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Legislative Reapportionment And Congressional Redistricting In Virginia

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LEGISLATIVE REAPPORTIONMENT AND CONGRESSIONAL REDISTRICTING IN VIRGINIA

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The Commonwealth of Virginia, like other states in the United States, has been very much preoccupied during the past 5 years with problems of legislative reapportionment and redistricting. For the past 3 years, State concern with redistricting problems has been prodded by suits which sought to compensate for the earlier failures of the political process to bring about equal representation in the State legislature, congressional districts, and on municipal governing bodies. Stimulated by *Baker v. Carr*,[1] decided by the United States Supreme Court in 1962, litigation successfully challenged the apportionment of both houses of the General Assembly, the composition of the State's 10 congressional districts, and representation on the councils of 2 Virginia cities. A reapportionment or redistricting was brought about in each instance. Only county governing bodies in Virginia thus far have escaped challenge in the courts.

The Virginia experience in the national "Reapportionment Revolution" is not unique. Most other states have been deeply involved in reapportionment and redistricting activities. But Virginia faced reapportionment crises on all levels of government in a relatively short period of time. What perhaps most distinguishes Virginia in the midst of the reapportionment problems afflicting the states is its response to the judicial insistence upon one man one vote standards for legislative representation. Virginia legislated acceptable plans for redistricting both houses of the General Assembly, the State's 10 congressional districts, and at least 1 city council without the delaying tactics and bitter acrimony characteristic of some other states. Undoubtedly, part of the explanation for Virginia's compliant response to the demands of equal representation lies in the fact that deviations from that principle were not deeply rooted in the State's political traditions. In addition, the political impact of reapportionment in the Commonwealth was not so great as to produce immediate and substantial re-

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

alignments of political power in this decade. Finally, the legislative process in Virginia takes place in an environment of strong majority party control of both houses of the General Assembly which serves to reduce the probability of deadlock on reapportionment solutions.

It is appropriate to examine the Virginia involvement in reapportionment on the 2 levels of government where the reapportionment issue finally has been closed. Litigation further challenging the apportionment of city councils is still under way. This article will focus on the Virginia legislative and congressional cases and not attempt to treat the numerous other issues of reapportionment raised in cases affecting other states.

The Virginia cases did not raise the panoply of issues and questions which had to be confronted by courts sitting in other states. Malapportionment of the Virginia legislature was not a result of long-standing legislative failure to act to reapportion. The Virginia Constitution did not provide explicitly for the composition of legislative districts nor contain formulas for apportionment which produced inherent inequalities in representation. No question of a "Federal analogy" was really pertinent to the Virginia General Assembly since an area concept of representation had not been applied to either legislative chamber. The relevance of an initiative or referendum process to the selection of an apportionment system was not present.

What a population standard required when it was applied was perhaps the most vital question of apportionment. How close to population equality legislative districts must be was the primary operational problem of the one man-one vote standard for apportionment adopted by the U.S. Supreme Court. This problem was faced directly by the Federal court in the Virginia case well in advance of *Reynolds v. Sims*.[2] The manner in which the problem was resolved in the Virginia litigation suggested the later approach of the U.S. Supreme Court.

Peripheral issues were present in the Virginia cases. But the only issues of consequence related to the permissible disparities in the population size of legislative districts, the rationale or "proof" required to justify larger disparities, and the ingredients of population which could be used to structure districts. After *Baker*, *Gray*, and *Wesberry*,[3] and the cases decided by Federal and state courts elsewhere, the inherent questions posed in applying a population standard were

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

[3]Baker v. Carr, *supra* note 1; Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964).

the only difficult issues in the Virginia litigation. The State court's resolution of the question in the congressional case, relying upon its own precedent, as well as that of the Federal courts in the legislative case, similarly was a reasonable approach to the problem, although the outcome was never seriously in doubt. Virginia's historic application of a population standard for representation made the judicial problem a little simpler, as it enabled the courts to concentrate upon the meaning of population for apportionment purposes.

I. The General Assembly

The challenge to the apportionment of representation in the Virginia General Assembly culminated in the case being one of the famed "Reapportionment Cases" decided by the United States Supreme Court on June 15, 1964.[4] *Davis v. Mann*, the Virginia case,[5] was included among the cases from 5 other states for the Supreme Court to rule on standards of representation for state legislatures.[6]

The Virginia reapportionment case had roots in the results of the 1960 Federal census. Although the State's population had increased by over 19% since 1950, the rate of population increase was unevenly distributed throughout Virginia.[7] Most of the State's increase in population occurred in a crescent shaped corridor of counties and cities extending from the Northern Virginia suburbs of Washington, D. C., southward to the Richmond metropolitan area, thence eastward to the Tidewater cities and counties of Hampton Roads.[8] Illustrative of the uneven population growth were Fairfax County's increase of 179% in population in 10 years, Alexandria's 47% increase, and Norfolk's 40% increase. On the other hand, the populations of other counties and cities of the State either remained relatively constant or suffered decreases since the previous census.[9]

The inevitable uneven population movements in Virginia exaggerated the disparities in the population of legislative districts both for the election of State senators and members of the House of Dele-

[4]McKay, Reapportionment: The Law and Politics of Equal Representation vii (1965).

[5]213 F. Supp. 577 (E.D. Va. 1962).

[6]The other states were Alabama, Delaware, Colorado, Maryland, and New York.

[7]U.S. Bureau of the Census, *1960, Census of Population: General Population Characteristics, Virginia* (1961).

[8]Lorin A. Thompson, "Recent Population Changes In Virginia," 37 The University of Virginia News Letter 21 (Feb. 15, 1961).

[9]*Ibid.*

gates. The 2 delegates elected from the district embracing Fairfax County and the City of Falls Church each represented 142,597 persons; the City of Alexandria's delegate represented 91,023 persons. Other areas and the number of constituents per delegate were: Princess Anne County and the City of Virginia Beach, 85,218; the City of Portsmouth, 57,386; Arlington County, 54,467; and the City of Norfolk, 50,812. At the other extreme, 5 delegates were elected from individual districts ranging in size from 20,071 to 23,201. A similar situation prevailed in the State Senate. Each of the 2 senators from the City of Norfolk represented 152,435 persons, while Arlington County's single senator had 163,401 constituents, and Fairfax County and the City of Falls Church had 1 senator for a population of 285,194. However, 9 State senators were elected from districts which contained populations of less than 70,000. These extremes in the population size of districts contrasted with the 39,669 persons and 99,174 persons which each delegate and senator would ideally represent if an equal population standard for apportionment were applied.[10] The discrepancies in the number of people represented by the various State senators and delegates dramatized the need for a reapportionment of the General Assembly.

The Virginia Constitution provides for decennial reapportionment of the legislature. § 43 of the Constitution asserts:

> The present apportionment of the Commonwealth in the Senatorial and House Districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter.[11]

This provision in its present form was inserted in the Constitution by an amendment adopted in 1928 which did not, however, make any substantive change in the original provision of the 1902 Constitution. The 1902 Constitution continued the apportionment of the legislature enacted by the General Assembly in April 1902 but permitted a reapportionment to be made in 1906. However, the 1902 Constitution directed that a reapportionment "shall be made in the year 1912, and every tenth year thereafter." [12]

The provisions of the Virginia Constitution indicate that reapportionment of both houses of the General Assembly was obligatory upon

[10]See Ralph Eisenberg, "Legislative Apportionment: How Representative Is Virginia's Present System?" 37 The University of Virginia News Letter 29 (Apr. 15, 1961).

[11]VA. CONST., § 43.

[12]*Ibid.*

the General Assembly. The Constitution is clear that a reapportionment is to be enacted at the first regular session of the legislature following the Federal decennial census, since Virginia's regular biennial legislative sessions occur in even years.[13] However, the Virginia Constitution does not mention the standards to be used in reapportioning State legislative representation. The omission of standards for reapportioning the General Assembly is in marked contrast to the constitutional provisions concerning the redistricting of congressional districts in the State. In regard to congressional districts, the Constitution provides that:

> districts shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants.[14]

The absence of an explicit population standard for representation in the legislature did not suggest that the General Assembly was free to apportion representation in any manner that it deemed appropriate, although arguments to this effect have been developed in recent years as the concentrations of urban population have become more pronounced. It can be suggested that the requirement to reapportion 2 years after a decennial census was not merely coincidental. Each census presumably would demonstrate the need for a redrawing of legislative district lines to accommodate population movements over the previous decade. Linking the time to reapportion to a legislative session following the census was not new to Virginia constitutions. A brief recitation of the provisions of Virginia constitutions concerning reapportionment and standards for representation provides a useful background to the current constitutional provisions.

The original Constitution of Virginia, adopted in 1776, provided that each county would elect 2 representatives to the House of Delegates while the City of Williamsburg and the Borough of Norfolk would each elect 1 representative. But the Constitution went on to provide for a representative from each city or borough as it was created and, perhaps more significantly, when any such city or borough decreased in its number of voters for 7 successive years so that its voters totaled less than half of the voters in any 1 county of the State, that city or borough would cease to have a representative in the House of Delegates.[15] In a sense, these provisions took cog-

[13] VA. CONST., § 46.
[14] VA. CONST., § 55.
[15] VA. CONST. 1776, § 5.

nizance of the relevance of population as an apportionment standard, although the principle itself was not enunciated.

The Constitution adopted in 1830 reflected concern with the representation of the western and eastern sections of the State. At that time sectional differences in the State were pronounced. The Convention which drafted the Constitution adopted a compromise to meet the demands of western Virginia for increased representation in the legislature. The Constitution apportioned representation among 4 major sections of the State and the representatives for each section were then distributed among its constituent counties and cities primarily upon the basis of white population. But the Constitution also provided that when any municipal body not entitled to separate representation grew in population size sufficiently to merit representation on its own, the General Assembly's duty was to secure representation to such a city, town, or borough even if it was necessary to reapportion the representatives in that great section of the State.[16] The 1830 Constitution first declared the duty of the legislature to reapportion "in the year 1841 and every 10 years thereafter."

The 1851 Constitution did away with the allocation of representatives among the 4 great districts of the State. In its place, the Constitution described specifically the composition of legislative districts and the number of representatives to be elected from each.[17] This Constitution also affirmed the duty of the legislature to reapportion every 10 years if it could agree upon a principle of representation. But if no agreement on a principle of representation occurred, the Constitution contemplated that the electorate would decide which of 4 alternative representative systems would be used: (1) a suffrage basis (number of voters in the several counties and cities), (2) the amount of all State taxes paid in the counties and cities, (3) a mixed basis combining the number of inhabitants and the amount of State taxes paid, and (4) a mixed basis in the Senate and a suffrage basis in the House of Delegates.[18] The alternatives more closely approximated a population standard than did the requirements of earlier constitutions.

The 1864 Constitution again described specifically the composition of legislative districts and allocated varying numbers of legislators to districts across the State. That Constitution also stated the duty of the legislature to reapportion representation in both legislative chambers in 1870 and "every tenth year thereafter . . . from an enumeration of

[16] VA. CONST. 1830, art. III, §§ 4 and 5.
[17] VA. CONST. 1851, art. IV, § 5.
[18] *Ibid.*

the inhabitants of the state." [19] The 1869 Constitution did not specify the composition of legislative districts nor provide a standard for legislative apportionment. It provided for a reapportionment in 1879 and stipulated that a reapportionment "shall be made in the year 1891 and every tenth year thereafter." [20] This allusion to the legislature's reapportionment duty has remained in constitutional provisions ever since.

The Constitutional Convention of 1901-02 apparently was not concerned with the question of legislative apportionment. The Convention produced the vague statement noted above of the duty of the General Assembly to reapportion.[21] The constitutional statement merely updated the provisions of the preceding constitution.

If the State's constitutional concern with reapportionment implicitly connoted a population standard, Virginia's legislative performance in reapportioning under the 1902 Constitution indicates an understanding of population as the primary guideline for structuring representative districts in both houses. Unlike other states, which were distinguished by their failure to reapportion for 60 years or more despite constitutional provisions for decennial reapportionment, Virginia has regularly reapportioned legislative representation since 1902. Except for the State Senate in 1906 and 1912, the Virginia General Assembly has reapportioned after each census in accordance with § 43 of the Constitution.[22] Some legislative reluctance was evident in the delay in reapportioning the State Senate in 1934. However, the relationship of Virginia's legislative apportionment systems throughout this period to a population standard was closer than in other states.[23] These factors indicate to many observers that Virginia's standard for legislative apportionment was principally a population standard.[24]

Legislative and special study commissions in Virginia considered population to be the principal basis for apportioning representation

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[19]VA. CONST. 1864, art. IV, § 6.

[20]VA. CONST. 1869, art. V, § 4.

[21]VA. CONST., § 43.

[22]House of Delegates apportionment: 1906 Acts, c. 83; 1910 Acts, c. 7; 1922 Acts, c. 271; 1923 Acts, Ex. Sess., c. 14; 1932 Acts, c. 169; 1942 Acts, c. 387; 1948 Acts, c. 407; 1952 Acts, Ex. Sess., c. 18; 1958 Acts, c. 33.

State Senate apportionment: 1922 Acts, c. 271; 1923 Acts, Ex. Sess., c. 14; 1934 Acts, c. 169; 1942 Acts, c. 387; 1948 Acts, c. 407; 1952 Acts, Ex. Sess., c. 17; 1958 Acts, c. 333.

[23]See DAVID & EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE, vol. I, at 1-5, 11-15, 64 (1961) and vol. II, at 164-70 (1962).

[24]See NATIONAL MUNICIPAL LEAGUE, COMPENDIUM ON LEGISLATIVE APPORTIONMENT (1961 ed.); BAKER, STATE CONSTITUTION: REAPPORTIONMENT 70 (1960); McKay, *op. cit. supra* note 4, at 474-75.

in both houses of the General Assembly. A legislative committee in 1940 conceded that the timing of the reapportionment duty "argues an obvious intention on the part of the framers of the Constitution that the population figures should be a major consideration in redistricting." The committee, however, noted the absence of a specific statement of population as a controlling standard and concluded "that it was intended to allow the General Assembly discretion to modify the population basis in line with other factors which must be considered." [25] A Commission on Redistricting which reported in 1951 reached a similar conclusion but added: "Equality of population is not mandatory and the General Assembly may concede such factors as it deems appropriate. . . ." [26]

The increasing reluctance of the legislature to redistrict the General Assembly became evident after the 1950 Census. The first regular session of the General Assembly failed to enact redistricting legislation in 1952. Governor John S. Battle had to call a special session to reapportion both legislative chambers. In 1960 Governor J. Lindsay Almond asked the General Assembly to create a commission to study the need for legislative reapportionment and congressional redistricting, but legislation for that purpose was not enacted. Governor Almond in early 1961, therefore, appointed a Commission on Redistricting. A legislator and a citizen were appointed to the Commission[27] from each of the State's 10 congressional districts.

The Commission on Redistricting in its report, submitted to the Governor and the General Assembly in November 1961, proposed redistricting plans for both the State Senate and the House of Delegates.[28] The Commission's proposals contemplated the shift of 3 Senate seats and 8 Delegate seats from less populous to more populous areas of the State. Its plans were guided by concern for "the factors of compactness, contiguity, ease of access and communication, community of interest, and a reasonable degree of equality of representation." [29]

The 1962 General Assembly fulfilled its reapportionment responsibility for both legislative houses, but it did not enact the apportionment plans recommended by the Commission on Redistricting. The

[25] 1940 House Document #6, *Report of the Commission on Redistricting of House and Senatorial Districts* 14.

[26] 1951 House Document #15, *Report of the Commission on Redistricting* 6-7.

[27] Richmond Times-Dispatch, Jan. 17, 1961, pp. 1, 3.

[28] Virginia, REPORT OF THE COMMISSION ON REDISTRICTING, Nov. 15, 1961.

[29] *Id.* at 8.

1962 redistricting merely shifted 1 Senate seat and 3 Delegate seats to urban areas.[30] It appeared that the redistricting was merely a token effort in the direction of equality of representation in both houses. Table I indicates in statistical terms the limited scope of the 1962 redistricting.

TABLE I

VIRGINIA GENERAL ASSEMBLY, MEASURES OF REPRESENTATIVENESS BEFORE AND AFTER 1962 REDISTRICTING

	STATE SENATE		HOUSE OF DELEGATES	
	Ratio of Largest District to Smallest District	Percent of Population Necessary to Elect a Majority of Members	Ratio of Largest District to Smallest District	Percent of Population Necessary to Elect a Majority of Members
Prior to 1962 Redistricting..	5.5	37.7	7.1	36.8
After 1962 Redistricting.....	2.4	41.1	4.4	40.5

Based on 1960 population figures.

The most underrepresented areas of the State, however, were not provided with the additional legislators to which their populations would have entitled them. Only 1 additional senator and 1 delegate were allocated to Fairfax County and Falls Church, while Norfolk received no increases in its representation. Thus, in the Senate, Norfolk had only 65% of the representation to which on a population basis it would have had, while Fairfax County had 70%, and Arlington County, only 61%. In the House of Delegates the situation was much the same with Fairfax County having 42%, Hampton City 44%, Arlington County 73%, and Norfolk 78% of the delegate representation a population-based apportionment would have provided. There were, in contrast, 4 Senate districts in rural areas which were overrepresented by at least 50% and 8 Delegate districts which were also overrepresented by at least 50%.

Governor Albertis S. Harrison, Jr., in signing the redistricting bills, had acknowledged "the disparity in population between some districts." The Governor expressed his view of apportionment standards in Virginia in the following terms:

> Historically, population has been utilized as the principal factor in redistricting in Virginia, although population alone has never

[30]1962 Acts, c. 635, c. 638.

> been deemed the sole basis of redistricting. The General Assembly —properly, I think—has always considered not only population, but also geographical area, the number of political subdivisions within a district, terrain, and community of interest, in drawing district lines. . . .
>
> Unless equality of population be permitted to overbalance completely all considerations of compactness, contiguity, habit, convenience of the people, and community of interest, I am convinced that the present plan is a fair reapportionment of Virginia's legislative representation.[31]

To justify the equity of the redistricting acts, the Governor cited factors of geographic diversity and geographic barriers and the need to have few political subdivisions within legislative districts. He particularly emphasized Virginia's comparatively high standing among the rest of the states in the relation of its legislative apportionment to population.

The legal attack on the 1962 redistricting acts was launched on April 9, 1962, when suit was filed in Alexandria in the U.S. District Court for the Eastern District of Virginia by 4 legislators from Northern Virginia.[32] The plaintiffs contended that they were denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the U.S. Constitution, because the 1962 redistricting acts prevented them from casting votes as effective as those cast by voters resident in overrepresented legislative districts. The plaintiffs maintained that the 1962 acts invidiously discriminated against them and other voters in districts where effective votes were similarly diluted. They pointed out that the redistricting acts permitted a minority of the people of Virginia to control the General Assembly. The suit sought injunctive relief to prevent elections from being held under the 1962 apportionment or under the existing (1952) apportionment system. It is to be noted how soon after *Baker v. Carr*,[33] decided on March 26, 1962, the Virginia case was filed.

The 3-judge panel appointed to consider the complaint consisted of Judge Albert V. Bryan of the Court of Appeals of the 4th Circuit, Judge Oren R. Lewis of Alexandria, and Judge Walter E. Hoffman of Norfolk, both of the Eastern District of Virginia. The Court permitted plaintiffs from Norfolk, who alleged that they

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[31]Statement by Governor Harrison re: HB 250 and SB 145, Apr. 7, 1962.

[32]The 4 plaintiffs were Delegates Harrison Mann and Kathryn Stone of Arlington County, and Delegate John C. Webb and Senator John A. K. Donovan of Fairfax County.

[33]*Supra* note 1.

suffered the same inequalities as Northern Virginia voters, to intervene in the case. After hearing the case on October 22 and 23, the District Court handed down its decision on November 28, 1962, with Judge Bryan writing the opinion for the majority and Judge Hoffman dissenting.[34]

The Court denied the defendant's motion to dismiss the complaint, noting that *Baker v. Carr* "unequivocally declares . . . that allegations comparable to those now before us state a claim upon which the relief here prayed may be granted."[35] The Court also refused to grant dismissal upon other grounds claimed by the defendants. Dismissal was not justified because the Court did not see the " 'exceptional circumstances' " present for the State remedy "to oust Federal jurisdiction."[36] Judge Bryan denied the defendants' contention that the suit was one against the State barred by the Eleventh Amendment and held that it ". . . was against State officials acting pursuant to State laws, a type of action universally held appropriate to vindicate a Federally protected right."[37] The Court, however, did sustain the motion to dismiss the Governor and Attorney General as defendants because they did not have a " 'special relation' " to the elections.[38]

To the contention that the Federal court should abstain from deciding the case until State courts had had an opportunity to review and interpret the redistricting acts and the relevant State constitutional provisions, Judge Bryan answered that the redistricting acts were not ambiguous and the constitutional provisions were not unclear. The acts, he noted, were specific and the Constitution alluded to no special local considerations:

> Whether the acts of the Assembly are within the aim and purpose of the Constitution can, therefore, be gained only from the bare words of its clauses, fair inferences from the acts themselves

[34]Mann v. Davis, 213 F. Supp. 577 (E.D. Va. 1962). For a description of early developments in the case see Eisenberg, "Reapportionment: Journey Through a Judicial Thicket," in CASES IN AMERICAN NATIONAL GOVERNMENT AND POLITICS, 182-94 (Tresolini & Frost ed. 1966).

[35]Mann v. Davis, *supra* note 34, at 579.

[36]*Ibid.* The court cited the following cases to support its position: Lane v. Wilson, 307 U.S. 268, 274 (1939); United States v. Bureau of Revenue, 291 F.2d 677, 679 (10th Cir. 1961); Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

[37]Mann v. Davis, *supra* note 34, at 579. Judge Bryan cited the following cases to support this view: Ex parte Young, 209 U.S. 123, 155-56 (1908); Duckworth v. James, 267 F.2d 224, 230-31 (4th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959); Kansas City So. Ry. v. Daniel, 180 F.2d 910, 914 (5th Cir. 1950).

[38]Mann v. Davis, *supra* note 34, at 579, noting *Ex parte Young*, 209 U.S. 123, 157 (1908).

> and commentary evidence. This determination is thus as well within the competence of a Federal court sitting in Virginia.
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> Furthermore, the strong implication of Baker v. Carr, if not its command, is that the Federal three-judge court should retain and resolve the litigation.[39]

As to the merits of the plaintiffs' allegations, Judge Bryan declared that the equal protection clause of the Fourteenth Amendment demanded that apportionment afford "substantially equal representation" to the State's citizens, and he then examined the disparities in the population size of districts in both legislative houses. He noted the obvious inequalities in the voting power of various legislative districts and, while asserting that population was not "the sole or definitive measure of districts when taken by the Equal Protection Clause," [40] declared that the burden of proof to justify the disparities among the districts fell upon the defendants. Judge Bryan admitted the existence of factors other than population to be weighed in evaluating the justness of an apportionment, but he concluded that population was the predominant apportionment standard under the Fourteenth Amendment. The other relevant factors were compactness and contiguity, community of interest, observance of "natural lines," and adherence to the boundaries of political subdivisions. But there had to be evidence that such factors were actually considered in constructing legislative districts. In Virginia, his opinion concluded, no such evidence was forthcoming.

The defendants had contended that a factor explaining the variations in the districts was the number of military persons located in Arlington and Fairfax counties and in the City of Norfolk. Judge Bryan said, however, that the evidence presented was not explicit or satisfactory. The majority of the Court, speaking through the opinion, asserted "there must be a fair approach to equality unless it be shown that other acceptable factors may make up for the differences in the numbers of people." [41] Two of the 3 members of the Court obviously felt that no demonstration of the application of other factors had been made in defense of the 1962 redistricting.

The Court refused to distinguish between the 2 legislative houses in the application of a population standard for apportionment. Judge Bryan commented briefly that the state Senate was not a "regional

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[39]Mann v. Davis, *supra* note 34, at 580.

[40]*Id.* at 584.

[41]*Ibid.*

counterpart" [42] of the United States, and that State Senate districts did not have State autonomy. The Court thus concluded that it could find "no rational basis for the disfavoring of Arlington, Fairfax, and Norfolk." [43] Without setting any permissible tolerances in mathematical terms for the disparities in district size and without declaring that wide differences between districts cannot be tolerated "if a sound reason cannot be advanced," the Court held "unconstitutional, invidious discrimination adverse to Arlington, Fairfax, and Norfolk has been proved." [44]

Judge Bryan's opinion in *Mann v. Davis* was one of the better apportionment opinions in this early period of reapportionment litigation in lower Federal and state courts. The opinion is admirably concise and the reasoning is clear and to the point. The substantial issues were treated as their significance merited and they were met directly. The opinion was particularly outstanding for the reasonable approach to the concept of equal representation as reflected in the population characteristics of legislative districts. The Court perceived the difficulty of achieving mathematical exactness in the population size of districts and did not attempt to establish an exact standard for acceptable districting. Although population was declared the principal standard for legislative districts, the Court admitted the relevance of other factors in assessing the constitutionality of an apportionment system. In these respects, the Court generally anticipated the subsequent U.S. Supreme Court approach to the problem. In viewing population as the primary basis for representation and examining deviations from population equality in terms of rational use of non-population factors, the Court took a reasonable view of the difficulties and objectives of the redistricting process. The most significant feature of *Mann v. Davis* was to place the responsibility for justifying departures from population equality upon the State and to demand evidence of the rationality and relevance of the factors offered in defense of districts of disparate size. The failure to produce a rational explanation for Virginia's redistricting acts of 1962 proved fatal.

Judge Hoffman's dissent argued that because the U.S. Supreme Court had provided only limited guidance in the reapportionment area, the inequalities in Virginia's 1962 redistricting acts did not conclusively constitute invidious discrimination. Judge Hoffman was impressed with the relative standing of Virginia's apportionment in

[42] *Ibid.*
[43] *Id.* at 585.
[44] *Ibid.*

comparison to the representative nature of other state legislatures.[45] Data furnished the Court by the State indicated that at that time, Virginia ranked 10th among the states in the minimum proportion of population that could elect majorities in both legislative houses. He also noted that even the extreme disparities in the size of Virginia districts were considerably less than in other states where apportionment systems had been invalidated and in some cases upheld in the courts. Judge Hoffman contended that there were too many unanswered questions about apportionment to justify invalidating Virginia's redistricting effort. He felt that State courts should have an opportunity to assess the apportionment system while the District Court retained jurisdiction. If the State courts invalidated the apportionment using superior knowledge of local conditions, the General Assembly could reexamine State policies and Federal interference might be unnecessary. Nevertheless, Judge Hoffman's principal difference with the majority lay in his conviction that insufficient guidelines existed to decide the case. It is significant that he did not suggest that he was impressed by the relevance of military population or other factors cited in defense of the redistricting.

The Court entered a judgment declaring the 1962 redistricting acts invalid but stayed the effect of the injunction until January 31, 1963, so that either an appeal could be taken to the U.S. Supreme Court or a special session of the General Assembly could be convened to reapportion. The Court retained jurisdiction of the case but said that further stays would have to be secured from the U.S. Supreme Court. The Attorney General of Virginia on December 10 requested a stay of the lower court order and Chief Justice Earl Warren issued the stay on December 15 to permit an appeal to the Supreme Court. The stay permitted the General Assembly to be elected in November 1963 on the basis of the 1962 redistricting acts. On June 9, 1963, the Supreme Court announced that it would review the lower court decision along with cases from 5 other states. The cases were scheduled for argument beginning November 12. The decision in *Davis v. Mann* was not handed down until June 15, 1964.

In the interim, suit was filed in State court by 2 citizens of Norfolk alleging that the 1962 redistricting acts violated § 43 of the Virginia Constitution and the Fourteenth Amendment to the U.S. Constitution. Originally filed in the Circuit Court of the City of Norfolk, the case

[45]In the summer of 1962, Virginia ranked 8th among the states in comparative view of the overall representative nature of state legislatures as calculated by the Dauer-Kelsay method of assessing how representative state legislatures were. See David & Eisenberg, *op. cit.*, *supra* note 20.

was transferred to the Circuit Court of the City of Richmond which possessed exclusive jurisdiction in cases against State officials.[46] The move to the State court took cognizance of Judge Hoffman's dissent in the Federal case and sought to exhaust State court remedies. Judge Edmund W. Hening, Jr., of the Richmond court, delivered his opinion on September 19, 1963. Citing precedents of the Supreme Court of Appeals of Virginia in dealing with apportionment of congressional districts in the State,[47] Judge Hening suggested that the Virginia Court's 1932 guideline that deviations from population equality had to be grave and unreasonable to be invalidated might be a preferable standard by which to evaluate apportionment.[48] Judge Hening pointed to the responsibility of persons who assail statutes as unconstitutional to bear the burden of establishing it. He also was guided by a presumption in favor of the reasonableness of legislative action. With these premises, Judge Hening recited the small extremes of deviation in Virginia's apportionment compared to those of other states and Virginia's comparative high standing among the states in the overall representative character of the General Assembly. He concluded that the disparities in Virginia districts were not invidious in view of the accommodation of factors of compactness, contiguity, integrity of county and city boundary lines, geographic features, and community of interests. Judge Hening concluded that the 1962 acts were marked by "an honest and fair discretion" exercised in "good faith" by the General Assembly. The population disparities, he said, were "in every way reasonable and a far cry from invidious discrimination." Judge Hening also considered the effect of excluding military population from the computation of extreme district ratios, although he viewed the point unnecessary to the disposition of the case. He concluded that if military population were excluded, the 1962 acts were even more acceptable. Therefore, he upheld the 1962 acts. Although an appeal to the Virginia Supreme Court of Appeals was made, no action had occurred when the U.S. Supreme Court finally acted on the Reapportionment Cases.

The Supreme Court's reapportionment decisions revolved about the principal opinion in *Reynolds v. Sims*,[49] the case from Alabama. The

[46]VA. CODE, §§ 8-38 par. 9, 8-40.

[47]Wise v. Bigger, 79 Va. 269 (1884), and Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932).

[48]Tyler v. Davis, Civil No. B2908 Cir. Ct. of the City of Richmond, Va., Sept. 19, 1963.

[49]377 U.S. 533 (1964).

court's opinion in *Davis v. Mann*[50] was written by Chief Justice Warren with only Justice Harlan in dissent. The Supreme Court held that both houses of the Virginia General Assembly were not apportioned sufficiently on a population basis and that they were therefore unconstitutionally apportioned, thereby sustaining the District Court decision. Chief Justice Warren noted that in *Reynolds v. Sims* the Supreme Court "held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis." Against that standard, the 1962 redistricting acts were deficient in their relation to a population base. Even though Virginia had reapportioned regularly, the Court said "state legislative malapportionment, whether resulting from prolonged legislative inaction or from failure to comply sufficiently with federal constitutional requisites, although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause." [51]

The Supreme Court also explicitly rejected the argument that the underrepresentation of Arlington, Fairfax, and Norfolk was constitutional because of their large military-related populations. Chief Justice Warren asserted: "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." [52] In addition, the Chief Justice noted that there was no evidence that the legislature had "in fact" taken military population into account in devising its apportionment system, and cited the District Court's opinion in this regard. He also took notice that Virginia statutes fostered voting by military-related personnel by waiving registration and poll tax requirements for military personnel and in applying the same residence requirements for voting to military personnel as for other citizens of the State. Even if military personnel were to be excluded from the population of legislative districts, Warren pointed out, the variations between the smallest and largest districts in each house would still be excessive. It is difficult to ascertain what the Chief Justice contemplated by implying that discrimination against a class of individuals might be sustained if enough were shown. Furthermore, in pointing out that the deviations were excessive even if such exclusions were permissible, the Chief Justice seems to suggest that somehow not counting some individuals because of employment can be supported. It seems, however, that un-

[50] 377 U.S. 678 (1964).

[51] *Id.* at 691.

[52] *Ibid.*

less employment carries very temporary residence, perhaps less than the applicable State residence requirements, there are few instances where exclusion would be justified.

The opinion proceeded to rebut the other arguments offered in support of the 1962 redistricting. The argument that the apportionment was designed to balance urban and rural political power was met by pointing out that urban areas in Virginia were not all treated in the same fashion. The Court cited the adequacy of representation given to Richmond in contrast to that extended to Arlington, Fairfax, and Norfolk. This logical defect in the defense of the 1962 redistricting had been obvious since the passage of the legislation. Examples of other urban areas adequately represented in the 1962 statutes were Virginia Beach, Lynchburg, and Danville. Allusions to the inequities of the Electoral College in defense of the redistricting were also rejected by referring to the Court's rejection in *Reynolds* of the Federal analogy argument.

The Court did not discuss remedies at length, but noted that sufficient time remained before the next legislative elections to give the General Assembly an opportunity to devise valid apportionment statutes. The Supreme Court noted that the District Court had retained jurisdiction in the case and assumed that the lower court would take further action if the legislature failed to take constitutionally valid action.

The District Court on September 18, 1964, reaffirmed its previous order of November 28, 1962, but stayed enforcement until December 15, 1964, to give the General Assembly an opportunity to reapportion both legislative houses.[53] The District Court also declared that the terms of incumbent senators would end at the expiration of the terms of the delegates elected in 1963. Thus, the Court interrupted the 4-year terms of the entire Senate, who were supposed to hold office until January 1968. The Court also declared that the incumbent General Assembly could enact legislation only after it had enacted a constitutionally valid apportionment plan. Finally, the Court retained jurisdiction in the case in the event that the General Assembly failed to act or produced an unacceptable apportionment plan.

Judge Bryan justified the interruption of senators' terms in asserting that to permit to act in 1966 a legislature composed of 1 constitutionally valid house and 1 constitutionally invalid house would not be constitutionally justifiable. Both houses form a single legis-

[53]Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964), order on mandate 238 F. Supp. 459.

lature and to be constitutionally valid 1 house could not be permitted to lag behind the other in the equality of representation. This view took proper notice of the fact that the legislative process involves both legislative houses, and that the principle of equal representation in 1 house is effectively diluted if the 2d chamber is not apportioned equally. To be effective, equal representation is required in both houses of a legislature, when viewed, as all of the apportionment cases were, in terms of the right to vote. An individual hardly realizes an equally effective vote if he has an equal voice in 1 house but a diluted vote in the 2d.

The State responded to the District Court's order by seeking a stay to appeal again to the U.S. Supreme Court. But the petition was denied without comment[54] and Virginia faced the problem of devising a constitutionally valid apportionment plan.

Governor Harrison called a special session of the General Assembly to meet on November 30 to reapportion itself. Appropriate legislation was passed by both houses on December 2 and signed by the Governor on the next day so that the General Assembly could proceed to consider other legislative matters. The patient wait by the legislature for the Governor to affix his signature to the legislation reflected the seriousness with which the General Assembly viewed the directions of the District Court.[55] The 1964 redistricting acts extended to the areas involved in the litigation the representation to which population entitled them.[56] In addition to the 2 senators that Fairfax County and Falls Church alone were to elect, Arlington was allotted 4 delegates; Norfolk its 7 delegates and a 3d senator; Fairfax County and Falls Church were to elect 6 delegates, and together with Alexandria another delegate, and with Arlington County another senator. The 1964 redistricting reduced the extreme variations between districts in the House to 1.53-1.00 and in the Senate to 1.37-1.00. Majorities of the membership could be elected by 47.7% of the population of the State in the House and 48.2% in the Senate. The 1964 reapportionment satisfied both the original plaintiffs from Northern Virginia and the intervening plaintiffs from Norfolk: they did not return to the court to seek additional corrective action.

To this point, the Virginia apportionment cases offered little in the way of surprises in their progress or outcome. After *Baker v. Carr*

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[54]Davis v. Mann, 379 U.S. 694 (1965).

[55]Daffron, *Assembly Speedily Passes Bills to Redistrict Virginia*, Lynchburg News, Dec. 2, 1964, p. 1.

[56]1964 Special Session Acts, c. 1 and 2.

and the development of litigation elsewhere, it seemed that the Virginia apportionment was destined to be invalidated unless the U.S. Supreme Court were to permit wide variations in the size of legislative districts and thereby run the risk of committing itself to some fixed tolerable ratio of inequality. This move would not only be inconsistent with principles of equal representation but also invite difficulty in uniformity, and exploitation by state legislatures. Even if the Court had been more lax in interpreting the population requirements of equal representation, Virginia was confronted with a historic reliance upon population as the principal standard for apportioning both legislative houses, with little evidence that military population was a factor seriously considered by the General Assembly in redistricting in 1962 or even uniformly evident, and with little consistency in the manner in which some areas received overrepresentation and others underrepresentation. It was difficult, therefore, to characterize the statutes as rational in design.

The next and final stages of litigation affecting Virginia's legislative apportionment raised more difficult questions, those of gerrymandering. The 1964 reapportionment was challenged by 3 groups of voters resident in the City of Richmond, Henrico County, and Shenandoah County who alleged that because of the legislative districts in which these governmental units were placed the Equal Protection clause of the Fourteenth Amendment was violated. Three separate questions relating to the districting process and its relation to the one man-one vote principle of representation were raised. Judges Bryan, Lewis, and Hoffman heard the suits, exercising the jurisdiction which the Court had retained.[57]

The Henrico County petitioners claimed that they were injured in the effectiveness of the vote which they could cast because Henrico County was combined with the City of Richmond into a single legislative district to elect 8 delegates on an at-large basis. Therefore, it was alleged that the 117,339 people of Henrico would suffer adversely because, theoretically, the 219,958 people of Richmond would dominate the district; hence, Henrico residents would not be able to elect an Henrico resident to office. The Henrico petitioners noted that Richmond alone was entitled to 5 delegates and Henrico County to almost 3 by themselves. Noting that Virginia cities and counties traditionally were allotted whole numbers of representatives when they had sufficient population to merit them, the petitioners alleged invidious discrimination to dilute the effectiveness of their votes. They

[57]Mann v. Davis, 245 F. Supp. 241 (E.D. Va. 1965).

also pointed to the fact that the 1964 reapportionment established Richmond and Henrico as separate Senate districts.

The Court resolved the question by examining the composition of legislative districts solely in terms of the population of the respective districts. The claim of the Henrico citizens was rejected. The Court cited *Fortson v. Dorsey*[58] to note that multi-member districts and multi-county or city-county districts are constitutional. Similarly, the Court commented that because a legislator was elected from one part of a district rather than another did not invalidate the district. It also commented that Henrico had not complained of the 1962 redistricting when Henrico elected 1 delegate and shared 8 others with Richmond.

The Court asserted that the principle of the integrity of city and county boundary lines was not violated because Richmond and Henrico still were separate Senate districts. Presumably alluding to the rationale for bicameral legislatures, the Court saw no inconsistency in having House districts devised differently from Senate districts. The logic of the design was evidently to " 'balance off minor inequities,' " sanctioned in *Reynolds*. In further evaluating the rationale of the Richmond-Henrico district, the Court noted the close geographic, residential, and economic interests of the 2 units.

Central to the Court's validation of the district was the conclusion that in neither Richmond nor Henrico did the district devalue the votes of residents. The Court was clearly impressed by the fact that the 8 delegates allotted to the city and county each represented 42,164 persons, closer to the ideal of 39,669 than the alternatives suggested by Henrico. If Richmond were to elect 5 delegates, each would represent 43,992 persons, or 90% of perfectly equal representation; if Henrico elected 3 representatives each would represent 39,113 persons, or 101% of perfectly equal representation. The 42,164 persons which each of the 8 delegates represented under the 1964 reapportionment amounted to 94% of ideally equal representation. Hence the deviation from equality was only 6% under the 1964 acts but would be 10% under the alternative proposal. Because the 1964 statutes provided "representation fairly nearing the par," the Court refused to invalidate the district.[59] In addition to the other factors cited above, the population equality feature of the district seemed to determine the outcome.

An allegation of racial gerrymandering was made by Richmond Negro citizens against the same Richmond-Henrico delegate districts

[58]379 U.S. 433 (1965).

[59]Mann v. Davis, *supra* note 57, at 245.

although they also leveled the same charge against the Richmond Senate district, which was elected 2 senators-at-large throughout the city. They stressed that Negroes constituted 42% of the population of Richmond but only 29% of the population of the combined Richmond-Henrico district. Thus, it was contended that by being united with predominantly-white Henrico County, Negroes in Richmond suffered a dilution of the effectiveness of their vote insofar as it would be more difficult to elect a Negro to the General Assembly. The remedy sought was twofold. First, it was suggested that Richmond and Henrico County be separated as delegate districts so that each political subdivision elected its own delegates. The proposal paralleled that of the Henrico residents in suggesting that Richmond elect 5 delegates and Henrico 3 delegates. Second, it was suggested that the 5 delegates, and the 2 senators, then elected from Richmond should be elected from single-member districts of equal population. The result, it was suggested, would make Negro votes effective so that a Negro might be elected to the legislature. This effect would follow because Negroes in Richmond lived in compact areas, and with single-member districts Negroes would elect at least 1 delegate and possibly 1 of the 2 senators. To marshal arguments in support of this position, the Negro residents suggested that the intent of the State's constitutional and statutory provisions was to elect legislators from districts without regard to county and city boundary lines. They thus alleged a deprivation of rights under both the Fourteenth and Fifteenth Amendments.

Judge Bryan disposed of these contentions rather summarily in upholding the validity of Richmond-Henrico district against this attack. First, Bryan noted the upholding of the district against the challenge of Henrico County residents. Second, he concluded that the discrimination on racial grounds was not evident in the case. The at-large system of representation, Judge Bryan emphasized, had deep historic roots in Virginia legislative elections. Single-member districting or subdistricting had never been used in Virginia cities or counties entitled to more than a single legislator. With this background, it was clearly difficult to prove that continued adherence to multi-member districts was motivated by racial considerations. Judge Bryan buttressed his conclusion by noting the at-large system for electing Richmond city councilmen, "without question by either race." [60] The consistent record of using multi-member districts in particular made the case for single-member districts difficult to sustain. Perhaps the

[60] *Ibid.*

more effective argument for a dilution of the Negro vote lay in the challenge to the Richmond-Henrico district. But the general problem of proving racial discrimination in diluting voting rights is illustrated by the conflicting claims put forth by Richmond Negroes on the one hand and Henrico whites on the other. Each group claimed an attempt to dilute the votes of residents of each of the 2 components of the district. The Negro cause was undoubtedly damaged by the Henrico claim which, it should be stressed, was equally genuine.

Judge Bryan's response to the allegation of racial gerrymandering was:

> The concept of "one person-one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.[61]

This view of the question was in accord with the U. S. Supreme Court's decision in *Wright v. Rockefeller*[62] and even with the principles enunciated in dissent in that case by Justice Douglas, whom Judge Bryan quoted in his opinion. The District Court's hesitancy to act on these gerrymandering questions was mirrored by subsequent judicial reluctance to enter the morass this issue involved. The virtues of relying upon population as the primary standard of the one man-one vote principle and putting the burden upon the State to explain deviations from a population standard was evident in the Court's accepting approximations of population equality in gerrymandering allegations and allocating the burden of proof to those charging a gerrymander.

The disposition by the Court of the gerrymandering allegation by Shenandoah County residents also illustrates the reliance upon the population standard in examining the validity of districts. Shenandoah County with its 21,825 population had constituted a single district to elect 1 delegate in the 1962 redistricting, and hence was one of the most overrepresented areas in the State. But the 1964 reapportionment placed Shenandoah County along with Page County, with its population of 15,572, into a legislative district with Rockingham County and the City of Harrisonburg, which made for an additional population of 52,401, to elect 1 delegate. But Rockingham and Harrisonburg alone constituted another district to elect 1 delegate, an application of Virginia's use of "floater districts." The Court focused upon the 4-

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[61] *Ibid.*

[62] 376 U.S. 52 (1964), cited in Mann v. Davis, *supra* note 57, at 245.

unit district and noted that district's deviation from the ideal district population of 39,669. The injustice of the district's size was compensated for Rockingham and Harrisonburg by their additional delegate, but "Shenandoah with Page suffers from a clear underrepresentation." [63] Invidious discrimination against Shenandoah County thus was proved. The Court found the disparity in population figures alone sufficient to prove the discrimination, as it had when examining the 1962 statutes in the absence of any demonstration of rationale by the State. The contrast to the Court's approach in the Richmond-Henrico district is obvious and without population equality as a feature of the Shenandoah situation the district was doomed.

The Court itself acted to correct the Shenandoah situation because of the proximity of the filing dates for candidates in the primary election. The Court felt there was not enough time for the General Assembly to meet to rectify the situation. The Court set aside the 1964 act's provisions concerning the 2 districts and the 4 governmental units and ordered that Harrisonburg, Rockingham, Page, and Shenandoah counties constitute a single district to elect 2 delegates. Each of the 2 delegates, then, the Court noted, would represent 45,380 persons, "above the proper ratio" but not "an unfair approach in the circumstances." [64] The Court also expressed its approval of the 1964 act. Efforts by the Henrico and Richmond citizens to have the U. S. Supreme Court review the dismissal of their allegations were unsuccessful.[65]

II. Congressional Districts

Congressional districts in Virginia have also been subjected to attack in court. The 1962 session of the General Assembly which reapportioned the legislature did not redistrict the State's 10 congressional districts. The 1960 Census had revealed population disparities from 356,000 to 539,000 among the congressional districts.

The Commission on Redistricting, reporting to the 1962 legislature, concluded that it was unnecessary to reapportion congressional representation.[66] The Commission's logic was that the failure of the State to lose a congressional seat as a result of the census permitted existing districts to continue to be valid. The Commission's view was that congressional districts, if valid when created, remained valid despite

[63]Mann v. Davis, *supra* note 57, at 246.
[64]*Ibid.*
[65]Burnette v. Davis, 382 U.S. 42 (1965).
[66]Report of the Commission on Redistricting, *op. cit.*, *supra* note 28, at 6-7.

subsequent changes in their populations. The Commission conceded that there were considerable population disparities among legislative districts. To remedy such disparities, the Commission concluded, would require the abandonment of a consistent Virginia practice, the principle of the integrity of county and city boundary lines in constructing congressional districts. The Commission also suggested that to alter overpopulated districts would violate other relevant districting criteria, such as contiguity, compactness, and community of interest. For these reasons, and acknowledging the extensive continuity of service by Virginia Congressmen, which the Commission noted might be upset by rearranging districts, no congressional redistricting plans were offered. This conclusion was postulated despite the citation of the requirements of § 55 of the Constitution.

The first constitutional reference to a principle of equality in congressional district apportionment was found in the 1830 Constitution[67] which required congressional representation to be "apportioned as nearly as may be amongst the several counties, cities, boroughs and towns of the State, according to their respective numbers." The numbers of course included only 3/5 of slaves and excluded "Indians not taxed."

The origins of the provisions of § 55, requiring congressional districts to be composed of "contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants," are found in the 1851 Constitution.[68] That Constitution provided that the State was to be divided into districts of "contiguous counties, cities and towns, be compact, and include, as nearly as may be, an equal number of the population." Similar provisions were found in the 1864 and 1869 Constitutions.[69] The modifications of this language in the 1902 Constitution, which now are effective, appear not to have been a matter of discussion at the 1901-02 Convention.

The suit by Norfolk residents attacking congressional districts in Virginia, styled *Wilkins v. Davis*,[70] was initiated in State courts, and, since a violation of the State Constitution was alleged, the Supreme Court of Appeals of Virginia heard the case in the first instance.[71] Behind the litigation in 1963 lay a direct precedent in Virginia on the very question of congressional districts: *Brown v. Saunders* in

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[67] VA. CONST. 1830, art. III, § 6.

[68] VA. CONST. 1851, art. IV, §§ 13-14.

[69] VA. CONST. 1864, art. IV, §§ 13-14; VA. CONST. 1869, art. V, §§ 12-15.

[70] Wilkins v. Davis, 205 Va. 803, 139 S.E. 2d 849 (1965).

[71] VA. CONST., art. VI, § 88.

1932[72] had invalidated the congressional districts enacted by the General Assembly in that year. The Virginia Supreme Court had decided *Brown* strictly on State constitutional grounds in matching the 1932 redistricting against § 55 of the Constitution. The Court in *Brown* conceded the impossibility of achieving mathematical equality of districts and the inevitability of some variation from the ideal size, particularly when in Virginia there was an "unbroken custom to refrain from dividing any county or city into separate districts." [73] The Court traced the use of population as the standard for congressional districts in Virginia for over 100 years and declared:

> Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the provisions of section 55. The discretion to be exercised should be an honest and fair discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land. No small or trivial deviation from equality of population would justify or warrant an application to a court for redress. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution. No exact dividing line can be drawn.[74]

Moving on to the merits of the case, the Court asserted:

> Applying these principles to the facts, there can be no uncertainty in the conclusion to be reached in the case under consideration. The inequality is obvious, indisputable and excessive. No argument is needed. It is demonstrated by the statement of facts.[75]

Hence, the Court invalidated the 1932 redistricting and ordered the State's 9 congressmen elected at large.

Table II, which is set forth on page 320, illustrates the variations in the populations of the 9 districts in 1932 and of the 10 districts in 1964. It is clear that the 1964 districts had greater disparities in their absolute population size than those in 1932. The extent of underrepresentation of the Second and Tenth districts in 1964 was significant. However, the ratio of the largest to the smallest district in 1964 was 1.69 to 1 compared to 1.83 to 1 in 1932.

A petition for a writ of mandamus was filed in the Supreme Court of Appeals of Virginia on April 10, 1964, by a resident of Norfolk

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[72] 159 Va. 28.

[73] *Id.* at 37.

[74] *Id.* at 43-44.

[75] *Id.* at 45.

TABLE II

POPULATION OF VIRGINIA CONGRESSIONAL DISTRICTS, 1932 AND 1964

	1932				1964		
DISTRICT	Population	Variation from Ideal Size	Percent Variation from Ideal Size	DISTRICT	Population	Variation from Ideal Size	Percent Variation from Ideal Size
1.....	239,835	−29,257	−10.9	1.....	422,624	+ 27,182	+ 6.9
2.....	302,715	+33,623	+12.5	2.....	494,292	+ 98,850	+25.0
3.....	288,939	+19,847	+ 7.4	3.....	418,081	+ 22,639	+ 5.7
4.....	212,952	−56,140	−20.9	4.....	352,157	− 43,285	−10.9
5.....	251,090	−18,002	− 6.7	5.....	325,989	− 69,453	−17.6
6.....	280,708	+11,616	+ 4.3	6.....	378,864	− 16,578	− 4.2
7.....	336,654	+67,562	+25.1	7.....	312,890	− 82,552	−20.9
8.....	183,934	−85,158	−31.6	8.....	357,461	− 37,469	− 9.6
9.....	325,024	+55,932	+20.8	9.....	364,973	− 30,469	− 7.7
.....	.....	.....	.....	10.....	527,098	+131,656	+33.3
269,092 = Ideal population per district				395,442 = Ideal population per district			

to compel the State Board of Elections to certify only candidates at large for election to Congress because the existing districts violated § 55 of the Virginia Constitution and rights guaranteed by the U.S. Constitution. The decision in *Wilkins v. Davis* was handed down on January 18, 1965, in an opinion written by Justice Buchanan.[76] The Court invalidated the 1952 redistricting acts and ordered that until the General Assembly enacted constitutionally valid congressional districts, only elections at large for Congress could be held.

The Court rejected the defendant's arguments that military population could properly be excluded in determining the number of inhabitants in congressional districts. Justice Buchanan reported that the Court was "not convinced that the military personnel constitute a permissible exclusion." [77] He noted that military population were included in the determination that Virginia was entitled to 10 congressmen. The Court also cited *Davis v. Mann*[78] in rejecting the military personnel deductibility argument.

Justice Buchanan then proceeded to determine whether the variations in the district populations were excessive. He noted the difficulties of drawing district lines to achieve mathematical equality and to achieve effective community of interest, remarked that "from the standpoint of community of interest alone this record would show

[76] *Supra* note 70.
[77] *Supra* note 70, at 808.
[78] *Supra* note 57, cited in Wilkins v. Davis, *supra* note 70, at 809.

little reason for disturbing the boundaries of the present districts," and continued:

> But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution. There must be, as nearly as practicable, an equal number of inhabitants in the districts.[79]

The Court then proceeded to note the inequalities in the districts, particularly those in the Second and Tenth districts. The Court concluded that the record did not disclose that the districts as composed were as nearly equal as practicable, or that alternative districts could not be constructed that were as equal as practicable as well as compact and contiguous. Because the requirements of § 55 were violated, the districts were invalid.

Justice Buchanan also pointed out that the congressional districts were invalid when pitted against the U.S. Constitution. He cited the U.S. Supreme Court holding in *Wesberry v. Sanders*[80] that Article I required members of the House of Representatives to be chosen by the people. *Wesberry* had held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," and that "it was population which was to be the basis of the House of Representatives." After reviewing the U.S. Supreme Court's actions and opinions in *Baker v. Carr*[81] and *Reynolds v. Sims*,[82] the Virginia Court concluded that the congressional districts could not be upheld because they violated the Federal Constitution "as construed and applied" by the U.S. Supreme Court.

Justice Buchanan affirmed the duty of the General Assembly to reapportion the congressional districts so that the constitutional requirements of equality of population and compactness and contiguity were realized. In addition, the General Assembly could "so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, give effect to the community of interests within the districts." [83] But clearly, to the Court, substantial equality of population was the most vital ingredient of a constitutionally valid apportionment plan. The remedy the Court offered was at-large elections if the General Assembly failed to reapportion congressional districts.

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[79]Wilkins v. Davis, *supra* note 70, at 810.
[80]376 U.S. 1 (1964).
[81]369 U.S. 186 (1962).
[82]377 U.S. 533 (1964).
[83]*Supra* note 70, at 813.

Once again, Governor Harrison called the General Assembly into special session for reapportionment purposes. The special session convened on August 31 and met for only 4 days. New congressional districts were enacted which were based on substantial equality of population and preserved what seemed feasible of the compactness and contiguity requirements.[84] Even community of interest considerations seemed to be accommodated. No challenge to the 1965 congressional districts was forthcoming and the first elections under that districting scheme were held in the primary election on July 12, 1966. The populations of the 10 districts and the disparities among them are contained in Table III. The ratio of the largest district to the smallest is now merely 1.11 to 1.

TABLE III

POPULATION OF 1965 VIRGINIA CONGRESSIONAL DISTRICTS

DISTRICT	Population	Variation from Ideal Size	Percent Variation from Ideal Size
1	401,052	+ 5,610	+1.4
2	419,642	+24,200	+6.1
3	408,494	+13,052	+3.3
4	386,712	− 8,730	−2.2
5	386,179	− 9,263	−2.4
6	381,611	−13,831	−3.5
7	377,511	−17,931	−4.5
8	398,951	+ 3,509	+0.9
9	386,965	− 8,477	−2.1
10	407,312	+11,870	+3.0

395,442 = Ideal population per district

* * * *

The litigation which produced reapportionments of Virginia legislative and congressional districts has not yet produced any revolutions in the constitutional, legal, or political systems of Virginia. The implications of *Wesberry*[85] and *Reynolds*[86] require the use of population as the standard for future apportionment, but this standard is clearly not new to Virginia. The primary effect of the decisions is to return Virginia to the apportionment standard to which in its own Constitution the State committed itself many years ago. It also marked a return to the legislative standard the State itself applied until the 1950 Census

[84] 1965 Special Session Acts, c. 1.
[85] *Supra* note 80.
[86] *Supra* note 82.

demonstrated the increasing urbanization, and its concentration, in the Commonwealth. Attempts to dilute the population standard since 1950 have been arrested and reversed by the litigation, and future efforts to amend the standard prevented.

The ultimate political effects of these cases in Virginia are unclear. Efforts to prevent urban populations from wielding political weight equivalent to their numbers has failed, hence the urban character of the State will be reflected in legislative as well as executive institutions. Policy-making in the State, therefore, will take place in the context of equal voting power for all of the State's people. This return to the traditional Virginia view of representation offers the State the opportunity to reassert its vital governmental role in responding to the needs of the Commonwealth as perceived by its people. Political realities under a one man-one vote standard will insure this response.

It is preferable to retain the democratic principles of Virginia government even through involvement in the "Reapportionment Revolution" than to have distorted them through legislative action.

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