

The Burger Court Opinion Writing Database

Brown v. Thomson

462 U.S. 835 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 2, 1983

Re: 82-65 - Brown v. Thomson

MEMORANDUM TO THE CONFERENCE:

At Conference I stated I felt bound by prior holdings to reverse, but that I thought it absurd that the machinery of the federal courts - and the time of this Court - was invoked to deal with what seemed to me a de minimis claim. Whether one county in Wyoming is overrepresented by having one legislative member, when it is entitled to only a fraction of one is not a Supreme Court case.

I now vote to affirm on the de minimis basis, and if that overrules a prior holding, that is what I am for.

Regards,

WRB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1983

Re: 82-65 - Brown v. Thompson

Dear Lewis:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'W.P.', written in a cursive style.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1983

No. 82-65 -- Brown v. Thomson

Dear Byron, Thurgood and Harry,

We four are in dissent in the
above. I'll be happy to undertake the
dissent.

Sincerely,

Justice White
Justice Marshall
Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 20, 1983

Re: No. 82-65

Brown, et al. v. Thomson, et al.

Dear Lewis,

I will be circulating a dissent in
this case (by August 1).

Sincerely,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 14 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE BRENNAN, dissenting.

The Court today upholds a reapportionment scheme for a state legislature featuring an 89% maximum deviation and a 16% average deviation from population equality. I cannot agree.

I

Although I disagree with today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedential value. The Court goes out of its way to make clear that because appellants have chosen to attack only one small feature of Wyoming's reapportionment scheme, the Court weighs only the *marginal* unequalizing effect of that one feature, and not the overall constitutionality of the entire scheme. *Ante*, at 10-11, and n. 8; see *ante*, at 2 (O'CONNOR, J., concurring). Hence, although in my view the Court reaches the wrong result in the case at hand, it is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature. Whether this will be a good thing for the speed and cost of constitutional litigation remains to be seen. But at least plaintiffs henceforth will know better than to exercise

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1, 7-10

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: JUN 16 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPELLANTS *v.*
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
dissenting.

The Court today upholds a reapportionment scheme for a state legislature featuring an 89% maximum deviation and a 16% average deviation from population equality. I cannot agree.

I

Although I disagree with today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedential value. The Court goes out of its way to make clear that because appellants have chosen to attack only one small feature of Wyoming's reapportionment scheme, the Court weighs only the *marginal* unequalizing effect of that one feature, and not the overall constitutionality of the entire scheme. *Ante*, at 10-11, and n. 8; see *ante*, at 2 (O'CONNOR, J., concurring). Hence, although in my view the Court reaches the wrong result in the case at hand, it is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature. Whether this will be a good thing for the speed and cost of constitutional litigation remains to be seen. But at

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 10

JUN 18 1983

3rd Draft

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPELLANTS *v.*
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[June 22, 1983]

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE
MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The Court today upholds a reapportionment scheme for a
state legislature featuring an 89% maximum deviation and a
16% average deviation from population equality. I cannot
agree.

I

Although I disagree with today's holding, it is worth
stressing how extraordinarily narrow it is, and how empty of
likely precedential value. The Court goes out of its way
to make clear that because appellants have chosen to at-
tack only one small feature of Wyoming's reapportionment
scheme, the Court weighs only the *marginal* unequalizing ef-
fect of that one feature, and not the overall constitutionality
of the entire scheme. *Ante*, at 10-11, and nn. 8-9; see *ante*,
at 2 (O'CONNOR, J., concurring). Hence, although in my
view the Court reaches the wrong result in the case at hand,
it is unlikely that any future plaintiffs challenging a state re-
apportionment scheme as unconstitutional will be so unwise
as to limit their challenge to the scheme's single most objec-
tionable feature. Whether this will be a good thing for the
speed and cost of constitutional litigation remains to be seen.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 19, 1983

Re: 82-65 - Brown v. Thomson

Dear Lewis,

I shall await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1983

Re: 82-65 - Brown v. Thomson

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1983

Re: No. 82-65-Brown v. Thomson

Dear Lewis:

I await the dissent.

Sincerely,


T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1983

Re: No. 82-65-Brown v. Thomson

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1983

Re: No. 82-65 - Brown v. Thomson

Dear Bill:

I think that you have written a very devastating opinion. I am particularly glad that you have said what you did in Part I. It seems to me that, with all the reservations made by Lewis and Sandra in their respective opinions, the decision in effect becomes a "noncase." It certainly doesn't stand for much.

Sincerely,

Justice Brennan

cc: Justice Marshall ✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1983

Re: No. 82-65 - Brown v. Thomson

Dear Bill:

Please join me in your dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 17 1983

Recirculated: _____

MAY 18 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPELLANTS *v.*
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[May —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the State of Wyoming violated the Equal Protection Clause by allocating one of the sixty-four seats in its House of Representatives to a county whose population is considerably lower than the average population per state representative.

I

Since Wyoming became a State in 1890, its legislature has consisted of a Senate and a House of Representatives. The State's Constitution provides that each of the State's counties "shall constitute a senatorial and representative district" and that "[e]ach county shall have at least one senator and one representative." The senators and representatives are required to be "apportioned among the said counties as nearly as may be according to the number of their inhabitants." Wyo. Const., Art. 3, §3.¹ The State has had 23 counties

¹ Article 3, §3 of the Wyoming Constitution provides in relevant part: "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

May 27, 1983

82-65 Brown v. Thomson

Dear Sandra:

Thank you for your suggestion.

We are certainly not far apart, and with a minor change in language I will accept it. The change will fit into my opinion a little better if it reads as follows:

"This holding requires only 'that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable,' for 'it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters.' Id., at 577. ~~Although an appropriate ideal, '[m]athematical exactness or precision is hardly a workable constitutional requirement.'~~ Ibid. See Gaffney v. Cummings, 412 U.S. 735, 745-748 (1973) (describing various difficulties in measurement of population). We have recognized that ..."

If acceptable to you, I will make this change. I am grateful for your cooperation.

Sincerely,

Justice O'Connor

lfp/ss

June 1, 1983

82-65 Brown v. Thomson

Dear Sandra:

As requested in your note of the 31st, I will omit the second quote.

Perhaps you will forgive me - just for the record between us - if I reiterate why it seemed appropriate to include this quote from Reynolds v. Sims. The opinion in that case was written by Chief Justice Warren and concurred in by Justices Black, Douglas, Brennan, White and Goldberg. They did not think the statement was inconsistent with the "one-man-one-vote" holding.

Of course, the "culprit" is the Court's subsequent opinion in Kirkpatrick in which - inexplicable to me - a rule of mathematical exactitude was announced. Since then, and again unjustifiably it seems to me, the Kirkpatrick rule has been followed largely in cases involving congressional districts while a more flexible, sensible rule has developed in cases reviewing reapportionment among state legislative districts.

Of course, I view this case (Brown v. Thomson) as presenting a narrow question not previously considered by any of our cases.

Sincerely,

Justice O'Connor

lfp/ss

P. 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

JUN 2 1983

From: Justice Powell

Circulated: _____

Recirculated JUN 2 1983 _____

~~LA~~
~~2~~

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPELLANTS *v.*
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the State of Wyoming violated the Equal Protection Clause by allocating one of the sixty-four seats in its House of Representatives to a county whose population is considerably lower than the average population per state representative.

I

Since Wyoming became a State in 1890, its legislature has consisted of a Senate and a House of Representatives. The State's Constitution provides that each of the State's counties "shall constitute a senatorial and representative district" and that "[e]ach county shall have at least one senator and one representative." The senators and representatives are required to be "apportioned among the said counties as nearly as may be according to the number of their inhabitants." Wyo. Const., Art. 3, §3.¹ The State has had 23 counties

¹ Article 3, §3 of the Wyoming Constitution provides in relevant part: "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

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pp. 11-12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 15 1983

JUN 15 1983

3rd DRAFT |

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN ET AL., APPELLANTS *v.*
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the State of Wyoming violated the Equal Protection Clause by allocating one of the sixty-four seats in its House of Representatives to a county whose population is considerably lower than the average population per state representative.

I

Since Wyoming became a State in 1890, its legislature has consisted of a Senate and a House of Representatives. The State's Constitution provides that each of the State's counties "shall constitute a senatorial and representative district" and that "[e]ach county shall have at least one senator and one representative." The senators and representatives are required to be "apportioned among the said counties as nearly as may be according to the number of their inhabitants." Wyo. Const., Art. 3, §3.¹ The State has had 23 counties

¹ Article 3, §3 of the Wyoming Constitution provides in relevant part: "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

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1-3, 9, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

From: Justice Powell

SUPREME COURT OF THE UNITED STATES

Revised: _____
JUN 17 1983
Recirculated: _____

No. 82-65

**MARGARET R. BROWN ET AL., APPELLANTS v.
THYRA THOMSON, SECRETARY OF STATE
OF WYOMING, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING**

[June 22, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue is whether the State of Wyoming violated the Equal Protection Clause by allocating one of the 64 seats in its House of Representatives to a county the population of which is considerably lower than the average population per state representative.

I

Since Wyoming became a State in 1890, its legislature has consisted of a Senate and a House of Representatives. The State's Constitution provides that each of the State's counties "shall constitute a senatorial and representative district" and that "[e]ach county shall have at least one senator and one representative." The senators and representatives are required to be "apportioned among the said counties as nearly as may be according to the number of their inhabitants." Wyo. Const., Art. 3, §3.¹ The State has had 23 counties

¹ Article 3, §3 of the Wyoming Constitution provides in relevant part: "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

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 19, 1983

Re: No. 82-65 Brown v. Thomson

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1983

Re: 82-65 - Brown v. Thomson

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1983

Re: 82-65 - Brown v. Thomson

Dear Sandra:

Please join me in your separate concurring opinion.

Respectfully,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 26, 1983

Re: No. 82-65, Brown v. Thomson

Dear Lewis,

I generally agree with your analysis in this case, particularly Part IIC. I am concerned about some of the language because of my position in Karcher and wonder if you would consider making a change along the following lines:

On page 6, to replace the second and third sentences of Part IIA:

"This holding requires only 'that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.' Id., at 577. Insistence on exact numerical equality, though an appropriate ideal, must yield in many circumstances to the 'practical impossibility [of] arrang[ing] legislative districts so that each one has an identical number of residents, or citizens, or voters.' Ibid."

Sincerely,

Sandra

Justice Powell

See my reply.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 82-65 Brown v. Thomson

Dear Lewis,

I do appreciate your willingness to adjust the language which is of concern to me in your opinion. I would be completely satisfied with your counterproposal if you could see fit to omit the second quote that "mathematical exactness or precision is hardly a workable constitutional requirement." My concern with it is that endorsement of the statement detracts from the one-person, one-vote principle that we should expect legislators to keep uppermost in their minds as they undertake the apportionment task.

Sincerely,

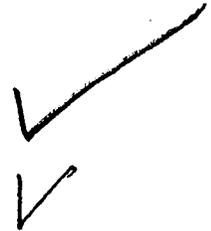
Sandra

Justice Powell

I would go along. I have indicated what it would look like (see attached pg). (I can't say I'm pleased!)

MM

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 1, 1983

No. 82-65 Brown v. Thomson

Dear Lewis,

Thank you for your continued patience in this and other cases. At this time of year, the circulations are going so rapidly it is hard to stand back and take a long range look at the situation.

As you know, I have tried this Term to bring the opposing views on congressional reapportionment and legislative redistricting a little closer together. I hope I correctly detect a little movement in that direction.

I enclose a draft of my separate concurrence in this case which I have not yet circulated. Please let me know if you see a problem in doing so.

Sincerely,

Sandra

No objection.

I called her

Justice Powell

Enclosure

1 P. 1, 2

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 1 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPLICANTS, PETITIONER *v.* THYRA THOMSON, SECRETARY OF STATE OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE O'CONNOR, concurring.

By its decisions today in this case and in *Karcher v. Daggett*, ante, p. —, the Court upholds, in the former, the allocation of one representative to a county in a state legislative plan with an 89% maximum deviation from population equality and strikes down, in the latter, a congressional reapportionment plan for the State of New Jersey where the maximum deviation is 0.6984%. As a member of the majority in both cases, I feel compelled to explain the reasons for my joinder in these apparently divergent decisions.

In my view, the "one-person, one-vote" principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the State policies alleged to require the population disparities.

Both opinions recognize this need for flexibility in examining the asserted state policies.¹ In *Karcher*, New Jersey

¹As the Court notes in this case, "consideration must be given 'to the character as well as the degree of deviations from a strict population basis.' . . . The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause." *Ante*, at 10 (citation omitted). Similarly, in *Karcher*, the Court observes:

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

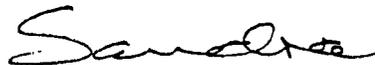
June 2, 1983

No. 82-65 Brown v. Thomson

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

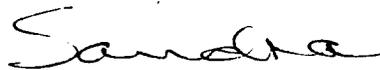
June 2, 1983

No. 82-65 Brown v. Thomson

Dear John,

I am happy to make the suggested changes
in my concurring opinion. They are quite appropriate.

Sincerely,



Justice Stevens

Copies to the Conference

7P. 3

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 3

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-65

MARGARET R. BROWN, ET AL., APPLICANTS, PETITIONER *v.* THYRA THOMSON, SECRETARY OF STATE OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF WYOMING

[June —, 1983]

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring.

By its decisions today in this case and in *Karcher v. Daggett*, *ante*, p. —, the Court upholds, in the former, the allocation of one representative to a county in a state legislative plan with an 89% maximum deviation from population equality and strikes down, in the latter, a congressional reapportionment plan for the State of New Jersey where the maximum deviation is 0.6984%. As a member of the majority in both cases, I feel compelled to explain the reasons for my joinder in these apparently divergent decisions.

In my view, the "one-person, one-vote" principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.

Both opinions recognize this need for flexibility in examining the asserted state policies.¹ In *Karcher*, New Jersey

¹As the Court notes in this case, "consideration must be given 'to the character as well as the degree of deviations from a strict population basis.' . . . The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

SUPREME COURT OF THE UNITED STATES

Circulated: _____
Recirculated: JUN 17 1983

No. 82-65

MARGARET R. BROWN, ET AL., APPLICANTS, PETITIONER v. THYRA THOMSON, SECRETARY OF STATE OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF WYOMING

[June 22, 1983]

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring.

By its decisions today in this case and in *Karcher v. Daggett*, ante, p. —, the Court upholds, in the former, the allocation of one representative to a county in a state legislative plan with an 89% maximum deviation from population equality and strikes down, in the latter, a congressional reapportionment plan for the State of New Jersey where the maximum deviation is 0.6984%. As a member of the majority in both cases, I feel compelled to explain the reasons for my joinder in these apparently divergent decisions.

In my view, the "one-person, one-vote" principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.

Both opinions recognize this need for flexibility in examining the asserted state policies.¹ In *Karcher*, New Jersey

¹As the Court notes in this case, "consideration must be given to the character as well as the degree of deviations from a strict population basis. . . . The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment

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