UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 50 | Number 1 Article 10

12-1-1971

Constitutional Law -- Reapportionment -- A Substantive Constitutional Right to Minority Representation in the Legislature

Robert Starr Gillam

Constitutional Law—Reapportionment—A Substantive Constitutional Right to Minority Representation in the Legislature?

One of the most significant new developments in constitutional law during the past decade was the application of the fourteenth amendment to legislative apportionment. In a series of landmark decisions, of which the most basic were *Baker v. Carr*[1] and *Reynolds v. Sims*,[2] the United States Supreme Court held that apportionment plans which are not based on population violate the equal protection clause.[3] Left unanswered by these cases, however, was another important reapportionment issue: the constitutionality of multi-member districting. This was the issue before the Supreme Court in two recent cases, *Whitcomb v. Chavis*[4] and *Connor v. Johnson*.[5]

Three arguments have been advanced against the constitutionality of multi-member districts. Two of these arguments were developed by Professor John F. Banzhaf. Banzhaf contended that all multi-member districts are unconstitutional. First, he suggested that multi-member

---

[1]369 U.S. 186 (1962).

[2]377 U.S. 533 (1964).

[3]Confusion has developed over one aspect of this equal-population requirement. Contrary to widespread press reports, the Supreme Court has never laid down a rule that whenever a state legislature considers reapportionment, it is required to adopt the one plan of all those proposed which comes closest to absolute population equality. In other words, the introduction of one reapportionment plan does not automatically render unconstitutional all other plans with larger deviations. Such a rule has, however, been adopted by a few lower federal courts. Preisler v. Secretary of State, 257 F. Supp. 953 (W.D. Mo. 1966), *aff'd mem. sub nom.* Kirkpatrick v. Preisler, 385 U.S. 450 (1967); League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (D. Neb. 1965), *appeal dismissed sub nom.* Marsh v. Dworak, 382 U.S. 1021 (1966); and especially Preisler v. Secretary of State, 279 F. Supp. 952 (W.D. Mo. 1967), *aff'd sub nom.* Kirkpatrick v. Preisler, 394 U.S. 526 (1969). The lower court in the latter *Preisler* case was particularly explicit in its statement and application of the rule. Significantly, however, the Supreme Court, in affirming, did not adopt the lower court's rationale, but only mentioned the existence of a better plan as one of several factors indicating the unconstitutionality of the plan at issue.

The rule is law in New Jersey, having been adopted in Jones v. Falcey, 48 N.J. 25, 222 A.2d 101 (1966). In fact, the New Jersey court has carried it to its logical extreme, in Koziol v. Burkhardt, 51 N.J. 412, 241 A.2d 451 (1968), declaring unconstitutional a plan with a difference in population of only 851 between two Congressional districts, because a proposed alternative reduced the disparity to 13 persons.

None of the courts adopting the rule have held that it takes precedence over the preservation of county lines—that a "better" plan which divides counties invalidates a "worse" plan which does not. The New Jersey court rejected this suggestion in Jackman v. Bodine, 55 N.J. 371, 378-83, 262 A.2d 389, 393-95 (1970), *cert. denied*, 400 U.S. 849 (1971).

[4]403 U.S. 124 (1971).

[5]402 U.S. 690 (1971) (per curiam).

districts give excessive power to their inhabitants and discriminate against voters in smaller districts. Defining a citizen's "voting power" as his chance of casting the tie-breaking vote in an election, Banzhaf "demonstrate[d] mathematically that . . . voting power does not vary inversely with the size of the district and that to increase legislative seats in proportion to increased population gives undue voting power to the voter in the multi-member district since he has more chances to determine election outcomes than does the voter in [either] single-member"[6] or smaller multi-member districts. Second, Banzhaf suggested that large-district representatives are more effective in the legislature than are other representatives, because they can and often do vote together as a bloc. By voting en bloc, they can cast the deciding votes on bills more often than they could if they voted independently.[7]

The third argument against multi-member districting was perhaps even stronger than the other two, even though it was less sweeping in its scope. This contention was that multi-member districting denied representation to minorities within large districts. For instance, ghetto Negroes could elect legislators of their own if there were single-member districts, but under a multi-member system they are outnumbered by white people and denied representation. The Supreme Court first considered this argument in *Fortson v. Dorsey*[8] and *Burns v. Richardson*.[9] In those cases it refused to hold multi-member districts unconstitutional per se, but it indicated that if some future plaintiff could present factual evidence that multi-member districts do discriminate against minorities, it might rule in his favor.[10]

The plaintiffs in *Whitcomb* challenged the Indiana legislative apportionment plan adopted in 1965. According to this plan, Marion

---

[6]403 U.S. at 144-45. *See* Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

[7]*Cf.* Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965). As the Court pointed out, having the legislators from a multi-member district vote en bloc "is tantamount to the district having one representative with several votes." 403 U.S. at 146.

[8]379 U.S. 433 (1965).

[9]384 U.S. 73 (1966).

[10]379 U.S. at 439; 384 U.S. at 88.

In support of this minority-representation argument, *see* Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219, 258-61, 264-68; Jewell, *Minority Representation: A Political or Judicial Question*, 53 KY. L.J. 267, 276-88 (1965); Note, *Reapportionment*, 79 HARV. L. REV. 1224, 1258-61 (1966).

County elected fifteen representatives and eight senators. The plaintiffs presented detailed evidence showing that Marion County contained a Negro ghetto; that ghetto residents were rarely elected to the legislature; and that if Marion County were broken down into single-member district, three House of Representatives districts and one senatorial district would fall to the ghetto.

The lower court accepted the plaintiffs' minority-representation argument and held that the Marion County multi-member district discriminated against ghetto Negroes.[11] In addition, it found that the Indiana legislature did not meet the constitutional standards of population equality among districts because the deviations from equality ranged up to 14.521 percent,[12] a figure almost as high as those condemned by the Supreme Court in *Swann v. Adams*[13] and *Kilgarlin v. Hill*.[14] Therefore, instead of merely ordering the abolition of the Marion County multi-member district, the court required the legislature to reapportion the whole state. Though the lower court did not explicitly accept the arguments of Professor Banzhaf, it did instruct the legislature not to create multi-member districts anywhere in the state in its new apportionment.[15] When the legislature failed to reapportion, the court issued its own plan.[16] From the order issuing this plan, the state appealed.

The Supreme Court reversed. Dealing with each of plaintiffs' contentions, it rejected Banzhaf's first argument;[17] it held that plaintiffs had not presented sufficient evidence in support of Banzhaf's second arguments;[18] and it similarly held that plaintiffs had not proved their case with respect to minority non-representation.[19]

---

[11]Chavis v. Whitcomb, 305 F. Supp. 1364, 1385-87 (S.D. Ind. 1969).

[12]*Id.* at 1387-88.

[13]385 U.S. 440 (1967).

[14]386 U.S. 120 (1967).

[15]305 F. Supp. at 1391-92. Actually the lower court permitted Indiana to use small multi-member districts if all the districts in the state were multi-member districts and all elected the same number of legislators. This theoretical possibility was politically impractical; in effect, single-member districts were required.

[16]Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969).

[17]403 U.S. at 144-46.

[18]*Id.* at 146-48.

[19]*Id.* at 148-55. The Supreme Court did approve the lower court's finding that the deviations from equality in Indiana's apportionment plan were unconstitutionally large, *id.* at 161-63, but this was of little practical importance, since the Indiana legislature had adopted a new plan based on the 1970 census figures while the appeal was pending. *Id.* at 140.

The Court did not entirely foreclose the possibility that the plaintiffs might ultimately prevail if they could prove that the establishment of single-member districts would significantly affect particular legislative decisions in a manner favorable to them. However, the decision clearly shows that the plaintiffs will be required to produce a much greater quantity of evidence to obtain a favorable decision than did the plaintiffs in cases such as *Reynolds v. Sims*. There, the plaintiffs had to introduce only the census figures to establish a constitutional violation. What is the reason for this difference? Is the Court shifting the burden of proof so as to encourage the desired result,[20] or is there a more orthodox explanation?

Ostensibly, the reason is that *Whitcomb* did not involve a dilution of the plaintiffs' right to vote. *Reynolds* protected a citizen against the dilution of that right, but the plaintiffs in *Whitcomb* were claiming denial of their right to representation. Therefore, they had to produce evidence on the nature and quality of their representation, rather than merely setting forth the census figures.

This explanation is partially correct, but not entirely. To understand its weakness, one must consider why the Court rejected Banzhaf's first argument. If the right protected by *Reynolds* is the right of each individual to cast his own vote without dilution—in other words, the right to have equal voting power—then Banzhaf's first theory is the logical result. Certainly, as Banzhaf points out, the measure of an individual's voting power is his chance of casting a tie-breaking vote; a voter obviously exerts no power if he merely adds one more vote to a 100,000-vote majority. And it is mathematically provable that a voter in a single-member district has a smaller chance of casting a tie-breaking vote than does a voter in a multi-member district.[21] Because voters in a single-member district have less voting power, it would seem inevitable that they are denied a constitutional right.

However, the Supreme Court rejected Banzhaf's theory—and rightly so, because the theory leads to absurd results. Imagine County *X*, with 300,000 population, electing *two* senators. County *Y*, popula-

[20]Some commentators have suggested that the Court is doing this or even urged that it do so. Dixon, *Reapportionment Perspectives: What is Fair Representation?*, 51 A.B.A.J. 319, 322 (1965); Velvel, *Suggested Approaches to Constitutional Adjudication and Apportionment*, 12 U.C.L.A.L. REV. 1381, 1405 (1965); Note, *The Apportionment Cases: An Expanded Concept of Equal Protection*, 1965 WIS. L. REV. 606, 643-44.

[21]*See* Banzhaf, *supra* note 6.

tion 100,000, elects one. It is mathematically provable that a voter in County *X* has a *greater* chance to cast a tie-breaking vote than a voter in County *Y*.[22] Does this mean that County *Y* is discriminated against? Surely not. Yet that is the conclusion required by Banzhaf's reasoning.[23]

If a theory leads logically to an absurd result, it must rest on a mistaken assumption. Banzhaf's theory is no exception. He mistakenly assumes that *Reynolds* assures each voter an equal chance to cast a tie-breaking vote. It does not. In reality the right guaranteed by *Reynolds* is simply the right to population-based apportionment. The Court's rejection of Banzhaf's theory proves that it was this, and not merely the individual's right to cast his own ballot without dilution, that *Reynolds* protected.[24]

The plaintiffs in *Reynolds* did not, of course, seek this right of population-based apportionment for its own sake. They sought it as a method of ensuring that they would have sufficient representatives in the legislature to speak for their views. This points out the fundamental distinction between *Reynolds* and *Whitcomb*: In the former, the plaintiffs sought to have the legislature apportioned by population as a *means* of obtaining sufficient representation for their viewpoints. In the latter, the plaintiffs wanted the courts to step in and *directly* assure them representation. The difference between *Reynolds* and *Whitcomb* is the difference between a procedural right and a substantive right.

With this distinction in mind, the position of the Court on the burden of proof in *Reynolds* and *Whitcomb* can be more accurately explained. In *Reynolds*, the Supreme Court established a constitutional right to population-based apportionment. If census figures showing population inequality among districts are produced, violation of this right is demonstrated. But the Court has not held that any group has a constitutional right to have its interests *actually represented* in the legislature. Even if this right exists, its denial is not proved merely by

---

[22]*See* Banzhaf, *supra* note 6.

[23]Again, imagine Counties *A*, *B*, and *C*, each having 100,000 population, each electing one senator. It is proposed to merge them into District *Z* which will elect two senators. Few if any residents of these counties would agree to this change. Yet it is mathematically demonstrable that the creation of District *Z* would increase the "voting power" of each voter in the district.

See 403 U.S. at 169 (Justice Harlan's refutation of Banzhaf's first theory).

[24]This does not mean that this right is not, as the *Reynolds* Court stated, an "individual and personal" one. 377 U.S. at 561. Each citizen has an individual right to population-based legislative apportionment. If this right is denied, it can be enforced in a suit by an individual citizen. *E.g.*, Reynolds v. Sims.

showing that multi-member districts are used or that members of the particular group are rarely elected as legislators. A legislator does not have to belong to a group to represent its interests adequately. In other words, the *Whitcomb* plaintiffs not only failed to convince the Court that it should recognize a constitutional right to representation, but also failed to demonstrate that they were denied this right if it does exist. To prove that multi-member districting denies a group its right of representation, it is not sufficient to show merely that multi-member districts are used; it is also necessary to prove that the legislature has made decisions which are harmful to the group and that these decisions would not have been made but for the existence of the multi-member system. In establishing this requirement, the Court is not shifting the burden of proof at all. It is only following the traditional rule that a plaintiff must show that he has been harmed before the courts will give him relief.

The plaintiffs similarly failed to prove their case with respect to the second of the two arguments advanced by Professor Banzhaf. Even if small-district voters have a right to be represented as effectively as multi-member district voters, the denial of this right is not proved by the mere fact that large-district legislators can vote en bloc. As the Court indicated, there would be nothing to prevent the Marion County legislators from voting en bloc even if single-member districts were used.[25] Thus the plaintiffs again failed to show that multi-member districting had actually denied them any right to representation.

The distinction between the right to population-based apportionment and the substantive right to representation may be important not only for the allocation of the burden of proof but also for the ultimate decision as to the constitutionality of multi-member districts. Possibly the Supreme Court will not recognize the substantive right to representa-

[25]For that matter, even now there is nothing to prevent rural legislators from forming blocks of their own. In any case, the increase in power resulting from bloc voting is fairly slight in a body as large as a legislature. *See* Banzhaf, *supra* note 7, at 335-38. In all probability it is outweighed by other, intangible factors, such as the possibly greater competence of small-district legislators, the distrust of rural lawmakers for those from the cities, and the fact that the presence of a large-county bloc may encourage other legislators to cooperate more closely among themselves. Certainly in North Carolina the large Mecklenburg County delegation derives no great strength from its numbers. *See* Walls, *The 'State of Mecklenburg' Does Poorly In Legislature*, The Charlotte Observer, May 23, 1971, § B, at 3, col. 4. Banzhaf himself pointed out that his "analysis does not pretend to be a complete picture of the representative system and the conclusions do not necessarily reflect all political realities" and intangible factors. Banzhaf, *supra* note 6, at 1311.

tion as a constitutional right at all. Certainly it did not do so in *Whitcomb*, and there are indications in Justice White's majority opinion that it will not recognize such a right in future cases.[26]

Several considerations would justify the Court in upholding multi-member districts and refusing to create a constitutional right of minority representation. One of these is the fact that should the courts guarantee representation for one minority group, many other groups would also seek it.[27] Losing political parties,[28] Indians,[29] Catholics, farmers, the poor, and a host of other minorities would claim the right to representation in proportion to their members. Providing representation for all these interests would be virtually impossible because of the overlap among them.[30] Even the proportional-representation system, as used in Europe without encouraging results,[31] only assures representation to all political parties.[32]

---

[26]*See* notes 27, 33, 36 & 38 *infra*.

[27]This problem was discussed in part V of the majority opinion, 403 U.S. at 156-60.

[28]It seems unlikely, however, that the Court would look with favor upon a defeated party's claim that it had been denied its right to representation. In *Whitcomb* it rejected the plaintiffs' suggestion that multi-member districting discriminated against losing political parties because the winning party ordinarily took all the district's seats in each election. 403 U.S. at 160.

If the Court took any step towards requiring the percentage distribution of seats in the legislature to approximate the percentage distribution of votes for each party, it would be superimposing an element of proportional representation on the system of election by districts.

[29]*See* Ely v. Klahr, 403 U.S. 108, 119 (1971) (Douglas, J., concurring).

[30]*See* Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 46; Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729, 748-52 (1969).

[31]Proportional representation was used in Fourth Republic France and is now used in Italy and various small European nations. There is no evidence that it has made these governments unusually good or unusually responsive to the people's will. There is substantial evidence that it has encouraged the development of a multi-party system. M. DUVERGER, POLITICAL PARTIES 245-55 (2d Eng. ed. rev. 1959); S. LIPSET, THE FIRST NEW NATION 293-306 (1963). There is also reason to believe that multi-party systems are on the whole less beneficial than two-party systems, except in nations which are sharply divided into hostile economic, social, or religious groups. *Id.* at 307-12. Surely the Fourth Republic, which in 1958 collapsed because of its instability, and Italy, which lurches from one crisis to another, are not proper models for American government.

[32]Justice Douglas' dissent offered an interesting response to this objection. He argued that the fifteenth amendment's ban on racial discrimination in elections could be used to limit the guarantee of minority representation to racial groups. 403 U.S. at 180 (Douglas, J., dissenting and concurring). Such a proposal might well have appealed strongly to the Court, because it combined two themes that have appeared and reappeared in Supreme Court decisions of the last twenty years: the drive for voting equality, and the struggle for racial equality, which has produced Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Brown v. Board of Education, 347 U.S. 483 (1954); and other historic constitutional decisions. Yet the Court rejected this approach, because it simply does not solve the problem. There are almost as many overlapping interest groups among particular races as among the population as a whole.

Another reason for not establishing a substantive right to representation is the fact that the system of democratic election by districts is inconsistent with the notion that any minority group or interest group should be guaranteed representation.[33] Under the district election system, each campaign is a struggle among interest groups to secure representation. Ordinarily the winning candidate represents not just one, but many of these groups.[34] On the other hand, those interests which support the losing candidate are left without representation. The winning candidate is the one who can obtain the support of the broadest coalition of various interest groups (and also of other voters who do not vote according to their self-interest). If the Court decides not to assure any interest group of representation, it would avoid disrupting this system of electoral struggle. It would be choosing to play the role of a referee who lines the racers up even at the start of the race, rather than that of a puppeteer who lines them up even at the finish.

A third difficulty that would arise if the Court were to create a right to minority representation would be the problem of fashioning a remedy. The *Whitcomb* plaintiffs wanted to form ghetto districts with Negro majorities. Other Negroes, however, might object to this plan, preferring instead a system which would spread the black vote out among more districts in order to influence more legislators. For instance, in *Wright v. Rockefeller*[35] a Negro sued to break up a ghetto district, contending that the all-Negro district constituted segregation. The Supreme Court held that she had failed to sustain her burden of proving that the district was in fact a racial gerrymander, but it did not suggest that her contentions were without merit.[36] How can a court maximize minority representation, as sought in *Whitcomb*, without minimizing minority influence and thus raising the issue of *Wright*? Should it seek a happy medium? Is a court the proper agency to seek such a medium?[37]

---

[33]This reason is reflected in the majority opinion, 403 U.S. at 149-55. *See* Auerbach, *supra* note 30, at 37-38, who reaches the same conclusion in a different manner.

[34]*Id.* at 51-52; Irwin, *supra* note 30, at 735; *see* S. LIPSET, *supra* note 31, at 287. Concerning the role of political parties in this electoral struggle of interest groups, see L. EPSTEIN, POLITICAL PARTIES IN WESTERN DEMOCRACIES 73, 275-81 (1967).

[35]376 U.S. 52 (1964).

[36]*Cf.* 403 U.S. at 156 n.34. A similar case is Honeywood v. Rockefeller, 214 F. Supp. 897 (1963), *aff'd mem.*, 376 U.S. 222 (1964).

[37]"Prominent on the surface of any case held to involve a political question is found . . . the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion." Baker v. Carr, 369 U.S. 186, 217 (1962) (Justice Brennan's third criterion for a political question).

On a more practical level, the Court may have been influenced by the fact that while *Reynolds*' impact has been both substantial and beneficial, it has not produced the radical changes predicted by some commentators. If the benefits of the first stage were less than anticipated,[38] perhaps the Court felt that it should turn to other areas rather than incur the burden of carrying reapportionment into a new and complicated second stage. Influenced by considerations such as these, the Court in *Whitcomb* declined to recognize a right to minority representation.[39] In the future it may explicitly reject this right—or so it seems until one reads *Connor v. Johnson.*[40]

Connor contrasts so sharply with *Whitcomb* that it raises the possibility of a "double standard" under which multi-member districts will be upheld or overturned depending on their location in the nation. In *Connor*, decided four days before *Whitcomb*, the Supreme Court required the establishment of single-member districts in Hinds County, Mississippi.

Connor began as a typical reapportionment case. The plaintiffs

---

[38]*See, e.g.*, R. DIXON, DEMOCRATIC REPRESENTATION 574-78 (1968); T. DYE, POLITICS, ECONOMICS, AND THE PUBLIC 270-81 (1966); Elliott, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474 (1970); Irwin, *supra* note 30, at 753; Dolbeare, Book Review, 1970 WIS. L. REV. 616, 618-19; 403 U.S. at 148 n.27, 154 n.33.

[39]Despite these objections, the Court might have felt compelled to rule for plaintiffs if it had felt that racial and political gerrymandering were thwarting the people's will today to the same extent that malapportionment thwarted it before 1964. Fortunately, this is not the case. *Reynolds* and Gomillion v. Lightfoot, 364 U.S. 339 (1960), have taken the strongest weapon away from those who seek excessive power by gerrymandering.

Reynolds made racial gerrymandering especially risky. Imagine State *S* with 77,000 population—63,000 white, 14,000 black—divided into seven legislative districts. To keep Negroes out of the legislature, the districts are arranged so that each contains 9,000 whites and 2,000 Negroes. No Negroes will be elected; nevertheless, the next legislature may be quite sympathetic to Negroes and their problems, for the blacks have been able to cast 2,000 votes in each district for the candidate most favorable to them. Likewise, if all the legislators are elected from one seven-member district, the Negroes can influence each seat. Now, suppose the courts order reapportionment to insure minority representation. They create one ghetto district with 11,000 Negroes and six other districts of 500 Negroes and 10,500 whites. A Negro will now sit in the legislature, but he may be a lonely figure among the conservatives elected from the other six districts, each almost lily-white. *See Political Tragedy*, Atlanta Constitution, June 7, 1971, § A, at 4, col. 1 (editorial). Political gerrymanders involve similar risk after *Reynolds*.

No one could sensibly contend that *Reynolds* eliminated all the dangers of gerrymandering. What can be argued, however, is that *Reynolds* reduced the evil to such a point that further constitutional protection is not required.

[40]Connor v. Johnson, 402 U.S. 690 (1971) (per curiam).

argued successfully that the deviations in Mississippi's apportionment scheme were excessive, and the three-judge court announced that it would adopt its own reapportionment plan.[41] Three days later the plaintiffs submitted four suggested plans which utilized only single-member districts. The three judges rejected these plans, however, and adopted a plan making Hinds County a multi-member district. They agreed that "single-member districting would be 'ideal' for Hinds County"[42] but felt that there was too little time to subdivide the county before the legislative filing deadline seventeen days later.

The Supreme Court, in a per curiam opinion, instructed the lower court to adopt a single-member plan, "absent insurmountable difficulties,"[43] and to postpone the filing deadline as long as necessary to effect this purpose.[44] The majority stated that the three judges had had sufficient time to subdivide Hinds County, pointing out that plaintiffs had produced four plans in three days. The Court held that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."[45] Thus, the Court has endorsed multi-member districts in Indiana and banned them in Mississippi. The cases were widely interpreted in the press as meaning that multi-member districts would henceforth be permitted everywhere except in the South.[46]

It would be unfortunate if the Supreme Court were to adopt such a rule, for the double standard is quite devoid of any constitutional basis. If the Court found the Hinds County multi-member district unconstitutional without similarly invalidating the Marion County district in *Whitcomb*, it must have assumed that the Mississippi district, unlike the

[41]Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971).

[42]402 U.S. at 692.

[43]*Id.*

[44]*Id.* at 692-93. Justice Black, joined by the Chief Justice and Justice Harlan, dissented. The dissenting opinion dealt almost entirely with the confusion that this last-minute decision would create in the Hinds County electoral process. *Id.* at 693-95.

On remand, the lower court found that "insurmountable difficulties" were present because there were no accurate population figures for each precinct of Hinds County. The 1970 census did not determine the population of each precinct but instead subdivided the county into "enumerator districts" with boundaries that did not correspond with precinct boundaries. Thus multi-member districting remains in effect in Hinds County. Connor v. Johnson, 330 F. Supp. 521 (S.D. Miss. 1971).

[45]402 U.S. at 692.

[46]*E.g.*, Greensboro Daily News, June 8, 1971, § A, at 1, col. 6, *quoting* Professor Robert R. Dixon.

one in Indiana, was an intentional racial gerrymander banned by *Gomillion v. Lightfoot*.[47] But this assumption seems unwarranted, for there was no showing that the Hinds County district was racially inspired, much less that all Southern multi-member districts (and none in the North) are so motivated. Multi-member districts ordinarily are based on the desire to preserve county lines, not the desire to preserve white supremacy.[48] They were common in the South earlier in the century when Negroes were effectively disfranchised and racial gerrymanders were unnecessary.[49] Since the recent rise of Negro voting, their use has actually declined.[50] In view of these considerations, the assumption of a racial motivation for all Southern multi-member districts seems arbitrary.[51]

Since the geographical double standard is not based on valid reasoning, it would be wrong to assume that the Supreme Court has adopted it unless *Connor* and *Whitcomb* can be reconciled in no other

[47]364 U.S. 339 (1960). Decisions enforcing this ban include Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965). Determining the legislature's intent is not an easy or an infallible process, however. *See* Sims v. Baggett, *supra* at 107 n.17. *Compare Sims* (use of numbered-seat system as evidence showing intent to create racial gerrymander) *with* Connor v. Johnson, 265 F. Supp. 492 (S.D. Miss.), *aff'd mem.*, 386 U.S. 483 (1967) (numbered seats used in court-drawn plan).

[48]*See Courts and counties*, Greensboro Daily News, June 9, 1971, § A, at 6, col. 1 (editorial).

[49]In 1956, Holmes, Washington, Monroe, Noxubee, Copiah, Panola, Yazoo, and Marshall Counties of Mississippi constituted three-member districts in the state House of Representatives, without any subdistricting. MISS. CODE ANN. § 3376 (1956). Essentially the same apportionment system was in effect in 1942, when the "white primary" system was still in effect. MISS. CODE ANN. § 3326 (1942). In 1927, all the above counties, plus Hinds County, elected three representatives without subdistricting. ANNOTATED MISS. CODE §§ 6177, 6186 (Hemingway 1927).

[50]Multi-member districts have been abolished in Oklahoma and greatly reduced in Tennessee during the past decade. *Compare* tit. 14, ch. 3, §§ 1-3, [1961] Okla. Sess. L. 182 (repealed 1963) *with* OKLA. STAT. ANN. tit. 14, § 112 (Supp. 1971); ch. 1, [1962] Public Acts—Tenn. Extraordinary Sess. 7 (repealed 1963) *with* TENN. CODE ANN. §§ 3-101 to -110 (1971).

[51]Professor Dixon suggested that there is a presumption of intentional racial gerrymandering in the states and counties subject to the Voting Rights Act. Greensboro Daily News, *supra* note 46. This presumption, however, is no more defensible than any other form of the double standard. A number of provisions of the Voting Rights Act apply only to areas where less than fifty per cent of the voting-age population voted in 1964 or in 1968. 42 U.S.C. § 1973b(b) (1970). This criterion has a logical, natural relationship to the question of whether Negroes were being denied their right to vote; obviously, if a large group is denied the franchise, voting turnout will be lower. It has no such relationship to the question of intentional racial gerrymandering. Gerrymandering does not involve a denial of the right to cast one's ballot. It is perfectly possible to have gerrymandering and high voting turnout or to have low turnout and no gerrymandering. To assume that the legislature intended to create a racial gerrymander in 1971, because voting turnout was low in 1964 or 1968, is no more justified than to assume a racial gerrymander because a place is south of a certain parallel of latitude.

way. At first glance, it would seem quite possible to reconcile the two cases without using a double standard. In *Whitcomb* the Court dealt with a minimum constitutional requirement; it held that the Indiana multi-member districting plan met this minimum. *Connor*, on the other hand, dealt not with what is permissible but rather with what is best. The Supreme Court has a supervisory power which enables it to impose rules on the lower federal courts without making them constitutional requirements.[52] Exercising this supervisory power, the Court determined that single-member districts were desirable for policy reasons, and so it required the district court to use them in framing its own plan. But single-member districts are not constitutionally required; legislatures may still create multi-member districts.

Unfortunately, this reconciliation has a hole in it. In *Whitcomb*, also, the lower court adopted its own reapportionment plan.[53] This was necessary, since the Indiana legislature did not meet the *Swann-Kilgarlin* equal-population standard. If *Connor* means that single-member districts are required in court-drawn plans, the *Whitcomb* lower court obeyed this rule, and the Supreme Court should have affirmed. But instead it reversed. Apparently the "rule of *Connor v. Johnson*" is not a uniform rule after all.

It might appear, then, that the contrasting results of these two cases cannot be explained except by the double standard. But before accepting this conclusion, one should examine more closely the exact words used in *Connor*: "[S]ingle-member districts are preferable to large multi-member districts *as a general matter*."[54] In other words, exceptions can be made to the *Connor* rule. And if any exceptions are to be made, then for several reasons *Whitcomb* was a proper case in which to do so.

First, the plaintiffs in *Whitcomb* offered no ground on which the Court was prepared to grant them single-member districts. Their constitutional arguments were rejected. The only reason why the lower court acted properly in adopting a reapportionment plan was that it found that Indiana's legislature violated the equal-population requirement. It made this finding entirely on its own; there was no such allegation in the

[52]This power has often been exercised in criminal procedure cases. *See, e.g.*, Mallory v. United States, 354 U.S. 449 (1957); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327-37.

[53]Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969).

[54]402 U.S. at 692 (emphasis added).

plaintiffs' complaint.[55] So if the *Whitcomb* plaintiffs had obtained single-member districts, they would have done so only through luck. Second, if the Indiana legislature had reapportioned during the time period allotted and had sufficiently reduced the population inequalities without abolishing multi-member districts, the Supreme Court would have had to accept the reapportionment as constitutional. However, the lower court expressly instructed the legislature not to follow this course.[56] Therefore, for all practical purposes, if the legislature wanted to preserve multi-member districts, there was nothing it could do but let the lower court impose a reapportionment plan and appeal from that decision. For the Supreme Court to hold that this road, too, was blocked—thus penalizing the legislature just because the lower court had made an erroneous decision—would have been very harsh. Third, the practical significance of the whole question was reduced since Indiana had already reapportioned according to the 1970 census, using single-member districts only.

In *Connor*, on the other hand, these three factors were not present. Moreover, the Supreme Court may well have been particularly displeased and provoked with the lower court ruling in the *Connor* case, because the district court had swept aside the plaintiffs' four suggested single-member plans without making any attempt to explain in full its reasons for adopting instead a multi-member plan.[57] The lower court's brush-off of the plaintiffs' suggested plans may have caused the Court to look at the *Connor* case with a particularly critical eye.

Connor v. Johnson and *Whitcomb v. Chavis* clearly do not constitute a precise and unmistakable ruling on the issues of multi-member districting and minority representation.[58] However, they at least open the door for a just solution to the reapportionment question. By distinguishing between the right to population-based apportionment and the sub-

---

[55]403 U.S. at 131.

[56]Chavis v. Whitcomb, 305 F. Supp. 1364, 1392 (S.D. Ind. 1969).

[57]Connor v. Johnson, 330 F. Supp. 506, 508 (S.D. Miss. 1971). On remand the district court explained more fully the inadequacies of the plaintiffs' suggested plans. Connor v. Johnson, 330 F. Supp. 521, 525-26 (S.D. Miss. 1971).

[58]This is demonstrated by the fact that the two district courts which have considered the question since *Whitcomb* and *Connor* have reached three different conclusions. In Wold v. Anderson, 327 F. Supp. 1342, 1344 (D. Mont. 1971) (per curiam), the court followed *Whitcomb* and simply ignored *Connor*. In Howell v. Mahan, 330 F. Supp. 1138, 1146 (E.D Va. 1971), the majority in a two-to-one decision viewed *Connor* as forbidding large multi-member districts and *Whitcomb* as upholding small ones. This argument was easily refuted by Lewis, J., dissenting, who pointed out that *Whitcomb* involved a fifteen-member district and *Connor* only a twelve-member district.

stantive right to representation, the Court will be able to avoid the maze of enforcement difficulties foreseen in *Baker v. Carr* by Justices Frankfurter[59] and Harlan[60] without denying relief to the victims of malapportionment. Such a result would disprove the contentions of judicial conservatives who argue that courts should not attempt to rectify social or political evils, for it will show that the judiciary can keep a sweeping, forward-looking decision such as *Reynolds* firmly under control and limit its scope at the point at which further broadening would cease to be beneficial. It would show that there is a third alternative between judicial chaos and judicial immobility.

ROBERT STARR GILLAM

Judge Lewis suggested, instead, *id.* at 1148, that *Whitcomb* was the controlling case and that *Connor* was decided solely on the basis of the lower court's belief that "single-member districting would be 'ideal' for Hinds County." 402 U.S. at 692.

Judge Lewis's argument is plausible, but two objections can be raised. First, the Supreme Court's language in *Connor* was general and indicated no limitation to a particular fact situation: "[S]ingle-member districts are preferable to large multi-member districts as a general matter." *Id.* Second, the *Connor* district court did not determine that Hinds County was unusually well adapted to single-member districting; it only suggested that ideally *all* districts electing four or more legislators should be broken down into single-member districts. Connor v. Johnson, 330 F. Supp. 506, 519 (S.D. Miss. 1971). *Connor* cannot be distinguished on the basis of its peculiar fact situation when in fact there was no peculiar fact situation.

[59]369 U.S. 186, 266-70, 323-30 (1962) (dissenting opinion).

[60]*Id.* at 339 (dissenting opinion).