

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH MOON, C.J., JOINS

I write to emphasize that, in contrast to the majority's opinion, Riley v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992), in no way supports the conclusion that the 2001 County of Hawai'i Reapportionment Commission (Commission) followed a "rational" redistricting policy that justifies what is otherwise an unconstitutional redistricting plan.

Riley is clearly distinguishable. At issue in that case was a county redistricting plan drawn by the election commission of Baxter County, Arkansas. Having relied on an accurate population count, the commission was aware that its plan, which exhibited a total population deviation of 10.149 percent, was presumptively unconstitutional. Id. at 832.

When the plan's constitutionality was subsequently challenged, commission members stepped forward to justify the heightened population deviation. Testimony from those members indicated that, while endorsing the "overriding principle . . . [of] equal representation," the commission also believed that the plan should "keep to the old district lines as much as possible to avoid inconveniencing the voters." Id. at 833. The rational policy of "voter convenience," proffered by the commission in formal testimony, thus justified the plan's incremental erosion of equal representation. Id.


Riley accordingly stands for the far from novel proposition that, where a redistricting plan's total population deviation exceeds 10 percent, the redistricting authority must step forward and articulate some rational justification for the

deviation. See Voinovich v. Quilter, 507 U.S. 146, 161 (1993). Riley does not address the far different factual situation at issue here, where a redistricting authority, in mistaken reliance on an inaccurate population count, formulates a redistricting plan that was never intended to be presumptively unconstitutional. Neither Riley, nor for that matter, any of the other cases cited by the majority, endorses the majority's contention that a presumptively unconstitutional redistricting plan may be "rationalized" when the redistricting authority, due to an unrealized computational error, inadvertently devises a plan that exhibits a total population deviation in excess of 10 percent.

The dearth of authority supporting that contention is unsurprising. The fourteenth amendment to the United States Constitution generally requires that a reapportionment plan's total population deviation be less than 10 percent to pass constitutional muster. Brown v. Thomson, 462 U.S. 835, 842-843 (1983). Nonetheless, because "[m]athematical exactness or precision is hardly a workable constitutional requirement," Reynolds v. Sims, 377 U.S. 533, 577 (1964), the fourteenth amendment tolerates a limited degree of divergence "from a strict population standard," provided that the plan as a whole is "based on legitimate considerations incident to the effectuation of a rational state policy." Id. at 579. In other words, countervailing state interests may, at times, permit a less than numerically equal redistricting plan, and a reapportionment authority is not necessarily remiss in pursuing those interests at the expense of perfect numerical equality among the voting districts.

The foregoing framework for assessing the constitutionality of a redistricting plan pragmatically acknowledges that government must, in certain circumstances, be allowed to pursue redistricting policies that incidentally enhance the representational power of some members of the electorate at the expense of others. It was never intended to function as a curative device for excusing, after the fact, a reapportionment authority's gross computational errors or inadvertent methodological mistakes -- especially where, as here, those missteps were solely responsible for tainting the redistricting plan with the presumption of unconstitutionality.

The right of equal representation is far too hard-won a liberty for its erosion to be justified so blithely. Accordingly, I must dissent.


Anna C. Nakamura