In the

Supreme Court of the United States

J. BRIAN GAFFNEY,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 71-1476
	)	
THEODORE R. CUMMINGS, et al.,	)	
	)	
Appellees.	)	

Washington, D.C.
February 26, 1973
February 27, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

J. BRIAN GAFFNEY,

Appellant,

v. No. 71-1476

THEODORE R. CUMMINGS, et al.,

Appellees.

Washington, D. C.,

Monday, February 26, 1973.

The above-entitled matter came on for argument at 2:27 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT G. DIXON, JR., ESQ., 720 Twentieth Street, N.W., Washington, D. C. 20006; for the Appellant.

ROBERT A. SATTER, ESQ., 60 Washington Street, Hartford, Connecticut 06106; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1476, Gaffney against Cummings.

Mr. Dixon, you may proceed.

ORAL ARGUMENT OF ROBERT G. DIXON, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. DIXON: Mr. Chief Justice, and may it please the Court:

This case is here on direct appeal from a three-judge District Court of Connecticut which invalidated the official State Legislative reapportionment plan. We appear here in defense of that official State plan.

The plan was devised by a bi-partisan board of three members, including tiebreaker, under the State Constitution, which constitution thereby tries to incorporate an anti-gerrymandering spirit into the process of reapportioning activity.

The plan of the board was subjected to litigation promptly in both State and Federal courts. The Federal court denied a plea of extension, and on April 4, 1972, it did invalidate that plan.

An appeal was promptly taken, and also a submission of a motion for a stay order; that motion was referred by Mr. Justice Marshall to the court; and on June 12, 1972, this Court stayed the adverse District Court judgment.

That had two effects, one was to bar implementation of a master's plan, which had been under preparation under the now stayed judgment, and, more importantly perhaps, it also opened the way for conducting the 1972 election of State Legislators in Connecticut under the official State plan. That was done.

Along the way there was a supplementary mandamus action in State court to clarify one or two clerical errors. The plan was reviewed by the State court and the State Supreme Court found no constitutional impediment under the State Constitution to use of the State plan.

The large question, therefore, here is whether Connecticut can continue the use of this official State reapportionment plan the remainder of the 1970 decade. In more precise fashion, the federal issues are three: population equality; justification of deviations, if such be needed; and plaintiff-appellees allegations of gerrymandering.

Turning first to the population issue, we assert and most strongly assert that trivial deviations of the sort in Connecticut, and I'll mention those in a second, the trivial deviations present no prima facie case. Therefore, the plan would remain presumptively constitutional, unless plaintiff-appellees could introduce proof of a non-population nature of discrimination.

We think that the concept of a presumptive

constitutionality concept keyed to a lack of a prima facie case if there are trivial deviations is implicit in Swann v. Adams, although it was not settled in Swann v. Adams, and is implicit in the dissenting opinions in Kirkpatrick v. Preisler.

What are these Connecticut deviations which we find so trivial?

In percentage terms, the most deviant district from ideal in the Connecticut Senate deviates by only 0.9 percent; for the Lower House, the most deviant district from ideal deviates by only 3.9 percent.

When these percentage terms must be put in the context of the size of the district being created they become meaningful, and likewise the available census data. We look at the census data and we find that the most deviant district in either house in Connecticut deviates from ideal by fewer than 800 census persons; for the Lower House, 789; for the Senate, 787.

You might well ask if the population deviation in real census terms is identically virtually, why are the percentages so different? The answer is in the size of the districts. Connecticut has 36 State Senate seats, average population is 84,000, roughly; 800 population deviants, census bodies deviant on that base you get only 0.9 percent deviation.

Connecticut had 151 Assembly districts, average population about 20,000; on that base the same trivial, 800

persons deviation, gives you only -- I should say raises the percent deviation to 3.9 percent.

In terms of the census data, which was a building unit for the Apportionment Board, of the 2700 census units available to the board, 88 percent exceed 400 in census population, yet the average deviation in Connecticut, in either house, is under 400.

By contrast, Howell v. Mann -- Mann v. Howell last week, excuse me, the most deviant district from ideal was, I believe, about 4400, 4,400.

The figures of the political type, we suggest, are really on target in the Reynolds v. Sims sense of substantial equality or of not showing that the vote of each voter in a State be approximately equal to that of any other, on target, and therefore constitute no dilution of voting power.

Hence, we suggest that this case could fit the general principle of treating trivial deviations of this sort as constituting no prima facie case of dilution of voting power as being presumptively constitutional.

More precisely, and we suggest this for Connecticut and not for the nation necessarily, but that the rules be divided as follows, for Connecticut, making more precise this presumptive constitutionality concept. It could run this way, that where the maximum deviation in census population terms, actual census bodies in a district, in the most deviant

district in a State plan, is less than the average population of the census units being constructed, that plan should be presumptively constitutional. And the average population of the census units in Connecticut is 1100, the median unit, census unit is 1,000. And, as I said, the most deviant natural district from ideal is only 800.

Without such a presumptive constitutionality rule keyed to lack of showing a prima facie case with trivial deviations of this sort, we feel the courts will remain not only in the business of stirring up the political thicket by plaintiff instigation but may take up residence on a permanent basis in the political thicket.

Why do we say this? Because plaintiffs can always show a slightly less deviant plan than laboriously constructed official State plans.

At any given level of percentage deviation, with a hand calculator you could devise hundreds of plans, each one, though, having a quite different political effect because no district line is neutral. Lower courts have tended to follow this approach in the past. In fact, we've had in the past, and maybe still today to an extent, a one-body-better rule. That is, plaintiffs come in with a plan, often at the last minute, at trial perhaps, showing their own self-serving plan, with no statewide input in it, showing that it is one-body-better, so to speak, than the State plan. And if the

election is imminent, and the State cannot justify having a bill put in its process, the State plan goes down the drain.

Now, Mann v. Howell, last week, that does not solve this problem of avoiding casual invalidations on a one-body-better rule, because a State which has tried to be directly on target and has not cranked into its process any corollary rational State purposes and an attempt to be directly on target on population could not qualify to utilize the Mann v. Howell justification process.

Where there is what we refer to here as a presumptive constitutionality rule keyed to very low deviations of this sort, we will achieve some legislative certainty, other bodies can apportion without the sense of futility, as has often been the case in the last several years, litigation has been massive, as we all know, even after the 1970 Census.

As far as the courts are concerned, this approach of finding there is no prima facie case with low deviations of this sort, trivial deviations, would flush out many petty cases, and reserve court time for those cases where justification does seem needed because of the size of the deviation, or for the more complex issue of gerrymandering, if the court proceeds in that direction.

QUESTION: Mr. Dixon, do I understand your argument to be, as you told us a couple of minutes ago, that you cannot rely on the Virginia cases decided last week for the very

reason --

MR. DIXON: No. Excuse me, I --

QUESTION: -- for the very reason -- just a moment, so I can ask my question to be sure I understand it -- you cannot rely on it for the very reason that you have, in order to approach to a maximum numerical proportionality you have disregarded the State boundaries and town boundaries and so on. Is that it? And therefore you can't rationalize the tiny deviations that remain in terms of any legitimate State interest, as Virginia could in respecting local political boundaries. Is that your argument or did I misunderstand?

MR. DIXON: Mr. Justice Stewart, my point was made in general terms that a State might have only a straight population purpose, that is not Connecticut. Connecticut has three purposes to be served in its reapportionment process.

And I was suggesting that we would not reach the need to justify, should not reach the need to justify until it is first determined that the deviation is of a given plan -- and I am now talking about Connecticut with its trivial deviations -- are high enough to warrant constitutional concern.

We feel that if the deviations are smaller, actual deviations are smaller than the census average population, the average population of the census units being used, that it is

really on target and should be declared constitutional --

QUESTION: Without getting to any figures or -- I mean without giving any reason or any --

MR. DIXON: Without getting to the process justifications, correct, Mr. Justice White.

QUESTION: Well, the point is, though, that the more a State, in order to approach numerical perfection, disregards its other State interests, the less it can justify any tiny deviations in terms of any State interest. Isn't that correct? Because it's disregarded them.

MR. DIXON: That would depend upon, Mr. Justice Stewart, would depend upon the rational State policy at issue, and I think that is the next logical consideration for the Connecticut case. We have sought not merely to achieve population equality directly on target as a permanent goal in order to serve the over-all purpose of fair and decisive representation, as mentioned several times in Reynolds v. Sims. We have also added two corollary policies, which we think would support this plan under the decision of Mann v. Howell last week.

If we do not prevail on a theory of presumptive constitutionality, because deviations are very trivial, then there are the following justifications to be made: The apportionment Board seeking close population equality also had two corollary policies, the Connecticut town policy and a

policy of political balance or fairness, which I'll define in just a moment.

Turning first to the town policy, which is the analog of the no county-line cut policy in Mann v. Howell last week, we find that where Virginia could honor that fully and still stay inside a top-to-bottom variation of 16 percent, if Connecticut sought to honor its no town-line cut fully for the Lower House -- it does not apply to the Senate -- but for the Lower House, the population deviations would reach 111 percent if we bring forth the 1965 plan that cut no town-lines and test it out under the 1970 Census.

Well, 110 percent or 111 percent is way beyond Howell v. Mann, even if we think a no-cut policy is good. We do think that it's important to note the purposes lying behind these no local division line cuts in order to see if they can be served by some other process.

In Mann v. Howell last week, speaking of the Virginia county policy analogous to the no-cut policy in Connecticut, it said that it served the purpose of furthering a political voice for the counties. We see in this a judicial recognition of community of interest factor in representation that also spoke of the no-cut policy as serving an important anti-gerrymandering function.

We see in this a judicial recognition of the danger of blind or invidious line drawing.

The Apportion Board in Connecticut honored the no town-line cut policy substantially, approximately three-fourths of the towns are not cut. The Board cut 47 towns out of 169.

If they are seeking to serve, preserve the substance, if not the letter, of a no-cut policy and these purposes of political voice against anti-gerrymandering, use a complementary policy of political fairness or political balance, which requires some definition.

This political balance, the political fairness policy worked out as follows: The Board with knowledge of public voting patterns in past elections tried to devise equal population districts which would not only offer hope of avoiding the minority election that actually occurred in 1970 in Connecticut but would actually offer hope of providing each party with a seat-gain in the Legislature approximately proportionate to its percent or total of -- percent total of the popular vote.

Now, on functional terms we see this as being a vital anti-gerrymandering principle in an attempt to safeguard political opportunity for effective political action by all of the voters.

The essence of this political fairness or political balance principle used as a corollary principle was an attempt at no-cut town-lines, and they only cut three-fourths in order

to become what they felt would be on target in equality terms, this essence is a direct turning away from a gerrymandering purpose.

What are the results of the plan that was achieved? We think that, regarding 1966 through 1970 election data, the plan was considerably fair, demonstrably so. Regarding 1972, we would suggest that it is also demonstrably fair. All plans before the court, District Court, would have achieved somewhat the same outcome in 1972. Under all plans there would have been an excess seat gain for the Republican Party. Why? Because that was a landslide election year in Connecticut.

And past election data in Connecticut and, indeed, under the law of political science, indicates that when you have a landslide election the seat gain runs substantially ahead of the percent of the vote cast.

Also the charts on this point in our reply brief indicate that the factor of State seats is endemic in all the plans before the District Court and is no different under the official State plan than other plans.

QUESTION: Well, would you find any difference here if they had followed a plan of political unfairness? Assume all the districts were right on target, as you put it, number-wise, populationwise, and the only thing is that they didn't follow the policy of maximizing either Republican or Democratic representation by putting the districts in places where one

party or the other would benefit the most. Would you reach the same result or not?

MR. DIXON: Mr. Justice White, we would find in that instance, as we have presented to us, an issue of gerrymander, whether or not, with equality satisfied, there were, nevertheless, because of district pattern, as mentioned in Fortson v. Dorsey, as substantial submergence of a political or racial group in the population, which would bring it within --

QUESTION: So you would say it turns from into fair to unfair when either party's representation is not maximized. If you could draw equally number of districts in a way that one party would have more or less -- or what? Both parties together have to have the maximum number.

MR. DIXON: No, Mr. Justice White. Our proposition is this, that a State does not violate any constitutional requirement of the Federal Constitution by seeking a policy of fairness along with a policy of population equality.

QUESTION: But "fairness" means --?

MR. DIXON: And by fairness in this sense we do mean what is sometimes called political balance, does impart the past election data, in testing out various plans possible, to see if they would become -- we would appear very unfair under normal voting patterns.

QUESTION: You are talking about benevolent gerrymandering.

MR. DIXON: Yes, we could use that term. It's not required by this Court, but --

QUESTION: And the courts never held that the ordinary kind of gerrymandering is a justiciable question or any business of ours in any of these reapportionment cases so far. But whatever the ultimate answer to that question might be, your point is that benevolent gerrymandering at least is neutral, that it doesn't make an otherwise valid plan invalid.

Is that it?

MR. DIXON: Mr. Justice Stewart, that is precisely our position here, really an a fortiori basis.

QUESTION: I should think you could take some comfort from the arguments in the preceding cases where, at least I understood them to say, that if it isn't politically fair, it's unconstitutional. That argument is the one you think supports your position?

MR. DIXON: Yes. Our position on that is that that is a matter for plaintiff proof, for plaintiff attack on a State plan, and that because gerrymandering of an invidious sort is not clearly subject to close policing by this Court, yet, an attempt to be fair should not be questionable, either.

Our last point is to mention the plaintiff-appellees' gerrymandering argument. They do allege that the plan is a gerrymander of an invidious sense. We see in this record not one iota of proof regarding the standard suggested in

Whitcomb v. Chavis, flowing on down from Fortson v. Dorsey, for attacks on plans on an impact basis rather than a population basis.

This Court said in Whitcomb that when that kind of a claim is made, there must be a showing that the districts were conceived or operated as purposeful devices to further discrimination, racial, economic, we even say a fortiori political fits that principle. And the proof under Whitcomb must be real life proof of impact on enviable voting power.

So, in short, we suggest that at one level we have a plan with deviation so trivial that it should be deemed to be presumptively constitutional, absent a gerrymandering type proof.

If that is not thought to be the case, not triggered enough, then we suggest, too, a rational State policy to justify the deviations, preserving as many town lines as possible, more than about three-fourths; and also making a good-faith attempt to avoid unfairness.

And, lastly, we find no evidence at all here of any overt, invidious gerrymandering of the sort which this Court has spoken of in Whitcomb v. Chavis and similar cases.

If it please the Court, I would like to reserve the remainder of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Satter.

ORAL ARGUMENT OF ROBERT A. SATTER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SATTER: Mr. Chief Justice, and may it please the Court:

This Court scored a stunning success in the one-man-one-vote doctrine, in the cases which enunciated that doctrine. In the space of a few years this Court has come close to achieving, or leading this country to achieve, the fundamental purpose of that doctrine, and has thereby enhanced a funamental civil right, namely the right of each individual citizen to an equally weighted vote.

As this Court said in Reynolds, to the extent that a citizen's right to vote is debased, he is that much less a citizen.

And so these one-man-one-vote cases are important, and they put us on a high road toward improving the quality of our democracy, and the passion and the high hopes with which this Court started that journey, with Baker v. Carr, should not flag. And particularly it should not flag, in light of how close we are to an ultimate success.

QUESTION: Do you think these principles have the same validity whether people do or do not vote, whether 30 percent of the people vote, or 50 percent, or 75 percent?

MR. SATTER: I think they have that same principle,

yes. Whether the people do or do not vote doesn't change the quality of -- change the necessity of having equally weighted vote, or giving people the opportunity to be in districts where they have an equal voice with every other person. Yes, sir.

QUESTION: You said only 30 percent of the people in a whole, in an entire district actually vote. Then, of course, you have no assurance that that result represents the majority view, do you?

MR. SATTER: No, of course you don't.

I might say, in Connecticut, that the history is that we vote close to 80 percent in many of our elections and, in fact, in some of our Presidential elections we have voted close to 90 percent. And that's a remarkable fact, it's true.

Now, why do I say that we have come so close to success in these one-man-one-vote cases? Because the facts are that in 53 percent of the States the extent of the deviation is five percent or less, the range of deviation is five percent or less in the reapportionment of their Senate and in 47 percent of the States the range of deviation is five percent or less in the House, in their Lower House.

And by range of deviation I mean plus or minus two and a half percent.

Now, the States did not come to that voluntarily. The States were not anxious to accord this extent of equality

to their citizenry on their own free will. Reapportionment is a very painful process. I know it because I have been in the State Legislature, and I have been in the State Legislature in which I was required to reapportion myself. And it is a very painful process. It is a painful process whether the legislators are doing it or whether others are doing it.

And the concern for the equality of the vote, of the individual citizen, on the part of the reapportioners, if left to their own devices, is very slight, except when this Court has required them to do so.

QUESTION: Mr. Satter, what are your figures as to the deviation here, in this case?

MR. SATTER: We submitted a plan of deviation of 2.16 percent.

QUESTION: No, as to the deviation that was struck down by the District Court.

MR. SATTER: 7.8 percent. The range of deviation is 7.8 percent, Your Honor.

QUESTION: The range meaning what, the maximum?

MR. SATTER: No, the range from the highest to the lowest.

QUESTION: What's that mean?

MR. SATTER: That means that it was plus 3.9 and approximately minus 3.9.

QUESTION: So you don't disagree with the figures?

MR. SATTER: Oh, no, we don't disagree with the figures at all.

QUESTION: Well, in many of the cases the parties can't seem to get together on the figures.

MR. SATTER: No, Your Honor, we recognize that the range of deviation is 7.8 percent.

QUESTION: From a maximum of 3.93 to a minimum of 3.9 percentage points?

MR. SATTER: Yes.

QUESTION: That was for the House.

MR. SATTER: That was for the House, yes.

QUESTION: No issue on the Senate here.

MR. SATTER: No issue on the Senate, no.

QUESTION: The Senate issue is not here.

MR. SATTER: It's not here. We obviously recognize that.

QUESTION: On the average, do you agree that for all these districts in the House it's 1.9, and the median 1.8?

MR. SATTER: I think the figures that are in the stipulation are correct, yes. And that's what I think the court found.

QUESTION: So at least we don't have that kind of an argument in this, do we?

MR. SATTER: Do not have that kind of argument, Your Honor.

And so, may it please the Court, the point I am making is that the process is a painful one, that the rights of the individual citizens are only going to be protected by a court having a very firm and severe stand on the requirement to achieve equality, and that thus the States had to be ordered, first, to reapportion, and Baker v. Carr made that issue sufficiently litigable for them to realize they had to, and, secondly, that they had to achieve equality.

The Reynolds case established a standard of equality as equal as practicable. There is no question that it had some caveats in it. It's expressly stated that absolute, maximum, exactness or precision was not required.

And taking the fairly tolerant approach that appeared to be implicit in the Reynolds decision, the courts replied, and in the period after 1964 the pattern of approved deviation in State legislative cases ranged substantially above 15 percent, and in fact our record shows that prior to 1969, 88 percent of our States had deviations of over 15 percent with respect to their Senate and 96 percent had deviations with respect to their House of over 15 percent.

Then came Kirkpatrick, fortuitously in 1969, prior to the 1970 census and prior to the time when the vast majority of the States had to reapportion.

Now, the Kirkpatrick decision had two parts to it. The first part was that the standard of equality was going to

be strict, as equal as practicable meant, that the States had to seek to achieve precise mathematical equality and there were to be permitted only those deviations in which the variations were unavoidable.

And the second aspect of it was that virtually all excuses or justifications, at least as applied to congressional reapportionment, were going to be ruled out. And the States listened to that, and they knew that this Court meant what it was saying, and they felt that they had to apply those rules in the Kirkpatrick case to their own State legislative reapportionment. They were very attuned, as all reapportioning authorities are, to the nuances of the language of this Court's opinion, where they can find an escape hole, where they can interpret an out, they will do so. Because achieving equality is not a high priority on the part of reapportioners. They have other purposes.

They do not have that purpose, unless a court tells them that they have to have it.

But they read Kirkpatrick to say it applies to us, and we're going to listen to it, and we're going to apply it. And that's why we have 53 percent of the States keeping within a deviation of five percent or less.

QUESTION: How many States is 53 percent?

MR. SATTER: How many States? Your Honor, 53 percent is all but -- what? --

QUESTION: Somewhere between 26 and 27 States.

MR. SATTER: Right. Thank you, Your Honor.

And what this has demonstrated is, and I know this line has been said to you so many times it's a frightful cliche, that the life of the law is not logic but experience.

Experience has proven the wisdom of Justice Brennan's statement in Kirkpatrick, that a State Legislature which tries can achieve complete numerical equality among all of the State's districts. And this is the answer to this Court's carping critics who have wrung their hands over an over-insistence upon equality among the districts. That is, an over-insistence upon achieving an equally weighted vote for our citizens. As if we can ever have an over-insistence upon perpetuating valid and important constitutional rights.

And that was the purpose -- excuse me.

MR. CHIEF JUSTICE BURGER: We will resume at this point in the morning, counsel.

MR. SATTER: Yes, sir.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, February 27, 1973.]

IN THE SUPREME COURT OF THE UNITED STATES

J. BRIAN GAFFNEY, Appellant,	:	
v.	:	No. 71-1476
THEODORE R. CUMMINGS, et al., Appellees.	:	

Washington, D. C.,

Tuesday, February 27, 1973.

The above-entitled matter was resumed for argument at 10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 71-1476, Gaffney against Cummings.

Mr. Satter, you have about 19 minutes left.

ORAL ARGUMENT OF ROBERT A. SATTER, ESQ.,

ON BEHALF OF THE APPELLEES [Resumed]

MR. SATTER: Mr. Chief Justice, and may it please the Court:

The issues in a reapportionment case can be framed as follows:

One, the standard of equality that's going to be applied.

Two, the nature or the type of a rational State policy which will justify deviations in excess of that standard; and

Three, the tolerable limits of the deviation, even if they are justified.

Expressing or framing the issues in that fashion sets a blueprint for the kinds of evidence necessary to prove a case of this nature, and establishes the legal questions necessary to decide it.

Let me endeavor to apply these principles to our case before us.

As to the standard of equality, we urge that that continue to be as strict as it has been, and that the cause,

that the greatest cause of the success of reapportionment in the 1970's, which I alluded to yesterday, that 50 percent of the States have achieved a deviation of five percent or less is because of the strictness of that standard.

Now, the equal as practicable expression in Reynolds is kind of a wavering line and does not state the standard with sufficient precision. I urge upon this Court to continue the standard expressed in the Kirkpatrick case, namely, that the States be required to achieve as precise a mathematical equality as they can, and only limited population variances which are unavoidable will be permitted, unless they can be justified.

Now, those words in that standard are uncomfortable to the reapportioner. I know, because I have been in the back rooms with the reapportioners. But it is necessary that it be uncomfortable for them, because the only thing that assures a respect for the constitutional right of the individual citizen to an equally weighted vote, the only thing that assures a respect for the constitutional right of the individual citizen to an equally weighted vote is the language of the opinions of this Court.

And I urge that you do not adopt the de minimis rule that has been asked of you by the appellant. Certainly it should not be applied in this case, where the deviations are 7.8 percent, which is in excess of what 50 percent of the

States have already achieved. And in the cases which have required that close a deviation, less than five percent, they over and over again say in their opinions, the lower courts say, there is no de minimis rule.

As was pointed out in Kirkpatrick, once you've established a de minimis rule, that becomes the target at which the reapportioners will aim at, and not at precise equality.

Moreover, we urge you not to adopt any presumption of constitutionality in this case, as the appellant has urged upon you. Essentially the argument is the same.

The great expansion of civil rights in this country -- and now, by civil rights, I mean the rights that have derived from the Equal Protection clause of the Fourteenth Amendment, the rights that have come from the First Amendment, Freedom of Speech and Freedom of Religion, and the rights that come from the other Amendments to the Constitution -- in my judgment, derive their fundamental source from three basic causes.

First, the standing of citizens to sue. That was terribly important. Giving a standing to citizens to sue for these important rights and, as a kind of a subdivision of that, a kind of expansion of the whole notion under the Federal Rules of Class Action.

Secondly, the availability of lawyers and the

willingness of lawyers to take these cases.

And thirdly, not necessarily an absence of the presumption of constitutionality in these basic civil rights cases, but at least a kind of dip in the presumption of constitutionality in order to lower the threshold of the burden of proof upon the plaintiffs, for them to establish a prima facie case. And then require the States to come forward in these basic civil rights cases and explain or to justify why they have created an unequal treatment.

I would trust that that basic kind of underlying rule that you have adopted in these basic civil rights cases would not be changed in this kind of a case, or in any of the civil rights cases.

Now, let's apply this standard of equality to the case before us.

The deviation in this case, the range of deviation, which I have previously defined from top to bottom, was 7.8 percent.

A plan was submitted by the plaintiffs showing that that deviation in this case could have been 2.6 -- the range of deviation could have been 2.6 percent. That plan was based on the same census material as was available to the board. It was prepared by an unquestioned expert. The expert and the plan itself was known to the appellants, was given to them at least two weeks before the trial, in

accordance with a pretrial order, a pretrial conference order of the trial judge.

The appellants had the opportunity to depose the plaintiff's expert before trial. They had the opportunity to cross-examine him at trial, as to whether or not the plan that was submitted indicated that there was an opportunity to avoid the deviation in the board's plan.

And finally, there was a finding by the court, or at least an implied finding by the court that it had accepted as a reliable demonstration of how greater equality could have been achieved with the materials on hand; and the court so expressly stated that.

This is the way these cases have been tried. They were tried in Swann that way. A party puts in a plan that shows that greater deviations are possible, and that the deviations in the plan are avoidable. That's a perfectly litigable issue. It is subjected to objective proof, namely, the use of the census data, the pretrial conference can require that any plans which are going to be submitted by any party shall be provided to the other parties for examination, that witnesses shall be determined, and you have a litigable issue upon which a court, on the basis of objective evidence, can find an answer and render a finding.

And in this case the court found that the plan of the plaintiffs was a reliable, valid, and accurate expression

of the possibility for reducing the deviation.

Now, let me turn for a moment to the argument made by the appellants, that the average population of census units has some meaning and is some opportunity, as an objective standard as to what the court should aim at. That average population of census units is a figure with no meaning whatever. What is it? You take the total population of the State, you take a haphazard number, which represents all the census units in the particular census, namely, the block groups, the enumeration districts, et cetera; you divide them together -- you divide one to the other, and that's your average census unit, average population of a census unit.

It means nothing statistically, it means nothing in the objective utility. It has no operative utility in the development of a plan. Because the important thing is what is the size of the lowest census unit. The legislative districts are put together by various census units. You want to know how many there are of small, of the smallest population units, and compare that number with the number of districts which have to be made. And here there were 151 districts, but there were 240 of the census units which were below 300.

In fact, the plan which we developed showed that only four of those census units, only four of the districts, with the

same census material, had to be over 200 people.

Now, the question is: having arrived at the fact that the deviations are avoidable, is there any justification for them?

The district court found that partisan political structuring was a substantial cause of the numerical deviation of the board plan here, and, quoting again, "if partisan political balancing were eliminated as a factor, a closer approach to perfect equality could be achieved."

Now, the question is: Is political structuring a legitimate State interest which justifies these deviations? And we assert to Your Honors that it is not.

It is not listed among the permissible justifications in the Reynolds case; it is expressly rejected in the Kirkpatrick case, where this Court said, Practical politics cannot justify population disparities. The consideration of political party strength was deemed to be, in quotes, "inapposite" in the Ely v. Klahr case. The so-called political balancing doesn't serve a governmental purpose, such as a respect for town lines, where you have towns who have an interest in the State Legislature.

It is not supported by any State Constitution or any State Statute; and, finally, it is much too wide an avenue of subterfuge to be allowed as a justification. Because it will always be brought out, because that is always the reason

for any deviation that a plan gets, that a plan has. It is not an objective standard, and if allowed, if political balancing, if political compromise, if all this political business is ever allowed as a justification for a deviation, it will press this Court to the tolerable limits as to what it will accept, because it will always be paraded out before you.

Now, what further is the reason why you should reject it as a rational State policy?

Remember, in order to achieve it, in the kind of political structure you're talking about, it takes a total Statewide vote for each political party in all of these individual district elections, and you say that the percentage of the total vote in each of these individual elections, that total is to be the same percentage as the political party candidates win in the Legislature.

Now, that number of adding up all of these individual district, single district elections is meaningless, because these individual, single district elections are disparate, and they go off on many different reasons, on local tax questions, on a question of sex education in the schools, on a question of -- I know of an attorney who lost an election, a Representative candidate, because he represented a black person in the purchase of a house in a local town.

And add up those numbers in these individual, single

district elections, and say that that total has any meaning, in my judgment is like adding up apples and ancient hockey sticks and deflated basketballs. It doesn't mean anything.

But because it's an irrational number, it also creates irrational consequences.

Now, this marvelous cartoon that's sitting before you during the course of my argument reveals what I'm talking about. If you're going to take the excess plurality of a particular political party in a particular district or section of the State and say that that excess plurality can be the basis for that party electing candidates in another part of the State, you've got to wiggle and jiggle and ferret out party votes all over the State; and that's what happens. That's a district, this is Assembly District No. 13, this is No. 14, and -- or 12, and this is 14.

That's an indecent piece of drawing.

[Turning to another drawing.]

This is what it could have, if you're interested in seeking some form of rationality. That's the same district. But they are rationally arranged.

[Turning to another drawing.]

This is another indecent district, in Windsor and Bloomfield, and this is the way that [turning to next one] that district could have been rearranged.

QUESTION: Mr. Satter, do you think a scheme of

proportional representation would be constitutional?

MR. SATTER: I think that to design -- a scheme of proportional representation?

QUESTION: Yes. Which would, just frankly, reflect as accurately as possible the party strengths in the State.

MR. SATTER: Yes, if you took the whole State and said it was one district, I wouldn't object to that. I mean, I think that -- I can't see it, but --

QUESTION: But this sounds like an attempt to approach some proportional representation through the districts, through districting.

MR. SATTER: That's right. But the problem is --

QUESTION: And isn't it --

MR. SATTER: It sounds like it, yes.

QUESTION: Yes.

MR. SATTER: But in fact it results in the distortion of the districts to a frightful extent, it justifies a mutilization of the individual districts.

QUESTION: But, resultwise, it does approach to some extent proportional representation?

MR. SATTER: It attempts to approach it, yes.

QUESTION: Going back to your second chart or map, would you turn back to that and let me ask you a question about it?

MR. SATTER: Yes, sir.

QUESTION: That's your ideal solution. Are those two districts precisely the same in numbers?

MR. SATTER: Oh, yes, they're exactly the same.

QUESTION: They are precisely the same?

MR. SATTER: Oh, absolutely. The same geographic area is covered in each.

But this is what happened. And the consequence of this is, is at least that you get a questioning of the fitness of the whole reapportionment system. And somewhat a disrespect of the whole legitimacy of the thing.

Now, the point I want to end with is that reapportionment is over, essentially, for the 1970's. The flood tide of litigation is passed, but if you change the rules, particularly the rules about the strictness of the standard, you are going to open the floodgates again.

This case is the kind of a case that can announce to the country that there has been no retreat from the one-man-one-vote doctrine, that the strict standards of equal population for the districts is still required, and that political structuring is not a justifiable excuse for not reaching that standard.

Finally, I would say to you this: that if we are wrong as to the standard of equality, if we are wrong -- which I hope we are not, both for the sake of this case and for the sake of the country, and for the sake of what will

happen in general in terms of litigation -- if we are wrong, that we urge that this case be remanded to the District Court, to take advantage of the decision in the Mann case which appears to -- or not appears, but which expressly gives to the States the opportunity to loosen the strictness of deviations of equality, when there is a justifiable basis for respect for town lines.

And here, if you permit, if the District Court can find that it can permit, under the circumstances of the case, a 15 percent deviation, range of deviation, then we can more carefully respect town lines in our State.

For these reasons, Your Honors, I urge that the judgment of the District Court below be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Satter.

Mr. Dixon, you have some time left.

REBUTTAL ARGUMENT OF ROBERT G. DIXON, JR., ESQ.,
ON BEHALF OF THE APPELLANT

MR. DIXON: Mr. Chief Justice, and may it please the Court:

Opposing counsel stated yesterday that he had no quarrel with the State plan regarding the Senate. He attacked primarily the State plan regarding the House. And yet the census body deviation for the Senate is identical with that in the House. In each case, in actual deviation from ideal of under 800, average deviation under 400, and the median

census unit is 1,000 in population.

Also the same apportionment board process was used, including the political fairness principle, for the Senate as in the House.

His concession, therefore, would seem to remove all federal issues from the House aspect of the case, too, with the possible exception of invidious gerrymandering within burden-of-proof standards of Whitcomb v. Chavis.

Opposing counsel's remarks yesterday also dealt with precedent cases. As we see it, if he has to distinguish between the State reapportionment line of cases flowing from Reynolds, Swann, Mann, and now to Gaffney from the congressional districting line of cases, he seems to us to be arguing for an overruling of Mann.

We welcome Mann and simply seek to add to it.

Now, yesterday's arguments in certain other cases, in Texas, urged this Court to mandate political fairness, or it's better phrased as equal political opportunity principle, to mandate that under the Fourteenth Amendment. That would be a large order. It might be good, depending upon the facts of a given case, but that is not our case. We do not ask this Court to mandate political fairness under the Fourteenth Amendment.

However, when a State, as in Connecticut, pursues a policy of political fairness in a conscious anti-gerrymandering

spirit, trying to spot pitfalls and avoid those pitfalls in the very process of devising districts, which might be characterized as benevolent gerrymandering, stressing the word "benevolent", the purpose being to effectuate certain representation interests, political, racial, or otherwise, there is no federal constitutional impediment.

Returning now to the aspect of the case concerning our suggestion of a need for a presumptive constitutionality rule keyed to trivial deviations, I suggest that is the next logical step after Mann v. Howell. The action of such a rule could penalize a State which has sought a level of population equality well within Mann v. Howell. But perhaps -- perhaps -- thereby weakened the plan's connection with other rational State policies which could operate if needed at the justification level.

In that circumstance, absent a presumptive constitutionality rule keyed to trivial deviations, plaintiff could more easily, quite easily perhaps, defeat the official plan by simply offering his own one-body-better plan either at trial, the week before, two weeks before, and upset a laboriously constructed State plan, with many inputs in it of a Statewide nature.

Also it would seem to us that in its context with the Connecticut case the plaintiff's plan should have been before the apportional board and not be presented just before

trial.

Certainly on this part of the case, the presumptive constitutionality rule, a State's burden should not become heavier with very trivial population deviations than the burden imposed on Virginia in Mann v. Howell, with Virginia's 4500, 4,500 body deviants from ideal, its most deviant district in the Lower House, compared to Connecticut's 800.

The board did aim for zero. On that, see trial testimony at page 262 in our appendix. They did not aim for a fixed percentage. And we would submit that even a bull's-eye, in the context of this volatile field of reapportionment, even a bull's-eye has a certain width and breadth to it.

We feel that an example of an unfortunate outcome of not having a presumptive constitutionality rule keyed to miniscule deviation levels, even opening up an everlasting one-body-better approach, is the Iowa case, Noun v. Turner, which we cite and discuss in our brief.

Regarding the question of shape, which really is another aspect of compactness, compactness is not required by the Connecticut State Constitution. Really, it is only a possible alternative rational State policy, which a State normally ought to have, does not present a federal issue.

In Connecticut's case, as a possible alternative rational State policy, it was subordinated somewhat to the actual rational State policy adopted by the apportionment

Board, and they were an insiduous stress on population equality, plus the complementary concerns for minimizing town-line cuts, and only about one-fourth of the towns were cut; and avoidance of political unfairness.

Indeed, with regard to the shape and compactness question, we could put it this way: We cannot judge the quality of the board, merely by whether or not she has a pleasingly symmetrical quality; and likewise in the more volatile field of politics and reapportionment, shape was put in the context of the over-all goal.

In Reynolds v. Sims, as stated there and repeated in the voting rights cases, that effective representation is a crucial element of the right to vote. All we ask is that a State be allowed to implement this rational and constitutional goal through a bipartisan commission with tiebreaker device by further building in a check against the evil, difficult to police, of invidious gerrymandering, under the standard of Whitcomb v. Chavis.

We also submit the Connecticut plan is the tightest plan in population terms known to us, given full review in this Court. It has not been shown to be unfair in operation, it serves more than one rational State purpose. And until shown to be unfair in operation by proof meeting the Whitcomb v. Chavis test, we submit there really is no constitutional basis for effective attack on it.

If there are no questions, I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dixon.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:34 o'clock, a.m., the case in the above-entitled matter was submitted.]

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