



## WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** May 26, 2021  
**TO** Members, Joint Corporations, Elections and Political Subdivisions Interim Committee  
**FROM** Ted Hewitt, Senior Staff Attorney  
**SUBJECT** Principles of State Legislative Redistricting Law

### **Introduction**

Several legal principles of redistricting state legislative districts can help guide a legislature to craft a legally defensible redistricting plan. This memorandum will provide a discussion of these guiding principles and their judicial development, as well as a brief history of challenges to past Wyoming redistricting plans. Hopefully this memorandum will be useful to the Joint Corporations, Elections and Political Subdivision Interim Committee as it begins the process of developing plans for redistricting Wyoming State House and Senate districts based on the 2020 United States Census.

### **One Person, One Vote**

"One person, one vote" provides a guiding principle for all redistricting efforts. This phrase encompasses the notion that the full protections of the United States Constitution are imposed on State actions impacting voting in general, and legislative redistricting in particular, through the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>1</sup> The concept of "one person, one vote" has been described by the United States Supreme Court as meaning that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>2</sup>

In furtherance of this principle, the United States Supreme Court has held that when drawing state legislative boundaries "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."<sup>3</sup> The Court has expounded on that standard over the years and in 2016,

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<sup>1</sup> Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>2</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

<sup>3</sup> *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

in *Evenwel v. Abbott*, the Supreme Court set out a succinct formulation on state legislative district deviation and the one-person, one-vote principle:

[W]hen drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. **Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10% are presumptively impermissible.**<sup>4</sup>

It is worth noting that adopting a redistricting plan with a maximum deviation of less than 10% does not guarantee that a court will find a plan constitutional, though it is perhaps the surest approach that states have employed to prevent and defeat challenges to redistricting plans.

### **Redistricting in Wyoming – From Statehood to Present**

The decisions of the United States Supreme Court requiring substantial population equity among all state legislative districts have directly clashed with provisions of the Wyoming Constitution, Article 3, Section 3, which provides:

**Each county shall constitute a senatorial and representative district;** the senate and 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 sixteen and thirty-three members respectively. (Emphasis added).

Until the 1960s, Wyoming's redistricting plans incorporated the requirement that each county constitute at least one senate and house district.<sup>5</sup> However, things began to change with the redistricting cycle following the 1960 census when a federal district court held invalid a portion of the 1963 Wyoming redistricting plan.<sup>6</sup> The court noted that the constitutional requirement of one senator from each county meant that the six most populous counties, with 65% of the state population, had eight senators, while the six least populous counties, with eight percent of the state's population, had six senators.<sup>7</sup> The court also noted that strict compliance with Art. 3, § 3 of the state constitution "would be wholly unreasonable, untenable and impractical" as it would result

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<sup>4</sup> 136 S. Ct. 1120, 1124 (2016) (citations omitted and emphasis added).

<sup>5</sup> Various Wyoming redistricting plans have also incorporated multi-member districts, which will be further addressed in this memorandum.

<sup>6</sup> *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964)

<sup>7</sup> *Id.* at 251 n.5.

in "a legislature substantially in excess of 300 members."<sup>8</sup> The court then went on to hold that "the Wyoming reapportionment Act of 1963... insofar as it provides for representation in the state senate, constitutes an invidious discrimination, and violates the equal protection clause of the Fourteenth Amendment to the Constitution."<sup>9</sup>

The *Schaefer* decision, however, did not alter the manner in which representatives to the Wyoming House were apportioned. Redistricting plans subsequent to *Schaefer* still provided that each county was required to be, at least, its own house district. In fact, the 1981 redistricting plan, which provided that every county shall constitute at least one house district, survived a direct challenge in the United States Supreme Court.<sup>10</sup>

However, the redistricting landscape changed following the 1991 decision of *Gorin v. Karpan*.<sup>11</sup> In *Gorin*, a federal district court held that Wyoming's 1991 Legislative Reapportionment Act violated the Equal Protection Clause because the act had a population deviation of 83% in the Wyoming House and 58% in the Wyoming Senate and the State had not sufficiently justified the deviations.<sup>12</sup> The court directed that the Legislature could disregard Art. 3, Section 3 when reapportioning house and senate seats because of its inherent conflict with the one person, one vote principle.<sup>13</sup> The court set a deadline for the legislature to develop a plan that conformed to the requirements of the federal constitution and also explicitly warned the legislature that if it failed to come up with a plan that satisfied constitutional requirements by the deadline, the court itself would reapportion the state legislative districts.<sup>14</sup>

In response to the *Gorin* decision, the Wyoming Legislature enacted a new redistricting plan in 1992.<sup>15</sup> The 1992 act was a "nested" plan – two house districts were placed wholly inside of the boundaries of one senate district. The house and senate boundaries did not adhere strictly to county boundaries. The 1992 act had a population deviation of less than 10% among districts in each chamber of the legislature. The federal district court concluded that the 1992 act met the constitutionally required mandate of substantial equality of population among legislative districts.<sup>16</sup>

The 2002 Redistricting Act<sup>17</sup> followed the basic structure and guidelines of the 1992 act and used nested house and senate districts with a population deviation of less than 10%. The 2002 redistricting plan was not challenged in court.

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<sup>8</sup> *Id.* at 252.

<sup>9</sup> *Id.* at 253.

<sup>10</sup> *Brown v. Thomson*, 462 U.S. 835 (1983).

<sup>11</sup> 775 F. Supp. 1430 (D. Wyo.).

<sup>12</sup> *Id.* at 1445.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1445-46.

<sup>15</sup> See 1992 Wyoming Session Laws, Chapter 1.

<sup>16</sup> *Gorin v. Karpan*, 788 F. Supp. 1199 (D. Wyo. 1992).

<sup>17</sup> See 2002 Wyoming Special Session Laws, Chapter 1.

The 2012 Redistricting Act<sup>18</sup> similarly followed the structure of the 1992 and 2002 acts. The 2012 act was challenged in state court on three grounds.<sup>19</sup> The plaintiffs alleged: 1) the Legislature failed to reapportion in a manner that minimized county splitting, as required by Article 3, Section 3 of the Wyoming Constitution; 2) by not minimizing county splitting, voters in some legislative districts were provided different electoral rights than others, in violation of their equal protection rights; and 3) holdover Senators elected in the 2010 election whose district boundaries changed in the 2012 act should have been required to run for reelection in 2012. The state district court ruled against the Plaintiffs on all three allegations in an opinion issued in 2015. On the first allegation, the court found that nothing in the Wyoming Constitution required minimizing of county splitting (even though the Legislature had the opportunity to do so in 1965 when it amended the state Constitution) and that federal caselaw (that is discussed above) meant that the State did not have to strictly comply with following county lines in light of the "one person, one vote" principle.<sup>20</sup> On the second allegation, the court found that the plaintiffs failed to offer any evidence that the rights of voters in legislative districts based on county lines differ from the rights of voters in legislative districts not based on county lines.<sup>21</sup> Finally, on the third allegation, the court found the issue of holdover Senators to be moot because holdover Senators had run for reelection in 2014 and consequently the court, in 2015, could not have had any effect on the status of Senators for the 2012-2014 period.<sup>22</sup>

### **Minority Voters**

Most racial discrimination challenges to redistricting maps allege either a violation of the 14<sup>th</sup> Amendment's Equal Protection Clause or a violation of The Voting Rights Act of 1965. Unlike numerous other states' redistricting plans, including those of some neighboring states, a Wyoming redistricting plan has never been challenged in court for illegally under-representing minority groups.

With respect to the Equal Protection Clause, the Supreme Court has interpreted it to require that a redistricting plan "that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest."<sup>23</sup> Such strict scrutiny review applies not only to redistricting plans that expressly distinguish citizens because of race, but also to those plans "that, although race neutral, are, on their face, unexplainable on grounds other than race."<sup>24</sup> To challenge an alleged racial gerrymander under the Equal Protection Clause, a plaintiff must show standing and prove that "either through circumstantial evidence of a district's shape and demographics or more direct evidence as to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."<sup>25</sup> If these showings are made, the burden shifts to the state to meet

<sup>18</sup> See 2012 Wyoming Session Laws, Chapter 8.

<sup>19</sup> *Hunzie v. Maxfield*, No. 179-562 (Dist. Ct. Wyo. 2015).

<sup>20</sup> *Id.* at \*8-9.

<sup>21</sup> *Id.* at \*12.

<sup>22</sup> *Id.* at \*13.

<sup>23</sup> *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

<sup>24</sup> *Id.* (internal citations and quotations omitted).

<sup>25</sup> *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 266-67 (2015).

the strict scrutiny test noted above, and can be satisfied on the basis of remedying past discrimination.<sup>26</sup>

The Voting Rights Act has had broad reaching effects on the manner in which states conducted the redistricting process. Prior to 2013, many states were required to receive pre-approval of their redistricting plans from the Department of Justice to ensure that the plans gave minority groups representation in Congress and state legislatures commensurate with a minority group's population in a given geographical area. The Supreme Court made this requirement unenforceable by its decision in *Shelby County v. Holder*.<sup>27</sup>

In past redistricting cycles, the Wyoming Legislature has recognized that the Native American population residing within the Wind River Reservation in Fremont County constitutes a geographically distinct minority group with a sufficient population to warrant the creation of a Native American majority house district. Per LSO sources, in developing the 2002 and 2012 Redistricting Plans, the Joint Corporations, Elections and Political Subdivision Interim Committee actively sought the input of the Eastern Shoshone and Northern Arapahoe Tribes to ensure that Native Americans were fairly represented in the redistricting plan. Additionally in the 2001-02 interim and again in the 2011-2012 interim, the Wyoming Legislature reached out to Hispanic groups throughout the state to make certain that these groups were fully advised of the Committee's redistricting activities and were given an opportunity to comment and provide input on redistricting plans.

### **Multi-Member Districts**

Until the 1992 Redistricting Act, Wyoming legislative apportionment plans incorporated multi-member legislative districts, or districts in which more than one senator or representative was elected to represent the entire district.<sup>28</sup> As stated previously, the 1992 Redistricting Act incorporated nested senate and house districts in which one senator and one representative were elected to represent each senate or house district, respectively.

The shift away from multi-member districts was not directly necessitated by a court decision. The courts have held that multi-member legislative districts are not per se, or automatically, unconstitutional, though such plans can be challenged if they "minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>29</sup> A federal district court in Wyoming has noted practical weaknesses of multi-member districts, which include:

1. Voter confusion may be more likely;
2. Legislators may be more remote or distant from their constituents;

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<sup>26</sup> *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

<sup>27</sup> 570 U.S. 529 (2013).

<sup>28</sup> See *The 1992 Reapportionment Law: The Demise of the Multi-Member District System and its Effect Upon the Representation of Women in the Wyoming Legislature* 34 Land & Water L. Rev. 407 (1999).

<sup>29</sup> *Gorin*, 775 F. Supp. 1430, 1446 (citing *Fortson v. Dorsey*, 379 U.S. 433, 436 (1965)).

3. Electoral minorities tend to be submerged while the electoral majority is overrepresented;
4. Candidates running for office in districts electing more than four representatives face significantly greater campaign costs and are less likely to defeat incumbent candidates; and
5. Voter participation is historically lower in most multi-member districts.<sup>30</sup>

Nationally, the use of multi-member districts for legislative districts has declined over the decades. In 1980, multi-member legislative districts were used in seventeen states. By 2019, ten states still had multi-member districts in at least one legislative body.

### **Political Gerrymandering**

"Political gerrymandering" is the term used to describe a redistricting plan that is intended to advantage a certain group or party. The name for the term comes from then Massachusetts governor Elbridge Gerry who authorized a redistricting plan in 1812 with districts that were not contiguous or compact, but which reminded one commentator of resembling the shape of a salamander, hence the term "gerrymander".<sup>31</sup>

Until 2019, it was uncertain whether political gerrymandering claims could be effectively adjudicated in the federal courts.<sup>32</sup> But in June 2019, in the case of *Rucho v. Common Cause*<sup>33</sup> the Supreme Court foreclosed partisan redistricting claims based on the First and 14<sup>th</sup> Amendments, the Elections Clause, and Article 1, Section 2 of the United States Constitution. The Court held partisan gerrymandering claims to be nonjusticiable political questions; the Court reasoned there is no workable standard from which a partisan gerrymandering claim can be adjudicated in the federal courts. The Court summarized its ruling thusly:

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. Judicial action must be governed by standard, by rule and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.<sup>34</sup>

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<sup>30</sup> *Id.* at n.23.

<sup>31</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

<sup>32</sup> See e.g., *Davis v. Bandemer*, 478 U.S. 109 (1986).

<sup>33</sup> 139 S. Ct. 2484 (2019).

<sup>34</sup> *Id.* at 2506-07 (internal citations and quotations omitted).

While the federal courts cannot now provide relief for partisan gerrymandering, state courts may. Since 2010, state courts in Florida<sup>35</sup>, North Carolina<sup>36</sup> and Pennsylvania<sup>37</sup> have declared partisan gerrymanders invalid on state constitutional grounds. The Pennsylvania Supreme Court, in declaring the state's congressional district map invalid, relied on the state constitution's free and fair elections clause, which provides that: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The court noted that the clause is designed to "prevent dilution of an individual's vote by mandating that the power of his or her vote . . . be equalized to the greatest degree possible with other Pennsylvania citizens."<sup>38</sup>

The Wyoming Constitution contains a similar provision to the Pennsylvania Constitution. Article 1, Section 27 of the Wyoming Constitution reads: "Elections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammelled exercise of the right of suffrage."

### **Contiguous, Compact, Geographic Features, and Census Blocks**

Ensuring that legislative districts are both contiguous and compact have been identified by the United States Supreme Court as traditional principles of redistricting.<sup>39</sup> Contiguity requires that all parts of a district be connected at some point with the rest of the district. The term "compactness" has historically been used to relate to the minimum distance between all parts of the constituency. However, given the enormous disparities in legislative districts across the nation (a city block in New York with over 3000 residents compared to an entire county in Wyoming without that many residents) there are no definite rules as to when a district is compact.

In measuring compactness, at least three separate tests have been employed by the courts.<sup>40</sup> The United States Supreme Court stated that it uses an "eyeball approach" to evaluate compactness.<sup>41</sup> A state does not need to show that it drew the most compact district possible, but is required to have compactness as one of its primary goals. Compactness has been described not as a reference to geographical shape,

but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city.<sup>42</sup>

A "census block" is a geographic area bounded on all sides by visible or nonvisible features shown on census maps. A census block is the smallest geographic entity for which the Census Bureau

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<sup>35</sup> *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

<sup>36</sup> *Common Cause v. Lewis*, No. 18-CVS-014001 (N.C. Super. Ct., Wake Cty.).

<sup>37</sup> *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287 (2018).

<sup>38</sup> *League of Women Voters v. Commonwealth*, 645 Pa. 1, 122 (2018).

<sup>39</sup> *Shaw*, 509 U.S. 630, 646.

<sup>40</sup> Those tests are: 1) The total perimeter test; 2) The Reock test; and 3) The Schwartzberg test. See *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W.Va 1992).

<sup>41</sup> *Bush v. Vera*, 517 U.S. 952, 960 (1996).

<sup>42</sup> *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994).

collects and tabulates decennial census information. States have input into the boundaries of census blocks through the first phase of the Redistricting Data Program, when the county clerks and Census Bureau work together to draw accurate lines. County clerks utilize census blocks when establishing precinct boundary lines. Following census blocks helps ensure that legislative districts follow boundary lines of other election districts, such as county and municipal elected officials, school board and special districts. While following census block boundaries certainly helps county clerks and other election officials as they prepare for an election, the full benefit is realized on election day with a reduction in different ballots required at a polling station, less voter confusion, and a decreased likelihood that election irregularities will occur.

### **Conclusion**

While certainly not an exhaustive resource for all potential issues that may arise during the redistricting process, consideration of issues provided in this memorandum hopefully will help the Joint Corporations Committee develop a redistricting plan to introduce in the 2022 Budget Session that is likely to withstand a legal challenge.