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Equal Protection in Legislative Apportionment: A New Double Standard

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The main reason to keep "generic name only" prescribing from becoming a reality, and to keep the ant substitution laws intact is that one drug is not the therapeutic or biologic equivalent of another and therefore a substituted drug could produce undesired effects. Many who agree with this statement admit that in many cases there would be no harmful effects where the substituted drug is chemically equivalent to the one originally prescribed. However, the fact that there are a few reported cases where substitution has been harmful, and an indication that more reports will follow as substitution proliferates, is sufficient grounds for arguing to keep the federal and state safeguards as they are. Until a therapeutic or biologic equivalency test can be established, changes in the present laws would be premature. If in the future a doctor could prescribe a generic drug with confidence that it would be therapeutically equivalent to the brand name drug, and that it has been through extensive clinical tests—at that point a change in the laws should be considered.

If prescription drug prices are indeed too high, then other remedies besides allowing substitution or generic prescribing should be considered to lower them. It has not been sufficiently proven that the proposed changes would result in a savings to the consumer. However, even if there was a savings, as long as there are even a few cases of therapeutic nonequivalency and the subsequent danger of serious or fatal injury occurring from this lack of equivalency, the present laws should remain intact.

MICHAEL DANA MASON

Equal Protection in Legislative Apportionment: A New Double Standard

INTRODUCTION: MALAPPORTIONMENT: INEQUALITY AND THE INDIVIDUAL'S VOTE

In *Mahan v. Howell*,¹ the Supreme Court gave legal sanction to limited malapportionment. In this apparent reversal of its prior stance, the Court in *Mahan* held, *inter alia*, that a Virginia statute which apportioned the House of Delegates by traditional county and city boundaries was valid

¹ 93 S. Ct. 979 (1973). The Virginia statute provided for a combination of 52 single-member multi-member, and floater districts from which 100 delegates were to be elected. 93 S.Ct. at 980. The term 'floater district' is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose combined population entitled the entire area to another seat in the particular legislative body being apportioned. *Davis v. Mann*, 377 U.S. 675, 686 (1964).

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despite a 16.4% deviation from ideal district populations.² The plaintiffs had alleged, *inter alia*, that the variances were an impermissible violation of equal protection.³ By contrast, the Court decided that the statute allowing deviations of 16.4% was reasonably related to a rational state policy of respecting political subdivision boundaries, and, therefore, did not violate the equal protection clause of the fourteenth amendment.⁴ Previously, the Court had maintained that the preservation of county lines in congressional redistricting did not justify relatively small population variations. Rather, congressional units were to be as equal in population as was practically possible.⁵ Accordingly, it is apparent that the *Mahan* decision has created a double standard in the law; certain small deviations are acceptable in state legislative redistricting, while virtually no population discrepancies are permissible in congressional redistricting.⁶

THE SUPREME COURT CLAIMS JURISDICTION

The creation of legislative districts and the decision of how the population is to be distributed among these districts is in the first instance the prerogative of the state legislators. The question which logically follows is, can the Court review legislative apportionment?

In *Baker v. Carr*,⁷ the Supreme Court decided that legislative reapportionment was a proper subject for judicial review.⁸ The complaint

² The ideal district in Virginia consisted of 46,585 persons per delegate. The 16th district with a population of 101,928 was allotted two seats, each of 50,964, and thus was under-represented by 9.6%. The 12th district had one delegate for a population of 43,319, thus being over-represented by 6.8%. *Howell v. Mahan*, 330 F.Supp. 1138, 1139 (E.D. Va. 1971).

³ *Id.* at 981-82. The suit also attacked the 40 single-member senatorial districts alleging that the city of Norfolk was unconstitutionally split into three districts, allocating Navy personnel "homeported" in Norfolk in one district and grouping Negro voters in another district. *Mahan v. Howell*, 93 S. Ct. 979, 982 (1973). The Court held that the establishment of a senatorial district assigned to Navy personnel "homeported" at Norfolk, regardless of where they resided, was a constitutionally impermissible discrimination against those individuals. *Id.* at 984. No mention was made by the Court of the alleged discrimination against black voters.

⁴ *Id.* at 980.

⁵ *Kirkpatrick v. Priesler*, 394 U.S. 526, 533 (1969) and *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969). See notes 32-33 *infra*.

⁶ In *Gaffney v. Cummings*, 93 S.Ct. 2321 (1973), the Court allowed minor deviations (7.83%) without justification in state redistricting. See note 92 *infra*. In a companion case, *White v. Register*, 93 S. Ct. 2332 (1973), a deviation of 9.9% in the House was upheld as not showing a *prima facie* case of invidious discrimination. For a comprehensive discussion of the reapportionment issue before *Mahan* and *Gaffney* see Note, *Reapportionment-Nine Years into the Revolution and Still Struggling*, 70 MICH. L. REV. 586 (1972).

⁷ 369 U.S. 186 (1962). In *Colegrove v. Green*, 328 U.S. 549 (1946), the Court had held that questions of reapportionment laid outside the scope of the courts because of the political nature of the issue. *Id.* at 553-554. For an excellent discussion of *Colegrove* and prior cases see L. R. Caruso, *The Rocky Road from Colegrove to Wesberry; or You Can't Get There From Here*, 36 TENN. L. REV. 621 (1969); See also, *Symposium on Baker v. Carr*, 72 YALE L. REV. 7 (1962).

⁸ *Id.*

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alleged that the Tennessee Apportionment Act of 1901 violated the Fourteenth Amendment through the enactment of grossly disproportionate districts for the voting population, thus placing the plaintiffs in a position of constitutionally unjustifiable inequality.⁹ The Court did not, however, discuss the merits of the complaint. Rather, it simply stated that the allegation of a denial of equal protection of the laws created a justiciable controversy.¹⁰

"ONE MAN, ONE VOTE": WESBERRY AND REYNOLDS

The "one man, one vote" principle was initially articulated in *Wesberry v. Sanders*.¹¹ This case, which was decided two years after *Baker*, dealt with Congressional reapportionment. In striking down a Georgia apportionment plan due to its discriminatory make-up, the Court decided that "as nearly as is practicable one man's vote in a Congressional district is to be worth as much as another's."¹² Since the Georgia statute diluted the right to vote for congressional representatives, the decision rested on Art. I, § 2 of the Constitution. That section states that representatives are to be chosen "by the People of the several States."¹³ The fundamental constitutional goal is equal representation for equal number of people.¹⁴

Reynolds v. Sims,¹⁵ decided the same term as *Wesberry*, dealt with a similar issue. Alabama had maintained its legislative districts intact since

⁹ *Id.* at 187.

¹⁰ *Id.* at 209.

¹¹ 376 U.S. 1 (1964). See *Gray v. Sanders*, 372 U.S. 368 (1963), which challenged Georgia's use of the county unit system as the basis for counting votes in the Democratic primary election for the nomination of United States senator and other statewide offices. The effect of the system was that one's vote counted less and less as the population of the county increased. The Court held that the equal protection clause required that once a geographical unit for which a representative was to be chosen was designated, all who participate in the election must have an equal vote—whatever their race, sex, occupation, or income and wherever their home may be in that geographical unit. The weighing of votes by the county unit system gave counties having one-third of the total population of the State a clear majority of county votes. *Id.* at 369.

¹² 376 U.S. at 8.

¹³ *Id.* at 7-8. The majority did not discuss whether the case could have been decided on fourteenth amendment grounds since the state acted to draw up the districts. Justice Clark, concurring in part and dissenting in part, felt that the case should have been decided on the fourteenth amendment because the history and language of Art. I, § 2 precluded a finding of "one person, one vote." *Id.* at 18. It can be inferred from the majority opinion that since we are dealing with an area where the states were given express power (to choose Representatives) it would be better to decide the case under the Articles of the Constitution than under state action.

¹⁴ *Id.* at 18.

¹⁵ 377 U.S. 533 (1964). Two other cases—*Davis v. Mann*, 377 U.S. 675 (1964), and *Roman v. Sincok*, 377 U.S. 695 (1964)—were decided on the same day as *Reynolds*. In these latter cases, the Court struck down reapportionment plans for Virginia and Delaware respectively. In *Davis*, the Court acknowledged Virginia's "tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, (which) resulted in the periodic utilization of floterial districts." 377 U.S. at 686-87. In *Roman*, the Court recognized that

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1900, with a resulting disparity in some districts of 41 to 1 in electing members to the State Senate, and 16 to 1 in choosing representatives for the House.¹⁶ The plaintiffs alleged a denial of equal protection of the laws, claiming that the statute of 1900 did not provide for equal representation and had not provided for such equality in its 60-year existence.¹⁷

Chief Justice Warren, who delivered the opinion of the Court, wrote that effective participation by all citizens in state government required that each citizen have an equally effective voice in the election of state representatives.¹⁸ The Court emphasized, however, that exact precision was not necessary. Most importantly, it indicated, in dicta, that a distinction could be made between Congressional and State apportionment plans. A state, the Court said, may maintain the integrity of various political subdivisions, while at the same time providing for compact districts of contiguous territory.¹⁹ This suggestion was based on the premise that there were usually more seats to be apportioned in state redistricting and that it might be feasible to use political subdivisions to a greater extent than would be possible in congressional redistricting.²⁰ Another consideration, in Chief Justice Warren's opinion, was to insure some voice to political subdivisions, based on the close relationships believed to exist between local governmental entities and the state in basic governmental operations.²¹ The underlying assumption was that state legislation was often directed to the concerns of political subdivisions.²² Additionally, it was the Court's feeling that construction of districts along political subdivision lines might deter the possibility of gerrymandering.²³ Although deviations would likely result from the aforementioned conditions, the majority said that a reapportionment scheme need not be in perfect harmony with the equal population principle.²⁴

The *Reynolds* decision was the first indication that more flexibility might be allowed when certain factors were present in state legislative reapportionment. These factors, however, would be inapplicable in congressional reapportionment. The citizens in the state system look primarily

minor deviations may occur by using certain factors which are free from arbitrariness of discrimination. 377 U.S. at 710. For a discussion of the trilogy cases—*Baker*, *Wesberry* and *Reynolds*, see Comment, *A Comprehensive Survey of Redistricting or Reapportionment Law: State and Federal*, 48 MARQ. L. REV. 516 (1965).

¹⁶ *Id.* at 545. The disparity means that one person's senate vote in the most overrepresented county was worth 41 times more than another person's senate vote in the most underrepresented county.

¹⁷ *Id.* at 540.

¹⁸ *Id.* at 565.

¹⁹ *Id.* at 578-78.

²⁰ *Id.* at 578.

²¹ *Id.* at 580.

²² *Id.* at 581.

²³ *Id.*

²⁴ *Id.*

to local units for governmental services. To provide these services, state governments legislate with regard to these specific units in mind. The interests of these individual units, while agreeing on broader national matters, might be in conflict on local issues. Thus, it may be rational to draw a distinction between the two; but, as the Court said in *Reynolds*, all these deviations must be valid in light of the basic standard of population equality.

EVOLUTION OF THE REYNOLDS STANDARD

In 1967, the Court in *Swann v. Adams*,²⁵ struck down a Florida reapportionment plan because the deviations from population equality therein were not justified by acceptable reasons.²⁶ The plan, drawn up by the Florida legislature, provided for 48 senators and 117 representatives.²⁷ The largest deviation in the senate was 25.65% and in the house was 33.55%.²⁸ The Court, citing *Reynolds*, said that variations may be unavoidable, but that the abnormally large deviations in this case were unwarranted without a satisfactory explanation founded on an acceptable state policy.²⁹ Such policy considerations, said the majority, might be to maintain the integrity of political subdivisions.³⁰ The Court refused, however, to set a standard for maximum deviation, stating that an acceptable deviation in one state could not be the norm for all other states.³¹ This decision indicated the possibility of a separate standard, *i.e.*, more leeway allowed to state apportionment plans recognizing political boundary lines.

Two terms later, the Supreme Court in *Kirkpatrick v. Priessler*³² and *Wells v. Rockefeller*³³ struck down two congressional reapportionment plans. In *Kirkpatrick*, the population variances from the ideal were only 3.13% and -2.84%.³⁴ The defendants claimed that these deviations were *de minimis*.³⁵ The Court responded that there was no set figure that could be considered *de minimis* since the whole thrust of the "as nearly as practicable" rationale was inconsistent with fixed percentages.³⁶ Basing their

²⁵ 385 U.S. 440 (1967). See *Kilgarlin v. Hill*, 386 U.S. 120 (1966), where a Texas House plan combining single-member, multimember and floterial districts had an aggregate deviation of 26.48% (+14.84%, -11.64%). The District Court found that Texas policy allowed for the violation of county lines in order to surmount undue population variances. The Supreme Court struck down this plan because the justices were not convinced that the policy of Texas necessitated the deviations between legislative districts. 386 U.S. at 123.

²⁶ *Id.* at 444.

²⁷ *Id.* at 442.

²⁸ *Id.*

²⁹ *Id.* at 444.

³⁰ *Id.*

³¹ *Id.* at 445.

³² 394 U.S. 526 (1969).

³³ 394 U.S. 542 (1969).

³⁴ 394 U.S. at 528-29.

³⁵ *Id.* at 530.

³⁶ *Id.*

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decision on *Wesberry*, the Court said that only limited and unavoidable variations were acceptable.³⁷ The Court rejected as justification for the variances, not only history, economics, and group interests, but also a state's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal and other subdivision boundaries.³⁸

In *Wells*, a New York plan treated seven sections of the state as homogeneous regions and divided those regions into congressional districts of equal population.³⁹ Thirty-one of the 41 congressional districts allotted to New York were constructed on that basis.⁴⁰ The plaintiffs alleged that under the principle of *Wesberry*, the statute violated Art. I, § 2, of the Constitution, and the statute was a systematic partisan gerrymander under the Fourteenth Amendment.⁴¹ The Court, while not reaching the Fourteenth Amendment claim, held the statute equalizing population only among the substates unconstitutional, reasoning that *Wesberry* dictated that congressional districting must meet the equal protection principle "as nearly as is practicable."⁴²

Though the two congressional opinions used dicta from *Reynolds*, the Court's reasoning in each case was based on *Wesberry*. There was no indication in the cases whether a different decision would have been reached if a state legislative plan had been before the Court. In the *Wells* case, New York's justification for the deviations in order to maintain regional lines was repudiated. Thus, on the one hand, it may appear that the Court rejected the notion that variances may be permissible where a plan respected boundary lines; but, on the other hand, the Court did not indicate that these decisions reflected a standard distinct from that employed in state legislative redistricting.

However, in *Ely v. Klah*,⁴³ an Arizona reapportionment case, the Court implied that a single standard was applicable in determining the validity of both Congressional and state legislative redistricting.⁴⁴ Ari-

³⁷ *Id.* at 531.

³⁸ *Id.* at 534.

³⁹ 394 U.S. at 547.

⁴⁰ *Id.*

⁴¹ *Id.* at 544.

⁴² *Id.*

⁴³ 403 U.S. 108 (1971).

⁴⁴ Mr. William Boyd of the National Legislative Conference and Council of State Governments had concluded that the *Ely* decision meant that "there is one criterion for Congressional districts and state legislative districts, and that criterion is virtually precise mathematical equality . . ." National Legislative Conference and Council of State Government, *Reapportionment in the States* at 2 (1972). But, cf. Hobbs, *Book Review*, 16 U.C.L.A.L. REV. 659 (1969): "[c]ongressmen are assumed to represent the state as well as their district; state legislators on the other hand, are expected to be more parochial. Therefore, there is arguably a better case on the state than on the local level for allowing deviation based on local communities of interest. In addition, on the state level, population variation in one house can be compensated for in the other. This of course is impossible in congressional districting. *Id.* at 682.

zona's plan, by guaranteeing each county a representative in the state legislature's lower house, resulted in a maximum deviation of 16%. The Court noted that the lower court "properly concluded that this plan was invalid under *Kirkpatrick v. Preisler* . . . and *Wells v. Rockefeller* . . . since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality."⁴⁵ Whether or not this statement is an indication of one or two standards is open to question. Reading the opinion one way, it could be assumed that the Court suggested that a state plan was invalid under the principles of *Kirkpatrick* and *Wells*. Interpreting the decision somewhat differently, however, the Court may have referred to those cases merely to support the proposition that the legislature had no right to rely on any deviation as being *de minimis*.

LIMITATION OF THE STRICT STANDARD

The strict standard was limited in a 1971 local reapportionment case, *Abate v. Mundt*,⁴⁶ where the Court said that a certain degree of flexibility in drawing district lines is allowable as long as the goal of population equality is maintained. *Abate* involved an apportionment plan for Rockland County, New York. The plan provided for a county legislature comprised of 18 members to be chosen from five districts.⁴⁷ These districts corresponded to the county's five constituent towns.⁴⁸ The plan, which allowed deviances of 11.9%, was upheld, with the Court reasoning that local governments might need more flexibility if they were to meet society's changing needs, and that a desire to follow political subdivision lines might justify a deviation from numerical equality.⁴⁹ The fact that there tended to be fewer representatives and people in local politics supported the argument that more flexibility was permissible for local apportionment schemes.⁵⁰ The Court, citing both *Reynolds* and *Swann* as support for its holding, accepted the county's deviation because it saw the need for intergovernmental coordination at the local level; thus, the resulting deviations were supported by an acceptable state policy.⁵¹ Most significant in this case was the Court's statement that Rockland County believed it to be an advantage to use the same individuals to occupy the governing positions of both its counties and

⁴⁵ 403 U.S. at 111.

⁴⁶ 403 U.S. 182 (1971). See Recent Decisions, 34 ALBANY L. REV. 692 (197), discussing *Reynolds*, *Kirkpatrick* and *Wells*, and their possible effect on *Abate*.

⁴⁷ *Id.* at 184.

⁴⁸ *Id.*

⁴⁹ *Id.* at 185.

⁵⁰ *Id.* The population equality doctrine had previously been applied to local government in *Avery v. Midland County*, 390 U.S. 474 (1968), where the Court held that a Commissioner's Court districting plan dividing the county into four districts, with one district having 95% of the voters, violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 479.

⁵¹ *Id.* at 186.

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towns.⁵² In its conclusion, however, the Court warned that these same factors could not justify substantially greater deviations from population equality.⁵³

Abate indicated that in local reapportionment there is a separate standard allowing small deviations in drawing district lines, as long as the goal of population equality is maintained. *Abate* parallels its particular situation to *Reynolds* and *Swann*, but did not specifically say that the opinion rested on those principles. The emphasis by the Court in *Abate* upon justifying deviations due to the close historical relationship between the county and town is similar to the ties between local units and the state. Thus, this case might be considered a forerunner to *Mahan*. Since a different standard is applicable to local apportionment where there is a special reason to follow political subdivisions, it would not be illogical to apply that same standard to state apportionment.

Shortly thereafter, the Supreme Court acknowledged that there could be two standards in *Connor v. Williams*, a Mississippi state reapportionment case.⁵⁴ After striking down a plan which contained a maximum deviation of 26% in the senate, the District Court devised an alternative plan with an allowable 18.9% deviation in the senate and an 18.7% deviation in the house.⁵⁵ The plaintiffs asked the Supreme Court to invalidate these deviations based on the decisions handed down in *Kirkpatrick* and *Wells*.⁵⁶ The Court said that "(these) decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment."⁵⁷

Viewing *Connor*, in retrospect, it may be argued that the last half of the court's statement negated the initial comment. However, it may be inferred from the Court's language that the principle of *Kirkpatrick* and *Wells* was not to be a controlling factor in state reapportionment. Rather, an allowable magnitude of deviation was to be the prime concern.

Prior to *Mahan*, a number of lower court decisions had indicated that a more flexible standard would be applied in state reapportionment.⁵⁸

⁵² *Id.*

⁵³ *Id.* at 187.

⁵⁴ 404 U.S. 549 (1972).

⁵⁵ *Id.* at 550.

⁵⁶ *Id.*

⁵⁷ *Id.* The Court concluded that since one-fifth of the seats in both houses had already been elected under a temporary multimember plan devised by the District Court, they would not consider the application of *Wells* and *Kirkpatrick* until a final decision with respect to the whole state was before them. *Id.* at 551-52.

⁵⁸ See, e.g., *Long v. Docking*, 283 F. Supp. 539 (D. Kan. 1968); *In re Legislative Districting of General Assembly, Iowa*, 193 N.W.2d 784 (S.Ct. Iowa 1971); *Troxler v. St. John the Baptist Police Jury*, 331 F. Supp. 222 (E.D. La. 1971); *Dunn v. Oklahoma*, 343 F.Supp. 320 (W.D. Okla. 1971); and *Wold v. Anderson*, 335 F. Supp. 962 (D. Mont. 1971). These cases all held that other considerations were justified in state districting as long as these considerations were legitimate. The use of political subdivisions was acceptable when such action was desirable to achieve the goal of population equality.

Most prominent of these cases was *Jackman v. Bodine*,⁵⁹ where the New Jersey Supreme Court per Chief Justice Weintraub upheld a state reapportionment plan. The deviations from mathematical equality of assembly districts had a ratio of 1.5 to 1.⁶⁰ Chief Justice Weintraub framed the issue as follows; although population equality receives the primary consideration, is it possible to accept some other criterion for the drawing of district lines?⁶¹ Chief Justice Weintraub answered this question affirmatively, asserting that neither *Wells* nor *Kirkpatrick* negated this possibility.⁶² These two cases dealt specifically with congressional redistricting.⁶³ According to Chief Justice Weintraub, gerrymandering was more of a problem in state redistricting, and while the use of county and municipal lines did not foreclose gerrymandering, it did limit it and tended to make the party responsible for drawing up such a plan more readily accountable at the polls.⁶⁴

Regarding the relationship between political entities and the legislative process, Weintraub stated that a county and a municipality were meaningful units in state-local governmental relations, and elections from districts would be more worthwhile if these units were reflected in a redistricting plan.⁶⁵ However, he observed that such deviations, could be made only if the population discrepancies were within tolerable limits.⁶⁶

This case, decided before the Supreme Court's decision in *Connor*, is a persuasive exposition of the double standard. After the *Connor* decision, in *Scrimminger v. Sherwin*,⁶⁷ Chief Justice Weintraub not only reaffirmed the principle enunciated in *Jackman*, but observed that the *Connor* decision did not undercut his prior reasoning.⁶⁸ In *Scrimminger*, a plan which was drawn up after the 1970 census contained deviations of 28.83% in the senate and 66.20% in the assembly.⁶⁹ Although Chief Justice Weintraub still thought that his assumption of allowing greater deviations in state legislative districts was viable, though somewhat suspect after the concluding remarks of the *Connor* Court, he concluded that the present plan before the court, contained such substantial devia-

⁵⁹ 55 N.J. 371, 262 A.2d 389 (1970), *cert. denied*, 400 U.S. 849 (1970).

⁶⁰ *Id.* at 381, 262 A.2d at 395. The citizen's vote in one district was worth one and one-half times as much as someone's vote in another district.

⁶¹ *Id.* at 378, 262 A.2d at 393.

⁶² *Id.*

⁶³ 55 N.J. at 379, 262 A.2d 393.

⁶⁴ *Id.*

⁶⁵ *Id.*, 262 A.2d at 394.

⁶⁶ *Id.* at 381, 262 A.2d at 395. Chief Justice Weintraub did not say what these limits would be. He simply stated that the ratio in this instance, 1.5 to 1, was not "inherently bad." *Id.* at 382.

⁶⁷ 60 N.J. 483, 291 A.2d 134 (1972).

⁶⁸ *Id.* at 492, *Id.* at 291 A.2d at 139.

⁶⁹ *Id.* at 493, 291 A.2d at 140.

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tions as to render it invalid.⁷⁰

By late 1972, the decisions governing state reapportionment were in a state of flux. The cases from the Supreme Court had been less than conclusive. Indications of two standards emanated from *Reynolds*, while *Ely* appeared to suggest a single standard. However, *Abate* set down the fundamental reasoning for a more lenient standard, and the dicta in *Connor*, if weighed, suggests a different standard for state apportionment. These two cases, however, did not establish two standards. It was not until 1973 that Chief Justice Weintraub's delineation of two standards was followed by the Supreme Court.

THE MAHAN AND GAFFNEY OPINIONS

The Supreme Court rendered its decision in *Mahan v. Howell*⁷¹ per Mr. Justice Rehnquist. The Court upheld despite the plaintiff's claim of an equal protection violation, a 16.4% deviation in the House of Delegates. Its decision was premised on the grounds that the deviation was not excessive and that it resulted from the state's rational objective of preserving the integrity of political subdivision lines.⁷²

Justice Rehnquist summarized the issues before the Court in the following manner:

The principal question thus presented is whether or not the Equal Protection Clause of the Fourteenth Amendment likewise 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.⁷³

Simply stated, the answer was no. Comparing *Reynolds* to *Wesberry*, Rehnquist concluded that state and congressional reapportionment did not come under identical standards. Rather, differences were based upon considerations articulated in *Reynolds*.⁷⁴ He felt that applying the "absolute equality" standard to state legislative reapportionment would hinder the functional relationships between state and local governments.⁷⁵ It was noted that Art. III, §§ 2 and 3 of the Virginia Constitution gave the Assembly power to enact special legislation with regard to political subdivisions. Thus, the redistricting statute sought to preserve subdivisions in order to effect such legislation.⁷⁶ Though the state did not need to show a necessity to adhere to political subdivision lines, a plan, however "rational" it might be, could not overshadow the goal of substantial equality.⁷⁷

⁷⁰ *Id.*

⁷¹ 93 S.Ct. 979 (1973).

⁷² *Id.* at 980.

⁷³ 93 S. Ct. at 983.

⁷⁴ *Id.*

⁷⁵ *Id.* at 984.

⁷⁶ *Id.*

⁷⁷ *Id.* at 986.

The final inquiry was whether or not the deviations were so large as to exceed any permissible limits. In comparing *Mahan* to *Swann*, *Kilgarlin*, and *Reynolds*, Mr. Justice Rehnquist noted that the Virginia plan contained minor deviations as compared to the variations in those cases.⁷⁸ Though there could be no set formula to fix permissible deviations, the population discrepancies in this case, though approaching tolerable limits, did not surpass such limits.⁷⁹

The majority opinion, therefore, established two standards for redistricting—first, a strict “absolute equality” standard for congressional redistricting, and second, a somewhat more flexible standard for redistricting based on a rational state interest. However, a plan might contain deviations so large as to render it invalid regardless of the justification for such deviations.

In his partial dissent, Mr. Justice Brennan argued that the case should be decided by the “as nearly as practicable” standard set forth in *Kirkpatrick*, *Swann*, *Reynolds*, *Davis* and *Sincock*.⁸⁰ He also suggested that the facts of the case revealed an actual discrepancy of 23.6% and that deviations of comparable size had led the Court to void state plans in *Swann* and *Kilgarlin*.⁸¹ At any rate, even the 16.4% deviation accepted by the majority, Brennan stated, should have been sufficient to invalidate the plan.⁸² He felt that the state must present a highly justifiable case of *necessity* for adhering to political subdivision lines.⁸³ The most important goal, he argued, was equal representation.⁸⁴ Accordingly, only when equality could not be achieved without jeopardizing some *critical* governmental interest were deviations proper.⁸⁵ Justifiable reasons could be similar to those found in *Abate*.⁸⁶

The fact that *Wells* and *Kirkpatrick* dealt with congressional reapportionment did not in Brennan’s opinion exempt the states from observing the principles articulated therein.⁸⁷ Although he conceded that there were differences between congressional and state redistricting, the Court had never before held that there were two standards,⁸⁸ and Mr. Justice Brennan

⁷⁸ *Id.* at 987.

⁷⁹ *Id.*

⁸⁰ *Id.* at 990.

⁸¹ *Id.* at 991. This figure was approved by the plaintiffs’ computations taking into account deviations in the floterial districts. The Court decided not to get into a mathematical squabble and used the 16.4% figures since the lower court based its decision on that figure. *Mahan v. Howell*, 93 S.Ct. at 982, n. 6.

⁸² *Id.* at 992.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 993.

⁸⁶ *Id.* Mr. Justice Brennan did not state what reasons could justify deviations. The Court in *Abate* emphasized the long tradition and need for intergovernmental coordination in Rockland County as acceptable state policy, *see* notes 49 and 52 *supra*.

⁸⁷ *Id.*

⁸⁸ *Id.*

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felt that the differences were not substantial enough to call for two different standards.⁸⁹ The prior decisions merely stated that certain factors had more relevance in state redistricting. States could point to other interest in attempting to justify deviations from substantial equality, but this did not mean that the states were subject to a lighter standard.⁹⁰ In his opinion, Virginia had not proved a need to insure representation of political subdivisions or a need to use county boundaries in the drawing of its districts.⁹¹

Brennan's dissent must be considered in light of the Court's previous cases. *Reynolds* clearly suggested that in state reapportionment certain special factors allowed state legislators more leeway. *Abate*, the foundation case for two standards, Brennan conceded, signaled a departure from the "absolute equality" rule. Hence, if a different standard could be applied to local units on the basis of the special factors arising from relationships within the state, it would logically follow that the similar local-state relationships should be guided by the same standard.

Gaffney v. Cummings,⁹² decided on June 18, 1973, added another step to the retreat from the one standard principle which *Mahan* initiated. The case concerned a 1971 state reapportionment plan for Connecticut. The plan provided for 36 single-member senatorial districts, creating a maximum total deviation of 1.81%, and for 151 single-member House seats creating a maximum deviation of 7.83%.⁹³ The plan was subsequently attacked as a political gerrymander in favor of the Republican party which violated the equal protection clause of the fourteenth amendment.⁹⁴ The District Court held that the deviations were not justifiable and that the plan denied equal protection of the law to voters in the districts of greater population.⁹⁵

The Supreme Court, in the opinion of Mr. Justice White who wrote the majority opinion, decided that minor deviations in state legislative redistricting did not constitute a prima facie violation of the fourteenth amendment.⁹⁶ Citing *Mahan*, the Court reemphasized the fact that since there were differences between state and congressional representation, a different standard was applicable to each.⁹⁷ State reapportionment cases prior to *Mahan* involved such large deviations that they could not be justified by any means, and *Mahan* demonstrated that population devia-

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 995.

⁹² 93 S.Ct. 2321 (1973). A bipartisan commission consisting of four democrats and four republicans failed to draw up a plan. Finally, the plan was drawn up by a three-man bipartisan board.

⁹³ 93 S.Ct. at 2323.

⁹⁴ *Id.* at 2324.

⁹⁵ 341 F.Supp. 139, 148 (D. Conn. 1972).

⁹⁶ 93 S.Ct. at 2325.

⁹⁷ *Id.* at 2325-26.

tions might be significant yet still justifiable.⁹⁸ Thus, Mr. Justice White concluded that in state reapportionment where the population equality goal did not depend upon the elimination of small variances, no justification was necessary.⁹⁹

Taken together, *Mahan* and *Gaffney* indicate a retreat from the strict "one man, one vote" principle initiated almost a decade earlier. *Mahan* established the principle that consistent with the dictates of the equal protection clause of the fourteenth amendment, a state's redistricting plan could contain certain deviations if justified by acceptable state policies. This conclusion rested upon special factors inherent in the formulation of state or local lines that required flexibility regardless of the strict standards established for legislators engaging in congressional redistricting. Thus, only congressional districts were required to be "as nearly equal as practicable."

Thus, the *Gaffney* decision is a corollary of the double standard, i.e., even if there are no justifications alleged by a state to uphold its redistricting plan, the plan will still be valid if the Court determines that the variances are small enough as not to obviate the goal of population equality. The *Gaffney* decision is a little more difficult to accept since all the prior cases, including *Mahan*, required at least some justification. All that the Court was able to point to in *Gaffney* was carefully selected dicta from previous cases. The Court also stated that the precise question of *de minimus* variations in state reapportionment cases had never been before them.¹⁰⁰ The decision, however, may not have been all that surprising considering the retreat initiated in *Mahan*. However, the fact that the Court was willing to allow certain large deviations where justified should not indicate that certain smaller unjustified deviations can be allowed.¹⁰¹

In *Mahan*, Mr. Justice Rehnquist, citing *Kirkpatrick* and *Abate*, stated that the "dichotomy" between the state and congressional cases has been consistently maintained.¹⁰² As discussed above, an examination of these particular cases as to whether or not there were two distinct standards reveals no definite answer. Based on a case by case analysis, Chief Justice Weintraub, however, was able to discern two standards. His decisions in *Jackman* and *Scrimminger*, even though they were never decided by

⁹⁸ *Id.* at 2329. Mr. Justice White reasoned that mathematical precision is not practical because of the inaccuracies of census data. Census is taken at one given time and it does not measure growth rates, mobility rates, and ineligible voters. Thus, since total population is not an accurate measuring stick of the weight of one's vote, slight variances do not obviate equality. *Gaffney v. Cumming*, 93 S.Ct. 2321, 2328 (1973). See R. L. Morril, *Lampadephoria On Criteria for Redistricting*, 48 WASH. L. REV., 847, 850 (1973). But see notes 133-134 *infra*.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2326.

¹⁰¹ Certain deviations are so large that they are invalid under any standard. See note 98 *supra*.

¹⁰² 93 S.Ct. at 984.

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the Supreme Court not cited by that Court, presaged the new double standard in apportionment.

EQUAL PROTECTION AND THE NEW DOUBLE STANDARD

Equal protection requires that all individuals similarly situated must be treated equally.¹⁰³ A state legislature, however, can create certain classifications among individuals, but these classifications and resulting deviations from perfect equality must be measured and appropriately weighed.

One standard (the reasonable or rational test) used by the Court questions whether or not the legislation considered is reasonably or rationally related to a legitimate legislative purpose.¹⁰⁴ A more comprehensive review is taken by the Court where the statute affects one's fundamental rights or is inherently suspect.¹⁰⁵ In this case, the state must show that the resulting inequality is necessary for a compelling state interest.¹⁰⁶ This second "stepped-up" stand is applied where the interest is one that requires close safeguarding, such as race, religion or alienage.¹⁰⁷

The right to vote has been characterized as fundamental.¹⁰⁸ Accordingly, any impairment of this right has been subjected to close scrutiny.

In *Harper v. Virginia Board of Elections*,¹⁰⁹ suits were brought by Virginia residents to declare Virginia's poll tax unconstitutional. The Court agreed with the plaintiffs' complaint that the conditioning of the right to vote on the payment of a fee or tax violated the equal protection clause of the fourteenth amendment.¹¹⁰ Virginia violated the Constitution because it could not classify voter qualifications according to the affluence of the voter. The court said that the interest of the state in fixing voter qualifications had no relation to wealth or the paying of a tax.¹¹¹ The right to vote, the Court concluded, is too fundamental to be so burdened.¹¹² Another case, *Williams v. Rhodes*,¹¹³ dealt with the question of whether the right

¹⁰³ See Tussman and TenBroek, *The Equal Protection of Laws*, 37 CALIF. L. REV. 341, 344 (1949); Note, *Development in the Law-Equal Protection*, 82 HARV. L. REV. 1065-1192 (1969).

¹⁰⁴ *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 402 (1927).

¹⁰⁵ *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

¹⁰⁶ *Id.*, n. 4.

¹⁰⁷ *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

¹⁰⁸ 304 U.S. at 152, n. 4; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁰⁹ 383 U.S. 663 (1965).

¹¹⁰ *Id.* at 665.

¹¹¹ *Id.* at 666.

¹¹² *Id.* at 670.

¹¹³ 393 U.S. 23 (1968). Ohio statutes required new parties to obtain signatures totalling 15% of the number of ballots cast in the last gubernatorial elections while allowing the old parties to retain their ballot positions by obtaining 10% of the voters in the last gubernatorial election. The plaintiffs claimed that the statutes denied to the new parties and to the voters who might wish to vote for them the equal protection of the laws. *Id.* at 25-26.

to vote is denied where statutory requirements make it difficult for a new party to obtain a ballot position. The Court held that the statutes placed a burden on the right of voters to cast their votes effectively for those of their political persuasion.¹¹⁴ Allowing the state to favor established parties over new by virtually denying new parties the opportunity for a ballot position, the Court concluded, conditioned the right to vote, without a showing of any "compelling interest."¹¹⁵

In apportionment, the problem is that the vote has been diluted. Whether the dilution of one's vote is a significant enough impairment of that basic right to be subject to a stricter scrutiny is the issue at hand. The right to vote is infringed where one cannot cast his vote effectively for the party of his choice and where one cannot cast his vote effectively because it has been diluted. The opportunity for equal participation for all voters is denied when one cannot vote because of a poll tax, or because his party is denied the ballot, and when the weight of one's vote is under-represented. Where the right to vote is diluted, that right is not the same as the right of the voter whose vote is overvalued. Since the eligible voter cannot be prohibited from voting, his vote can no more be destroyed in part by giving another voter a more effective right. Under this analysis the dilution of one's vote should be subject to the stricter standard.¹¹⁶

The Court in *Mahan* said that a state redistricting plan was not subject to the stringent standards of *Wells* and *Kirkpatrick*, but should follow the equal protection test of *Reynolds*.¹¹⁷ Extracting dicta from *Reynolds*, Mr. Justice Rehnquist emphasized that the test was one of rationality under the equal protection clause.¹¹⁸

An examination of *Reynolds* reveals that the Court did indicate that deviations from equality are permissible so long as the divergences are incident to a rational state policy.¹¹⁹ The Court, however, also emphasized that the judicial inquiry focused upon whether or not there was an unconstitutional impairment of one's right to vote.¹²⁰ The Court noted that the right to vote is a "fundamental matter" and such a right can be denied by its dilution just as effectively as by prohibiting its exercise.¹²¹ Accordingly, it should follow that the dilution of one's vote "impairs basic constitutional rights" and "since the right to exercise the franchise is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."¹²²

¹¹⁴ *Id.* at 30.

¹¹⁵ *Id.* at 31.

¹¹⁶ See, Note, *Beyond Wesberry: State Apportionment and Equal Protection*, 39 N.Y.U.L. REV. 264 (1964).

¹¹⁷ 93 S.Ct. at 985.

¹¹⁸ *Id.* at 986.

¹¹⁹ 377 U.S. at 579.

¹²⁰ *Id.* at 561.

¹²¹ *Id.* at 555.

¹²² *Id.* at 562.

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Taken in a broad perspective, the Court's language in *Reynolds* implied a concern that malapportionment denies, to a certain extent, one's right to vote. Nevertheless, the Court indicated that malapportionment might be justified if it serves to effectuate a "rational state policy." In fact, the Court in its concluding remarks on equal protection said that "careful judicial scrutiny" must be given in evaluating state apportionment schemes, but that a state can accord some legislative representation to political subdivisions if such a plan is in compliance with a clearly "rational state policy."¹²³

It appears more logical, however, to say that the emphasis of *Reynolds* indicated that a stepped-up standard is applicable in reapportionment cases, because the denial of one's right to vote is effectuated through its dissipation. Later cases, however, evidenced the confusion as to which standard was to be applied. *Swann*, whether it used the rational standard or not as a basis for its decision, quoted the "rational state policy" phrase from *Reynolds*.¹²⁴ *Kilgarlin* invalidated a Texas plan because the Court was not convinced the state's reasoning necessitated the deviations.¹²⁵ In *Abate*, the Court said that since "voting rights require highly sensitive safeguards this Court has carefully scrutinized state interests offered to justify deviations from population equality."¹²⁶ Chief Justice Weintraub, who read the pre-*Mahan* line of cases as evidencing a two standard review, stated in *Jackman* that it was clear from *Reynolds* that even a state legislative reapportionment plan must be more than rational.¹²⁷ Hence, *Mahan* and *Gaffney* are not in accord with the view of equal protection expressed in prior cases.¹²⁸

Thus, it is suggested that *Mahan* and *Gaffney* are inconsistent, with prior case law which has suggested that impairment of the right to vote through malapportionment can be justified only if *necessary* to uphold a critical state interest. The only support these cases can rely on is the "rational state policy" phrase from *Reynolds*.¹²⁹ As indicated, that phrase is outweighed by other arguments throughout the opinion. Consequently, *Mahan* and *Gaffney* taken together imply that a state may significantly

¹²³ *Id.* at 581. In the companion case of *Roman v. Sincok*, 377 U.S. 695 (1964), the Court said that the District Court properly concluded that Art. 11, § 2 of the Delaware Constitution, which establishes apportionment, was unconstitutional because the court found "no rational or reasonable basis for the Delaware apportionment . . ." *Id.* at 701.

¹²⁴ 385 U.S. at 44.

¹²⁵ See note 25 *supra*.

¹²⁶ 403 U.S. 182, 185 (1973).

¹²⁷ 55 N.J. 371, 381.

¹²⁸ See *Bullock v. Carter*, 405 U.S. 134 (1972), dealing with the constitutionality of filing fees, where the Court said that that burden on voting did not require the use of the strict scrutiny test as did the dilution of one's vote, citing *Reynolds* and *Wesberry* in a footnote. *Id.* at 143; *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1965). (Strict scrutiny citing *Reynolds*).

¹²⁹ See *Mahan v. Howell*, 93 S.Ct. at 985; *Gaffney v. Cummings*, 93 S.Ct. at 2326.

impair, through reapportionment, one's right to vote (by dilution) if such reapportionment is supported by a rational state policy. Moreover, the right to vote may be somewhat impaired (*i.e.* minor deviations in district populations) without any justification whatsoever.

Also, the holding in *Gaffney*—that certain percentage deviations are *per se de minimus* and thus do not require any justification whatever—appears completely inconsistent with prior opinions dealing with reapportionment and equal protection. In fact, this rationale had been completely rejected in *Kirkpatrick*.¹³⁰ The Court states in *Gaffney* that since the goal is the protection of one's vote from substantial dilution compared to the vote of another citizen, that goal cannot possibly be impaired by allowing certain minor deviations.¹³¹ The inaccuracies of census figures upon which reapportionment is based allowed the Court to draw its conclusion.¹³²

The same reliance on census population was urged by the State of Missouri in *Kirkpatrick*, and was expressly rejected. The Court said that even if there is a difference between total population and eligible voter population, Missouri had made no attempt to estimate the eligible voter population and apportion on that basis.¹³³ In response to the argument that the deviations gave weight to on-going population shifts, the Court said that the states could properly take this into account if the population shifts were being accurately predicted, with substantial documentation applied systematically throughout the state.¹³⁴

The Court's rationale in *Gaffney* is that since a dichotomy exists between state and congressional redistricting, and because in *Mahan* it was held that some amount of deviation could be justified by a rational state interest, it was recognized that in the state context, minor deviations need not be accounted for. Assuming the rational standard applies due to certain special factors inherent in state government, the argument appears sound that more flexibility in state redistricting is needed. In the context of allowing *de minimis* variations, however, certain special factors which allowed more leeway in state redistricting are not present. Clearly, nothing is unique in a census population used for state redistricting that differs from a census population used for congressional redistricting. In *Reynolds*, the Court emphasized that a state might want to follow political subdivision lines since much of the state's legislative activity could be aimed at particular subdivisions. There is no rational purpose, however, which a state might consider as applicable only to its level of government as distinct from congressional reapportionment in the context of allowing *de minimis* deviations.

¹³⁰ See note 36 *supra*.

¹³¹ 93 S.Ct. at 2327.

¹³² See note 98 *supra*.

¹³³ 394 U.S. at 534-35.

¹³⁴ 394 U.S. at 535.

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It could be argued that even if the Court's reasoning in creating a dichotomy between state and congressional redistricting cannot be applied to *de minimis* variations, such population discrepancies should be allowed. Precise mathematical equality is not required among district populations. Therefore, it would appear proper if states took other factors into consideration as long as fair and effective representation is maintained. Such factors could include grouping together voters who share a set of special state or local interests. For example, one approach might be to keep people who belong to a neighborhood political club in a single legislative district. If these people could be represented by the same legislators, with *de minimis* deviation, then such a plan, without other evidence, would appear to be neither arbitrary nor discriminatory. Otherwise, a hypothetical farmer redistricted into an urban area in the name of population equality might find himself without a farm-oriented representative to act in his behalf.

Though these arguments may be valid in support of state redistricting along political subdivision lines, they have no merit in upholding *de minimis* deviations. To pick certain deviation percentages as being *de minimis* contravenes the logic of the *Reynolds* rationale where the Court said that what may be an acceptable deviation in one state may be unsatisfactory in another.¹³⁵ To allow *de minimis* deviations would, as the Court observed in *Kirkpatrick*, "encourage legislators to strive for that range rather than for (the goal of) equality . . ."¹³⁶ This would relegate the equality goal to a secondary status.

As previously indicated, the new double standard created by *Mahan* can be supported by certain *dicta* from prior opinions,¹³⁷ and is justified by the fact that in state legislative redistricting, certain special factors not present in congressional redistricting require flexibility.¹³⁸ Allowing minor deviations without justifications, however, is neither consistent with prior decisions¹³⁹ nor justified in any way by special facts. It is suggested

¹³⁵ 377 U.S. at 578.

¹³⁶ 394 U.S. at 531.

¹³⁷ See *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *Abate v. Mundt*, 403 U.S. 182, 185 (1971). See note 139 *infra* and accompanying text.

¹³⁸ In a memorandum decision, the Court, with Chief Justice Burger and Mr. Justice White dissenting, vacated and remanded an Idaho District Court decision allowing a 19.4% deviation from the ideal population in state legislative districts. *Summers v. Cenarussa*, 93 S.Ct. 3037 (1973).

¹³⁹ See *Ely v. Klahr*, 403 U.S. 108, (1971), where the Court indicated that the lower court was proper in invalidating a state plan where the legislature operated on the notion that the deviation was *de minimis*. *Id.* at 111. In *Sims v. Amos*, 336 F.Supp. 924 (M.D.A.La. 1972), *aff'd*, *Amos v. Sims*, 409 U.S. 942 (1972), of the four plans drawn up by the State of Alabama, the plan with the least deviation was 28.65% in the House and 25.98% in the Senate. The court invalidated all four plans. To the issue of whether there can be a *per se de minimis* deviation, the court looked to the principles of *Kirkpatrick*, and said that "with respect to state apportionment no amount of deviation should be considered *per se de minimis*." *Id.* at 933. Against the state's argument that the variances were necessary to preserve county lines, the court said that political subdivisions may be recognized in the state apportionment context (citing

that while the decision in *Mahan*¹⁴⁰ could be accepted as a logical extension of *Reynolds*, the decision in *Gaffney*, because its effect could possibly result in the negation of population equality as the paramount goal of reapportionment,¹⁴¹ is entirely inconsistent with prior opinions which applied the requirement of equal protection to reapportionment.

IRWIN RUBIN

The Palestinian ~~Refugees~~ People and Their Political, Military and Legal Status in the World Community

. . . His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine. . . .¹

. . . This right ("of the Jewish people to national rebirth in its own country") was recognised in the Balfour Declaration of the 2nd November, 1917, and re-affirmed in the Mandate of the League of Nations. We hereby affirm both, which, in particular, give international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.²

. . . We do not consider the Arabs of the land an ethnic community nor a people with a distinct national character.³

The Lord giveth and the Lord taketh away. Praised be the name of the Lord.⁴

During the long winter following the most recent Middle Eastern conflict many Westerners have asked poignant questions for the first time.

Reynolds and *Abate*). Population is controlling and these other factors are not justifiable where there are substantially greater deviations. *Id.* at 934. *But cf.* *Wells v. Rockefeller*, 394 U.S. 542, 553-556 (Justice White dissenting).

¹⁴⁰ This takes for granted the fact that the rational test is applicable in state apportionment cases. Of course, if the test is one of strict scrutiny, only the "absolute equality" principle would be acceptable in all cases.

¹⁴¹ Since there is a fixed valid deviation, this leaves open the possibility whether or not proof may be admitted that population was not the prime goal of the legislators.

¹ Quoted from the text of the Balfour Declaration, appearing in STEIN, *THE BALFOUR DECLARATION* (1961).

² ISRAEL, *LAWS, STATUTES, ETC.*, Laws of the State of Israel (authorized trans.) (Tel Aviv, 1948). This passage is of particular significance as it is quoted from Israel's Declaration of Independence.

³ "An Open Letter to Y. Galili," *Arab World* XV, no. 9 (1969) at 3.

⁴ JOB 1:21.