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A Flexible Standard for State Reapportionment Cases

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A FLEXIBLE STANDARD FOR STATE REAPPORTIONMENT CASES

I. INTRODUCTION

In 1971, Connecticut and Virginia reapportioned their state legislatures. Both plans deviated from precise equality, and in each instance a federal district court held the resulting dilution of some votes and weighting of others was an unconstitutional malapportionment in violation of the equal protection clause of the fourteenth amendment.[1] In reversing the lower courts' decisions and upholding the validity of the proposed plans the Supreme Court announced a new standard applicable in state legislative reapportionment cases. The contours of the new standard, charted in *Mahan v. Howell*[2] and *Gaffney v. Cummings*,[3] suggests a shift in the Court's emphasis from mathematical idealism to political realism, from the personal right of the voter to the institutional integrity of legislative bodies.[4] While the Court in *Gaffney* stated its reluctance to "become bogged down in a vast, intractable apportionment slough,"[5] it nevertheless expanded the scope of apportionment issues to include a discussion of the many competing interests involved in the concept of equal representation in state legislatures.[6]

II. STATE INTERESTS: RATIONAL OR NECESSARY?

A. Mahan v. Howell

In 1971, the Virginia General Assembly passed two statutes reapportioning its legislature. One statute apportioned 100 delegates in the House among 52 dis-

1. Cummings v. Meskill, 341 F. Supp. 139 (D. Conn. 1972), rev'd sub nom. Gaffney v. Cummings, 412 U.S. 735 (1973); Howell v. Mahan, 330 F. Supp. 1138 (E.D. Va. 1971), modified, 410 U.S. 315 (1973).

2. 410 U.S. 315 (1973). Justice Rehnquist wrote the opinion of the court; Justice Powell took no part in the consideration of the case; Justices Brennan, Douglas and Marshall concurred in part and dissented in part.

3. 412 U.S. 735 (1973) (Justices Brennan, Douglas & Marshall dissented).

4. One commentator has argued that the Court's analysis in Baker v. Carr, 369 U.S. 186 (1962), centered on a "specious conception of personal right rather than upon the institutional aspect of the problem." Kauper, Some Comments on the Reapportionment Cases, 63 Mich. L. Rev. 243, 244 (1964).

5. 412 U.S. at 750.

6. In White v. Weiser, 412 U.S. 783 (1973), a congressional election case decided on the same day as Gaffney, the Court reaffirmed the rule of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), that in congressional election cases any deviation from mathematical equality must be shown to have been unavoidable. Congressional cases are distinguished from state cases: "Keeping in mind that congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb Kirkpatrick and Wells." 412 U.S. at 793. It should be noted that the Kirkpatrick rule is not entirely safe since three justices implied in a separate concurrence that if the same issue were again presented to the Court they would not apply it. Id. at 798 (Burger, C.J., Powell & Rehnquist, JJ., concurring).

tricts throughout the state.[7] Since two provisions of the Virginia constitution gave the General Assembly power to enact special legislation affecting local governments,[8] the apportionment plan attempted to respect the physical integrity of existing political subdivision boundaries. The plan resulted in a maximum deviation from perfect equality of 16.4 percent and an average deviation of plus or minus 3.89 percent.[9] The district court found this deviation to be an unconstitutional dilution of voting strength.[10] The second statute, apportioning the state senate, was not tailored to conform to political boundaries. While nearly perfect mathematically, it split the city of Norfolk into three districts and arbitrarily assigned a group of military voters to one district. The district court found this to be an unconstitutional discrimination and converted the three single member districts into one three member district.[11]

On appeal, the Supreme Court first discussed the problem presented by the reapportionment plan of the Virginia house. It framed the issue not positively in terms of a right to an absolutely equal vote, but negatively in terms of permissible deviations from a mathematical ideal: "The principal question thus presented for review is whether or not the Equal Protection Clause of the Fourteenth Amendment . . . permits only the 'limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality' in the context of state legislative reapportionment."[12] In resolving that issue the Court distinguished state legislative from congressional districting cases. In congressional cases the rule applied is that laid down in *Wesberry v. Sanders*:[13] absolute mathematical equality among voters.[14] On the other hand, state cases are controlled by *Reynolds v. Sims*.[15] While *Reynolds* required that states strive for mathematical equality in apportioning their state legislatures, it also suggested that because of the greater number of seats in state legislatures and the closer relationship between local and state governments, greater flexibility could be accorded the state in its implementation of the one man, one vote principle.[16] In addition to the considerations suggested in *Reynolds*, the *Mahan* Court also found that if the rigid *Wesberry* rule were applied to the Virginia reapportion-

7. Va. Code Ann. § 24.1-12.1 (1973).

8. Revised Va. Const., art. VII, §§ 2-3.

9. 410 U.S. at 319.

10. 330 F. Supp. at 1140.

11. Id. at 1147.

12. 410 U.S. at 320-21 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)) (footnote omitted).

13. 376 U.S. 1 (1964). See Dixon, Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 Mich. L. Rev. 209 (1964); Comment, Congressional Reapportionment: The Theory of Representation in the House of Representatives, 39 Tul. L. Rev. 286 (1965).

14. The Court based its decision on an analysis of U.S. Const. art. I, § 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."

15. 377 U.S. 533 (1964).

16. Id. at 579.

ment the practical consequences would be the impairment of the "normal functioning of state and local governments."[17] While Justice Rehnquist stated that distinction between the standards of *Reynolds* and *Wesberry* had been recognized by the Supreme Court in two distinct lines of cases, it appeared that *Mahan* was the first state reapportionment case in which the Court had the opportunity to apply the flexible standard suggested in *Reynolds*.[18]

While the *Reynolds* standard is flexible, that flexibility is qualified by *Mahan* in two important ways. First, permissible flexibility includes " 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.' "[19] Secondly, the purpose of a flexible rule is to permit the state to follow a rational policy in reapportionment.[20] The *Mahan* Court underscored this reasonablness factor: "the proper equal protection test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.' "[21] It follows that so long as its action is neither arbitrary nor discriminatory a state need only strive for substantial equality in reapportionment and it may be guided by rational policy considerations when deviating from the mathematical ideal. The Court found that respect for the integrity of political subdivision boundaries was a legitimate state interest under the facts in *Mahan*.[22] While stating that it was still possible for mathematical deviations to become so large that no state interest could save the reapportionment plan, the *Mahan* Court was unwilling to define the upper limits of its flexible standard.[23]

17. 410 U.S. at 323.

18. Id. at 322. While the constitutional underpinnings for separate standards appear sound, the existence of distinct lines of cases is far from clear. It appears that the Court, after establishing an absolute rule for congressional cases in Wells v. Rockefeller, 394 U.S. 542 (1969), and Kirkpatrick v. Preisler, 394 U.S. 526 (1969), next applied it in a case involving local government in Hadley v. Junior College Dist., 397 U.S. 50 (1970). Local reapportionment cases decided up to 1970 are analyzed in Martin, The Supreme Court and Local Reapportionment: The Third Phase, 39 Geo. Wash. L. Rev. 102 (1970). However, in dictum, Justice White in Ely v. Klahr, 403 U.S. 108, 111 (1971), approved a lower court's application of the Kirkpatrick standard to a state reapportionment. But see Note, Reapportionment—Nine Years into the "Revolution" and Still Struggling, 70 Mich. L. Rev. 586 (1972).

19. 410 U.S. at 325, quoting Roman v. Sincock, 377 U.S. 695, 710 (1964). Thus, apportionment statutes which respect traditional subdivisions which subdivisions were themselves originally the result of discriminatory action by the state are open to challenge. See Bussie v. Governor of La., 333 F. Supp. 452, 460-61 (E.D. La.), aff'd with modifications sub nom. Bussie v. McKeithen, 457 F.2d 796 (5th Cir. 1971), vacated and remanded sub nom. Taylor v. McKeithen, 407 U.S. 191 (1972).

20. 410 U.S. at 324-25, citing both Reynolds v. Sims, 377 U.S. 533, 579 (1964), and Davis v. Mann, 377 U.S. 678, 686 (1964).

21. 410 U.S. at 326.

22. Id. at 328.

23. "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." Id. at 329.

The Court then considered the statute reapportioning the Virginia Senate.[24] The Senate plan achieved mathematical precision, but by arbitrarily assigning voters to a district in which they did not reside.[25] In addition to being an impermissible use of the flexible apportionment standard because of its arbitrariness, the plan clearly violated a constitutional ban on discrimination against voters on the basis of their occupation.[26]

The dissent in *Mahan* argued that the constitutional standard to be applied in state reapportionment cases is the same regardless of the level of government involved: "the paramount goal of reapportionment must be the drawing of district lines so as to achieve precise equality in the population of each district."[27] Deviations can be justified only by a showing that "some critical governmental interest"[28] will be jeopardized. In urging a rule of necessity to justify such deviations the dissent relied on *Swann v. Adams*[29] and *Kilgarlin v. Hill*.[30] However, in *Swann* the reasons required to justify variations from a mathematical ideal were characterized as "acceptable"[31] and not as "critical." Additionally, the magnitude alone of the deviations was sufficient to dispose of the plan despite findings by the district court that the plan did not discriminate against any section of the state.[32] *Kilgarlin v. Hill* also can be harmonized with the result in *Mahan*. The maximum deviation in the plan challenged in *Kilgarlin* was 14.84 percent. The district court approved part of the reapportionment plan because the deviations resulted from an effort to respect existing county boundaries and because the plaintiff was unable to sustain the burden of proving the unconstitutionality of the legislation.[33] The Supreme Court reversed because the record failed to "demonstrate why or how respect for the integrity of county lines required the particular deviations."[34] In *Mahan*, on the other hand, respect for political subdivisions was shown to be related to a rational state objective—

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24. Va. Code Ann. § 24.1-14.1 (1973).

25. 410 U.S. at 330. A group of naval personnel homeported in one district was assigned for voting purposes to the district where the group was counted in a recent census, although they actually resided elsewhere.

26. Id. at 332. "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." Davis v. Mann, 377 U.S. 678, 691 (1964).

27. 410 U.S. at 339 (Brennan, Douglas & Marshall, JJ., concurring in part and dissenting in part) (footnote omitted).

28. Id. at 340.

29. 385 U.S. 440 (1967).

30. 386 U.S. 120 (1967).

31. 385 U.S. at 443. The Court in Swann relied on Reynolds v. Sims for the proposition that "mathematical exactness is not required in state apportionment plans." Id. at 444.

32. Id. at 444.

33. Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), rev'd sub nom. Kilgarlin v. Hill, 386 U.S. 120 (1967) (per curiam). The district court held another aspect of the plan regarding certain flotorial districts unconstitutional because the resulting dilution of votes was racially discriminatory. Id. at 410.

34. 386 U.S. at 124 (1967).

representation in the state legislature geared to a constitutional provision for local legislation.[35]

B. *Historical Perspective*

Viewed in the perspective of the twenty-seven-year-long debate over reapportionment, the new flexible standard enunciated in *Mahan*, reflects both a concern for local interests and a distrust for mathematical decision-making. These two themes have appeared consistently in opinions in the leading state reapportionment cases. In dicta in *Colegrove v. Green*,[36] Justices Frankfurter and Rutledge rejected the idea of precise mathematical equality in voting. Both viewed the personal right to an equal vote as one that must be balanced with the state's interest in the effective representation of the state's numerical minority.[37] In five separate opinions written in *Baker v. Carr*,[38] each writer agreed that legitimate state interests may be considered in any reapportionment plan without violating the fourteenth amendment.[39] Justices Clark and Stewart advanced the "rational plan" theory, described as an attempt "to straddle the concededly treacherous shoals of decision."[40] They first articulated this theory in their separate opinions

35. 410 U.S. at 329.

36. 328 U.S. 549 (1946).

37. "If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the Government and the state. There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution." Id. at 566 (Rutledge, J., concurring).

38. 369 U.S. 186 (1962).

39. Justice Douglas: "Universal equality is not the test; there is room for weighting." Id. at 244-45. Justice Clark: "No one . . . contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting." Id. at 258. Justice Stewart: "The Equal Protection Clause 'permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.'" Id. at 266 (citation omitted). Justice Frankfurter: "Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments." Id. at 269 (dissenting opinion). Justice Harlan: "It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account." Id. at 333 (dissenting opinion). The rational plan theory advanced by Justice Clark is a key element in the conceptual background against which the reapportionment dialogue is conducted. See Neal, Baker v. Carr: Politics in Search of Law, 1962 Sup. Ct. Rev. 252, 289-90; A. Bickel, Politics and the Warren Court 181 (1965).

40. E. McKay, Reapportionment: The Law and Politics of Equal Representation 135 (1965). Justice Stewart's views on proportional representation are analyzed in Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 Sup. Ct. Rev. 1, 31-35.

in *Reynolds v. Sims*.[41] The test was framed negatively, that is, " 'a crazy quilt,' "[42] or a reapportionment plan "completely lacking in rationality"[43] would clearly reveal invidious discrimination. The majority of the Warren Court rejected any reapportionment analysis based on rational state objectives and in later cases applied the test of absolute numerical equality to cases involving congressional and local elections.[44] Census figures continued to be used as the basis for reapportionment plans while members of the Court argued that census figures are notoriously inexact and that mere head-counting was as consistent with gerrymandering as it was with fair and equal representation.[45]

In addition to its place in the conceptual framework of the reapportionment debate, the *Mahan* standard should also be viewed against the broader background of the protection of personal rights afforded by the fourteenth amendment.[46] For example, in statutory discrimination cases the Court has given the states broad discretion to promote local interests:

> [T]he Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[47]

41. 377 U.S. 533 (1964).

42. Id. at 588 (Clark, J., concurring).

43. Id. (Stewart, J., concurring).

44. Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968); Swann v. Adams, 385 U.S. 440 (1967). See also McKay, Reapportionment and Local Government, 36 Geo. Wash. L. Rev. 713 (1968). In Hadley, the rule of absolute mathematical equality was pushed to its furthest point for any level of government: "[W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ." 397 U.S. at 56. The dissents in the Hadley case were particularly vigorous in challenging the application of the majority's absolute rule to lower levels of government, with no consideration given to legitimate local interests, and seemed to foreshadow the more flexible rule to be announced in Mahan. Justice Harlan: "The facts of this case afford a clear indication of the extent to which reasonable state objectives are to be sacrificed on the altar of numerical equality." Id. at 63. Chief Justice Burger: "Yet the Court has given almost no indication of which non-population interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local, specialized unit of government." Id. at 70-71.

45. "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander." Wells v. Rockefeller, 394 U.S. 542, 555 (1969) (White, J., dissenting). See also Elliot, Prometheus, Proteus, Pandora and Procrustes Unbound: The Political Consequences of Reapportionment, 37 U. Chi. L. Rev. 474 (1970).

46. See Note, The Apportionment Case: An Expanded Concept of Equal Protection, 1965 Wis. L. Rev. 606, 649; cf. Dixon, Reapportionment Perspectives: What is Fair Representation? 51 A.B.A.J. 319 (1965).

47. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (citations omitted). See gener-

While this statement of the equal protection test demands minimum content in the rational basis of a valid apportionment statute, the Court did not apply it in any of the apportionment cases decided during the 1972 Term.[48] Although this may be the direction in which the Court is heading, the decisions in *Mahan* and *Gaffney* seem to require something more than a merely conceivable rational basis. The choice, made in *Baker v. Carr*, of apportionment analysis under the equal protection clause of the fourteenth amendment[49] rather than under the guaranty clause[50] gave the Court the option of balancing the burden on the personal right to vote with the benefit to public interest, and the additional option of determining whether the scales would be pre-weighted in favor of one side.

In *Mahan* the Court considered both sides of the balancing equation and the result was a shift from analysis centered upon personal rights to one viewing both the personal right and the integrity of the political body:[51] "[T]he right to vote is not simply the right to an equal vote or to equal participation in elections, but more significantly is the right to cast a vote appropriately restricted on the basis of the nature and functions of the governmental body in question, the nature of the burdens imposed on voters, and the government's justifications for the restrictions."[52]

The reapportionment standard in state legislative cases outlined in *Mahan* can be stated as follows: the state may reapportion legislative districts so as to achieve equality in population and also to further legitimate state interests, *provided* that its actions are neither arbitrary nor discriminatory,[53] and *provided*

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ally Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973).

48. State courts appear to have anticipated the reapportionment rule developed by the Supreme Court last term: "The standards used by the state courts in apportionment cases are remarkably similar to the flexible test developed by the Supreme Court to measure state action against the equal-protection clause, the test of rational basis. . . . The view that the equal-protection clause is in essence 'a demand for purity of motive' has been persuasively argued." Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1085-86 (1958) (footnote omitted).

49. That choice is analyzed in Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law. 367 (1963); Note, Reapportionment, 79 Harv. L. Rev. 1228, 1241-43 (1966).

50. The Court historically has disposed of cases under the guaranty clause (U.S. Const. art. IV, § 4) on political question grounds; see, e.g., Pacific Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Bordon, 48 U.S. (7 How.) 139 (1849). These cases are distinguished in Baker v. Carr, 369 U.S. 186, 218-29 (1962).

51. See generally Kauper, supra note 4.

52. Comment, Fundamental Personal Rights: Another Approach to Equal Protection, 40 U. Chi. L. Rev. 807, 827 (1973).

53. See note 19 supra and accompanying text. Where a state's requirements for entering the political process are deemed to discriminate against minority groups the Court gives little weight to the state interest advanced in justification. See Bullock v. Carter, 405 U.S. 134 (1972) (candidate filing fees unconstitutional). But see Rosario v. Rockefeller, 410 U.S. 752 (1973) (registration requirements upheld). The actions which will be held discriminatory include: denying minority groups access to the political process (White v. Regester, 412 U.S. 755, 765-70 (1973)); minimizing or cancelling out the voting strength of racial or polit-

further, that deviations from numerical equality are not so large as to outweigh state policy objectives. Within six months, the Supreme Court in *Gaffney* had the opportunity to define the limits of the flexible *Mahan* standard.

III. Prima Facie Case and Possible Defenses

A. Gaffney v. Cummings

The Connecticut General Assembly appointed a three-man bipartisan board to formulate a new reapportionment plan for the state. The Board followed a principle of "political fairness" in outlining a reappointment plan for the state. The "political fairness" principle meant that "the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats."[54] The plan resulted in an average deviation of 1.9 percent and a maximum deviation of 7.83 percent.[55] The plan was challenged on grounds that in achieving such a *low* numerical deviation an excessive number of town boundaries were cut and that the "political fairness" principle resulted in a Republican gerrymander. The district court held the plan unconstitutional because of the dilution of votes in the more populous towns and the policy of partisan political structuring.[56]

On appeal, the Supreme Court noted that three of the four alternative plans suggested by the plaintiff involved deviations greater than those in the Board's plan.[57] On the other hand, the Court noted that, in any case, a resourceful mind might hit upon a plan more mathematically precise by a percentage point and thus make a case for invalidating an existing plan. The Court found a need to cut off judicial involvement in such litigation.[58] Reversing the district court, the Court established the lower limit of the flexible *Mahan* standard:

> It is now time to recognize, in the context of the eminently reasonable approach of *Reynolds v. Sims*, that minor deviations from mathematical equality among state legislative

ical elements of the population (Whitcomb v. Chavis, 403 U.S. 124, 143-50 (1971); Burns v. Richardson, 384 U.S. 73, 88 (1966); Fortson v. Dorsey, 379 U.S. 433, 439 (1965)); and depriving a racial group of their pre-existing municipal vote (Gomillion v. Lightfoot, 364 U.S. 339 (1960) (based on the fifteenth amendment)).

54. 412 U.S. at 738.

55. Id. at 750.

56. Cummings v. Meskill, 341 F. Supp. 139, 150 (D. Conn. 1972), rev'd sub nom. Gaffney v. Cummings, 412 U.S. 735 (1973).

57. 412 U.S. at 739.

58. "And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard." Id. at 750-51.

It has been argued that the mathematical equality rule reduces judicial involvement. Irwin, Representation and Election: The Reapportionment Cases in Retrospect, 67 Mich. L. Rev 729 (1969).

districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.[59]

Minor deviations are those no greater than the maximum 7.8 percent involved in this case or the 9.9 percent involved in the companion case, *White v. Regester*.[60]

The absence of a prima facie case based on minor deviations is justified by the inherent inexactness of the census figures used,[61] by the rapid shifts in district populations,[62] and by the failure of census figures to reflect various classes of non-voting residents.[63] Failure to establish a minimum numerical threshold means that any mathematical deviation may be sufficient to render a reapportionment plan unconstitutional and in effect equates fair representation with numerical equality.[64]

The effect of the *Gaffney* holding is to reallocate the burden of proof in reapportionment cases. Under the former rule of *Kilgarlin v. Hill*,[65] the plaintiff had to prove only that deviations existed and that another plan could be formulated which would reduce those deviations. Presumably, deviations as low as 5 percent rendered apportionment plans subject to constitutional attack.[66] The *Mahan* standard, qualified by *Gaffney* and *White*, requires that a plaintiff show either a deviation at least exceeding 9.9 percent or an arbitrary discrimination before the burden shifts to the state. Once the burden has shifted, the state must justify the deviation by showing a competing rational state interest. In *Gaffney* the state interest sustained by the Court was "political fairness."[67] In effect, the Court recognized that the right to vote is essentially political rather than personal: it is only *one* element in fair and effective representation in government. Another element is the proportional representation of all interest groups in the state. Combination of the mathematical approach to reapportionment problems together with a winner-take-all electoral system could effectively nullify the representation of a state's minorities and their interests:[68]

Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely

59. 412 U.S. at 745.

60. 412 U.S. 755, 764 (1973). "Very likely, larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy.' " Id. (citations omitted).

61. 412 U.S. at 745-46.

62. Id. at 746-47.

63. E.g., non-resident military personnel, non-resident students, nonvoters otherwise eligible. Id. at 747.

64. Insistence on mathematical equality has led to the development of the much criticized multi-member districts. See, Washington, Does the Constitution Guarantee Fair and Effective Representation to all Interest Groups Making up the Electorate, 17 How. L.J. 91 (1971).

65. 386 U.S. 120 (1967).

66. T. O'Rourke, Reapportionment Law, Politics, Computers 28 (1972).

67. See note 54 supra and accompanying text.

68. T. O'Rourke, supra note 66, at 31.

on mathematical equality among district populations. . . . An unrealistic over emphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.[69]

In dictum, the Court in *Gaffney* pointed to a number of factors other than proportional representation which legitimately may be taken into account in a reapportionment plan.[70] For example, a state may seek to preserve the integrity of its political subdivision boundaries where there is an important relationship between the subdivisions as separate political entities and their representation in the legislature.[71] A state may consider whether there is a compelling need for coordination between varying levels of government within the state.[72] Similarly, where a local government requires specialized knowledge of the problems of a rural area contained within the boundaries of a city, mathematical deviations will be justified in order to provide for such knowledge.[73] Deviations are justified where the governmental body performs essentially administrative functions.[74] The desire of a group of citizens who are willing to forego equal representation in order to be joined with another district sharing their peculiar problems and interests will also be given effect.[75]

B. *Historical Analysis*

The dangerous possibility that minorities could be excluded from the political process by an artificial and unrealistic apportionment standard had been discussed in previous state reapportionment cases. In *Colegrove v. Green*, Justice Frankfurter related the congressional requirement of districting to minority representation:

The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils."[76]

69. 412 U.S. at 748-49 (footnote omitted). But see Edwards, The Gerrymander and "One Man, One Vote," 46 N.Y.U.L. Rev. 879, 896-97 (1971). See also Dixon, Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 Mich. L. Rev. 209 (1964).

70. 412 U.S. at 749. The Court did not explain in detail the nature of these legitimate state interests, but only referred to previous cases where various state interests had been upheld. See notes 71-74 infra.

71. Mahan v. Howell, 410 U.S. 315 (1973). See note 22 supra and accompanying text.

72. Abate v. Mundt, 403 U.S. 182, 186 (1971).

73. Dusch v. Davis, 387 U.S. 112, 116 (1967).

74. Sailors v. Board of Educ., 387 U.S. 105, 110 (1967).

75. Burns v. Richardson, 384 U.S. 73 (1966).

76. 328 U.S. at 553 (citation omitted).

In *Baker v. Carr*, Justice Harlan argued that representation of an agricultural minority in a state might justify electoral imbalance.[77] In *Reynolds v. Sims* he argued that "people are not ciphers" and that legislators must speak "for their interests—economic, social, political."[78] Justice Stewart argued in *Lucas v. Colorado Gen. Assembly*[79] that the majority view expressed in the Court's insistence on numerical equality was simply one political theory among many and that a state should be able to innovate "the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority."[80]

In *Gaffney*, the Court seems to have expressed a lack of confidence in the logic of pre-*Mahan* reapportionment decisions to assure proportional representation of interests in state legislatures.[81] The new rationale is based on a functional conception of the state legislature and therefore tolerates insubstantial infringements on personal rights. The Court in *Gaffney* and *White* indicated the numerical threshold which must be crossed before the flexible *Mahan* standard becomes applicable and suggested some of the rational objectives which may be pursued by states to justify deviations above the threshold level, including the proportional representation of significant minority interest groups. In addition, judicial scrutiny should continue to be exercised on all plans challenged on the other pole of the *Mahan* rule: arbitrariness or discrimination, regardless of the plan's numerical perfection.[82]

IV. Conclusion

The state reapportionment cases decided during the 1972 Term, *Mahan* and *Gaffney*, represent not so much a retreat from the rule of "one person, one vote" as a shift in emphasis from the concept of the vote as a personal right, to a view of the vote as a part of the total institutional political process. By viewing the apportionment problem as one involving a cluster of rights and interests the Court has fashioned a standard for judicial decision-making which, in a proper case, requires the district court to examine the factual political situation in its state in its entirety.

The flexibility of the new rule appears to be its chief advantage over the former, purely mathematical standard. In the first instance, it aids judicial administration by disregarding de minimis variations from mathematical equality. At the same time, it allows purely arbitrary apportionments, possibly including

77. "Indeed, I would hardly think it unconstitutional if a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities." 369 U.S. 186, 336 (1962) (dissenting opinion).

78. 377 U.S. 533, 623-24 (1964) (dissenting opinion).

79. 377 U.S. 713 (1964).

80. Id. at 748-49 (dissenting opinion).

81. But see Irwin, supra note 58.

82. 412 U.S. at 751-52.

gerrymanders, to be challenged notwithstanding their mathematical symmetry. While it might be argued that federal judges are ill-equipped to make the pragmatic political decisions which the Supreme Court seems to require, or that apportionment litigation will become hopelessly bogged down in the testimony of political scientists, sociologists and others,[83] the answer must be that an apportionment decision will always be fundamentally political in nature and impact, regardless of the standard used, and that the most effective political decision made by a court will be one on which it is most fully informed.[84]

Of necessity, critical evaluation of *Mahan* and *Gaffney* is incomplete until the flexible standard they announce is applied in specific cases and given more content.[85] The Court appears to have laid the conceptual foundation for a judicial definition of republican government; it must still define the state interests which will be allowed to become part of the superstructure.

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83. See Irwin, supra note 58, at 748-49.

84. See R. Dixon, Democratic Representation: Reapportionment in Law and Politics 19-20 (1968).

85. See Israel, Non-population Factors Relevant to an Acceptable Standard of Apportionment, 38 Notre Dame Law. 499 (1963).