The 1980 Census and "One Man-One Vote": Do We Yet Know What Fair Representation Is?

by

Robert G. Dixon, Jr.

The 1980 Census and "One Man-One Vote": Do We Yet Know What Fair Representation Is?

by
Robert G. Dixon, Jr.

I. Introduction

What is this thing called legislative reapportionment and congressional redistricting that the 1980 census is bringing around again?

Of course, we all know certain jokes about it. After the Supreme Court in the *Baker* case in 1962 and the *Reynolds* case in 1964 mandated that legislative districts must be substantially equal in raw population terms, a frenzy of activity followed in state legislatures which, as you know, control the drawing both of their own district lines and congressional district lines. The old signal, S-O-S, acquired a new meaning: "Save Our Seats." And Lord Acton's old dictum about power and corruption was transformed to read: All power corrupts, but the prospect of being out of power corrupts absolutely.

Somehow the Supreme Court, sailing irresponsibly above a fray that it had instigated without giving any meaningful guidelines for resolving it, avoided such derogatory humor. After all, there *had* been a serious problem of population malapportionment among districts, and the Supreme Court *had* done something about it. As I said at the time, and despite my admiration for Justice Frankfurter's dissent in *Baker v. Carr,* the time had come when some judicial intervention in the politics of the people was essential to have an effective politics of the people. But the Supreme Court did not escape all jibes. Professor Paul Freund of Harvard said that the Court's early "one man-one vote" decisions reminded him of the little boy who had just learned to spell the word "banana" — ba-na-na-na-na — but not where to stop.

Now back to my first question: What is this thing called legislative reapportionment and congressional redistricting — or simply, districting of legislative seats? We must look back a little before we can move forward with clarified concepts.

From England we inherited the distinctively non-European concept of electing members of legislative bodies from districts, normally single-member districts. However, to focus narrow-mindedly on districting, per se,

which has been the tendency of the Supreme Court, is to overlook the crucial point that matters of districting, line-drawing, computerizing, opting for single-member or multimember districts, and the like, are all *means:* means to what ultimate ends and *purposes*?

If I were to pause here, in professorial style, and ask what is the ultimate purpose to which districting is merely a means, you probably would all shout with one voice: *representation.* But then if I asked, what is representation, there probably would be a thoughtful silence. Let us explore that basic concept for a moment. In Chief Justice Warren's opinion for the Court in *Reynolds,* the concept does appear in the statement that "Fair and effective representation *for all citizens* is concededly the basic aim of legislative apportionment." However, the concept is not explored, or fleshed out, or related to any feasible means, or — in my own view — understood by Warren. Note in particular the phrase "representation for all citizens," for it goes to a deeper question. That question is: Does the ill-defined "one man-one vote" concept which the Supreme Court derived from the "equal protection of the laws" clause in the Constitution create an *individual* constitutional right or a *group* constitutional right, or something else?

In the original sea of litigation, the plaintiffs based their attack on unequal population districts by talking of the right to vote — which certainly is a constitutionally protected individual right, if we are talking about such things as access to the polls and prohibition of discrimination in application of voter eligibility rules. However, an attack on the districts which are the basis for the composition of the legislature is something more than an individual right-to-vote matter. Clearly, as Justice Frankfurter perceived in his dissent in *Baker v. Carr* in 1962, the reality of group interest, if not an actual group right, emerges. Only if you or I, as voters, are located in a district where many others share our values do we have a prospect of actually electing a representative or of being in such a balance-of-power position that the winner cannot afford to ignore us. As Justice Frankfurter put it in his *Baker* dissent:

> "What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful — in short that Tennessee has adopted a basis of representation over which they are dissatisfied. Talk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy — in order to establish an appropriate frame of government for the State of Tennessee and thereby for all of the States of the Union." [*Baker v. Carr,* 369 U.S. 186 at 299-300]

Thus, we forfeit clarity of analysis in discussing legislative districting unless we recognize at the outset that it does *not* involve mere vindication of a personal right. District line drawing involves coalescing or separating the partisans of one cause or another — with direct consequential effect on the political parties primarily identified with one or another interest group.

Perhaps the core problem can be stated somewhat simply: our *ideals* about political representation and our implementing *election system* do not fit together neatly. One of the major ideals, here as well as in Europe, is to have the political parties (who, after all, still organize and run our legislatures), win seats in legislatures roughly proportional to their share of the popular vote. That is the core meaning of the term "fair representation." To the extent that other group interests can be factored in, we probably would like that also. Such an effort, however, would be a highly speculative process and probably cannot be carried beyond recognition of the fact that the support for any candiate — or political party — is itself a collection of "interest factions," with varying degrees of internal organization, cohesiveness, and visibility. A key stumbling block to formal attempts to factor in subinterests is that district representation is a zero-sum game. Explicit favoring of one subgroup adversely affects another group (and the political party with which it is aligned).

This fair representation ideal, which might be called the ideal of "proportionate representation" of political parties (and the shifting interests subsumed within them), does not dovetail well with an election system based on use of geographic legislative districts and the plurality rule (or winner-take-all rule) within each district. Obviously, if there were ten congressional districts in a state and the Democratic Party polled 55 percent of the vote in each district while the Republicans were polling 45 percent in each district, the Democrats would have a disproportionate 100 percent of the representation in the congressional delegation, and the Republicans would have a disproportionate zero percent of the representation. Indeed, as is well recognized in political science, even under ideal circumstances a district system of electing legislative representatives always tends to overrepresent the dominant party in a given election year. That party's dominance tends to be reflected across many districts — certainly across all of the so-called balanced or "swing" districts.

But we live with this system because we are used to it and because it accomplishes certain other ideals, or at least beneficial results. It accomplishes the ideal (or strongly tends to) of preserving a two-party system. A two-party system operates to produce such associated benefits as a clear governing majority, governmental stability, and pinpointing of governing responsibility. The Europeans do not use our kind of district system but use proportional representation systems whereby parties are guaranteed seats in proportion to their percent of the popular vote. However, a proportional representation system strongly tends to invite the formation of a multi-party system because even a small party can get some kind of a "win" in terms of seats in the Parliament. The result usually is that no party wins a majority of the seats, thus necessitating government by unstable coalitions of minority parties.

In short, proportional representation election systems yield more proportionate representation than do district systems but sacrifice the coordinate goals of a governing majority, governmental stability, and clear lines of responsibility.

I am not, of course, recommending a shift to proportional representation. Nevertheless, to appreciate what we have, it is helpful to note in passing this alternative system which dominates Europe and many other areas. It substantially avoids the very difficult process of districting, avoids gerrymandering as that term is commonly understood, and produces significant fairness in representation. Indeed, when our district system produces disproportionate results in terms of representation of political parties and associated interests in the elected legislature, we tend to feel that something has gone wrong.

II. The Effect of the Early Cases

To put the recent American experience in historical perspective, we must recognize that the issues, and the effects, in the early reapportionment cases in the Sixties were simpler than the issues which now confront us as the non-elected federal judiciary increasingly uses the bare "one man-one vote" slogan as the basis for intervening in the national political process. A bit of this background should be noted before we pass on to the urgent current issues of the degree of population equality required, and gerrymandering.

Until 1962, the court followed a hands-off policy in respect to legislative districting. Justice Frankfurter in his 1946 controlling opinion in *Colegrove v. Green*, which involved the congressional districts in Illinois, had warned that it would be "hostile to a democratic system to involve the judiciary in the politics of the people." 328 U.S. 549, 553-54. The problem before the Court then, as in 1962 in *Baker v. Carr*, 369 U.S. 186 (1962), was a gross population malapportionment. At the time of *Colegrove v. Green*, the population disparity between the largest and smallest congressional districts in Illinois was the most extreme in the nation: 914,053 to 112,116. At the time of *Baker* in 1962, which was a challenge to the malapportioned state legislative districts in Tennessee, disparities between largest and smallest districts of 10 to 1 or higher were common in most states for both congressional and state legislative districts. In Tennessee, for example, lower-house districts ranged from 42,298 down to 2,340.

Baker v. Carr was responsive to the fact that political avenues for redress had become dead-end streets. With disparities of this dimension, any serious move toward equalization would destroy the districts of a substantial number of legislators. When the Supreme Court reached the merits of the matter two years later in 1964, it predictably announced a constitutional principle of population equality. It said in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that congressional districts should be equal "as nearly as is practicable," and said in *Reynolds v. Sims*, 377 U.S. 533 (1964), that state legislative apportionments must be "based substantially on population." The difference in wording was

inconsequential, and for a time the cases on congressional redistricting and on state legislative reapportionment were cited interchangeably.

Within a short two or three years, the problem that had given rise to these cases had been totally corrected. That problem, to repeat, was gross population malapportionment due to legislative nonaction, which normally resulted in substantial overrepresentation of rural and small-town areas and substantial underrepresentation of the growing urban and suburban areas. In other words, the original problem was one of *regional imbalance in political control,* in large measure.

However, the reapportionment-redistricting revolution quickly transcended its origin. Because the concept of substantial population equality is not a self-defining concept, there was a strong tendency in lower courts, with the Supreme Court following, to make the population equality requirement ever more stringent.

Two tactical factors contributed to this development. First, the courts began to insist that all population deviations be justified in terms of a consistent, logical application of identifiable state policy. This was a practical impossibility, both because all law-making including redistricting is a compromise and adjustment process and not an exercise in logic and, more importantly, because nonpopulation policies — even a policy of following political subdivision lines insofar as practicable — cannot be made into an objective process. Second, it was always easy for a plaintiff to offer a slightly more "equal" plan than the official state plan. Of course, although offered in mock innocence as a plan oriented only to census figures, the plaintiffs' plans invariably were also more palatable to the plaintiffs' political interests which motivated the plaintiffs' suit. Hence, there was pressure on the state to move in the direction of ever tighter districting population equality — in strict census data terms — in order to maximize the chances of prevailing in court; but plaintiffs still often prevailed with last-minute "tighter" plans. Paradoxically, a direct corollary of insistence on ever-smaller population deviations — from 15 percent which was an early rule of thumb and is tighter than the English follow, down to 10 percent, 5 percent, or lower — was to maximize the need to cut ever more political subdivision lines. This also maximized the freedom of choice in drawing new lines, and consequently greatly increased opportunities for politically imbalanced redistricting; i.e., gerrymandering.

In this subtle way, based more on trial tactics and the ambiguities in the Supreme Court's basic opinions in 1964 than on an organized body of theory, the issue shifted from the original relatively simple question of safeguarding against *gross population disparities* to the complex question of safeguarding against *misrepresentation of interests.* The misrepresentation of interests problem arose as district lines were fine-tuned nominally in pursuit of population equally but concurrently and predominantly in pursuit of one or another political result.

It cannot be expressed too strongly or too frequently that equal population districting has no necessary link with fairness. At any given level of population

equality — 5 percent maximum deviation from ideal or 1 percent — a computer can produce hundreds of equally "equal" district plans. However, each plan will cluster interest groups a different way and achieve a quite different political effect. No district line is "neutral."

III. The Apparent Current Supreme Court Approach to Population Equality in Districting

The modern era on population equality begins with two congressional districting cases in 1969: *Kirkpatrick v. Preisler*, from Missouri, and *Wells v. Rockefeller*, from New York. Here the Court ignored Justice Cardozo's famous warning about the danger of pushing any principle beyond the limit of its logic and proceeded to do just that. Justice Brennan's majority opinion flatly states that the Court "requires a State to make a good-faith effort to achieve precise mathematical equality." [*Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31.] He then proceeded to list and reject every conceivable countervailing "fair representation" interest. This extremism on numbers split the court 5-4.

Sharp dissents were filed by Justices Harlan, Stewart, White, and Fortas. They perceived that on its face the opinion was a charter to gerrymander because district lines could be drawn anywhere, so long as the resulting districts were equal in terms of the census data. Indeed, one of the plantiffs perceived the case just that way and plaintively asked, "Can we appeal from a decision that we won?" Also, a majority party reapportioner in one of the states, with more candor than discretion, said that it was now just a matter of slicing the salami — and the salami is in our hands.

This absolute equality rule still applies for congressional districts as made clear in 1973 in a case from Texas, *White v. Weiser*, 412 U.S. 783. The anomaly of *Weiser* is that it endorsed a rule which three members of the Court (the Chief Justice and Justices Powell and Rehnquist) said that they would not have supported had they been on the bench at the time of the 1969 *Kirkpatrick-Wells* decision, and that two other Justices had opposed at its inception in 1969 (White who wrote the opinion in *Weiser*, and Stewart).

A further anomaly is that although it is true, as Justice White observed, that even a one-percent deviation from ideal in congressional districts averaging 450,000 yields 4,500 census bodies, the plan the Court favored in *Weiser* transcended census accuracy. There is an acknowledged margin of error in the census of at least 2 percent, which yields 9,000 census bodies in the context of congressional districting. Yet the redistricting plan the Court favored in 1973 for Texas was claimed to have a maximum deviation from ideal, in census terms, of 400 in excess of the ideal and 10 under the ideal. At this point, population absolutism enters the theater of the absurd.

For state legislatures (and local government councils, too, that are composed on a district basis), we enter the 1980 round of reapportionment with multiple signals from the Supreme Court. Under certain conditions there may be more flexibility — or, to put it the other way around, less absurdity —

than the "ground zero" rule in the *Kirkpatrick-Wells* congressional districting cases. In 1973 the Court recognized two limited conditions of flexibility in cases from Virginia and Connecticut. In *Mahan v. Howell,* 410 U.S. 315, the Court had before it a reapportionment plan for the Virginia legislature. The most deviant district was 9.6 percent from ideal. This was held constitutional under the special justification that by keeping all districts within — indeed most districts well within — the 9.6 percent deviation limit, Virginia (with one or two minor exceptions) was able to avoid cutting across political subdivision lines in the process of drawing the lines for the state senatorial and assembly districts. The *Mahan* case does not tell us that a 9.6 percent maximum deviation is in general, or even presumptively, constitutional. It must be accompanied by actual accomplishment of the other valid state policy of "maintaining the integrity of political subdivision lines."

The *Mahan* case may be more unique than appears at first glance. My guess is that in most states an attempt to maintain the integrity of all political subdivision lines would require a maximum deviation from ideal considerably exceeding 9.6 percent, and that the court would not approve. Virginia was in the fortunate circumstance of having a great many counties to use as building blocks, and also a relatively even spread of population across the state.

The other state legislative reapportionment case in the Supreme Court in 1973, *Gaffney v. Cummings,* 412 U.S. 735, may have more general application to the population equality question. The plan under attack had been devised by the bipartisan commission with tie-breaker arrangement specified in the state constitution. The population deviations were so miniscule that an innocent person — and the nation and the press seem to be especially innocent in this field — might have wondered why the plaintiffs raised the issue. The short answer is that all district lines are political. The two major parties in Connecticut were jockeying for a power position, and the population equality argument was simply one of several ploys used by the plaintiffs in the hope of blocking the official state plan, and sneaking one of their own carefully honed-partisan plans into existence at the last moment by order of our friendly United States District Court, on the ground that time had run out and an election was imminent.

Under the official plan being attacked, the maximum deviation from ideal was 0.93 percent (787 "census persons") for state senate districts, and 3.93 percent (789 "census persons") for assembly districts. If you were listening carefully to this last sentence, two things are noteworthy about that statement. First, how is it that a deviance of a handful of "census data bodies" (i.e., under 800 in each instance) produces such a wide difference in *percentage* deviations? The simple answer is that Connecticut assembly districts are numerous and average only about 20,000 "census persons," while senate districts are fewer and larger and average 84,000 "census persons." Obviously a deviance of 800 looms four times larger, *percentage-wise,* on a base of 20,000 than on

a base of 84,000. Hence, to compare district deviations percentages, while ignoring the sizes of the districts, can be very misleading, if not downright dishonest. I would venture a small wager that this elemental aspect of districting is unknown to the vast majority of journalists in this country and probably to a high proportion of the federal judges who will review the 1980 census reapportionments. Truly we wallow in a sea of ignorance in this field.

The second thing noteworthy about these Connecticut population deviations is that the deviations of under 800 actually were smaller than the average size of the census units that reapportioners had to work with. The average size of the available census units was 11,000.

This reality, coupled with the 2 percent margin of error in the census count anyway, led me to suggest, in my brief to the Supreme Court on this branch of the *Gaffney* case, that the Court should get away from its practice of awarding victory to the challenger who can come in, however late, with a plan whose maximum deviation is a "tad" smaller than the deviation in the state plan; e.g., a maximum deviation of 700 rather than 779. To avoid this constitutionally demeaning "one body better" game, I urged on the Court the need to have a presumption of constitutionality for plans utilizing the census data in such fine-tuned fashion, thus placing on the plaintiffs the need to show real inequity rather than play the "one body better" game. I phrased it formally as follows:

> "Where the census units used to construct a state legislative reapportionment plan are the most refined available and are not so large as to be inherently unsuitable for creating districts of substantially population, a state legislative apportionment in which the population of the most deviant district deviates from ideal by no more than the average population of the census units used, the apportionment plan should be presumed constitutional. The plan should be sustained without more, absent a plaintiff's particularized allegation and proof in terms other than such small population deviations, that the plan is intended to or will operate in an invidiously discriminatory manner." [*Gaffney* Reply Brief for Appellant, pp. 10-11.]

The Supreme Court, dividing 6-3, embraced the idea, and in an opinion by Justice White expressed it as follows:

> "We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether these deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviation among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an individious discrimination under the Fourteenth Amendment which would entitle appellees to relief absent some countervailing showing by the State." [*Gaffney*, 4012 U.S. 735 at (1973).]

Following such a presumption of constitutionality in cases where the plaintiffs are challenging only such diminimus population deviations would go far to avoid endless, and on its face farcical litigation under the 1980 census.

IV. Gerrymandering

Perhaps the most important thing to say at the outset about gerrymandering is that *all districting is gerrymandering.* The function of line-drawing is to separate people into districts. But people are not fungible, like grains of wheat, so it matters a great deal, politically, where the lines are drawn. Add to this the fact that at any given level of population stringency a computer can spew forth hundreds of equally "equal" plans. However, each will have a different political effect and thus a very fine brew results.

Also journalists and cartoonists miss the mark when they make fun of turkey-shaped or long, slinky districts. Of course I do not recommend such districting per se. Perhaps many of them in the past were wholly invidious.

It is a new ball game now. If we are serious about the ultimate goal of *fair representation* as the concealed but real meaning of one man-one vote, then some district lines may have to be drawn in special fashion, whether shapely or not, in the cause of political opportunity. Indeed, that is the essence of the Voting Rights Act as now administered by the Department of Justice to create more black "safe seats." The focus is on a particular statewide (or less for a local election) representation purpose, not the shape. The Department of Justice is going pretty far in that direction, perhaps too far, but that would be the topic for a different paper.

There is not much constitutional law on gerrymandering; i.e., unfair districting. The reason is that the Supreme Court has shown great disinclination to get involved. The present state of the law seems to be that courts may consider gerrymandering, but plaintiffs have the burden of proving invidious discrimination.

The earlier cases were simple ones, involving multimember districts. Such districts, operating on a winner-take-all basis, tended of course to submerge both political and racial minorities. [*Fortson v. Dorsey,* 379 U.S. 433 (1965); *Burns v. Richardson,* 384 U.S. 73 (1966); *Whitcomb v. Chavis,* 403 U.S. 124 (1971). See also *White v. Regester,* 412 U.S. 755 (1973).] Because the underlying principle is a concern for fairness in political representation, logic dictates that claims of gerrymandering levied against *single-member* districting likewise should be within judicial power, whether or not there is an alleged racial discrimination overlay. That much does seem to be accepted, even though no invalidations have occurred in the Supreme Court on political gerrymandering grounds, absent a racial overlay.

Looking to the forthcoming state legislative reapportionments under the 1980 census, most of which will involve single-member districts, I venture to suggest that the most important precedent may be *Gaffney v. Cummings.* We have already looked at *Gaffney* in relation to its contribution to the

population equality issue. Its contribution to gerrymandering may be of equal or greater importance. The *Gaffney* majority opinion may be read as intimating that reapportioners should take all relevant data, including political data, into account but that they even have a constitutional duty to do so. The population aspects already have been discussed.

Plaintiffs also arranged a gerrymandering claim. They did not try to meet the constitutional gerrymandering test of proving intent to construct unfair districts. [*Washington v. Davis*, 426 U.S. 229 (1976)]. Indeed such proof would have been prima facie impossible because Connecticut had used a bipartisan commission with tie breaker, and that commission had consciously utilized past election results and other political data in an effort to achieve a "balanced" set of districts which would give each party a fair chance of capturing a share of seats in the legislature not widely variant from its statewide popular vote for legislative offices. Instead, they tried to argue that commission use of political data, even in the cause of "political fairness," was constitutionally forbidden.

The court rejected this claim in *Gaffney*, and the following quotation from Justice White's majority opinion seems to create a significant new principle in the law of gerrymandering. He said:

> "It may be suggested that those who redistrict and reapportion should work with census, not political, data, and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, *in which event the results would be both known and, if not changed, intended.*"
> [412 U.S. at 753 (Emphasis added.)]

In other words, "knowing ignorance" equals bad intent! If the Court meant this, reapportioners who merely feed population data into their computers operate at their peril!

V. Conclusion

I could continue on to discuss other aspects of the topic, such as the question of specifying districting standards by stature; however, it should be implicit from what I have chosen as my main themes that I have little faith in so-called districting "standards." Even "contiguity" and "compactness," which sound so innocent, could in some instances cause unfairness.

A compactness requirement rigidly enforced could be especially counterproductive. For example, a benign gerrymander in the sense of some asymmetrical districts may well be required in order to assure representation of submerged elements within a larger area. The trouble with shape requirements and most other so-called "standards" is that they focus on form rather than on the substance of effective political representation.

Districting method is more important than districting standards, and more important than anything is a disposition to have an open intake and a careful scrutiny, including prospective political performance. There is no substitute for using all the knowledge available and testing all proposed plans against all the knowledge available.