

circumstances invalidate a plan.¹⁹³² The total population deviation allowed in *Abate* was 11.9%; the Court refused, however, to extend *Abate* to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City's five boroughs on the New York City Board of Estimate.¹⁹³³

Nine years after *Reynolds v. Sims*, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.¹⁹³⁴ But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the state's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.¹⁹³⁵ Second, just as the first case "demonstrates, population deviations among districts may be sufficiently

¹⁹³² Although the Court has used total population figures for purposes of computing variations between districts, in *Burns v. Richardson*, 384 U.S. 73 (1966), it approved the use of eligible voter population as the basis for apportioning in the context of a state with a large transient military population, but with the caution that such a basis would be permissible only so long as the results did not diverge substantially from that obtained by using a total population base. Merely discounting for military populations was disapproved in *Davis v. Mann*, 377 U.S. 678, 691 (1964), but whether some more precise way of distinguishing between resident and nonresident population would be constitutionally permissible is unclear. *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969); *Hadley v. Junior College Dist.*, 397 U.S. 50, 57 n.9 (1970).

¹⁹³³ *New York City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989). Under the plan each of the City's five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. *Id.* at 699–701.

¹⁹³⁴ *Mahan v. Howell*, 410 U.S. 315, 320–25 (1973).

¹⁹³⁵ 410 U.S. at 325–30. The Court indicated that a 16.4% deviation "may well approach tolerable limits." *Id.* at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the state, an issue not addressed by the Court. In *Chapman v. Meier*, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also Summers v. Cenarrusa*, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see Voinovich v. Quilter*, 507 U.S. 146 (1993) (vacating and remanding for fur-