294 infra.

287. See note 283 supra and accompanying text.

288. 4 Revised Record of the Constitutional Convention of 1894 of the State of New York 646 (1900); see note 283 supra.

289. 2 New York Constitutional Convention Committee of 1938, Amendments Proposed to the New York Constitution 1895-1937, at 135 (1938); see note 283 supra.

290. The actual 1938 proposal was that no county alone shall be allotted a senator unless it contains at least two-thirds of a ratio. Journal of the New York State Constitutional Convention of 1938, Doc. No. 16, at 50 (1938).

is a smaller variation than that provided in the last two apportionment acts, eighteen of New York's twenty-two senatorial reapportionments provided for a smaller variation.²⁹¹

The inequality between districts could be further restricted by adoption of a provision similar to Missouri's: "[T]he *population* of no district shall vary from the . . . [ratio] by more than one-fourth thereof."²⁹² This would still allow a total variation of fifty per cent—a larger one than provided in fifteen of New York's twenty-two senatorial reapportionments.²⁹³ A provision similar to the one recently proposed by Pennsylvania's Constitutional Revision Commission might limit the inequality between districts to forty per cent²⁹⁴—still a variation greater than that provided by nine of New York's twenty-two senatorial reapportionments.²⁹⁵ The National Municipal League's new Model State Constitution will provide that no district shall contain a *number of inhabitants* that is ten per cent greater or ten per cent less than the average *number of inhabitants* in all districts.²⁹⁶ This still means a total variation of twenty per cent. Although seven of New York's twenty-two senatorial reapportionments had an even smaller per cent of variation,²⁹⁷ adoption of the League's proposal may require modification or excision of one or more of the districting rules now prescribed in the first paragraph of article III, section 4. This is a question which cannot be answered until a thorough districting study has been made. Indeed, such a study may show that the League's proposal would be an adequate and desirable substitute for some or all of these districting rules.

Although the League's proposal would still allow one district to be twenty-two per cent larger than another,²⁹⁸ this is probably the smallest inequality that can be achieved if county lines are to be respected in drawing the boundaries of senatorial districts. Various students of the problem have suggested, however, that county lines

291. See note 265 *supra*.

292. Mo. Const. art. III, § 7. (Emphasis added.)

293. See note 265 *supra*.

294. The Pennsylvania proposal might actually allow an even greater variation: "Each county containing one or more ratios of population shall be entitled to one senator for each ratio, and to an additional senator for a surplus population exceeding three fifths of a ratio, but no county shall form a separate district unless it shall contain four fifths of a ratio, except where the adjoining counties are each entitled to one or more senators, when such county may be assigned a senator on less than four fifths and exceeding one half of a ratio." Pennsylvania Commission on Constitutional Revision Report 90-91 (1959). The four-fifths provision apparently does not apply to a multi-county district. A better provision might be: "No district shall contain less than four fifths of a ratio, except. . . ."

295. See note 265 *supra*.

296. National Municipal League, New York (Jan. 1958).

297. See note 265 *supra*.

298. That is: $110 - 90 = 20$ and $20 \div 90 = 22\%$.

should not be obstacles to the creation of equally populated senatorial districts and that it should be made constitutionally possible to attach the surplus population in one county to all or part of another county. To a limited extent, this was actually done under New York's constitution of 1846. Advocates of this alternative contend that local geographical areas, even when coextensive with civil or political divisions such as counties or towns or wards, simply are not communities today. Such local units, the argument continues, are merely locations of population, statistical abstractions, lines on a political subdivision map, an indefinite and amorphous mass of mobile individuals. While it is conceded that a few very small rural communities may retain the characteristics of a primary social community, it is contended that even these small rural units often lack well defined political sentiments. Those who assert this position conclude that making legislative districts conform to county or town or ward boundaries is largely an artificial attempt to force people into an intermittent political community and does not realistically recognize the multiplicity of individual and group interests present in the modern community.²⁹⁹ That minimal representation must continue to be given to traditional units of government, on the other hand, is conceded even by a number of people whose political interests would be advanced if representation had a wholly popular base without regard to any territorial base.³⁰⁰

Plan Three

Plan three departs from recent tradition by not requiring county or town or other traditional geographical boundaries to be followed in drawing the boundaries of senatorial districts. Adoption of plan three, however, not only would permit greater population (or voter) equality between districts but also would make it possible to replace virtually all of article III, section 4 with a simple districting provision similar to the following: The State shall be divided into fifty senatorial districts,³⁰¹ each of which shall elect one senator. Each district shall be composed of contiguous territory and shall be as compact as practicable. No district shall contain a *number of inhabitants* that is (three) per cent greater or

299. See, e.g., Hardy, "The California Reapportionment of 1951" pp. 423-25; (unpublished doctoral thesis, University of California at Los Angeles, 1955); Page, "Legislative Apportionment in Kansas" p. 32 (unpublished doctoral thesis in University of Minnesota, 1951); National Municipal League, Model State Constitution (Jan. 1953).

300. E.g., "Certainly minimal representation must continue to be given to traditional units of government. But we must get much closer to our basic ideal of one vote for each citizen with the same weight, regardless of who you are or where you live." DeSapio, The Case for Reapportionment, Harv. L. Rec. 4 (Oct. 24, 1957). DeSapio's last sentence could, of course, be used to support votes rather than people as the popular base. See note 283 supra.

301. See note 284 supra.

(three) per cent less than the average *number of inhabitants* in all districts.³⁰²

Adoption of such a provision not only would allow every section of the state to have its proportionate share of senatorial representation but would also reduce the verbiage in article III, section 4 by more than ninety per cent.

Which of these three plans will be preferred depends largely on a policy decision concerning the weight given to the popular base relative to the territorial base. Plan three does, of course, give greater weight to the popular base than do plans one and two. If plan one or plan two should be selected, then a thorough study of the proper constitutional limitations to be placed on districting would be in order. If plan three should be selected, on the other hand, a less thorough districting study would suffice.³⁰³ While plan three is in harmony with the tradition of New York's first three constitutions,³⁰⁴ it is certainly a departure from New York's present one.

Plan Four

Plan four, which is an even greater departure from the present constitution, is patterned after the Alaska, Hawaii, and Illinois plans. The Illinois constitutional amendment of 1954, for example, divides the state into three regions or types of areas for purposes of senatorial apportionment: the City of Chicago, the remainder of Cook County, and the downstate.³⁰⁵ Similarly, the constitutions of Alaska and Hawaii each divide their respective States into four major geographic regions for purposes of apportioning members of the lower house. Members are first apportioned to each of these basic regions.³⁰⁶ In Hawaii, for example, one member is assigned to each of the four regions. The remaining forty-seven members are then distributed among the four regions according to the method of equal proportions.³⁰⁷ Once this is done, the

302. See note 283 *supra*.

303. The State of New York Temporary Commission on Revision and Simplification of the Constitution concentrated its attention on apportionment but did not make a districting study. N.Y. Leg. Doc. No. 33 (1960).

304. See notes 120 & 121 *supra*.

305. Juergensmeyer and Sokolow, *The Campaign for the Illinois Reapportionment Amendment* (mimeographed, University of Illinois Institute of Government and Public Affairs) 49 (1957); Steiner and Gove, *The Legislature Redistricts Illinois* (mimeographed, University of Illinois Institute of Government and Public Affairs) 5-7 (1956).

306. Hawaii Const. art. III, § 4, in H.R. Rep. No. 32, 86th Cong., 1st Sess. 32-33 (1959); S. Rep. No. 80, 86th Cong., 1st Sess. 42-43 (1959); Alaska Legislative Council, *Legislative Districting and Apportionment in Alaska* (Staff Memo. No. 8) 4-6, 30-34 (1956).

307. For an explanation of equal proportions, the method used for apportioning seats in the United States House of Representatives among the states, see Chafec, *Reapportionment of the House of Representatives Under the 1950 Census*, 36 Cornell L.Q. 643 (1951); Schmeckebier, *The Method of Equal Proportions*, 17 Law & Contemp. Prob. 302 (1952).

members apportioned to each region are then apportioned to the various districts (or counties) in that region by the same method of equal proportions.

This plan could be adapted to the New York scene, first, by dividing the State into four groups of counties similar to the classification used by the United States Bureau of the Census.³⁰⁸ The senators might then be apportioned among the four groups according to a modern apportionment method such as major fractions or equal proportions.³⁰⁹ The third step would be to distribute the senators apportioned to the New York City suburban area to one or more subgroups of contiguous counties. At present, this would mean distributing ten senators among two subgroups. This might also be done according to the formula of major fractions.³¹⁰ This third step would involve distributing the senators apportioned to the metropolitan counties upstate among the various standard metropolitan areas in these counties. At present, this would mean the distribution of twelve senators among six standard metropolitan areas: The Albany-Schenectady-Troy, Binghamton, Buffalo, Rochester,

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308. (1) The five counties of New York City.
 (2) The New York City suburban area (Nassau, Rockland, Suffolk, and Westchester).
 (3) Ten metropolitan counties upstate (Albany, Broome, Erie, Herkimer, Monroe, Niagara, Oneida, Onondaga, Rensselaer, and Schenectady).
 (4) The forty-three remaining counties.

For an explanation of major factions, see Willcox, *Last Words on the Apportionment Problem*, 17 *Law & Contemp. Prob.* 290 (1952). See also Schmeckebier, *The Method of Equal Proportions*, 17 *Law & Contemp. Prob.* at 310 (1952).

309. U.S. Bureau of the Census, *U.S. Census of Population: 1960 vol. I, pt. A, 34-1 to 34-40* (1961). An apportionment of sixty senators on the basis of the 1960 population according to the major fractions formula, for example, would produce the following distributions:

Area	Number of Senators	Population	Number of Inhabitants per Senator
New York City	28	7,781,984	277,928
N.Y.C. suburban area	10	2,912,649	291,265
10 metropolitan counties upstate	12	3,428,211	285,684
43 remaining counties	10	2,659,460	265,946
New York State	60	16,782,304	279,705

Counties	Number of Senators	Population	Number of Inhabitants per Senator
Nassau & Suffolk	7	1,966,955	280,994
Rockland & Westchester	3	945,694	315,231
N.Y.C. suburban area	10	2,912,649	291,265

Syracuse, and Rome-Utica standard metropolitan areas.³¹¹ The fourth and final step involves dividing each multi-senator group or subgroup or area into a number of districts equal to the number of senators apportioned to that group or subgroup or area. At present, that would mean dividing New York City into twenty-eight districts, Nassau and Suffolk into seven, Rockland and Westchester into three, Albany and Rensselaer and Schenectady into two, Erie and Niagara into five, Monroe into two, and the forty-three non-metropolitan counties into ten districts. In order to prevent or at least restrict gerrymandering, certain districting rules probably should be adopted. In the absence of a thorough districting study, two may be tentatively suggested: (1) the rule of contiguity and compactness, and (2) a percentage limit on the deviation from the average.

Plan Four may be embodied in a constitutional provision similar to the following:

The senate shall always be composed of (sixty) senators, who shall be elected in single-member districts. All of the State's counties shall be divided into four groups: (1) New York City, (2) the other counties in the New York City standard metropolitan area, (3) the counties in the other standard metropolitan areas, and (4) the remaining counties, as these last three groups are defined by the United States Government at the time of the last preceding federal census. One senator shall be assigned to each group. The remaining fifty-six senators shall be apportioned among the four groups on the basis of the *number of inhabitants* in each group according to the method of major fractions.

The senators apportioned to the New York City suburban area shall then be distributed among two or more subgroups of counties according to the method of major fractions. Each subgroup shall be composed of contiguous counties. One senator shall be assigned to each of the other standard metropolitan areas. The remaining senators apportioned to these areas shall be distributed among said areas according to the method of major fractions.

311. A distribution of these senators by applying the major fractions formula to 1960 population statistics would yield the following distribution:

Counties	Number of Senators	Population	Number of Inhabitants per Senator
Albany, Rensselaer, & Schenectady	2	568,407	284,204
Broome	1	212,661	212,661
Erie & Niagara	5	1,306,957	261,391
Monroe	2	586,387	293,194
Onondaga	1	423,028	423,028
Oneida & Herkimer	1	330,771	330,771
Standard metropolitan areas upstate	12	3,428,211	285,684

New York City shall be divided into a number of senatorial districts equal to the number of senators apportioned to said city. Each subgroup of other counties in the New York City standard metropolitan area shall be divided into a number of senatorial districts equal to the number of senators to which that subgroup shall be entitled. Each of the other standard metropolitan areas shall be divided into a number of senatorial districts equal to the number of senators to which that area shall be entitled. The remaining counties shall be divided into a number of senatorial districts equal to the number of senators to which said counties shall be entitled. Each district shall be composed of a contiguous territory and shall be as compact as practicable. No district shall contain a *number of inhabitants* that is (three) per cent greater or (three) per cent less than the average *number of inhabitants* in all districts in that group, subgroup, or area as the case may be.³¹²

Although plan four must necessarily be more verbose than the other three plans discussed, it is brief compared to article III, section 4 of the present constitution. Although plan four requires greater inequality between districts than plan three would permit, this inequality is much greater than the present apportionment rules require. The great merit in plan four is that it deals realistically with the metropolitan development, which is more of a "community" than most counties are. Plan three, however, would also allow the metropolitan development to be treated as a unit. Therefore, if the choice were between these two plans, plan three should be preferred for two reasons: it permits less inequality between districts than plan four requires; and it is simpler and less verbose.

Plan Five

There is a fifth and final alternative for senatorial apportionment. This plan provides for the apportionment of one senator to each of the sixty-two counties and for the weighting of each senator's vote in the senate according to the population in his county or according to the number of popular votes cast in his county at the last two regular senatorial elections. If each senator's vote were weighted on the basis of population, the senator from the least populous county would have one vote. Every other senator's vote would be weighted by dividing the population of that senator's county by the population of the least populous county. Hamilton is now the least populous county. Therefore, Hamilton's senator would have one vote in the senate. In 1960, for example, Hamilton's population was 4,267 while Bronx had a population of 1,424,815. Since Bronx's population was 334 times that of Hamilton, Bronx's senator would be entitled to cast 334 votes in the senate.

312. See note 283 supra and accompanying text.

Similarly, a senator's vote could be weighted according to the number of popular votes cast in his county at the last two regular senatorial elections. The fewest popular votes cast in any one county in the 1958 and 1960 senatorial elections were cast in Hamilton County. While only 5,245 popular votes were cast for senator in these two elections in Hamilton, 463,805 were cast in Suffolk. Therefore, Hamilton's senator would be entitled to one vote in the senate while Suffolk's senator would be entitled to eighty-eight.³¹³ One objection to this particular weighting system is that high electoral participation by the minority party's supporters in a county simply would enhance the other party's strength in the legislature. This would, of course, encourage the minority party in any given county to boycott the senatorial election.

Therefore, a better system might well be to increase the number of senators to 124, giving one senator to each of the two major parties in each of the State's sixty-two counties and weighting each senator's vote in the senate according to the number of popular votes cast *for his party's candidate* in his county at the last two regular senatorial elections. The fewest popular votes cast for a major party's senatorial candidate in any one county in the last two senatorial elections were cast for the Democratic candidate in Hamilton County. Since 1,461 popular votes were cast for the Democratic senatorial candidate while 3,748 were cast for the Republican candidate in Hamilton in the 1958 and 1960 elections, Hamilton's Democratic senator would have one vote in the senate while Hamilton's Republican senator would have 2.6 votes. Similarly, since 1,461 popular votes were cast for the Democratic candidate in Hamilton while 195,098 were cast for the Democratic candidate and 268,707 were cast for the Republican candidate in Suffolk in the 1958 and 1960 elections, Hamilton's Democratic senator would have one vote in the senate while Suffolk's Democratic senator would have 133.5, and Suffolk's Republican senator would have 183.9 votes. While various other weighting systems have been suggested, they have not been discussed here, because not only are they a great deal more complicated, but they also require the use of a proportional or semi-proportional electoral system.³¹⁴

The merit of weighting a senator's vote in the senate according to the popular vote cast at the last two senatorial elections is that it provides what amounts to an automatic biennial reapportionment. Re-equalizations are not made once a decade on the basis of obsolete census returns but every two years on the basis of votes, many of which were

313. 463,805 divided by 5,245 equals 88. N.Y. Leg. Manual 1093, 1100 (1959). The 1960 election statistics supplied by the New York Secretary of State.

314. See Engle, *Weighting Legislators' Votes to Equalize Representation*, 12 *Western Pol. Q.* 442 (1959).

cast only two months before the senate convenes. Moreover, if a senator's vote were weighted on the basis of the votes cast only for his party's senatorial candidate in the last two elections, weighting would stimulate voter participation at senatorial election, for each voter would know that his senator's weight in the senate would depend on his casting a vote at the popular election.³¹⁵

The merit of a system of weighted votes such as the ones discussed in plan five is that the system is arithmetically simple, easy to understand, respects county lines, provides equitable representation with mathematical precision, and solves all senatorial apportionment and districting problems by making senatorial reapportionment and redistricting unnecessary. It is impossible to divide the State into districts equal in population or in the number of voters if adjustments must usually be made by adding or withdrawing entire towns or counties. Weighting automatically corrects this inequality with precision. It allows the second major party in every county, however small, to have a spokesman in the senate. Weighting would greatly reduce the natural bias against reapportionment. Since no senator would be voting to reapportion himself or a colleague or a fellow partisan out of the senate, there doubtless would be less resistance to reweighting than to reapportionment. Moreover, the formula is so simple that the function of reweighting would involve no discretion and could be vested in an officer of the senate or in an executive officer. Then, reweighting could be compelled by mandamus. This, in turn, would eliminate the need for compulsory devices designed to compel reapportionment. Similarly, a weighting system would eliminate the need for remedies for misapportionment, malapportionment, and gerrymandering. Weighting would make gerrymandering pointless and useless. Finally, weighting each senator's vote would reduce the number of periodic reapportionments from two to one—a reapportionment of assemblymen.

Defenders of a weighting system propose to weight a senator's vote only on legislative enactments—that is, only on those measures that would enact law and establish state policy and on those procedural matters that would advance bills toward enactment. They point out that a great deal of a senator's work is on committees, where much of his work involves editing, investigating, report-writing, and the like as distinguished from establishing policies. No one proposes to extend the weighting system to a senator's committee work—only to votes on controversial policy measures. Only in votes enacting policies for the State

315. This and the four following paragraphs are based largely on Engle, *Weighting Legislators' Votes to Equalize Representation*, 12 *Western Pol. Q.* 442-46 (1959). See also Hardy, "The California Reapportionment of 1951," p. 427 (unpublished doctoral thesis, University of California at Los Angeles 1955).

would weighted votes be used to register the relative number of people (or popular votes cast) in each county. This, of course, is a real weakness of plan five. The nine or ten most populous counties having more than sixty per cent of the population and electorate would have only eighteen or twenty of the 124 senators to serve on committees. This weakness could be overcome, of course, by giving two senators to each major party in each of these most populous counties and allowing each of these senators a vote equal to only one-half the weight that the senator's vote would have if he were his party's lone senator from his county.

Proponents of a weighting system argue that the system is not new, that there is ample precedent for such a plan. They point out that, at corporation meetings, each shareholder votes the number of shares he owns or for which he holds proxies. Similarly, labor union federation delegates vote the membership strength of their respective unions. In many political organizations, a similar weighting system is employed. Illinois law, for example, provides that each member of a party committee shall have one vote for each ballot cast in his district by his party's primary electors.³¹⁶ In conclusion, it has been argued: "Either the votes of legislators must be weighted . . . to equalize the representation of the people, or the people themselves are necessarily weighted. . . ."³¹⁷

Adoption of one of the five plans discussed or of a plan similar to one of them will be necessary if the senate is to actually represent either people or voters as they are or may be distributed throughout the State. Adoption of any one of the five plans would, of course, require a constitutional amendment. The senate can be made much more representative than it is today without resort to constitutional amendment, however, by statutory reinterpretation of the last fifty-seven words in the third paragraph of article III, section 4 of the present constitution.

316. Ill. Ann. Stat. ch. 46, § 7-8(d) (Smith-Hurd 1944).

317. Engle, *Weighting Legislators' Votes to Equalize Representation*, 12 *Western Pol. Q.* 442, 444 (1959).