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Philip L. Martin

THE SUPREME COURT AND STATE LEGISLATIVE REAPPORTIONMENT: THE RETREAT FROM ABSOLUTISM

PHILIP L. MARTIN*

INTRODUCTION

In 1946 the Supreme Court reaffirmed its precedent of classifying matters of representation as political questions to be answered by the elected branches of the government even though malapportionment favoring rural interests was depriving other citizens of their democratic rights.[1] Yet, it should have been apparent at the time of the *Colegrove* opinion that this issue could not be ignored forever because the last rurally dominated census was recorded in 1910.[2] That a closer scrutiny of representational systems would be needed in the future became obvious during the next decade as the character of the nation was changed dramatically by a rapid growth in urbanization while there was a substantial decline in rural population. This increasing disparity coupled with the refusal of state legislatives to obey their constitutional mandates requiring, for the purpose of achieving equity, adjustments in their apportionment after each decennial census persuaded the Supreme Court that it should again review the matter of how representation is allocated.

An imposing influence on this decision was the problems created, particularly in metropolitan areas, by legislative abnegation of responsibility. While cities shouldered a disproportionate share of the tax burden, one study has noted that "[w]hen it came to the distribution of statewide revenues in order to aid schools, highways, streets, mass transit, air pollution or welfare programs, malapportioned legislatures devised ingenious formulas that shortchanged their urban constitutents."[3] *Baker v. Carr*[4] overturned tradition in 1962 by declaring the apportionment of representation to be a justiciable question, though this ruling necessitated the formulation of

* Professor of Political Science, Virginia Polytechnic Institute and State University. B.S. Virginia Polytechnic Institute; M.A., Ph.D., University of North Carolina.

1. Colegrove v. Green, 328 U.S. 549 (1946).
2. STATISTICAL ABSTRACT OF THE UNITED STATES 4 (1965).
3. T. MITAU, DECADE OF DECISION 113 (1967).
4. 369 U.S. 186 (1962).

guidelines because there were no precedents upon which implementing decisions could be based.

The first step in this direction was taken in 1964 when the "one man, one vote" principle was enunciated for congressional districts[5] and state legislatures.[6] However, the diverse patterns of electoral schemes used by state governments could not be easily categorized for standardizing solutions, and the Supreme Court subsequently had to make a number of clarifications. As a result reapportionment requirements have ranged from flexibility to mathematical stringency, but in several recent decisions there has been a return to demanding less rigorous standards. This article will examine the latest reapportionment rulings for the purpose of ascertaining why the Supreme Court has retreated from requiring absolute equality for the state legislatures.

I. The Trend of Legislative Reapportionment: 1964-1969

When the "one person, one vote"[7] standard was defined in *Reynolds v. Sims*, it was obviously intended to mean something less than absolute equality. On this score the Court said that

> we mean that the Equal Protection Clause requires that a State make an honest and good effort to construct districts in both houses of its legislature, *as nearly of equal population as is practicable*. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. *Mathematical exactness* or precision is hardly a workable constitutional requirement.[8]

The indication that flexibility in electoral arrangements is constitutionally permissible was further reinforced by the special emphasis given to the "as nearly as practicable" clause in the Court's realistic admission that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[9]

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5. Wesberry v. Sanders, 376 U.S. 1 (1964).
6. Reynolds v. Sims, 377 U.S. 533 (1964).
7. Presumably, in deference to the equal rights movement of women, the Supreme Court has changed the *Reynolds* principle to "one person, one vote." Wells v. Edwards, 409 U.S. 1095, 1095 (1973) (dissenting opinion).
8. Reynolds v. Sims, 377 U.S. 533, 577 (1964) (emphasis added).
9. *Id.* at 578-79.

Concerning their effect on state legislative apportionment, the *Reynolds* caveats were interpreted by a leading authority as meaning that there exist several possible exceptions to mathematical stringency:

> In a left-handed sort of way the Court did speak in one section of the *Reynolds* opinion of several possibly legitimate nonpopulation considerations: "insuring some voice to political subdivisions, as subdivisions;" "according political subdivisions some independent representation in at least one body of the state legislature;" following principles of compactness and continguity in districting; achiev[ing] "some flexibility by creating multimember or floterial districts;" "effectuat[ing] . . . a rational state policy."[10]

Support for this analysis was seemingly provided in a companion case, *Lucas v. Forty-fourth Colorado General Assembly*.[11] Its decision led another commentator to conclude that "maximum population variances among the [state legislative] districts in the ratio of 1 to 1.7 are at least 'arguably' permissible."[12] This latitude could, of course, conceivably enable state legislatures to preserve the integrity of many traditional subdivisions in making judicially acceptable reapportionment; but despite the connotation of flexibility contained in the *Lucas* ruling, a closer reading of *Reynolds* discloses that only a narrow deviation from a zero population variance is constitutionally permissible. Addressing this point, the Supreme Court said:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are consitutionally permissible . . . . But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.[13]

10. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 271 (1968).

11. 377 U.S. 713 (1964).

12. Note, *The Case for District Court Management of the Reapportionment Process*, 114 U. PA. L. REV. 504, 513-14 (1966) (footnote omitted). *See* Lucas v. Forty-Fourth Colorado General Assembly, 377 U.S. 713, 727, 730 (1964).

13. Reynolds v. Sims, 377 U.S. 533, 579-80 (1964) (footnote omitted).

While theoretically designed to achieve the goal of perfect apportionment, a consistent application of the "one person, one vote" guideline has not been easy in later cases because in practice it has been difficult to balance this objective against the nonpopulation factors alluded to in *Reynolds* as considerations for attaining equitable representation.

The first test of what was intended in the *Lucas* and *Reynolds* rulings came the next year in *Fortson v. Dorsey*[14] which upheld the use of an electoral system that combined a multimember district with a residence requirement for the election of state legislators. According to this plan, Fulton County, Georgia was divided into seven districts for the purpose of determining residence for the seven state senators who were elected at-large. Since it would be possible for a district to elect more than one senator or since a district might reject its resident candidate who could still be elected by the countywide vote, the multimember provision was challenged as being in violation of the equality standard. In upholding this plan the Supreme Court considered the senators to be as much the representatives of the entire county upon whose vote their election depended as the district in which they resided. This decision, however, was not an unqualified approval of flexibility as originally thought inasmuch as "[i]t was not widely realized that plaintiff's contentions were very narrow and did not reach the crucial issue of unfair impact on political representation needs in the multimember counties, flowing from the winner-take-all aspect of the at-large election system."[15]

The accuracy of this appraisal was demonstrated in the next significant case of *Swann v. Adams*[16] in which a tougher position was taken with the warning that anything larger than "de minimis" deviations in the population among state legislative districts would have to be justified by an "acceptable state policy."[17] Although the population variance ratios in the Florida senate and house were only 1.3 to 1 and 1.4 to 1, its reapportionment was found unconstitutional, as mathematical exactness was the sole criterion used in the judicial evaluation, and the Court did not specify what factors

14. 379 U.S. 433 (1965).
15. R. DIXON, *supra* note 10, at 477.
16. 385 U.S. 440 (1967).
17. *Id.* at 440, 444.

would constitute an "acceptable state policy" for justifying "de minimis" variations. It soon became apparent though that there might not be any permissible exceptions to perfect equality for state legislative representation.

Two years later the issue confronting the Court in the cases of *Kirkpatrick v. Preisler*[18] and *Wells v. Rockefeller*[19] concerned how much divergence would be allowed from the numerical ideal in congressional apportionment. The states involved, Missouri and New York, acted on the assumption that population differences among districts are unavoidable if there is to be a

> legitimate regard for such factors as the representation of district interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of "legislative inter-play."[20]

Therefore, their electoral plans, which had maximum percentage deviations of 5.97 and 13.1 respectively, were rejected on the grounds that the " 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality."[21] According to this interpretation, "[e]qual representation for equal number of people is a principle designed to prevent debasement of voting power and diminution of access to elective representatives."[22] It was further emphasized that "[t]oleration of even small deviations detracts from these purposes."[23] In other words, the *Kirkpatrick* and *Wells* decisions assigned to arithmetic precision a priority over all other factors unless the judiciary believes variance is justifiable or unavoidable "despite a good-faith effort to achieve absolute equality."[24]

The demand for stringently applying the "one person, one vote" formula in congressional districting is the most extreme position taken by the Supreme Court for any reapportionment. Yet, not all

18. 394 U.S. 526 (1969).
19. 394 U.S. 542 (1969).
20. Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).
21. *Id.* at 529.
22. *Id.* at 531.
23. *Id.*
24. *Id.* at 530.

of the majority were at ease with a stricter requirement of the *Reynolds* mandate. On one hand Justice Fortas concurred with the *Kirkpatrick* ruling as he found fault with Missouri's procedure, but he disapproved of tightly defining the "as nearly as practicable" concept.[25] Moreover, he believed that the Court had virtually eliminated all justifications for digressing from a rigid correlation of population and ballot.[26] For example, it was pointed out that despite a genuine concern with special interest representation, the traditional argument of geographic compactness was refused because "[a] state's preference for pleasingly shaped districts can hardly justify population variances."[27]

In both cases three Justices flatly opposed the new course charted by their colleagues. First, because of their previous disagreement with the Court's abandoning of the political questions classification of representation, Justices Harlan and Stewart joined in dissent. Objecting to the straitjacket placed by the majority upon legislative discretion in reapportionment, Justice Harlan remonstrated that

> the Court now transforms a political slogan into a constitutional absolute. Straight indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history and economics, so as to achieve the magic formula: one man, one vote.[28]

Apart from its sarcasm, the gist of this rebuttal was that the majority was ignoring its own warning against partisan gerrymandering in order to achieve "voting equalitarianism" which Justices Harlan and Stewart have consistently regarded as a mythical rather than a practical goal in matters of democratic representation.[29]

A more cogent dissent which has implications for the future was registered by Justice White who for the first time disagreed with the Supreme Court's conclusions concerning reapportionment. In his opinion the "Court's new ruling is an unduly rigid and unwarranted application of the Equal Protection Clause which will unnecessarily

25. *Id.* at 536-37.
26. *Id.* at 537.
27. *Id.* at 534.
28. *Id.* at 540-41 (dissenting opinion).
29. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 579 (1964) (dissenting opinion).

involve the courts in the abrasive task of drawing district lines."[30] This responsibility would logically result from the intolerant attitude of the majority toward the reasons for establishing variance and their insistence upon almost absolute instead of substantial equality for legislative apportionment. Recognizing that census figures are often imprecise, or at least not accurate for very long due to population shifts, Justice White also predicted that gerrymandering could be more easily manipulated under the *Kirkpatrick* rule because "[i]f county and municipal boundaries are to be ignored, a computer can produce countless plans for population equality, one differing very little from another, but each having its own very different political ramifications."[31] Therefore, it was recommended that the Supreme Court should, under normal circumstances, restrict its decision-making to the formulation of broad guidelines which can be implemented by legislatures or nonpartisan commissions. Otherwise, Justice White feared, the judiciary would ultimately have to resolve such problems as "whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality."[32]

Although only congressional apportionment was regulated by the *Kirkpatrick* and *Wells* rulings, their tone certainly implied that state legislatures were similarly affected. However, Justice White's dissent gained support in subsequent cases, and this impact along with changes in the Court's membership has encouraged its retreat from mathematical stringency. Prior to the total departure from a position of expecting strict egalitarianism in every instance to one emphasizing a reasonable approximation of equality in the interest of representing more than just numbers in a governing body there had been a reconsideration of how the "one person, one vote" principle should apply to local government. In 1971 the Supreme Court in *Abate v. Mundt*[32.1] declared that the population deviations contained in local apportionment structures should not always be controlled by the standards established for national and state legislative districting because "local legislative bodies frequently have fewer representatives than do their state and national counterparts

30. Kirkpatrick v. Preisler, 394 U.S. 526, 544 (1969) (dissenting opinion).
31. *Id.* at 547 (dissenting opinion).
32. *Id.*
32.1. 403 U.S. 182 (1971).

and . . . some local legislative districts may have a much smaller population than do congressional and state legislative districts."[33] Not only was local representation placed in a separate category but there was also an endorsement of geographical differentiation and historical legitimacy as factors warranting an exception to the *Reynolds* doctrine.[34] Moreover, in a companion case, which was remanded to the lower courts for an additional review of its facts, the Court nevertheless indicated that "[i]n our view . . . experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment."[35] This reaffirmation of a conceivable flexibility was consequently interpreted by some state legislatures to mean that they would not have to practice the exactitude specified by *Kirkpatrick* and *Wells* in realigning their election districts after the decennial census was reported. Thus, a new wave of litigation began in 1972.

II. Return to Reynolds

After the *Abate* pronouncement, the first implementation of its qualifications brought before the Supreme Court involved representation in a state legislature. Beginning in 1971 the Revised Virginia Constitution requires the reapportionment of legislative election districts every ten years according to the "as nearly as practicable" population measure.[36] When the state carried out its constitutional mandate, it prepared plans for each chamber with the result that the Supreme Court's decision is in essence divided into separate parts dealing with different problems.

A. *The House of Delegates*

First, in the case of the lower house an ideal district in 1971 should have contained 46,485 persons per delegate, but the scheme designed by the legislature had a maximum variance of 16.4 percent because of an effort to preserve the integrity of traditional local government boundaries by using a combination of floterial, single and multimember districts. Recognizing the sincerity of Virginia's

33. *Id.* at 185.

34. For an analysis of the weight assigned by the Court to these points, *see* Martin, *The Constitutional Status of Local Government Reapportionment*, 6 VAL. U.L. REV. 237, 246-52 (1972).

35. Whitcomb v. Chavis, 403 U.S. 124, 159-60 (1972).

36. REV. VA. CONST. art. II, § 6.

intention, a three-judge federal court nonetheless rejected the electoral policy on the grounds that the state had not demonstrated that representation by political subdivision was necessary to the fulfillment of a governmental policy. Therefore, the consolidated court undertook the "abrasive task" forecast by Justice White[37] and substituted its own plan which to a degree adhered to the boundaries of state subdivisions while reducing the differential from the ideal district to 10 percent. This deviation was justified as falling "within [the] passable constitutional limits as 'a good-faith effort to achieve absolute equality.' "[38] In its counterargument against this decision Virginia charged the lower court with misapplying the precedents of *Kirkpatrick v. Preisler*[39] and *Wells v. Rockefeller*[40] whose purpose, it was contended, was to elucidate the holding in *Wesberry v. Sanders* that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[41] The state thus claimed that its legislative reapportionment was subject only to the principles enunciated in *Reynolds v. Sims*.[42]

Reviewing the Virginia case, the Supreme Court in *Mahan v. Howell*[42.1] agreed that the inflexible standards of *Kirkpatrick* and *Wells* were inapplicable to state legislative districting inasmuch as those rulings were intended to affect only congressional apportionment. Relying on the *Reynolds* caveats,[43] the Court also interpreted them to mean that since there are generally more state legislative than congressional seats distributed throughout a state, there could probably be, while providing adequate statewide representation, a greater use of political subdivision as election units for the state legislature than would be feasible for allocating membership in the national House of Representatives. In addition it was pointed out that *Reynolds* mentioned the possibility of giving political subdivisions per se some independent representation in at least one cham-

37. *See* note 30 *supra* and accompanying text.
38. Howell v. Mahan, 330 F. Supp. 1138, 1150 (E.D. Va. 1971).
39. 394 U.S. 526 (1969).
40. 394 U.S. 542 (1969).
41. 376 U.S. 1, 7-8 (1964).
42. *See* note 10 *supra* and accompanying text.
42.1. 410 U.S. 315 (1973).
43. *See* note 10 *supra* and accompanying text.

ber of the state legislature. This alternative was based on the following longtime practice:

> Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activities involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering . . . .[44]

Noting the extensive power vested in Virginia's General Assembly to enact special legislation concerning the organization and powers of local governments,[45] the original apportionment was upheld because "[t]he statute redistricting the House of Delegates consistently sought to avoid the fragmentation of such subdivisions, assertedly to afford them a voice in Richmond to seek such local legislation."[46]

To give empirical verification to this conclusion, several examples were included. First, Scott County with a population of 24,376 was originally placed in a district with three other demographically similar counties having a combined population of 76,346. Since this district deviated from numerical perfection by 8.3 percent, five of Scott County's census enumeration units containing 6,063 persons were transferred by the lower court to an adjacent district thereby reducing the maximum percentage variance to 1.8. The *Mahan* court regarded this quest for equality as inconsequential in comparison to the reduction of Scott County's political participation in its original district and to the practically nonexistent representation for the people transferred to the second district whose other population totaled 87,041. Not even a multimember arrangement in each situation was considered sufficient to provide much opportunity for citizens to seek local legislation relating to Scott County.

Another reference was made to the City of Virginia Beach which was initially given three delegates for its population of

44. Reynolds v. Sims, 377 U.S. 533, 580-81 (1964).
45. *See* REV. VA. CONST. art. VII, §§ 2-3.
46. 410 U.S. at 323.

172,106, and to correct areawide underrepresentation, the city was also included in a one delegate floterial district along with parts of the Cities of Chesapeake and Portsmouth. After abolishing the floterial district, the lower court had to reassign 29,136 Virginia Beach citizens to a multimember district comprising the 307,951 persons living in the City of Norfolk. As a result of constituting only 8.6 percent of the Norfolk district's population, the reallocated people convinced the Supreme Court that "such representation is no representation at all so far as local legislation is concerned" and that they have "in that respect been effectively disfranchized."[47] The desire for approximate equality was thus classified as a secondary consideration in Virginia.

To establish currency for the idea that local legislation is a rational state policy justifying an exception to strict enforcement of the "one person, one vote" formula, there was a review of previous decisions in which the issue had been whether a minimal divergence from voting equity should be allowed in order to preserve the integrity of political subdivision boundaries. This problem coincidentally had been faced in an earlier case involving Virginia whose legislative reapportionment at that time had been rejected only for exceeding a reasonable deviation from equality.[48] In a collateral case the Court gave the following definition for a permissive population-variance ratio:

> In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.[49]

47. *Id.* at 324.

48. Davis v. Mann, 377 U.S. 678 (1968).

For a discussion of this case, *see* Eisenberg, *Legislative Reapportionment and Congressional Redistricting in Virginia*, 23 WM. & MARY L. REV. 295 (1966).

49. Roman v. Sincock, 377 U.S. 695, 710 (1964).

Valparaiso University Law Review, Vol. 9, No. 1 (1974), Art. 2

Pronouncements such as the above led the Congressional Legislative Reference Service to conclude that there is no precise method of measurement for state legislative apportionment and that most likely a combination of several methods would be necessary to achieve equitable representation.[50] This philosophy was incorporated into the *Mahan* ruling which emphasized that the fourteenth amendment neither contains nor suggests a mathematical equation legitimizing a range of percentage deviations.[51]

On the basis of the preceding evidence the Supreme Court asserted that the intention to foster local legislation is a legitimate objective within the meaning of *Reynolds*,[52] and it declined to review the question of whether it is wise to empower a state legislature to enact such laws. Yet, there was no repudiation of those decisions which had declared state reapportionments unconstitutional because of excessive deviations from the *Reynolds* equation.[53] To the contrary, the *Mahan* majority reaffirmed the necessity of the "as nearly of equal population as is practicable" stipulation which by extrapolation means a review of each situation will be necessary to ascertain if a "good faith effort" has been made to provide equitable representation.[54] In the case of the Virginia House of Delegates this purpose was adjudged to have been implemented without violating voting rights.

B. The Virginia Senate

In the second part of its ruling the Supreme Court upheld the lower court's order changing the state's plan of dividing the entire jurisdiction encompassing the Cities of Norfolk and Virginia Beach into three senatorial precincts of almost equal population. The fault discerned in this alignment was that the approximately 37,000 military personnel stationed in the area including those living aboard ships "homeported" to the Norfolk Naval Station were counted in the official census tracts upon which the redistricting was based. Therefore, the special court declared the three-single member districts to be malapportioned, but lacking the kind of survey data

50. J. KILLIAN, METHODS FOR THE MEASUREMENT OF LEGISLATIVE APPORTIONMENT SYSTEMS (1965).

51. Mahan v. Howell, 410 U.S. 315, 329 (1973).

52. *See* note 13 *supra* and accompanying text.

53. Specific reference was made to the cases of Swann v. Adams, 395 U.S. 440 (1967) and Kilgarlin v. Hill, 386 U.S. 120 (1967).

54. Mahan v. Howell, 410 U.S. 315, 824-25 (1973).

needed to rearrange the election boundaries according to the actual population, the Court converted the individual units into a multi-member district for the purpose of having the state senators elected at-large.

Answering the charge that the solution of the federal court exceeded its authority, the Supreme Court emphasized that judicial remedies in matters of representation must follow the guidelines set forth in *Reynolds v. Sims*.[55] Its recommendation was that:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws. . . .[56]

These were apposite instructions for the Virginia situation inasmuch as its 1971 elections were to be held within a few months after the court order.[57] In addition the substitute scheme was affirmed as the only feasible alternative for correcting an obvious malapportionment while avoiding the Supreme Court's mandate against discrimination of the voting rights of military personnel.[58]

C. *The Dissent*

There was complete agreement on the second part of the *Mahan* decision because of the special circumstances, but the vote on the apportionment of the Virginia House of Delegates was 5 to 3[59] with Justices Brennan, Douglas and Marshall registering a strong dissent against the 16.4 percent deviation. Not only did they believe the maximum percentage variance to be at least this great but, depending upon the method of calculation used, it was asserted that the difference might be as high as 23.6 percent.[60] Regardless of what was the actual deviation, the minority still considered Virginia's policy to be as unrepresentative as those previously rejected by the Supreme Court.

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55. 377 U.S. 533 (1964).

56. *Id.* at 585.

57. As a result of litigation the state's primary elections had been postponed from June 8 until September 14, 1971.

58. Davis v. Mann, 377 U.S. 678, 691-92 (1964).

59. Justice Powell did not participate in the case because his former law firm was involved.

60. This figure was derived by computing deviations in the floterial districts.

The *Mahan* dissenters also dismissed as specious the majority's argument that local legislation could best be secured by maintaining the integrity of political subdivision boundaries in constructing election districts. In their opinion

> . . . the best that can be said of appellant's efforts to secure county representation is that the plan can be effective only with respect to some unspecified but in all likelihood small number of issues which affect a single county and which are overwhelmingly important to the voters of that county; and even then it provides effective representation only where the affected county represents a large enough percentage of the voters in the district to have a significant impact on the election of the delegate.[61]

In short, three Justices believe that absolute equality is the primary principle guiding apportionment and that there is no rational basis for upholding unequal representation which by its nature unconstitutionally dilutes the voting power of citizens. Interpreting *Swann v. Adams*,[62] it was alleged that only in cases of necessity, not rationality, would any departure from the "one person, one vote" measure be constitutionally permissible.[62.1] The tenor of the *Mahan* dissent, however, generates doubt as to whether any necessity would be judicially acceptable.

D. Conclusion

One disagreement in the *Mahan* case illustrates a difficulty the Supreme Court has created for the resolution of reapportionment problems. This point concerns the dissenter's disclaimer that the applicability of the *Reynolds* standard is categorically different for federal, state and local governments. They criticized such a classification as being a disregard of the contemporary constitutional right of voting equity. Yet, the dichotomy can be somewhat verified historically as contended by the *Mahan* majority. In 1967 Justice Douglas wrote a unanimous opinion in which he concluded that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in munici-

61. Mahan v. Howell, 410 U.S. 315, 349 (1973) (dissenting opinion).
62. 385 U.S. 440 (1967).
62.1. *Id.* at 447.

pal arrangements to meet changing urban conditions."[63] A few years later state and local apportionment was definitely distinguished from congressional apportionment[64] with local government seemingly regarded as a special category in contradistinction to state government.[65] This last delimitation, of course, has been clearly stated in a later case,[66] but it had remained uncertain whether there was a similar differentiation of the requirements for congressional and state representation. On one hand the Supreme Court did enunciate the equal population objective for congressional districting with very little, if in fact any, allowance for exceptions in the cases of *Wesberry v. Sanders*,[67] *Kirkpatrick v. Preisler*[68] and *Wells v. Rockefeller*,[69] whereas the *Reynolds* decision for state legislatures mentioned several possible exemptions from mathematical stringency[70] while at the same time it denoted only a small amount of permissible deviation from the norm of "one person, one vote."[71] As a consequence then of not having precisely defined precedents separating congressional and state reapportionment standards the *Mahan* ruling must be construed as establishing discrete categories. This fact is verified by subsequent decisions in the 1972-73 term of the Supreme Court.

III. The Aftermath of Mahan v. Howell

One of the implications of *Mahan* was that political reality justifies a departure from perfect equality, but no criteria were specified for gauging the acceptability of such a factor. A second vague possibility suggested by the Virginia case was that there might be some range within which variations from the "one person, one vote" benchmark would be permitted. Both of these variables would obviously require clarification before they could be competently evaluated in other situations. Otherwise, the lower courts and the state legislatures would have to muddle their way through a variety of

63. Sailors v. Board of Educ., 387 U.S. 112, 116-17 (1967).

64. Hadley v. Junior College District, 397 U.S. 50, 56 (1970).

65. These developments are analyzed in Martin, *The Supreme Court and Local Reapportionment: The Third Phase*, 39 Geo. Wash. L. Rev. 102, 113-15 (1970).

66. *See* notes 33 and 34 *supra* and accompanying text.

67. 376 U.S. 1 (1964).

68. 394 U.S. 526 (1969).

69. 394 U.S. 542 (1969).

70. *See* note 10 *supra* and accompanying text.

71. *See* note 13 *supra* and accompanying text.

probabilities. Since the preceding questions were involved in two cases on its docket, the Supreme Court provided answers at the end of its term. *Mahan* was thus the prelude to a more sweeping modification of the precedents for apportioning state representation.

A. Bipartisan Apportionment

The issue over political reality concerned Connecticut where the state constitution establishes a unique alternative method for achieving reapportionment in the event the legislature cannot agree on a plan by April 1 of the year following the taking of the decennial census.[72] When a decision has not been made by this date, the matter is referred to an eight man bipartisan commission consisting of two sets of four members appointed respectively by the Democratic and Republican Party leaders in the legislature.[73] If this commission is unable to complete its work by a legislatively determined deadline, the constitutional process next transfers the task to a three-member bipartisan board with one appointment being given to each of the party leaders in the lower chamber.[74] These appointees then select the third person.[75]

In 1971 initiation of the third stage was necessary to reapportion the Connecticut legislature. The result was a scheme in which a state senate district deviated from the ideal of 84,228 people by a maximum of 1.81 percent and an assembly district had a total variance of 7.83 percent from the ideal population of 20,081. In drawing up its plan the board had difficulty in reconciling two of Connecticut's constitutional provisions controlling the arrangement of local representation.[76] On one hand it is stipulated that "no town shall be divided" in the creation of a lower house election district unless it is formed "wholly within the town."[77] On the other hand there is a conflicting mandate that the "establishment of districts . . . shall be consistent with federal constitutional standards."[78] Conse-

72. CONN. CONST. art. III, § 6.
73. *Id.* at § 6(b).
74. *Id.* at § 6(c).
75. *Id.* at § 6(d).
76. In Connecticut, as in all New England states, counties are divided into constituent towns. A county serves principally as a judicial district while a town is the basic political unit assigned governmental and legislative responsibilities. *See* C. ADRIAN, STATE AND LOCAL GOVERNMENTS 206-07 (1972).
77. CONN. CONST. art. III, § 4.
78. *Id.* at § 5.

quently, the board had to cut 47 of the state's 169 towns in order to make what was regarded as an equitable redistricting. All alignments though were based on a concept of "political fairness" which was designed to achieve arithmetic equity along with a rough approximation of the proportional strength registered by the two major political parties in the preceding three statewide elections. Instead of reflecting the differences in party membership within the old districts in the new ones this improvisation attained a desired equality for the entire state by calculating the average number of Democratic and Republican legislative seats during the base period for the purpose of constructing electoral units which would produce essentially under similar conditions and circumstances the same ratio of success between the two major political parties in forthcoming elections.

Unimpressed by this measure a federal district court rejected the board's reapportionment on the grounds that "partisan political structuring" is not "a legitimate reason for violating the requirement of numerical equality of population in districting."[79] Relying on its reasoning in *Mahan*[80] coupled with the same references to the flexibility endorsed by *Reynolds*,[81] the Supreme Court in *Gaffney v. Cummings*[81.1] disagreed with the lower court's conclusion that the deviation of Connecticut's plan from the "one person, one vote" principle was excessive. Rather it was contended that the nature of representation encompasses whatever political preferences are expressed in the voting booth, in the legislative process and in public office. Writing for the majority, Justice White noted that these considerations which affect the everyday operation of government could be obfuscated by an addiction to the politically insensitive method of counting noses in election districts.[82] Furthermore, the *Gaffney* majority stressed that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at-large, in which the winning party would take 100% of the legislative seats."[83] In its opinion political considerations cannot be isolated from districting and reapportionment be-

79. Cummings v. Meskill, 341 F. Supp. 139 (1972).
80. *See* notes 43-54 *supra* and accompanying text.
81. *See* notes 8 and 9 *supra* and accompanying text.
81.1. 412 U.S. 735 (1973).
82. *Id.* at 749.
83. *Id.* at 753.

cause "[d]istrict lines are rarely neutral phenomena."[84] A strict reliance on census data, it was asserted, could unquestionably achieve population equality but only at the expense of political impact and at the risk of producing "whether intended or not, the most grossly gerrymandered results. . . ."[85] In any event the Supreme Court realistically doubted that those responsible for allocating representation always worked impartially with census data, and it, therefore, reaffirmed the judicial power of reviewing apportionment schemes for the purpose of rectifying constitutional violations.[86]

At the same time the *Gaffney* ruling sanctioned politics as a significant criterion to be weighed in the redrawing of electoral boundaries it declared the legislature to be more competent for making such decisions than the judiciary because the political process involves bargaining between partisan parties, devising compromises among pressure groups, protecting minority interests, reconciling diverse viewpoints and looking after the general welfare of the public whereas courts are primarily responsible for correcting wrongs, preventing abuses of private rights and settling disputes through judgments and orders. No matter how they might try, the Supreme Court frankly questioned the ability of courts, including itself, to understand much less take into account the nuances of politics in most situations requiring reapportionment. Therefore, it was ruled for Connecticut and for other cases in general that the "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."[87]

A salient point in the *Gaffney* decision was its unequivocal differentiation of national from state legislative districting. The Court clearly stated that this issue had been settled in the *Mahan* case[88] and that in the future apportionment should be evaluated in pursuance of the equal protection test enunciated in *Reynolds v. Sims*.[89] Yet, much was left to speculation because aside from reiter-

84. *Id.*
85. *Id.*
86. *See* note 54 *supra* and accompanying text.
87. Gaffney v. Cummings, 412 U.S. 735, 754 (1973).
88. *See* notes 63-71 *supra* and accompanying text.
89. *See* note 13 *supra* and accompanying text.

ating the *Mahan* exception of "maintaining the integrity of political subdivision lines,"[90] there was no other indication of what else might constitute a rational state policy justifying variance from the equal-population standard. Likewise, there was not any consideration in *Gaffney* of whether deviations would only be constitutionally permissible within some predetermined limit, but an answer to this last question was rendered in a concomitant decision.

B. *One Person, Nine Tenths of a Vote*

Coincidentally, the companion to *Gaffney* involves very similar procedures in that the Texas Constitution instructs the state legislature to reapportion itself at its first session following the decennial census.[91] This requirement was completed in 1970 for the state House of Representatives, but the legislature could not reach agreement on a redistricting plan for the Senate. Therefore, in accordance with constitutional provisions a Legislative Redistricting Board[92] was assembled to realign the Senate, and after the House scheme was rejected by the Texas Supreme Court,[93] the Board was ordered to remap the lower chamber.[94]

As soon as both reapportionments were officially reported they were challenged in a three-judge federal court in the case of *Graves v. Barnes*.[94.1] Although the Board's rearrangement of the Texas Senate was upheld, the new proposal for the House was declared unconstitutional for two reasons: first, it contained excessive population disparity;[95] and second, the multimember districts established for Bexar and Dallas Counties diluted the voting power of ethnic and racial minorities.[96] When it reviewed this decision, the Supreme

90. *See* notes 44-52 *supra* and accompanying text.

91. TEX. CONST. art. III, § 28.

92. The Board consists of five members designated by the Texas Constitution. They are: the Lieutenant Governor, the Speaker of the state House of Representatives, the Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office. The Board must be convened within ninety days after the final adjournment of the regular legislative session, and it has sixty days to complete its work. *Id.*

93. Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971).

94. Mauzy v. Legislative Redistricting Board, 471 S.W.2d 570 (Tex. 1971).

94.1. 343 F. Supp. 704 (W.D. Tex. 1972).

95. The Board's recommendation provided for the 150 representatives to be elected from 79 single and 11 multimember districts. The total variation from the mathematically ideal population of 74,645 was 9.9 percent.

96. 343 F. Supp. at 727, 730.

Court agreed that the upper chamber was properly apportioned and that the multimember districts violated the equal protection clause of the fourteenth amendment,[97] but it could not sustain the rejection of a representational plan on simple mathematical grounds. Concerning what constitutes impermissible deviation from the *Reynolds* formula, the district court had interpreted the *Kirkpatrick* modification[98] to mean that the "critical issue" in analyzing such problems is whether "the State [has] justified any and all variances, however small, on a basis of a consistent rational State policy."[99] In the court's opinion, Texas, in deviating from the ideal, was not implementing any state policy other than apportioning the lower house of its legislature. This was considered to be strictly a state constitutional duty which does not justify inequities in drawing election boundaries. In addition the special court criticized the actions and decisions of the Legislative Reapportionment Board, implying that it had created divergences for political motives, and the *Graves* decision doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence."[100]

Referring to the distinction elucidated in both *Mahan*[101] and *Gaffney*,[102] the Supreme Court reaffirmed the *Kirkpatrick* principle as an inappropriate standard for state legislatures.[103] There was also a reassertion that congressional and state reapportionment had never previously have placed in the same category. Excusing the lower court for not having the latest clarification before it while hearing the Texas controversy, the *White* majority explained the significance of the aforementioned classification by declaring that for the same reasons outlined in *Gaffney v. Cummings*[104] "we do not

97. It was cautioned that this ruling does not impair the viability of multimember districts because their use in the Texas case was found to be for the purpose of invidiously discriminating against the voting strength of certain groups of citizens instead of achieving equitable representation. When such disqualifications are not present, the Supreme Court reaffirmed that under its precedents "multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State." White v. Regester, 412 U.S. 755, 765 (1973).

98. *See* notes 21-23 *supra* and accompanying text.

99. Graves v. Barnes, 343 F. Supp. 704, 713 (W.D. Tex. 1972).

100. *Id.* at 717.

101. *See* notes 63-71 *supra* and accompanying text.

102. *See* note 88 *supra* and accompanying text.

103. White v. Regester, 412 U.S. 755 (1973).

104. *See* notes 82-86 *supra* and accompanying text.

consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation."[105] Since the Texas plan was ostensibly designed to achieve the same objective of "political fairness" approved for Connecticut, it was concluded that the maximum percentage variance of 9.9 was not a violation of the "one person, one vote" doctrine. However, the warning was issued that larger differences between districts would require under the *Reynolds* mandate a stronger justification in the form of being essential and necessary to the effectuation of a rational state policy. The implication then was that unless an invidious discrimination was being perpetrated the Supreme Court will not question the basis for a population deviation up to 10 percent.

C. *The Shortsightedness of Politics*

It was this last point that three members of the Court particularly took to task. In their opinion an arbitrary line has been drawn at 10 percent with the result that any deviations below this mark do not require any justification, whereas the judiciary will have to be convinced of the need for excessive variation. The dissenters deplored this development inasmuch as they believed "it is important to understand that the demand for precise mathematical equality rests neither on a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process."[106] Regardless of what state might be involved, it was charged that the "paramount concern" in redistricting is "the right to an equal vote."[107] Speaking for the minority, Justice Brennan complained that the Connecticut and Texas decisions had jeopardized the positive gains made for this constitutional guarantee since jurisdiction over questions of representation was accepted in *Baker v. Carr*.[108]

IV. Conclusion

On the same day the preceding rulings for state apportionment

105. White v. Regester, 412 U.S. 755, 764 (1973).
106. *Id.* at 780-81 (dissenting opinion).
107. *Id.*
108. 369 U.S. 186 (1962).

were reported in *Gaffney v. Cummings*[109] and *White v. Regester*[110] it was also announced in *White v. Weiser*[111] that congressional districting is still controlled by a strict demand for arithmetic exactness thereby clearly delimiting the extent of the Supreme Court's retreat from absolute equality. Although this case was somewhat complicated by a reversal of the lower court's management of judicial process, it firmly stated that while the percentage deviations contained in Texas' congressional plan were smaller than those invalidated in *Kirkpatrick v. Preisler* and *Wells v. Rockefeller*,[112] they were not found to be unavoidable and consequently the districts were not as equal in population as the Court thought was possible under the prevailing circumstances of reapportionment in Texas.

Distinguishing state from congressional requirements, the *Mahan* justification for a differential caused by an effort to avoid fragmentation of local governments[113] was adjudged inappliable for congressional districting. This difference was based on the conclusion that "at some point or level in size, population variances *do* import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation."[114] Since congressional districts have greater populations than those established for state legislators, it was pointed out how each percentage point of deviation could in most instances include as many as 5,000 people who are underrepresented in their national House of Representatives. In addition special consideration for preserving the integrity of political subdivision boundaries was regarded as being less important for Congress whose "districts are not so intertwined and freighted with local interests as are state legislative districts. . . ."[115] Thus, the case of *White v. Weiser* removes all doubt regarding the constitutional status of state legislative apportionment.

By giving a more comprehensive and precise definition to a great deal of what is intended, the Supreme Court in 1973 has also

109. 412 U.S. 735 (1973).
110. 412 U.S. 755 (1973).
111. 412 U.S. 783 (1973).
112. *See* notes 18-27 *supra* and accompanying text.
113. *See* note 46 *supra* and accompanying text.
114. White v. Weiser, 412 U.S. 783, 792-93 (1973).
115. *Id.* at 793.
116. *See* note 17 *supra* and accompanying text.

eliminated the uncertainty created by *Swann v. Adams*[116] and the subsequent congressional redistricting decisions of 1969.[117] Moreover, the recognition of political variables has injected realism into the quest for more equal legislative representation, but this approach will require the resolution of another fundamental issue. Sooner or later, the Court will have to come to grips with the proposition of partisan gerrymandering which is too much an integral part of the total reapportionment problem to be forever ignored. Reserved in an earlier ruling,[118] this question was more definitely presented in the *Wells* case, but at that time the Justices preferred to sidestep the challenge by letting its decision rest upon a clarification of the "as nearly as practicable" standard.[119] Nevertheless, the crux of the matter is that "political fairness" is not necessarily the same thing as constitutionally correct representation since it is possible to draw district lines with the result that legislative dominance is given to one faction at the expense of others. Justice White, in his *Wells* dissent, equated districting itself with "gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations."[120] Therefore, he concluded that:

> In terms of the gerrymander, the situation will not be much different if equality means what it literally says—a zero variation—rather than only "substantial" equality which would countenance some variations among legislative districts. Either standard will prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation and both are powerful forces toward equalizing voter influence on legislative performance. In terms of effective representation for all voters there are only miniscule differences between the two standards. But neither rule can alone prevent deliberate partisan gerrymandering if that is considered an evil which the Fourteenth Amendment should attempt to proscribe.[121]

Now that "substantial" equality has been endorsed as the criterion

117. *See* notes 18-24 *supra* and accompanying text.
118. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
119. Wells v. Rockefeller, 394 U.S. 542, 544 (1969).
120. *Id.* at 554-55 (dissenting opinion).
121. *Id.* at 555 (dissenting opinion).

for districting state legislatures Justice White's commentary is even more pertinent.

The evidence indicates that the Supreme Court at various times has been contemplating the practicality of ruling on the invidious practice of partisan gerrymandering. In *Whitcomb v. Chavis* the dissenters questioned if the time had not come to determine "whether a gerrymander can be 'constitutionally impermissible.' "[122] Manifesting an awareness of this political discrimination, the majority in *Gaffney v. Cummings* acknowledged the probability of census data being manipulated occasionally for political purposes as implicit grounds for maintaining the power to examine how election lines are drawn.[123] On the basis of these statements it is reasonable to anticipate that a future phase of judicial review over reapportionment will concern the legitimacy of partisan gerrymandering. This could be a bold step for the Court to take, but until this defect is remedied, the ultimate goal of effective representation, that is, "the equalization of citizen influence on legislative outcomes . . . ,"[124] cannot be realized.

122. 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part).

123. *See* note 86 *supra* and accompanying text.

124. Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 GEO. WASH. L. REV. 694, 711 (1968).