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CASE NOTES

CONSTITUTIONAL LAW—A Narrow Reapportionment Holding with Broad Implications for Wyoming. *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

Following the 1980 decennial census, the Wyoming Legislature reapportioned the state's legislative districts.¹ The legislature declared its primary concern was to preserve the integrity of county boundaries as election districts for the House of Representatives so the interests of each county would be guaranteed a voice in the legislature.² Based on this policy the legislature allocated a representative to Niobrara County even though its population did not warrant it.³ In the event of a successful constitutional attack, the legislature provided an alternative plan whereby Niobrara County would be combined with Goshen County to form a legislative district.⁴ The Wyoming Chapter of the League of Women Voters challenged the constitutionality of Wyoming's 1981 reapportionment plan as a violation of the equal protection clause of the fourteenth amendment. The league limited their challenge to the provisions in the plan granting Niobrara County a representative and requested that the court institute the alternative plan provided for by the legislature.⁵ The United States District Court for the District of Wyoming rejected the League of Women Voters' arguments and held that the difference between giving Niobrara County its own representative and combining Niobrara County with an adjoining county into a single legislative district was constitutionally insignificant.⁶

In a five to four decision the United States Supreme Court affirmed the district court's decision.⁷ The majority found that considerable population variations between legislative districts remain even if Niobrara County's representative is eliminated.⁸ Therefore, the difference between the 1981 reapportionment plan and the league's proposed remedy did not constitute a sufficient statistical difference to warrant interference with the political decisions of a state legislature.⁹ The dissent went beyond the requested prayer for relief, however, and, after careful analysis of the case law, concluded the entire plan was unconstitutional.¹⁰

This Note will discuss the holding in *Brown v. Thomson* and will analyze the constitutional standard set forth in the case in light of possible future litigation over Wyoming's reapportionment plan. Finally, this Note will discuss options available to the legislature which would allow a future Wyoming reapportionment plan to survive a constitutional attack. The 1981 Wyoming reapportionment plan is vulnerable to a broad constitutional attack. The United States Supreme Court would undoubtedly apply

1. 1981 WYO. SESS. LAWS ch. 76.

2. *Id.* at § 3.

3. WYO. STAT. § 28-2-109(c) (xiv) (Supp. 1983).

4. WYO. STAT. § 28-2-109(a) (iv) (Supp. 1983).

5. Complaint at ¶ 9, *Brown v. Thomson*, 536 F. Supp. 780 (D. Wyo. 1982).

6. *Brown v. Thomson*, 536 F. Supp. 780, 784 (D. Wyo. 1982).

7. *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

8. *Id.* at 2698.

9. *Id.*

10. *Id.* at 2704, 2705.

its established constitutional standards¹¹ to the case and invalidate the Wyoming plan. The legislature should act now while it has the opportunity to carefully examine alternatives and formulate a reapportionment plan that substantially preserves Wyoming's traditional state interests.

EQUAL PROTECTION CLAUSE ANALYSIS FOR STATE REAPPORTIONMENT PLANS

Prior to 1962, the United States Supreme Court avoided deciding reapportionment cases because of their peculiarly political nature.¹² The Court first held the question of reapportionment was justiciable in *Baker v. Carr*.¹³ It was not until 1964 in *Reynolds v. Sims*¹⁴ that the one person, one vote, principle was clearly enunciated. Since that time the Court has narrowed the acceptable limits for reapportionment plans but the basic principles remain the same.¹⁵

In *Reynolds*, the Supreme Court held the equal protection clause of the fourteenth amendment guarantees the opportunity for equal participation by all voters in the election of state legislators.¹⁶ In several early cases the court held that voting is a fundamental right and any substantial infringement of equal representation must be subject to careful and meticulous scrutiny,¹⁷ although the Court has not clearly enunciated a level of scrutiny for state reapportionment plans. After plaintiffs demonstrate that a prima facie case exists, the burden shifts to the state to show a rational state policy justifies the malapportionment.¹⁸ At this point, the Court's analysis appears to be consistent with the traditional level of scrutiny. However, the Court further requires the state to show no alternative plans exist which would achieve the state's purported interest while preserving statistical equality between districts.¹⁹ Although flexibility exists, the Court has indicated that even a rational state policy cannot justify population deviations between districts beyond a certain limit.²⁰ It is difficult to categorize the Court's analysis but it is safe to say the Court has at least adopted a heightened level of scrutiny when reviewing reapportionment plans.

Several mathematical tests have been used to determine whether an apportionment meets the one person, one vote, test.²¹ The Court seemingly places the most emphasis on the reapportionment plan's maximum

11. See NOWAK, ROTUNDA & YOUNG, *Constitutional Law*, Ch. 16, § IX (2d ed., 1983).

12. See *Colgrove v. Green*, 328 U.S. 549 (1946).

13. *Baker v. Carr*, 369 U.S. 186 (1962).

14. 377 U.S. 533 (1964).

15. For an overview of basic constitutional principles in state reapportionment plans, see Walker, *One Man-One Vote: In Pursuit of an Elusive Ideal*, 3 HASTINGS CONST. L.Q. 453, 461-466 (1976).

16. 377 U.S. at 560-61.

17. *Id.* at 562.

18. *Id.* at 579. See *infra* text accompanying notes 74-105.

19. *Kilgarlin v. Hill*, 386 U.S. 120, 123-124 (1967), *reh'g denied*, 386 U.S. 999 (1967).

20. The court found the 16.4 percent maximum deviation contained in a Virginia reapportionment plan may well approach tolerable limits. See *Mahan v. Howell*, 410 U.S. 315, 329 (1972).

21. The Court predominantly relies on three statistical indicators: maximum deviation, average deviation, and voting ratio. See *infra* note 25. The following chart will be used to explain these three statistical indicators.

deviation.²² The 1980 census placed Wyoming's population at 469,557.²³ The 1981 House reapportionment plan provided for sixty-four representatives, so the ideal apportionment would be 7,337 persons per representative.²⁴ Maximum deviation is the amount the most over-represented county and the most under-represented county deviate from the ideal apportionment. Average deviation is the average amount that all the counties deviate from the ideal apportionment. Voting ratio is the ratio of the most under-represented county's population per representative to the most over-represented county's population per representative.

County	Population	# of Reprs.	Persons Represented	Relative Deviation
Natrona	71,856	9	7,984	1.09
Niobrara	2,924	1	2,924	0.40
Washakie	9,496	1	9,496	1.29

"Persons Represented" is calculated by dividing the county population by its number of representatives. Since Niobrara County and Washakie County only have one representative, the persons represented will be identical to their respective population.

"Ideal Apportionment" is determined by dividing the total population by the number of representatives. The 1981 Wyoming house ideal apportionment would be 7,337 because Wyoming's population is 469,557 and the house plan contained 64 representatives.

"Relative Deviation" is calculated by dividing the persons represented by the ideal apportionment.

$$\frac{7,984}{7,337} = 1.09 \text{ (relative deviation for Natrona County)}$$

A value of less than 1.00 indicates under-representation. A value of more than 1.00 indicates over-representation.

"Maximum Deviation" is the sum of the relative deviation values of the most over-represented county, Niobrara, and the most under-represented county, Washakie. In this case the maximum deviation is 89 percent. These are the same numbers used to calculate the statistics for the 1981 Wyoming House of Representatives Reapportionment Plan.

Niobrara County deviates from the ideal apportionment by	.60
Washakie County deviates from the ideal apportionment by	.29
The sum is	.89

"Average Deviation" is the sum of the relative deviations divided by the number of counties. The average deviation for the counties included in the chart shown above would be calculated as follows:

	Relative Deviation	
Natrona	1.09	
Niobrara	0.40	2.78 + 3 = .92 or 92%
Washakie	1.29	
	2.78	

"Voting Ratio" is the ratio of the largest population-per-seat from the most under-represented county to the smallest population-per-seat from the most over-represented county. The voting ratio for the 1981 Wyoming House Reapportionment Plan would be calculated as follows:

Washakie	9,496	=	$\frac{3.25}{1}$	or 3.25
Niobrara	2,924		1	

For an explanation of the various numerical tools used by the U.S. Supreme Court see, Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607, 636-637 (1980).

22. For example, the Court determines de minimis deviations by an examination of a reapportionment plan's maximum deviations. See 103 S.Ct. at 2696.
23. Bureau of the Census, U.S. Dep't. of Commerce, *Characteristics of the Population, Number of Inhabitants, Wyoming, 1980*, p. 14 (PC80-1-A52).
24. This number is derived by dividing Wyoming's 1980 population, 469,557, by the number of representatives, 64.

The Court has relied on these mathematical tests to determine the constitutionality of reapportionment plans.²⁶ In *Reynolds*, the court examined reapportionment plans by using simplistic tools for population analysis and stressed that mathematical precision was unnecessary.²⁶ The Court's hesitation in *Reynolds* may have been due to its relative inexperience in scrutinizing reapportionment plans. In recent cases, the Court has relied more heavily on mathematical precision and has allowed much less flexibility.²⁷ It would appear that the Court has more confidence in examining reapportionment plans with statistical population analysis since the development of the maximum deviation, average deviation, and voting ratio tests.

BACKGROUND

The 1980 decennial census indicated Wyoming's population had grown by 24 percent.²⁸ Only one of Wyoming's twenty-three counties, Niobrara, experienced no population growth. The population of Niobrara County remained stable at 2,924 during the ten-year period from 1970 to 1980.²⁹

The Wyoming Legislature's initial 1981 reapportionment statute provided for sixty-four representatives and is referred to as the "64 Plan." Niobrara county's population of 2,924 is less than half of the ideal district of 7,337. The Wyoming legislature awarded Niobrara County a representative even though the general statutory formula would have dictated that its population, for purposes of representation, be rounded down to zero.³⁰ The legislature declared its intent in giving Niobrara its own representative as follows: "The legislature finds that the opportunity for oppression of the people in this state or any of them is greater if any county is deprived a representative in the state legislature than if each is guaranteed at least one representative."³¹ The 64 Plan has a maximum deviation of 89 percent and a voting ratio of 3.25.³²

The legislature provided an alternative reapportionment plan in the event of a successful constitutional attack on the 64 Plan. Following the Court's nullification of the 64 Plan, the Wyoming House of Representatives would have sixty-three members, with two members to be shared between Niobrara County and Goshen County.³³ The 63 Plan had a maximum deviation of sixty-six and a voting ratio of 2.09.³⁴

Seven members of the Wyoming League of Women Voters, as residents of seven under-represented counties, filed suit contending their

25. See *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *Chapman v. Meier*, 420 U.S. 1 (1975).

26. 377 U.S. at 579.

27. *Connor v. Finch*, 431 U.S. 407 (1977).

28. Bureau of the Census, *supra* note 23, at 14.

29. *Id.*

30. WYO. STAT. § 28-2-109(a) (iii) (Supp. 1983).

31. 1981 WYO. SESS. LAWS Ch. 76., § 3.

32. Joint Appendix Exhibits, Volume One, at 20. *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

33. WYO. STAT. § 28-2-109(a) (iv) (Supp. 1983) provides: If the provisions of paragraph (a)(iii) of this section are found to be unconstitutional or have an unconstitutional result, then Niobrara County shall be joined to Goshen County in a single representative district

34. Joint Appendix Exhibits, Volume One, *supra* note 32, at 22.

vote had been impermissibly diluted by the legislature's 64 Plan. As a result of a League of Women Voters referendum, the plaintiffs did not attack the reapportionment plan as a whole, but instead limited their prayer to request that the court institute the 63 Plan rather than the 64 Plan.³⁵ The complaint requested that the court permanently enjoin the State of Wyoming from reapportioning the Wyoming legislature for the purposes of granting a seat in the House of Representatives to Niobrara County.³⁶ The League of Women Voters contended that the 64 Plan was unconstitutional because the legislature gave Niobrara County a representative solely because it is a political subdivision and without regard to population.³⁷

A three-judge panel convened in the federal district court and unanimously rejected the League of Women Voters' arguments. The court upheld the allocation of a representative to Niobrara County in the 64 Plan because the difference between the two plans was statistically insignificant.³⁸ The League's proposed plan did not significantly alter the population deviations found in the legislature's 1981 reapportionment plan and, therefore, the court did not feel compelled to invalidate the legislature's plan.³⁹ In its opinion, the court emphasized the importance of county political boundaries in Wyoming, concluding that without separate representation the people of Niobrara County would be virtually unprotected.⁴⁰

THE CASE

The League of Women Voters appealed the district court's decision to the United States Supreme Court. The League cited three equal protection clause violations. First, the League argued the 64 Plan was unconstitutional because it gave a county a representative without regard to population, solely because it was a political subdivision.⁴¹ Second, the League maintained there were no overriding state policies justifying violation of the equal protection clause.⁴² Finally, the League argued there was an improper dilution of the voting privileges of appellants and other citizens and electors of Wyoming because the 64 Plan had a maximum deviation of eighty-nine percent.⁴³

The League belatedly recognized the problem with limiting their objections to the one representative from Niobrara County. Therefore, the League suggested the Court could examine the entire plan and find both

35. Counsel for the state League of Women voters explained at oral argument that "a referendum had been passed by the League of Women Voters which authorized the attack of only that one portion of the reapportionment plan. It was felt by the membership or by the leadership of that group that no broader authority would ever be given because of the political ramifications and arguments that would be presented by the membership in attacking or considering . . . that broader authority." 103 S.Ct. at 2698 n.8.

36. Complaint, *supra* note 5, ¶ 7.

37. *Id.*

38. *Brown v. Thomson*, 536 F. Supp. 780, 784 (D. Wyo. 1982).

39. *Id.*

40. *Id.*

41. Brief for Appellant at 12, *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

42. *Id.*

43. *Id.*

the 64 Plan and the 63 Plan violated the equal protection clause.⁴⁴ The Supreme Court had previously gone beyond the request of the prayer for relief to strike down an entire reapportionment plan in *Maryland Committee v. Tawes*.⁴⁵ In *Tawes*, the Court considered the constitutionality of the apportionment of the Maryland House of Delegates even though the lower courts had not considered the issue.⁴⁶

Wyoming presented three arguments in support of the legislature's reapportionment. First, the state contended there was no significant difference between the 64 Plan and the 63 Plan because it took approximately the same number of people to elect a majority of representatives under either plan.⁴⁷ Second, the state maintained the seven plaintiffs did not show the state purposely discriminated against them.⁴⁸ Finally, the state argued Wyoming had traditionally used counties as the basic unit of local government and giving Niobrara County its one representative enhanced this rational state policy.⁴⁹

The state argued the Supreme Court was not required to review an entire plan⁵⁰ and in the past had avoided doing so.⁵¹ In *Gaffney v. Cummings*, the Court considered only the constitutionality of the composition of one house of the Connecticut Legislature because no challenge had been made to the composition of the other house. Similarly, Wyoming argued that review of both reapportionment plans would be improper; it would force the state to confront new issues for the first time on appeal⁵² and the Court would be without specific findings on the record.⁵³

The Supreme Court affirmed the district court's judgment in a five to four decision.⁵⁴ Justice Powell's majority opinion focused on the reapportionment plan's allocation of a representative to Niobrara County and the statistical difference between the 64 Plan and the 63 Plan:

The issue, therefore, is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment

44. *Id.* at 14.

45. 377 U.S. 656 (1964).

46. *Id.* at 673.

47. Brief for Appellee at 16, *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

48. *Id.* at 12. The United States Supreme Court has only required plaintiffs to demonstrate purposeful discrimination when plaintiffs claim their constitutional rights have been violated as members of a suspect class. In state reapportionment cases the Court has determined that constitutionally impermissible maximum deviations are sufficient to invalidate a plan because the plaintiff's fundamental right to vote has been diluted. *See* 377 U.S. at 562. The Court did not bother discussing this particular state argument because the Wyoming reapportionment plan only infringed on plaintiff's fundamental right to vote and did not place plaintiffs in a suspect class. However, the Court has required plaintiffs to demonstrate purposeful discrimination in cases involving political gerrymandering and racial vote dilution. For a discussion of political gerrymandering, see *An Answer to "The Other Half of Reynolds v. Sims."* 14 GA. L. REV. 813 (1980). For a discussion of racial vote dilution, see *At Large Electoral Schemes and Vote Dilution*, 94 HARV. L. REV. 138 (1981).

49. *Id.* at 26-30.

50. *Id.* at 9 n.1.

51. 412 U.S. 735 (1973).

52. *Id.*

53. Brief for Appellee, *supra* note 47, at 10.

54. 103 S.Ct. at 2699.

plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.⁵⁵

The majority refused to expand the scope of the lawsuit. "In this case, we can see no reason why appellants should not be bound by the choices they made when filing this lawsuit."⁵⁶ This limited the scope of the Court's examination to the difference between the two plans.⁵⁷ The Court noted that the voters residing in the seven counties in which the plaintiffs reside will elect twenty-eight representatives under either plan. The difference is whether these voters elect twenty-eight out of sixty-four members of the legislature (43.75 percent) or twenty-eight out of sixty-three members of the legislature (44.44 percent).⁵⁸ The Court characterized this difference as "de minimis." "It scarcely can be denied that in terms of the actual effect on appellants' voting power, it matters little whether the 63-member or 64-member House is used."⁵⁹ Justice Powell stressed the insignificant difference between the two plans by demonstrating the considerable maximum deviations contained in both plans. The grant of a representative to Niobrara County did not account for the significant maximum deviations in the 64 Plan⁶⁰ and, therefore, adopting the 63 Plan would do little to alter the degree of unconstitutionality because both plans have large maximum deviations.

The Court discussed at length the significance of county boundaries in Wyoming and concluded: "In short, this case presents an unusually strong example of an apportionment plan, the population variations of which are entirely the result of the consistent non-discriminatory application of a legitimate state policy."⁶¹ The Court determined the difference in population deviations between the two plans was justified on the basis of Wyoming's policy of preserving county boundaries.⁶² However, the majority did not approve the state's argument that Wyoming's interest in county boundaries justified the population deviations as a general condition of apportionment.⁶³ By limiting the scope of their examination, the Court avoided this issue.

55. *Id.* at 2698.

56. *Id.* at n.9.

57. However, the majority indicated the result might have been different with a broad constitutional attack. "The ultimate inquiry, therefore, is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'" 103 S.Ct. at 2696 (citing *Mahan v. Howell*, 410 U.S. 315, 328). The Court has never permitted a rational state policy to justify maximum deviations over 20 percent in the past. Therefore, the Wyoming reapportionment plan's 89 percent deviation should satisfy the majority's standard for invalidating a reapportionment plan.

58. *Id.* at 2698.

59. *Id.*

60. *Id.*

61. *Id.* at 2697.

62. *Id.* at 2698.

63. *Id.*

Justice O'Connor, in a concurring opinion joined by Justice Stevens,⁶⁴ stated that her motive for the separate opinion was to clear up the possible confusion over her vote to strike down a New Jersey congressional reapportionment plan with a maximum deviation of .6984 percent⁶⁵ while on the same day upholding Wyoming's reapportionment plan with its eighty-nine percent maximum deviation. Her concurring opinion emphasized the narrow scope of the majority opinion by noting the Court had dealt only with the difference between the 64 Plan and the 63 Plan:

In this regard, I would emphasize a point acknowledged by the majority. Although the maximum deviation figure is not the controlling element in an apportionment challenge, even the consistent and non-discriminatory application of a legitimate state policy cannot justify substantial population deviations throughout the State where the effect would be to eviscerate the one-person, one-vote principle.⁶⁶

Justice O'Connor indicated her doubt that a reapportionment plan with an eighty-nine percent maximum deviation could survive constitutional scrutiny despite Wyoming's strong interest in preserving county boundaries.⁶⁷

Justice Brennan's dissenting opinion stressed the extraordinarily narrow scope of the majority opinion and how empty of likely precedential value it was.⁶⁸ Brennan advised future plaintiffs not to be "so unwise as to limit their challenge to the scheme's single most objectionable feature."⁶⁹ The dissent would have accepted the League's invitation to examine the plan as a whole⁷⁰ and found the eighty-nine percent maximum deviation sufficient grounds to determine that the plan was unconstitutional.⁷¹ Brennan noted that the 64 plan represents an absolute disregard of the population equality principle because Niobrara County is allocated a seat on a basis wholly unrelated to population.⁷² Furthermore, Brennan related the majority's reasoning in ignoring the Plan's eighty-nine percent deviation and concentrating only on the difference between the 64 Plan and the 63 Plan. The minority castigated the majority for adopting a rule whereby a single instance of gross inequality is unconstitutional if it occurs in a plan otherwise letter-perfect, but constitutional if it occurs in a plan that flagrantly violates the constitution.⁷³

THE WYOMING REAPPORTIONMENT PLAN'S VULNERABILITY TO FUTURE ATTACK

The United States Supreme Court did not decide *Brown v. Thomson* on the merits of Wyoming's reapportionment plan. The question thus remains

64. *Id.* at 2699 (O'Connor, J., concurring).

65. *See* *Karcher v. Daggett*, _____ U.S. _____, 103 S.Ct. 2653 (1983).

66. 103 S.Ct. at 2699-2700 (O'Connor, J., concurring).

67. *Id.* at 2700.

68. *Id.* (Brennan, J., dissenting).

69. *Id.*

70. *Id.* at 2704.

71. *Id.* at 2701.

72. *Id.* at 2702.

73. *Id.* at 2705.

whether or not the 1981 reapportionment plan could withstand a broad constitutional attack. Precedent which has evolved since *Baker v. Carr*⁷⁴ strongly indicates the Court would not accept Wyoming's interest in preserving county boundaries as justification for the eighty-nine percent maximum deviation figure contained in the plan.

Justice Brennan's minority opinion in *Brown v. Thomson* discussed the relevant case law for a broad constitutional attack whereas the majority opinion focused on the narrow issue which it finds controlling. Brennan outlined a four-part test to determine the constitutionality of reapportionment plans.⁷⁵ The test draws together holdings from previous Supreme Court cases into a cohesive framework.⁷⁶ First, the plaintiffs must show a maximum deviation that exceeds the threshold amount of ten percent to make out a prima facie case of discrimination. At this point the burden shifts to the state to demonstrate the maximum deviation resulted from a rational state policy. The state must then show any deviations are not greater than those absolutely necessary to serve the state's asserted policy. Finally, the Court must determine whether the deviations exceed constitutionally tolerable limits regardless of the state's interest.

Prima Facie Case

In *Connor v. Finch*,⁷⁷ the Supreme Court held that a prima facie equal protection violation under the fourteenth amendment occurs when the maximum deviation is greater than 9.9 percent.⁷⁸ Future plaintiffs challenging the Wyoming reapportionment plan could easily establish a prima facie case by demonstrating the plan's eighty-nine percent maximum deviation.⁷⁹ In fact, the sixteen percent average deviation⁸⁰ contained in the 1981 reapportionment plan considerably exceeded the necessary maximum deviation needed for a prima facie case.

Rational State Policy

Upon establishing a prima facie case, the burden will shift to the State of Wyoming to prove adhering to county boundaries is a rational state policy. History, tradition and efficiency all indicate that the state has a rational basis for preserving county boundaries. In Wyoming, counties serve as the primary administrative agencies of the state because few public services are provided directly by the state. The counties work closely with the state to provide such necessary services as maintenance of roads and bridges, adequate hospital facilities, prosecution of state offenses, administration of zoning regulations, and maintenance of solid waste disposal sites.⁸¹

74. 369 U.S. 186 (1962).

75. 103 S.Ct. at 2701 (Brennan, J., dissenting).

76. This is the first time a four-part test has been discussed by the Court in reapportionment cases. The general rules have been applied in the past. See TRIBE, AMERICAN CONSTITUTIONAL LAW, Ch. 13, §§ 2-7 (1978).

77. 431 U.S. 407 (1977).

78. *Id.* at 418.

79. See *Swan v. Adams*, 385 U.S. 440, 444 (1967).

80. See Bickerstaff, *supra* note 21, at 637.

81. Brief for Appellee, *supra* note 47, at 26-27.

A good example of a court permitting minor deviations for a rational state policy, in this case preserving county boundaries, can be found in the litigation surrounding the 1963 Wyoming Reapportionment Act. In 1963, the Wyoming legislature approved a senate reapportionment plan based on the 1960 decennial census. The legislature allocated one senator to each county with the two most densely populated counties receiving two senators.⁸² The four most heavily populated counties accounted for nearly 50 percent of Wyoming's total population but received only six senators out of a twenty-five seat senate.⁸³ The maximum deviation between the largest and smallest number of residents per representative was 205 percent.⁸⁴ This plan gave an individual living in the most over-represented county 9.82 votes compared to one vote for an individual living in the most under-represented county.⁸⁵

The 1963 house reapportionment plan was somewhat more closely linked to population, although the house apportionment still had a ninety percent maximum deviation.⁸⁶ An individual living in the most over-represented county had 2.59 votes to every one vote per person living in the most under-represented county.⁸⁷

In 1964, a three-judge panel in the United States District Court for the District of Wyoming struck down the legislature's 1963 apportionment plan as it pertained to the state senate because it violated the equal protection clause of the 14th amendment to the Constitution of the United States.⁸⁸ However, the court upheld the apportionment plan insofar as it concerned the House of Representatives: "The court is satisfied that this divergence from a strict population standard is the result of an honest attempt, based on legitimate considerations, to effectuate a rational and practical policy for the house of representatives under conditions as they exist in Wyoming."⁸⁹

Minimum Deviation Necessary

In addition to showing the deviations result from a rational state policy, the state would have to demonstrate that the deviations are no larger than the minimum necessary to implement that policy. In *Kilgaren v. Hill*,⁹⁰ the United States Supreme Court invalidated a disputed reapportionment plan because alternative plans existed with substantially smaller deviations. The only way to preserve representation by county and have a reapportionment plan based on population would be to significantly increase the size of the House of Representatives and the Senate. The burdensome cost involved may prevent this from being considered a viable option.⁹¹

82. 1963 WYO. SESS. LAWS Ch. 22.

83. *Id.*

84. Joint Appendix Exhibits, Volume One, *supra* note 32, at 8.

85. *Id.*

86. *Id.* at 16.

87. *Id.*

88. *Schaefer v. Thomson*, 240 F. Supp. 247, 253 (D. Wyo. 1964).

89. *Id.* at 251.

90. 386 U.S. 120 (1967).

91. See *infra* text accompanying notes 106-115.

Constitutionally Tolerable Limits

Although states are allowed marginal flexibility for rational state policies, such as maintaining county lines, courts have indicated upward limits exist. To determine the nature of these limitations for a future case, it is useful to examine several cases in which the Supreme Court has explained the constitutionally tolerable limits it has set.

*Reynolds v. Sims*⁹² involved the creation of a thirty-five member state senate in Alabama with population variations between 15,417 and 634,864 per district.⁹³ The reapportionment scheme satisfied Alabama's Constitution but the United States Supreme Court struck it down because it violated the one man, one vote principle incorporated into the equal protection clause of the 14th amendment to the United States Constitution.⁹⁴ The Court held that the state legislature could follow political subdivision lines in establishing legislative districts only if the resulting apportionment was based substantially on population and if the equal population principle was not diluted in any significant way.⁹⁵ The Court recognized the role of history, socio-economic factors, group interests, sparse population, and political subdivisions but maintained that these factors could not justify large deviations from the equal population principle.⁹⁶ No numerical limitations were established in the case, although the Court made it clear that reapportionment plans must be based substantially on population regardless of the state's policy considerations. The Court stated:

Permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in the house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal population principle in that legislative body.⁹⁷

In *Mahan v. Howell*,⁹⁸ the Virginia legislature apportioned itself following the political subdivision lines of counties and cities with only one exception.⁹⁹ The Court reaffirmed its position that population considerations must be foremost in the minds of legislators when reapportioning. However, in upholding the plan the court noted Virginia's 16.4 percent maximum deviation may well approach the tolerable limits within which a

92. 377 U.S. 533 (1964).

93. *Id.* at 545-46.

94. The court stated, "[b]ut it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a non-compliance with state constitutional requirements. When there is an unavoidable conflict between the federal and a State Constitution, the Supremacy Clause of course controls." *Id.* at 584.

95. *Id.* at 578.

96. *Id.*

97. *Id.* at 581.

98. 410 U.S. 315 (1973). See also Hyland, *Mahan v. Howell—Forward or Backward For The One Man - One Vote Rule*, 22 DE PAUL L. REV. 912 (1973).

99. VA. CODE § 24.1-12.1 (Supp. 1972).

state may follow its rational policy in violation of absolute population equality.¹⁰⁰ Population equality must always be the foremost goal of any legislative reapportionment plan, as the Court said: "a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality."¹⁰¹

In *Connor v. Finch*,¹⁰² a higher level of scrutiny was used to examine a 1977 case challenging the court ordered Mississippi reapportionment plan than would have been used if the plan had legislative origins. The Court said:

The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as de minimis; they substantially exceed the "under-10%" deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.¹⁰³

This case reaffirmed the Supreme Court's basic requirement of population based reapportionment plans while setting forth limitations on a state's maneuverability. Although the Court in *Connor* stressed mathematical precision more than it had in the past, the prevailing theme remained the same: "Recognition that a state may properly seek to protect the integrity of political subdivisions or historical boundary lines permits no more than 'minor deviations' from the basic requirement that legislative districts must be 'as nearly of equal population as is practicable.'"¹⁰⁴

ALTERNATIVE PLANS

It is apparent from the concurring and minority opinions that a majority of the United States Supreme Court Justices would vote to invalidate Wyoming's 1981 reapportionment plan following a broad constitutional attack.¹⁰⁶ The legislature should recognize the inevitable doom of a reapportionment plan containing an eighty-nine percent maximum deviation.¹⁰⁶

100. 410 U.S. at 329.

101. *Id.* at 326.

102. 431 U.S. 407 (1977).

103. *Id.* at 418.

104. *Id.* at 419.

105. See *supra* note 57.

106. It is interesting to compare how far the Wyoming legislature has wandered from the generally accepted reapportionment guidelines.

State Legislative Reapportionment: Completed Plans
(as of 12/1/81)

State	Date Completed	Maximum Deviation	
		House %	Senate %
Alabama	10/26/81	9.8	8.5
Alaska	7/24/81	9.99	9.77
Arkansas	6/26/81	9.15	9.15
California	9/16/81	3.6	4.6
Connecticut	7/31/81	8.35	3.92
Delaware	7/24/81		
Georgia	9/10/81	9.92	9.96

The opportunity is ripe for constructive change. There are at least three alternatives that the legislature should consider when deciding on a future reapportionment plan. First, the size of the legislature could be increased. Second, legislative voting districts could be formed combining a few counties while basically leaving county boundaries the same. Third, the entire state could be subdistricted strictly on a population basis.

I. Increasing the Size of the Legislature

Increasing the number of senators and representatives in the legislature would be the only available alternative consistent with the reapportionment mandates of the Wyoming Constitution, assuming county boundaries remain the same.¹⁰⁷ The Wyoming Constitution established a bicameral legislature and provided the following guidelines for apportionment:

Each county shall constitute a senatorial and representative district; the senate and the house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate. The senate and house of representatives first elected in pursuance of this constitution shall consist of 16 and 33 members respectively.¹⁰⁸

State	Date Completed	Maximum Deviation	
		House %	Senate %
Hawaii	9/28/81	16.02	43.18
Illinois	10/2/81	1.97	1.59
Indiana	5/5/81	19.93	4.04
Iowa	8/20/81	1.78	0.71
Kansas	3/21/79	9.9	6.5
Louisiana	11/19/81	9.7	8.4
Missouri	11/16/81	9.3	6.1
Nebraska	5/29/81	Unicameral	9.7
Nevada	6/4/81	9.7	8.2
New Jersey	4/13/81	7.7	7.7
North Carolina	10/30/81	15.61	22.68
North Dakota	11/20/81	9.93	9.93
Ohio	10/1/81	9.67	8.88
Oklahoma	6/25/81	10.98	5.6
Oregon	9/30/81	5.34	3.73
Pennsylvania	10/13/81	2.82	1.93
South Dakota	3/20/81	12.4	12.5
Tennessee	8/10/81	1.66	3.14
Texas	10/28/81	9.95	1.82
Utah	11/10/81	7.80	5.41
Washington	5/18/81	5.7	5.4
Wyoming	3/3/81	89.4	63.7

See Wollock, *Reapportionment Now*, STATE LEGISLATURES 10 (Jan. 1982).

107. In all fairness to the drafters of the Wyoming Constitution, in 1890 Wyoming only had five counties. Each county extended from the southern state line up to the northern state line in a rectangular form. It was not until 1922 that Wyoming had the 23 counties it now has. It is hard to imagine that the drafters of the constitution envisioned the county system that developed 32 years later. Any argument relying on the Wyoming Constitution's treatment of counties must be seriously questioned because of the changes in county boundaries since the constitution was written.

108. Wyo. CONST. art. 3, § 3.

Three guidelines in this section of the constitution conflict with the equal protection mandates of the United States Supreme Court.¹⁰⁹ Wyoming's uneven population distribution makes it virtually impossible to apportion the House and the Senate by county boundaries and still maintain the current balance between both parts of the legislature. For example, 71,856 people live in Natrona County while only 2,924 people live in Niobrara County.¹¹⁰ Equalization between these two extremes would mandate Natrona County be given twenty-five seats to one seat for Niobrara County in order that both counties and their populations be constitutionally represented.

Following this alternative would require increasing the membership of the legislature two to three times its present size.¹¹¹ This increase would have a significant effect on both the efficiency of the legislature and the cost of its operation. Wyoming's legislature is only in session sixty days every two years.¹¹² Assuming the amount of legislation increased in direct proportion to the number of legislators, the resulting workload would increase by two to three times its present volume. In addition, floor debates, committee work and caucuses would all be more time consuming.

The cost of increasing the physical size of the legislature would be prohibitive. Both houses of the legislature would require new chambers or at least significant expansion of the Capitol.¹¹³ The Legislative Service Office staff would have to be increased and new offices would have to be built to accommodate them. Salaries for the additional legislators and staff would also add on to the cost.¹¹⁴ Although increasing the size of the legislature would be the natural extension of Wyoming's constitutional mandates, the efficiency and cost factors make it an unattractive alternative.

II. Multi-districting

In multi-districting, two or three counties are combined to form a large district with several representatives. The district legislators represent the entire district rather than just one county. Counties are combined primarily on the basis of population so that a county with below average population per representative would be combined with a county with above average population per representative. Geographic area should also be taken into account.¹¹⁵ It is possible to devise a plan to meet the equal representation ideals of the United States Supreme Court while combining only contiguous counties. For example:

109. The Supreme Court has held that the supremacy clause controls when there is a conflict between the federal and state constitution. See *supra* note 94.

110. Bureau of the Censes, *supra* note 23, at 14.

111. Rounding Niobrara County's 1980 population from 2,924 to 3,000 and Wyoming's 1980 population from 469,557 to 469,000 would require 153 representatives, for the smallest county and the other 22 counties to be constitutionally represented.

112. WYO. STAT. § 28-1-102(a) (1977) describes the 40-day regular session every even numbered year. WYO. STAT. § 28-1-102(b) (1977) describes the 20-day budget session every odd numbered year.

113. Physical changes to the capital building were recently made to accommodate 64 members in the House of Representatives.

114. The legislature appropriated \$3,086,387 to pay the costs and expenses of the 46th legislature. 1981 WYO. SESS. LAWS Ch. 1., § 1.

115. Non-contiguous counties could be used but problems would arise because of the large distances between them.

Proposed Wyoming Multi-Districting Plan¹¹⁶

County	Population	# of Reps	Persons Represented	Relative Deviation ¹¹⁷
Crook/Campbell	29,675	4	7,419	1.03
Park/Big Horn/Sheridan	58,583	8	7,323	1.01
Fremont/Sublette	43,540	6	7,257	1.00
Natrona/Converse	85,925	12	7,160	.99
Goshen/Niobrara/Weston	22,070	3	7,357	1.02
Laramie/Platte	80,624	11	7,329	1.01
Lincoln/Teton	21,532	3	7,177	.99
Johnson/Hot Springs/ Washakie	21,906	3	7,302	1.01
Carbon/Sweetwater/Uinta	76,640	11	6,967	.96
Albany	<u>29,062</u>	<u>4</u>	<u>7,266</u>	1.00
	469,557	65	7,223 avg.	

In the past the legislature has always established voting districts based on county boundaries.¹¹⁸ The legislature has shown its willingness to adopt multi-districting if forced to meet the equal representation mandates of the United States Supreme Court.¹¹⁹ The legislature's rationale is that counties serve as the basic unit of government and are responsible for several administrative functions.¹²⁰ The United States District Court for the District of Wyoming and the United States Supreme Court have also recognized the importance of counties in Wyoming's scheme of government.¹²¹ In adopting multi-districting, the legislature would continue to recognize counties as the basic unit of government.

Multi-districting poses a problem however, because combining two or three counties can encompass a large area. Candidates would have to travel several hundred miles. The costs involved in campaigning might preclude certain individuals from running for office. The problems associated with campaigning in a large district would limit the information available to the public. Furthermore, the accessibility of individual legislators would decrease.

In examining the disadvantages of multi-districting, the concepts of county-based representation must be questioned.¹²² Urban and rural

116. It is not the intention of this article to propose a definitive reapportionment plan for the Wyoming legislature but rather to demonstrate some of the available alternatives.

117. The maximum deviation is the sum of the relative deviation values of the most under-represented counties, Crook/Campbell 1.03, and the most over-represented counties Carbon/Sweetwater/Uinta .96. Therefore, the maximum deviation is 7 percent.

118. 1981 WYO. SESS. LAWS Ch. 76. 1971 WYO. SESS. LAWS Ch. 161. 1963 WYO. SESS. LAWS Ch. 22.

119. Following the Court's invalidation of Wyoming's 1963 senate reapportionment plan the legislature combined counties to form senate districts. If the 1981 house "64 plan" had been declared unconstitutional then the legislature would have multi-districted by combining Niobrara County with Goshen County. 1981 WYO. SESS. LAWS Ch. 76.

120. 1981 WYO. SESS. LAWS Ch. 76., § 3. See also Brief for Appellee, *supra* note 47, at 26.

121. Most recently this occurred in the *Brown* case. *Brown v. Thomson*, 536 F. Supp. 780, 784 (D. Wyo. 1982). *Brown v. Thomson*, _____ U.S. _____, 103 S. Ct. 2690, 2696 (1983).

122. There are several exceptions to the state's argument that counties serve as the state's basic unit of local government. See WYO. STAT. § 21-18-202(a) (ii) (1977) for definition of community college district. See also WYO. STAT. § 41-10-102 (1977 & Supp. 1983) for definition of water and sewer district.

interests are combined with the result that rural interests are overshadowed because of the political influence of the cities.¹²³ Multi-districting compounds this problem by enlarging the voting districts so that a greater number of dissimilar interests (e.g., agriculture, energy, and tourism) are combined. The result of decreasing accessibility and the combining of dissimilar interests is less accountability of the legislator to the district's constituents.

III. Subdistricting

In subdistricting, the state is divided into voting districts based entirely on population. The 1980 population of Wyoming was 469,557.¹²⁴ Assuming the House of Representatives consisted of sixty-five members, each district would contain a population of 7,223.¹²⁵ The practical result of subdistricting would be to have sparsely populated segments of four or five counties form one district.

Subdistricting would assure equal representation throughout the state. In theory, having voting districts contain 7,223 people would result in absolute equality. In practice this could not be done, but the state could very nearly achieve a one person, one vote reapportionment plan. By adopting subdistricting, the legislature would eliminate the arbitrary distinctions it has developed between voters in different counties of the state.

Ideally, subdistricting would assure that districts would consist of individuals with similar interests. Even though a rural district might encompass parts of several counties, the inhabitants of that district would have more in common than they have under the present county representative system.¹²⁶ The rural areas would be assured of one or two representatives that would otherwise be elected from the county as a whole. This principle would also apply to sections of cities that have different interests from the rest of the county.

The major advantage of subdistricting would be the accessibility of the districts' representatives.¹²⁷ Under the present system, many of the

123. This is particularly true in Natrona County and Laramie County. Casper and the adjoining areas of Evansville and Mills account for 55,811 people out of Natrona County's total population of 71,856. Cheyenne and the adjoining areas of Fox Farm, Orchard Valley and Warren Air Force Base account for 57,087 of Laramie County's total population of 68,649. See Bureau of the Census, *supra* note 23, at 14.

124. Bureau of the Census, *supra* note 23, at 14.

125. 65 Representatives - 469,557 total population in Wyoming = 7,223 persons per representative. See Bureau of the Census, *supra* note 23, at 14.

126. Individuals are primarily concerned with economic and social interests and county boundaries do not necessarily reflect these interests. For example, an individual may use another county's hospital because it is closer and is, therefore, not necessarily concerned with the appropriation to the hospital in his own county.

127. Accessibility of a legislator is very important to the character of Wyoming government. In arguing for county-based government, the appellee-intervenor made this point clearly in their brief to the U.S. Supreme Court:

"Effective representation in Niobrara County, as in most of the counties in Wyoming, means that your state legislator is your neighbor and usually your friend; he or she drives the same isolated pot-hole filled roads; sends his or her children to the same public schools; attends the same weddings and funerals; sells and buys sheep and cattle at the same auction; screams at the referees at the same high school football games; shops at the same stores; curses the same snow storm in May; and generally speculates whether life really might be more agreeable in Arizona." Brief for Appellee - Intervenor at 20, *Brown v. Thomson*, _____ U.S. _____, 103 S.Ct. 2690 (1983).

legislators from Casper, Cheyenne and other large towns live in close proximity to one another. In fact, many areas of a county or city have no representative residing nearby while others have several. Subdistricting would assure each district a representative. Although these characteristics make subdistricting appealing, it is politically unattractive for incumbent legislators. Many of the legislators living in close proximity to one another would be competing against each other for that district's office while other districts within those counties would have no incumbents.

The major disadvantage of subdistricting is that it completely ignores county boundaries. This would appear to be particularly distasteful to the Wyoming legislature in light of the strong desire to maintain county boundaries expressed in the 1981 reapportionment plan.¹²⁸ Although counties have been and remain the primary administrative agencies of the state government, it is not clear that the administrative functions performed by counties would not be properly represented by the district representative simply because the district boundaries do not coincide with the county boundaries. It would seem logical that a legislator would represent the interests of his constituency for a hospital or solid waste disposal site without regard to county lines.

CONCLUSION

Wyoming's 1981 Reapportionment Act¹²⁹ could not survive a broad constitutional attack. The United States Supreme Court has given the Wyoming Legislature a reprieve to examine various alternatives and implement a reapportionment plan based on population equality. Increasing the size of the legislature is costly and has many disadvantages. The burdens of multi-districting far outweigh the benefits to be gained from continuing to recognize county boundaries. Subdistricting is less costly and more efficient than a plan based on increasing the size of the legislature and subdistricting offers many advantages that are not possible in a constitutional reapportionment plan based on county boundaries such as multi-districting. The legislature should welcome the opportunity to scrutinize the available options and develop a reapportionment plan that meets the guidelines set forth by the United States Supreme Court while substantially preserving Wyoming's interests.

KENNETH R. BUCK

128. 1981 WYO. SESS. LAWS Ch. 76., § 3.

129. 1981 WYO. SESS. LAWS Ch. 76.