10-1972

White v. Regester

Lewis F. Powell Jr.

2/2/72

Re: Texas State Legislative Redistricting Case--Graves v. Barnes

I. PROCEDURAL HISTORY OF THE CASE

This application for a stay pending appeal is from the judgment of a three-judge court sitting in the USDC WD Texas (GOldberg, Justice, Woods--Per Curiam). The action below grows out of four consolidated actions filed in four district courts. The four cases raised the following issues:

(1) Graves--challenge to apportionment plan for the Senatorial Districts in Harris County (Houston) on the ground that they were racially gerrymandered.

(2) Regester--challenge to the House of Representative reapportionment plan for the Texas House on the ground of populational disparities. They also challenged the use of multi-member districts in the metropolitan communities as invidious discrimination.

(3) Marriott--challenged the House reapportionment plan's provisions dealing with multi-member districts (Dallas plaintiffs)

(4) Archer--challenge to the House Plan on the ground that multi-member districts violate equal protection (San Antonio--Bexar County). Also challenged the Senate Plan on ground of racial gerrymandering.

The four cases were consolidated and a single three-judge panel appointed by Judge Brown. A pretrial conference was held on 12/22/71 and an expedited discovery and trial procedure was agreed on. The Plans under attack--both House and Senate--were promulgated by the Texas Legislative Redistricting Bd, a body created by the Texas Constitution to resolve all redistricting problems if the Texas Legislature is unable to redistrict in its first session after the decennial census. The Plans were handed down on the 15th and 22d of October.

II. HOLDINGS OF THE THREE-Judge COURT

(1) The Senate Redistricting Plan promulgated by the Board was approved by the court and is not now before you in this stay application.

(2) The House Redistricting Plan was held violative of the equal protection clause because of populational deviations. The court found, using the most conservative statistical measuring rod offered by the State, that there existed populational deviation of 9.9%. The court noted that the burden is on the State to justify deviations from mathematical equality, i.e., that it was the State's burden to demonstrate a rational justification for populational disparities. The court held that the State had offered no evidence to meet that burden. The only justification offered was adherence to county lines. The court noted, on that score, that (1) the plan itself crossed county lines in 19 instances, and (2) decisions of the Supreme Court have held that blind adherence to political lines will not justify such wide disparities. Despite its concluion that the House Plan was unconstitutional, the three-judge court stated that it was unwilling to ursurp the prerogative of the Texas House of Representatives until it becomes clear that the State is unwilling to correct it's deficiencies. Therefore, the court stayed its own decision for purposes of the upcoming election. The Board's deficient plan will go into operation for this election. But, between the convening of the 1973 Session and July 1 of that year the Texas house is under orders to write another plan. If the State House refuses to act, then the DC, which is retaining jurisidiction, will then enter a plan of its own. At this point in time, then, there is no air of immediacy about that aspect of the case. This Court will have ample opportunity to pass on the merits of this segment of

case before any irreparable injury may occur. The State virtually concedes that the stay is not being sought to abate the court's decision on this aspect of the case (P. 19 of Stay application).

(3) The court held the 18-man multi-member district in Dallas County [redacted] unconstitutional. The court ordered the implementation of single-member districts for Dallas according to its own plan. The court's plan will be in effect for this upcoming election, but the State's Redistricting Plan which the court orders by July 1, 1973 may impose different requirements. As an "equity of transition" the court ruled that the candidate need not reside in the district from which he runs in this next election. The provision of the Texas Constitution requiring residence in the district is abated for this year--the candidate may live ## anywhere in the county.

(4) The court held that the 11-man multi-member district in San Antonio (Bexar County) violated the constitution...The ct here also imposed its own plan for the 1972 elections and abated the residency rule.

(5) The court refused to hold that the other 9 multi-member districted metropolitan communities in the State violated the Constitution. That aspect of the case is not before you in this application.

III. DISCUSSION

As CEP and I read this application, the only two issues before you on this request for stay are whether the Dallas and Bexar County multi-member districts are Constitutionally unacceptable. The law on this question seems clear (although its implimentation presents difficult factual problems).

Multi-member districts are not per se unconstitutional. In Whitcomb v. Chavis the Court makes clear that the 14th Amendment does not imply that "any group with distinctive interests must be represented in the legislative halls if it is numerous enough to command at least one seat." No group, as the three-judge notes, "has any constitutional right to be successful in its political activities." However, the State "may not design a system that deprives such groups of a reasonable chance to be successful." (P. 56 of DC opinion). On several occasions this Court has made clear that

> apportionment schemes including multi-member districts will constitute invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate 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). See also Fortson v. Dorsey, 379 U.S. 433,438-39 (1965); Whitcomb v. Chavis, 403 U.S. 124, 143 (1971). Finally, Whitcomb made clear that the burden rests on the challenger to demonstrate that the multi-member district unconstitutionally operates to dilute or cancel the voting strength of racial or political elements. Id. at 144. It is uncontested that the DC was fully aware of the applicable law. Indeed, as to both Dallas and Bexar Counties, the DC did conclude that multi-member districts tended to dilute or cancel out the vote of Negro or Mexican-American elements. (Pp. 42, 55-56). The controlling inquiry is whether the facts found by the DC supported that judgment.

not strict scrutiny

(1) Dallas County

To place the question in context, the DC noted that the multi-member district plan cannot be justified as State dedication to

the neutral principle that such districts are to be preferred in all metropolitan communities. Houston, the largest community, does not have multi-member districts but has 23 single-member districts (Harris County). As the DC noted, the disparity between Houston and all other metropolitan areas--a disparity which the State made no effort to explain--leads to the inference that the plan is either arbitrary for no reason or is affirmatively discriminatory for some impermissible motive. Secondly, as a preface applicable to both counties in question in this case, the DC indicated that it is more expensive to run from a large multi-member district than it is to run in a geographically smaller community for a single district slot. This cost increase makes it more difficult for poorer classes to be represented. This is an impact of multi-member districts which adheres in all such districts but is one upon which this Court does not appear to have focused in any of its major reapportionment cases.

Turning to the factors which the DC found controlling in Dallas, the following aspects of the Dallas Plan were relied upon:

(1) Most of Dallas's 16 % Black population votes Democratic. The Party slate is drawn up by the Dallas Committee for Responsible Government and Negroes have no voice on that Committee. The Committee tells the Blacks how many slots they are allowed on the ballot. In the 20th Century only 4 Negroes have been placed on the ballot.

(2) The Dallas County delegation to the State House of Representatives has consistently failed to represent their Black constituents. Dalles Legislators led the fight for segregation in the 1950s. As recently as 1970, the DCRG was utilizing racial campaign tactics to win races in white precincts.

(3) Hostility toward Blacks has been in the past, and is today,

"an integral part of Dallas County politics." This is to be distinguished from Marion County (Indianapolis) in the Whitcomb case in which the Court found that race played no significant role in party politics.

(4) Within the multi-member district Texas uses a mechanism known as the "place requirement." Under this rule each candidate must choose a place on the ballot. It makes no difference which area of the county is his home: indeed, as the court stated, all the candidates could conceivably live in the same apartment house. Because of this rule it is quite possible--and the usual occurrence--that none of the Party's candidates is from the Black segment of town.

(5) Another aspect of the multi-member district plan is the "majority" requirement. Under this requirement, which the DC pointed out was a tool utilized only in Southern States, each successful candidate must garner a majority of the vote. Under the Texas scheme, therefore, the eighteen candidates receiving the most votes are not necessarily the representatives. Each must poll a majority of the vote. Run-off elections will be held for all places in which a majority was not obtained. The DC found that these two requirements, the place requirement and the majority requirement, working together operate to "submerge racial or political minorities."

(2) Bexar County (San Antonio)

The problem in San Antonio is somewhat different from the Dallas case. Here the recognizable element of the electorate is the Mexican-American population and, although no statistics are cited, they clearly represent a significant percentage of the population (around 50%). The DC launches its analysis with an extended discussion indicating that Mexican-American's do

constitute a recognizable ethnic group entitled to the same equal protection guarantees available to Negroes. It then indicates that these Mexican-Americans or "Chicanos" live predomintly in the "barrio" or West Side of San Antonio within a small and relatively contiguous area. The court points out the "appalling" conditions of poverty under which they live and that they exist in a definable and visible subculture with its own severe cultural and language barriers, separating the barrio from the remainder of San Antonio.

(1) Looking again at the difficulties of campaigning costs, the DC found that Anglo candidates spend 2 or 3 times as much as Chicano candidates.

(2) Only 4 candidates have run from the barrio since 1880 for the Texas House of Representatives. Only 5 Chicanos from Bexar County have served in the Texas Legislature since 1880.

(3) Voter registration is very low in San Antonio among Mexican-Americans. Only about 30% of all of that group register. The DC finds that the multi-member district pattern operates to keep the Mexicans from realizing their participatory role in the government.

(4) Of course, Bexar County has the same majority-place requirements which operate in Dallas.

CONCLUSION

First, despite the other disagreements among the panel mambers, and despite Judge Woods' disagreement with the philosophy of federal judicial activity in the reapportionment area, all three concur in the finding that Bexar and Dallas Counties may not retain multi-member districts. They reach this conclusion precisely because they agree that these particular districts "operate to dilute or cancel the voting strength of racial or political elements."

Second, the DC's order is drawn narrowly (as the Court in Whitcomb intimates that it should be). 403 U.S. at 160-61. The DC looked at the individual districts and found that these two met the standards of proof called for by Whitcomb. It did not strike down multi-member districts in 9 other metropolitan areas of Texas. This restrictiveness in the court's decision is the best indicator that the court did not really conclude that multi-member districts are presumptively invalid.

Third, the State urges that it will be difficult, expensive, and maybe even impossible for the two counties in question to re-do their voter registration statistics before the upcoming primaries. The State is apparently concerned about telling citizens in which precinct they are to vote. However, the State nowhere tells us in how many cases the court's lines cross precinct lines. There are 299 precincts in Dallas, which have been divided among 18 districts. There are about 225 precincts in San Antonio, which have been divided among 11 districts. Without other information, it is my guess that relatively few of the precincts will be severed by the district lines. Most will probably be entirely within a single district. Indeed, I am not persuaded that the counties will necessarily need to alter precinct lines for this election. Residents in precincts which straddle district lines could still vote at the same polling place but would be instructed to vote for different candidates. I assume all this information could be disseminated through the newspapers or through one mass mailing to all registered voters.

I would deny the stay. The question is a narrow one--whether the plaintiffs successfully demonstrated that the multi-member districts in two counties operated to dilute or cancel the voting strength of racial or political elements. The DC, as I read its

opinion, correctly appraised the status of Supreme Court law. I find the elements of proof relied on by the DC to be sufficient. I wonder what the plaintiffs could have done to make a stronger case. Dallas is notoriously well-known for its ~~racial~~ reluctance to accept racial reform over the last 20 years. The history of San Antonio is, in some respects, more disappointing. The "minority" there is larger yet its needs have been largely ignored for many, too many, years. Neither the Blacks nor the Chicanos have ever actively participated in Texas political life. Multi-member district abolition is certainly not the universal salve that will end this long history of political impotence. That mechanism--coupled with the majority-place requirement, and run by a powerful Democratic machine--has contributed to subjugation. On the other side of the scale, where we would suspect to find a catalogue of unique state interests justifying the continued utilization of multi-member districts, there is nothing. The State has chosen to offer no explanation. In light of the status of Houston it is not surprising that the State has failed to lay before the court its reasons for multi-member districts.

For me, the question is not a difficult one. I recommend that you reject the application for stay pending appeal.

LAH

file - 72-147
Bullock v Regester

SUPREME COURT OF THE UNITED STATES

No. A–795

Curtis Graves et al. *v.* Ben Barnes et al. Diana Regester et al. *v.* Bob Bullock et al. Johnny Mariott et al. *v.* Preston Smith et al. Van Henry Archer, Jr., *v.* Preston Smith et al.	Application for a Stay of a Judgment of a Three-Judge District Court for the Western District of Texas.

[February 7, 1972]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Western District of Texas. The court's decision covers issues raised in four consolidated actions. The principal issues were as follows:

1. In *Graves* v. *Barnes,* plaintiffs challenged the State's reapportionment plan for the senatorial districts in Harris County (Houston) on the ground that they were racially gerrymandered.

2. In *Regester* v. *Bullock,* the State's reapportionment plan for the Texas House of Representatives was challenged on the grounds of population deviations from the one-man, one-vote requirement, and on the impermissibility of use of multi-member districts in the metropolitan communities.

3. In *Mariott* v. *Smith,* the House plan provision calling for a multi-member district for Dallas County was challenged.

4. In *Archer* v. *Smith,* a generally similar attack was levelled against the use of multi-member districting in Bexar County (San Antonio).

The four cases were consolidated and tried by a single three-judge panel. After full pretrial discovery, during which over 2,000 pages of depositions were taken, the District Court heard testimony at a three-and-one-half day hearing. The extensive *per curiam* opinon, and the concurring and dissenting opinions, which were handed down after some three weeks of deliberation, reflect a careful and exhaustive consideration of the issues in light of the facts as developed. The court's conclusions, in substance, were as follows:

(a) The Senate redistricting plan, as promulgated by the Texas Legislative Redistricting Board, was approved.

(b) The House redistricting plan was held violative of the Equal Protection Clause because of population deviations from equality of representation. But, in an exercise of judicial restraint, the court suspended its decision in this respect for the purpose of affording the Legislature of Texas an opportunity to adopt a new and constitutional plan. Meanwhile, the forthcoming election may be held under the plan found to be deficient.

9.9 Deviation (Howell was 16.4)

(c) The multi-member district plans for Dallas and Bexar Counties were found to be unconstitutional under the standard prescribed by this Court in *Fortson* v. *Dorsey,* 379 U. S. 433, 438–39 (1965); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966); and *Whitcomb* v. *Chavis,* 403 U. S. 124, 143 (1971). The three-judge court found from the evidence that these multi-member district plans would operate to minimize or cancel out the voting strength of racial minority elements of the voting population, and ordered the implementation of a plan calling for single-member districts for Dallas and Bexar Counties. The State offered no plan for single-member districts for these

counties, and the court was compelled to draft its own plan. To minimize the disruptive impact of its ruling, the court ordered that the State's requirement that candidates run from the district of their residence be abated for the forthcoming election. A candidate residing anywhere within the county, therefore, may run for election from any district in the county.

(d) The evidence with respect to nine other metropolitan multi-member districts was found insufficient to warrant treatment similar to that required for Dallas and Bexar Counties.

(e) Finally, the court's order stated that its judgment was final and that no stays would be granted.

In view of the foregoing holdings, the only present necessity to consider a stay relates to the District Court's decision with respect to multi-member districts in Dallas and Bexar Counties. A number of principles have been recognized to govern a Circuit Justice's in-chambers review of stay applications. Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.

As a threshold consideration, Justices of this Court have consistently required there be a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahon* v. *Howell,* 404 U. S. 1201, 1202 (1971); *Organized Village of Kake* v. *Egan,* 80 S. Ct. 33, 4 L. ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Jus-

tices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

In applying these considerations to the present case, I conclude that a stay should not be granted. The case received careful attention by the three-judge court, the members of which were "on the scene" and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court. Moreover, the order of the court was narrowly drawn to effectuate its decision with a minimum of interference with the State's legislative processes, and with a minimum of administrative confusion in the short run.

Following a practice utilized by other Justices in passing on applications raising serious constitutional questions (see *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. ed. 2d 43 (1962); *McGee* v. *Eyman,* 83 S. Ct. 230, 9 L. ed. 2d 267 (1963)), I have consulted informally with each of my Brethren who was available* at this time during the recess. Although no other Justice has participated in the drafting of this opinion, I am authorized to say that each of them would vote to deny this application. My denial of a stay at this point, of course, may not be taken either as a statement of my own position on the merits of the difficult questions raised in this case, or as an indication of what may, in fact, ultimately be the view of my Colleagues on the Court.

The application is denied.

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*All Justices, save two who were not available, have been consulted.

Held on Issue #1
Affirm " " 2

9/24/72--LAH

Texas state reapportionment case in which I denied stay last Fet.
Three issues raised by State:

1. Disparity in population - 9.9% deviation in districts for State House. Then raises issue before our Court in the Virginia case. We should Hold.

2. Multi-member districts (Dallas & San Antonio). DC found these cancelled out voting strength of minorities. System is complex & has prevented any significant Black representation (4 Blacks this Century). All candidates at large, but each is assigned a "place" & can win only if he receives a majority of votes cast for that "place". Dem. Committee names slates & omits Blacks from Committee. *

DISCUSS

Appellees challenge juris. of this Ct. to review on no injunction was issued below, this Ct allowing old system pending next session of Leg.

No merit →

No. 72-147 OT 1972
Bullock v. Regester
Appeal from USDC WD Texas (Goldberg, Justice, Wood--Per Curiam)
3 judge
REAPPORTIONMENT

I denied stay - see my Chambers opinion.

This is an appeal by the State of Texas from the judgment of a three-judge ct declaring Texas' reapportionment scheme for the State House of Representatives unconstitutional. You are familiar with the facts of this case. You denied a stay sought by the State last winter. (Attached you will find the lengthy memo I wrote at that time and a copy of your In Chambers opinion).

The appeal presents three merits issues and one jurisdictional issue. In view of my more extensive treatment in the attached memo, I will treat the merits claims in conclusory fashion.

(1) Populational disparity

The three-judge ct found that the state had failed to provide a legitimate justification for a 9.9 % deviation from

* As to this issue, Affirm on authority of Whitcomb, Burns & Fortson

exact populational equality. Rather than enjoin the effectiveness of the State's Plan, however, the ct stayed the effectiveness of its decision until the summer of 1973. Therefore, the elections this fall will go forward under the state's plan and the State will have an opportunity to correct it's plan later.

The State in its jurisdictional statement heavily emphasizes this aspect of the case--indeed it is the major focus of his claim for this Ct's intervention. It argues that the 9.9% disparity was an effort to assure respect for the integrity of county lines. With the exception of metropolitan areas, the State asserts that the drafters of the Plan only crossed one county line. Appellees assert that the Plan crossed 19 county lines and that is the number adopted by the DC. The State at bottom argues that the course of SC law in this area should change. It seeks a ruling that 10 to 20% (or more) disparity should be presumptively valid where state reapportionment is concerned. That is one of the claims before the Ct now in the Virginia state reapportionment case. The Ct may decide there whether it is prepared to adopt a double standard for the states and whether it is willing to set some figure as the presumptively rational minimum of departure from equality. The instant appeal should, therefore, be held pending resolution of that question.

(2) Multi-member districts in San Antonio

Surprisingly, although the State AG preserves this issue, he only devotes a page of his brief to it. He still argues that multi-member districts should be upheld but he

does so without the zeal we saw last winter, It is my guess that your in Chambers opinion took the wind out of that argument. It is pretty clear that the three-judge ct appropriately applied existing precedent (Whitcomb, Burns, Fortson) and that its factual determinations of intentional subjugation of racially identifiable minorities is supportable. Your conferences with other Justices while the stay was under submission last year would seem to guarantee that the Ct will not find this matter noteworthy.

(3) Multi-member districts in Dallas

See id. The factual support for the Dallas findings are even more persausive than the San Antonio determination.

(4) Jurisdictional question

Appellees argue that this Ct does not have jurisdiction. Section 1253, which governs appeals directly to this Ct from three-judge cts, states that a direct appeal is proper from any judgment granting or denying injunctive relief. As to the issue of statewide populational disparity the lower ct did not grant or deny injunctive relief. Appellees therefore assert that the only recourse is appeal to the CA5. Or, if the Ct were to view the decision to stay the effectiveness of the ######## judgment as a denial of an injunction, the State should not be allowed to appeal on that basis because it is not injured by the denial of the injunction. To the contrary, it was benefited by the denial of the injunction.

As to the multi-member district issue, appellees believe that no direct appeal is available because the ##### did not issue an order striking down a law of "statewide"

Answer as to jurisdictional argument

applicability. Here the appellees are arguing that the DC did not have jurisdiction to issue such a narrow order and, therefore, this Ct does not have jurisdiction to review.

My inclination is, as it was last February, that neither argument is well taken. The latter fails for two reasons. (1) This Ct has encouraged reapportionment cts to issue narrow orders, granting injunctive relief only in egregious cases where time is not available for the state to correct its own system. That is precisely what this DC did. I cannot believe that this Ct will now hold that the DC, while it had power to consider the whole state, was without power to strike down only a narrow portion of the plan. I think the "statewide applicability" rule refers to the law or regulation under attack at the outset and has nothing to do with the scope of the remedy issued by the DC in the exercise of its broad equitable powers. (2) Appellees can't seriously be arguing that the DC did not have jurisdiction. If so, what prevents the State from asserting in this Ct that the DC judgment should be reversed for lack of jurisdiction? The argument is, in my view, hypertechnical and unpersuasive.

9 cases

And, if the Ct has jurisdiction to review the multi-member district claims it may, as a pendent matter, review the populational disparity issue. Even if the Ct wishes only to review the population issue, I think that the failure of the DC to enter or deny an injunction could be disregarded. Of course, if the Ct decides for some reason to note the case it should postpone jurisdictional considerations until hearing on the merits but I find them not too bothersome.

HOLD FOR VRIGINIA REAPPORTIONMENT CASE LAH

No. 72-147 BULLOCK v. REGESTER Argued 2/24/73

Texas House plan

1. As to House reapportionment (max. deviation of 9.9% & average 1.82%), I think Howell is controlling & I'm inclined to reverse on this issue.

2. As to multi-member districts in Dallas & S/Antonio, I find it difficult to discover a rational basis. Inclined to affirm. Whitcomb v Chavis.

Jaworski:

Howell case is significant — though not new doctrine.

3 J/Ct majority did not recognize distinction bet. state & fed. elections.

Total max. variation 9.9%

Average variation was 1.82%

E/P test requires a good faith effort to approach equality as nearly as practicable.

The Record is full of extraneous material. The Ct. announced it would receive everything submitted, & rule later on admissibility. But Ct. never did rule. Thus ev. is replete with irrelevant & inadmissible "ev".

Ct. below imposed burden of proof on state.

Jaworski (cont)

There are 150 members of House.

? In only one instance (Red River County) was County line crossed.

Dallas (multi-member district problem)

(1,3 million

Traditionally Dallas & S/Antonio (Bexar) have had multi-member districts.

Dallas County has a strong Democratic political org.

Richards (for appellees)

Will address Dallas situation.

Urban counties presented the problem.

Harris County (Houston) - multi-district

Dallas - at large, 18 Representatives

F

No rational basis for "at large" elections in a city as large as Dallas.

Size of Dallas is so large, a candidate must spend $75/100 000 to conduct a proper campaign.

Richards (Cont.)

There are other multiple member districts (in addition to Dallas & S/Antonio) that were not invalidated by Court. No ev. of racial motivation in these.

Chief Justice raised Q whether any identifiable group (e.g. Catholics, Poles, etc) is entitled to same preferred treatment as blacks.

Idar (for San Antonio)

Judge Wood (dissenting) lived in S/Antonio. Only 5 Mexican Americans ever elected to Texas House

Gee (for Republicans)

Dallas & Bexar County are largest Districts in U.S.

Even if there were no blacks in Dallas, the multi-member plan would still be invalid – violative of E/P clause in view of fact that Houston has individual districts.* ~~what if no~~ ~~other districts~~

Gee declined to say what should be size of a valid district.

19 Counties (of 254) are divided by this Plan (~~[redacted]~~ Only 1 Rural County)

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* Even if all Tex. cities had multi-member districts, Gee says in large cities this denies E/P. Why?

Jaworski (Rehnttal)

2/26/73

Cf Larry

Bullock v. Register 72-147

Max. deviation was 9.9 as compared with 16.4 in Howell. But in Va county lines were violated in only one county (Fairfax)

Texas makes no defense:

1. Any dev. under 10% is de minimus

2. The preservation of integrity of small counties

In Abate v Mundt 403 U.S. - a county district plan was ~~stained~~ sustained.

Imp. Q is whether there is a rational justification for what was done by Texas.

(Is the present rationale - as to small counties ad hoc (an afterthought)

LAH 3/1/73

Re: REAPPORTIONMENT CASES

Judge:

The following is an effort to outline in skeletal form the issues and critical facts in these three cases in order to suggest a manner of disposition which I believe is compatible with your views as I understand them.

(1) Bullock v. Weiser, No. 71-1623

This is the Texas Congressional reapportionment case. Populational disparity from the "ideal" of 4.1%. There are at least three alternatives that might be selected upon which the reverse the DC's determination that the Texas plan is unconstitutional.

(1) Overrule Kirkpatrick v. Priesler.

Charles Black makes a strong argument for this proposition. His primary points are (1) that the historical foundation of Article I, § 2 shows a desire to achieve approximate equality (as suggested in Wesberry v. Sanders) but no serious effort to achieve any mathematical parity; (2) populational statistics, based on census figures, are too loosely related to voter statistics and, therefore, provide no accurate measure of the existence of disproportionability; (3) the rule is productive of "great harm" because it occasions considerable judicial intervention in state legislative activities.

Considerations on the other side, however, suggest that an alternative to overruling Kirkpatrick should be sought. (1) It is a recent precedent and its abrogation would surely be viewed as a consequence of a changed

personnel on the Court. (2) In light of the fact that it is cited extensively in Mahin v. Howell (9 times by my count) and carefully distinguished it would appear unseemly to overrule it three months later. This is, I think, the reason for Charlie Black's reticence at oral argument. I can think of no care which the Court has overruled several months after seemingly reaffirming its basic principles. (3) Whatever its intellectual merit, Kirkpatrick has caused what I regard as happy results in state and federal reapportionment. As the table in the appellees' brief in Gaffney (p. 26-27) indicates, in the post-Kirkpatrick era relatively few states have approved reapportionment schemes for their senates and houses with disparities in excess of 15%. (4) Overruling would occasion the reopening of an area of this Court's jurisprudence that is now on the virge of becoming solidified and, within limits, finalized. (5) From a purely personal point of view you might be especially reluctant to overrule a case of the stature and notoriety of Kirkpatrick in the same Term in which you would overrule other major recent cases (I am thinking specifically of Kaufman and Swann).

(2) Establish a de minimis rule

Without overruling Kirkpatrick entirely, the Court might depart only from the language in that case which declines to adopt any black-and-white percentage rule. There is something to be said for the stability and finality that would result from any such rule. It would assist in getting the federal courts out of the reapportionment game. But, there are several important considerations

on the other side. (1) It would require a partial abrogation of Kirkpatrick. (2) There is no strong constitutional principle upon which any such per se rule can rest. As you have often said, the Constitution does not accommodate itself to per se rules. It rests instead on broad principles and sensible application on a case-by-case basis. (3) In the absence of any solid foundational principle, the Court would be open to a charge of legislating. How to we pick 4.1% rather than 5.9%? The problem would be like that presently faced in the Dunn v. Blumstein cases.

(3) Distinguish Kirkpatrick.

While this case has been much cited for its rule of exact equality, a creful opinion may be written which focuses on the facts of the case and upon the several statements of controlling principle in Kirkpatrick. Charlie Black does this well (pp 65-79). In essence, an opinion would carefully parse the factual background of Missouri reapportionment and compare it with a close look at Texas congressional reapportionment. Centrally, it would show that while (1) Missouri's legislature affirmatively endeavored to subvert the goal of populational equality in an effort to preserve particular seats, i.e., Missouri was not entitled to the usual presumption of good faith. Secondly, the opinion would emphasize that there was (2) no justification for the Missouri deviations while in Texas there was an effort to preserve county lines. This latter point requires two caveats. An opinion here would heavily emphasize Mahin v. Howell and the respect for county lines there. And, it would emphasize that they could not have gotten less dis-

parities without breeching more lines. That is the case in Texas. The alternative plans submitted required decimation of 18 more counties to achieve populational equality. Second, Kirkpatrick does suggest that preservation of subdivision lines is not a valid justification in federal congressional cases. However, the Ct's opinion ## in that case makes pretty clear that Missouri did not offer any underlying reason for the desire to preserve county lines other than the desire to minimize political gerrymandering. In the Texas case it may well be contended that there are valid, neutral principles justifying preservation so far as possible of traditional county lines. Here the Ct could take some of the affirmative county-line language from Mahin and from Reynolds. ##Caveat: This is not an entirely satisfactory way to distinguish and is sure to draw a dissent but I think it is sufficiently solid, especially in light of the alternatives, to warrant its adoption.

Therefore, on the strength of the distinctions between this case and Kirkpatrick the DC may be reversed and the Plan reinstated.

(2) Bullock v. Register, No. 72-147

There are three issues here: I will address each briefly.

(1) Jurisdiction

Because of Gunn v. Univ Comm to End the War this Ct does not have a clear ground for jurisdiction over the populational disparity aspect of this case, i.e. the DC did not enter an injunction, instead it specifically declined to enjoin the State's plan. However, the DC did enter a

injunctive order with respect to Dallas and San Antonio. On one of two grounds this Ct might be said to have proper jurisdiction over that aspect of the case. (1) Since the DC had jurisdiction, and since it entered an injunction, we need not decide whether the injunction itself was one of statewide impact. Any injunction entered, if the DC had jurisdiction ab initio, is satisfactory. (2) The law struck down, even though it applied only to Dallas and Bexar Counties, was nonetheless a law of statwide impact within the Court's prior decisions. Moody v. Flowers involved the selection of county officials who would have only countywide jurisdictional power. New Left Mobilization involved a Bd of Regenst Rule in Texas which applied only on three of the 23 state college campuses in the State. While neither of those were statewide, the present law is because it concerns the selection of officials to state office in the House of Representatives for the State. They have power to pass on statewide legislation.

Now, if it is decided that the Ct does have jurisdiction over Dallas and Bexar counties, then as a matter of pendent jurisdiction it might reach the populational disparity argument. Recall in Roe v. Wade Justice Blackmun embraced a doctrine of pendent jurisdiction on the ground that it would be wasteful of judicial resources not to hear the entire case once a significant segment of it is here. Also, it might be argued that both issues involve the same basic facts. Both turn on the actions of the Redistricting Bd. This overall theory gets this entire case before the Ct.

While I think this is an acceptable theory, it is not unalterably correct. Ir might be argued on the basis of cases like Gunn and New Left that direct appeal jurisdiction has always been, and should continue to be, narrowly construed and that adoption of a doctrine of pendent jurisdiction here is an unwarranted extension of that jurisdictional power.

(2) Populational disparity.

The deviation for the House is 9.9%. You have asid that you regard it as controlled by Mahin v. Howell, because there 16.4 % was approved. However, a careful reading of Howell demonstrates that it is based on three factors: (1) the state justified its departures from equality (i.e. preservation of county lines); (2) the State closely adhered to its rationale, cutting only a single line in Fairfax County and that single deviation was fully explained; (3) it was conceded that no less populational deviation was possible in Virginia without breeching more lines. In theTexas case, these same factors would seem to cut the other way. (1) Although the State argued for preservation of county lines in cut 19 of them and it did so in a haphazard manner which it fails to explain or justify, showing that its rationale was not pursued with great seriousness as in Virginia. (2) The DC found that a closer approximation to equality could be achieved while cutting the same number or lesser number of lines (it had an alternative plan before it which did a better job). If the Ct now determines to disregard these distinguishing factors, it will be, in effect, establishing a per se rule

Factors which justified Mahin are not present here.

that 16.4% (at least) is presumptively all right. I do not think that such a rule should be established for the reasons stated in my prior discussion of the congressional case.

(3) Multi-member districts.

There are two independent theories for striking down the Dall and Bexar County districts, both are discussed at length in the DC opinion.

(a) The Texas plan constitutes discrimination in violation of the equal protection clause between districts in the state. As we say in Rodriguez, this Ct has frequently held that a state may distinguish between districts but only where there is a rational basis for so doing (see McGowan v. Maryland, Salsbury v. Maryland, Griffin v. School Bd). Is there a rational basis for discriminating between Houston candidates and voters and those in Dallas and San Antonio. Houston has single-member districts while the latter two had huge multi-member districts. The DC found that very large multi-member districts,(especially with the other restrictions on the ballot in those areas), disadvantage poor candidates and supporters of poor candidates. On a theory akin to Bullock v. Carter (the DC relied on the lower ct opinion in this case--Dies v. Carter--since Bullock had not yet been decided) it is fair to conclude that such discrimination is "invideous." This theory is good because it rests on clear findings of fact supported by the record that (1) demographically Dallas and SA are indistinguishable from Houston; (2) that only an independently wealthy person could win in either Dallas

or San Antonio. The State has no justification for its discrimination. The State witnesses testified that they were responding to the wishes of the local people in each place. But the record showed and the DC found that the Dallas people had indicated a desire for single-member districts and that the Bd had relied on the views of a few political cronies. This would be a narrow way to resolve the case without entering the Whitcomb v. Chavis thicket.

(b) Under Whitcomb v. Chavis, Burns v. Richardson, and Fortson, the DC also held (and seven Justices agreed last Term when the case was here on a stay) that the m-m districts in Dallas and SA operated to exclude black and minority voters. An opinion could be written focusing on the converging operation of the place and residency requirements, the history of minority submergence in both cities, the operation of the DCRG and the CGG, and the effect of a large slate which inevitably cafries every seat. I regard this theory as valid but am a little reserved in my enthusiasm because it may not be desirable for the Ct to reopen the m-m district dispute. Would a distinguishing job here encourage blacks in other m-m districts to renew their efforts despite the bar of Whitcomb.? To a large extent, of course, this would depend on how carefully the opinion was written. However, as Justcie White said in our offices last year, if this Dallas district is not invalid no m-m district anywhere could be found to be invalid.

(3) Gaffney v. Cummings, 71-1476

If you vote in Register to approve the 9.9% deviation from equality then this case is completely controlled and the 7.86% deviation in the House here must be approved. However, if you adopt the approach I suggested in Register of taking a careful look at Mahin v. Howell's articulated foundation, this case is a close one. You have commented on the grotesque political gerrymandered districts in this case. If you still think this case a bothersome one then the following rationale would seem appropriate.

Mahin expresses that deviations are tolerable where they are justified and where the justification is adhered to. The State of Connecticut offers two justifications for its 7.8% deviation. (1) Preservation of town lines; (2) political fairness. Under the Mahin theory it is clear that the first justification falls because the State cut 41 town lines, demonstrating no clear desire to preserve that as an overriding interest. (2) Political fairness, or political gerrymandering as the appellees refer to it, raises a difficult question. This Ct has dodged in s everal cases the question whether gerrymandering is per se unconstitutional. My guess is that, if pushed, the Court would conclude that it is nonjusticiable and, in a sense, inevitable and dangerous in the long run. But, it is fair to conclude as the DC in this case did, that whatever its validity it is not a sufficient justification for deviations from populational equality. Here the DC fould that a closer approximation could have been easily achieved but for this tortured desire to preserve a numerical parity of

Democratic and Repoblican seats.

There is still the question of the Senate seats, where there was also considerable political gerrymandering but a much closer approximation to equality (less than 2%). I would not knock that down under the theory expressed in the former paragraph but it is difficult to say anything about that aspect of the case. The DC did not focus particular attention on it and the briefs barely mention the Senate. If that aspect of the case requires the Ct for the first time to decide whether gerrymandering is unconstitutional, it is a most undesirable circumstance. Instead of reaching the senate question, however, I would hold that since the State must start over with the House, and since it has apparently tried to treat the House and the Senate as a single operative unity, it would probably wish to consider anew its senate districting to make it compatible with its new house scheme. Moreover, we simply to not have the sort of focused record and argument necessary to decide the Senate question.

Final caveat: It may be appropriate on the other side of this case to look at the number of people constituting the populational disparity. In Missouri in Kirkpatrick the 5.9% deviation comprehended about 20,000 people, whereas the 7.86 deviation inthe House and the 2.% deviation in the Senate in Connecticut involved only 800 or so people. It might, therefore, be argued that where the numbers make such a great difference a greater percentage is permissible where smaller units of government are involved.

LAH

[n.d.]

REAPPORTIONMENT NOTES

Bullock v. Register, No. 72-147

I. State of Texas' Brief

A. Population

(1) Populational disparities of 9.9% do not have to be justified at all. Reynolds mandates only "substantial" equality or "approximate" equality. It requires of the State that it act in "good faith." Swann v. Adams recognized that de minimus deviations are unavoidable Kirkpatrick undermines the tolerance for de minimus deviations but that is a Congressional case. Reynolds and Connor v. Williams recognine that a looser standard should apply to the States. The State would argue that, so long as the State acts in good faith, its plan will be approved where deviations from exactitude are not substantial.

(2) If some justification is required, Texas has met it in its preservation of county lines. This is a policy mandated by the State Const; it was required by the Texas SC in Smith v. Craddick; in Kirkpatrick the county integrity argument appeared hollow and after-the-fact (A belated attempt to squeeze within Reynolds); also there the State could have come closer w/o breeching its own justification; also lower deviation plans were before the ## State legislature. The State need not persuade the DC that its policy is a good or important one, only that it is rational and legitimate.

(3) The mathematical exactitude standard is seriously flawed. Note in Reynolds that the Ct said that mathematical exactness "is hardly a workable constitutional requirement." Census statistics often undercount minority groups; population statistics do not accurately reflect voting statistics; census alone does not account for shifts in population over a decade.

(4) Waht @ practicalities of the political process? Talks of the "political impact" of any scheme and the need for "play in the joints." Compromise is the life blood of the political process.

C. Multi-member districts--SAN ANTONIO

Here findings are less persuasive with regard to Whitcomb than even Dallas.

II. Appellee (Texas Repub Party)@@--Tom Gee; Terry Bray

Factual disputes: Texas argued in DC that it had no obligation to explain existing disparities; refused to submit an alternative plan; the DC found that the State had followed its own justification--county lines--only fitfully (cuts 19 counties, but only one "small" county)

A. Dallas & San Antonio

There is no rational basis for discrimination against D and SA and in favor of Houston w respect to sungle-member districts. May have been a product of time pressure; or politics but the DC found the cities to be identical in all important respects.

This Ct has said that single-member districts are preferrable all other things being equal in Connor v. Williams. The Ct has also said that either is permissible in Whitcomb, Burns, Fortson.

These are not ordinary m-m districts. (1) They are very large and, therefore, require expensive campaigns to win. The proof was that it is virtually impossible to win w/o the support of the Dallas machine. (2) Both areas have significant minority pockets.

Relies on Bullock for the impact on the impecunious.

What justification? (1) Local citizens prefer it. DC and record refute this claim. Does not concede that majority preference would be an acceptable justification (p. 30). (2) Policy of providing single-m districts when there were 1,000,000 residents. But Dallas was 1.3 million and there is no rationale of that rule of thumb.

B. Populational Variances

(1) Good faith explanation is lacking in view of the manner in which the Plan was adopted. It was the product of Spellings, an aid to Barnes who was w/o instruction

The DC did two things: (1) declared that the State H of R was malapportioned, but it did not enter an injunction, giving the State a chance to act; (2) ordered Dallas & Bexar counties reapportioned. Steps in the analysis. Gunn was a DC declaratory judgment that a State law was unconstitutional but refusing to enter an injunction until after next legislative session. Whitcomb v. Chavis, fn 19, DC held state legis reapportionment invalid but stayed injunction until after next legislature.

The Dallas SA aspect of the case will not support a direct appeal. Moody v. Flowers, 387 U.S. 97--no statewide application. Bd of Regents, and Skolnick.

III. State's reply to Jurisdictional argument

Focuses on the appealability of the injunction w respect to the two cities. Contends that this Ct has jurisdiction if the case is one properly before a three-judge ct and if an injunction or entered. It is not correct to look only to the impact of the order. The first argument then is that the law need not be of statewide applicability. The State then argues that the injunction is one having statewide impact. In Moody they were county officials, having local authority only. Here they are state officials having statewide power

Once it establishes that the Dallas & Bexar County portions of the case are before us, it gets in the state reapportionment scheme as a matter of pendent jurisdiction. Both involve examintaion of the proceedings of the Reditricting Bd. Relies on Roe v. Wade. Its argument is essentially one of judicial economy.

(Examination of case law on jurisdictional q.)

Gunn v. University Comm to End the War, 399 U.S. 383 (1970). Antiwar demonstrators were arrested during a LBJ speech in Texas under the Texas disturbing toe peace statute. They filed suit in a three-j ct to enjoin the statute. The DC held that law unconstitutional as overbroad. After saying that they were entitled to

This Ct held that it has no juris because the order is not one granting or denying an injunction. This is not a mere "tecnicality" said the Ct. Congress required that the law be narrowly construed. And, it is not possible to know what the Ct has decided.

Whitcomb v. Chavis. 403 U.S. 124 (1971)
Here the DC found improper districting and malapportionment of the State legis but declined to issue an injunctive order. Instead it withheld judgment giving the State legislature a chance to reapportion itself. Fn 19 says that this Ct does not have jurisdiction because no injunction was granted or denied, citing Gunn.

This case was fild by residents of Indiana challenging multi-member districts for the state house and senate for Marion County. The DC agreed with the suit and decided that full state reapportionment was required, but it said "An injunction will not issue at this time" in order to give the Governor a chance to call a special session. The Governor appealed directly to this Court. On March 16, 1970 this Ct noted probable jurisdiction. One week later, it revoked its prior note and noted, instead, the appeal by the Governor from the ensuing final judgment. 397 U.S. 984. Then it decided the appeal from the formal injunction and dismissed the previous one. 403 U.S. 914, citing Gunn.

Bd of Regents v. New Left Education Project, 404 U.S.
The term "statute" in 2281 does not include a "state statute having only local impact, even if administered by a state official." Holds that the Bd of Regents Rules were not of statewide applicability. Although the brief accuses the Ct of overruling Alabama State Teachers Ass'n, 393 U.S. 400, and the dissent in New Left (WOD) does also, the majority distinguishes it on the ground that it was an attack upon a local impact having the effect of being expressive of a statewide policy of racial discrimination.

Alabama State Teachers is a PC affirmance w/o opinion.

Board of Revenue and Control, and challenged Suffolk Cty Bd of Supervisors. These were held not to be laws of statewide applicability, even though they were like other local laws in the State.

Other cases reversed in light of Gunn:

(1) Fontane v. Dial,303 F. Supp. 436 (1969) (WD Texas--Thornberry, Spears, Suttle)

P is manager of movie theatre; Ds are the local ass't DA and his assistant; they obtained a search warrant to seize the film w/o a prior adversary hearing. The DC held that the state law allowing seizure w/o prior adversary hearing violated the first and 4th amendments. The DC said:

> #"The procedures defendants used in seizing the motion picture film, trailers, and display posers, as evidence #for future criminal procedutions against plaintiffs under article 527, are hereby declared unconstitutional, and defendants are ##ordered to return the seized materials to plaintiffs. In addition, defendants are prohibited from utilizing the provisions of section 6 of said statute, unless a prior adversary hearing is afforded the party against whom 'any writs and processes . . . are sought.
>
> "Inasmuch as defendants have represented in open Court that they will abide by any final decision reached herein, it is not deemed necessary at this time to grant injunctive relief to the plaintiff. However, in the event this judgment is not complied with in good faith, this Ct will entertain further request for such relief."

399 U.S. 521 dismissed for want of jurisdiction, citing Gunn. WOD dissented.

(2) Hutcherson v. Lehtin,313 F. Supp. 1324 (ND Cal 1970--Duniway, Sweigert, Levin)

This was a tenants' suit against landlords challenging the constitutionality of the California unlawful detainer statute on the ground that it impermissibly limits the defenses that may be raised, including (1) that eviction was in retaliation for reporting code violations, (2) breach by landlord of covenant to repair, and (3) nonconformity of premises to municipal code. The DC abstained as to the first claim to allow the state cts to decide whether that defense may be raised, and denied a consti viol on the latter two.

This Ct, 399 U.S. 522, dismissed for want of jurisdiction,

I cannot tell for sure w/o reviewing the briefs# but this is the only logical explanation since it is clear that the DC did deny an injunction with respect to the 2d and 3d defenses.

(3) Babbitz v. McCann, 310 F.Supp. 293 (ED Wisc. 1970--Kerner, Reynolds, Gordon--PC)

P was a physician prosecuted in a state ct under a state anti-abortion statute which made it unlawful to perform a abortion except to save the life of the mother. On the basis of notions of abstention and also because of the bar of 2283 (pre-Younger) the DC refused to issue an injunction against the pending state prosecution but it did go on to declare the law unconstitutional.

This Ct, 400 U.S. 1, said "appeal dismissed," citing Donovan and Gunn. The State, and not the Doctor, was appealing.

(4)

[n.d.]

ISSUES in Bullock v. Register

(1) Supreme Ct jurisdiction under 1253. Inclined to agree with explanation in State's reply brief. Scope of injunction is unimportant if case was properly befpre the DC and, in any event, the order was one of statewide applicability. The populational disaprity argument could be treated as pendent under a Roe v. Wade analysis.

(2) Populational disparities. 9.9% is not so de minimus as to require no justification at all. Rem in Abate v. Mundt 11.9% was allowed but this was a narrow opinion and was supported by a strong and consistently maintained rationale.

The State's justification is weak in view of 19 deviations. Case here is primarily a comparison to Mahin v. Howell where, as I recall, the rational had been closely adhered to.

(3) Multi-member districts

The first confusing question is which theory to apply. Should this be treated as a straight Whitcomb case in which we look for proof that m-m districts operate to disenfranchise minorities? Or, should the wealth discrimination argument be made. And, if that is to be the course, what is the controlling test? If the m-m districts in Dallas are not impermissible then no m-m districts could ever be. The Negro in Dallas is politically subservient to the DCRG since that is the only way to get elected. (Note the amicus figures indicating the success of single-member districts.)

DC PC in Bullock v. Regester, No. 72-147

P. 14--State made no effort to explain any deviations from equality.

P. 18--The State itself has not complied with Smith and has not explained the rationale that makes its desire to preserve local boundaries so importamt.

No rational is offered for distinctions between multi-m and single-m districts. The Bd did not consider or explain the difference. The million-resident rationale of Kilgarlin was violated here; there is nothing in the record to support the grassroots support notion.

DC relying on cases such as the DC opinion in Bullock v. Carter says if it disadvantages candidates because of their wealth it must meet compelling state interest test.

P. 29--DC refrains from holding m-m districts per se invalid as discriminatory against the poor because the recrod is too thin to support such action and because it may not constitute "invideous discrimination."

The DC follows a straight Bullock argument. M-m dist candidates and voters in some areas are disadvantaged on the basis of wealth and the State has shown no compelling state interest.

P. 35--Finds no rational basis for the discrimination between candidaites and voters in Dallas and Houston.

The DC applied the test of Whitcomb separately and found that it met the required level of proof of a system operating to dilute the vote of racial minorities. Makes a similar finding w respect to SA and Mexican-Americans. Focuses on the history of mistreatment and discrimination and being blocked out of the political process.

Conf. 10/2/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 72-147

BULLOCK

vs.

REGESTER

Relist
10/13
Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.				✓			✓							
Powell, J.							✓							
Blackmun, J.				✓			✓							
Marshall, J.							✓							
White, J.				✓										
Stewart, J.							✓							
Brennan, J.							✓	(but would Dismiss as to House of Representatives						
Douglas, J.							✓							
Burger, Ch. J.				✓										

No. 72-147 Bullock v. Regester — Conf. 3/2/73

Probably a majority for Remand or Reversal on State Plan. Affirm as to Cities

DOUGLAS, J.

Affirm as to two cities.
Passed on first vote as to state plan.

MARSHALL, J. Affirm

Across board.

BRENNAN, J.

There is an appeal from an injunction. Even tho this relates only to two cities, then brings whole case here. This is not pendent juris. There is statewide impact.
Affirm as to two cities
As to state House plan, inclined to affirm — but case is very close to Mahan v. Howell

BLACKMUN, J. Agree with Brennan as to jurisdiction.
As to merits, Texas has burden of proof and has not met it.
Affirm as to entire case.
Whitcomb v Chavis burden has not been met in Dallas.
Is doubtful about S/Antonio but is tentatively for affirmance.

STEWART, J.

Agree with Bell as to juris.
Affirm as to two cities
Remand as to state plan in light of Mahan. (Vacate remand)

(Potter, after discussion, said he might join a Reversal if written persuasively)

POWELL, J. Affirm as to Dallas & S/Antonio
Remand as to statewide case in light of Mahan — altho I may defer to Rehnquist's views and will await writing to decide whether to reverse rather than remand.

WHITE, J. No problem as to Juris
Affirm as to two cities.
Whitcomb v Chavis presumed cases involving discrimination. There was no discrimination in Whitcomb.
Agrees with Potter that we Remand as to State case unless in this case we decided that variation is too [illegible] diminimus.

REHNQUIST, J.

Is in doubt as to jurisdiction, but accepts judgement of majority on this as to state wide issue.
Justification need not be as great as deviation is smaller. As Deviation here is much less than in Mahan, he would Reverse.
As to cities, affirm as to Dallas. Reverse as to S/Antonio.

MEMO: C.J.

Juris. point is doubtful but can accept juris
Affirm as to Cities.
Reverse or remand as state plan

Bell Rehnquist said Mahan really does not control

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As to cities, affirm as to Dallas. Reverse as to S/Antonio.

MEMO: C.J.

Juris. point is doubtful but can accept juris
Affirm as to Cities.
Reverse or remand as state plan

Bell Rehnquist said Mahan really does not control because facts are different in several respects. He thinks deviation is so small - for State leg - that it is presumptively valid

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 4-25-73

No. 72-147

Recirculated: _____

Bob Bullock et al., Appellants, v. Diana Regester et al. } On Appeal from the United States District Court for the Western District of Texas.

[May —, 1973]

Discuss with Bill Rehnquist - see p 9 p 11 p 14

Reviewed 4/26/73

MR. JUSTICE WHITE delivered the opinion of the Court. This Reverses as to State Plan & Approved as to Cohen.

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.

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

9s in accord with my views & I'll join. Check out points on p 9, 11, 14

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

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion to 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 Legislature 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,

reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation 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]

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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 majority 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 representative 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 ot 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."

[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 apportioned among the several counties, according to the number of population 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

Smith v. *Craddick,* 471 S. W. 2d 375 (Tex. 1971). Meanwhile, pursuant to the requirements of the Texas Constitution, 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 (Tex. 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 Board's Senate and House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember 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

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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."

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.

The State 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. 409 U. S. 840.

I

We deal at the outset with the challenge to our jurisdiction 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 appealed 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 appor-

[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).

[4] 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."

tionment 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. The State is 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 the State, because it appealed from the entry of an injunction, is 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 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 within the State in accordance with the constitutional guidelines set out in this opinion this court will so apportion the State of Texas"; and for ordering the Secretary of State to "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion. . . ." In these circumstances, although the State could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, *Gunn* v. *University Committee,* 399 U. S. 383 (1970); *Mitchell* v. *Donovan,* 398 U. S. 427 (1970), we conclude that we have jurisdiction of the State's entire appeal. *Roe* v. *Wade,* — U. S. — (1973); *Florida Lime & Avocado Growers* v. *Jacobson,* 362 U. S. 73 (1960). With the

Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe* v. *Wade, supra,* at ——; *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Florida Lime & Avocado Growers* v. *Jacobson, 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 districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between largest and smallest district is thus 9.9%.[5]

max. variation 9.9%

The District Court read our prior cases to require any deviations from equal population among districts to be justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), to conclude that the permissible tolerances suggested 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 deviations 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 variances, however small, on a basis of a consistent, rational State policy." 343 F. Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court

[5] See Appendix to opinion of the Court.

concluded that justification by the State 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 Reapportionment 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 was "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 ground for declaring the entire plan unconstitutional." [6] Finally, the court specifically invalidated the use of multimember 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

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[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 multi- 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 not authorities in this Court for the proposition that the mere mixture of multi- and single-member districts in a single plan, even among urban areas, is invidiously 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.

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. — (1970), and *Gaffney* v. *Cummings*, *ante*, p. —, 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), nor 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*, *ante*, p. —, 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

[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." The majority of the District Court also concluded that Senate districting scheme for Harris County did not dilute black votes.

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 —, 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 Protection 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 over 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 proving 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]

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dal-

[8] The Court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require reconsideration and reversal under *Mahan* v. *Howell*, 410 U. S. — (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.

las 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,* 410 U. S. — (1973); see *Burns* v. *Richardson,* 384 U. S. 73 (1964); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Lucas* v. *Forty-Fourth General Assembly,* 377 U. S. 713 (1964); *Reynolds* v. *Sims,* 377 U. S. 533 (1964).[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 allegedly 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

[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.'" 386 U. S., at 121.

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, the District Court thought, enhanced the opportunity for racial discrimination.[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 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

[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.

[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. 726.

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 concentrated 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 "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others." 343 F. Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tract 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, poor education, and a high rate of unemployment. The

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

typical Mexican-American suffers a cultural and language barrier [13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "A cultural incompatibility . . . fostered by a deficient educational system . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-American 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, although they now occupy a plurality in Bexar County, only five Mexican-Americans since 1880 have served in the Texas Legislature from that 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 multimember 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 of the

[13] The District Court found that "[t]he fact that [Mexican-Americans] are reared in a subculture 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.

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

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 discriminations against Mexican-Americans," *id.*, 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.

correctly

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

Affirmed in part, reversed in part.

APPENDIX TO OPINION OF WHITE, J.

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)
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)

Continued

APPENDIX—*Continued*

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
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
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)

Continued

APPENDIX—*Continued*

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 26, 1973

Re: No. 72-147, Bullock v. Regester

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 30, 1973

Re: No. 72-147 - Bullock v. Regester

Dear Byron:

Please join me. At conference I indicated concern about Bexar County, for I felt that the appellees had not sustained their burden, particularly in light of the fact that Mexican-Americans now enjoy a county plurality. Your treatment of this, however, is an effective one when it emphasizes the "intensely local appraisal," and I am content to go along with you on your evaluation judgment.

Sincerely,

Harry

Mr. Justice White

Copies to the Conference

May 1, 1973

No. 72-147 Bullock v. Regester

Dear Byron:

I wonder if you would consider making changes to accommodate the following suggestions:

1. On p. 12 of your opinion, Barrio (in San Antonio) is described as an area of "poor education". And on p. 13 there is a reference to the Mexican-Americans being "effectively denied access to the political processes" "due in part to the "deficient educational system".

This may be read as being contrary, at least implicitly, to the Court's opinion in Rodriguez. There (pp. 32, 33), we said that the educational system provided children with the opportunity to acquire the basic minimal skills necessary to participate in the political process. In Rodriguez, of course, we were speaking explicitly about present levels of educational expenditure, and we had previously emphasized the progress made in recent years. I take it that in Regester you were talking about the history of disadvantaged educational backgrounds. The persons currently disadvantaged may well have found the schools which they attended some years ago to be far less adequate than those now available. The progress in Texas has been most marked in the past decade. Moreover, I suppose a significant number of the persons involved were born and educated in Mexico or even in rural migratory labor camps in south Texas.

In view of this apparent incompatibility in the two opinions as to education in the same area of San Antonio, would you be willing to make the necessary modest revisions to emphasize that you are talking about the district court's finding of a history of disadvantaged treatment which

is unrelated to the education presently received by young residents. I note that on page 13 you refer to "the residual impact of this history".

2. The first sentence at the top of page 11 might be read, I think, as implying that requirement of a majority vote is in itself a potentially discriminatory election provision. I would suppose that, in most situations, the majority vote requirement is wholesome. This is especially true where there are a number of candidates for an office, none of whom obtains more than a fractional plurality. Perhaps you could drop a footnote along the lines of the enclosed draft.

As these are minor suggestions, I am not sending a copy of this letter to the Conference.

Sincerely,

Mr. Justice White

lfp/ss

B.B., 1, 2, 4, 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72–147

Recirculated: 5-8-73

Bob Bullock et al., Appellants, *v.* Diana Regester et al.	On Appeal from the United States District Court for the Western District of Texas.

[May —, 1973]

Reversed & Jour 5/10/73

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.

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

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

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion to 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 Legislature 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,

reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation 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]

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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 majority 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 representative 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 ot 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."

[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 apportioned among the several counties, according to the number of population 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

Smith v. *Craddick,* 471 S. W. 2d 375 (Tex. 1971). Meanwhile, pursuant to the requirements of the Texas Constitution, 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 (Tex. 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 Board's Senate and House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember 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

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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."

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.

The State 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. 409 U. S. 840.

I

We deal at the outset with the challenge to our jurisdiction 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 appealed 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 appor-

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[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).

[4] 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."

tionment 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. The State is 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 the State, because it appealed from the entry of an injunction, is 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 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 within the State in accordance with the constitutional guidelines set out in this opinion this court will so apportion the State of Texas"; and for ordering the Secretary of State to "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion. . . ." In these circumstances, although the State could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, *Gunn* v. *University Committee,* 399 U. S. 383 (1970); *Mitchell* v. *Donovan,* 398 U. S. 427 (1970), we conclude that we have jurisdiction of the State's entire appeal. *Roe* v. *Wade,* — U. S. — (1973); *Florida Lime & Avocado Growers* v. *Jacobson,* 362 U. S. 73 (1960). With the

Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe* v. *Wade, supra,* at ——; *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Florida Lime & Avocado Growers* v. *Jacobson, 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 districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between 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 justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), to conclude that the permissible tolerances suggested 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 deviations 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 variances, however small, on a basis of a consistent, rational State policy." 343 F. Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court

[5] See Appendix to opinion of the Court.

concluded that justification by the State 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 Reapportionment 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 ground for declaring the entire plan unconstitutional." [6] Finally, the court specifically invalidated the use of multimember 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

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[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 multi- 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 not authorities in this Court for the proposition that the mere mixture of multi- and single-member districts in a single plan, even among urban areas, is invidiously 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.

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. —— (1970), and *Gaffney* v. *Cummings*, *ante*, p. ——, 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), nor 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*, *ante*, p. ——, 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

[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." The majority of the District Court also concluded that Senate districting scheme for Harris County did not dilute black votes.

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 —, 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 Protection 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 over 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 proving 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]

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dal-

[8] The Court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require reconsideration and reversal under *Mahan* v. *Howell*, 410 U. S. — (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.

las 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*, 410 U. S. — (1973); see *Burns* v. *Richardson*, 384 U. S. 73 (1964); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965); *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713 (1964); *Reynolds* v. *Sims*, 377 U. S. 533 (1964).[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 allegedly 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

[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.'" 386 U. S., at 121.

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 or 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 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

[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.

[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. 726.

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 concentrated 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 "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others." 343 F. Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tract 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

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

and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier [13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "A cultural incompatability . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-American 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, although they now occupy a plurality in Bexar County, only five Mexican-Americans since 1880 have served in the Texas Legislature from that 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 multimember 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 of the

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[13] The District Court found that "[t]he fact that [Mexican-Americans] are reared in a subculture 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.

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

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 discriminations against Mexican-Americans," *id.*, 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 the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part,

APPENDIX TO OPINION OF WHITE, J.

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)
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)

Continued

APPENDIX—*Continued*

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
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
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)

Continued

APPENDIX—*Continued*

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
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

May 11, 1973

No. 72-147 Bullock v. Regester

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1973

Re: No. 72-147 - White v. Regester

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
Join BRW 6/12/73	Join WJB Parts I + II may write in part III 6/7/73	Concurring in part + dissenting in part 6-5-73 Withdraw Part III 6/11/73	Join BRW 4/26/73	1st draft 4/25/73 2nd draft 5/3/73	Join WJB Parts I + II	Join BRW 4/30/73	Join BRW 5/11/73	Join BRW 4/30/73
					No. 72-147 Bullock v. Regester (White)			