The Burger Court Opinion Writing Database

Gaffney v. Cummings
412 U.S. 735 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1973

Re: No. 71-1476 - Gaffney v. Cummings

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 7, 1973

Dear Bill:

In 71-1476, Gaffney v. Cummings and 72-147, Bullock v. Regester please note that I join in Parts I and II of your dissent. As to Part III I may say a few words.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

-B

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

From: Brennan, J.

Circulated: 6/5/73

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71–1476 AND 72–147

J. Brian Gaffney, Appellant,
71–1476 *v.*
Theodore R. Cummings et al.
} On Appeal from the United States District Court for the District of Connecticut.

Bob Bullock et al., Appellants,
71–147 *v.*
Diana Regester et al.
} On Appeal from the United States District Court for the Western District of Texas.

[June —, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

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

To: The Ch ef Justic
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: 6/8/73

SUPREME COURT OF THE UNITED STATES

Nos. 71-1476 AND 72-147

J. Brian Gaffney, Appellant,
71-1476 v.
Theodore R. Cummings et al.

On Appeal from the United States District Court for the District of Connecticut.

Bob Bullock et al., Appellants,
71-147 v.
Diana Regester et al.

On Appeal from the United States District Court for the Western District of Texas

[June —, 1973]

MR. JUSTICE BRENNAN, joined (with respect to Parts I and II) by MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western District of Texas reaching a similar result as to the Texas plan. In the Texas case, the Court does affirm, however, the District Court's determination that the use of multi-member districts in Dallas and Bexar Counties had the unconstitutional effect of minimizing the voting strength

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1973

Joined this I + II yesterday 6/12

MEMORANDUM TO THE CONFERENCE

RE: No. 71-1476 Gaffney v. Cummings
No. 72-147 White v. Regester

Since Part III of my concurring and dissenting opinion in the above has attracted no takers, I am deleting it from the opinion.

W. J. B. Jr.

1, 7, 11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71–1476 AND 72–147

J. Brian Gaffney, Appellant, 71–1476 *v.* Theodore R. Cummings et al. — On Appeal from the United States District Court for the District of Connecticut.

Bob Bullock et al., Appellants, 71–147 *v.* Diana Regester et al. — On Appeal from the United States District Court for the Western District of Texas.

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

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

file

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

From: Brennan, J.

Circulated: _____

Recirculated: 6/13/73

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71–1476 AND 72–147

J. Brian Gaffney, Appellant,
71–1476 *v.*
Theodore R. Cummings et al.

On Appeal from the United States District Court for the District of Connecticut.

Bob Bullock et al., Appellants,
72–147 *v.*
Diana Regester et al.

On Appeal from the United States District Court for the Western District of Texas.

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 71-1476 Gaffney v. Cummings et al.

With one exception, I agree with each of Byron's recommendations. The exception concerns No. 71-1190 Summers v. Cenarrusa. At issue in Summers is the apportionment of the Idaho State Legislature. Since the total range of deviation is 19.4%, the case is plainly not controlled by the de minimis rule announced in Gaffney. Under Mahan v. Howell, deviations of this amount must be justified by the State, and it seems to me very doubtful that the State has successfully met its burden of proof.

Although I dissented in Mahan, I was persuaded that Virginia had made a conscientious effort to apportion its legislature on the basis of political subdivision lines. In fact, as early as 1964 we had noted in Davis v. Mann that Virginia did have a policy of following county lines and we conceded that the practice had conformed to the policy. The situation in Idaho is completely different, for the State has made virtually no effort at all to justify the deviations. Describing the State's asserted justifications, the District Court could only say that

> "In creating the districts, the Legislature took into consideration anticipated increases in population, the exclusion of non-resident college students, which were included in the 1970 census, and, insofar as practical, existing county, natural and historical boundary lines so as to create districts with similar economical and community interests and to provide the most effective representation possible to the citizens of Idaho in the Legislature."

The District Court did not, however, explain how these

correlated to the particular deviations, supposed justifications, nor does appellees' brief shed any light on the matter. Moreover, most of the factors asserted in justification of the inequality are insufficient, either as a matter of fact or of law, to meet the burden. The suggestion that the State relied on county lines is clearly refuted by the fact that 14 of the 35 legislative districts were composed of county fragments--this despite a specific prohibition in the Idaho Constitution againt dividing counties. Nor can the plan be justified on the basis of "natural and historical" lines or on a desire to create districts "with similar economical and community interests." For we specifically held in Reynolds v. Sims that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation."

In short, I can only conclude that on this record (the case was resolved below on a motion for summary judgment) the State has not yet provided the kind of justification required by Mahan v. Howell. Surely under Kirkpatrick v. Preisler the State's justifications would be found insufficient. But in my view, they are unquestionably insufficient even under the more lenient standard adopted in Mahan. Accordingly, I believe that probable jurisdiction should be noted and the case set for oral argument. As an alternative, we might merely vacate the judgment and remand for reconsideration in light of Mahan. Indeed, since the lower courts have had no opportunity to digest this Term's contributions to the law of reapportionment, the latter course might even be preferable.

Sincerely,

W.J.B., Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 26, 1973

Re: No. 71-1476, Gaffney v. Cummings

Dear Byron,

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

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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

1st DRAFT

From: White, J.

Circulated: 4-25-73

Recirculated: ~~4-25-73~~

SUPREME COURT OF THE UNITED STATES

No. 71-1476

J. Brian Gaffney, Appellant, v. Theodore R. Cummings et al. } On Appeal from the United States District Court for the District of Connecticut.

[May —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut House of Representatives, proposed in 1971, made out a prima facie case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally vulnerable where its purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by the Secretary of the State in December 1971. Under the Connecticut Constitution, the state legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission.

pp 10, 11, 14, 18

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

From: White, J.

2nd DRAFT

Circulated: _____

Recirculated: 5-8-73

SUPREME COURT OF THE UNITED STATES

No. 71-1476

J. Brian Gaffney, Appellant, v. Theodore R. Cummings et al. | On Appeal from the United States District Court for the District of Connecticut.

[May —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut General Assembly, proposed in 1971, made out a prima facie case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally vulnerable where its purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by the Secretary of the State in December 1971. Under the Connecticut Constitution, the state legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 3

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

From: White, J.

Circulated: _____

Recirculated: 6-15-73

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1476

J. Brian Gaffney, Appellant, v. Theodore R. Cummings et al. | On Appeal from the United States District Court for the District of Connecticut.

[June —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut General Assembly, proposed in 1971, made out a prima facie case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally vulnerable where its purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by the Secretary of the State in December 1971. Under the Connecticut Constitution, the state legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 18, 1973

MEMORANDUM FOR THE CONFERENCE

Re: Cases held for the Reapportionment Cases:
No. 71-1476, Gaffney v. Cummings
No. 71-1623, White v. Weiser
No. 72-147, White v. Regester

On March 1, following the issuance of the opinion in No. 71-364, Mahan v. Howell, Bill Rehnquist circulated a detailed memorandum on the cases held for Mahan. All of the cases discussed in Bill's memorandum were subsequently held for Gaffney, Weiser, and Regester. In light of the decisions in those three cases, I would recommend the following dispositions:

1. No. 72-166, Kelly v. Bumpers. This case was not discussed in Bill's memo. The largest top-to-bottom deviation is 9.5%, less than Regester. The three-judge court approved the plan. The multi-member district contentions seem foreclosed by Whitcomb v. Chavis, Connor v. Johnson, and Regester. I would summarily affirm.

2. No. 71-1190, Summers v. Cenarrusa. The largest top-to-bottom deviation is 19.4%. Mahan was 16.4%; Swann v. Adams was 26%. The District Court found the deviation justified on the basis of rational state policies. I am

not prepared to say that this range of deviations is at the level which may not be justified; nor am I prepared to overturn the holding of the District Court as to the justifications. I would summarily affirm.

3. No. 72-76, Fortson v. Millican. The largest top-to-bottom deviation is 4.25%. The District Court invalidated the plan. The deviations are less than those in either Gaffney or Regester. Thus, there is no equal protection violation in the case. I would vacate the judgment and remand for reconsideration in light of Gaffney and Regester.

4. No. 72-452, Powell v. West. The top-to-bottom deviation is 9.93%; .03% larger than Regester. Although the case is technically not covered by Regester, because the deviation is slightly larger, I am not prepared to hold that this case involved an equal protection violation. As Bill Brennan points out in his dissent, we will probably draw the line at either 10% or Abate's 10.8%. The action of the District Court in approving Plan A rather than drawing a new plan would seem in accord with Weiser. I would summarily affirm.

5. No. 72-205, Stevenson v. West. The District Court approved a plan with a maximum top-to-bottom deviation of 106.8%. I would summarily reverse on Swann v. Adams and Reynolds v. Sims.

B.R.W.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1973

Re: Nos. 71-1476 and 72-147 - Gaffney v. Cummings and Bullock v. Regester

Dear Bill:

Please join me in your concurrence and dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

file in folder in cabinet

Return to official files BS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1973

Re: Nos. 71-1476 and 72-147 - Gaffney v. Cummings and Bullock v. Regester

Dear Bill:

Please join me in Parts I and II of your concurrence and dissent, and ignore my earlier circulation.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 30, 1973

Re: No. 71-1476 - Gaffney v. Cummings

Dear Byron:

You have written a helpful and, I think, a significant opinion. I am glad to join it.

Sincerely,

Harry

Mr. Justice White

Copies to the Conference

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

[redacted]POWELL, JR.

May 11, 1973

No. 71-1476 Gaffney v. Cummings

Dear Byron:

Although this is about as grotesque an example of gerrymandering as I have seen, the discussion at the Conference persuaded me that we should not get into this "thicket" at this time.

Accordingly, please join me in your opinion for the Court.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 30, 1973

Re: Nos. 71-1476 - Gaffney v. Cummings; 72-147 - Bullock v. Regester, 71-1623 - Bullock v. Weiser

Dear Byron:

Please join me in your opinion for the Court in No. 71-1476, Gaffney v. Cummings.

Please join me also in your opinion for the Court in Bullock v. Regester. Although in Conference I voted otherwise with respect to the multi-member district in Bexar County, I do not plan to dissent on this point.

In No. 71-1623, Bullock v. Weiser, I had voted in Conference to limit Kirkpatrick v. Preisler so as to allow a tolerance of the kind, if not of the degree, allowed in State reapportionment. I would be willing to go along with the general reaffirmation of Kirkpatrick, however, which your opinion contains, if you would add a line or two at least leaving open the question of whether even in congressional reapportionment, there may not be a minimum percentage disparity -- obviously below the 4.1% involved in Bullock -- where evidence of disparity itself does not make out a prima facie case of constitutional violation (analogous to the higher percentage enunciated in Gaffney).

Sincerely,

WWW

Mr. Justice White

Copies to the Conference