

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-65

TITLE MARGARET R. BROWN, ET AL., Appellants v.
THYRA THOMSON, SECRETARY OF STATE OF WYOMING, ET AL

PLACE Washington, D. C.

DATE March 21, 1983

PAGES 1 thru 42



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARGARET R. BROWN, ET AL., :

4 Appellants :

5 v. : No. 82-65

6 THYRA THOMSON, SECRETARY OF STATE :

7 OF WYOMING, ET AL, :

8 - - - - -x

9 Washington, D.C.

10 Monday, March 21, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

15 SUELLEN L. DAVIDSON, ESQ., Cheyenne, Wyoming;

16 on behalf of the Appellant.

17 RANDALL T. COX, ESQ., Assistant Attorney General of
18 Wyoming, Cheyenne, Wyoming; on behalf of the Appellees.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

SUELLEN L. DAVIDSON, ESQ.

on behalf of the Appellant

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RANDALL T. COX, ESQ.

on behalf of the State of Wyoming

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SUELLEN L. DAVIDSON, ESQ.

on behalf of the Appellant -- rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Brown against Thomson, Secretary
4 of State of the State of Wyoming.

5 Ms. Davidson, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF SUELLEN L. DAVIDSON, ESQ.,
8 ON BEHALF OF THE APPELLANTS

9 MS. DAVIDSON: Mr. Chief Justice, may it
10 please the Court.

11 A simple straightforward issue is being
12 presented today for your review. The issue is whether a
13 county may constitutionally receive a representative to
14 its state house of representatives based merely upon its
15 status as a county and without regard to its population.

16 In addition to other legal considerations
17 which will be presented in argument, it is important
18 that the Court have the benefit of a brief factual
19 overview.

20 When faced with the decennial task of
21 reapportioning its legislative membership in 1981, the
22 Wyoming State Legislature determined that the population
23 of the state of Wyoming had grown by 3 -- pardon me --
24 137,141 persons, or in other words by 24 percent.

25 Each of the state's 23 counties had

1 experienced a population growth but one, Niobrara
2 County. Instead the population of that county had
3 stabilized during the ten year period, from 1970 to
4 1980, at 2,924 persons. As introduced in the house, the
5 1981 Reapportionment Act provided for a membership of 63
6 members in the house of representatives. A statutory
7 ratio formula based upon population considerations was
8 used to determine which counties would receive
9 representatives. Again --

10 QUESTION: Ms. Davidson, is this material
11 which you are speaking of now in the record somewhere,
12 or in the opinion of the District Court?

13 MS. DAVIDSON: Yes, Mr. Justice, most of this
14 material is in the record.

15 Based upon the statutory ratio formula each of
16 the state's 23 counties, again with the exception of
17 one, Niobrara County, would receive at least one
18 representative.

19 The 1981 Reapportionment Act then passed the
20 house of representatives providing that the house
21 membership would continue to be comprised of 63 members,
22 but Niobrara County would be combined with its
23 neighboring county of Goshen.

24 The senate, however, changed the 1981
25 Reapportionment Act and instead provided that the house

1 membership should be increased to 64. The additional
2 representative would be awarded to Niobrara County. The
3 Act then was committed to the conference committee where
4 it soon became very apparent that the committee would be
5 deadlocked and remain deadlocked unless a compromise was
6 effected. Such a compromise was struck.

7 The compromise was that Niobrara County would
8 receive the 64th member. But at the same time too, if
9 any court determined that the gratuitous grant of a
10 representative to Niobrara County was unconstitutional,
11 then Niobrara would be combined with Goshen County.
12 There must have been a strong realization in the Wyoming
13 State Legislature that there would be a strong
14 possibility, a probability, that the provision would be
15 struck.

16 In 1964, a three-judge panel, in the case of
17 Schaefer versus Thomson, had already determined that
18 Article 3, Section 3, of the Wyoming State Constitution
19 was not to be applied in future instances involving
20 apportionment of the Senate, for the article provided
21 that each county would constitute a senatorial
22 district. And each county would, therefore, receive a
23 senator.

24 QUESTION: Ms. Davidson, did you attack the
25 apportionment scheme as a whole, or just as it applied

1 to the one county?

2 MS. DAVIDSON: Mr. Justice, we attacked it
3 just as to the one county.

4 QUESTION: Why not the whole plan?

5 MS. DAVIDSON: Although there was an awareness
6 that the whole plan was probably unconstitutional, we
7 received a directive from our clients to attack only
8 that portion of the reapportionment act which gave
9 Niobrara County a representative, because it was a
10 feeling that any consideration other than population was
11 wrong and clearly an award had been made to this county
12 based upon its status as a political subdivision.

13 QUESTION: You don't think you've weakened
14 your case by this tactic?

15 MS. DAVIDSON: I think certainly we may have
16 done so in the district court level.

17 QUESTION: Did -- why are you so concerned
18 about the grant of a single representative to this one
19 county?

20 MS. DAVIDSON: I think, Mr. Justice, we go back to the
21 fact again that the grant was given purely because of
22 its status as a political subdivision. That people's
23 voting rights were diluted substantially in giving them
24 not only that particular sort of grant --

25 QUESTION: But you don't care about the rest

1 of the state?

2 MS. DAVIDSON: I can't say that. That is not
3 true. Of course, we care about the rest of the state,
4 and so, frankly, do our clients. But at that time --

5 QUESTION: May I ask you --

6 MS. DAVIDSON: Maybe if I can give you some
7 background that that would be instrumental.

8 QUESTION: Would you as part of that
9 background tell us who your clients are and what their
10 interest is in winning this lawsuit?

11 MS. DAVIDSON: Yes, I surely will.

12 There, of course, are seven named plaintiffs
13 or appellants in this case, each of whom represent one
14 of the most populous counties in the state of Wyoming.
15 In addition, these ladies represent the League of Women
16 Voters.

17 By a referendum which was passed by the League
18 of Women Voters at their state convention, it was
19 determined that the one grant, the one county grant to
20 Niobrara, would be attacked. It was also too a feeling
21 of that group that they would be unable to pass a
22 broader referendum so as to attack the whole
23 reapportionment plan.

24 QUESTION: In your state does the League -- is
25 it statewide in its organization?

1 MS. DAVIDSON: Yes, it is. Yes, it is. In
2 fact --

3 QUESTION: Now I come back to my question.
4 Why didn't you just attack the whole apportionment, the
5 whole state apportionment of the house?

6 MS. DAVIDSON: Hopefully, I had explained that
7 but if I may once again. What happened was a referendum
8 had been passed by the League of Women Voters which
9 authorized the attack of only that one portion of the
10 reapportionment plan. It was felt by the membership or
11 by the leadership of that group that no broader
12 authority would ever be given because of the political
13 ramifications and arguments that would be presented by
14 the membership in attacking or considering -- pardon me
15 -- that broader authority.

16 QUESTION: Your clients have to reach a sort
17 of a political compromise, I suppose, just the way the
18 legislature does.

19 MS. DAVIDSON: Yes, that is in fact true.

20 QUESTION: But that political compromise is
21 not binding on us, I hope?

22 MS. DAVIDSON: Pardon me?

23 QUESTION: That political compromise is not
24 binding on us, I hope?

25 MS. DAVIDSON: No, sir, it is not.

1 QUESTION: Why is it here at all?

2 MS. DAVIDSON: Pardon me, again?

3 QUESTION: If we decide, this will apply to
4 the other counties or just one county?

5 MS. DAVIDSON: I think, Mr. Justice, that your
6 authority goes as far as you want it to go, and
7 certainly my clients are not going to be unhappy if your
8 decision reaches beyond the consideration of this one
9 county.

10 QUESTION: But I'd be bound by the pleadings
11 in the case?

12 MS. DAVIDSON: I think not, Mr. Justice. And
13 I go back to two decisions. The initial decision of
14 Reynolds versus Sims, and also Swann versus Adams.
15 Particularly in the Swann case, there was a situation
16 where this Court looked at the apportionment of the
17 senate, although only one issue had been brought to the
18 Court for its attention, the reapportionment plan of the
19 house. And the Court in that case determined that it
20 would exceed the pleadings and it would address the
21 issue which involved the senate.

22 QUESTION: I just don't understand how the
23 League of Women Voters or any other private organization
24 can limit this Court.

25 MS. DAVIDSON: They cannot. I do not believe

1 that they can.

2 QUESTION: I should have said tried to.

3 MS. DAVIDSON: Yes, Your Honor.

4 One thing that is important for you to
5 understand is that all parties stipulated that the
6 overall relative range was 89 percent in the 64 plan and
7 that the ratio was 3.25 to one, while the 63 plan had an
8 overall relative range of 66 percent and a ratio of 2.09
9 to one.

10 The three-judge panel, of course, found that
11 the 64 plan, the vote dilution suffered by the
12 appellants below, was de minimis and even if it were or
13 were not, as the case may be, that there were rational
14 state policies which would justify the discrepancy.

15 QUESTION: Could I -- could I ask you, did you
16 attack the alternative --

17 MS. DAVIDSON: The 63 plan?

18 QUESTION: No. Did you say that the
19 conference committee or the bill says if this provision
20 for this county is stricken, then it would be combined
21 with another county?

22 MS. DAVIDSON: Yes, that is correct.

23 QUESTION: Did you attack that part of it?

24 MS. DAVIDSON: No, we did not, Mr. Justice.

25 QUESTION: Well what's the -- suppose that

1 this county is combined with the next county, or
2 whichever county it's to be combined with.

3 MS. DAVIDSON: Yes.

4 QUESTION: What then would be the maximum
5 deviation between the largest county and the smallest
6 county?

7 MS. DAVIDSON: The overall --

8 QUESTION: Or the -- the largest district and
9 the smallest district.

10 MS. DAVIDSON: Thank you.

11 The overall relative range would remain the
12 same under the 63 plan at 66 percent.

13 QUESTION: And that would be between what?

14 MS. DAVIDSON: That would be the difference
15 between the most over-represented county and the most
16 under-represented county, which would be Washakie as
17 being the most under-represented, and Sublette as being
18 the most over-represented county. In this instance,
19 Niobrara was combined with a contiguous county, Goshen
20 County.

21 The plaintiff's complaint was dismissed with
22 prejudice. Thereafter, of course, this appeal ensued.

23 Since the Court, in the 1964 case, Reynolds
24 versus Sims, held that both houses of a bicameral state
25 legislature must be apportioned on the basis of equal

1 population, the reapportionment law has been more
2 clearly defined in the 1973 cases of Gaffney versus
3 Cummings, White versus Regester, and Mahan versus Howell.

4 The first two cases stand for the proposition
5 that if the overall relative range of a reapportionment
6 plan exceeds 9.9 percent, then a prima facie violation
7 of the equal protection clause has been deemed to have
8 occurred. The 9.9 percent hurdle in this case is very
9 easy to jump. The overall relative range of the 64 plan
10 is 89 percent.

11 But Mahan versus Howell goes one step
12 further. Even if the overall relative range exceeds the
13 minimum 9.9 percent limitation, the state can save the
14 reapportionment plan by showing that there are
15 legitimate considerations incident to the effectuation
16 of a rational state policy.

17 Basically a two-prong test applies. First, is
18 the state's policy furthered by plan. And secondly, if
19 it is, are there deviations -- are the deviations within
20 acceptable limitations?

21 This Court has found that neither history,
22 topography, geography, sparseness of population,
23 vastness of area, economic considerations like tax
24 consequences or uniqueness, are factors which have been
25 found to be rational state policy.

1 In Mahan, though, the integrity of maintaining
2 political subdivisions was found to be a rational state
3 policy, yet the overall relative range did not exceed
4 16.4 percent. The state of Wyoming, in this case, hangs
5 its hat on the same sort of rational justification.
6 That is, that the maintenance of the integrity of
7 political subdivisions saves the 64 plan.

8 There are other factual incidences, though,
9 that differentiate this case from the Mahan case. The
10 first factor which is necessary to consider is that the
11 Virginia General Assembly had been authorized by
12 constitution not only to act general law, but to act
13 specific or local law in regard to the government,
14 organization and powers of cities, counties and towns.
15 That sort of authority is specifically prohibited by our
16 Wyoming state constitution. No such authority is given
17 to our Wyoming state legislature.

18 Lastly, the Virginia plan produced the most
19 minimal deviation possible while keeping the counties
20 intact. In Wyoming, in this case, there was no showing
21 that the state of Wyoming had made an honest good-faith
22 effort to produce the minimal deviations possible.

23 QUESTION: But there is -- I suppose it's
24 almost self-demonstrating that if Niobrara County is to
25 have one member of the legislature, the alternative --

1 an alternative plan that would both provide for a
2 minimal deviation and that, would give Wyoming a two or
3 three hundred member house of representatives.

4 MS. DAVIDSON: Yes, that is true. If we went
5 back and used the smallest county as the most basic unit
6 -- it would be an incremental unit -- in determining
7 membership of the house, it would well exceed three
8 hundred members.

9 QUESTION: Ms. Davidson, what practical harm
10 do your various clients in the more populous counties of
11 Wyoming suffer as a result of giving Niobrara a
12 representative rather than half a representative.

13 MS. DAVIDSON: That's a very good question.
14 If I may I would ask the Court to consider these
15 examples. Appellant Margaret Brown resides in Carbon
16 County, Wyoming. In the past ten years, that county has
17 grown by approximately 7,500 persons. The county
18 received the same amount of representation that it did
19 in 1973, three members, but the vote dilution which has
20 occurred there is on a scale of 2.49 to one. In other
21 words, Mrs. Brown's vote is two and a half times less
22 valuable, if you will, than a vote cast in Niobrara
23 County.

24 QUESTION: But if it's statewide it really
25 doesn't make a whole lot of difference what the people

1 in Niobrara County do or their one out of 64
2 representatives do, does it?

3 MS. DAVIDSON: If I understand you to say,
4 what is the impact of an individual voter, statewide, it
5 would not be very great.

6 If I may though, Mr. Justice --

7 QUESTION: Isn't that again the weakness of
8 your case?

9 MS. DAVIDSON: I think not.

10 QUESTION: In attacking just the one county?

11 MS. DAVIDSON: I think it is not, because the
12 Court in past instances have said that any time a vote
13 cast in one part of a state is worth substantially less
14 than a vote cast anywhere else in the state, then there
15 must be some sort of tremendous vote dilution which has
16 occurred.

17 In this case, we find that the maximum vote
18 ratio is 3.25 to 1. In other words, an individual in
19 Washakie County who casts a vote finds that his vote is
20 worth 3.25 times less than, than a vote passed in
21 Niobrara County.

22 I think even more in point, maybe more
23 illustrative, is the case of appellant Jane Maxwell, who
24 lives in Laramie County, my county. During the past ten
25 years the county's population has grown by 12,000,

1 almost 12,500 people. And we find that in that instance
2 that not only has that county not maintained the
3 original legislative grant -- or in other words, number
4 of representatives -- of 11 that it had in 1970, but
5 during the past decade, because of population shifts and
6 such, it actually lost two representatives. You compare
7 that to a situation where the county has grown four
8 times that of the stagnant population of Niobrara and
9 you see that there is a very substantial divergency that
10 has occurred.

11 QUESTION: Would anything in a court order
12 directing the Wyoming legislature to follow the
13 63-member plan rather than the 64-member plan and merge
14 Niobrara with whatever the other county is. That
15 wouldn't get Laramie County back the two representatives
16 that you say it has lost?

17 MS. DAVIDSON: That is true. It would not get
18 back the two representatives which the county has lost.
19 But, again, we look to the fact that a county as a
20 political unit, received a representative. People
21 somehow were lost in the shuffle.

22 QUESTION: What about the State's
23 constitution, does that have some part on the response
24 you just gave?

25 MS. DAVIDSON: Yes, well, there are two

1 considerations which our Wyoming State constitution asks
2 us to look at.

3 First, as I've already stated, that each
4 county shall constitute a representative district, while
5 at the same time in the very same provision, our
6 constitution provides that reapportionment shall occur
7 on a basis of population. And the two sort of thoughts
8 or ideas are in congress in this case.

9 QUESTION: May I ask you a hypothetical
10 question? Supposing we agreed with you the plan as it
11 was presently structured was unconstitutional, and we
12 suggested that the appropriate remedy might be to have a
13 resident of Niobrara County remain in the legislature
14 but be elected by the state at large. Would that cure
15 the objection for you?

16 MS. DAVIDSON: I think it would not, Your
17 Honor.

18 If -- if I may, let me make sure I understand.

19 QUESTION: It would take care of the voting
20 disparity. It would take care of the disparity in
21 voting power between people in your county and
22 elsewhere. In fact, the people in Niobrara County then
23 would have a lesser vote than anybody else in the state.

24 MS. DAVIDSON: But, Mr. Justice, you still are
25 limiting who can be qualified to sit in that seat. If I

1 understand --

2 QUESTION: But, you have no interest in that
3 as I understand it. Your only interest is in the weight
4 of your vote -- of your clients' vote.

5 MS. DAVIDSON: We are also very concerned that
6 the County of Niobrara receives a seat, and Niobrara
7 would continue to receive a seat, as I understand your
8 hypothetical.

9 QUESTION: Well supposing all of -- the whole
10 legislature was elected at large, but they provided
11 residence requirements just exactly as they have now.
12 Would that be unconstitutional? And everybody then had
13 an equal vote for every legislator.

14 MS. DAVIDSON: I don't know that it would be
15 unconstitutional given prior rulings of this Court.
16 However, it would be very unworkable in another sense.
17 I do not believe that it would --

18 QUESTION: If you agree that that would not be
19 unconstitutional, it seems to me you must also agree
20 that my first hypothetical would not be
21 unconstitutional, because then the voting power as for
22 the people who voted for the Niobrara legislator would
23 be equally distributed throughout the state.

24 MS. DAVIDSON: But, again --

25 QUESTION: You wouldn't like it, I

1 understand. You would want that county to be
2 represented.

3 MS. DAVIDSON: Sure.

4 QUESTION: But your claim must be founded on
5 the constitution in order to prevail here.

6 MS. DAVIDSON: But, again, you would have a
7 very small group of people, the citizens of Niobrara,
8 who would be receiving one representative. And I think
9 that that's where we find the substantial disparity
10 occurs.

11 QUESTION: Ms. Davidson, this type of plan has
12 been in existence since 1913, as I recall, has it not?

13 MS. DAVIDSON: I believe a more accurate
14 statement might be, Mr. Justice, that Niobrara County
15 has received a representative since the county's
16 creation in 1913.

17 QUESTION: Since what?

18 MS. DAVIDSON: Since the County's creation in
19 1913.

20 QUESTION: Yes. And has this type of plan
21 been approved by three-judge courts before?

22 MS. DAVIDSON: Yes, but there were different
23 factors to be considered at that point of time.
24 Additionally, those courts did not have the full benefit
25 of this Court's most recent rulings.

1 QUESTION: What were the dates of those
2 decisions?

3 MS. DAVIDSON: There was a 1964 case.

4 QUESTION: Was that after Reynolds v. Sims?

5 MS. DAVIDSON: Yes, it was.

6 Subsequent to that there was 1965 case and my
7 -- maybe giving you a small explanation -- the 1964 case
8 involved the attack of the reapportionment of the
9 Wyoming state house and state senate. The court found
10 that the Wyoming state senate plan constituted an
11 invidious discrimination. But it did not so find as
12 regards the Wyoming house of representatives.

13 It continued to maintain jurisdiction, if you
14 will, of the case. And, later in 1965, when the
15 legislature took no action to remedy the inequities that
16 were apparent, the court came back in and then ordered a
17 court ordered apportionment.

18 Again in 1971, there was an attack on the
19 Wyoming state house of representatives. The court again
20 found that there was no violation of the equal
21 protection clause, but interestingly enough, the court
22 in that case did not use the standards of measurement
23 which this Court had endorsed. Instead, it looked at
24 what sort of changes had occurred from the 1965 court
25 ordered plan, and found that there was no discrimination

1 then in that instance.

2 And of course then this case followed.

3 QUESTION: Were -- were any of those cases
4 reviewed here?

5 MS. DAVIDSON: Yes, Your Honor, there was one,
6 Harrison versus Schaefer which trailed on the heels of
7 the 1965 case.

8 QUESTION: And there was a summary affirmance
9 in that instance?

10 MS. DAVIDSON: Yes, there was.

11 If I may, there's one other distinguishing
12 factor, again, in all of these instances. A statutory
13 ratio formula was used. And in all of those instances,
14 Niobrara County was found to justify or to be deserving
15 of a grant one legislator. But in this instance, in
16 applying the statutory ratio formula, we find that it
17 does not have enough population to justify a
18 representative. The statutory formula told us that we
19 needed to round to the nearest whole number, and any
20 time that that whole number -- pardon me -- the ratio
21 percentage could be rounded to the whole number of one,
22 then the county would be entitled to a representative.
23 But in this case, the only way that Niobrara's
24 percentage could be rounded was down to zero, so it
25 deserved none.

1 QUESTION: May I ask one other general
2 question? Does the record tell us anything about the
3 political makeup of the legislature or Niobrara County.
4 What political party is involved?

5 MS. DAVIDSON: I believe that there may be
6 some reference in the record as to the political makeup
7 of Niobrara County. And as I recall, Your Honor, if
8 your specific question is what is that makeup, that they
9 have a Republican representative.

10 QUESTION: And, what is the majority of the
11 legislature?

12 MS. DAVIDSON: Republican.

13 QUESTION: Is there a significant -- I mean --
14 is it a closely -- what is the makeup of the legislature
15 basically, do you recall, generally? How many -- how
16 big is the Republican majority of the legislature?

17 MS. DAVIDSON: Frankly, Your Honor, I don't
18 recall.

19 QUESTION: But you don't, there is no claim
20 here that that is going to be affected by the outcome of
21 this case.

22 MS. DAVIDSON: No. No, there is no claim at
23 all of that.

24 If I may capsulize, Appellants pray that
25 Article 3, Section 3, of the Wyoming State Constitution

1 and the 64 plan be declared unconstitutional because
2 they give a vote to a county and not to people.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mr. Cox?

5 ORAL ARGUMENT OF RANDALL T. COX, ESQ.

6 ON BEHALF OF THE APPELLEE

7 MR. COX: Mr. Chief Justice, may it please the
8 Court. We agree with the Appellant's characterization
9 that this case involves the apportionment of one
10 representative to one representative district in
11 Wyoming. That is, to the citizens and taxpayers of
12 Niobrara County. All other representatives were
13 apportioned by the legislature by the use of a
14 population based formula. And that formula, as stated
15 in the pleadings and as admitted by the Plaintiffs today
16 -- by the Appellants today -- comports with applicable
17 law.

18 QUESTION: This is an unfair question, but in
19 the light of decisions from this Court in the past, do
20 you think the entire apportionment of the Wyoming House
21 is constitutional?

22 MR. COX: Yes, Your Honor, I do.

23 The reason that I think it's unconstitutional
24 -- that it is constitutional relates to our theory of
25 the case as we have talked about Niobrara County in

1 particular. And that is, that even though there are
2 substantial statistical deviations using the relative
3 range figure, those deviations do not indicate any
4 significant erosion of any person's fundamental rights
5 of free and fair participation.

6 QUESTION: Those deviations are higher than
7 any that have been upheld here before.

8 MR. COX: That's correct, Your Honor. They
9 are considerably lower than those reapportionment plans
10 stricken by this Court in Reynolds v. Sims and its
11 companion cases. They are in an area that this Court
12 hasn't really had an opportunity to look at before, and
13 this case is somewhat unique in that respect.

14 QUESTION: Well -- didn't we summarily affirm
15 a three-judge court back in the '60's?

16 MR. COX: That's correct, Your Honor. And
17 Harrison --

18 QUESTION: What was the deviation, there?

19 MR. COX: The deviation was either 89 or 90
20 percent.

21 QUESTION: Do you think -- do you think --
22 that affirmance is -- or that three-judge court decision
23 is consistent with our later cases?

24 MR. COX: I'm not sure what you're asking. I
25 think it is consistent with your later cases.

1 QUESTION: 89 percent is consistent with them?

2 MR. COX: Yes, Your Honor.

3 The reason that I contend that is because this
4 Court has looked at that percentage deviation figure as
5 an indicator, and a very important indicator, which
6 shows just how close a state is coming to numerical
7 equality in its apportionment decisions. But the Court
8 has not invested that statistic with any particular
9 significance, except in saying that if a plan deviates
10 by less than ten percent it is presumptively valid and
11 there can't be threat. The reason there can't be a
12 threat to majority control, if you have got less than
13 ten percent is it's statistically highly improbable to
14 have a minority dominating the legislature, if you've
15 got less than ten percent deviation.

16 If you have more than ten percent deviation, I
17 suggest that we use the other standards that this Court
18 has used in the past, and look at other statistical
19 measures to see whether that indicator that says there's
20 deviation between districts indicates some kind of
21 fundamental impact, invidious impact upon the exercise
22 fundamental right.

23 This Court talked in Reynolds v. Sims and its
24 companion cases, the one man, one vote rule means that
25 the majority has to control the legislature. That if a

1 small minority such as 25 percent in Alabama or 18
2 percent in Maryland has a strangle hold on the
3 legislature then other persons, the substantive rights
4 of the majority are threatened.

5 In this case, substantive rights of majority
6 in Wyoming or the Plaintiff's in particular or the
7 counties that they represent, are not threatened if we
8 refer to those other statistical measures.

9 The reasons for that are that the number of
10 representatives in the Wyoming house substantially
11 exceeds the number of representative districts, a
12 measure emphasized by this Court in Reynolds v. Sims.

13 Further, the legislature is responsive to the
14 majority even if we take, deliberately, a sample of the
15 legislative districts in the state and take those that
16 are most overrepresented, we still find 47 percent of
17 the -- not less than 47 percent can elect the majority.
18 It takes at least 47 percent to elect the majority of
19 representatives.

20 QUESTION: Mr. Cox, is it basically your
21 position that the state policy of having at least one
22 representative from each county would justify any
23 deviation no matter how large?

24 MR. COX: No, Justice O'Connor, we would not
25 take that position.

1 Clearly Reynolds teaches us that although
2 political subdivisions may be a factor that deserve
3 consideration in apportionment, carried too far there
4 could be a submergence of equal participation.

5 QUESTION: What is too far, if 89 percent
6 isn't too far?

7 MR. COX: I don't think that that statistic
8 alone tells us the answer to that question. I think we
9 have to look at several of these statistics because each
10 just measures, and sometimes in an exaggerated fashion,
11 a particular part of the statistical picture.

12 QUESTION: What if there are only one hundred
13 people in this county? You would be arguing the same
14 thing, wouldn't you?

15 MR. COX: That's correct, Your Honor.

16 QUESTION: Even though the deviation might be
17 five hundred percent?

18 MR. COX: That's correct, Your Honor. But,
19 fortunately, we're not presented with that.

20 QUESTION: And would you be making the same
21 argument if there were five counties like Niobrara?

22 MR. COX: If we looked at all of the
23 statistics and we found that there wasn't a threat to
24 the people of the other state, I would be comfortable
25 doing that. But, when you start getting into a number

1 of counties that are that far away, you could get into a
2 situation, like in Reynolds, where a few rural counties
3 with a tiny fraction of the state's population were
4 dominating the legislature.

5 If we look at it from that angle, there is no
6 way we have enough rational state interest here to
7 justify that --

8 QUESTION: So you are really suggesting to us
9 that we return to that -- give more weight to that
10 equation? We used to do that, a way back in the '60s.

11 MR. COX: I wasn't aware that the Court had
12 departed from that. I find frequent references to that
13 standard, and it really seems to me that the approach
14 taken in Reynolds and its companions, looking at all
15 those measures to determine whether there is invidious
16 discrimination, is a good approach.

17 If we examine the effects of this decision to
18 give one representative to Niobrara County upon the
19 plaintiffs, then the analysis comes down to what happens
20 to the plaintiffs if we have that extra representative
21 or if we don't. If we look at those statistics we see
22 that 46 percent of the population of Wyoming resides in
23 the seven counties represented by the plaintiffs, the
24 appellants. They elect 28 of 64 representatives. If
25 Niobrara County's legislator were withdrawn, they would

1 elect 28 of 63. If we look at a percentage to see which
2 -- how much percentage of control each of those counties
3 has in the legislature, they would each gain .03 or .07
4 of a percent of increased power, if you will, in the
5 Wyoming legislature if Niobrara County's representative
6 were withdrawn.

7 The district --

8 QUESTION: These women in the state that -- in
9 the House of Representative, there is one person which
10 unconstitutionally elected. Would anybody have a right
11 to contest that?

12 MR. COX: If --

13 QUESTION: It's only one vote out of three
14 hundred.

15 MR. COX: There's no question that the
16 plaintiffs have standing to raise this issue, Your Honor.

17 QUESTION: Would they be entitled to relief
18 from an unconstitutional representative, just one?
19 Suppose it's a -- it's an imbecile. Would you have a
20 right to object to that and prevail?

21 MR. COX: To an imbecile serving in the
22 legislature, Your Honor?

23 QUESTION: Yes.

24 MR. COX: Yes, I think they would have a right
25 to object to that.

1 QUESTION: Why don't these people have a right
2 to object, here?

3 MR. COX: They have a right to object. Their
4 burden is to show that there is an injury to a
5 substantial --

6 QUESTION: Isn't that an injury to them?

7 MR. COX: It is an injury in a theoretical
8 sense as the district court --

9 QUESTION: Injury -- theoretical?

10 MR. COX: Yes. Well, we can measure the
11 injuries statistically, Your Honor. And if we do
12 measure --

13 QUESTION: How do you get around a vote that's
14 an illegal vote. It hurts. There's no degree involved.

15 MR. COX: What we're suggesting to the Court
16 is we look at the nature and the degree of injury here.
17 And if we look at the nature of the injury --

18 QUESTION: But you do admit that there is an
19 injury?

20 MR. COX: There is deviation from strict
21 population equality.

22 QUESTION: The word was "injury".

23 MR. COX: I can't find the injury in the
24 statistically significant sense, Your Honor. The
25 district court looked at these figures. And they

1 focused on the substantive rights of the plaintiffs,
2 their counties, and other voters in Wyoming.

3 QUESTION: A large portion of the opinion was
4 taken up with the fact that this case has been there
5 four times before. That was a large part of the
6 opinion, wasn't it?

7 MR. COX: That was cited in the opinion, yes,
8 Your Honor.

9 QUESTION: So all that we're saying is, is it
10 another run of the same thing?

11 MR. COX: Well, in -- the district court was
12 correct in that this, if we take our worse possible
13 jaundiced view of this represent -- of this
14 apportionment plan, it contains nothing more dilutive of
15 votes than anything previously reviewed by the court --
16 by the district court.

17 I don't know that we particularly have to
18 stand on that if we take a fresh look at the nature of
19 the injury that's alleged here --

20 QUESTION: Well, that appeared here once
21 before.

22 MR. COX: Yes, that's correct, Your Honor.
23 The opinion also talks about the nature and degree of
24 the alleged injury and the arguments put forth by the
25 state to justify the deviation from strict population

1 equality. We certainly can't deny the existence of
2 those statistics. And the reasons for this districting
3 decision, I believe, are more important in Wyoming than
4 in Virginia or any other state whose apportionment plans
5 have been reviewed to date.

6 Local governments in Wyoming, like local
7 governments in most states, particularly counties and
8 school districts, are charged with important public
9 duties and providing essential public services and
10 construction of public works and so forth.

11 What distinguishes Wyoming from any other
12 states is there are explicit and strict constitutional
13 limits upon the ability of counties to raise money,
14 either through taxing or borrowing, and in comparing
15 those limits to other states such as Delaware, Maryland,
16 even our neighboring states of Montana and Colorado, we
17 see that counties in other states have significantly
18 greater ability to raise revenue.

19 In addition, in Wyoming, we do not have
20 provisions for county self-rule. In order for a county
21 to obtain the necessary powers to deal with new growing
22 situations and new needs such as we see in the mineral
23 boom areas of Wyoming, they need help from the
24 legislature.

25 If we look at every local government in

1 Wyoming we see that they are unable to raise sufficient
2 revenues to provide an acceptable level of public
3 services. Accordingly, the Legislature has enacted a
4 number of supplemental revenue schemes to provide monies
5 on a variety of criteria, not all of which are
6 consistent, to help local governments, like counties and
7 school districts, supply essential public services.

8 Those political decisions to figure out what
9 criteria should be used in revenue distribution, to
10 determine which new taxes should be imposed, or in the
11 case of school funding, to determine whether a greater
12 share of local tax resources should be taken by the
13 state and redistributed under new criteria, those
14 decisions, of course, affect the very lifeblood of local
15 government in Wyoming.

16 And those decisions, of course, are made in
17 the legislature. Quite simply, local government in
18 Wyoming is dependent on the legislature.

19 There's a certain vulnerability of counties
20 like Niobrara that is set forth in the record, that
21 because of political decisions made in the state
22 legislature, Niobrara County is contributing
23 substantially more revenues in the forms of excise taxes
24 and school foundations monies to the state, which is
25 then distributed to other local governments throughout

1 the state, than that county is getting back through
2 those same distribution programs.

3 QUESTION: If you do not prevail here, what is
4 -- what could be the immediate consequence of such a
5 holding?

6 MR. COX: That is somewhat speculative, Your
7 Honor.

8 QUESTION: The county would have no
9 representation until the legislature comes up with a new
10 plan, would that be the result?

11 MR. COX: That's correct, Your Honor.

12 QUESTION: Well, I thought there was a
13 provision that if you fail here the arrangement of a
14 combination with Goshen County would become effective.

15 MR. COX: The two counties would be combined.

16 QUESTION: Yes.

17 MR. COX: Yes.

18 QUESTION: Well, then this county doesn't lose
19 if that happens.

20 MR. COX: It loses effective representation,
21 Your Honor. Goshen County has got about three times as
22 many registered voters as Niobrara County.

23 QUESTION: It would share a representative
24 with the other county.

25 MR. COX: It would share a representative in a

1 theoretical sense. It would have very little effect
2 upon that representative's actions as a political matter.

3 QUESTION: In other words, are you saying the
4 voters in that other county don't need the people in
5 this county?

6 MR. COX: Unfortunately, that's true. If we
7 examine -- and this is in the record -- if we examine
8 the interests of those two counties in a number of state
9 revenue programs, we see that the two counties are
10 diametrically opposed.

11 For instance, Niobrara County taxpayers
12 provide a good deal of oil and gas severance tax to the
13 state, a lot more than they get back, whereas Goshen
14 County is exactly the opposite. Very little of that
15 money goes to the state and they draw many hundreds of
16 thousands of dollars of that money every year.

17 The same analysis in greater numerical terms
18 applies to school funding. Niobrara County contributes
19 a substantial amount -- by county I'm referring, of
20 course, to the taxpayers and to taxes collected by the
21 county. That money goes to the state in a much greater
22 proportion. As a matter of fact, there are no school
23 funding supplements received by Niobrara County, whereas
24 Goshen County receives one of the largest distributions
25 of revenue from the foundation program, of any county.

1 And, in addition, Goshen County has gone to the
2 legislature and gotten specific local apportionments to
3 help them maintain their educational system.

4 To expect a representative to balance those
5 competing considerations in a joint district like that
6 is to really expect the impossible. A representative is
7 going to have to make a choice as to how these revenue
8 distribution and spending provisions work and he's going
9 to have to favor the more populist county unless he
10 wants to be a one-term legislator.

11 QUESTION: I don't understand, though, your
12 answer to the Chief Justice that if you lose there has
13 to be legislative action before the situation can be
14 corrected. Is that so?

15 MR. COX: I think I might have misunderstood
16 the question, Your Honor.

17 QUESTION: Because I gather -- whether the
18 plan is workable or not, if you lose then the
19 combination with Goshen becomes effective, doesn't it?

20 MR. COX: That's correct.

21 QUESTION: And whether or not the legislature
22 does something further will be --

23 MR. COX: Up to the legislature, that's
24 correct. If this Court disapproves the apportionment of
25 a representative to the citizens of Niobrara County,

1 then the combination plan goes into effect automatically.

2 What Reynolds v. Sims tells us about this case
3 is that the interests of political subdivisions can be
4 considered by the legislature so long as those interests
5 are related to a rational legitimate state purpose, and
6 so long as the legislature does not go too far.

7 We submit to you that in providing Niobrara
8 County with a much needed representative the legislature
9 of Wyoming has not gone too far. There is ample
10 evidence of legitimate state interests to justify the
11 numerical deviation. If, as in Reynolds and its
12 companion cases, there were a substantial erosion of
13 majority control so that a minority could injure other
14 rights of a majority of a state's population, that's a
15 different story.

16 I think in a situation like that the Court has
17 indicated that strict scrutiny is called for. And in
18 the absence of a demonstrable injury to a fundamental
19 interest here, free and fair participation in a
20 generally population-based apportionment plan that does
21 not threaten the majoritarianism, then the usual
22 standard of constitutional analysis should apply, and
23 that is to examine legitimate state interests that
24 justify the decision.

25 QUESTION: Do you think any of -- any

1 reapportionment plan in any state should be acceptable
2 as long as majority rule is not threatened?

3 MR. COX: Well, of course, there are other
4 considerations that this Court has addressed in cases
5 like City of Mobile v. Bolden and Rogers v. Herman
6 Lodge, but absence discrimination against the suspect
7 class -- we're not looking at a scheme designed to
8 deprive or submerge a minority --

9 QUESTION: So any rational state policy should
10 justify the plan as long as a minority is not put in
11 position given the power to elect a majority to
12 legislature?

13 MR. COX: That's correct, Your Honor.

14 QUESTION: That would really be a departure
15 from one man, one vote, wouldn't it?

16 MR. COX: I don't think so, Justice Brennan,
17 because the whole purpose of one man, one vote, as this
18 Court observed in Connor v. Finch, is preservation of
19 majoritarianism. And as you creep further and further
20 away from majoritarianism, the demonstrable injury of
21 people's rights becomes readily apparent. We don't have
22 that problem here. I don't think you have to depart
23 from Reynolds v. Sims one bit to approve this
24 apportionment decision.

25 QUESTION: Mr. Cox, as a matter of history,

1 how often has the state changed its county boundaries?

2 MR. COX: There have been isolated examples
3 where counties have split off -- maybe a large county
4 was divided -- I don't know that much about the history
5 of that.

6 QUESTION: Is there any -- can that be done by
7 the state legislature or does it take a constitutional
8 amendment?

9 MR. COX: I believe it has to be -- the voters
10 of the county involved, and then it has to be approved
11 by the legislature. I don't believe the constitutional
12 amendment is required because --

13 QUESTION: For example, if Niobrara and the
14 adjoining county wanted to merge and become one county,
15 they could do it by referendum within the county,
16 approved by the state legislature, or something like
17 that?

18 MR. COX: Yes, I believe that could be done.

19 But, in fact, the citizens of Niobrara County
20 split off from their neighboring counties some 70 years
21 ago for reasons that are colorfully illustrated in the
22 intervenor's briefs. I don't think that's very likely
23 to occur, Your Honor.

24 For the reasons that we have discussed, we
25 would ask that this Court affirm the decision of the

1 district court.

2 CHIEF JUSTICE BURGER: Do you have anything
3 further, Ms. Davidson?

4 ORAL ARGUMENT OF SUELLEN L. DAVIDSON, ESQ.,
5 ON BEHALF OF THE APPELLANTS -- REBUTTAL

6 MS. DAVIDSON: Of course it is the appellant's
7 position that the 89 percent overall relative range is a
8 per se, if you will, violation of the constitution.

9 Greater clarification of the law has been made
10 since the summary affirmance in Harrison versus
11 Schaefer. An old outdated mode of measurement of vote
12 dilution has been used or has been propounded by the
13 state, that is, that a minority cannot control,
14 basically, the legislature.

15 The most modern and accurate measurements are
16 brushed to the wayside. Overall relative range is found
17 to have no significance. And the same, too, with
18 ratio. Where is the breaking point? Appellants submit
19 that it's somewhere around the 16.4 percent overall
20 relative range mark that was set forth in the Mahan
21 versus Howell case.

22 Even more remarkable is the fact that that
23 breaking point has been exceeded since the summary
24 affirmance of Harrison versus Schaefer in the state of
25 Wyoming.

1 First in the case -- in the 1971 case,
2 Thompson versus Thomson and then, again, in this case
3 Brown versus Thompson. If you look at the
4 administrative responsibilities which have been given to
5 the counties as political subdivisions, you find that
6 they are not so unlike the other administrative arms of
7 states which are found in the majority of the states in
8 these United States. Some reliance, in almost all of
9 those instances, is based on revenue and taxation
10 considerations.

11 But I ask the Court to remember that judicial
12 remedies are available in those instances where a county
13 may be discriminated in some manner by virtue of a vote
14 that's taken on a tax bill or a revenue bill. And then,
15 if you will look, all in all, one 64th of a vote makes
16 very, very little difference when it comes to a matter
17 being considered typically on the floor of a legislature.

18 One thing I think that this Court would find
19 to be of interest is that there are -- there is at least
20 one instance in a combination district where the
21 minority county provides the senator to the legislature.

22 And it's not to say that just because Goshen
23 and Niobrara would be combined that Niobrara County
24 would not in fact be the county which would be sending
25 its representative if you will -- a county

1 representative, the local member, the district member,
2 representative to the state house.

3 In Wyoming political subdivisions are no more
4 nor no lessening, as I've already stated, than the
5 majority of other counties found in the United States.

6 Niobrara County, in summary has judicial
7 remedies available should it be found that it is a
8 victim of discrimination. A one man-three vote
9 principle as evidenced in this case is certainly
10 unconstitutional.

11 Might the Court have any questions?

12 Thank you, very much.

13 CHIEF JUSTICE BURGER: Thank you, counsel.

14 The case is submitted.

15 [Whereupon, at 10:56 a.m., the case in the
16 above-entitled matter was submitted.]

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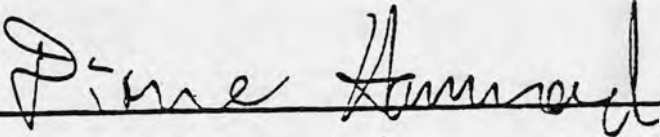
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MARGARET R. BROWN, ET AL. Appellants vs. THYRA THOMSON, SECRETARY
OF STATE OF WYOMING, ET AL. #82-65

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