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BOB BULLOCK, Secretary of the State of Texas,

Appellant,

v.

DAN WEISER, et al.,

Appellees.

No. 71-1623

Washington, D. C.
February 26, 1973

Pages 1 thru 39

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IN THE SUPREME COURT OF THE UNITED STATES

BOB BULLOCK, Secretary of the State of Texas, Appellant,	:	
v.	:	No. 71-1623
DAN WEISER, et al., Appellees.	:	

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

The above-entitled matter came on for argument at 11:00 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:

CHARLES L. BLACK, JR., Esq., 169 Bishop Street, New Haven, Connecticut 06511; for the Appellant

LAWRENCE FISCHMAN, Esq., 601 Kirby Building, 1509 Main Street, Dallas, Texas 75201; for the Appellees

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1623, Bullock against Weiser.

Mr. Black, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES L. BLACK, JR., ESQ.,

ON BEHALF OF THE APPELLANT

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

I think it not unfitting to state in court in the beginning, that having had the benefit of his wise counsel, I now have the benefit of the physical presence of the Honorable John L. Hill, Attorney General of Texas, who is in attendance in court today and at the table with me because of the transcendent importance to the state and to its political structure of this case.

The case involves the constitutional validity of Senate Bill 1, passed by the Texas legislature in 1971, and signed into law by the Governor in June of that year, redistricting the State of Connecticut into 24 new congressional districts in consequence of the April 1, 1970 census, as against the objection of a violation of Article I, Section 2, because of certain population discrepancies amongst the districts.

These discrepancies may be described as follows. The average percentage discrepancy amongst all districts is

.745 percent. The highest variation is 2.43 percent up, and the lowest 1.70 percent down, making a total spread of approximately 4.1 percent and placing the smallest and the largest district in a ratio of some 1 to 1.04.

Appellees filed their complaint in October, 1971, assailing this plan as unconstitutional and tendering to the Court as one of the remedial possibilities a Plan B, which differed from Senate Bill 1, the state's plan, only in that county lines--substantially only in that county lines were freely cut, some 18 more county lines cut, and virtually a zero population variation thereby attained, while the general plan of the legislature's bill was followed.

Evidence in the cause was taken by deposition, and it showed the following. First, it conspicuously and pervasively showed a deep concern of the state legislators in the maintenance of present congressional districts--that is to say, prior congressional districts--in something like their same form, in the preservation of the seniority accrued to the Texas congressional delegation, and in other such concerns later to this, which may be called by the pejorative term of incumbency protection, which we, taking account of both parties to the relation, prefer to designate as protection of the constituency-congressman relationship.

There is uncontradicted, unimpeached and affirmative evidence in the record that this concern in its inception and

in its implementation had no partisan or ideological bias and there is no showing in the record, as we read it, of any causal connection between this concern and any of the variations in the plan, small as they are, or the whole set of them.

During the passage of Senate Bill 1, the plan we are defending, through the state legislature, another bill was originated in and passed the Texas House of Representatives which showed variations of 2.5 percent up and down, or 1.6 percent lower than those in the bill which finally passed and which we are defending.

There is nothing in this record, at least, as to the average deviations in that bill. There is evidence that the motives for the defeat of this bill in conference committee were various and only partly known, but it is fair to say that they undoubtedly had to do in some substantial part with contesting congressional aspirations of a House member and a Senate member.

The record shows that certain of the legislators had a belief that they were operating under certain percentage leeways, that a certain tolerance was afforded to them by the constitutional law of the subject. Whether that belief was right will, of course, depend on the outcome of this case.

There is shown by the record an unimpeachedly

bona fide concern with the preservation of county lines. The best evidence for this concern and for its bona fides is a map of the plan as it emerged, which we have thoroughly analyzed in our reply brief.

Finally, there is not a scintilla of evidence that we can find in this plan that we are defending of any bias toward any section, toward any type of sectional interest, toward any rural or city interest, industrial or labor interest, or anything of the sort. With respect to interests, so far as we can tell, it is completely random and nothing of this sort has been brought forward.

On January 10th, the appellees herein filed an amended complaint in which, in addition to Plan B, they tendered to the Court as another alternative for remedy a Plan C, which this time departed very widely indeed from the legislature's plan and rather radically in some respects redistricted the state.

On January 21st, 11 days later, a trial was held which actually by agreement consisted only of arguments, since all the evidence had been taken by deposition, and at that trial appellees' counsel six times recommended the adoption of their Plan B, the one which followed the legislative intent as closely as possible, while reducing variations to virtually zero, and Plan C was never mentioned by anyone except one judge in the course of a rather

garrulous enumeration of all the plans before the court. The next morning, January 22, 1972, at 11:00 o'clock in the morning, the court reconvened, in a very short opinion knocked out the legislature's plan for districting, and announced that Plan C, the radically revised plan, was to be, and I quote, "the plan of this court for the congressional districts of the State of Texas."

The court left open the possibility of a stay--I beg the Court's pardon, of an action, a new action by the legislature. But the Governor refused to call a special session; so, that possibility was not a real one. This Court stayed this judgment on an application to Mr. Justice Powell by him referring to the Court at about the end of January, 1972. And the elections last year were held under the state's plan.

Q May I ask you, Mr. Black, was it held under S.B.1?

MR. BLACK: Under S.B.1, yes, Your Honor.

Q Not under the preceding system?

MR. BLACK: No. The judgment was being wholly stayed. There was no injunction against S.B.1; it was therefore used by the secretary of state, who is the appellant herein.

Q So, the present state legislature was elected under S.B.1.

MR. BLACK: The present state congressional delegation.

Q I beg your pardon. Yes.

MR. BLACK: Yes. There was an intervention on the plaintiffs' side, on the appellees' side, by the chairman of Bexar County Republican Committee and others, and they have filed a brief herein as appellees-intervenors. But it is believed that neither the intervention nor the position here add anything significantly one way or another to the issues of this case.

May it please the Court, the condemnation of so tight-fitting a plan as this, with variations up and down of 4.1 percent, must rest, if it is to be pronounced, on the strictest rule associated with the case of Kirkpatrick v. Preisler, the rule of very strict arithmetical equality as to congressional districting.

We have other contentions which I will urge, but our contention in chief here to this Court is that we ask that this Court recede generally from a rule attributing constitutional significance to variations of the magnitude that are found in this case, any constitutional significance at all.

We have to start, of course, with the recognition that Mahan v. Howell seems to put our question in a somewhat different frame of reference today, the frame of reference

being that it would seem a distinction between the Equal Protection Clause and the inferential rule drawn by analogy of functional equivalency from Article I, Section 2. But this frame of reference may easily be more misleading than helpful as to this question, because the principal question actually is still just the same.

The constitutional law of congressional districting has to march on its own feet. If there had never been a state legislative districting or apportionment case, if there were no Equal Protection Clause, if there were no 14th Amendment, the dominant question in this case, the one principally interesting in this Court, would still be, Can it rationally be held by analogic or functional inference from Article I, Section 2, that the substantive constitutional law of congressional districting contains a requirement of exact arithmetic equality of district populations or can this be held by any other lawfully warrantable process of reason?

The right answer to this question--

Q Can you find anything in there that indicates that any degree of inexactitude would be against the Constitution?

MR. BLACK: I think it is fair to infer analogically or as a matter of functional equivalancy from a plan which aims at a rough and substantial proportionality of

representatives to constituencies, that the roots which make up--

Q If within the state one district was five times as large as another--say there was a state with two districts in it and one congressional district was five times as large as the other. You would say that would violate that provision in the Constitution?

MR. BLACK: Article I, Section 2. Your Honor, that would be relatively easy, I think, because there is no variation amongst the states which is anything like that great. The real difficulty is reached when one finds such variations in ideal districts as well as between some of the states at the extreme of the ideal district table, which never varied by more than 200,000 or so. And at that point my answer would be that there is no mechanical character in this inference, that the federal plan aims at substantial equality and that the state congressional delegation ought to be apportioned by analysis--

Q You say a state ought to be free to vary by as much as the Constitution permits states to vary among themselves?

MR. BLACK: No, Your Honor, that is the meaning of my statement, as I see it, that I don't think this is a mechanical inference which carries over the exact arithmetical characteristics. I think it is the nature of

the federal plan as a plan aiming not at total--not at exactly forming but at substantial and reasonable equality that must form the first term and an analogic inference to any rule having to do with the formation of a state's congressional delegation. What is substantially reasonable may be a different matter within a state from what it is on the national sphere.

But at the other end of the scale, there is simply no warrant whatever for the use of the federal scheme permitting without feeling of wrong or apology the variations which it does as the first term in an analogy which terminates in the judgment that zero variation is somehow the rule in state delegations.

We have to recognize, of course, realistically at this time and at this hour that there are certain expressions, and certain strong expressions, in the recently decided case of Mahan v. Howell which seem to assume vitality, or continuing vitality, in the Kirkpatrick rule as applied to congressional districts.

But it is never too late for the right answer, and it is appellant's submission herein that the answer in the negative to the question whether this inference of substantive law is warrantable is overwhelmingly the right answer for two reasons, which I will canvass though either one is sufficient alone. And I would urge upon the Court

that there never will be a better case than this for the total new look and total reconsideration of the Kirkpatrick rule of exact arithmetical exactness.

First, because in this case from every practical point of view, the variations are trivial, 4.1 percent up and down.

Secondly, there is a total lack of any evidence or any suggestion of any kind of bias in this case toward any sort of political or sectional or economic interest.

And, finally, because there is an absolutely clean, unimpeachably clean, approach to the county line question, to the question of the integrity of counties.

In my answer to Mr. Justice White, I have really in a sense broken into the first of our points, which is simply that in brief--though these matters are better canvassed, arithmetical as they are, in writing and in extension, we have tried to do that in our brief--but in sum, there is nothing in Article I, Section 2, or an inference which can be drawn therefrom, which leads the mind rationally to a requirement of exact arithmetic equality.

It is well, I think, to look--first, to round the picture out, I will say what our second point will be and it is just simply that there are easily accessible data, mere arithmetical facts, which it were pretentious to refer to as

demographic, which put it entirely out of doubt, that there is no firm correlation whatever for multiple reasons at the low percentage range between very small variations in population as of census day and the voting power of people who either do vote or can vote at the times and places when they do vote which, I will remind the Court, commence two and one half years after the census day of April 1st in the zero numbered--

Q I am surprised that you would read Mahan as being a reaffirmation of Kirkpatrick. I would have taken it that no party in Mahan had any occasion to challenge Kirkpatrick and therefore there was no occasion to deal with it other than as datum.

MR. BLACK: Your Honor, of course that is correct and perhaps I have been guilty of an advocate pessimism, but there did seem to us to be expressions which at least I assumed that Kirkpatrick was for the moment being taken as a fixed star and that the part of wisdom for us, therefore, is directly to address ourselves to that point. Of course, it is very true, as Your Honor says, that there was nothing at issue in Mahan that concerned continuing validity of the rule in Kirkpatrick v. Preisler.

The relevance of the last point to substantive law, the relevance of this lack of correlation with substantive law, is very simple and thoroughly pervading of

the whole legal framework. Good law never commands a futility; and when it discovers that it has commanded a futility by inadvertence, it hastens to retract it.

We think that it can be shown by these simple arithmetical means that the command of exact arithmetical equality is a futility, that it effects nothing, that it has no connection of any kind with the power to vote at the times and places when people actually do vote.

If I may develop these points just a little more deeply, let me revert, as one does revert at these times, to the question of the intent of those who put into place Article I, Section 2. Again, this is a matter much better canvassed in writing and with extensive references. But I think that we happen to be furnished by history with a single incident which, if unrebutted--and it is not rebutted--is absolutely conclusive as to what the framers of the Constitution would have thought of a case of this kind. When the first apportionment, interim apportionment in Article I, Section 2, was constructed by a committee in the Constitutional Convention, that committee had before it the best population estimates which the art of demography, not yet so baptized, made available to it at the time. The committee came back to the whole convention with a plan which substantially respected the population figures but did so only substantially and departed from what they would

have indicated considerably more widely than anything in this case or in any case remotely like it.

Every attempt to change this report was perfunctorily defeated on the floor of the convention. And at last a motion was made to ask the committee to state its reasons. Whereupon, these practical men, who realized that such reasons are multiple, that they differ amongst the different constituents of the districting body or the apportioning body, that they may be only partly articulable, proceeded to defeat this motion ten to one. We have asked in our brief--and I ask again with respect--Is it so much as possible that the people who did this would have considered the variations in this case, 4.1 percent up and down, as violative of the Constitution they were then building, of the article they were then writing, of the very section they were at that moment drafting?

There is nothing in the record in Farrand or elsewhere to rebut this inference.

I think the question of the analogy with the federal plan has already been dealt with in my response to Mr. Justice White's question, and I would simply say, finally, on this point that there is nothing in the derivation of the congressional districting rule, nothing in its working, nothing in its history, to make it more exact than the state legislative rule.

In fact, the connection here with Mahan v. Howell is simply that since there is nothing in Article I, Section 2, or anything inferable from Article I, Section 2, or from its history or from its working through history that could support a stricter rule than the rule under the vague mandate of the Equal Protection Clause, Mahan v. Howell in its holding at least, ought to afford very strong collateral support to us, though indirect, at this stage, because if these rules are the same in the texture with which they end up at the end of their derivation, the rules, namely, of the Equal Protection Clause and the rule derived only by functional analogy from Article I, Section 2, and from nowhere else, if these things are the same, then if there was room for the accommodation of pragmatic factors in Mahan v. Howell, surely there should be room for accommodation to pragmatic factors in a congressional case.

I would only remind the Court that the tolerance that we ask for in this case is exactly, as it happens, four times less, one-fourth as much as that that was granted in Mahan v. Howell.

I would ask the Court's indulgence for a very small amount of arithmetic at this time and then completely conclude on this point. The cases--this is a bit of a filling out of my assertion it is a futility to command this degree of exactness--the cases have insisted on

dilution of the vote as a rationale for the apportion of cases. Wesberry v. Sanders, the leading congressional case, is utterly saturated with this concept; in line after line, paragraph after paragraph it occurs.

What are the facts of the correlation between the raw body count on April 1, 1970 and the power of the vote in congressional districts in the ensuing 12-1/2 years, beginning 2-1/2 years later and ending 12-1/2 years later?

I pass over briefly the census count problem with Blacks and minorities, the minor problems such as aliens, students, prisoners, and so on, and come to the three great strategic factors which totally defeat this correlation. First is the surprisingly wide variance in the percentage of age-eligibiles to vote as amongst the congressional districts in virtually every state in the union.

The second is the very wide difference in growth patterns in the congressional districts in any large state in the union or even any middle size state in the union.

And finally and as a clincher, the unpredictability agreed upon by all authorities in the present state of the art of demography of these growth patterns. When one remembers that these things operate sequentially over a period of 12-1/2 years on raw body count, as an indicator of voting power, and when one remembers that the projection or the sub-national post-census projection, as they call it,

which one would be asking of the demographers has to do not only with people who are 18 in 1970 but with people who are eight in 1970, and it asks them to say how many people 18 years old, how many citizens as opposed to aliens, how many non-prisoners as opposed to prisoners, there will be in a district. The position becomes quite hopeless, and I think we have to stop and ask at this point what it is that these cases are doing. Is it something symbolic or is it something that has to do really and truly with the power of the vote?

It is our submission that if the latter is the case, and it must surely be the case, then this arithmetic which may have a trivial sound--figures often do sound trivial--is utterly and deadly serious and that these problems have to be faced before another case is decided, with respect and deference, in which the raw census count is treated as though it really did accurately indicate the power of the vote.

As to the age-eligible population, let me give Your Honors an example--well, I will give you the whole Texas range. Texas districts differing by about four percent in raw population have age-eligible populations from 324,000 to 264,000, with no correlation whatever to speak of with the raw population.

We have done a table that ranges the districts in

order of raw population as of April 1, 1970, and I will just give the Court the first five--the first five, the first largest, second largest, third largest, and so on, districts. We then range them in order of age-eligible populations. The numbers in the different districts, 1, 2, 3. 4, 5, are as follows: 318,000, 286,000, 295,000, 325,000, 297,000. But the message is made a little more intelligible if I give the Court the order numbers.

These districts respectively stand in the following order, and remember that they are in the order 1, 2, 3, 4, 5 in population. The third, the twentieth, the eighteenth, the first, and the sixteenth. Those are not district names. Those are numbers in which the first five districts in population stand when they are arranged in an order of age-eligible population.

The rest of the table for Texas shows the same thing, and similar tables show much the same thing from other states.

The growth-pattern problem speaks for itself, when one considers that what one is dealing with is growth patterns of 12-1/2 years projection, of growth patterns applied to 18 year olds and up and to all these other factors, and I do not think it is really necessary, once attention is drawn to it, to say very much more about that. I would simply conclude--

Q I do not know that inaccurate census figures is much of a justification for varying from absolute equality based on the census figures, as inaccurate as they are. Let us assume that they were inaccurate, either ten percent high or ten percent low.

MR. BLACK: With the deepest respect, Mr. Justice White, it is not upon the inaccuracy of the census figures that we principally rely. It is, as we have said in our brief, a probably existing but relatively minor factor.

Q It is not much of an argument for justifying the variations.

MR. BLACK: No, not very much. It would not be, and it is not ours. Our principal arguments are--

Q Or even growth patterns is not much of a justification.

MR. BLACK: Growth, I should respectfully differ. When one considers that growth patterns are up--

Q What if it is growth down, like a lot of places are?

MR. BLACK: In Texas one has growth both up and down.

Q That is right, that is right.

MR. BLACK: So, when one superimposes these growth patterns only in part predictable on the age-eligible population, one finds simply that one might arbitrarily

select census population, though with respect I should not see why that would be done; but one cannot select it with any warrantable hope that it has anything to do with the power of the vote at the times when people actually do vote, because of the lack of correlation with eligibility to vote, because of the large and unpredictable character of the growth patterns.

Q How far would you go, Mr. Black, in allowing a variation? Would you go 20 percent or 50 percent or 100 percent?

MR. BLACK: With respect, Your Honor, I do not think that question is susceptible of a categorical answer. I think it would take more study than a single case ever affords.

What I should say confidently in this case is that we are a very long way below the point at which any significance as to voting power can be attributed to the variations in population which are shown.

I thank the Court.

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

Mr. Fischman.

ORAL ARGUMENT OF LAWRENCE FISCHMAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

I will address myself, if the Court please, to the first of the appellant's arguments; that is, whether the rule laid down in Kirkpatrick v. Preisler should be retreated from. Secondly, I would address myself to whether, if that not be the case, the record in this case brings a case before the Court that falls within the Kirkpatrick rule. And, thirdly, I will say a word about the remedy which was fashioned by the court below and which is in issue here today.

The grounds urged by appellant, may it please the Court, in support of its position that Kirkpatrick ought to be retreated from are fourfold. First, that Kirkpatrick is not supported by the cases relied on in that decision. Kirkpatrick, as I recall, cited Wesberry v. Sanders and Reynolds v. Sims. These cases, Wesberry of course being the first congressional case in this recent line and Reynolds being the major, if we may use that term with respect to any one case, decision with respect to legislative, from those cases was fashioned a rule enunciated in Kirkpatrick. We think that the state must make a good faith effort, the emphasis being on the effort, to achieve absolute equality, not that equality be achieved. If the recent Mahan decision stands for anything, I think it is possibly a reaffirmation of that principle, and we certainly do not rely on that decision since it was not a congressional

case.

But, as we see it, the plain wording of the Constitution requires that people of the state elect the members of the United States House of Representatives, not the Texas legislature. If it were the intention of the framers of the Constitution to permit legislatures to elect the representatives, certainly they could have done so as they did in the case of United States Senators. The cleavage between the two houses, the great compromise, is very clearly articulated in the Wesberry opinion.

But the point that we wish to emphasize is this. We are here today because the State of Texas did not make a good faith effort to achieve absolute equality, not so much that equality was not achieved.

The second reasons advanced by the appellant are that--I believe they refer to the Kirkpatrick decision as a Draconian rule or a Proustian rule and suggest that it is a rule of absolutism. I think this is an incorrect reading. They ask the Court to make allowance for reasonable legislative interplay. This proposition was, of course, expressly rejected in Kirkpatrick, we suggest, on very sound reasons. It leaves the door open, first of all, to gerrymandering under whatever reason that the legislature might have.

And, most importantly, may it please the Court, is

that this proposition presumes that the legislature is unable to act in good faith. We submit that the function of the legislature in congressional redistricting cases is to act impartially, to apportion the congressional seats among the population, considering only factors of population and nothing else.

We are willing to say that the legislature can make that good faith effort, and we feel that to presume otherwise is not only a gratuitous insult to the legislature but to the people that elect them as well.

I think a moment's time should be devoted to the argument that, because census data is inaccurate it cannot be that the Constitution requires a good faith effort to achieve absolute equality.

Q Your argument seems to be perhaps suggesting a variation of tests here, Mr. Fischman, if I understood you correctly. I got the impression you were telling us that you do not fault Texas so much for a bad result as you do for not trying hard enough. That is the way I read you, at any event. That means that a review in Court must get into motives primarily rather than results.

MR. FISCHMAN: I think not in the classical sense of trying to divine intent, for example in a criminal case; I do not think and have never suggested, Mr. Chief Justice, that the legislature of the State of Texas has set

out with bad faith, intent, to deprive the people of the State of Texas or a certain portion thereof of the full weight of their vote in electing congressional representatives.

When we talk about intent, we must consider in the case at bar the justifications that the state relies on. How did we get a bill with a 4.1 deviation top to bottom? We got it for two reasons primarily. Number one, the desire to preserve incumbents.

I submit to the Court that if this is a legitimate consideration, then the Court should and expressly say so and would necessarily reverse this case.

Q What if it is simply a neutral consideration? What if it is a consideration that the Court might decide it is simply no business of this Court? It is not an invidious, or it is not an impermissible or illegitimate consideration, but it is not one maybe that we should say necessarily legitimately justifies any further deviation than might otherwise exist. What if it is simply neutral?

MR. FISCHMAN: I do not think it can ever be neutral.

Q Why could it not be? It is just no business of this Court; neutral from that point of view.

In other words, we could all agree, everybody would agree, that if there were evidence here of racial discrimination, we would all agree that that is wholly

illegitimate for other constitutional reasons. But if it were this incumbency preservation, constituency preservation, what if the Court should just decide that is no business of ours and therefore a neutral factor? Is that not within the realm of possibility? Certainly it could be neutral from the point of view of the Constitution, could it not be?

MR. FISCHMAN: Not if the decision of the Court in Kirkpatrick is to stay in. We think that this is an element of the equation in determining a good faith effort.

Q This factor, this ingredient, was not in Kirkpatrick, was it?

MR. FISCHMAN: No--

Q One way or the other.

MR. FISCHMAN: --it was not. It has been before the Court twice in Klahr v. Williams and in Taylor v. McKiffin, but in neither case did the Court reach those questions. They were there on procedural matters.

The district courts, I might add, in both of those cases squarely rejected this consideration and we think on extremely legitimate grounds. No congressman--

Q What is there in the Constitution that prevents a legislature to consider this so long as it otherwise meets the test of Article I, Section 2? What is there that makes this an illegitimate consideration?

MR. FISCHMAN: Mr. Justice, members of the United

States House of Represenatives are to be elected by the people and not by the legislatures.

Q But the legislature devised this plan of congressional districting, and that is what I am talking about. What is there in the United States Constitution, in any provision, Article I, Section 2, or anywhere else, that prevents a state legislature, in providing the congressional districts for the state, to give consideration to the preservation of incumbents so long as it does not otherwise violate Article I, Section 2? What is it that makes this an illegitimate consideration constitutionally.

MR. FISCHMAN: I cannot follow the premise, because I am not prepared to say that consideration of preserving incumbents is not otherwise violative of Article I, Section 2. It is our reading of Article I, Section 2, which we think is consistent with Wesberry, that "by the people" means by the people. This is the whole basis for the language, if we are to take the opinion in Wesberry as being authoritative on the constitutional history that led to this.

The great compromise was that in one branch of the United States legislature the states were to be represented, and in the other the people. This is the only answer that I can give. There is no express wording, of course, that preservation of incumbents is prohibited. But we think that

it flies in the teeth of the great compromise in Article I, Section 2, for the legislature--

Q Are you suggesting that this motivation to preserve incumbency is itself violative of something in the Constitution?

MR. FISCHMAN: Insofar as it negates the good faith effort that we believe Article I, Section 2, requires. We believe that Article I, Section 2, requires there be no consideration, other than population, as overlaid by demographics. We think that Kirkpatrick left open--

Q Even though you had computerized perfect equality, at least so far as any figures you could use as a bench mark had it, and yet if you could show racial discrimination it could still be a highly unconstitutional scheme of congressional districting, could it not?

MR. FISCHMAN: Yes, it could under the 14th Amendment.

Q Right. And is it your claim that if you had perfect numerical proportionality, so far as any bench marks you could find, that this would be a suspect scheme if you could show that it was motivated by a desire to protect incumbents?

MR. FISCHMAN: I wish I could say that, but I do not think I can. It is our belief that where the desire to protect incumbents subordinates legitimate considerations of

population, then it rises to the magnitude of constitutional violation--

Q Then you say it is not a justification for any variation between districts?

MR. FISCHMAN: We believe not.

Q It just is not a good enough reason to vary from equality?

MR. FISCHMAN: I cannot think of any justification to support it. No congressman--

Q Can you say the same thing about following county lines or local subdivision lines?

MR. FISCHMAN: No, I do not.

Q Will that justify some variation?

MR. FISCHMAN: I am inclined to say not in a congressional case.

Q Which one cut the most lines in this case, Plan B or C?

MR. FISCHMAN: Plan B, I believe.

Q Plan B cut more county lines than C did?

MR. FISCHMAN: Yes, sir.

Q And C was adopted by the court?

MR. FISCHMAN: Yes, sir.

Q And C had more variation than Plan B, did it not?

MR. FISCHMAN: It was approximately three times as

great, if the amount involved is significant. Plan B--

Q What was the justification for that, for Plan C varying more than Plan B did? Was it the desire to follow county lines?

MR. FISCHMAN: We have nothing in the court's opinion other than the statement that Plan C most closely effectuates the principle of one man, one vote. We do not know and I would not presume to speculate on why Plan C was adopted.

Q There just was not any evidence about it, no explanation of why Plan C rather than B was adopted, even if you were going to through out the legislative plan?

MR. FISCHMAN: There was nothing in the court's opinion. The plan was before the court for some period of time. There is some pleading, of course, to support the plan. But the Court had comparison of all three plans both in maps and statistics--

Q Which one followed the incumbency lines? Which one preserved the most incumbents?

MR. FISCHMAN: That would be the plan that the Court declared unconstitutional, S.B.1.

Q How about between Plan B and C?

MR. FISCHMAN: Plan B, there is no evidence in the record--

Q Your clients drafted both B and C, did they

not?

MR. FISCHMAN: That is correct.

Q So, you ought to know which one did what to incumbents.

MR. FISCHMAN: In all candor, I do not.

Q So, you really were neutral?

MR. FISCHMAN: Yes, I was.

Q Is it not true that Plan B more closely resembled in shape and form S.B.1 than Plan C did?

MR. FISCHMAN: That is correct, Mr. Justice.

Q And yet it had less variance than Plan C on a population basis?

MR. FISCHMAN: It did.

Q How can you defend Plan C here over and above your own Plan B?

MR. FISCHMAN: Only on the basis that this is what the court imposed. I think the only difference was that Plan C was represented to the court to be based solely on population and no other factor. At one time in their pleadings to this effect, there was discussion about considering social and cultural and economic ties, community of interest and this sort of thing.

This was some of the discussion that appears in the record among the legislators that were concerned with drafting the bill. Plan C took none of these, at least we

have so represented, into account, and it is based solely on population. There was no, as I understand it, regard for county lines or at most a minimal regard. The sole test was population. And if I had to speculate on what the court below thought, I would suggest that this is probably the basic reason that Plan C was adopted.

I do wish to emphasize, I think appropriately at this point, that Plan C was adopted by the court conditionally. The way it was left wide open for the legislature to hold a special session--the legislature, in point of fact, is in session at this time, approximately one-third of the legislative session is over. So far not a word about a congressional redistricting bill.

Whatever arguments there may be for the fact that the Governor did not call a special session, there are none now. The legislature is free to adopt any plan, including Plan B.

Q Mr. Fischman, I gather under your view you would reject the following of county lines and you would reject protection of incumbency as justification for population deviation. Do you concede that there are any justifications other than those for population disparity in congressional districting?

MR. FISCHMAN: I do, Mr. Justice Rehnquist. They are demographic arguments only. I think it is certainly

legitimate for the legislature to consider documented or at best that the science of demography can document patterns of growth or decline in population. I think it would be a borderline situation to consider voting population. But certainly allowances for demographics as suggested in Kirkpatrick are certainly valid considerations. But they are neutral so long as they done in a systematic way, based on as reliable a data as is available, and not with the intention of discriminating and not as an after-thought to justify what has been done for other motivations, protection of incumbents, creating a safe seat for one of the members of the legislature to run for Congress. These considerations are singularly inappropriate and any other justification cannot be used as a coverup, as it were.

Q Mr. Fischman, did you prefer one plan over the other in the court below?

MR. FISCHMAN: Our argument, if the Court please, was we did emphasize that Plan B should be adopted. I would say in defense--

Q Why did you submit another one? You submitted C after you submitted B as an amendment to your complaint, did you not?

MR. FISCHMAN: We filed an amended complaint offering both Plans B and C. I cannot answer that question, Mr. Justice, inside the record. But outside the record I

thought it would be appropriate not only to have a plan with population disparity ironed out, as Plan B, and to follow as closely as possible what the legislature had done, but I also thought that we ought to tear everything up and start from scratch, and I have to admit to being the eminence greezay [phonetic] behind Plan C, but this does not appear in the record. But as far as the effect politically, I have to say in complete candor before this Court I have no idea.

I would like to discuss for a moment what alternatives there are in the consideration of what the appropriate constitutional test is. The appellant suggests that perhaps some sort of leeway ought to be allowed. They do not argue that it ought to be the same leeway percentage-wise as between states. This notion, of course, was expressly rejected in Kirkpatrick.

The reasons set forth in Kirkpatrick I think much better answer that argument than I can. We have seen a very practical result of this allowance of a toleration. This is what the legislature aimed for. We have testimony among the people that were the moving forces behind these bills that they were allowed a toleration of between four and ten percent. And as long as they got within, some said four percent, some said within ten percent, everything would be all right.

As one of the witnesses put it, their desire was to protect the incumbents and then make it fit the numbers within five percent. This is precisely the vice that the Court foresaw in Kirkpatrick and a very cogent reason for not adopting any sort of de minimis standard by whatever name you call it. It is no more than a de minimis standard to allow this sort of toleration. The goal should be absolute equality. It does not have to be reached if there is good reason for it not to have been. This is all the Constitution requires, in our view.

Q And these other reasons, you claim, can be only a demographic reason, i.e., an estimate, a valid, rational, supportable estimate of growth in a district or loss of population in a district?

MR. FISCHMAN: That is our view, Mr. Justice. I think, confined to the record in this case, it might be better to say our view is a negative one of what a good faith effort is not. It is not preservation of incumbents; it is not snarling up the legislature into a special session till you deicde whether Senator Wilson will occupy Congressman Dowdy's to be vacant seat or whether Representative Haines will have that privilege. And this is what the final map was a product of. And the reason--and this is well supported in the record--that the lower bill adopted by the House twice and sent to the conference

committee or sent to the Senate--it ended up in the conference committee--was not adopted, because in that bill the home county of Senator Wilson, Angelina County, was excluded from the second district and Representative Haines' home county was in it; the final bill that came out was just the opposite way around.

And we must also consider the fact that the shape of one district must necessarily reflect the shape of the others.

Q That what? I did not get the last point.

MR. FISCHMAN: The shape of one district must necessarily reflect the shape of others. And when I say "shape," I do not mean just the geographical shape; I mean the number of people. If you have got 11 million people to work with, you put so many in one district--

Q You have 24 districts, right?

MR. FISCHMAN: Yes, Your Honor.

These were the considerations of the legislature. And neither--

Q What you mean by that last is that the more districts that are above the average, the more probably that will be below the average?

MR. FISCHMAN: That is my point, Mr. Justice, yes.

Q All right.

MR. FISCHMAN: I should talk for a moment about

the county line argument. The Court, we think, in Kirkpatrick expressly and finally rejected the argument that preservation of county lines is a legitimate consideration in congressional redistricting. Appellant suggests that it was rejected because it was a sham. We find no such language in the opinion of this Court.

In Mahan, recently decided, the Court held, if we understand it, that in state legislative redistricting this was a legitimate consideration because the county governments were in many instances functionaries of the state. In the case of Virginia, there was local legislation that affected counties only. We find no such considerations, at least not of such a pervasive nature, in congressional redistricting as would allow for any substantial variations based on preservation of county lines.

But the basic problem that we have in this case, with the county line argument, is that we do not think that it was done on a consistent, systematic basis. County lines were cut, as we pointed out in our brief, where necessary--I will retreat from the term "expedient"--where it was necessary to do so. We have little Midland County, with a population of--not Midland County, Ector County where the city of Odessa is located, with a population of less than 100,000 people. It is cut in half right through the city of Odessa under S.B.1.

We have instances in Bexar County in particular where largely rural districts intrude into Bexar County, the 21st and the 23rd Districts. Whereas, under Plan C, I believe, Bexar County would undoubtedly be able to elect two congressmen.

The most glaring example is in the Sixth District which affects my home county of Dallas. The Sixth District runs all the way from near the Houston area, Bryan, which is the home of Congressman Teague, northwest into the southern part of Dallas County, drops down and comes back around and catches the southwestern corner of Tarrant County.

Q Fort Worth.

MR. FISCHMAN: Yes, Your Honor. Fort Worth is the large metropolitan area. There are a number of smaller communities there.

But in this case, this is, we submit, not the proper case for determination of the validity of county line arguments in congressional redistricting.

Q How many people live in the district; do you know offhand?

MR. FISCHMAN: It is one of the, I believe, slightly underpopulated districts. I do not have that figure in front of me.

But without the inclusion of the southern part of Dallas County and the southwest corner of Tarrant County, it

would be no district at all. And under Plan C the district shape is radically altered to much more reflect the fact that it is a predominantly rural district. This is the farm belt, cattle, crops of various kinds. And community of interest, if any, between the people in the southern part of Dallas County and the people in the Bryan, Texas area is almost nil.

Finally, I wish to again emphasize the remedy selected by the court was a conditional one. No argument is made that the court exceeded its authority, that there is no authority for the imposition of court-ordered districting. The quarrel, I believe, of the appellants in the case at bar is that the legislative should have had an opportunity. They have and they have always had that opportunity.

We think that this bill is manifestly unconstitutional because of the lack of a good faith effort. We are confronted with a situation of consistent disenfranchisement in every phase of government in the State of Texas. The court was aware of this, acutely aware of it, and felt, I am sure, that there was no alternative but to impose a constitutional plan conditionally and give the legislature an opportunity to correct what was wrong. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 12:00 o'clock noon the case was submitted.]