WHITE, SECRETARY OF STATE OF TEXAS, ET AL. v. REGESTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 72–147. Argued February 26, 1973—Decided June 18, 1973

In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared invalid, the court permitted its use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts. *Held:*

1. This Court has jurisdiction under 28 U. S. C. § 1253 to consider the appeal from the injunction order applicable to the Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. *Roe* v. *Wade,* 410 U. S. 113. Pp. 759–761.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, § 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. *Gaffney* v. *Cummings, ante,* p. 735. Pp. 761–764.

3. The District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. Pp. 765–770.

343 F. Supp. 704, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in Parts I, III, and IV of which all Members joined, and in Part II of which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST,

JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined,. *post,* p. 772.

Leon Jaworski, Special Assistant Attorney General of Texas, argued the cause for appellants. With him on the briefs were *John L. Hill,* Attorney General, *Larry York,* Executive Assistant Attorney General, *Alton F. Curry,* Special Assistant Attorney General, and *Lewis A. Jones,* Assistant Attorney General.

David R. Richards argued the cause for appellees Regester et al. With him on the brief were *Ronald L. Clower* and *James A. Mattox. Ed Idar, Jr.,* argued the cause for appellees Bernal et al. With him on the brief were *Mario Obledo, George J. Korbel,* and *Frank Hernandez. Thomas Gibbs Gee* argued the cause for appellees Willeford et al. With him on the brief was *William Terry Bray. J. Douglas McGuire* filed a brief for appellees Van Henry Archer, Jr., et al. *D. Marcus Ranger* and *E. Brice Cunningham* filed a brief for appellees Washington et al.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and Dallas Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

___

William A. Dobrovir filed a brief for League of Women Voters of the United States et al. as *amici curiae* urging affirmance.

The Texas Constitution requires the state legislature
to reapportion the House and Senate at its first regular
session following the decennial census. Tex. Const.,
Art. III, § 28.[1] In 1970, the legislature proceeded to
reapportion the House of Representatives but failed to
agree on a redistricting plan for the Senate. Litigation

---

[1] Article III, § 28, of the Texas Constitution provides:

"The Legislature shall, at its first regular session after the publi-
cation of each United States decennial census, apportion the state
into senatorial and representative districts, agreeable to the provisions
of Sections 25, 26, and 26-a of this Article. In the event the Legis-
lature shall at any such first regular session following the publication
of a United States decennial census, fail to make such apportionment,
same shall be done by the Legislature Redistricting Board of Texas,
which is hereby created, and shall be composed of five (5) members,
as follows: The Lieutenant Governor, the Speaker of the House of
Representatives, the Attorney General, the Comptroller of Public
Accounts and the Commissioner of the General Land Office, a major-
ity of whom shall constitute a quorum. Said Board shall assemble in
the City of Austin within ninety (90) days after the final adjournment
of such regular session. The Board shall, within sixty (60) days
after assembling, apportion the state into senatorial and representa-
tive districts, or into senatorial or representative districts, as the
failure of action of such Legislature may make necessary. Such
apportionment shall be in writing and signed by three (3) or more
of the members of the Board duly acknowledged as the act and deed
of such Board, and, when so executed and filed with the Secretary
of State, shall have force and effect of law. Such apportionment shall
become effective at the next succeeding statewide general election.
The Supreme Court of Texas shall have jurisdiction to compel such
Commission [Board] to perform its duties in accordance with the
provisions of this section by writ of mandamus or other extraordinary
writs conformable to the usages of law. The Legislature shall provide
necessary funds for clerical and technical aid and for other expenses
incidental to the work of the Board, and the Lieutenant Governor
and the Speaker of the House of Representatives shall be entitled to
receive per diem and travel expense during the Board's session in
the same manner and amount as they would receive while attending
a special session of the Legislature. This amendment shall become
effective January 1, 1951. As amended Nov. 2. 1948."

was immediately commenced in state court challenging
the constitutionality of the House reapportionment.
The Texas Supreme Court held that the legislature's
plan for the House violated the Texas Constitution.[2]
Smith v. *Craddick,* 471 S. W. 2d 375 (1971). Mean-
while, pursuant to the requirements of the Texas Con-
stitution, a Legislative Redistricting Board had been
formed to begin the task of redistricting the Texas Senate.
Although the Board initially confined its work to the
reapportionment of the Senate, it was eventually ordered,
in light of the judicial invalidation of the House plan,
to also reapportion the House. *Mauzy* v. *Legislative
Redistricting Board,* 471 S. W. 2d 570 (1971).

On October 15, 1971, the Redistricting Board's plan for
the reapportionment of the Senate was released, and, on
October 22, 1971, the House plan was promulgated.
Only the House plan remains at issue in this case. That
plan divided the 150-member body among 79 single-
member and 11 multimember districts. Four lawsuits,
eventually consolidated, were filed challenging the

---

[2] The Court held that the plan violated Art. III, § 26, of the Texas
Constitution, which provides:

"The members of the House of Representatives shall be appor-
tioned among the several counties, according to the number of popu-
lation in each, as nearly as may be, on a ratio obtained by dividing
the population of the State, as ascertained by the most recent United
States census, by the number of members of which the House is
composed; provided, that whenever a single county has sufficient
population to be entitled to a Representative, such county shall be
formed into a separate Representative District, and when two or
more counties are required to make up the ratio of representation,
such counties shall be contiguous to each other; and when any one
county has more than sufficient population to be entitled to one or
more Representatives, such Representative or Representatives shall
be apportioned to such county, and for any surplus of population it
may be joined in a Representative District with any other contiguous
county or counties."

Board's Senate and House plans and asserting with re-
spect to the House plan that it contained impermissible
deviations from population equality and that its multi-
member districts for Bexar County and Dallas County
operated to dilute the voting strength of racial and ethnic
minorities.

A three-judge District Court sustained the Senate
plan, but found the House plan unconstitutional.
Graves v. *Barnes,* 343 F. Supp. 704 (WD Tex. 1972).
The House plan was held to contain constitutionally
impermissible deviations from population equality, and
the multimember districts in Bexar and Dallas Counties
were deemed constitutionally invalid. The District
Court gave the Texas Legislature until July 1, 1973, to
reapportion the House, but the District Court permitted
the Board's plan to be used for purposes of the 1972
election, except for requiring that the Dallas County
and Bexar County multimember districts be reconstituted
into single-member districts for the 1972 election.

Appellants appealed the statewide invalidation of the
House plan and the substitution of single-member for
multimember districts in Dallas County and Bexar
County.[3] MR. JUSTICE POWELL denied a stay of the
judgment of the District Court, 405 U. S. 1201, and we
noted probable jurisdiction *sub nom. Bullock* v. *Regester,*
409 U. S. 840.

I

We deal at the outset with the challenge to our juris-
diction over this appeal under 28 U. S. C. § 1253, which
permits injunctions in suits required to be heard and
determined by a three-judge district court to be ap-

---

[3] In a separate appeal, we summarily affirmed that portion of the
judgment of the District Court upholding the Senate plan. *Archer*
v. *Smith,* 409 U. S. 808 (1972).

pealed directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts

---

[4] Title 28 U. S. C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

within the State in accordance with the constitutional ,
guidelines set out in this opinion this Court will so reap-
portion the State of Texas"; and for its order that the Sec-
retary of State "adopt and implement any and all proce-
dures necessary to properly effectuate the orders of this
Court in conformance with this Opinion . . . ." 343 F.
Supp., at 737. In these circumstances, although appel-
lants could not have directly appealed to this Court
the entry of a declaratory judgment unaccompanied
by any injunctive relief, *Gunn* v. *University Com-
mittee,* 399 U. S. 383 (1970); *Mitchell* v. *Dono-
van,* 398 U. S. 427 (1970), we conclude that we
have jurisdiction of the entire appeal. *Roe* v.
Wade, 410 U. S. 113 (1973); *Florida Lime & Avocado
Growers* v. *Jacobsen,* 362 U. S. 73 (1960). With the
Texas reapportionment plan before it, it was in the inter-
est of judicial economy and the avoidance of piecemeal
litigation that the three-judge District Court have juris-
diction over all claims raised against the statute when a
substantial constitutional claim was alleged, and an ap-
peal to us, once properly here, has the same reach. *Roe*
v. *Wade, supra,* at 123; *Carter* v. *Jury Comm'n,* 396 U. S.
320 (1970); *Florida Lime & Avocado Growers* v. *Jacob-
sen, supra,* at 80.

II

The reapportionment plan for the Texas House of
Representatives provides for 150 representatives to be
selected from 79 single-member and 11 multimember
districts. The ideal district is 74,645 persons. The dis-
tricts range from 71,597 to 78,943 in population per rep-
resentative, or from 5.8% overrepresentation to 4.1%
underrepresentation. The total variation between the
largest and smallest district is thus 9.9%[5]

The District Court read our prior cases to require any
deviations from equal population among districts to be

---

[5] See Appendix to opinion of the Court, *post,* p. 770.

justified by "acceptable reasons" grounded in state
policy; relied on *Kirkpatrick* v. *Preisler,* 394 U. S. 526
(1969), to conclude that the permissible tolerances sug-
gested by *Reynolds* v. *Sims,* 377 U. S. 533 (1964), had
been substantially eroded; suggested that *Abate* v.
Mundt, 403 U. S. 182 (1971), in accepting total devia-
tions of 11.9% in a county reapportionment was *sui
generis;* and considered the "critical issue" before it to
be whether "the State [has] justified any and all vari-
ances, however small, on the basis of a consistent, rational
State policy." 343 F. Supp., at 713. Noting the single
fact that the total deviation from the ideal between Dis-
trict 3 and District 85 was 9.9%, the District Court
concluded that justification by appellants was called for
and could discover no acceptable state policy to support
the deviations. The District Court was also critical of
the actions and procedures of the Legislative Reappor-
tionment Board and doubted "that [the] board did the
sort of deliberative job . . . worthy of judicial abstinence."
Id., at 717. It also considered the combination of single-
member and multimember districts in the House plan
"haphazard," particularly in providing single-member
districts in Houston and multimember districts in other
metropolitan areas, and that this "irrationality, without
reasoned justification, may be a separate and distinct
ground for declaring the plan unconstitutional." [6] *Ibid.*

---

[6] It may be, although we are not sure, that the District Court
would have invalidated the plan statewide because of what it thought
was an irrational mixture of multimember and single-member districts.
Thus, in questioning the use of single-member districts in Houston
but multimember districts in all other urban areas, and remarking
that the State had provided neither "compelling" nor "rational"
explanation for the differing treatment, the District Court merely
concluded that this classification "may be" an independent ground
for invalidating the plan. But there are no authorities in this Court
for the proposition that the mere mixture of multimember and single-
member districts in a single plan, even among urban areas, is in-

Finally, the court specifically invalidated the use of multi-member districts in Dallas and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote,' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." *Id.*, at 735.[7]

Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from *Mahan* v. *Howell*, 410 U. S. 315 (1973), and *Gaffney* v. *Cummings*, *ante*, p. 735, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick* v. *Preisler* did not dilute the tolerances contemplated by *Reynolds* v. *Sims* with respect to state districting, and we did not hold in *Swann* v. *Adams*, 385 U. S. 440 (1967), or *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), or

───────────────

vidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

[7] The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not "unconstitutionally dilute the votes of any political faction or party." 343 F. Supp. 704, 735. The majority of the District Court also concluded that the Senate districting scheme for Harris County did not dilute black votes.

later in *Mahan* v. *Howell, supra,* that *any* deviations
from absolute equality, however small, must be justified
to the satisfaction of the judiciary to avoid invalidation
under the Equal Protection Clause. For the reasons
set out in *Gaffney* v. *Cummings, supra,* we do not
consider relatively minor population deviations among
state legislative districts to substantially dilute the
weight of individual votes in the larger districts so as to
deprive individuals in these districts of fair and effective
representation. Those reasons are as applicable to Texas
as they are to Connecticut; and we cannot glean an
equal protection violation from the single fact that two
legislative districts in Texas differ from one another by
as much as 9.9%, when compared to the ideal district.
Very likely, larger differences between districts would
not be tolerable without justification "based on legitimate
considerations incident to the effectuation of a rational
state policy," *Reynolds* v. *Sims,* 377 U. S., at 579; *Mahan*
v. *Howell, supra,* at 325, but here we are confident that
appellees failed to carry their burden of proof insofar
as they sought to establish a violation of the Equal Pro-
tection Clause from population variations alone. The
total variation between two districts was 9.9%, but the
average deviation of all House districts from the ideal
was 1.82%. Only 23 districts, all single-member,
were overrepresented or underrepresented by more than
3%, and only three of those districts by more than 5%.
We are unable to conclude from these deviations alone
that appellees satisfied the threshold requirement of prov-
ing a prima facie case of invidious discrimination under
the Equal Protection Clause. Because the District Court
had a contrary view, its judgment must be reversed in
this respect.[8]

---

[8] The court's conclusion that the variations in this case were not
justified by a rational state policy would, in any event, require re-

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Mahan.* v. *Howell, supra;* see *Burns* v. *Richardson,* 384 U. S. 73 (1966); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Lucas* v. *Colorado .General Assembly,* 377 U. S. 713 (1964); *Reynolds* v. *Sims,* supra.[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitcomb* v. *Chavis, supra; Burns* v. *Richardson, supra; Fortson* v. *Dorsey, supra.* To sustain such claims, it is not enough that the racial group al-

consideration and reversal under *Mahan* v. *Howell,* 410 U. S. 315 (1973). The Texas Constitution, Art. III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of *Mahan* v. *Howell,* may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

[9] See *Whitcomb* v. *Chavis,* 403 U. S. 124, 141–148 (1971), and the cases discussed in n. 22 of that opinion, including *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" *Id.,* at 121.

legedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra,* at 149-150.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F. Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party

___

[10] There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

candidate slating in Dallas County.[11]   That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community.   The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community."   *Id.*, at 727.   Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was.therefore generally not permitted to enter into the political process in a reliable and meaningful manner.   These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with *Hernandez v. Texas*, 347 U. S. 475 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the. multimember district on this group constituted invidious discrimination.   Surveying the historic and present condition of the Bexar County Mexican-American community, which is concen-

---

[11] The District Court found that "it is extremely difficult to secure either a representative seat in the Dallas County- delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." 343 F. Supp., at 726.

trated for the most part on the west side of the city of
San Antonio, the court observed, based upon prior cases
and the record before it, that the Bexar community, along
with other Mexican-Americans in Texas,[12] had long "suf-
fered from, and continues to suffer from, the results and
effects of invidious discrimination and treatment in the
fields of education, employment, economics, health, poli-
tics and others." 343 F. Supp., at 728. The bulk of
the Mexican-American community in Bexar County oc-
cupied the Barrio, an area consisting of about 28 con-
tiguous census tracts in the city of San Antonio. Over
78% of Barrio residents were Mexican-Americans, making
up 29% of the county's total population. The Barrio
is an area of poor housing; its residents have low income
and a high rate of unemployment. The typical Mexican-
American suffers a cultural and language barrier [13] that
makes his participation in community processes ex-
tremely difficult, particularly, the court thought, with
respect to the political life of Bexar County. "[A] cul-
tural incompatability . . . conjoined with the poll tax and
the most restrictive voter registration procedures in the
nation have operated to effectively deny Mexican-
Americans access to the political processes in Texas even
longer than the Blacks were formally denied access by
the white primary." 343 F. Supp., at 731. The residual
impact of this history reflected itself in the fact that
Mexican-American voting registration remained very
poor in the county and that only five Mexican-Americans
since 1880 have served in the Texas Legislature from

---

[12] Mexican-Americans constituted approximately 20% of the popu-
lation of the State of Texas.

[13] The District Court found that "[t]he fact that [Mexican-
Americans] are reared in a sub-culture in which a dialect of Spanish
is the primary language provides permanent impediments to their
educational and vocational advancement and. creates other traumatic
problems." 343 F. Supp., at 730.

Bexar County. Of these, only two were from the Barrio area.[14] The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multi-member district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans "are effectively removed from the political processes of Bexar [County] in violation of all the *Whitcomb* standards, whatever their absolute numbers may total in that County." *Id.,* at 733. Single-member districts were thought required to remedy "the effects of past and present discrimination against Mexican-Americans," *ibid.,* and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

The District Court apparently paid due heed to *Whitcomb* v. *Chavis, supra,* did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of

---

[14] Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part, and remanded.

APPENDIX TO OPINION OF THE COURT

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7 (3)	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1
13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19 (2)	150,209	75,104	459	.6
20	75,592		947	1.3
21	74,651		6	.0
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26 (18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76,505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32 (9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35 (2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37 (4)	295,516	73,879	(766)	(1.0)

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)
42	74,706		61	.1
43	-74,160		(485)	·(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46 (11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48 (3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59 (2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3
71	73,711		(934)	(1.3)
72 (4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)·	(1.2)
75 (2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)
95	73,825		(820)	(1.1)
96	72,505		(2,140)	(2.9)
97	74,202		(443)	(.6)
98	72,380		(2,265)	(3.0)
99	74,123		(522)	(.7)
100	75,682		1,037	1.4
101	75,204		559	.7

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting in No. 71–1476, *ante,* p. 735, and concurring in part and dissenting in part in No. 72–147.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western Dis-

trict of Texas reaching a similar result as to the Texas
plan. In the Texas case, the Court does affirm, however,·
the District Court's determination that the use of ·multi-
member districts in Dallas and Bexar Counties had the ·
unconstitutional effect of minimizing the voting strength
of racial groups.[1] See *Whitcomb* v. *Chavis*, 403 U. S.
124, 142–144 (1971); *Burns* v. *Richardson*, 384 U. S. 73,
88 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965).
With ·that latter conclusion I am in full agreement, as I'
also agree·with arid join Part I of the Court's opinion in
No. 72–147, *White* v. *Regester*. But the decision to up-
hold the state apportionment schemes reflects· a sub-
stantial and very unfortunate retreat from the principles
established in our earlier cases, and I therefore must state
my dissenting views.

I

At issue in No. 71–1476, *Gaffney* v. *Cummings*, is the
1971 reapportionment plan for election of members of
the House of Representatives of Connecticut. The plan ·
was premised on a 151-member House, with each· mem-.
ber elected from a single-member district. Since 'the
population of the·State was 3,032,217, according to 1970·
census data, the ideal would fix the population of each
district at 20,081. In fact, the population· of many

---

[1] In *Fortson* v. *Dorsey*, 379 U. S. 433 (1965),· we held that a
multimember district is not *per se* unconstitutional under the Equal
Protection Clause, even though we had previously recognized certain
inherently undesirable features of the device. See *Lucas* v. ·*Colo-
rado General Assembly*, 377 U. S. 713, 731 n. 21 (1964). We have
.concluded, however, that the use of the device is, in fact, uncon-
stitutional, where it operates to "·'minimize or cancel out the voting
strength of racial or political elements of the voting population,' "
Burns v. *Richardson*, 384 U. S. 73, 88 (1966), quoting from *Fortson* v.
Dorsey, *supra*, at 439. Today's decision is· the first in which we
have sustained an attack on the use of multimember districts. Cf.
Whitcomb v. *Chavis*, 403 U.·S. 124, 144 (1971).

districts deviated substantially from the ideal, ranging
from a district underrepresented by 3.93% to one over-
represented by 3.9%. The total spread of deviation—a
figure deemed relevant in each of our earlier decisions—
was 7.83%. The population of 39 assembly districts
deviated from the average by more than 3%. Another
34 districts deviated by more than 2%. The average
deviation was just under 2%. To demonstrate that the
state plan did not achieve the greatest practicable de-
gree of equality in per-district population, appellees sub-
mitted a number of proposed apportionment plans, in-
cluding one that would have significantly reduced the
extent of inequality. The total range of deviation under
appellees' plan would have been 2.61%, as compared to
7.83% under the state plan.

The District Court held the state plan invalid on the
ground that "the deviations from equality of popula-
tions of the . . . House districts are not justified by any
sufficient state interest." [2] 341 F. Supp. 139, 148 (Conn.
1972). Instead of adopting one of appellees' plans, the
court appointed a Special Master to chart a new plan,
and his effort produced a scheme with a total range of
deviation of only 1.16%. In overturning the District
Court's decision, the Court does not conclude, as it did
earlier this Term in *Mahan* v. *Howell,* 410 U. S. 315
(1973), that the District Court failed to discern the
State's sufficient justification for the deviations. Indeed,
in view of appellant's halfhearted attempts to justify

---

[2] With regard to the senatorial districts, the 1971 plan pro-
duced a total variance of 1.81%. Although appellees did not
specifically challenge the apportionment of senatorial districts, the
District Court properly concluded that its finding of unconstitutional
deviation in one house required invalidation of the entire appor-
tionment plan. *Maryland Committee for Fair Representation* v.
Tawes, 377 U. S. 656, 673 (1964); *Lucas* v. *Colorado General Assem-
bly, supra,* at 735. *Burns* v. *Richardson, supra,* at 83.

the deviations at issue here, such a conclusion could hardly be supported. Whereas the Commonwealth of Virginia made a substantial effort to draw district lines in conformity with the boundaries of political subdivisions—an effort that was found sufficient in *Mahan* v. *Howell* to validate a plan with total deviation of 16.4%— the evidence in the case before us requires the conclusion that Connecticut's apportionment plan was drawn in complete disregard of political subdivision lines. The District Court pointed out that "[t]he boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district." 341 F. Supp., at 142. Moreover, the boundary lines of 29 of these 47 towns were cut more than once, and the plan created "78 segments of towns in the formation of 151 assembly districts." *Ibid.*

Although appellant failed to offer cogent reasons in explanation of the substantial variations in district population, the Court nevertheless upholds the state plan. The Court reasons that even in the absence of any explanation for the failure to achieve equality, the showing of a total deviation of almost 8% does not make out a prima facie case of invidious discrimination under the Fourteenth Amendment. Deviations no greater than 8% are, in other words, to be deemed *de minimis*, and the State need not offer any justification at all for the failure to approximate more closely the ideal of *Reynolds* v. *Sims, supra.*

The Texas reapportionment case, No, 72–147, *White* v. *Regester*, presents a similar situation, except that the range of deviation in district population is greater and the State's justifications are, if anything, more meager. An ideal district in Texas, which chooses the 150 members of the State House of Representatives from 79 single-member and 11 multimember districts, is 74,645. As

defined in the State's 1970 plan, a substantial number
of districts departed significantly from the ideal. The
total range of deviation was at least 9.9%, and arguably
almost 30%, depending on the mode of calculation.[3] The
District Court pointed out that

> "[i]n all of the evidence presented in this case, the
> State has not attempted to explain in terms of
> rational State policy its failure to create districts
> equal in population as nearly as practicable, nor has
> the State sought to justify a single deviation from
> precise mathematical equality. The lengthy depo-
> sitions of the members of the legislative redistricting
> board and of the staff members who did the actual
> drawing of the legislative district lines are devoid
> of any meaningful indications of the standards used."
> 343 F. Supp. 704, 714 (WD Tex. 1972).

As the District Court's opinion makes clear, the varia-
tions surely cannot be defended as a necessary byproduct
of a state effort to avoid fragmentation of political sub-
divisions. Nevertheless, the Court today sets aside the
District Court's decision, reasoning, as in the Connecti-
cut case, that a showing of as much as 9.9% total devia-
tion still does not establish a prima facie case under the
Equal Protection Clause of the Fourteenth Amendment.
Since the Court expresses no misgivings about our re-
cent decision in *Abate* v. *Mundt,* 403 U. S. 182 (1971),
where we held that a total deviation of 11.9% must be

---

[3] The District Court pointed out that "the State's method of
computing deviations in the multi-member districts may distort the
actual percentage deviations in those eleven districts. . . . Since
we have concluded that the 9.9% total deviation is not the result
of a good faith attempt to achieve population equality as nearly
as practicable, it is unnecessary for us to resolve this complex
computational conflict." 343 F. Supp. 704, 713 n. 5. A similar
conflict existed in *Mahan* v. *Howell,* 410 U. S. 315 (1973), as I
pointed out in my dissenting opinion, *id.,* at 333, and there too the
Court declined to indicate any awareness of the dispute.

justified by the State, one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.

II

The proposition that certain deviations from equality of district population are so small as to lack constitutional significance, while repeatedly urged on this Court by States that failed to achieve precise equality, has never before commanded a majority of the Court.[4] Indeed, in *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 530 (1969), we expressly rejected the argument

> "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

The Court reasons, however, that *Kirkpatrick* v. *Preisler,.*

---

[4] There is-a statement, to be sure, in *Swann* v. *Adams,* 385 U. S. 440,-444 (1967), that "[d]e *minimis* deviations are unavoidable," but that statement must be viewed in context. By way of clarification, the Court immediately added that "the *Reynolds* opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U. S. 533, 579." *Ibid.* Similarly, the Court noted, quoting from *Roman* v. *Sincock,* 377 U. S. 695, 710 (1964), that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of- arbitrariness or discrimination.'" 385 U. S., at 444. *Swann* v. *Adams* does not, in my view, suggest any support for the proposition that deviations as great as 10% are tolerable in the absence of any justification or explanation by the State.

supra, a case that concerned the division of Missouri into congressional districts, has no application to the appor-· tionment of seats in a state legislature. In my dissenting ·opinion in *Mahan* v. *Howell, supra*, I pointed out that the language, reasoning, and background of the *Kirkpatrick* decision all command the conclusion that our holding there is applicable to state legislative apportionment no less than to congressional districting. In fact, this Court specifically recognized as much in the context of `a challenge to an Arizona apportionment scheme in *Ely* v. *Klahr*, 403 U. S. 108 (1971). Describing the opinion of the District Court whose judgment was under review, we noted that the court below had ·"properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells·* v. *Rockefeller*, 394 U. S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality." 403 U. S., at 111. Yet it is precisely such a notion that the Court today approves.[5]

Moreover, even if *Kirkpatrick* should be deemed inapplicable to the apportionment of state legislative districts, the reasoning that gave rise to our rejection of a

---

[5] By contrast, in *Mahan* v. *Howell, supra*, the Court expressly reaffirmed the holding of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), that "some deviations from the equal-population principle are constitutionally permissible" "[s]*o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.*" *Id.*, at 579, quoted in *Mahan·*- v. *Howell, supra*, at 325 (emphasis added). In my view, the Court incorrectly concluded in *Mahan* v. *Howell* that Virginia had justified the population variations at issue there. Nevertheless, the Court did follow the line of analysis prescribed in our earlier decisions—requiring the State to justify every deviation from precise equality. The approach of *Mahan* is, therefore, directly at odds with·the approach adopted today. See also, *e. g., Abate* v. *Mundt*, 403 U. S. 182, 185 (1971); *Kilgarlin* v. *Hill*, 386 U. S. 120, 122 (1967); *Swann·* v. *Adams, supra*, at 443–446.

de minimis approach is fully applicable to the case before us. We pointed out there that the "as nearly as practicable" standard—the standard that controls legislative apportionment as well as congressional districting, *Reynolds* v. *Sims, supra,* at 577—demands that "the State make a good-faith effort to achieve precise mathematical equality. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." 394 U. S., at 530-531. *Kirkpatrick* recognized that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U. S., at 531.

Although not purporting to quarrel with the principle that precise mathematical equality is the constitutionally mandated goal of reapportionment, the Court today establishes a wide margin of tolerable error, and thereby undermines the effort to effectuate the principle. For it is clear that the state legislatures and the state and federal courts have viewed *Kirkpatrick* as controlling on the issue of legislative apportionment, and the outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate. Appellees in No. 71-1476 make the point forcefully by comparing the extent of inequality in the population of legislative districts prior to 1969, the year of our decision in *Kirkpatrick*; with the extent of inequality in subsequent years.[6] Prior to 1969, the range of variances in population of state senatorial districts exceeded 15% in 44 of the 50 States. Three States had

---

[6] Appellees' figures are compiled from a table entitled Apportionment of Legislatures, in 17 Council of State Governments, the Book of the States: 1968-1969, pp. 66-67 (1968), and from Council of State Governments, Reapportionment in the Seventies (1973).

reduced the total variance to between 10% and 15%; two had cut- the variance to between 5% and 10%; only one had reduced the variance below 5%. The record of apportionment of state House districts was even less encouraging. Variances in excess of 15% characterized all but two of the States, and only one of these had brought the total variance under 10%. The improvement in the post-1969 years could not have been more dramatic. The table provided by appellees, set out in full in the margin,[7] reveals that in almost one-half of the States the total variance in population of senatorial districts was within 5% to zero. Of the 45 States as to which information was available, 32 had reduced the total variance below 10% and only eight had failed to bring the total variance below 15%. With regard to House districts the improvement is similar. On the basis of information concerning 42 States, it appears that 20 had achieved a total variance of less than 5%, and only 14 retained districts with a total variance of more than 15% from the constitutional ideal.

To appreciate the significance of this encouraging development, it is important to understand that the demand for precise mathematical equality rests neither on

---

[7]   Deviations After 1970

Range of Deviations	Number of States	Percentage of States
	Senate:	
Under 1%	3	6.7%
1-5%	21	46.7%
5-10%	8	17.8%
10-15%	5	11.1%
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1-5%	16	38.1%
5-10%	8	19.1%
10-15%	4	9.5%
Over 15%	10	23.8%

a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right—the right to an equal vote. "While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds* v. *Sims, supra,* at 561. We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives. The conclusion that a State may, without any articulated justification, deliberately weight some persons' votes more heavily than others, seems to me fundamentally at odds with the purpose and rationale of. our reapportionment decisions. Regrettably, today's decisions are likely to jeopardize the very substantial gains that have been made during the last four years.

Moreover, if any approach ascribes too much importance to abstract numbers and too little to the realities of malapportionment, it is not *Kirkpatrick*'s demand for precise equality in district population, but rather the Court's own *de minimis* approach. By establishing an arbitrary cutoff point expressed in terms of total percentage variance from the constitutional ideal, the Court fails to recognize that percentage figures tend to hide the total number of persons affected by unequal weighting of votes. In the Texas case, for example, the District Court pointed out that

"the total deviations for Dallas and Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people.

The percentage deviation figures are only a short-hand .method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that legislators repre-sent people, not trees or cows, so we would empha-size that legislators represent people, not percent-ages of people." 343 F. Supp., at 713 n. 5.

Finally, it is no answer to suggest that precise mathe-matical equality is an unsatisfactory goal in view of the inevitable inaccuracies of the census data on which the plans are based. That argument, which we implicitly rejected in *Kirkpatrick* v. *Preisler, supra,*[8] mixes two distinct questions. In the first place, a state appor-tionment plan must be grounded on the most accurate available data, and the unreliability of the data may itself necessitate the invalidation of the plan. But once the data are established, the State's constitutional obliga-tion is to achieve the highest practicable degree of equal-ity with reference to the information at hand. In my view, the District Courts properly concluded that neither Texas nor Connecticut had satisfied this obligation. I would therefore affirm both judgments.

---

[8] See 394 U. S., at 538–540 (1969) (Fortas, J., concurring); *Wells* v. *Rockefeller,* 394 U. S. 542, 554 (1969) (WHITE, J., dissenting).