ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8517 HOUSE COMMUNITY & REGIONAL AFFAIRS

Effect of amendments. — The 1980 amendment substituted "the requirements of this section" for "AS 29.23.023" near the end of subsection (b), and added subsection (d).

NOTES TO DECISIONS

Deviation in the populations of electoral districts of up to 10 percent are presumptively valid, but variations in excess of 10 percent are unlawful unless the government body justifies the malapportionment. Kentopp v. Anchorage, Sup. Ct. Op. No. 2569 (File No. 6209), 652 P.2d 453 (1982).

Statute superseded home-rule enactments. — See Roderick v. Sullivan, Sup. Ct. Op. No. 1099 (File No. 2243), 528 P.2d 450 (1974), decided under former AS 29.23.020.

Sec. 29.23.023. Composition and form of representation. (a) The borough assembly shall provide for its composition and for the form of its representation.

(b) Not later than the first regular election which occurs after the report of a federal decennial census, the assembly shall propose and submit to the voters of the borough, at that regular election or at a special election called for the purpose, one or more forms of borough assembly representation. The forms of representation which the assembly may submit to the voters are:

(1) election of members of the borough assembly at large by the qualified voters throughout the borough;

(2) election of members of the borough assembly by district, including

(A) election at large by the qualified voters throughout the borough, but with a requirement that a candidate live within an election district established by the borough for election of assembly members; or

(B) election from election districts established by the borough for the election of assembly members by the qualified voters of a district;

(3) election of members of the borough assembly both at large and by district.

(c) A form of borough assembly representation which includes election of borough assembly members under (b)(2) or (b)(3) of this section shall be submitted to the voters of the borough with a plan of apportionment as required by AS 29.23.025(a).

(d) The borough assembly shall, within 30 days of certification of the results of the election held on a proposed form of representation under this section, adopt an ordinance providing for its composition and the form of assembly representation, and, if applicable, the apportionment of assembly seats which corresponds to the proposed form of representation which receives the most votes at the election.

(e) This section does not apply

(1) to a unified municipality incorporated under AS 29.68.240 — 29.68.440;

(2) to a home rule borough if the borough charter contains procedures for changing assembly composition and form of representation. (§ 1 ch 83 SLA 1979; am § 5 ch 128 SLA 1980)

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Effect of amendments. — The 1980 amendment rewrote the section.

Sec. 29.23.025. Assembly recomposition and reapportionment. (a) Not later than two months after the official report of a federal decennial census, the borough assembly shall determine and declare by resolution whether the existing apportionment of the borough assembly meets the standards of AS 29.23.021. If the borough assembly submits to the voters a form of representation which includes election of borough assembly members under AS 29.23.023(b)(2) or (b)(3), the assembly shall submit with the proposition a proposed plan of apportionment which corresponds to the form of representation proposed. The assembly shall describe the plan of apportionment in the ballot proposition, and may present the plan in any manner which it believes accurately describes the apportionment which is proposed under the form of representation. If the borough assembly determines that its existing apportionment meets the standards of AS 29.23.021, the assembly may include the existing apportionment as a proposed plan of apportionment of assembly seats which corresponds to a form of representation which is proposed.

(b) The borough assembly shall provide, by ordinance, for a change in an existing apportionment of the borough assembly whenever it determines that the apportionment does not meet the standards of AS 29.23.021. At the same time, the borough assembly may, by ordinance, change the composition of the assembly.

(c) If a petition signed by not less than 50 registered voters who are residents of the borough requests the borough assembly to determine whether the existing apportionment meets the standards for apportionment in AS 29.23.021, and the petition contains evidence that the existing apportionment does not meet those standards, the assembly may make the determination requested. The borough assembly shall make a determination required by this subsection within two months of receipt of a petition which meets the requirements of this subsection.

(d) An ordinance adopted by the assembly under (b) or (c) of this section shall be submitted to the voters for approval. In order for the ordinance to be approved it must receive the approval of a majority of the votes cast.

(e) Within six months of a determination by the borough assembly under (b) or (c) of this section that the current apportionment does not meet the standards of AS 29.23.021, the borough assembly shall adopt an ordinance providing for reapportionment, and submit the ordinance to the voters. If, at the end of the six-month time period, an ordinance providing for reapportionment has not been approved by the voters, the commissioner of the Department of Community and Regional Affairs shall provide for the reapportionment in accordance with the standards of AS 29.23.021 by preparing an order of reapportionment and delivering the order to the borough mayor.

(f) *[Repealed, § 13 ch 128 SLA 1980.]*

(g) *[Repealed, § 13 ch 128 SLA 1980.]* (§ 1 ch 83 SLA 1979; am §§ 6-9, 13 ch 128 SLA 1980)

Effect of amendments. — The 1980 amendment rewrote subsections (a) — (c) and repealed subsections (f) and (g). The amendment also rewrote subsection (e).

NOTES TO DECISIONS

Statute superseded home-rule enactments. — See Roderick v. Sullivan, Sup. Ct. Op. No. 1099 (File No. 2243), 528 P.2d 450 (1974), decided under former AS 29.23.020.

The legislature intended that all reapportionment ordinances be submitted to the electorate. Roderick v. Sullivan, Sup. Ct. Op. No. 1099 (File No. 2243), 528 P.2d 450 (1974), decided under former AS 29.23.020.

Quoted in Kentopp v. Anchorage, Sup. Ct. Op. No. 2569 (File No. 6209), 652 P.2d 453 (1982).

Sec. 29.23.027. Apportionment appeals. (a) A reapportionment ordinance approved by the voters, or a decision of the borough assembly that the standards of AS 29.23.021 do not require a change in apportionment, may be appealed to the commissioner of the Department of Community and Regional Affairs. Fifty registered voters who are residents of the borough may submit a petition to the commissioner of community and regional affairs requesting the commissioner to determine whether the proposed reapportionment ordinance approved by the voters meets the standards of AS 29.23.021, or whether a decision of the borough assembly that the standards of AS 29.23.021 do not require a change of apportionment is correct. If the petition asks the commissioner of community and regional affairs to review an ordinance approved by the voters under AS 29.23.025(e), the petition shall be delivered to the commissioner not later than 20 days after certification of the election. If the petition asks the commissioner of community and regional affairs to review a decision of the borough assembly under AS 29.23.025(c), the petition shall be delivered to the commissioner within 20 days of the decision of the borough assembly.

(b) The commissioner of community and regional affairs shall review the petition and may make the determination requested. The commissioner shall provide copies of the determination to the persons petitioning for appeal and to borough officials not later than 60 days after the commissioner receives the petition.

(c) If the commissioner of community and regional affairs determines that the proposed reapportionment ordinance approved by the voters does not meet the standards of AS 29.23.021, or if the commissioner determines that the decision of the borough assembly that the standards of AS 29.23.021 do not require a change of apportionment is not correct, the commissioner shall, by order, direct the borough assembly to prepare a reapportionment ordinance which meets the standards of AS 29.23.021 and submit the ordinance to the voters.

(d) When the borough assembly has been directed by the commissioner of community and regional affairs to prepare a reapportionment ordinance under (c) of this section, the borough assembly shall, within two months of its receipt of the commissioner's order, adopt an ordinance providing for reapportionment. The borough assembly shall submit an ordinance adopted under this subsection to the voters at a regular election or special election held within 60 days of the date of adoption of the reapportionment ordinance.

(e) If at the end of the time period provided und[illegible] of this section an ordinance providing for reapportionment has not been approved by the voters, the commissioner of community and regional affairs shall provide for the reapportionment of the borough assembly in accordance with the standards of AS 29.23.021 by preparing an order of reapportionment and delivering the order to the borough mayor. (§ 10 ch 128 SLA 1980)

Sec. 29.23.029. Judicial review and relief. (a) The commissioner of community and regional affairs may request the superior court to enforce a reapportionment order is[illegible]ed under AS 29.23.027(e).

(b) Each of the following is subject to judicial review:

(1) a plan of reapportionment approved by the voters under AS 29.23.025(a);

(2) a determination by the borough assembly under AS 29.23.025(c) that the standards of AS 29.23.021 do not require a change in apportionment;

(3) a reapportionment ordinance approved by the voters under AS 29.23.025(d);

(4) a reapportionment order of the commissioner of community and regional affairs made under AS 29.23.027(c);

(5) a reapportionment ordinance approved by the voters under AS 29.23.027(d); and

(6) a reapportionment order of the commissioner of community and regional affairs made under AS 29.23.027(e). (§ 10 ch 128 SLA 1980)

Sec. 29.23.030. Election and appointment. [Repealed, § 16 ch 118 SLA 1972.]

Sec. 29.23.031. Effective date of apportionment. (a) A change in assembly apportionment or composition under AS 29.23.025 or 29.23.027 is effective beginning with the first regular election for members of the assembly which is held more than 60 days after the later of:

(1) approval of a reapportionment ordinance by the voters under AS 29.23.025(a), 29.23.025(e), or 29.23.027(d); or

(2) the delivery to the mayor of a reapportionment order of the commissioner of community and regional affairs under AS 29.23.027(e).

(b) The provisions of (a) of this section do not apply to a borough in which a change in assembly composition or apportionment is subject to review and approval or determination of nonobjection by the Attorney

General of the United States under the Voting Rights Act of 1965, as amended, (42 U.S.C. 1971 — 1974). A change in assembly composition or apportionment subject to review under the Voting Rights Act of 1965, as amended, is effective beginning with the first regular election for members of the assembly which is held more than 60 days after

(1) receipt by the borough assembly of approval by the Attorney General of the United States of the proposed change in the composition or apportionment of the assembly;

(2) receipt by the borough assembly of a statement of nonobjection from the Attorney General of the United States to the proposed change in the composition or apportionment of the assembly; or

(3) the last day on which the Attorney General of the United States may review a proposed change in the composition or apportionment of the assembly. (§ 10 ch 128 SLA 1980)

Sec. 29.23.033. Applicability of apportionment provisions. The provisions of AS 29.23.025 — 29.23.031 do not apply

(1) to a unified municipality incorporated under AS 29.68.240 — 29.68.440;

(2) to a home rule borough if the borough, by charter, provides for reapportionment of the borough assembly. (§ 10 ch 128 SLA 1980)

Sec. 29.23.040. Regular term of office. (a) Assemblymen are selected for three-year terms and until their successors are selected and have qualified, unless different terms not exceeding four years are prescribed by borough charter or ordinance. Except when otherwise required by a change of composition or apportionment, if the term of an assemblyman is changed by charter or ordinance, the term of an assemblyman holding office at the time the change takes effect is not affected by that change.

(b) The regular term of office begins on the first Monday following certification of the election, unless a different date is prescribed by borough charter or ordinance.

(c) This section applies to home rule and general law boroughs. (§ 2 ch 118 SLA 1972; am § 13 ch 118 SLA 1972; am § 4 ch 83 SLA 1979; am § 11 ch 128 SLA 1980)

Effect of amendments. — The 1980 amendment restructured the section into present subsections (a) — (c), added the present second sentence of subsection (a), and substituted "unless a different date is prescribed by borough charter or ordinance" for "the current term of incumbent assemblymen may not be altered under this section" at the end of subsection (b).

Sec. 29.23.050. Qualifications. A resident of the borough is eligible to be an assemblyman if the resident is a borough voter. An assemblyman who ceases to be a borough voter immediately forfeits the office. An assemblyman elected from or selected to represent a borough area less than the borough area at large and who becomes a resident

Chapter 23. Municipal Officers and Employees.

Article

1. Borough Assembly (§§ 29.23.010—29.23.100)
2. Borough Executive and Administrator (§§ 29.23.130—29.23.180)
3. City Council (§§ 29.23.200—29.23.220)
4. City Executive and Administrator (§§ 29.23.240—29.23.290)
5. School Boards (§ 29.23.310)
6. Utility Boards (§ 29.23.340)
7. Other Officers and Employees (§§ 29.23.360—29.23.401)
8. Adoption or Repeal of Manager Plan (§§ 29.23.410—29.23.480)
9. Miscellaneous Provisions (§§ 29.23.500—29.23.580)

Article 1. Borough Assembly.

Section

10. General power
20. Composition, apportionment, and reapportionment
30. [Repealed]
40. Regular term of office
50. Qualifications
60. Procedure
70. Departments
80. Assembly vacancies
90. [Repealed]
100. [Repealed]

Sec. 29.23.010. General power. The legislative power of a borough is vested in the assembly. (§ 2 ch 118 SLA 1972)

Establishment of department and procedures for exercise of areawide power. — The establishment of a department and of standards and procedures to be used in the exercise of an areawide power is a task for the borough assembly, in which is vested the general legislative power. 1962 Op. Att'y Gen., No. 9.

The borough assembly may set up a board of health as an advisory board and be substantially guided by such a board of health in its exercise of the public health power, as long as the borough assembly is the body finally expressing the public health power. 1962 Op. Att'y Gen., No. 9.

Borough chairman cannot serve on borough assembly. — To permit the borough chairman to serve on the borough assembly would constitute a clear violation of this section, and would violate the common law prohibition against holding incompatible offices. 1963 Op. Att'y Gen., No. 27.

But positions of borough assemblyman and school board representative can be served concurrently. — A person elected to the positions of borough assemblyman and borough school board could properly exercise the powers, privileges and duties of both offices concurrently. 1963 Op. Att'y Gen., No. 27.

Sec. 29.23.020. Composition, apportionment, and reapportionment. (a) The assembly shall be composed of the number of members and be apportioned in a manner set out in the incorporation petition approved by the voters or, if a borough is already incorporated, the assembly shall be composed and apportioned in a manner prescribed by charter or ordinance. Assembly composition and apportionment, including voting procedures based on the apportionment, may be prescribed in any manner consistent with the equal representation standards of the Constitution of the United States.

(b) Within six months of October 14, 1972, and thereafter within six months of the official report of a federal decennial census and issuance of any supplementary data to the report necessary to

establish population distribution within the borough, the assembly shall

(1) determine and declare by resolution whether the existing assembly apportionment meets the standards designated under (a) of this section;

(2) if the existing apportionment does not meet the designated standards, provide by ordinance for reapportionment and, if it chooses, changes in assembly composition, in accordance with the designated standards;

(3) submit the ordinance to borough voters for approval or rejection as provided in (c) of this section.

(c) The vote on an ordinance submitted under (b)(3) of this section shall be tabulated in two separate classifications. One classification shall consist of all votes cast in the first class and the home rule cities of the borough. The other classification shall consist of all votes cast in the remaining areas of the borough. In order for the ordinance to be approved it must receive majority approval in each classification. If, at the end of the time period prescribed in (b) of this section, no ordinance has been approved, the Department of Community and Regional Affairs shall provide for the reapportionment in accordance with the standards designated in (a) of this section.

(d) In addition to providing for apportionment at the times required under (b) of this section, the borough assembly shall provide for its reapportionment and, if it chooses, a change in assembly composition, whenever, on the basis of federal census reports or other reliable population data, it determines that the existing apportionment does not meet the standards for apportionment designated in (a) of this section. The assembly is required to determine whether the standards are being met upon petition of 50 borough voters. The petition must include reliable evidence that the existing apportionment of the assembly does not meet the designated standards. Reapportionment under this section shall be implemented by ordinance or by act of the Department of Community and Regional Affairs in the same manner as prescribed for reapportionment in (c) of this section.

(e) Members of the assembly are selected according to assembly composition and apportionment set out in the incorporation petition approved by the voters or subsequently provided in accordance with this section. A change in assembly composition or apportionment under this section shall be effective beginning with the next regular election to the assembly.

(f) Assembly or Department of Community and Regional Affairs determinations or reapportionments made under this section are subject to judicial review. The running of time periods specified

in (b) of this section shall be tolled until a final judgment is rendered in an action brought under this subsection.

(g) This section applies to home rule and general law boroughs. (§ 2 ch 118 SLA 1972; am § 12 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Cross reference.—See Editor's note to AS 29.18.120.

Effect of amendments. — The first 1972 amendment rewrote this section. The second 1972 amendment, effective July 1, 1972, substituted "Department of Community and Regional Affairs" for "Local Affairs Agency" in the last sentence of subsections (c) and (d), and in the first sentence of subsection (f).

This section provides a convenient method for reapportioning whenever necessary. 1965 Op. Att'y Gen., No. 5.

It does not indicate what population data may be used by the reapportioning agency. 1965 Op. Att'y Gen., No. 5.

However, the agency may use population data other than official census figures in reapportioning seats or votes. 1965 Op. Att'y Gen., No. 5.

The only limit imposed by this section is that a reapportionment plan may not take effect until the next assembly election. 1965 Op. Att'y Gen., No. 5.

Sec. 29.23.030. Election and appointment.

Repealed by § 16 ch 118 SLA 1972.

Cross reference.—See Editor's note to AS 29.18.120.

Editor's note.—The repealed section derived from § 2, ch. 118, SLA 1972.

Sec. 29.23.040. Regular term of office. Assemblymen are selected for three-year terms and until their successors are selected and have qualified, unless different terms not exceeding four years are prescribed by borough charter or ordinance. However, if under a borough apportionment city councilmen are appointed as assemblymen or elected to dual assembly-council seats, they may not be replaced until their assembly term expires as provided by city charter or ordinance, or they cease to be a member of either the assembly or council. The current term of incumbent assemblymen may not be altered under this section. This section applies to home rule and general law boroughs. (§ 2 ch 118 SLA 1972; am § 13 ch 118 SLA 1972)

Cross reference.—See Editor's note to AS 29.18.120.

Effect of amendment. — The 1972 amendment rewrote this section.

Editor's note.—Section 20, ch. 118, SLA 1972, provides: "The terms of elected officials who are incumbents on September 10, 1972, are not affected by this Act. Their terms expire as provided before enactment of this Act."

Sec. 29.23.050. Qualifications. A resident of the borough is eligible to be an assemblyman if he is a borough voter. An assemblyman who ceases to be a borough voter immediately forfeits his office. An assemblyman elected from or selected to represent a borough area less than the borough area at large and who becomes a resident of another area may continue to serve only until the next regular election. The assembly may by ordinance establish residence requirements for assemblymen not exceeding three years.

[412 US 755]

MARK WHITE, JR., Secretary of State of Texas, et al., Appellants,

v

DIANA REGESTER et al.

412 US 755, 37 L Ed 2d 314, 93 S Ct 2332

[No. 72–147]

Argued February 26, 1973. Decided June 18, 1973.

SUMMARY

A reapportionment plan for the Texas House of Representatives provided for 150 representatives to be selected from 79 single-member districts and 11 multimember districts. Under the plan, the population of the smallest district (71,597) was approximately 9.9 percent smaller than that of the largest district (78,943). The plan was challenged in the United States District Court for the Western District of Texas. A three-judge District Court was convened and held that the reapportionment plan was unconstitutional because of the state's failure to justify the population variations among the districts, and that in two counties the use of multimember districts unconstitutionally diluted the votes of Negroes and Mexican-Americans, respectively (343 F Supp 704).

On appeal, the United States Supreme Court affirmed in part and reversed in part. In an opinion by WHITE, J., it was held (1) expressing the unanimous view of the court, that the appeal was properly before the Supreme Court; (2) expressing the view of six members of the court, that the population variations among the districts were insufficient to establish a prima facie case of invidious discrimination under the equal protection clause of the Fourteenth Amendment; and (3) expressing the unanimous view of the court, that the District Court had properly invalidated the multimember districts in two counties as having unconstitutionally diluted the votes of Negroes and Mexican-Americans, respectively.

BRENNAN, J., joined by DOUGLAS and MARSHALL, JJ., concurred in holdings (1) and (3) above, but dissented from holding (2) on the ground that the court, by establishing a wide margin of tolerable error, was undermining the principle that precise mathematical equality was the constitutionally mandated goal of reapportionment.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Appeal and Error § 327; Courts § 225.6 — three-judge District Court — injunction — direct appeal to Supreme Court

1. A three-judge Federal District Court must be convened (under 28 USCS § 2281) where (1) a statewide legislative reapportionment statute is challenged, (2) injunctions are asked against its enforcement, and (3) the constitutional questions raised are not insubstantial on their face; the fact that the District Court declares the entire apportionment plan invalid, but enters an injunction with respect to its implementation for the next election in two counties only, in no way indicates that the case requires only a single judge; the state's appeal from the District Court's injunction dealing with these two counties is therefore properly before the United States Supreme Court (under 28 USCS § 1253), since the District Court's order directed at the two counties is an order granting an injunction in a civil action required to be heard and determined by a three-judge District Court.

Appeal and Error § 327; Courts § 225.5 — three-judge District Court — injunction — direct appeal to Supreme Court

2. Where a state's appeal from a three-judge Federal District Court's entry of an injunction dealing with multimember legislative districts in two counties is properly before the United States Supreme Court (under 28 USCS § 1253), the state is entitled to review of the District Court's accompanying declaration that a proposed reapportionment plan for the

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25 Am Jur 2d, Elections § 16; 42 Am Jur 2d, Injunctions § 343

9 Am Jur Pl & Pr Forms (Rev ed), Elections, Forms 7, 8

US L Ed Digest, Appeal and Error § 327; Constitutional Law § 334; Evidence § 904.3; Legislature § 5

ALR Digests, Elections § 104

L Ed Index to Anno, Elections; Equal Protection of the Laws; Legislature; One Man-One Vote; Three Judge Court

ALR Quick Index, Elections

Federal Quick Index, Elections; One Man-One Vote; Three-Judge Court

ANNOTATION REFERENCES

Construction and application of 28 USC § 1253 permitting direct appeal to Supreme Court from order of three-judge District Court granting or denying injunction. 26 L Ed 2d 947.

Necessity and propriety (under 28 USC § 2281) of three-judge Federal District Court in suit to enjoin enforcement of state statute or administrative order. 4 L Ed 2d 1931, 15 L Ed 2d 904.

Inequalities in population of election districts or voting units as rendering apportionment unconstitutional. 12 L Ed 2d 1282.

state house of representatives, including those portions providing for multimember districts in the two counties, is invalid statewide because of population variations among the districts; although the state could not have directly appealed to the Supreme Court the entry of a declaratory judgment unaccompanied by any injunctive relief, the Supreme Court has jurisdiction of the state's entire appeal where the declaratory judgment was the predicate for the District Court's order requiring the two counties to be reapportioned into single districts; with the state reapportionment plan before the court, it is in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim is alleged, and an appeal to the Supreme Court, once properly before the court, has the same reach.

Constitutional Law § 334 — equal protection — legislative reapportionment

3. Under a reapportionment plan which provides for 150 members of a state house of representatives to be selected from 79 single-member districts and 11 multimember districts, population variations among such districts are insufficient to establish a prima facie case of invidious discrimination under the equal protection clause of the Fourteenth Amendment, where (1) the population of the smallest district (71,597) is approximately 9.9 percent smaller than that of the largest district (78,943); (2) the average deviation of all districts from the ideal district population (74,645) is 1.82 percent; and (3) only 23 districts, all single-member, are overrepresented or underrepresented by more than 3 percent, and only three such districts by more than 5 percent.

Legislature § 5; United States § 13 — reapportionment — standards

4. State legislative reapportionment statutes are not subject to the same strict standards applicable to reapportionment of Congressional seats.

Constitutional Law § 334 — equal protection — legislative districts

5. With respect to the population of a state's legislative districts under a reapportionment plan, it is not necessary that any deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the equal protection clause of the Fourteenth Amendment.

Legislature § 5 — apportionment — districts

6. Relatively minor population deviations among state legislative districts do not substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.

Legislature § 5 — apportionment — districts

7. It is erroneous to hold that population variations among the election districts for members of a state house of representatives are not justified by a rational state policy, where (1) the state constitution expresses the state policy against cutting county lines wherever possible in forming representative districts, and (2) it appears that to stay within tolerable population limits, it is necessary to cut some county lines, and that the state has achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

Evidence § 904.3 — racial discrimination — voting

8. A three-judge Federal District Court's findings and conclusions are sufficient to sustain the District Court's judgment that the use of multimember districts for state representatives from a particular county unconstitutionally dilutes the votes of Negroes, and the United States Supreme Court will not disturb such findings and conclusions, where

(1) the District Court has referred to the history of official racial discrimination in the state, which discrimination at times touched the right of Negroes to register and vote and to participate in the democratic processes; (2) the District Court has referred to a state rule requiring a majority vote as a prerequisite to nomination in a primary election and to a so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the county multimember district reduced to a head-to-head contest for each position; (3) the District Court considered these characteristics of the state electoral system to have enhanced the opportunity for racial discrimination; (4) there is no requirement that candidates reside in subdistricts of the multimember district; thus, all candidates may be selected from outside the Negro residential area; (5) the District Court has found that since Reconstruction days, there have been only two Negroes in the county delegation to the state house of representatives, and that these were the only two Negroes ever slated by the white-dominated organization which is in effective control of Democratic Party candidate-slating in the county; (6) the District Court has found that such organization did not need the support of the Negro community to win elections in the county, and that it therefore did not exhibit good-faith concern for the political and other needs and aspirations of the Negro community; (7) the District Court has found that in a recent election, such organization was relying upon racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the Negro community; and (8) the District Court has concluded that the Negro community has been excluded from participation in the Democratic primary selection process and has therefore generally not been permitted to enter into the political process in a reliable and meaningful manner.

Legislature § 5 — apportionment — multimember districts

9. Multimember legislative districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the state.

Evidence § 904.3 — racial discrimination — voting

10. In order to sustain a claim that multimember legislative districts are being used invidiously to cancel out or minimize the voting strength of racial groups, it is not enough to show that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential; evidence must be produced to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Evidence § 904.3 — discrimination — voting

11. A three-judge Federal District Court's findings and conclusions are sufficient to sustain the District Court's judgment that the use of multimember districts for state representatives from a particular county unconstitutionally dilutes the votes of Mexican-Americans, and the United States Supreme Court will not overturn such findings, where (1) the District Court has concluded, on the basis of its survey of historic and present conditions, that the county's Mexican-American community has long suffered from, and continues to suffer from, the effects of invidious discrimination and treatment in such fields as education, employment, economics, health, and politics; (2) cultural and language barriers, poll taxes, and restrictive voter registration procedures have operated to effec-

tively deny Mexican-American access to political processes; (3) although Mexican-Americans constitute 29 percent, a plurality, of the county's population, only five Mexican-Americans from the county have served in the state legislature since 1880, and only two of these have been from the area within which most of the county's Mexican-Americans live; (4) the District Court concluded that the county legislative delegation in the state house of representatives was insufficiently responsive to Mexican-American interests; (5) the District Court concluded that the county's Mexican-Americans were effectively removed from the political processes of the county; (6) the District Court found that single-member districts were required to remedy the effects of past and present discriminations against Mexican-Americans and to bring the Mexican-American community into the full stream of political life of the county and state by encouraging further registration, voting, and other political activities; and (7) the District Court did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but concluded, from its own special vantage point, that the multimember district, as designed and operated in the county, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the state house of representatives.

SYLLABUS BY REPORTER OF DECISIONS

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

1. This Court has jurisdiction under 28 USC § 1253 [28 USCS § 1253] to consider the appeal from the injunction order applicable to the Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art I, § 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. Gaffney v Cummings, ante, p 735, 37 L Ed 2d p 298.

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

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

White, J., delivered the opinion of the Court, in Parts I, III, and IV of which all Members joined, and in Part II of which Burger, C. J., and Stewart, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Douglas and Marshall, JJ., joined, post, p 772, 37 L Ed 2d p 328.

APPEARANCES OF COUNSEL

Leon Jaworski argued the cause for appellants.

David R. Richards argued the cause for the appellees Regester et al.

Ed Idar, Jr., argued the cause for the Mexican-American appellees Bernal et al.

Thomas Gibbs Gee argued the cause for the Republican appellees Willeford et al.

Briefs of Counsel, p 1095, infra.

OPINION OF THE COURT

[412 US 756]

Mr. Justice **White** delivered the opinion of the Court.

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

[412 US 757]

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

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was immediately commenced in state court challeng-

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

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

ing the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] Smith v Craddick, 471 SW2d 375 (1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. Mauzy v Legislative Redistricting Board, 471 SW2d 570 (1971).

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

[412 US 759]

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

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

Appellants appealed the statewide invalidation of the House plan and the substitution of single-member for multimember districts in Dallas County and Bexar County.[3] Mr. Justice Powell denied a stay of the judgment of the District Court, 405 US 1201, 30 L Ed 2d 769, 92 S Ct 752, and we noted probable jurisdiction sub nom Bullock v Regester, 409 US 840, 34 L Ed 2d 79, 93 S Ct 70.

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

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

3. In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. Archer v Smith, 409 US 808, 34 L Ed 2d 68, 93 S Ct 62 (1972).

I

[1] We deal at the outset with the challenge to our jurisdiction over this appeal under 28 USC § 1253 [28 USCS § 1253], which permits injunctions in suits required to be heard and determined by a three-judge district court to be appealed [412 US 760] directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

[2] We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts [412 US 761] within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas"; and for its order that the Secretary of State "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion . . . ." 343 F Supp, at 737. In these circumstances, although appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, Gunn v University Committee, 399 US 383, 26 L Ed 2d 684, 90 S Ct 2013 (1970); Mitchell v Donovan, 398 US 427, 26 L Ed 2d 378, 90 S Ct 1763 (1970), we conclude that we have jurisdiction of the entire appeal. Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973); Florida Lime & Avocado Growers v Jacobsen, 362 US 73, 4 L Ed 2d 568, 80 S Ct 568 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substan-

4. Title 28 USC § 1253 [28 USCS § 1253] provides:

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

tial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. Roe v Wade, supra, at 123, 35 L Ed 2d 147; Carter v Jury Comm'n, 396 US 320, 24 L Ed 2d 549, 90 S Ct 518 (1970); Florida Lime & Avocado Growers v Jacobsen, supra, at 80, 4 L Ed 2d 568.

II

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

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

[412 US 762]

justified by "acceptable reasons" grounded in state policy; relied on Kirkpatrick v Preisler, 394 US 526, 22 L Ed 2d 519, 89 S Ct 1225 (1969), to conclude that the permissible tolerances suggested by Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362 (1964), had been substantially eroded; suggested that Abate v Mundt, 403 US 182, 29 L Ed 2d 399, 91 S Ct 1904 (1971), in accepting total deviations of 11.9% in a county reapportionment was sui generis; and considered the "critical issue" before it to be whether "the State [has] justified any and all variances, however small, on the basis of a consistent, rational State policy." 343 F Supp, at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by appellants was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence. Id., at 717. It also considered the combination of single-member and multimember districts in the House plan "haphazard," particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this "irrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional."[6] Ibid.

[412 US 763]

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

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5. See Appendix to Opinion of the Court, post, p 770, 37 L Ed 2d p 327.

6. It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multimember and single-member districts. Thus, in questioning the use of single-member districts in Houston but multimember districts in all other urban areas, and remarking that the State had provided neither "compelling" nor "rational" explanation for the differing treatment, the District Court merely concluded that this classification "may be" an independent ground for invalidating the plan. But there are no authorities in this Court for the proposition that the mere mixture of multimember and single-member districts in a single plan, even among urban areas, is invidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

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

[3-7] Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from Mahan v Howell, 410 US 315, 35 L Ed 2d 320, 93 S Ct 979 (1973), and Gaffney v Cummings, 412 US, p 735, 37 L Ed 2d 298, 93 S Ct 2321, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. Kirkpatrick v Preisler did not dilute the tolerances contemplated by Reynolds v Sims with respect to state districting, and we did not hold in Swann v Adams, 385 US 440, 17 L Ed 2d 501, 87 S Ct 569 (1967), or Kilgarlin v Hill, 386 US 120, 17 L Ed 2d 771, 87 S Ct 820 (1967),

[412 US 764]

or later in Mahan v Howell, supra, that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in Gaffney v Cummings, supra, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," Reynolds v Sims, 377 US, at 579, 12 L Ed 2d 506; Mahan v Howell, supra, at 325, 35 L Ed 2d 320, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.[8]

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

[7] 8. The court's conclusion that the variations in this case were not justified

[412 US 765]

III

[8-10] We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. Whitcomb v Chavis, 403 US 124, 29 L Ed 2d 363, 91 S Ct 1858 (1971); Mahan v Howell, supra; see Burns v Richardson, 384 US 73, 16 L Ed 2d 376, 86 S Ct 1286 (1966); Fortson v Dorsey, 379 US 433, 13 L Ed 2d 401, 85 S Ct 498 (1965); Lucas v Colorado General Assembly, 377 US 713, 12 L Ed 2d 632, 84 S Ct 1459 (1964); Reynolds v Sims, supra.[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See Whitcomb v Chavis, supra; Burns v Richardson, supra; Fortson v Dorsey, supra. To sustain such claims, it is not enough that the racial group allegedly

[412 US 766]

discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. Whitcomb v Chavis, supra, at 149–150, 29 L Ed 2d 363.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F Supp, at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the

by a rational state policy would, in any event, require reconsideration and reversal under Mahan v Howell, 410 US 315, 35 L Ed 2d 320, 93 S Ct 979 (1973). The Texas Constitution, Art III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of Mahan v Howell, may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

9. See Whitcomb v Chavis, 403 US 124, 141–148, 29 L Ed 2d 363, 91 S Ct 1858 (1971), and the cases discussed in n 22 of that opinion, including Kilgarlin v Hill, 386 US 120, 17 L Ed 2d 771, 87 S Ct 820 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" Id., at 121, 17 L Ed 2d 771.

opportuni[illegible] for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party

[412 US 767]

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

IV

[11] The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with Hernandez v Texas, 347 US 475, 98 L Ed 866, 74 S Ct 667 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated

[412 US 768]

for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas,[12] had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." 343 F Supp, at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that

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

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

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

13. The District Court found that "[t]he

makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." 343 F Supp, at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that, only five Mexican-Americans since 1880 have served in the Texas Legislature from

[412 US 769]

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

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

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

[412 US 770]

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

Affirmed in part, reversed in part, and remanded.

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

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

APPENDIX TO OPINION OF THE COURT

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7(3)	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1
13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19(2)	150,209	75,104	459	.6
20	75,592		947	1.3
21	74,651		6	.0
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26(18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76,505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32(9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35(2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37(4)	295,516	73,879	(766)	(1.0)
[412 US 771]				
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)
42	74,706		61	.1
43	74,160		(485)	(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46(11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48(3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59(2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3
71	73,711		(934)	(1.3)
72(4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)	(1.2)
75(2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8
[412 US 772]				
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)
95	73,825		(820)	(1.1)
96	72,505		(2,140)	(2.9)
97	74,202		(443)	(.6)
98	72,380		(2,265)	(3.0)
99	74,123		(522)	(.7)
100	75,682		1,037	1.4
101	75,204		559	.7

SEPARATE OPINION

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting in No. 71-1476, ante p 735, 37 L Ed 2d 298, and concurring in part and dissenting in part in No. 72-147.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative dis-

tricts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." Reynolds v Sims, 377 US 533, 577, 12 L Ed 2d 506, 84 S Ct 1362 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western District

[412 US 773]

of Texas reaching a similar result as to the Texas plan. In the Texas case, the Court does affirm, however, the District Court's determination that the use of multimember districts in Dallas and Bexar Counties had the unconstitutional effect of minimizing the voting strength of racial groups.[1] See Whitcomb v Chavis, 403 US 124, 142–144, 29 L Ed 2d 363, 91 S Ct 1858 (1971); Burns v Richardson, 384 US 73, 88, 16 L Ed 2d 376, 86 S Ct 1286 (1966); Fortson v Dorsey, 379 US 433, 439, 13 L Ed 2d 401, 85 S Ct 498 (1965). With that latter conclusion I am in full agreement, as I also agree with and join Part I of the Court's opinion in White v Regester, 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332. But the decision to uphold the state apportionment schemes reflects a substantial and very unfortunate retreat from the principles established in our earlier cases, and I therefore must state my dissenting views.

I

At issue in Gaffney v Cummings, 412 US 735, 37 L Ed 2d 298, 93 S Ct 2321, is the 1971 reapportionment plan for election of members of the House of Representatives of Connecticut. The plan was premised on a 151-member House, with each member elected from a single-member district. Since the population of the State was 3,032,217, according to 1970 census data, the ideal would fix the population of each district at 20,081. In fact, the population of many districts

[412 US 774]

deviated substantially from the ideal, ranging from a district underrepresented by 3.93% to one overrepresented by 3.90%. The total spread of deviation—a figure deemed relevant in each of our earlier decisions—was 7.83%. The population of 39 assembly districts deviated from the average by more than 3%. Another 34 districts deviated by more than 2%. The average deviation was just under 2%. To demonstrate that the state plan did not achieve the greatest practicable degree of equality in per-district population, appellees submitted a number of proposed apportionment plans, including one that would have significantly reduced the extent of inequality. The total range of deviation under appellees' plan would have been 2.61%, as compared to 7.83% under the state plan.

1. In Fortson v Dorsey, 379 US 433, 13 L Ed 2d 401, 85 S Ct 498 (1965), we held that a multimember district is not per se unconstitutional under the Equal Protection Clause, even though we had previously recognized certain inherently undesirable features of the device. See Lucas v Colorado General Assembly, 377 US 713, 731 n 21, 12 L Ed 2d 632, 84 S Ct 1459 (1964). We have concluded, however, that the use of the device is, in fact, unconstitutional, where it operates to "'minimize or cancel out the voting strength of racial or political elements of the voting population.'" Burns v Richardson, 384 US 73, 88, 16 L Ed 2d 376, 86 S Ct 1286 (1966), quoting from Fortson v Dorsey, supra, at 439, 13 L Ed 2d 401. Today's decision is the first in which we have sustained an attack on the use of multimember districts. Cf. Whitcomb v Chavis, 403 US 124, 144, 29 L Ed 2d 363, 91 S Ct 1858 (1971).

The District Court held the state plan invalid on the ground that "the deviations from equality of populations of the . . . House districts are not justified by any sufficient state interest."[2] 341 F Supp 139, 148 (Conn 1972). Instead of adopting one of appellees' plans, the court appointed a Special Master to chart a new plan, and his effort produced a scheme with a total range of deviation of only 1.16%. In overturning the District Court's decision, the Court does not conclude, as it did earlier this Term in Mahan v Howell, 410 US 315, 35 L Ed 2d 320, 93 S Ct 979 (1973), that the District Court failed to discern the State's sufficient justification for the deviations. Indeed, in view of appellant's halfhearted attemps to justify

[412 US 775]

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

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

The Texas reapportionment case, White v Regester, 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332, presents a similar situation, except that the range of deviation in district population is greater and the State's justifications are, if anything, more meager. An ideal district in Texas, which chooses the 150 members of the State House of Representatives from 79 singlemember and 11 multimember districts, is 74,645. As

[412 US 776]

defined in the State's 1970 plan, a substantial number of districts departed significantly from the ideal. The total range of deviation was at least 9.9%, and arguably almost 30%, depending on the mode of calcula-

2. With regard to the senatorial districts, the 1971 plan produced a total variance of 1.81%. Although appellees did not specifically challenge the apportionment of senatorial districts, the District Court properly concluded that its finding of unconstitutional deviation in one house required invalidation of the entire apportionment plan. Maryland Committee for Fair Representation v Tawes, 377 US 656, 673, 12 L Ed 2d 595, 84 S Ct 1429 (1964); Lucas v Colorado General Assembly, supra, at 735, 12 L Ed 2d 632; Burns v Richardson, supra, at 83, 16 L Ed 2d 376.

tion.[3] The District Court pointed out that

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

As the District Court's opinion makes clear, the variations surely cannot be defended as a necessary byproduct of a state effort to avoid fragmentation of political subdivisions. Nevertheless, the Court today sets aside the District Court's decision, reasoning, as in the Connecticut case, that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in Abate v Mundt, 403 US 182, 29 L Ed 2d 399, 91 S Ct 1904 (1971), where we held that a total deviation of 11.9% must be

[412 US 777]

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

II

The proposition that certain deviations from equality of district population are so small as to lack constitutional significance, while repeatedly urged on this Court by States that failed to achieve precise equality, has never before commanded a majority of the Court.[4] Indeed, in Kirkpatrick v Preisler, 394 US 526, 530, 22 L Ed 2d 519, 89 S Ct 1225 (1969), we expressly rejected the argument

> "that there is a fixed numerical or percentage population variance small enough to be considered de

3. The District Court pointed out that "the State's method of computing deviations in the multi-member districts may distort the actual percentage deviations in those eleven districts. . . . Since we have concluded that the 9.9% total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable, it is unnecessary for us to resolve this complex computational conflict." 343 F Supp 704, 713 n 5. A similar conflict existed in Mahan v Howell, 410 US 315, 35 L Ed 2d 320, 93 S Ct 979 (1973), as I pointed out in my dissenting opinion, id., at 333, 35 L Ed 2d 335, and there too the Court declined to indicate any awareness of the dispute.

4. There is a statement, to be sure, in Swann v Adams, 385 US 440, 444, 17 L Ed 2d 501, 87 S Ct 569 (1967), that "[d]e minimis deviations are unavoidable," but that statement must be viewed in context. By way of clarification, the Court immediately added that "the Reynolds opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 US 533, 579 [12 L Ed 2d 506, 84 S Ct 1362]." Ibid. Similarly, the Court noted, quoting from Roman v Sincock, 377 US 695, 710, 12 L Ed 2d 620, 84 S Ct 1449 (1964), that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" 385 US, at 444, 17 L Ed 2d 501. Swann v Adams does not, in my view, suggest any support for the proposition that deviations as great as 10% are tolerable in the absence of any justification or explanation by the State.

minimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

The Court reasons, however, that Kirkpatrick v Preisler,
[412 US 778]
supra, a case that concerned the division of Missouri into congressional districts, has no application to the apportionment of seats in a state legislature. In my dissenting opinion in Mahan v Howell, supra, I pointed out that the language, reasoning, and background of the Kirkpatrick decision all command the conclusion that our holding there is applicable to state legislative apportionment no less than to congressional districting. In fact, this Court specifically recognized as much in the context of a challenge to an Arizona apportionment scheme in Ely v Klahr, 403 US 108, 29 L Ed 2d 352, 91 S Ct 1803 (1971). Describing the opinion of the District Court whose judgment was under review, we noted that the court below had "properly concluded that this plan was invalid under Kirkpatrick v Preisler, 394 US 526, 22 L Ed 2d 519, 89 S Ct 1225 (1969), and Wells v Rockefeller, 394 US 542, 22 L Ed 2d 535, 89 S Ct 1234 (1969), since the legislature had operated on the notion that a 16% deviation was de minimis and consequently made no effort to achieve greater equality." 403 US, at 111, 29 L Ed 2d 352. Yet it is precisely such a notion that the Court today approves.[5]

Moreover, even if Kirkpatrick should be deemed inapplicable to the apportionment of state legislative districts, the reasoning that gave rise to our rejection of a
[412 US 779]
de minimis approach is fully applicable to the case before us. We pointed out there that the "as nearly as practicable" standard—the standard that controls legislative apportionment as well as congressional districting, Reynolds v Sims, supra, at 577, 12 L Ed 2d 506—demands that "the State make a good-faith effort to achieve precise mathematical equality. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." 394 US, at 530–531, 22 L Ed 2d 519. Kirkpatrick recognized that "to consider a certain range of variances de minimis would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 US, at 531, 22 L Ed 2d 519.

5. By contrast, in Mahan v Howell, supra, the Court expressly reaffirmed the holding of Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362 (1964), that "deviations from the equal-population principle are constitutionally permissible" "[s]*o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.*" Id., at 579, 12 L Ed 2d 506, 84 S Ct 1362 quoted in Mahan v Howell, supra, at 325, 35 L Ed 2d 320 (emphasis added). In my view, the Court incorrectly concluded in Mahan v Howell that Virginia had justified the population variations at issue there. Nevertheless, the Court did follow the line of analysis prescribed in our earlier decisions—requiring the State to justify every deviation from precise equality. The approach of Mahan is, therefore, directly at odds with the approach adopted today. See also, e. g., Abate v Mundt, 403 US 182, 185, 29 L Ed 2d 399, 91 S Ct 1904 (1971); Kilgarlin v Hill, 386 US 120, 122, 17 L Ed 2d 771, 87 S Ct 820 (1967); Swann v Adams, 385 US, at 443–446, 17 L Ed 2d 501.

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

[412 US 780]

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

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

[412 US 781]

a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right—the right to an equal vote. "While the result of a court decision in a state legislative appor-

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

7. Deviations After 1970

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

tionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." Reynolds v Sims, supra, at 561, 12 L Ed 2d 506. We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives. The conclusion that a State may, without any articulated justification, deliberately weight some persons' votes more heavily than others, seems to me fundamentally at odds with the purpose and rationale of our reapportionment decisions. Regrettably, today's decisions are likely to jeopardize the very substantial gains that have been made during the last four years.

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

> "the total deviation for Dallas and Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people.
>
> [412 US 782]
>
> The percentage deviation figures are only a shorthand method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in Reynolds concluded that legislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people." 343 F Supp, at 713 n 5.

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

8. See Kirkpatrick v Preisler, 394 US 526, 538-540, 22 L Ed 2d 519, 89 S Ct 1225 (1969) (Fortas, J., concurring); Wells v Rockefeller, 394 US 542, 554, 22 L Ed 2d 535, 89 S Ct 1234 (1969) (White, J., dissenting).

[412 US 783]

MARK WHITE, Jr., Secretary of State of Texas, Appellant,

v

DAN WEISER et al.

412 US 783, 37 L Ed 2d 335, 93 S Ct 2348

[No. 71-1623]

Argued February 26, 1973. Decided June 18, 1973.

SUMMARY

The Texas legislature adopted a reapportionment plan for Texas' congressional districts. Under the plan, the population of the smallest district (458,581) was approximately 4.1 percent smaller than that of the largest district (477,856), and the average deviation among districts was .745 percent, or 3,421 persons. The plaintiffs challenged the plan in the United States District Court for the Northern District of Texas, and the plaintiffs proposed alternative reapportionment plans known as Plan B and Plan C. Plan B generally followed the redistricting pattern of the legislature's plan, adjusted district lines where necessary to achieve smaller population variances among districts, and involved smaller population variances than either the legislature's plan or Plan C. Plan C substantially disregarded the configuration of districts in the legislature's plan, was based on consideration of no factors other than population, and provided for more compact and contiguous redistricting than either the legislature's plan or Plan B. A three-judge District Court was convened, held that the legislature's plan was unconstitutional, and ordered the implementation of Plan C.

On appeal, the United States Supreme Court affirmed in part, reversed in part, and remanded the case. In an opinion by White, J., it was held, in Part I, expressing the unanimous view of the court, that the legislature's reapportionment plan was properly held unconstitutional, on the basis of Article 1, § 2, of the Constitution, which permits only those population variances among congressional districts which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown; and it was held, in Part II, expressing the view of eight members of the court, that since Plan B achieved the goal of population equality to a greater extent than did Plan C, and since Plan B more clearly approximated the legislature's reapportionment plan than did Plan C, which had a very different political impact, the District Court erred in choosing Plan C rather than Plan B.

Briefs of Counsel, p 1098, infra.

"grand and petit juries selected at random from a fair cross section of the community." 28 U.S.C. § 1861.

Since petitioner was denied an opportunity to inspect the jury lists, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand to the District Court so that petitioner may attempt to support his challenge to the jury-selection procedures. We express no views on the merits of that challenge.

It is so ordered.

420 U.S. 1, 42 L.Ed.2d 766

Daniel CHAPMAN and Jacque Stockman, Appellants,

v.

Ben MEIER, etc.

No. 73-1406.

Argued Nov. 13, 1974.

Decided Jan. 27, 1975.

A declaratory judgment action was instituted for reapportionment of the North Dakota Legislative Assembly. A three-judge District Court, 372 F.Supp. 371, adopted a permanent reapportionment plan. The Supreme Court noted probable jurisdiction on appeal and, by Mr. Justice Blackmun, held that, absent persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid the use of multimember districts and must ordinarily achieve the goal of population equality with little more than de minimis variation; if important and significant state considerations rationally mandate a departure from such standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

Judgment reversed and case remanded.

1. Courts ⚷385(1)

The United States Supreme Court had jurisdiction, under statute providing for appeal of injunction granted by three-judge district court, only if three-judge court was required by statute prohibiting granting of injunctive relief against enforcement or execution of state statute except by three-judge district court. 28 U.S.C.A. §§ 1253, 2281.

2. Courts ⚷101.5(4)

Where, although reapportionment under attack was court-ordered, its enforcement was doubly based on State's Constitution and statutes, and where effectuation directly depended on state election law machinery and plan itself was court-imposed replacement of state constitutional provisions and state reapportionment statutes, that were primary objects of attack, three-judge court was properly employed and required. 28 U.S.C.A. §§ 1253, 2281.

3. Constitutional Law ⚷225(1)

To establish denial of equal protection by multimember constituency apportionment scheme, the scheme, must, designedly or otherwise, under circumstances of particular case operate to minimize or cancel out voting strength of racial or political elements of voting population; beyond evidence of simple disproportionality be[illegible] vo[illegible] poten-tial and legislative [illegible] racial or political group, [illegible] be evidence that group has been denied access to political process equal to access of other groups. Const. N.D. §§ 25-30, 32-35; NDCC 54-03-01; Laws N.D.1931, c. 7; Laws N.D.1963, c. 345; Laws N.D. 1965, c. 338; Laws N.D.1973, c. 411; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A. Const. Amend. 14

4. States ⚷27(7)

Absent particularly pressing features calling for multimember legislative districts, United States District Court should refrain from imposing them upon a state. Const. N.D. §§ 25-30, 32-35; NDCC 54-03-01; Laws N.D.1931, c. 7; Laws N.D.1963, c. 345; Laws N.D.

c. 411; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14.

12. States ⟹27(10)

Court-ordered plan of legislative reapportionment must be held to higher standards than a state's own plan, and with a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. Const. N.D. §§ 25–30, 32–35; NDCC 54-03-01; Laws N.D.1931, c. 7; Laws N.D.1963, c. 345; Laws N.D.1965, c. 338; Laws N.D.1973, c. 411; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14.

13. States ⟹27(5, 7)

Absent persuasive justifications, court-ordered reapportionment plan of state legislature must avoid use of multimember districts and must ordinarily achieve goal of population equality with little more than de minimis variation; if important and significant state considerations rationally mandate departure from such standards, it is reapportioning court's responsibility to articulate precisely why plan of single-member districts with minimal population variance cannot be adopted. Const. N.D. §§ 25–30, 32–35; NDCC 54-03-01; Laws N.D.1931, c. 7; Laws N.D.1963, c. 345; Laws N.D.1965, c. 338; Laws N.D.1973, c. 411; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14.

14. States ⟹27(10)

Reapportionment is primarily duty and responsibility of state through its legislature or other body, rather than of federal court. Const. N.D. §§ 25–30, 32–35; NDCC 54-03-01; Laws N.D. 1931, c. 7; Laws N.D.1963, c. 345; Laws N.D.1965, c. 338; Laws N.D.1973, c. 411; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14.

Syllabus *

This case involves the issue of the constitutionality of a federal-court-ordered reapportionment of the North Dakota Legislative Assembly. Following protracted state and federal litigation challenging various apportionment plans, statutes, and state constitutional provisions, including a federal action in which a three-judge District Court in 1965 approved a reapportionment plan that included five multimember senatorial districts, appellants brought the present federal action against appellee, the Secretary of State, alleging that substantial population shifts had occurred and that the 1965 plan no longer met equal protection requirements, and requesting the court to order apportionment based on the 1970 census figures, to provide for single-member districts, to declare the 1965 plan invalid, and to restrain appellee from administering the election laws under that plan. A three-judge District Court, holding that such plan failed to meet constitutional standards, approved another plan that called for five multimember senatorial districts and that contained a 20% population variance between the largest and smallest senatorial districts. *Held*:

1. This Court has jurisdiction of the appeal under 28 U.S.C. § 1253. Although the challenged reapportionment plan was court-ordered, its enforcement is based on the State's Constitution and statutes, its effectuation directly depends on the state election law machinery, and the plan itself is a court-imposed replacement of state constitutional provisions and reapportionment statutes. P. 759.

2. Absent persuasive justification a federal district court in ordering state legislative reapportionment should refrain from imposing multimember districts upon a State. Here the District Court has failed to articulate a significant state interest supporting its departure from the general preference for single-member districts in court-ordered reapportionment plans that this Court recognized in Connor v. Johnson, 402 U.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268, and unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senatorial districts. Pp. 759–763.

3. A population deviation of such magnitude in a court-ordered reapportionment plan as the 20% variance involved here is constitutionally impermissible absent significant state policies or other acceptable considerations requiring its adoption. The burden is on the District Court to elucidate the reasons necessitating any departure from approximate population equality and to articulate clearly the relationship between the variance and the state policy furthered. Here the District Court's allowance of the 20% variance is not justified, as the court claimed, by the absence of "electorally victimized minorities," by the sparseness of North Dakota's population, by the division of the State caused by the Missouri River, or by the asserted state policy of observing geographical boundaries and existing political subdivisions, especially when it appears that other, less statistically offensive, reapportionment plans already devised are feasible. Pp. 763–766.

372 F.Supp. 371, reversed and remanded.

John D. Kelly, Fargo, N. D., for appellants.

Paul M. Sand, Bimarck, N. D., for appellee.

⊥3 ⊥Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality of a federal-court-ordered reapportionment of the North Dakota Legislature, called in that State the Legislative Assembly. That State like many others, has struggled to satisfy constitutional requirements for legislative apportionment delineated in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (1964); Maryland Committee v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964); Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964); Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964); Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964), and other cases. This litigation is the culmination of that struggle, totally ineffectual on the legislative side, during the past decade.

I

The State's Constitution and Its Statutes

North Dakota's original Constitution, adopted at the State's admission into the Union in 1889, is still in effect. It has been amended, of course, from time to time. Since 1918, § 25 thereof has read: "The legislative power of this state shall be vested in a legislature consisting of a senate and a house of representatives." N.D.Const. Art. II. That legislative power for 70 years has been subject to the initiative and the referendum. *Ibid.* The Constitution has further provided that the State's senate "shall be composed of forty-nine members", § 26, elected for a four-year term, § 27, with one-half thereof elected every two years, § 30, and that no one shall be a senator unless he is a qualified elector of the senatorial district, has attained the age of 25 years, and has been a ⊥resident of the ⊥4 State for the two years next preceding the election, § 28. Since 1960, § 29 has read:

> "Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented

by one senator and no more."[1] Laws 1959, c. 438; Laws 1961, c. 405.

The document also states that the house of representatives "shall be composed of not less than sixty, nor more than one hundred forty members", § 32, elected for a two-year term, § 33, and that no one shall be a representative unless he is a qualified elector of the district, has attained the age of 21 years, and has been a resident of the State for the two years next preceding the election, § 34. Section 35 provides for at least one representative for each senatorial district and for as many representatives as there are counties in the district; states that the Legislative Assembly, after each federal decennial census, shall apportion "the balance of the members of the House of Representatives", and, if the Legislative Assembly fails in its apportionment duty, places the task of apportioning the house in a designated group of officials of the State.[2]

There have been complementary statutory provisions. An apportionment effected by Laws 1931, c. 7, N.D.Cent. Code § 54-03-01 (1960), was in effect for over 30 years despite the mandate of § 35 of the Constitution that apportionment be effected after each federal census.

II

Prior Litigation

A. Things began to stir in North Dakota even prior to this Court's decision in Baker v. Carr in 1962. The State's Legislative Assembly of 1961 had failed to apportion the house following the 1960 census. After *Baker* had been decided at the District Court level, 179 F.Supp. 824 (MD Tenn.1959), and between the argument and reargument of the case here, the Supreme Court of North Dakota dismissed an original action for a prerogative writ to enjoin its Chief Justice from issuing the apportionment proclamation which would have announced the conclusions of the statutorily designated "apportionment group" that were then anticipated. The peti-

1. Prior to the 1960 amendment, § 29 read: "The legislative assembly shall fix the number of senators, and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law."

2. Section 35 reads in full as follows: "Each senatorial district shall be represented in the House of Representatives by at least one representative except that any senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to apportion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial districts. If any Legislative Assembly whose duty it is to make an apportionment shall fail to make the same as herein provided it shall be the duty of the chief justice of the supreme court, attorney general, secretary of state, and the majority and minority leaders of the House of Representatives within ninety days after the adjournment of the legislature to make such apportionment and when so made a proclamation shall be issued by the chief justice announcing such apportionment which shall have the same force and effect as though made by the Legislative Assembly." Prior to the 1960 amendment, § 35 called for the Legislative Assembly (seemingly at least every 10 years) "to fix by law" the number of senators and the number of representatives "within the limits prescribed by this constitution" and to "proceed to reapportion the state into senatorial districts, as prescribed by this constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts", with the proviso that at any regular session "the legislative assembly may . . . redistrict the state into senatorial districts, and apportion the senators and representatives respectively."

tion asserted that the group's plan would apportion the house in an unconstitutional manner and not according to population. The Supreme Court ruled that the function of the group was legislative; that it had not yet completed its work; that it was performing a function the Legislative Assembly should have performed; and that, until the proclamation was issued, the group's action was not subject to challenge in the courts. State ex rel. Aamoth v. Sathre, 110 N.W.2d 228 (ND 1961).

B. Citizens of North Dakota then sought declaratory and injunctive relief in federal court under the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1988. By this time the State's Chief Justice had issued the proclamation. A three-judge District Court held that the presence of the proclamation eliminated the aspect of prematurity that had characterized the earlier challenge in the state court. But the "basic issues," the court concluded with one dissent, had not been presented to the Supreme Court of North Dakota. "We believe that court should have the opportunity of passing on all questions herein". The court, accordingly, abstained from passing upon those issues; it stayed further proceedings before it, but did not dismiss the action. Lein v. Sathre, 201 F.Supp. 535, 542 (ND 1962).

C. The plaintiffs in the federal case promptly took to the Supreme Court of North Dakota their attack upon the plan adopted by the apportionment group. That court assumed jurisdiction. State ex rel. Lein v. Sathre, 113 N.W.2d 679, 681 (ND 1962). It noted that no question arising under the United States Constitution was presented, *id.*, at 681–682, and that it was not concerned with the validity of the allotment of one representative to each senatorial district, as prescribed by the first sentence of § 35 of the Constitution, *id.*, at 683. The court recognized that there was inherent in a constitutional direction to apportion according to population "a limited discretion to make the apportionment that will approach, as nearly as is reasonably possible, a mathematical equality." *Id.*, at 685. It then went on to hold that the apportionment made by the group "violates the constitutional mandate of apportionment according to the population of the several districts and is void", *id.*, at 687, and that the apportionment effected by the 1931 statute continued to be the law until superseded by an apportionment valid under § 35 or under a further amendment of the Constitution. *Id.*, at 687–688.

D. The same plaintiffs then turned again to the federal court. The three-judge court, with one judge dissenting, denied the request for injunctive relief on the ground that the only challenge before it was to the apportionment group's plan and that the 1931 apportionment was not challenged. Lein v. Sathre, 205 F.Supp. 536 (ND 1962). It noted that the Legislative Assembly would meet the following January, that it had "the mandatory duty" to apportion the house, and that the court would not presume that it would not perform that duty. Jurisdiction was retained, with the observation that if the Legislative Assembly failed to act, the plaintiffs, upon appropriate amendment of their complaint, might further petition the court for relief. *Id.*, at 540.

E. The 1963 Legislative Assembly did reapportion. Laws 1963, c. 345.

F. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, and its companion cases were decided in June 1964. A new suit then was instituted in federal court to invalidate North Dakota's entire apportionment system on federal constitutional grounds. Sections 26, 29, and 35 of the Constitution and the 1963 statute were challenged. The three-judge court held that these constitutional and statutory provisions were violative of the Equal Protection Clause. Paulson v. Meier, 232 F.Supp. 183 (N D 1964). It went on to hold that the 1931 apportionment, being "the last valid apportionment," as described by the North Dakota Supreme Court, and by which the 1963 legislators had been

elected, was also invalid. Thus, "there is no constitutionally valid legislative apportionment law in existence in the State of North Dakota at this time." *Id.*, at 187. The court encountered difficulty as to an appropriate remedy. It concluded, one judge dissenting, that adequate time was not available within which to formulate a proper plan for the then forthcoming 1964 elections, *id.*, at 188; that the 1965 Legislative Assembly would have a *de facto* status; and that that Assembly should promptly devise a constitutional system. Injunctive relief was denied. *Id.*, at 190.

G. The 1965 Legislative Assembly produced a reapportionment act although it was not approved or disapproved by the Governor. Laws 1965, c. 338.

H. The North Dakota Secretary of State, defendant in the federal court, then moved to dismiss the federal action on the ground that the 1965 act met constitutional requirements. The three-judge court, however, ruled otherwise. Paulson v. Meier, 246 F.Supp. 36, 43 (ND 1965). It turned to the question of remedy and concluded that the Legislative Assembly had had its opportunity and that the court now had the duty itself to take affirmative action. *Id.*, at 43–44. It considered ⊥9 several plans that had been introduced in the Assembly and centered its attention on the Smith plan. Although the court found the plan "not perfect" (five multimember senatorial districts,[3] and county lines violated in 12 instances), it concluded that the plan, if "slightly" modified, would meet constitutional standards ("impressive mathematical exactness," namely, 25 of 39 districts within 5% of the average population, four slightly over 5%, and only two exceeding 9%). *Id.*, at 44–45. The "slight" modification was made and reapportionment, really the first to be finally effected since 1931, was therefore accomplished in North Dakota by federal-court intervention.

I. Still another original proceeding in the State's Supreme Court was instituted. This one challenged the right of senators from the multimember districts to hold office. It was claimed that this multiple membership violated § 29 of the North Dakota Constitution which provided that each senatorial district "shall be represented by one senator and no more." The state court held that the 1965 judgment of the federal court was not res judicata as to the then plaintiffs; that the initial or "freezing" portion of § 29 was clearly invalid; that the concluding portion, restricting representation of a district to one senator, would not have been desired by the people without the "balance" of the freezing portion; and that § 29 as a unit must fall as violative of equal protection. State ex rel. Stockman v. Anderson, 184 N.W.2d 53 (1971). The result was that multimember senatorial districts were not held illegal by the state court.

⊥10 III

The Present Litigation

The 1970 federal census was taken in due course. The 1971 Legislative Assembly failed to reapportion. The present federal action was instituted the following November. The plaintiffs alleged that substantial shifts in population had taken place, and that the court-ordered plan of 1965 no longer complied with the requirements of the Equal Protection Clause. The relief requested was that the court order apportionment upon the 1970 census figures and also provide for single-member districts; that the 1965 plan be declared invalid; and that the Secretary of State be restrained from administering the election laws under that plan.

On May 22, 1972, the three-judge court entered an order to the effect that the existing North Dakota apportionment failed to meet federal constitutional standards and that the court would

3. This feature was later described as "a radical departure from state precedent". Chapman v. Meier, 372 F.Supp. 371, 382 (ND 1974) (dissenting opinion).

attempt to reapportion. Jurisdictional Statement A–54. It appointed a commission to formulate and present a plan within 30 days, and it submitted guidelines to the commission. With respect to multimember districts, the order provided:

> "We have considered the matter of 'multi-member' districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of 'multi-member' districts will be studied in depth by the Commission and the results of that study be made available to us." *Id.*, at A–55.

An opinion was filed on June 30. 372 F.Supp. 363 (ND). This recited that the commission had presented eight separate plans to the court; that shifts in population since 1960 had resulted in constitutionally impermissible population variations among existing districts; that a plan submitted by Commissioner Dobson substantially reduced the disproportionate representation, although it decreased the number of districts by one and increased the number of senators by two and the number of representatives by four.[4] "[C]ertain weaknesses" in the plan were recognized, including "some variance in population . . . which, in a few instances, seems substantial", and a continuation of multimember districts. *Id.*, at 366. These districts included the State's five largest cities. The court noted that the districts had been created, not by enactment of the Legislative Assembly, but by the federal court in the 1965 *Paulson* decision, and observed, *ibid.*: "In light of subsequent [United States] Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan." Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), and Connor v. Williams, 404 U.S. 549, 551, 92 S.Ct. 656, 658, 30 L.Ed.2d 704 (1972), were cited. The court, however, felt

> "constrained to permit multi-member districts to continue during the 1972 elections . . . to avoid extreme disruptions in the elective processes. . . . We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour." 372 F.Supp., at 366.

The Dobson plan was therefore approved "for the 1972 election only." *Id.*, at 367. An alternative, the Ostenson plan, was commended to the commission for "further study," with a direction to modify it "so as to eliminate the existing multi-member senate districts". *Id.*, at 367–368. Chief District Judge Benson dissented as to the limitation of the Dobson plan to the 1972 election; for him, the *Connor* litigation was distinguishable on racial grounds and the desirability of multimember districts was a question for the Legislative Assembly and not for the court. *Id.*, at 368–369. Jurisdiction was retained.

On November 8, 1972, immediately after the election that year, the three-judge court suspended its June 30 order until further notice and directed the State's Attorney General promptly to report any action taken by the 1973 Legislative Assembly.

That Assembly not only passed an apportionment Act but overrode its veto by the Governor.[5] Laws 1973, c. 411, and Note, at 1178. The Act provided for 37 legislative districts, each having one senator and two representatives, except for five multimember senatorial districts. Section 3 thereof specifically recited the population of each district and

4. Cf. Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1 (1972).

5. The Governor's principal objection, as announced in his veto message, was the failure of the Legislative Assembly to eliminate the multimember senatorial districts. Return to and Compliance with Order, filed March 30, 1973.

the population variance (plus 3.3% to minus 3.5%, a total of 6.8%; or plus 408 persons to minus 432 persons, a total of 840 persons) from the average of 12,355 per senator.

The effectiveness of the legislative plan, however, promptly was suspended by a referendum petition. See Laws 1973, p. 1549. By a companion initiative petition, an amendment to the State's Constitution was proposed; this would have created a commission to reapportion the State and, in addition, would have mandated single-member senatorial districts. A special election on these took place December 4, 1973. *Both* were defeated. The Legislative Assembly's work to reapportion was thus nullified by the people. It could be suggested, and apparently was, that the people also reacted against the elimination of the five multimember districts. In any event, the defendant thereupon moved the federal court to readopt the plan temporarily approved by its order of June 1972. The plaintiffs resisted.

The three-judge District Court, with Circuit Judge Bright dissenting, then made "permanent" the 1972 Dobson plan, with its five multimember districts providing 18 senators out of a statewide total of 51. 372 F.Supp. 371, 379 (ND 1974). We noted probable jurisdiction. 416 U.S. 966, 94 S.Ct. 1988, 40 L.Ed.2d 556 (1974).

IV

Jurisdiction

[1] We are met at the threshold with a mild question of jurisdiction not pressed by the parties. We have jurisdiction under 28 U.S.C. § 1253 [6] only if a three-judge court was required by 28 U.S.C. § 2281.[7]

[2] It might be suggested that the three-judge court here did not restrain the enforcement of a statute but, instead, the enforcement of the court-ordered plan of 1965 which had become unconstitutional in the circumstances of 1972, and, hence, that the provisions of § 2281 were not satisfied. The argument is less than persuasive and we conclude that it is without merit. Although the reapportionment now under attack was indeed court ordered, its enforcement is doubly based on the State's Constitution and statutes. Its effectuation directly depends on the state election law machinery and, in addition, the plan itself is a court-imposed replacement of the North Dakota constitutional provisions and the 1931, 1963, and 1965 reapportionment statutes. It is these that are, and have been, the primary objects of attack. It would be highly anomalous if jurisdiction were not here, for then it would follow that a single judge could invalidate a reapportionment plan that had been evolved or approved, and was required so to be, by a three-judge court some time before. Subject matter of this kind is regular grist for the three-judge court, and that route typically has been employed under conditions similar to those present here. *See, e. g.*, Skolnick v. State Electoral Board of Illinois, 336 F.Supp. 839 (ND Ill.1971). We think this is correct procedure and we conclude that we have jurisdiction.

6. 28 U.S.C. § 1253:

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

7. 28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title."

V

The Multimember Districts

From the above review of the North Dakota constitutional and statutory provisions and of the litigation of the past 12 years, two significant facts emerge: The first is that some multimembership on the house side of the Legislative Assembly traditionally has existed. This plainly qualifies as established state policy.[8] The second is that, in contrast, multimembership on the senate side, even as to the five districts, has never existed except as imposed (a) by the three-judge federal court by its 1965 *Paulson* decision; (b) by a majority of the three-judge court as a temporary expedient for the 1972 election only; (c) by the provisions of the 1973 act immediately nullified by referendum; and (d) by a different majority of the three-judge court as a "permanent" solution in the judgment under review. Thus only once has the Legislative Assembly provided for multimember senate representation and that effort was promptly aborted. Every other such provision in North Dakota's history has been court imposed. Multimember senate representation, therefore, obviously does not qualify as established state policy.

This Court has refrained from holding that multimember districts in apportionment plans adopted by States for their legislatures are *per se* unconstitutional. White v. Regester, 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973), and cases cited therein. On the contrary, the Court has upheld numerous state-initiated apportionment schemes utilizing multimember districts. See, *e. g.*, Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967); Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). And, beginning with Reynolds v. Sims, 377 U.S., at 577, 84 S.Ct., at 1389, the Court has indicated that a State might devise an apportionment plan for a bicameral legislature with one body composed of at least some multimember districts, as long as substantial equality of population per representative is maintained.

Notwithstanding this past acceptance of multimember districting plans, we recognize that there are practical weaknesses inherent in such schemes. First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases. See Lucas v. Colorado General Assembly, 377 U.S., at 731, 84 S.Ct., at 1470. Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them. *Ibid.*[9] Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts. This possibility, however, was rejected, absent concrete proof, in Whitcomb v. Chavis, 403 U.S. 124, 147, 91 S.Ct. 1858, 1871, 29 L.Ed.2d 363 (1971). Criticism of multimember districts has been frequent and wide-

8. Indeed, at oral argument, the appellants did not oppose the allocation of two house members to each senatorial district. Tr. of Oral Arg. 16–17.

9. *Cf.*, however, Fortson v. Dorsey, 379 U.S. 433, 438, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965), for the suggestion that the at-large representative serves all residents in the subdistricts. Furthermore, while we mentioned these potential weaknesses of multimember districts in Lucas v. Colorado General Assembly, 377 U.S., at 731 n. 21, 84 S.Ct., at 1471, we noted that we "do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects . . . that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

spread. *Id.*, at 157–160,[10] and articles cited therein. See generally Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972); Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309 (1966).

[3] ⊥117 In Fortson v. Dorsey, *supra*, we held that the mere assertion of such possible weaknesses in a legislature's multimember districting plan was insufficient to establish a denial of equal protection. Rather, it must be shown that

> "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S., at 439, 85 S.Ct., at 501.

Further, there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups. White v. Regester, 412 U.S., at 765–766, 93 S.Ct., at 2339–2340. Such evidence may be more easily developed where the multimember districts compose a large part of the legislature, where both bodies in a bicameral legislature utilize multimember districts, or where the members' residences are concentrated in one part of the district. Burns v. Richardson, 384 U.S., at 88, 86 S.Ct., at 1294.[11] Whether such factors are present or not, proof of lessening or cancellation of voting strength must be offered.

This requirement that one challenging a multimember districting plan must prove that the plan minimizes or cancels out the voting power of a racial or political group has been applied in cases involving apportionment schemes adopted by state legislatures. In Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), however, which came to ⊥118 us on an application for a stay, we were presented with a *court-ordered* reapportionment scheme having some multimember districts in both bodies of the state legislature. We stated explicitly that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Id.*, at 692, 91 S.Ct., at 1762. Exercising our supervisory power, we directed the District Court to devise a single-member districting plan, "absent insurmountable difficulties." *Ibid.* This preference for and emphasis upon single-member districts in court-ordered plans was reaffirmed in Connor v. Williams, 404 U.S., at 551, 92 S.Ct., at 658, and again in Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320 (1973). In the latter case a District Court was held to have acted within its discretion in forming a multimember district as an interim remedy in order to alleviate substantial underrepresentation of military personnel in an impending election.[12]

10. In Whitcomb v. Chavis, 403 U.S., at 158–159, 91 S.Ct., at 1877, we acknowledged that "criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests."
Such criticism did not amount to a showing that the use of multimember districts was "inherently invidious" or violative of the Fourteenth Amendment. *Id.*, at 160, 91 S.Ct., at 1877.

11. These factors have been criticized as not being particularly helpful. See Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666, 694–695 (1972).

12. In Mahan v. Howell, 410 U.S., at 333, 93 S.Ct., at 989, we stated that the District Court "was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against mil-

The standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use. The practical simultaneity of decision in Connor v. Johnson and in Whitcomb v. Chavis, *supra*, so demonstrates. When the plan is court ordered, there often is no state policy of multimember districting which might deserve respect or deference. Indeed, if the court is imposing multimember districts upon a State which always has employed single-member districts, there is special reason to follow the *Connor* rule favoring the latter type of districting.

[4] Appellants do not contend that any racial or political group[13] has been discriminated against by the multimember districting ordered by the District Court. They only suggest that the District Court has not followed our mandate in Connor v. Johnson, and that the court has failed to articulate any reasons for this departure. We agree. Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.

[5] The District Court cannot avoid the multimember issue by labeling it, see 372 F.Supp., at 377, a political issue to be resolved by the State. The District Court itself created multimember districting in North Dakota, and it might be said to be disingenuous to suggest that the judicial creation became a political question simply by the passage of nine years. The District Court's treatment of this issue directly conflicts with its prior opinion in this case, where it allowed continuation of the multimember districts first established in the *Paulson* decision in 1965 only as an interim remedy. 372 F.Supp., at 367. The court there noted that in the largest multimember district, a voter would be asked to evaluate the qualifications of at least 30 candidates for the state legislature, a "most formidable" task. *Id.*, at 366. Taking note of Connor v. Johnson, the court held in 1972 that it would be improper to permit multimember districts to remain permanently and allowed continued use only for the impending election because of the great confusion that otherwise would result. The court appears now to have abandoned that position, with no suggestion of reasons for the abrupt change. It is especially anomalous that the court would continue with the multimember districting plan, when the Special Master who initially proposed it has disavowed use of permanent multimember districts. Dobson Reapportionment Problems, 48 N.D.L.Rev. 281, 289 (1972).

[6, 7] In contrast, the dissent in the District Court suggests a wide range of attributes of single-member districts. 372 F.Supp., at 391. One advantage is obvious: confusion engendered by multiple offices will be removed. Other advantages perhaps are more speculative: single-member districts may prevent domination of an entire slate by a narrow majority, may ease direct communication with one's senator, may reduce campaign costs, and may avoid bloc voting. Of course, these are general virtues of single-member districts, and there is no guarantee that any particular feature will be found in a specific

itary personnel is constitutionally impermissible, Davis v. Mann [377 U.S. 678,] 691–692 [84 S.Ct. 1441, 12 L.Ed.2d 609 (1964)], and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district."

North Dakota, too, has its military personnel apportionment problem with respect to the bases near Grand Forks and Minot. The appellants recognize the existence of that problem and acknowledge that, conceivably, it could result in some type of multimember districting. Tr. of Oral Arg. 10.

13. The only minority group of significant size in North Dakota is Indians, and the court-ordered reapportionment plan affects them no differently from any other group.

plan. Neither the District Court majority nor appellee, however, has provided us with any suggestion of a legitimate state interest supporting the abandonment of the general preference for single-member districts in court-ordered plans which we recognized in Connor v. Johnson.[14] The fact that no allegation of minority group discrimination is raised by appellants here does not make *Connor* inapplicable.

It is true that in 1973 the voters of North Dakota voted down a proposed constitutional amendment which would have re-established the State's tradition of single-member senatorial districts. At the same time the voters also rejected by referendum the Legislative Assembly's 1973 Act which would have continued the multimember format for five districts. We are unable to infer from these simultaneous actions of the electorate any particular attitude toward multimember districts. It simply appears that North Dakota's voters have not been satisfied with any reapportionment proposal, and that they are frustrated by the years of confusion since the obviously impermissible apportionment provisions of the State's Constitution were invalidated.

[8] We are confident that the District Court, with perhaps the aid of its Special Masters, will be able to reinstitute the use of single-member districts while also attaining the necessary goal of substantial population equality. Special Master Ostenson had indicated that it " 'would not be terribly difficult to adopt single-member districts.' " See 372 F.Supp., at 392.[15] Unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in Mahan v. Howell, 410 U.S., at 333, 93 S.Ct., at 989, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senatorial districts in North Dakota.

VI

The Population Variance

The second aspect of the court-ordered reapportionment plan that is challenged by the appellants is the population divergence in the various senatorial districts. Since the population of the State under the 1970 census was 617,761, and the number of senators provided for by the court's plan was 51, each senatorial district would contain 12,112 persons if population equality were achieved. In fact, however, one district under the plan has 13,176 persons, and thus is underrepresented by 8.71%, while another district has 10,728 persons, and is overrepresented by 11.43%. The total variance between the largest and smallest districts consequently is 20.14%, and the ratio of the population of the largest to the smallest is 1.23 to 1.

[9] Reynolds v. Sims, *supra*, established that both houses of a state legislature must be apportioned so that districts are "as nearly of equal population as is practicable." 377 U.S., at 577, 84 S.Ct., at 1390. While "[m]athematical exactness or precision" is not required, there must be substantial compliance with the goal of population equality. *Ibid.* Reynolds v. Sims, of course, involved gross population disparity among districts.

Since *Reynolds*, we have had the opportunity to observe attempts in many state legislative reapportionment plans to achieve the goal of population equality. Although each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others, Swann v. Adams, 385 U.S. 440,

14. For an example of a conceivable rationale supporting multimember districts, see Carpeneti, *supra*, n. 11, at 695–696, where it is suggested that multimember districts may insure that certain interests such as city- or region-wide views are represented.

15. See also the views of the late Special Master Smith, 372 F.Supp., at 392.

445, 87 S.Ct. 569, 572, 17 L.Ed.2d 501 (1967), certain guidelines have been developed for determining compliance with the basic goal of one person, one vote. In *Swann* we held that a variance of 25.-65% in one house and 33.55% in the other was impermissible absent "a satisfactory explanation grounded on acceptable state policy." *Id.*, at 444, 87 S.Ct., at 572. See also Kilgarlin v. Hill, 386 U.S., at 123–124, 87 S.Ct., at 822–823. In *Swann*, no justification of the divergences had been attempted. Possible justifications, each requiring adequate proof, were suggested by the Court. Among these were "such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." 385 U.S., at 444, 87 S.Ct., at 572. See also Reynolds v. Sims, 377 U.S., at 578–581, 84 S.Ct., at 1390–1392.

On the other hand, we have acknowledged that some leeway in the equal-population requirement should be afforded States in devising their legislative reapportionment plans. As contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality. Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969); White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973), when state legislative districts are at issue we have held that minor population deviations do not establish a prima facie constitutional violation. For example, in Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), we permitted a deviation of 7.83% with no showing of invidious discrimination. In White v. Regester, *supra*, a variation of 9.9% was likewise permitted.

The treatment of the reapportionment plan in Mahan v. Howell, *supra*, is illustrative of our approach in this area. There the Virginia Legislature had fashioned a plan providing a total population variance of 16.4% among house districts. This disparity was of sufficient magnitude to require an analysis of the state policies asserted in justification. We found that the deviations from the average were caused by the attempt of the legislature to fulfill the rational state policy of refraining from splitting political subdivisions between house districts, and we accepted the policy as legitimate notwithstanding the fact that subdivision splits were permitted in senatorial districts. Since the population divergences in the Virginia plan were "based on legitimate considerations incident to the effectuation of a rational state policy," Reynolds v. Sims, 377 U.S., at 579, 84 S.Ct., at 1391, we held that the plan met constitutional standards.

[10] It is to be observed that this measure of acceptable deviation from population equality has been developed in cases that concerned apportionment plans enacted by state legislatures. In the present North Dakota case, however, the 20% variance is in the plan formulated by the federal court. We believe that a population deviation of that magnitude in a court-ordered plan is constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance. The burden is on the District Court to elucidate the reasons necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered.

[11] The basis for the District Court's allowance of the 20% variance is claimed to lie in the absence of "electorally victimized minorities," in the fact that North Dakota is sparsely populated, in the division of the State caused by

the Missouri River, and in the goal of observing geographical boundaries and existing political subdivisions. We find none of these factors persuasive here, and none of them has been explicitly shown to necessitate the substantial population deviation embraced by the plan.

First, a variance of this degree cannot be justified simply because there is no particular racial or political group whose voting power is minimized or canceled. All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.

Second, sparse population is not a legitimate basis for a departure from the goal of equality. A State with a sparse population may face problems different from those faced by one with a concentrated population, but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, particular emphasis should be placed on establishing districts with as exact population equality as possible. The District Court's bare statement that North Dakota's sparse population permitted or perhaps caused the 20% deviation is inadequate justification.[16]

Third, the suggestion that the division of the State caused by the Missouri River and the asserted state policy of observing existing geographical and political subdivision boundaries warrant departure from population equality is also not persuasive. It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines. As the dissenting judge in this case noted, appellee's counsel acknowledged that reapportionment proposed by the Legislative Assembly broke county lines, 372 F.Supp., at 393 n. 22, and the District Court indicated as long as a decade ago that the legislature had abandoned the strict policy. Paulson v. Meier, 246 F.Supp., at 42–43. Furthermore, a plan devised by Special Master Ostenson demonstrates that neither the Missouri River nor the policy of maintaining township lines prevents attaining a significantly lower population variance.[17] We do not imply that the Ostenson plan should be adopted by the District Court, or that its 5.95% population variance necessarily would be permissible in a court-ordered plan. What we intend by our reference to the Ostenson plan is to show that the factors cited by the District Court cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible.[18] The District Court has provided no rationale for its rejection of the Ostenson plan.

[12] Examination of the asserted justifications of the court-ordered plan thus plainly demonstrates that it fails to meet the standards established for evaluating variances in plans formulated by state legislatures or other state bodies. The plan, hence, would fail even under the criteria enunciated in Mahan v. Howell and Swann v. Adams. A court-ordered plan, however, must be held to higher standards than a State's own plan. With a court plan, any deviation

16. As early as Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Court indicated that suggestions that population deviation was necessary "to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large [geographically] that the availability of access of citizens to their representatives is impaired" were unconvincing. *Id.*, at 580, 84 S.Ct., at 1391.

17. See Appendix B to memorandum opinion and order of June 30, 1972, by Judges Bright and Van Sickle (the Ostenson plan), App. 12-22. The Ostenson plan would allow a total population deviation of only 5.95%.

18. Another plan appearing to be more acceptable with respect to population variance than that adopted by the District Court is the one suggested by the State's Special Committee on Reapportionment, referred to in Judge Bright's dissenting opinion, 372 F. Supp., at 394 n. 23.

from approximate population equality must be supported by enunciation of historically significant state policy or unique features. We have felt it necessary in this case to clarify the greater responsibility of the District Court, when devising its own reapportionment plan, because of the severe problems occasioned for the citizens of North Dakota during the several years of redistricting confusion.

VII

[13] We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimem-⊥127 ber districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation.[19] Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

[14] We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. Reynolds v. Sims, 377 U.S., at 586, 84 S.Ct., at 1394; Maryland Committee v. Tawes, 377 U.S., at 676, 84 S.Ct., at 1440. It is to be hoped that the 1975 North Dakota Legislative Assembly will perform that duty and enact a constitutionally acceptable plan. If it fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

19. This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting under Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969); and White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).

Counties, and shall be entitled to one senator and two representatives;

31. The thirty-first legislative district shall consist of Kidder and Sheridan Counties and all of Burleigh County except that portion contained in the thirty-second legislative district, and shall be entitled to one senator and two representatives;

32. The thirty-second legislative district shall consist of the City of Bismarck and the unorganized territory designated as Hay Creek, Lincoln and Fort Rice precincts (Townships 137–80, 138–80, 139–80 and 139–81) in Burleigh County, and shall be entitled to three senators and six representatives;

33. The thirty-third legislative district shall consist of Mercer and Oliver Counties and all of Morton County except those portions contained in the thirty-fourth and thirty-fifth legislative districts, and shall be entitled to one senator and two representatives;

34. The thirty-fourth legislative district shall consist of the City of Mandan and the unorganized territory designated as Crown Butte, Bindewald, Custer and Highland precincts (Townships 138–80, 138–81, 138–82, 139–81, 139–82, 140–81, 140–82, and 140–83) in Morton County, and shall be entitled to one senator and two representatives;

35. The thirty-fifth legislative district shall consist of Grant and Sioux Counties, and Harmon Township and the unorganized territory designated as Wenger, Rural, Sweetbriar, Dettman, Albrecht, Columbia, Sims, Doll, Olin, Faust, Hermes, Buchli, Huff, Little Heart, Fallon, Stone, Fort Rice, Odense, and New Hope precincts (Townships 133–82, 134–79, 134–80, 134–81, 134–82, 134–84, 135–79 through 84, 136–79 through 84, 137–79 through 87, 138–83 through 90, 139–83, and 139–84) in Morton County, and shall be entitled to one senator and two representatives;

36. The thirty-sixth legislative district shall consist of Dunn and McKenzie Counties, and shall be entitled to one senator and two representatives;

37. The thirty-seventh legislative district shall consist of the City of Dickinson in Stark County, and shall be entitled to one senator and two representatives;

38. The thirty-eighth legislative district shall consist of Adams and Hettinger Counties and all of Stark County except those portions contained in the thirty-seventh and thirty-ninth legislative districts and shall be entitled to one senator and two representatives; and

39. The thirty-ninth legislative district shall consist of Slope, Billings, Bowman, and Golden Valley Counties and South Heart, Slope and Ash Coulee Townships and Townships 137–96, 137–97, 137–98, 137–99, 138–96, 138–97, 138–98, 138–99, 139–96, 139–99, 140–96, 140–98, and 140–99 in Stark County, and shall be entitled to one senator and two representatives.

Daniel CHAPMAN and Jacque Stockman, Plaintiffs,

v.

Ben MEIER, Secretary of State for the State of North Dakota, Defendant.

Civ. No. 4664.

United States District Court,
D. North Dakota,
Southeastern Division.

Jan. 30, 1974.

Probable Jurisdiction Noted April 29, 1974.
See 94 S.Ct. 1988.

Declaratory judgment action for reapportionment of the North Dakota State Legislature. The three-judge District Court, Benson, Chief District Judge, held that the court would adopt as its permanent reapportionment plan

the temporary plan adopted in 1972, that multimember districts were constitutionally permissible in North Dakota and that the population variances in the reapportionment plan were not so great as to be constitutionally impermissible.

Order in accordance with opinion.

Bright, Circuit Judge, dissented and filed opinion.

1. States 🔑27(7)

Minority group must be identifiable and must be effectively removed from the electoral process by reason of the districting scheme in order for multimember legislative district to be unconstitutional. U.S.C.A.Const. Amend. 14.

2. States 🔑27(4)

Not every racial or political group has constitutional right to be represented in state legislature. U.S.C.A.Const. Amend. 14.

3. Constitutional Law 🔑225(1)

Court, in considering various reapportionment options before it, should go only as far as is necessary in order to meet the constitutional requirements of "one man, one vote." U.S.C.A.Const. Amend. 14.

4. States 🔑27(7)

The complexion of the State of North Dakota and of individual cities within the State did not present any showing of unrepresented minorities or unresponsive representative which would render multimember legislative districts unconstitutional. U.S.C.A.Const. Amend. 14.

5. States 🔑27(7, 10)

The issue of multimember legislative districts or single-member districts is clearly political issue to be resolved by the electorate and the legislature and, in devising legislative reapportionment plan, the court would go no further than was required in order to formulate a constitutionally sufficient plan for North Dakota and would not intrude on the political realm. U.S.C.A.Const. Amend. 14.

6. States 🔑27(5)

Permanent legislative reapportionment plan for North Dakota which provided for 39 senatorial districts, five of which were multimember, and which increased the size of the state senate by two and increased the state house of representatives by four was not invalid because of population variance which appeared large percentagewise, but when applied to sparsely populated state did not result in significant population variances. U.S.C.A.Const.Amend. 14.

7. States 🔑27(5)

The key as to whether certain population deviation would be allowable in legislative reapportionment is whether the deviation causes a sacrifice of substantial quality; a percentage of variance can only have validity when measured against the actual number of electors, communities of interest, transportation, and size of the base from which the representation is drawn. U.S.C.A. Const. Amend. 14.

8. States 🔑27(10)

Once a legislative reapportionment has been formulated which, in consideration of all the attendant circumstances, fairly meets the constitutional requirements of "one man, one vote," a court should not continue to sift and shuffle abstract figures solely to arrive at a mathematically perfect plan. U.S.C.A. Const. Amend. 14.

9. States 🔑27(4)

Greater deviations from mathematical equality are permissible in the legislative reapportionment plan adopted for a sparsely settled state barren of electorally victimized minorities. U.S.C.A. Const. Amend. 14.

John D. Kelly, Wattam, Vogel, Vogel & Peterson, Fargo, N.D., for plaintiffs.

Paul M. Sand, First Asst. Atty. Gen., Allen I. Olson, Atty. Gen., Bismarck, N. D., for defendant.

Before BRIGHT, Circuit Judge, BENSON, Chief District Judge, and VAN SICKLE, District Judge.

MEMORANDUM OPINION AND ORDER

BENSON, Chief District Judge.

On May 18, 1972, this three judge district court panel heard evidence and oral argument on the constitutionality of the North Dakota legislative apportionment plan then in effect. On May 22, 1972, we entered an order requiring reapportionment of the state legislative districts to conform to the "one man, one vote" requirement of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Thereafter, on June 30, 1972, this Court filed its Memorandum Opinion and Order, Judge Benson dissenting in part, adopting an interim apportionment plan effective only for the impending 1972 general election. The plan provided for thirty-nine senatorial districts, five of which were multi-member. It increased the size of the state senate by two and increased the state house of representatives by four. It decreased the number of legislative districts from thirty-nine to thirty-eight. The plan recognized that the interests of those persons residing on the air bases at Grand Forks and Minot were more closely aligned with urban than with rural interests, and included those populations within the nearby urban districts. The multi-member districts retained are located in the cities of Fargo, Grand Forks, Minot, Bismarck and Jamestown.

The Court retained jurisdiction over the cause, and directed its commission of three special masters to study and report upon a more permanent plan. Subsequently, on motion by Defendant Meier, the Court, on November 8, 1972, ordered that further action be deferred pending the possible adoption of a new apportionment plan by the 43rd Legislative Assembly of the State of North Dakota, in its 1973 session.

Over the veto of the Governor, the Legislature adopted an apportionment plan which continued the multi-member districts substantially as provided in the Court's plan, and as had existed in the state since 1965. The Governor's principal objection to the Legislature's plan centered on the multi-member senate districts.[1]

The operation of the plan adopted by the Legislature was suspended by referendum petition. By initiative petition, an amendment to the Constitution of North Dakota was proposed which would create a commission to reapportion the state and which would mandate the creation of single member senatorial districts. A statewide special election on the referred plan of the Legislature and the initiated constitutional amendment was held on December 4, 1973. Both measures were defeated. Therefore, the obligation to make a final determination on a reapportionment plan for the legislative districts of the State of North Dakota remains with this Court.

The plaintiffs urge the Court to proceed in accordance with its Memorandum Opinion and Order of June 29, 1972, wherein the majority suggested that if a new, more permanent, plan had to be fashioned by the Court, it would probably establish single member districts in light of Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971):

> "When district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general rule." at 692, 91 S.Ct. at 1762.

On the other hand, the Defendant argues that this Court is not compelled by the *Connor* decision to create single member districts and urges us, in light of the apportionment decisions of the

1. Governor's veto message, Defendant's Report ot the Court, filed March 30, 1973.

United States Supreme Court that have been rendered since June 29, 1972, to adopt the June 29, 1972 Court plan (The Dobson Plan)[2] as the permanent plan for the State of North Dakota.

Evidence before this Court indicates that North Dakota is a sparsely settled, agricultural state with declining populations in most localities outside the urban areas. The state has fifty three counties. Most minor civil divisions in rural areas have very small populations that are becoming smaller. The 1970 Federal Census for North Dakota showed an overall state population of 617,761 persons, and a population density of 8.9 persons per square mile. The overall loss in population to North Dakota between 1960 and 1970 on a statewide basis was 2.3%. In 1960, the urban-rural population was divided 35.2% urban and 64.8% rural. In 1970, it was 55.7% urban and 44.3% rural. A total of 183 census county divisions are composed of mainly open country. Ten of these had more than 2,500 inhabitants in 1970, and thirty-nine (21.3%) had fewer than 1,000. The two smallest divisions had less than 500 inhabitants. The two largest census county divisions in this group had 1970 populations of 12,608 and 12,927, and contained the Grand Forks and Minot Air Force Bases.[3]

In hearings before the Joint Committee on Reapportionment held on January 3, 1973, State Representative Earl C. Rundle indicated that in Billings County there are 72 sections of land with no people residing on them. The total population of that county is 1,198. The population of the four largest cities in North Dakota in descending order are: Fargo, 53,365; Grand Forks, 39,008; Bismarck, 34,703; Minot, 32,290.[4]

Special Master Dobson, in presenting his plan, which with some minor amendments, was adopted by the Court on June 29, 1972, as an "interim" plan commented:

"The plan observes natural geographical barriers, such as the Missouri River . . . and . . . every district is connected with good arterial roads. It should not be necessary to travel outside of one's district in going from one part of it to another."

"In the formation of districts, parts of 10 counties are attached to an adjoining county or counties. However, in three instances (Burleigh, Ward and Williams), no real violence is done to county lines because an urban district is sealed off and the rural portion of the county is attached to a neighboring rural county. Three other counties which are divided (Barnes, Richland and Walsh) have traditionally been split into two districts. Thus, only four counties (McHenry, Cass, Morton and Stark) suffer any damage in the districting.

In this connection, it should be noted that the greatest complaints about the existing apportionment were voiced over the breaking of county lines, particularly in smaller rural counties. Counties with very small populations should not be split because they are thereby rendered politically powerless. It is a form of de facto disenfranchisement."

In its Order of June 29, 1972, this Court found that reapportionment was required because of the general population shift from rural to urban centers in North Dakota which "created constitutionally impermissible variations in population among the existing legislative districts of North Dakota".

The following is a chart of the plan adopted by this Court and is inserted in this Opinion to illustrate that it cures the "constitutionally impermissible vari-

2. Richard R. Dobson, one of the Special Masters appointed by the Court.

3. Stanley W. Voelker and Thomas K. Ostenson, Population Changes within Census County Divisions of North Dakota, 1950–1970, March, 1971.

4. 1970 Census of Population, U. S. Dept. of Commerce, Bureau of the Census, 1970.

ations", which were the basis for the court ordered reapportionment.

North Dakota Population—1970 Census	617,761
Number of Senators Provided for in Court Plan	51
Population per senator (absolute equality)	12,112

District Number	No. of Senators	Population Per Senator	Percentage Variance From Absolute Equality	Population Variance From Absolute Equality
1	1	12,250	−1.13%	138
2	1	11,615	+4.10%	497
3	1	12,481	−3.04%	369
4	1	13,176	−8.71%	1064
5	4	12,477	−3.01%	365
6	1	11,840	+2.24%	272
7	1	12,956	−6.98%	844
8	1	11,251	+7.10%	861
9	1	11,549	+4.65%	563
10	1	12,858	−6.15%	746
11	1	10,728	+11.43%	1384
12	1	12,349	−1.96%	237
14	1	12,679	−4.68%	567
15	1	12,915	−6.62%	803
16	1	11,296	+6.73%	816
17	1	10,731	+11.42%	1381
18	4	12,561	−3.70%	449
19	1	10,859	+10.41%	1253
20	1	11,534	+4.78%	578
21	5	12,048	+0.05%	64
22	1	11,448	+5.48%	664
23	1	11,007	+9.12%	1105
24	1	11,598	+4.24%	514
25	1	12,799	−5.68%	687
26	1	12,913	−6.61%	801
27	1	12,392	−2.31%	280
28	1	11,362	+6.11%	750
29	2	11,775	+2.79%	337
30	1	12,745	−5.23%	633
31	1	12,712	−4.96%	600
32	3	11,865	+2.04%	247
33	1	13,075	−7.96%	963
34	1	12,215	−0.09%	103
35	1	12,158	−0.04%	46
36	1	11,021	+9.92%	1091
37	1	12,405	−2.42%	293
38	1	12,566	−3.75%	454
39	1	12,743	−5.21%	631

The majority of this Court has concluded that the interim plan should be adopted as the permanent plan. Judge Bright, in dissenting, is concerned with the fact that Districts 5, 18, 21, 29 and 32 are multi-member districts, and with the fact that the 11.43% overrepresentation in District 11, coupled with the 8.71% underrepresentation in District 4, creates what he feels to be an impermissible variation of 20.14%.

I. MULTI-MEMBER DISTRICTS

There has been no showing before this Court that multi-member districts, which have existed in North Dakota since 1965, have resulted in discrimination of any kind against any groups. Plaintiff's counsel, in his brief filed with the Court on May 5, 1972, said: "Plaintiffs do not assume the burden of establishing that multi-member senate and house districts are violative of the United States Constitution". Relying on *Connor*, the thrust of the contention appears to be that multi-member districts cannot be allowed to continue because they were initially fashioned by the Court.

The situation in Mississippi, faced by the court in *Connor*, is obviously quite different from that which exists in North Dakota. According to the 1970 census, the State of Mississippi has a population of 2,216,912, and a population density of 49.6 persons per square mile. The white population is 1,393,293; the black population is 815,770.[5] In North Dakota, except for the Indian Reservations, none of which are included in the multi-member senate districts, there are no identifiable minorities.

Four days after its decision in *Connor*, the Supreme Court handed down Whitcomb v. Chavis, 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed.2d 363 (1971), wherein it reviewed the decision of a three judge court convened to consider whether two Indiana statutes had the effect of diluting the vote of Negroes and poor people living in Marion County (City of Indianapolis). The district court panel concluded that the existing multi-member district must be separated because of strong differences in minority groups, housing, income and educational levels. With respect to Marion County, the three judge panel drafted and adopted a plan said to protect the "legally cognizable racial minority group against dilution of its voting strength", 307 F. Supp. 1362, at 1365 (S.D.Ind.1969). On appeal, the Supreme Court, in passing

5. 1973 World Almanac, Newspaper Enterprise Association.

on the redistricting of Marion County into single member districts, reversed, saying that while Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), recognizes the right of every citizen to full and effective participation in the political processes of his state's legislative bodies, that decision did not render multi-member districts impermissible.

"In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. Surely the findings of the District Court do not demonstrate it. Moreover, if the problems of multi-member districts are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State. The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them. As presently advised we hold that the District Court misconceived the Equal Protection Clause in applying it to invalidate the Marion County multi-member district." 403 U.S. at 159–160, 91 S.Ct. at 1877–1888.

Citing particular problems which might render a multi-member plan ineffective, *Whitcomb* announced that the circumstances of each case must be considered.

In Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), the Supreme Court specifically held that multi-member districts were not per se illegal under the Equal Protection Clause.

In the 1973 case of Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), the court noted that considerations of substantial malapportionment with respect to military personnel and combinations of other unique factors must be considered in preferring single-member over multi-member districts or vice versa.

In the case of White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), the Supreme Court was called upon to consider a Texas reapportionment plan. Again the Court stated that multi-member districts are not unconstitutional per se, (citing *Whitcomb*, *Mahan* and *Sims*) but where the claim is that such districts are being used *invidiously* to cancel out or minimize the voting strength of racial groups, they must be questioned.

The Texas multi-member districts, it was found, did operate to exclude the black community from the electoral process. This case points up one of the basic foundations common to all cases finding multi-member districts unconstitutional; that is, invidious discrimination against some visible minority group. *See also* Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), involving Mexican-Americans.

[1, 2] The group must be identifiable and must be effectively removed from the electoral process by reason of the districting scheme. As the Court in *White* notes, not every racial or political group has a constitutional right to be represented in the state legislature, 412 U.S. at 769, 93 S.Ct. at 2341, 37 L.Ed.2d at 326. Earlier in *Whitcomb*, the court commented that were every group entitled to representation, the result would be inane for within every district there are workers, university communities, religious and ethnic groups occupying identifiable areas.

[3] A court, in considering various reapportionment options before it, should go only as far as is necessary in order to meet the constitutional requirements of "one man, one-vote". Minneso-

ta State Senate v. Beens, 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1 (1972).

[4] The tenor of the Supreme Court decisions with respect to reapportionment, clearly does not compel institution of single-member districts in North Dakota. The circumstances existing in this state contrast with those existing in states where apportionment plans were found constitutionally deficient. The complexion of the state and of individual cities within the state does not present any showing of unrepresented minorities or unresponsive representatives.

[5] The issue of multi-member districts or single-member districts is clearly a political issue to be resolved by the electorate and the legislature. In devising a plan, this Court will go no further than is required to formulate a constitutionally sufficient apportionment plan for the State of North Dakota, and will not intrude on the political realm.

II. VARIANCE

[6] While we are satisfied that the Court plan adopted June 29, 1972, is not constitutionally deficient by reason of the multi-member districts, consideration must be given to the realm of permissible variance. This Court, by its order filed May 22, 1972, appointed three special masters to serve as a commission to formulate an apportionment plan. The following guidelines to the commission were offered by the Court:

"a. The Commission shall try to conform new legislative districts to the existing districts.

b. The Commission shall not substantially change the size of the Legislature.

c. Natural geographic barriers shall be observed.

d. Existing political subdivision lines should be observed, in so far as possible.

e. In the event the Commission should find that it is unnecessary to substantially alter any one or more of the legislative districts presently defined, then it must consider and make recommendations relative to whether or not the incumbent senator or senators, whose term does not expire at the end of this year, must nevertheless stand for election in 1972."

One of the unique features existing in North Dakota is the Missouri River, which separates the state into two parts—two-thirds to the east and one-third to the west. The river traversing the state is crossed by only six highway bridges, four of them located in the area of Williston and Bismarck. This geographical reality, coupled with the difficulty of achieving the goals of observing geographical boundaries and existing political subdivisions, adds to the difficulty of minimizing the variance. That it was substantially accomplished, as illustrated by the chart made a part of this opinion, attests to the validity and soundness of the plan. The population variance between the districts in most cases is only a few hundred people. As a general rule, deviations from the average population decreases if many county lines are violated, and increases if few are split. The effort to preserve urban-rural identities and county lines intact produce the variations which look large percentage wise, but when applied to a sparsely populated state do not result in significant population variances.

In *Mahan*, the court considered the validity of a Virginia apportionment plan allowing for a 16% deviation. The Court stated that neither courts nor legislatures, can extract with accuracy from the Fourteenth Amendment, the mathematical formula that establishes what range of percentage deviation is permissible and what is not. While the 16% deviation of the Virginia plan may have approached the limits, it did not exceed them, said the Court.

[7] The key, it seems, as to whether a certain deviation will be allowable is whether or not the deviation causes a sacrifice of substantial equality. A per-

centage of variance can only have validity when measured against the actual number of electors, communities of interest, transportation, and size of the base from which the representation is drawn.

Virginia is a heavily populated state, and a 16% deviation there results in population discrepancies of thousands. That same percentage applied to a sparsely populated state like North Dakota, would result in actual deviations of only a few hundred persons.

The issue presented to the court in *Mahan* was whether or not the equal protection clause permits only limited population variances which are unavoidable, despite a good faith effort to achieve absolute equality. The court said that some variation from the one man, one vote rule is unavoidable, because blind application of "absolute equality" in state redistricting might well impair the normal functioning of state and local governments.

In Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967), the Supreme Court disapproved a Florida reapportionment plan having a 26% deviation. The Court, noting that no evidence in support of the deviation had been offered, said the allowable variation for one state has little bearing on the validity of a similar variation in another state.

In 1972, a three judge district court in Graves v. Barnes, 343 F.Supp. 704 (W.D.Tex.1972), declared unconstitutional a Texas reapportionment plan having a total variation between the largest and smallest district of 9.9%. On appeal, the Supreme Court in White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), said that a 9.9% deviation does not establish a prima facie equal protection violation. Citing *Mahan*, the Court said that relatively *minor population* deviations among state legislative districts do not substantially dilute the weight of individual votes in the larger districts.

Similarly, Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), decided at the same time as *White*, held that a state's redistricting plan is not to be judged by the more stringent standards applicable to Congressional reapportionment. In *Gaffney*, the Court said that while fair and equal representation is the goal, its attainment does not depend on elimination of insignificant population variations.

> "Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may be legitimately mindful of. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in a day-to-day operation are important to an acceptable representation and apportionment arrangement."
>
> "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.
>
> "This very case represents what should not happen in the federal courts. The official state functionaries proposed a plan with a maximum variation among the districts of 7.89% in the House and 1.8% in the Senate, and with respective average variations of 1.9% and .45%. Appellees then proposed four alternative plans for the House, three of which involved slightly larger variations among districts but cut fewer town lines. The fourth cut more lines, but had a maximum variation between its largest and smallest district of only

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2.6%. The District Court thought the state plan involved acceptably large variations between districts, although in the House, with districts of about 20,000 people, the average variation involved only 399 people, and the largest variations involved only 1,573 people. But neither did the District Court adopt any of the plans submitted by appellees. Instead, it appointed its own master to come up with still another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%. Was the master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the master's plan if a resourceful mind hits upon a plan better than the master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population equality standard." 412 U.S. at 748–751, 93 S.Ct. at 2329–2330, 37 L.Ed.2d at 309–311. (citations omitted).

[8] Once a plan has been formulated which, in consideration of all the attendant circumstances, fairly meets the constitutional requirements, a court should not continue to sift and shuffle abstract figures solely to arrive at a mathematically perfect plan.

Where there are identifiable minorities or political groups being forced out of the election process *and* their voting strength is *invidiously* weakened, a plan proper in other respects may require a further examination. As we view the cases, deviations of 16%, 8%, and 10% have recently been allowed in heavily populated states having significant minority populations.

[9] Even greater deviations are permissible in a sparsely settled state barren of electorally victimized minorities.

We adopt the Court Plan of reapportionment previously adopted as an interim plan on June 29, 1972, as set forth in Appendix A of that Order, (published at 372 F.Supp. 363) as the permanent plan for reapportionment for the State of North Dakota.

It is ordered that judgment be entered accordingly.

BRIGHT, Circuit Judge (dissenting).

I respectfully dissent.

Today, a reconstituted majority of this court permanently adopts the stopgap apportionment scheme for North Dakota's State Legislative Assembly known as the Dobson Plan, in the face of our earlier order [1] which stated:

> We approve the Dobson Plan of reapportionment at this time for the 1972 election only. This court retains jurisdiction of this cause for the purpose of adopting a different plan of reapportionment which will not be hampered by considerations of impending elections. [Chapman v. Meier, 372 F.Supp. 363, 367 (D.N.D., filed June 30, 1972)].

My colleagues thus have wordlessly brushed past the doctrine of the "law of the case," [2] changed completely the course of our previous decisions, and,

1. Chapman v. Meier, Civil No. 4664, 372 F. Supp. 363 (D.N.D., filed June 30, 1972).

2. Although this doctrine "merely expresses the practice of courts * * * not a limit to their power," Messenger v. Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912) (Holmes, J.), the Eighth Circuit has recognized it to be "a salutary rule of practice" and stated that a former decision of the same case would not be reversed unless the court were convinced that the former decision was "clearly erroneous and that it works a manifest injustice." Kempe v. United States, 160 F.2d 406, 408 (8th Cir.), cert. denied, 331 U.S. 843, 67 S.Ct. 1534, 91 L.Ed. 1864 (1947); Emery v. Northern Pacific Railroad Company, 407 F.2d 109, 112 (8th Cir. 1969).

A similar version of the doctrine applies in the Court of Claims, which stated:

> Where substantially similar questions have been determined in prior litigation, including a prior proceeding in the same case,

without further hearing of any kind, placed into effect a legally flawed plan whose overriding virtue at the time of its "temporary" adoption in 1972 was that it would cause minimum disruption in the then-pending elections and yet reduce substantially the existing inequality between legislative districts under the "one-man, one-vote" standard.

In our order filed June 30, 1972, we stated:

> We recognize certain weaknesses in the Dobson Plan, namely, (1) some variance in population among the legislative districts, which, in a few instances, seems substantial; (2) an increase in the size of the legislature, notwithstanding that the state has lost population over the past decade; and (3) a continuation of multi-member legislative districts. [Chapman v. Meier, *supra* 372 F.Supp. at 363.]

Simply stated, in adopting this plan today, the majority has not followed the supervisory admonition of the Supreme Court, contained in Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), and reaffirmed in Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed. 2d 320 (1973), disapproving the use of multi-member districts in court-fashioned plans. Nor has the majority adhered to the equal protection standard for permissible population variances between districts, enunciated in *Mahan*, *supra*; Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), and White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

My colleagues argue that we must not "intrude on the political realm" by eliminating multi-member districts, nor should we "sift and shuffle abstract figures" to achieve smaller deviations between districts. These arguments, I fear, miss the point. The former ignores the political consequences of simply preserving the status quo, while the latter substitutes convenience for the Constitution.

I agree with my colleagues that we must decide this case outside the "political realm," but the assumption of the majority that doing nothing with the existing plan is not doing something represents a "head-in-the-sand" viewpoint. Either doing something or doing nothing may have political consequences, but we, of course, must close our eyes to those consequences. Our decision must be based upon application of proper legal and constitutional principles.

The path to a proper resolution of the substantive issues in this case lies in understanding the nature of the decision that we are called upon to make. Unlike so many courts, we are not confronted with a challenge to an apportionment scheme duly enacted by a state legisla-

> the court will not consider such arguments unless there are compelling circumstances that require review of prior holdings. Considerations of judicial economy and orderly disposition of the issues render it desirable that both parties proceed directly to the issues yet undecided and forgo a purposeless and time-consuming rehashing of cold matters.

Trans Ocean Van Service v. United States, 470 F.2d 604, 620 n. 3, 200 Ct.Cl. 122 (1973).

District courts too are subject to the rule, and it has been said:

> Under the doctrine known as the law of the case, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. Orderly and consistent progress of the case requires that the parties be precluded, with rare exceptions, from re-opening and re-arguing matters already decided. [United States v. Swift & Company, 189 F. Supp. 885, 902 (N.D.Ill.1960) (citations omitted), aff'd, 307 U.S. 909, 81 S.Ct. 1918, 6 L.Ed.2d 1249 (1961).] *Accord* Barrett v. Baylor, 457 F.2d 119, 123 (7th Cir. 1972).

The question of the inappropriateness of the Dobson Plan as a permanent solution to North Dakota's reapportionment woes has already been settled by our order of June 30, 1972. To reverse our publicly stated view of this matter—without some new circumstance compelling that change—thus violates the sound judicial principles underlying the doctrine of the "law of the case" and seriously undercuts the stability of our decision-making process.

ture, where the threshold question is whether a constitutional violation exists to justify federal court intervention. We are well past that point in this litigation. The invalidity of the existing apportionment scheme was adjudicated in our order of May 22, 1972. What remained, following our temporary adoption of the Dobson Plan on June 30, 1972, was a final exercise of our equity power to fashion a more permanent remedy in the form of a new apportionment plan.

The general question now before us is this: what are the obligations and restrictions on the discretion of a federal district court in the exercise of this equity power? In particular, we search for an answer to these two specific questions:

1) Must the court replace multi-member districts with single-member districts where the former were never established as a matter of state policy, but were originally adopted as an expedient in a previous court-fashioned plan?
2) How close to absolute equality must the court come in re-drawing district lines in the absence of clearly controlling state apportionment policy?

Before suggesting my answers to these two points, I think that a detailed review of the history of reapportionment in North Dakota is useful.

I.

History shows that the North Dakota Legislature reapportioned itself infrequently and not too well. Mr. Richard Dobson, political editor of the Minot Daily News and drafter of the Dobson Plan here in question, has described the situation in these words:

> In eight decades of statehood, the reapportionment problem has never been dealt with satisfactorily. Much of the time the legislature simply tried to ignore the problem. When action was taken, it was usually designed to preserve the *status quo* and safeguard incumbent legislators. [Dobson, Reapportionment Problems, 48 N.D.L.Rev. 281 (1972).]

Importantly, there has been no valid, new apportionment scheme placed into effect by the legislature since 1931. Variances between districts, which existed even then, swelled with population shifts over the intervening years. For example, Renville County had 7,263 inhabitants in 1930, while the City of Fargo had 28,619; 30 years later, the 43rd District (Renville County) had shrunk to 4,698 while the 9th District (Fargo) had expanded to 46,857. *See* Dobson, *supra* at 285.

In 1961, a state reapportionment commission—created by a 1960 amendment to the North Dakota Constitution—sought to re-draw the districts, but produced a plan clearly favoring the rural areas in representation.[3] An initial court challenge was rejected by the state supreme court on a minor procedural point. State ex rel. Aamoth v. Sathre, 110 N.W.2d 228 (N.D.1961). The plaintiffs then turned to the federal district court which abstained, pending further action by the state supreme court. Lein v. Sathre, 201 F.Supp. 535 (D.N.D.1962) (Davies, J., dissenting). Accepting jurisdiction, the state supreme court invalidated the commission plan based on state consitutional law principles. State ex rel. Lein v. Sathre, 113 N.W.2d 679 (N.D.1962).

Following the United States Supreme Court's historic decision in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the plaintiffs returned to federal district court, but were again rebuffed. The court denied injunctive relief on the ground that there was no showing that the state legislature would not heed the state constitution's mandate to redistrict. Lein v. Sathre, 205 F.Supp. 536 (D.N.D.1962) (Davies, J., dissenting).

3. *See* Dobson, Reapportionment Problems, 48 N.D.L.Rev. 281 285 (1972).

Rural interests in the legislature, however, pushed through a reapportionment scheme in the 1963 Session which comported with no known version of the "one-man, one-vote" principle. *See Dobson, supra* at 286. Based upon the then-newly-decided case of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the federal district court invalidated that scheme as well as those portions of the state constitutional provisions relating to apportionment (sections 26, 29, and 35) amended in 1960. The court, however, refused to take further action until the legislature was given an adequate opportunity to reapportion itself within the Reynolds v. Sims guidelines. Paulson v. Meier, 232 F.Supp. 183 (D.N.D.1964) (Davies, J., dissenting in part) [*hereinafter Paulson I*].

A compromise legislative plan, enacted on the final day of the 1965 Session, became law without the signature of the governor, but made little improvement over the invalidated 1963 version. This plan was promptly nullified by the federal district court which then ordered into effect its own plan. Paulson v. Meier, 246 F.Supp. 36 (D.N.D.1965) [hereinafter *Paulson II*]. In a radical departure from state precedent, the court included in its plan five predominantly urban, multi-member senate districts, thereby creating the problem which is at the heart of the present dispute. This court-fashioned plan remained in effect until voided by our order of May 22, 1972, in the instant action.

Early in 1971, following some inconclusive grappling with the politically hot issue of multi-member districts by the legislature,[4] a suit was brought in state court challenging the districts on state constitutional grounds. The North Dakota Supreme Court ruled that that portion of section 29, which since statehood had required single-member senate districts, had been necessarily invalidated along with the other constitutional provisions relating to reapportionment in *Paulson I*, and dismissed the suit. State ex rel. Stockman v. Anderson, 184 N.W.2d 53 (N.D.1971).

This action was commenced in November 1971. Plaintiff alleged that population changes reflected in the 1970 Census had altered the urban-rural balance and that the court-fashioned plan of 1965 no longer provided representation in the legislature complying with the Equal Protection Clause of the fourteenth amendment. They further alleged that, since the legislature had failed to reapportion itself in 1971, the court was required to do so.

A three-judge district court was not requested by plaintiffs until they filed an amended complaint on May 8, 1972.[5] This panel, therefore, faced a

4. Republication legislators from the five urban districts, which elected from two-to-four senators each, wanted to retain the feature of at-large elections in these districts; but the Democrats wanted to subdivide those districts. Some rural Republication lawmakers also opposed multi-senator districting, contending that it gave urban residents an undue advantage. [*Id.* at 287.]

5. Although the record in this court does not indicate any reasons for delay in processing the action, we take judicial notice that North Dakota was undertaking the drafting of a new constitution and that a Constitutional Convention consisting of delegates representing the people of North Dakota were considering proposals to provide for reapportionment by a commission. *See* Petitioner's Application for Stay to the United States Supreme Court at 3–4 (dated July 11, 1972), Chapman v. Meier, Civ. No. 4664, 372 F.Supp. 363 (D.N.D.).

The Constitutional Convention adopted the following proposal as a reapportionment method for a *bicameral* legislature:

Section 5, REAPPORTIONMENT.

A legislature reapportionment commission, consisting of electors appointed by the district judges in a number and manner as shall be established by the district judges, shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The commission shall guarantee, as nearly as practicable, that every voter is equal to every other voter in the state in the casting of ballots for legisla-

time pressure in hearing the case and awarding relief, if appropriate, before the then-impending 1972 primary and general elections. We were acutely aware that making substantial changes in legislative district boundaries might lead to great confusion and disruption in the conduct of the elections and the operations of the political parties in North Dakota, which are required to organize and operate on the basis of legislative districts. N.D.Cent.Code § 16-17-01 et seq. (Supp.1971).[6]

This court, nevertheless, determined that our obligations as judges required us to undertake immediate consideration

tive candidates. One senator and at least two representatives shall be apportioned to each senatorial district and be elected at large or from subdistricts thereof. The commission may combine two senatorial districts and provide for the election of senators at large and representatives at large or from subdistricts thereof.

The commission shall prescribe its own procedures. Upon agreement by a majority of its members, the commission shall file its reapportionment plan with the secretary of state, and it shall become effective sixty days after the date of filing; provided, the supreme court, in the exercise of original jurisdiction, may review any plan adopted by the commission. If the plan fails to meet state or federal constitutional requirements, the court shall direct the commission to revise the plan within a stated time.

Commission members shall be appointed following adoption of this constitution and immediately following the 1980 general election and every ten years thereafter. No member of the legislative assembly shall be eligible, during his term of office, for appointment to the commission. Commission members shall serve until each reapportionment plan becomes finally effective, and shall be compensated as provided by law. Vacancies shall be filled in the same manner as for original appointment. [Article IV, § 5 (Alternate Proposition 1A), Final Draft of the Constitutional Convention as presented February 17, 1972, to the Plenary Session, Daily Journal of the Constitutional Convention, at 540.]

As an alternative if the people adopted a *unicameral* form of legislature, the proposed reapportionment section stated:

Section 5. REAPPORTIONMENT.

A legislative reapportionment commission, consisting of electors appointed by the district judges in a number and manner as shall be established by the district judges, shall fix the number of legislators and divide the state into legislative districts of compact and contiguous territory. No district shall elect more than four legislators, and the commission shall guarantee, as nearly as practicable, that every voter is equal to every other voter in the state in the casting of ballots for legislative candidates.

The commission shall prescribe its own procedures. Upon agreement by a majority of its members, the commission shall file its reapportionment plan with the secretary of state, and it shall become effective sixty days after the date of filing; provided, the supreme court, in the exercise of original jurisdiction, may review any plan adopted by the commission. If the plan fails to meet state or federal constitutional requirements, the court shall direct the commission to revise the plan within a stated time.

Commission members shall be appointed following adoption of this constitution and immediately following the 1980 general election and every ten years thereafter. No member of the legislative assembly shall be eligible, during his term of office, for appointment to the commission. Commission members shall serve until each reapportionment plan becomes finally effective, and shall be compensated as provided by law. Vacancies shall be filled in the same manner as for original appointment. [Article IV, § 5 (Alternate Proposition 1B), *id.* at 543.]

The voters of North Dakota on April 28, 1972, rejected the constitution and the North Dakota reapportionment again fell into the laps of federal judges.

6. The Chairman of the North Dakota Republican State Committee, for example, stated that his party had already commenced processes leading to the selection of delegates to state and national party conventions and that local party districts were in the process of endorsing legislative candidates. He concluded that:

If the court indicates a new apportionment will be undertaken before the 1972 elections the entire political structure will be suspended in confusion until the new district lines are determined. When the determination is made the entire process will have to be begun again and there will not be time to accomplish the necessary procedures required by the parties in an election year.

Affidavit of Jack Huss in Support of Defendant's Answer to Amended Complaint (filed May 18, 1972), Chapman v. Meier, Civil No. 4664 (D.N.D.).

of positive action. After hearing the case on May 18, 1972, we acted on the merits four days later, declaring:

> The plaintiffs have made a legally sufficient showing that the existing legislative apportionment scheme in the State of North Dakota fails to meet Federal Constitutional standards. [Chapman v. Meier, Civ. No. 4664 (D.N.D., filed May 22, 1972) at 1.]

We further said that we would attempt promptly to reapportion the state in conformity with federal constitutional standards and in time for the 1972 elections. To aid us in this task, we appointed three Special Masters.[7] Exhibiting our real concern for avoiding disruption to the political processes on the eve of the 1972 elections, we set out specific guidelines for the Masters.[8] On June 20–21, 1972, we met with the Masters to consider eight alternate plans of reapportionment.

In our memorandum opinion and order filed June 30, 1972, we settled on a slightly amended version of a plan drafted by Master Dobson, now called the Dobson Plan, as an appropriate means of affording interim relief to the citizens of North Dakota from malapportionment.[9] This relief was tailored to the exigencies of the pre-election situation and geared to minimizing disruption in the political and electoral processes.[10]

In their amended complaint, plaintiffs had asked that we provide for single-member districts in any reapportionment plan adopted by the court. In our opinion we recognized the validity of plaintiffs' request, but did not grant relief at that time in order to avoid "extreme disruption in the elective processes." [11] However, we directed the Masters to give additional study to

7. Mr. Richard Dobson of Minot, Mr. Thomas K. Ostenson of Fargo; and Mr. R. R. Smith of Grand Forks. We regret to note that Mr. Smith has since passed away, after serving our court well on this and other occasions.

8. *See* opinion of Judge Benson, *supra* at 367.

9. Judge Benson, concurring in but not signing the order, stated in a separate opinion that he would not limit the plan to the 1972 election.

10. Among other things, we said:

> The plan substantially reduces the disproportionate representation which would result from elections under the existing apportionment of North Dakota. At the same time, the Dobson Plan causes a minimum disruption in the election processes for the 1972 primary and general elections. * * * To avoid major change in the present legislative district boundaries, the Dobson Plan provides for an increase in the size of the legislature. In this way, the number of inhabitants attributable to each senator for equal representation is reduced to a figure compatible with the present populations of the rural districts, thereby avoiding the substantial remapping of these districts which would have been necessary if the number of senators had been kept at 49. [Chapman v. Meier, Civil No. 4664, 372 F.Supp. 365, 366 (D.N.D., filed June 30, 1972).]

In the odd-numbered districts which had elected senators for a four-year term in 1970, we took the following steps to minimize disruption. Since we made substantial changes in only four legislative districts having such "holdover" senators, we required new elections in those districts, but otherwise permitted all other "holdover" senators to serve out their terms. We permitted certain metropolitan districts to conduct elections only to fill vacancies attributable to any additional seats given them in the new plan.

As to even-numbered districts, we noted:

> No serious problems for the 1972 elections seem likely to arise from proposed changes in the boundaries of several *even-numbered* districts under the Dobson Plan since the terms of senators last elected from all even-numbered districts will expire this year. In each even-numbered district, as changed by the Dobson Plan, the electors in 1972 will select a senator or senators as well as house members to represent them during the next legislative session. [*Id.*, at 366.]

11. We said in this regard:

> We briefly comment on the continuation of the five multi-member senatorial districts in which are located the cities of Fargo, Grand Forks, Minot, Bismarck, and Jamestown. In the most populous 21st district, encompassing the Fargo area, voters may be called upon to elect fifteen members of the legislative assembly to represent that district, five to serve in the Senate and ten to serve in the House of Representatives. In each of the other

reapportionment [12] and to submit an additional report. We recognized the public's interest in the court's proceedings by making arrangements for "interested persons" other than the named parties to express their views.

Our order filed June 30, 1972, should have been the prelude to a final determination of the reapportionment controversy for the decade of the 1970's. But this panel, much like the earlier panel in *Paulson I*, paid great heed to the request of the State of North Dakota to stay our hand to give the legislature another opportunity to "carry out its duties, responsibilities, and functions" to reapportion itself. *See* Brief in Support of Defendant's Motion for Stay (filed October 30–1972) at 4, Chapman v. Meier, Civil No. 4664 (D.N.D.). Attached to this motion was a copy of a letter from Representative Bryce Streibel, Chairman of the North Dakota Legislative Council,[13] creating a bipartisan Special Committee on Reapportionment, consisting of six legislators and five citizens, to study and to develop a reapportionment plan for submission to the legislature and "for use by [state and federal] courts in any judicial proceedings relating to reapportionment of the North Dakota legislature." *See* At-

multi-member districts, the electors may also be called upon to elect a substantial number of representatives at a single election. If each of the major political parties endorses a full slate of candidates, the electorate in the largest multi-member district could be called upon to judge the qualifications of at least thirty candidates for state legislative office. In such circumstances, the task confronting a voter in making a considered choice among individual candidates would appear to be most formidable.

The five multi-member legislative districts were created by the Federal District Court in Paulson v. Meier, 246 F.Supp. 36 (D.N.D.1965), and not by enactment of the Legislative Assembly. In light of subsequent Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan. In Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed. 2d 268 (1971), the Court stated:

* * * (W)hen district courts are asked to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. *Id.* at 692, 91 S.Ct. at 1762.

The Supreme Court subsequently re-emphasized this ruling in Connor v. Williams, 404 U.S. 549, 551, 92 S.Ct. 656, 30 L.Ed. 2d 704 (1972). We feel constrained to permit multi-member districts to continue during the 1972 elections, however, to avoid extreme disruptions in the elective processes. We recognize that political party organizational structure has been formed, for elections subsequent to the 1965 apportionment decision, along legislative district lines. *See generally* Ch. 16–17 NDCC. We recognize that it takes considerable time for members of a political party to organize and operate effectively for the benefit of the electorate, following a change in district boundaries. We think it inappropriate, therefore, to change the method of selecting the members of the legislative assembly in these multi-member districts at this late date in light of the confusion which such a change would likely precipitate. We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, that it would be by the abolition of multi-member districts at this eleventh hour. [*Id.*, at 366.]

12. We specifically requested the following: The Special Masters should give additional consideration to creating legislative districts along the lines suggested in the Ostenson Plan, the boundaries of which should remain as compact as possible while taking into account ease of travel within each district, as well as the substantial identity of economic and social interests among its inhabitants. The guiding principle of this study, of course, will be the requirements of equal representation mandated by the Fourteenth Amendment to the United States Constitution.

Additionally, the Masters are directed to modify the Ostenson Plan so as to eliminate the existing multi-member senate districts by creating senate districts or subdistricts each of which shall be represented by a single senator and two house members in the North Dakota Legislative Assembly. [*Id.* at 368.]

13. The Legislative Council is a special body of the state legislature created to study matters of public interest and to recommend appropriate action by the legislature. The Council itself is composed entirely of legislators, but Council committees may include private citizens. N.D.Cent.Code § 54–35–01 et seq. (Supp.1973).

tachment to the Brief in Support of Defendant's Motion for Stay (filed October 30, 1972), Chapman v. Meier, Civil No. 4664 (D.N.D.).

Subsequently, we granted a stay of the proceedings, observing that "no prejudice is likely to follow from this court's deferring further action on reapportionment until the 1973 legislature has had the opportunity to consider the reapportionment question." Chapman v. Meier, Civil No. 4664 (D.N.D., filed November 8, 1972) at 3. We further directed the Attorney General to file a report to this court regarding action taken by the legislature, and, retaining jurisdiction, we stated that our order was "without prejudice to the contentions made by the plaintiffs in these proceedings." *Id.* at 3–4.

The report, filed by the Attorney General on March 30, 1973, discloses that, with great diligence, efficiency, and promptness, the Committee formulated a reapportionment plan which on its face at least complied with constitutional standards and appeared to be free of partisanship. Legislative Council Chairman Streibel described the plan, introduced as House Bill 1042, in these words:

> House Bill No. 1042 leaves 32 county lines intact. It has the smallest deviation ratio of all the plans submitted to either the Court or the Committee. The deviation ratio is 1.04–1, which is determined by taking the high percentage of the mean population (District #18–12,599 per Senator — + 2%) and dividing it by the low (District #22–12,150 per Senator percentage of the mean population — − 1.6%). House Bill No. 1042 calls for 50 Senators and 100 Representatives in 37 legislative districts.
>
> House Bill No. 1042 rigidly adheres to the one-man, one-vote requirement established by the Court. It maintains the "Communities of interest" philosophy to a great degree.
>
> Reapportionment is a legislative responsibility and not a job for the Courts. As elected representatives of the people, legislators can express the wishes of the voters regarding reapportionment better than appointed judges.
>
> House Bill No. 1042 was adopted unanimously by the Council's Reapportionment Committee. The plan meets all the Courts' tests for acceptability. It breaks fewer county lines than many plans submitted. It keeps legislative representation pretty much as it is. It does not drastically reduce the number of legislators which would have had the effect of reducing rural representation. The rural voice of North Dakota is fading fast enough as it is without us hastening it.
>
> The plan leaves in the current multi-senator districts. Subdistricting can be done at a later date if the legislature so desires. There just isn't enough census data from Grand Forks, Minot, or Bismarck to reapportion at this time on any basis other than multi-senator districts.[14]

14. Statement by Rep. Bryce Streibel to Joint Senate and House Reapportionment Committee, January 3, 1973, Exhibit 3, Return to and Compliance with Order (filed March 30, 1973), Chapman v. Meier, Civil No. 4664 (D.N.D.).

The last sentence of Rep. Streibel's statement, however, does not reflect quite fully the actions of the Committee on the issue of multi-member districts. On several occasions during its deliberations, the Committee considered the elimination of such districts and, at one point, actually voted to do so. *See* Minutes of the Special Committee on Reapportionment, October 11–12, 1972, at 7, Supplementary Return (filed January 14, 1974), Chapman v. Meier, *supra.* After additional debate on this issue, however, the Committee reversed itself and decided to hold the matter in abeyance until an overall reapportionment plan, including multi-member districts, was formulated and adopted. *See* Minutes of the Special Committee on Reapportionment, November 8–9, 1972, at 9, Supplementary Return, *supra.*

No further votes on the specific matter of multi-member districts were taken by the Committee, and the following sentence appeared in the Committee's final report:

> The Committee also concluded that it had neither the time, nor the necessary data, to divide multi-member districts into sin-

In its journey through the legislature, however, House Bill 1042 underwent substantial alteration. District lines were redrawn. The legislature refused to amend the bill to provide for subdistricts in the larger cities. *See* Senate Journal, January 23, 1973, at 241, Supplementary Return (filed January 22, 1974), Chapman v. Meier, Civil No. 4664 (D.N.D.). The altered reapportionment proposal lost its bipartisan support. Where the original Committee version avoided consideration of partisan politics,[15] the revised plan produced a volley of charges that the district lines were gerrymandered to protect incumbents. *See* Senate Journal, February 15, 1973, at 582–583, Exhibit 5, Return to and Compliance with Order (filed March 30, 1973), Chapman v. Meier, Civil No. 4664 (D. N.D.).

The bill in its altered form was vetoed by Governor Arthur A. Link on February 2, 1973, as "unfair," principally because of the failure of the legislature to create single-member senatorial districts. *See* Veto Message, Exhibit 1, Return to and Compliance with Order, *supra.*

In an atmosphere of politically partisan charges and countercharges, the legislature overrode the Governor's veto by a vote of 72 to 30 in the House and 37 to 14 in the Senate. *See* Exhibit 4, Return to and Compliance with Order, *supra.* Yet this reapportionment never became law: first, because under Section 67 of the North Dakota Constitution, it did not take effect until July 1st after the close of the session; and second, because, prior to July 1st, the effectiveness of the measure was stayed by the filing of a referendum petition signed by the requisite number of electors, pursuant to Section 25 of the North Dakota Constitution.

In addition, an initiated amendment to the North Dakota Constitution was proposed which would have created a bipartisan commission composed of non-legislators to accomplish reapportionment and which specifically provided for single-member senate districts and single-member house subdistricts thereof. The requisite number of electors signed the initiative petition pursuant to Section 202 of the North Dakota Constitution.

Upon the motion of the plaintiffs, and after a hearing on the matter, we ordered a stay of proceedings in this action pending the outcome of the initiative and referendum elections. Chapman v. Meier, Civil No. 4664 (D.N.D., filed May 25, 1973).

The elections were held on December 4, 1973. House Bill 1042 was rejected by the voters by a vote of 50,729 to 44,363, while the constitutional amendment was defeated by a vote of 53,831 to 43,178. *See* Certificate of the Secretary of State, Attached to Defendant's Motion to Readopt Court-Fashioned Plan (filed December 26, 1973), Chapman v. Meier, Civil No. 4664 (D.N.D.). With the legislature's action thus nullified and the commission device rejected, the matter is once again before our court without any clearly controlling state reapportionment policies for our guidance.

Defendants have moved for an order readopting permanently our reapportion-

gle-member subdistricts in an accurate manner. [Report of the North Dakota Legislative Council at 137, Supplementary Return, *supra.*]

For a discussion of data which was made available to the Legislative Council Committee on which it might have subdivided multi-senator districts, if the Committee wished to do so, see text of this opinion, *infra* at n. 20.

15. Gail Hernett, a state senator at the time and chairman of the Special Committee on Reapportionment, was asked by a member of the Joint Committee on Reapportionment of the legislature to comment on the 14 incumbents who would be required to run against each other under the Legislative Council Plan. Chairman Hernett stated, according to the report of the meeting, that "he could not [comment] because he did not consider politics when drawing this up." Minutes of the Joint Committee on Reapportionment, Jan. 4, 1973, at 2, Exhibit 3, Return to and Compliance with Order (filed March 30, 1973), Chapman v. Meier, Civil No. 4664 (D.N.D.).

ment plan filed June 30, 1972; plaintiffs resist and move for the adoption of a new plan consistent with our order of that date. Having more clearly defined the historical perspective of the instant action, I turn now to an examination of the legal issues.

II.

The majority today directs that future elections for the state legislature in the major cities of North Dakota shall again be conducted on a multi-member district basis.[16] In continuing these districts, the court has exceeded the permissible bounds of its discretion. *See* Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

We are not here concerned with a legislative adoption of such a reapportionment plan. The only plan ever enacted by the legislature containing the multi-member feature was House Bill 1042, which was defeated by the voters in a referendum election. If House Bill 1042 had withstood the voters' attack, the issue before us would be quite a different one and its resolution more evident. For, as the majority correctly points out, the cases clearly hold that the adoption of a multi-member scheme by a legislature does not constitute a *per se* violation of the Constitution. *See* Opinion of Judge Benson, *supra* at 375. But the cases compel a different conclusion when a federal district court is called upon to exercise its discretion in fashioning a new apportionment plan.

The Supreme Court has repeatedly noted the objectionable features of multi-member districting.[17] In Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964), for example, the Court stated:

> One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole. [377 U.S. at 731, 84 S.Ct. at 1471 (footnote omitted).]

Seven years later, in the key case of Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), while upholding a legislatively created multimember scheme against a head-on constitutional attack, the Court stated:

> We are not insensitive to the objections long voiced to multi-member district plans. Although not as prevalent as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. Criticism is rooted in their winner-take-all aspects, their tendency to submerge mi-

16. The 21st district including the cities of Fargo (population 53,365), West Fargo and Industrial Park (population 5,265), and some outlying areas of Cass County, embraces a total population of 60,242, and shall have five senators and ten representatives; the 5th District, Minot area and airbase (population 49,908), four senators and eight representatives; the 8th District, Grand Forks and airbase (population 51,243), four senators and eight representatives: the 32nd District, Bismarck area (population 35,596), three senators and six representatives; and finally, the 29th District, Stutsman County including Jamestown (population 23,550), two senators and four representatives. Representatives from multiple-senate districts amount to 35 percent of the legislature. *See* Opinion of Judge Benson, *supra*.

17. *See generally*, Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972).

norities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. [403 U.S. at 157-160, 91 S.Ct. at 1876-1877 (footnotes omitted).][18]

Thus, although multi-member districting does not amount to an Equal Protection violation, there are sufficient undesirable characteristics adhering to it to testify restricting its use in court-fashioned plans, absent special circumstances. This is precisely the rule which must control our decision in the case at bar, and it was enunciated by the Supreme Court under its supervisory power over federal courts in Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971).

The majority has unsuccessfully sought to distinguish away this controlling precedent by characterizing Connor v. Johnson as a racial discrimination case. This is a misreading of the fact situation, for it is a straight population variance case.

On May 14, 1971, a three-judge district court in the Southern District of Mississippi invalidated the then-existing Mississippi legislative reapportionment statute, because of a total variance of 26 percent between the largest and smallest districts, and, on the eve of the forthcoming 1971 legislative elections, attempted to fashion an interim plan of reapportionment—much as this court was called upon to do in the instant case in June 1972. Connor v. Johnson, 330 F.Supp. 506 (S.D.Miss.1971).

The district court's judgment was that single-member districting would be "ideal" for Hinds County, Mississippi, but that insufficient time remained before the candidate filing deadline, 17 days away, to perform the task of dividing this county into single-member districts. The three-judge court therefore issued a reapportionment plan calling for the at-large election of five senators and 12 representatives in Hinds County. Much like the action which we initially took in this case on June 29-30, 1972, that court promised to appoint a special master to investigate the possibility of single-member districts for the subsequent elections there in 1975 and 1977.

Plaintiffs promptly applied to the United States Supreme Court for a stay, requesting that the filing date for elections be postponed and that the district court provide single-member districts in

18. The Court in *Whitcomb* also discussed the thesis, expounded by Professor John Banzhaf in Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309 (1966), that residents in multi-member districts are overrepresented as a result of bloc-voting, but found no such showing in that case. 403 U.S. at 144-148, 91 S.Ct. 1858.

Dick Dobson, author of the Dobson Plan, political editor of the Minot Daily News and a delegate to the North Dakota Constitutional Convention, does not favor the multi-senate district proposal which the majority adopts in its plan, for Dobson has said:

It simply is not fair to allow a voter in an urban district to participate in the election of four senators while his neighbor in a rural district participates in the election of only one senator. It has been shown mathematically that multi-member electoral "systems contain inherent inequalities in representation." In decisions to date, the United States Supreme Court has not charted a clear path on this issue. Yet one fact is certain: Single-member districts are the essence of equal representation. [Dobson, Reapportionment Problems, 48 N.D.L.Rev. 281, 289 (1972).]

Hinds County. The Supreme Court granted the application, stating:

> The district court is instructed, absent insurmountable difficulties, to devise and put into effect a single member district plan for Hinds County * * *. [402 U.S. at 692, 91 S.Ct. at 1762.]

The court laid down the following standard for district courts exercising discretion in fashioning apportionment plans:

> We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. [402 U.S. at 692, 91 S.Ct. at 1762.]

I am satisfied that this standard remains the law which governs our decision. In Connor v. Williams, 404 U.S. 549, 92 S.Ct. 656, 30 L.Ed.2d 704 (1972), decided after Whitcomb v. Chavis, *supra*, the Supreme Court reviewed another challenge to the district court's Mississippi reapportionment plan and reemphasized its holding in the earlier *Connor* case, stating:

> The District Court retained jurisdiction over these three counties and ordered that a Special Master be appointed in January 1972 to "take testimony and make findings as to whether the Counties of Hinds, Harrison, and Jackson may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979." 330 F. Supp., at 519. Such proceedings should go forward and be promptly concluded, for, as this Court has emphasized, "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). [404 U.S. at 551, 92 S.Ct. at 659.]

Most recently, in Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), the Court examined the state legislature's apportionment of Virginia which had been invalidated by a three-judge district court. Although the Supreme Court reversed the district court in adopting a new standard on permissible population variances in state plans, it did affirm the trial court's use of multi-member districts in reapportioning certain areas containing military personnel. Because of "unusual, if not unique, circumstances" involving severe time pressures, the Court permitted the multi-member plan to stand, but only on an interim basis. 410 U.S. at 331-332, 93 S.Ct. 979. In reaching this decision, the Court noted that:

> The [district] court conscientiously considered both the legislative policy and this court's admonition in Connor v. Johnson, *supra*, that in fashioning apportionment remedies, the use of single-member districts is preferred, evidence of substantial malapportionment with respect to military personnel * * * and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district. [410 U.S. at 333, 93 S.Ct. at 989.]

Turning to the case at bar, it should be obvious that we are long past the "interim" remedy stage of *Mahan*. The conditions which justified the creation of multi-member senate districts in 1965 by the court in *Paulson II*, and which justified the temporary continuation of these districts by our court in 1972, have faded into history. I can find no valid state legislative policy nor any practical grounds at the present time justifying the use of multi-member senate districts in North Dakota. Thus, under the language of *Mahan* and the holdings in the two *Connor* cases, the continuance of multi-member senate districts constitutes an abuse of discretion by this court.

I have read the complete record in this case with care, and find no reasons advanced anywhere in that record for continuing multi-member senate districts as either furthering the art and science of politics or improving the conduct of state government. However, the record does disclose several arguments in favor of the more traditional single-member senate districts:

(1) It gives a voter a chance to compare only two candidates, head to head in making a choice.

(2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other poential districts that might narrowly go for the candidate of the opposite party.

(3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dares stray from the machine's line.

(4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.[19]

(5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.

(6) It reduces campaign costs and "personalizes" a campaign.

(7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.

(8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.

(9) It would tend to guarantee an individual point of view if all senators are not elected as a team.

(10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the *election* of *only one* senator.

From North Dakota's earliest days, the policy of single-member senate districts was an integral part of its political tradition. Section 29 of the Constitution of 1889 required such districts and controlled all elections in the state until it was invalidated as an almost accidental by-product of the federal district court's decision in *Paulson II*. *See* State ex rel. Stockman v. Anderson, 184 N.W.2d 53, 57–58 (N.D.1971). When a panel of this court adopted with some hesitancy a truly unprecedented multi-member senate plan in *Paulson II*, the court said:

> We have exhaustively considered the plan as set forth in Senate Bill 39 [which we hereby adopt]. We find it not perfect. Five "multi-member" districts are created; county lines are violated in twelve instances. * * * Insofar as the multi-member districts are concerned, if experience proves that practical difficulties or inequities result therefrom, appropriate remedial legislation may reasonably be expected. [246 F.Supp. at 44.]

In the nine years since the court in *Paulson II* first introduced multi-member senate districts to North Dakota,

19. For example, in the 21st District encompassing the cities of Fargo and West Fargo, four of the five senators live in the extreme south side of Fargo; only one resides in the northern section of Fargo. No state senator resides in West Fargo. I take judicial note of these facts and that, generally speaking, the most affluent citizens in the 21st Legislative District are concentrated on Fargo's south side. *See* Fargo Forum, January 29, 1974, at 9, c. 1 (morning edition).

they have been the subject of unceasing political, philosophical, and legal disputes.[20] Confronted with "practical difficulties or inequities" referred to in *Paulson II*, the legislature has been unable to resolve this bitterly divisive issue in a manner acceptable to the electorate. A court plan which has produced and continues to produce this kind of disruptive results ought not to be readopted. This, unfortunately, is exactly what the majority has done.

The evidence is at hand to permit the fashioning of a remedial plan which subdivides the multi-member senate districts in North Dakota's major cities. During the hearings of the Special Committee on Reapportionment, the late Mr. R. R. Smith, one of the court's Special Masters, advised the Committee that he had successfully formulated single-member districts for the cities of Bismarck, Grand Forks, and Minot. *See* Minutes of the Special Committee on Reapportionment, October 11–12, 1972, at 5, and November 8–9, 1972, at 5, Supplementary Return, *supra*. Mr. Ostenson, also one of our Special Masters, assured the Committee that:

> [I]t is not difficult to divide multi-member districts into single-member districts in Fargo and West Fargo, but in other cities it may be necessary to make ground surveys and estimate the population within enumeration districts. Mr. Ostenson said that if the Committee selects a reapportionment plan, it would not be terribly difficult to adopt single-member districts. [Minutes of the Special Committee on Reapportionment, Nov. 8–9, 1972, at 8, Supplementary Return, *supra*.]

Mr. Ostenson also assured this court that with present census data plus some added ground surveys, the existing multi-member senate districts may be subdivided into single-member senate districts. *See* Comments to Ostenson Plan, attached as Appendix B, Chapman v. Meier, Civil No. 4664, 372 F.Supp. 363 (D.N.D., filed June 30, 1972).

Given this information, the court should proceed to comply with the Supreme Court's admonition in Connor v. Johnson, *supra*, and establish single-member senate subdistricts within North Dakota's urban areas.

III.

The Dobson Plan cannot stand as a permanent reapportionment plan for North Dakota for a second major reason: it contains unconstitutionally large population disparities between districts. The largest district (population 13,176) exceeds the size of the ideal district by 8.8 percent; the smallest (population 10,728) falls short of the ideal by 11.4 percent—a total deviation of more than 20 percent and a deviation ratio of 1.23–1. *See* Chapman v. Meier, Civil No. 4664, 372 F.Supp. 363 at 365 n. 4 (D.N.D., filed June 30, 1972).

In our original consideration of this case, the court fashioned interim relief based on the fact that the case came to us on the eve of the 1972 elections. We sought to avoid disruption of the impending elections and, with that consideration in mind, selected the Dobson Plan because it effected less change in the then-existing legislative lines compared to other plans.[21] It is now the time to reevaluate this plan's variances calmly in light of the Constitution and without these unusual circumstances, but the question is: what standards to apply?

In Connor v. Williams, 404 U.S. 549, 92 S.Ct. 656, 30 L.Ed.2d 704 (1972), a court-fashioned plan for Mississippi's state legislature—containing a total variance of 18.9 percent—was attacked as unconstitutional based on Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), and Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969). The Supreme Court, however, chose not to reach this issue,

20. *See* text of this opinion at notes 4–6, 14–15, *supra*.

21. *See* text of this opinion at note 10, *supra*.

and instead vacated the district court's order pending completion of proceedings consistent with the Court's earlier mandate in Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). Since that time, the Court has more clearly defined the Equal Protection standards applicable to population deviations in legislative redistricting plans enacted by state legislatures. Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). However, it remains an open question whether a more stringent standard, one of "absolute equality," applies to reapportionment schemes fashioned by federal district courts in the exercise of their equity power. But even assuming, *arguendo*, that *Mahan's* flexible standard controls court-fashioned plans as well as plans enacted by legislatures, it seems to me that the variances in the Dobson Plan are in all likelihood too great to pass constitutional muster, particularly since no justification is shown on the record for continuing the use of this plan.

The touchstone of the *Mahan* case is its reaffirmation of a statement from Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), that:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. [377 U.S. at 579, 84 S.Ct. at 1391.]

Applying this flexible standard to the legislative reapportionment by the Virginia General Assembly, the Court upheld a 16.4 percent variation between the largest and smallest districts on the grounds that the deviation arose from a valid state policy of maintaining the integrity of political subdivision lines. Noting that the proper equal protection test is not framed in terms of "governmental necessity," but simply in terms of a claim that a state legislature may "rationally consider," 410 U.S. at 326, 93 S.Ct. 979, the Court concluded:

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations. [410 U.S. at 329, 93 S.Ct. at 987.]

Here, however, I cannot say that on the present record the Dobson Plan "has not sacrificed substantial equality to justifiable deviations." Not only does the Plan include a deviation greater than the 16.4 percent upheld in *Mahan*, but more importantly it is not justified by any rational state policy now in effect. It is clear for example that the State of North Dakota has not adopted, either by legislative action or otherwise, a firm policy of strictly adhering to political subdivision lines,[22] such as the Virginia policy found so important by

22. In *Paulson II*, a panel of this court determined that the 1965 legislature had retreated from the earlier policy of the State of North Dakota which accorded legislative representation on a county-wide basis. 246 F.Supp. at 42–43. Moreover, in oral argument on a motion for stay in the case at bar, counsel for defendant-Meier defended House Bill 1042 in its amended form as passed by the legislature, by stating:

> True, the Plan cuts through county lines, but that is not a criteria. There is no

the Supreme Court in *Mahan*. Absent some such policy to justify the large population deviation of the Dobson Plan, the Equal Protection Clause requires this court to adopt an apportionment plan with less variance between districts.[23]

IV.

In dissenting, I believe that it behooves me to offer my suggestions for resolving the case before us, particularly since the Supreme Court may once again be called upon to review the decision of this court.[24]

On June 30, 1972, we expressed tentative approval for the Ostenson Plan. Since that time, the Special Committee on Reapportionment of the North Dakota Legislative Council has considered the Ostenson Plan, the Dobson Plan, and many others, and with staff assistance arrived at a different reapportionment plan which it recommended to the legislature. The information which it gathered and the work that it performed are available to us. *See* text of this opinion at note 13, *supra*. That plan, as noted, keeps population deviation to a minimum. It seems to me that we might follow the precedent of an earlier panel of this court which adopted a committee plan recommended to the 1965 North Dakota Legislature in *Paulson II*,[25] and give careful consideration to the plan presented to the 1973 North Dakota Legislature by this bipartisan citizens-legislators committee.

Since 1931, the legislature of this state has been unable successfully to reapportion itself, and that duty now rests in our court. In the exercise of this duty, our function is to devise the best plan possible in conformity with the Constitution and the supervisory guidelines provided by the Supreme Court. Single-member districts have proved advantageous in assuring the citizens of a

North Dakota constitutional provision which addresses itself to that. The one we had is, of course, no longer applicable. [Transcript of Proceedings, held May 25, 1973, Chapman v. Meier, Civil No. 4664 (D.N.D.), at 4–5.]

23. The Dobson Plan was reviewed and rejected by the Special Committee on Reapportionment of the Legislative Council during its hearings. *See* Minutes of the Special Committee on Reapportionment, October 11–12, 1972, at 305, Supplementary Return (filed Jan. 14, 1974), Chapman v. Meier, Civil No. 4664 (D.N.D.). Ultimately, that Committee recommended a plan containing a total deviation of only 2.6 percent. *See* Report of the Special Committee on Reapportionment & Legislative Council Plan, Supplementary Return, *supra*.

24. The defendant sought a stay of our June 30th order from the Supreme Court, urging that the 1973 elections be held under the prior 1965 court plan. Justice Blackmun denied the stay on July 17, 1972.

25. The *Paulson II* court said, regarding the committee and the 1965 committee plan:

For several months prior to the commencement of the next session of that Assembly (the Thirty-ninth), the Legislative Research Committee had been considering such proposed legislation. That Committee had engaged Mr. R. R. Smith, a qualified and experienced Certified Public Accountant and resident of this state, to prepare and submit a plan of legislative apportionment based as precisely as practicable upon population as revealed by the 1960 federal census, but bearing in mind certain appropriate guiding principles with emphasis upon maintaining the integrity of county boundaries, where possible. Such a plan was prepared and submitted to a subcommittee of the LRC; said subcommittee unanimously approved it. Public hearings were thereafter held in different cities of the state. The LRC was composed of nineteen members; nine were experienced and influential members of the legislature, ten were prominent citizens of the state who, by reason of their places of residence, fairly represented the various sections of the state. Each of the major political parties was represented. The plan, as approved by the subcommittee, was thereafter unanimously approved by the LRC and submitted to the Legislative Assembly for action, under the designation Senate Bill 39. Senate Bill 39 was adopted by the Senate but rejected by the House of Representatives. [246 F.Supp. at 44.]

district meaningful representation, whole multi-member districts have been the subject of constant criticism by scholars, legislators, and courts. The Supreme Court recognized this in Connor v. Johnson, *supra*, and thus we are obligated to fashion an appropriate plan containing single-member senate districts in North Dakota's metropolitan areas.[26]

Apart from the necessity of subdividing these multi-member senate districts, lest I be misunderstood, I wish to make it clear that I am not saying that the Dobson Plan must be rejected out of hand by this court. Defendant-Meier should be given the opportunity to justify the Plan's continued existence upon a showing that it does indeed serve some rational state policy offsetting the population variances.

Accordingly, I would set a hearing upon the motions now before us. Pending this hearing, I would direct the Masters:[27]

1) to study and report to the court concerning the merits of the Legislative Council Reapportionment Plan;

2) to submit proposals to us for subdividing the existing multi-member senate districts of the Dobson Plan in Bismarck, Fargo, Minot, Grand Forks, and Jamestown, and the comparable multi-member senate districts proposed in the Legislative Council's Plan; and

3) to make recommendations concerning the proper handling of the military population at Grand Forks and Minot airbases for reapportionment purposes.

26. I contrast the result proposed by the majority in this case with that of the three-judge district court in Beens v. Erdahl, 349 F.Supp. 97 (D.Minn.1972), which in reapportioning Minnesota's legislature transformed multi-member House districts into single-member seats and kept the total deviation under 4 percent.

27. I would recommend the appointment of Mr. Gail Hernett, a former state senator and the former Chairman of the Special Committee on Reapportionment, to replace the late Mr. R. R. Smith as a Special Master.

The UNITED STATES of America on the relation of Thomas Roger McDOUGALD, Petitioner,

v.

D. R. HASSFURDER, Superintendent Division of Corrections, Raiford, Florida, Respondent.

No. 70-452-Civ-J-T.

United States District Court,
M. D. Florida,
Jacksonville Division.
March 15, 1974.

Habeas corpus proceeding. The United States District Court, Middle District of Florida, Jacksonville Division, Tjoflat, J., held that where officers first interfered with suspects' movement when they were stopped after alighting from an automobile which answered the description of getaway vehicle from robbery, the alleged "seizure" of the petitioner's person was valid; the reasonableness of seizure is to be judged by objective standard of whether facts available to officers at moment of seizure warranted a man of reasonable caution in belief that action taken was appropriate; that whether a "search" occurred turned on officer's intent to conduct a probing, exploratory quest for evidence of a crime,; and that in view of fact that initial detainment and initial search were valid, the petitioner's arrest was valid and subsequent search of automobile was likewise valid.

Petition dismissed with prejudice.

1. Searches and Seizures ⚷7(1)

The reasonableness of seizure is to be judged by objective standard of whether the facts available to officers at

CITY OF KENAI

" Oil Capital of Alaska "

210 FIDALGO AVE., SUITE 200 KENAI, ALASKA 99611-7794
TELEPHONE 907-283-7535
FAX 907-283-3014

May 8, 1995

Representative Mike Navarre
State of Alaska
State Capitol Building, Room 521
Juneau, AK 99801-1182

RE: *HB 247 - MANDATING SINGLE-MEMBER ELECTION DISTRICTS*

At the regular meeting of May 3, 1995, the Kenai City Council reviewed the enclosed Alaska Association of Municipal Clerks' (AAMC) Resolution No. 95-011. This resolution opposes HB 247, which, if passed, would eliminate the local option of districting for purposes of electing local officials.

As you are aware, the City of Kenai is a home-rule municipality. Our Charter requires mayor and council seats to be elected at-large. Our population is nearing 7,000. We have four voting precincts. HB 247 would financially impact our community, it would place us out of compliance with our Charter, and there would also be difficulties in securing candidates to represent the districts this bill would create. As the AAMC resolution delineates, there are other technical problems passage of this bill would present, i.e. reapportionment, computer programming, ballot layouts, mapping, etc.

The Kenai City Council strongly supports AAMC Resolution No. 95-001 in opposing HB 247.

CITY OF KENAI

John J. Williams

John J. Williams
Mayor

JJW/clf
Enclosure
cc: Senator Judy Salo
Representative Vezey
House Community & Regional Affairs Committee
House Health, Education & Social Services Committee
House State Affairs Committee

By: Alaska Association of Municipal Clerks
Introduced: 03/31/95
Adopted: 03/31/95

RESOLUTION NO. 95-001

A RESOLUTION OPPOSING PROPOSED LEGISLATION (HB 247) WHICH WOULD DIMINISH THE LOCAL OPTION OF DISTRICTING FOR PURPOSES OF ELECTING LOCAL OFFICIALS

WHEREAS, the Alaska Association of Municipal Clerks is composed of members representing first and second class cities, second and third class boroughs; and home rule and unified municipalities ranging in population from 70 to 250,000 people; and

WHEREAS, HB 247 would mandate single-member election districts for all local elected officials and would financially impact all municipalities including those that are currently districted for their governing bodies; and

WHEREAS, municipalities currently elect governing bodies either at-large or have some form of districting or combination of the two as determined by the voters under the local option law currently in effect under AS 29 and AS 14; and

WHEREAS, all school boards in the state of Alaska are currently elected on an at-large basis.

NOW, THEREFORE, BE IT RESOLVED that the Alaska Association of Municipal Clerks opposes HB 247 as it is currently written for the following reasons:

1. HB 247 fiscally impacts all municipalities and becomes an unfunded state mandate by causing additional ballot layouts and types of ballots; mapping; and probable litigation costs resulting from apportionment.

2. The State of Alaska Division of Elections would be fiscally impacted by having to redraw precinct boundaries to coincide with the Municipal reapportionment plan, and to provide voter registration lists for each precinct in each municipality as the State VREMS computer program is not capable of multi political subdivisions.

3. Most municipal school boards have a different number of members than the governing body of the same municipality. Overlapping districts for school boards and governing bodies will create confusion for the voters and difficulty in conducting and canvassing those elections.

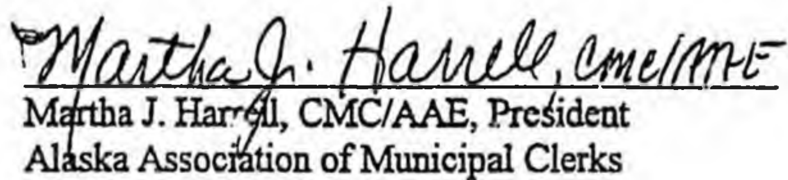
4. Most first and second class cities do not have a voter population that warrants mandating single-member districts. It would be cost prohibitive to the State and to the Municipality to divide a city such as Skagway, which is currently one precinct with 627 registered voters into 7 different precincts with approximately 90 voters per precinct.

5. HB 247 places home rule municipalities out of compliance with their charters.

6. This bill shortens the length of time that municipalities have to address reapportionment following the official report of a federal decennial census. Local government are held to a shorter time frame than the State of

Alaska for reapportionment, causing further confusion and difficulty in conducting elections. For example, following the 1990 census, the State of Alaska apportionment plan did not become final until mid 1994 causing precinct changes in 1990, 1992, and 1994.

PASSED AND APPROVED THIS 31ST DAY OF MARCH, 1995.



Martha J. Harrell, CMC/AAE, President
Alaska Association of Municipal Clerks

State of Alaska

Department of Community & Regional Affairs

Position Paper

Bill No.: HB 247
Sponsor: Rep. Vezey Position: Oppose

Title:

An Act relating to election of municipal governing bodies and municipal school boards.

Issue:

HB 247 mandates structuring of municipal governing bodies and school boards by requiring election to these bodies by single-member districts, and specifies composition of these bodies. Only voters residing within districts could vote for candidates in those districts.

DCRA Position:

As written, this bill will require candidates for municipal office to be elected from single-member districts, conforming to changes made in the state election process after the 1990 reapportionment. In its current form, the bill would create single-member districts for all municipalities regardless of size or type. The argument in favor of single-member districts for local governments is that they would provide a tighter link between elected officials and those who elected them, therefore better democracy.

At present the Kenai Peninsula Borough and the Mat-Su Borough structure elections in this manner. Other boroughs employ a variety of approaches including combining single and multi-member districts, "at large" representation, and combinations thereof. No cities that we are aware of use the single-member district approach, although they have the power to do so by ordinance.

The Department of Community and Regional Affairs has a number of concerns with this bill. Our most fundamental concern is that we do not believe the state should be mandating a districting approach for municipalities. Municipalities are in the best position to determine for themselves the kind of districting that is most appropriate for their individual

circumstances and policies. As noted, municipalities already have the power to structure their elections by single-member districts if they choose to do so. Some have done so -- most have not.

The department also has technical concerns regarding the imposition of single-member districts on smaller communities. The Yakutat Borough has 671 residents, the first class city of St. Mary's has a population of 477, and there are at least 10 second class cities with less than 100 residents. Not counting children and unregistered voters, we could be mandating geographic districts containing only a handful of eligible voters. Most of these smaller communities are homogenous to the point that geographic districting would be totally arbitrary at any rate.

The Department of Community and Regional Affairs opposes passage of this bill. At the least, the bill should be amended to exempt smaller communities from the single-member requirement. We would suggest that all municipalities under several thousand residents, or all municipalities whose population essentially resides in a single contiguous geographic area, be excluded.

Mike Irwin
Commissioner

3-30-95
Date

CITY OF HOONAH

P.O. Box 360 · Hoonah, Alaska 99829 · (907) 945-3663 · FAX (907) 945-3445

March 21, 1995

Representative Al Vezey
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

SENT VIA FACSIMILE

Dear Representative Vezey:

House Bill No. 247, introduced on March 9, 1995, has just been brought to my attention. A hearing is scheduled on this bill today at 1:00 p.m.

As I understand this bill, the City of Hoonah would be required to split into six separate member districts. Only a person residing inside a given district may run for the seat designated to it and only those living within that district may vote for that seat.

The City of Hoonah has had little time to study this bill, but in its present form, it would be ludicrous, and totally unworkable when applied to the First Class City of Hoonah with a population of 900 residents. We are lucky some years if we can get anyone to run for City Council Seats. If we start limiting them to districts, we will have no representation whatsoever from many of them.

In addition, the ***cost of implementing such a program would be staggering, not only for the Cities, but for the State of Alaska's Voter Registration office.*** Believe me, we don't have the MONEY.

When this bill comes before the committee, please recommend that it not be considered in its current form. At the very least, there must be language exempting communities with populations less than 20,000.

Thank you for your help in this matter.

Sincerely,

Albert W Dick

Albert W. Dick
Mayor, City of Hoonah

cc: Representative Jerry Mackie

AEG
873 Runamuck Ave.
North Pole, AK 99705

Phone: (907) 488-1990
Fax: (907) 488-7034

Attention:	Community & ~~Regional Affairs Com~~	Sender:	Art Griswold
Company:		Company:	
Fax No.:	465-4589 / 465-4956	Copied to:	Al Vezey, Atten: Joe E.
Date:	March 20, 1995	Fax No.:	465-3258
No. of Pages:	1 of (including cover page)	Project Code:	

(If you did not receive the complete transmission, please notify us immediately by return FAX No. (907) 488-7034 or telephone (907) 488-1990

MESSAGE:

To Co-chair Rep. Austerman & Rep Ivan:

Gentlemen,

Please note, we find House Bill 247 a much needed bill to amend the problem of representation by rural areas of boroughs and school districts, as it stands now the metropolitan areas control the elections as in the North Star school district, where all of the members are elected from the downtown area, and no representation from Fox, Ester, Salcha, Two Rivers and North Pole areas. This is just a small sample and if your group would check other areas of the state, you will find the same problem. We support this bill wholeheartedly and if you notice, the new North Pole Borough has tried to incorporate this in its charter and still stay within Title 29.

HB
248

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 248

Revision Date:
Title: Local exemption from PERA
Sponsor: Representative Vezey
Requestor: House Community & Regional Affairs

Department Affected: Labor
BRU: Office of the Commissioner
Component: Alaska Labor Relations Agency
COMPONENT SERIAL NO. 1200

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE FUND SOURCE #						

FUNDING: (Thousands of Dollars)

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY95) impact: $ None

ANALYSIS: (Attach a separate page if necessary)
HB 248 would exclude political subdivisions from coverage under the Public Employment Relations Act (PERA) unless the political subdivision, after election among voters, opts to be covered. The bill would also permit the rejection of PERA by election of the voters. The bill would remove a number of employers from the jurisdiction of the Alaska Labor Relations Agency (ALRA). This change should ultimately reduce the workload of ALRA, however the transition and initial disruptions will delay the decrease long past the effective date of the law.

Prepared by: Jan Hart DeYoung
Phone: 269-4895
Division: Alaska Labor Relations Agency
Date: 3/17/95

Approved by Commissioner: Tom Cashen. Commissioner
Agency: Department of Labor
Date: 3/17/95

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Alaska State Legislature

House of Representatives

Official Business

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

March 14, 1995

SPONSOR STATEMENT

The intent of HB-248, "An Act relating to application of the Public Employment Relations Act to municipalities and other political subdivisions", is to allow municipalities the option of removing themselves from PERA. Under this proposed legislation, a municipality could make such a decision with the approval of the voters of the municipality.

It was the intend of the 1972 legislation to allow municipalities to opt out of PERA. As the law currently exists, a municipality under PERA for all practical purposes, cannot remove themselves. This determination has been brought about by decisions of the court. This condition has resulted in diminished control over local self determination.

Existing legislation as interpreted by the courts has put local governing bodies in a position where one governing body can obligate all future governing bodies. This bill is intended to correct what the legislature has inadvertently allowed the court to mandate on local governments by placing the decision making process back into the hands of local governing officials and the people.

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House of Representatives

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Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

MEMORANDUM

March 14, 1995

TO: **Rep Ivan Ivan, Chairman, House Community and Regional Affairs Committee**

FROM: **Rep. Al Vezey**

SUBJECT: **Scheduling of HB-248 for hearing.**

Please schedule HB-248 for hearing at your earliest convenience.

Your help in this matter is appreciated.

217 Second Street, Suite 200 ▪ Juneau, Alaska 99801 ▪ Tel (907)586-1325, Fax (907)463-5480

March 20, 1995

TO: Representative Ivan Ivan, Chairman
and Members
House Committee on Community and Regional Affairs

FROM: Kevin C. Ritchie
Executive Director

RE: HB 248 - Local exemption from PERA

HB 248 would allow municipalities to choose, by vote of the people, to withdraw from coverage under the Public Employees Relations Act (PERA), which mandates collective bargaining. The bill is consistent with AML's overall philosophy of allowing maximum local control over the operation of municipal government, however, the AML Policy supports a choice by the elected body by ordinance consistent with the original PERA provisions.

The Alaska Municipal League 1995 Policy Statement (Part VII - Local Government Powers) includes the following statement:

"The League strongly opposes any legislation that would force municipalities to be subject to the provisions of the Alaska Public Employees Labor Relations Act. The League opposes, just as strongly, any legislative efforts to dictate the provisions of local public employee labor relations ordinances. **The League supports legislation to allow each municipality to reject or withdraw from the terms of the Alaska Public Employees Labor Relations Act at any time by action of the governing body.** The scope of decisions as to local government finance and labor policies is best left to the local governing body." (emphasis added)

While we would prefer that local governing bodies be allowed the maximum authority to address this issue, AML supports HB 248 as a move in the right direction.

JK/LEG/HB248.ltr

Legislative Research Agency

Alaska State Legislature

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 1' 1995

MEMORANDUM

TO: Representative Al Vezey

FROM: Carol R. Vandor
Legislative Analyst

RE: **Public Employment Relations Act (PERA)**
Research Request 95.161

You asked about the number of state political subdivisions covered by the Public Employment Relations Act (PERA). Title 23, chapter 40 of the Alaska statutes governs PERA. There is no requirement for a political subdivision to report its status under PERA; therefore, the only way of knowing whether a political subdivision is covered under PERA or has opted-out is if a hearing has been held by the Alaska Labor Relations Agency or a suit has been filed in the courts. Below is a brief discussion of PERA and the Alaska Labor Relations Agency followed by a list of the 16 political subdivisions that are known to be covered by PERA and the 13 that have opted-out of PERA.

Public Employment Relations Act

In June 1972 the State of Alaska enacted the Public Employment Relations Act (PERA). The PERA confers upon public employees the right to organize and to bargain collectively with their employers (AS 23.40.080). The Declaration of Policy, se' forth in AS 23.40.070, states in part:

> . . . The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining; (2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment; (3) maintaining merit-system principles among public employees.

Alaska Statute 23.40.250 defines public employer and public employee as used in the Declaration of Policy as follows:

> "public employer" means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees.
>
> "public employee" means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools.

An appointed official, defined in 8 AAC 97.990, includes persons who exercise significant responsibilities for the public employer in the area of collective bargaining policy formulation and implementation.

The interpretation of PERA as it applies to political subdivisions has been litigated on several occasions since PERA was enacted. A recent decision, *Kodiak Island Borough v State of Alaska*, 853 P.2d 1111 (Alaska 1993) addressed the issue of the right of public employees to organize for the purpose of collective bargaining under PERA, and the right of a political subdivision to exempt itself. In this case, the borough had adopted an opt-out resolution in 1980 after it became aware of substantial organizational activities by its employees. The court ruled that a political subdivision may not opt out of PERA after becoming aware of organizational activity by employees.

Alaska Labor Relations Agency

For many public employees in Alaska, the Alaska Labor Relations Agency provides enforcement of PERA. The agency is comprised of six members appointed by the governor and confirmed by the legislature. It serves as the labor relations agency under the Public Employment Relations Act and carries out the functions specified in that act. Under Title 23, the agency has the authority to enter into labor management matters when certain situations exist. The agency has several responsibilities, one of which is the investigation and resolution by conciliation of unfair labor practices committed by either employers or employees. The decisions can be enforced by an injunction to cause the prohibited practice to cease and desist. The agency also decides the unit appropriate for the purpose of collective bargaining and schedules representation elections and settles issues regarding clarifications of the appropriate unit.

PERA Status

According to the Alaska Labor Relations Agency, employees of 16 political subdivisions are known to be covered under PERA and 13 political subdivisions have opted-out. These are listed below.

Covered

Bristol Bay Borough
Fairbanks North Star Borough
Haines Borough
Ketchikan Gateway Borough
Kodiak Island Borough
City of Bethel
City of Cordova
City of Dillingham
City of Fairbanks
City of Hoonah
Nome
Petersburg
City of Seldovia
Unalaska
City of Whittier
Thomas Bay Power Authority

Opted-Out

City and Borough of Juneau
Mat-Su Borough
North Slope Borough
Municipality of Anchorage
City of Haines
City of Homer
City of Ketchikan
City of Kodiak
City of Kotzebue
North Pole
Seward
Sitka
Wrangell

I hope this information is useful to you. If we may be of further assistance, please contact this office.

Y 2 1994

Greater Fairbanks **Chamber** of Commerce

709 Second Avenue (907) 452-1105
Fairbanks, Alaska 99701 FAX (907) 456-6968

RESOLUTION 94-0425

A RESOLUTION BY THE GREATER FAIRBANKS CHAMBER OF COMMERCE IN SUPPORT OF HB 255 - PERA

WHEREAS, it is the mission of the Greater Fairbanks Chamber of Commerce to improve the economic base of Interior Alaska by promoting a climate in which business thrives and Fairbanks remains a dynamic and attractive place to live, and

WHEREAS, residents of the City have expressed a perception that class one city workers are paid disproportionately high wages compared to private sector workers, and

WHEREAS, studies indicate that class one city workers are paid disproportionately high wages compared to other class one workers in communities similar to Fairbanks, and

WHEREAS, city managers and councils have repeatedly been unable, through collective bargaining, to bring class one city workers wages in line with the private sector's wages or the city's ability to pay for city services, and

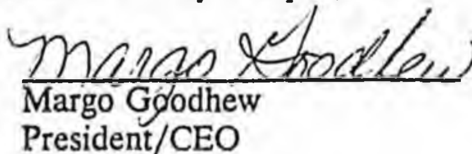
WHEREAS, it is believed that collective bargaining fails because mandatory binding arbitration is in place, and

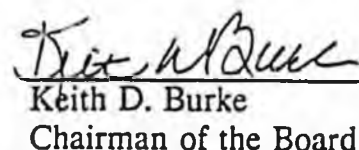
WHEREAS, based on the public's perception that class one city workers unfairly benefit from mandatory arbitration, the City of Fairbanks has been unable to raise voter approved taxes to pay for city services that improve the economic base of Interior Alaska and promote a climate in which businesses thrive, and

WHEREAS, no reasonable solution has been offered to voters except to opt out of those portions of collective bargaining which require mandatory arbitration with class one city workers, and

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Chamber of Commerce supports HB 255 which would allow the voters to elect to opt out of those portions of the Public Employees Relations Act which requires mandatory arbitration with class one city workers.

Dated this 25th Day of April, 1994.

By 
Margo Goodhew
President/CEO

By 
Keith D. Burke
Chairman of the Board

P E R A

Public Employment Relations Act

Copies of public documents and opinions pertaining to PERA

Compiled by

Anne M. Smith
1903 Capitol Avenue
Fairbanks, AK 99709-4123