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# NORTH DAKOTA'S 2001 APPORTIONMENT: OPPORTUNITIES AND CHALLENGES

RICHARD W. RATHGE\* AND JOHN E. MONZINGO\*\*

## I. INTRODUCTION

North Dakota's reapportionment process has always been challenging and controversial.<sup>1</sup> Much of the challenge can be attributed to the shifting demographics of the state.<sup>2</sup> Population redistribution and decades of out-migration have dramatically altered residential patterns in the state.<sup>3</sup> The controversy, on the other hand, rests more in the interpretation of the constitutional standards that guide reapportionment.<sup>4</sup> This article will examine both issues. First, a brief historical update of apportionment in North Dakota since 1980 will be presented. This will be followed by an overview of the reapportionment committee's activities. Next, a portrait of the state's demographic profile will be offered to provide context to the challenges that the state faces with regard to realigning legislative districts. Finally, the concluding section of the article will offer suggestions for approaching reapportionment and, no doubt, add to the controversy.

## II. HISTORICAL UPDATE ON REAPPORTIONMENT IN NORTH DAKOTA

North Dakota has had a long history of difficulties apportioning the state legislature.<sup>5</sup> These difficulties culminated during the 1970s.<sup>6</sup> Since 1980, three major issues relevant to redistricting in North Dakota have

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1. Sandra L. Tabor, Note, *Apportionment In North Dakota: The Saga of Continuing Controversy*, 57 N.D. L. REV. 447 (1981).

2. *Id.* at 471 & n.187.

3. *Id.*

4. See, e.g., *id.* at 447-54.

5. *Id.* at 447. Apportionment is the allocation of a specified number of representatives among established geographical entities, such as the states of the United States. JACK C. PLANO & MILTON GREENBERG, *THE AMERICAN POLITICAL DICTIONARY* 155 (4th ed. 1976).

6. Tabor, *supra* note 1, at 463-72.

arisen.<sup>7</sup> These have been the dilution of minority voting strength, the intent of Congress as stated in the Census Act,<sup>8</sup> and the North Dakota constitutional question: can a legislator's term be reduced from four to two years as a consequence of redistricting?

The first issue concerns the dilution of minority voting strength. Originally, § 2 of the Voting Rights Act of 1965 specified that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."<sup>9</sup> In 1973, the United States Supreme Court, in *White v. Regester*<sup>10</sup> upheld a three-judge district court ruling that multi-member districts in the Texas counties of Dallas and Bexar discriminated against racial and ethnic minorities by diluting their ability to effectively participate in the political process.<sup>11</sup> In 1980, in *Mobile v. Bolden*,<sup>12</sup> the United States Supreme Court overturned a district court finding that the at-large election of city commissioners of Mobile, Alabama, discriminated against minority voters, ruling that § 2 of the Voting Rights Act of 1965 does not go beyond the Fifteenth Amendment, which only prohibits intentional discrimination.<sup>13</sup> In response, Congress amended § 2, rejecting the "intent test" of *Bolden* and returning to the "effect test" of *White*.<sup>14</sup>

In 1986, in *Thornburg v. Gingles*,<sup>15</sup> the Supreme Court specified the conditions which would have to prevail if a state were required to create a district with a majority of minority voters.<sup>16</sup> The minority group would have to be large enough to constitute a single-member district; it would also have to be politically cohesive, and there would have to exist bloc voting by non-

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7. Redistricting is the creation of districts of equal population from which legislators are elected. PLANO & GREENBERG, *supra* note 5, at 181-82. States redistrict by drawing equal population districts from which members of the United States House of Representatives are elected, once the number of representatives have been apportioned. *Id.* at 182. Furthermore, since *Reynolds v. Sims*, 377 U.S. 533 (1964), states redraw district lines to create equal population districts for both houses (except for Nebraska which is unicameral) of their legislatures. *Id.*

8. 13 U.S.C. §§ 1 to 401 (2000).

9. Voting Rights Act of 1965, Pub L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974e (1994 & Supp. V 1999)).

10. 412 U.S. 755 (1973).

11. *White*, 412 U.S. at 763-64, 769.

12. 446 U.S. 55 (1980).

13. *Bolden*, 446 U. S. at 65. Section 1 of the Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

14. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971, 1973, 1973b, 1973c, 1973aa-1a, 1973aa-6 (1994)).

15. 478 U.S. 30 (1986).

16. *Thornburg*, 478 U.S. at 50-51.

minority voters that would frustrate efforts of minority voters to elect candidates of their choice.<sup>17</sup>

When the North Dakota interim Legislative Redistricting and Elections Committee met to draw district lines in accordance with the 1990 census figures, it appeared that there might be a problem of minority vote dilution due to at-large election of members of the lower house in the North Dakota Legislature.<sup>18</sup> Judicial interpretation of the Voting Rights Act of 1965 and the policy of the Department of Justice led many to conclude that the creation of districts with a majority of minority voters was mandatory.<sup>19</sup> Floyd Hickok, the geographer working with the committee, advised the committee based on this assumption.<sup>20</sup> "North Dakota needs to be very careful about the needs and desires of its Native Americans. . . . If a minority district can be provided, it is my opinion—and the opinion of the courts—that it must be provided."<sup>21</sup> One of the guidelines had been that no district would cross the Missouri River because there were so few bridges that traveling within a trans-Missouri River district might entail a trip of hundreds of miles.<sup>22</sup> For this and other reasons, the Fort Berthold Indian Reservation was divided among four districts.<sup>23</sup> In 1991, the redistricting plan united the Reservation.<sup>24</sup> However, Wilbur Wilkinson, the Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, pressed for a subdistrict from which a single member of the house would be elected.<sup>25</sup>

American Indians are the largest minority population in this state, yet their representation in the Legislature is poor. . . . Racial attitudes and the so-called neutral criteria have been set up so as to disenfranchise American Indians.

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17. *Id.*

18. North Dakota is divided into single-member senatorial districts from which two representatives are elected. N.D. CONST. art. IV, § 2.

19. Charles S. Bullock & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 84 EMORY L.J. 1209, 1210-11 (1999).

20. See Tim Roby, *Legislators Tackle Redistricting: Consultant Suggests Trimming Number of N.D. Lawmakers*, THE FORUM (Fargo), June 11, 1991, at A1.

21. *Id.* (quoting Floyd Hickok).

22. HARLAN FUGLESTEN, UNIVERSITY OF NORTH DAKOTA, BUREAU OF GOV'T AFFAIRS, LEGISLATIVE REAPPORTIONMENT IN NORTH DAKOTA: FROM STATEHOOD TO THE PRESENT, SPECIAL REPORT NO. 62A, at 6 (1981).

23. *Id.*

24. Maps of legislative districts for the 1980s and 1990s are available from the North Dakota Legislative Council, State Capitol, Bismarck, N.D. 58502.

25. N.D. LEGISLATIVE COUNCIL, INTERIM MINUTES AND BACKGROUND MEMOS, LEGISLATIVE REDISTRICTING AND ELECTIONS COMM., meetings on June 10-11 and Oct. 15, 1991, & app. C (vol. 9, 1991-1993) [hereinafter N.D. LEGISLATIVE COUNCIL 1991].

The Three Affiliated Tribes are prepared to press the issue of our disenfranchisement and to protect our rights. . . . The state can remedy [sic] this situation by taking action today, or the Three Affiliated Tribes will pursue this matter through litigation.<sup>26</sup>

When the redistricting bill was approved by both houses of the legislature and signed by the governor, Wilkinson brought suit in federal court on behalf of the Three Affiliated Tribes.<sup>27</sup> The suit, which was eventually dropped, contended that the legislature intentionally sought to dilute Indian voting power by, among other things, not creating a subdistrict within district four.<sup>28</sup>

Wilkinson's suit may have had merit at the time, but it is less likely to have prevailed given the decisions of the United States Supreme Court later in the 1990s. In its decision in *Johnson v. De Grandy*,<sup>29</sup> the Court ruled that states were not required to maximize the number of districts that have a majority of minority voters.<sup>30</sup> As one commentator noted, "[t]he argument advanced . . . in the post-1990 cycle—that a minority district must be drawn if it can be drawn—is now clearly wrong as a matter of law."<sup>31</sup>

The second issue arose as a result of concern over undercounting in the 1990 census.<sup>32</sup> Undercounting is a concern because those who are not counted are not distributed evenly throughout the population; rather, the undercounted tend to be the poor and racial and ethnic minorities.<sup>33</sup> Since representation is based on census numbers, those jurisdictions in which the undercounted are concentrated are shortchanged in terms of political influence.<sup>34</sup> The suggested solution was to use statistical sampling to adjust the census figures derived from forms and interviews.<sup>35</sup>

26. Tim Roby, *N.D. Tribe Threatens Redistricting Lawsuit*, THE FORUM (Fargo), Nov. 7, 1991, at B-1 (quoting Wilbur Wilkinson).

27. Tim Roby, *N.D. Tribe Files Challenge to Redistricting Plan*, THE FORUM (Fargo), Apr. 1, 1992, at C-1.

28. *Id.*; see also *Tribal Lawyer Misses Lawsuit Rebuttal Deadline*, THE FORUM (Fargo), June 17, 1992, at C-5; John McDonald, *N.D. Asks Federal Panel to Dismiss Tribal Suit*, THE FORUM (Fargo), June 17, 1992, at B-1; *Tribal Leader: Lawsuit Wasn't Authorized*, THE FORUM (Fargo), July 4, 1992, at B-6; *Tribes Will Drop N.D. Remap Suit*, THE FORUM (Fargo), July 7, 1992, at A-1.

29. 512 U.S. 997 (1994).

30. *Johnson*, 512 U.S. at 1017.

31. J. Gerald Herbert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 436 (2000).

32. N.D. LEGISLATIVE COUNCIL 1991, *supra* note 25.

33. See Michael Cohen, *Coverage Evaluation*, in ENCYCLOPEDIA OF THE U.S. CENSUS 95, 100 (Margo J. Anderson ed., 2000) (showing characteristics of the undercounted).

34. For a discussion of the political consequences of the undercount, see generally Nathaniel Persily, *Color by Numbers; Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899 (2000).

35. *Id.* at 902.

When the use of adjusted figures was challenged, the Supreme Court prohibited their use in apportioning the United States House of Representatives and ruled that statistically adjusted numbers were mandatory for non-apportionment uses, including redistricting, if the Secretary of Commerce deemed it feasible.<sup>36</sup> The Bureau of the Census under the Clinton administration planned to issue two sets of figures.<sup>37</sup> If this decision had stood, the redistricting committee would have had to choose between two sets of population figures; however, the Secretary of Commerce appointed by George W. Bush, Donald Evans, chose to release only the non-adjusted numbers, based on the recommendations of the Executive Steering Committee for Accuracy and Coverage Evaluation and William G. Barron Jr., Acting Director of the Economics and Statistics Administration of the U.S. Census Bureau.<sup>38</sup>

The third issue to face the redistricting committee was the question of whether legislators elected for a term of four years could have their terms shortened to two years as a result of redistricting.<sup>39</sup> Article IV, section 4 of the North Dakota Constitution sets the terms of legislators at four years, while article IV, section 3 requires the staggering of terms. In 1910, the Supreme Court of North Dakota issued a ruling that upheld the reduction of terms as constitutional.<sup>40</sup> Although Attorney General Nicholas Spaeth had issued an opinion in 1992 declaring the shortening of terms in violation of the North Dakota Constitution, the redistricting act of 1991 was not challenged.<sup>41</sup> In 2001, Senator Bob Stenehjem and Representative Wesley R. Belter requested an opinion from Attorney General Wayne Stenehjem regarding the constitutionality of the shortening of terms.<sup>42</sup> Based on the principles that acts of the legislature must be interpreted as constitutional, if possible, and that provisions of the North Dakota Constitution must be reconciled and harmonized, Attorney General Stenehjem predicted that the North Dakota Supreme Court would uphold the constitutionality of the shortening of terms.<sup>43</sup>

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36. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 339-41 (1999).

37. Persily, *supra* note 34, at 908.

38. Memorandum from William G. Barron, Jr., Acting Director of U.S. Census Bureau, to Donald L. Evans, Secretary of Commerce (Mar. 1, 2001).

39. N.D. LEGISLATIVE COUNCIL 1991, *supra* note 25.

40. *State ex rel. Williams v. Meyer*, 127 N.W. 834, 836 (N.D. 1910).

41. Letter from Nicholas Spaeth, N.D. Attorney Gen., to William Kretschmar, State Representative (Mar. 4, 1992) (on file with author); *see also* Tim Roby, *Spaeth, GOP Trio Settle Potential N. D. Redistricting Pitfall*, THE FORUM (Fargo), Mar. 18, 1992, at A-1.

42. Letter from Wayne Stenehjem, N.D. Attorney Gen., to Senator Bob Stenehjem and Representative Wesley Belter (July 13, 2001) (on file with author); *see also* Op. N.D. Atty. Gen No. L-25 (2001).

43. *Id.*

### III. CURRENT APPORTIONMENT ACTIVITIES

On January 15, 2001, the North Dakota House of Representatives passed a House Concurrent Resolution directing the Legislative Council to “study and develop a legislative redistricting plan or plans for use in the 2002 primary election.”<sup>44</sup> The Senate amended the resolution asking the Legislative Council to consider subdistricts,<sup>45</sup> but the amendment was defeated overwhelmingly in the House.<sup>46</sup> Thus began the process of devising a redistricting plan for North Dakota based on the 2000 census figures.

The Legislative Council is a legislative committee that oversees the work of the legislative support staff and the interim committees.<sup>47</sup> Because the census data were not available in time for the regular session of the legislature to deal adequately with redistricting, an interim committee was given the responsibility of devising a redistricting plan and reporting to a reconvened or special session of the Fifty-seventh Legislative Assembly.<sup>48</sup> The Chairman of the Legislative Council, Wesley R. Belter, determined the membership of the committee from legislators who had indicated an interest in serving on the committee.<sup>49</sup> Chairman Belter also took into account geographical and urban/rural balance as well as his estimate of who would serve well on the committee.<sup>50</sup> The committee of ten Republicans and five Democrats reflected the partisan distribution in the Legislative Assembly.<sup>51</sup> Republican Representative Mike Timm was appointed chairman of the Legislative Redistricting Committee.<sup>52</sup>

In 1981 and 1991, a consultant was hired to draft alternative proposals for the committee to consider.<sup>53</sup> In 2001, because of improvements in software and to save money, members of the committee themselves were to draw alternative proposals.<sup>54</sup> To accomplish this, the committee was pro-

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44. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, HOUSE JOURNAL 98 (2001).

45. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, SENATE JOURNAL 212 (2001).

46. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, HOUSE JOURNAL 322 (2001).

47. N.D. CENT. CODE § 54-35-02 (2001).

48. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, HOUSE JOURNAL 98 (2001).

49. Telephone Interview with Wesley R. Belter, N.D. Representative (Aug. 16, 2001).

50. *Id.*

51. N.D. LEGISLATIVE COUNCIL, INTERIM MINUTES AND BACKGROUND MEMOS, meeting on May 14, 2001 (vol. 4, 1999-2001).

52. *Id.*, meeting on June 14, 2001.

53. FLOYD HICKOK, UNIVERSITY OF NORTH DAKOTA, BUREAU OF GOV'T AFFAIRS, REAPPORTIONMENT OF THE NORTH DAKOTA LEGISLATURE: A REPORT OF THE JOINT REAPPORTIONMENT COMMITTEE OF THE NORTH DAKOTA LEGISLATURE (1981); *see also* N.D. LEGISLATIVE COUNCIL, INTERIM MINUTES AND BACKGROUND MEMOS, LEGISLATIVE AND REDISTRICTING COMM., meeting on July 9, 2001 (vol. 5, 2001-2003) [hereinafter REDISTRICTING COMM. 2001].

54. Interview with N.D. Senator Tim Mathern (Aug. 15, 2001).

vided with six computers and corresponding software.<sup>55</sup> Two of the computers were to be used by the Legislative Council staff and each caucus of both houses was furnished with a computer to use as it determined.<sup>56</sup> Two members of the committee expressed opinions that relying on committee members to devise plans was difficult and time consuming.<sup>57</sup>

The committee worked under rigid time constraints. Deputy Secretary of State Cory G. Fong discussed with the committee the deadlines for the 2002 election.<sup>58</sup> The first of these was January 12, 2001, the first date that candidates are allowed to circulate nominating petitions.<sup>59</sup> Time had to be allowed for precincts to be established, and for precinct caucuses and district and state nominating conventions to be held.<sup>60</sup> According to Fong, the optimum date for the redistricting plan to take effect was December 1, 2001, and the last date, without altering deadlines and procedures for the 2002 primary election, was January 31, 2002.<sup>61</sup>

According to the counsel to the committee, John Bjornson, the time at which the plan would become effective would depend on whether the legislature were to reconvene or meet in special session.<sup>62</sup> If the legislature reconvened, the plan would not go into effect for ninety days unless it was designated an emergency measure requiring a two-thirds vote of both houses.<sup>63</sup> On the other hand, if the legislature were to meet in special session, called by the governor, the plan would go into effect on the date specified by the plan.<sup>64</sup> Because of time constraints, the latter was preferable. The Legislative Council also had the authority to call a special session.<sup>65</sup> Chairman Timm said that the goal of the committee would be to finish work by the first week in November 2001.<sup>66</sup>

The committee met several times. At the first meeting, in addition to discussing the procedures and time constraints mentioned above, the committee adopted some guidelines.<sup>67</sup> Population variations between districts

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55. REDISTRICTING COMM. 2001, *supra* note 53.

56. *Id.*; Telephone Interview with N.D. Representative Glen Froseth (Aug. 10, 2001); Telephone Interview with N.D. Senator Bill Bowman (Aug. 16, 2001).

57. Telephone Interview with N.D. Senator Steve Tomac (Aug. 15, 2001); Telephone Interview with N.D. Representative Pam Gulleon (Aug. 16, 2001).

58. REDISTRICTING COMM. 2001, *supra* note 53.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. N.D. CENT. CODE § 54-35-16 (2001).

66. REDISTRICTING COMM. 2001, *supra* note 53.

67. *Id.*

were to be limited to 10% or less,<sup>68</sup> and the committee was to try to preserve existing district boundaries as much as possible.<sup>69</sup> In addition, it was determined that any plan to be reviewed by the committee must first be submitted to the Legislative Council for technical review at least three days before the meeting.<sup>70</sup>

At the second meeting, the committee addressed the issue of racial minorities.<sup>71</sup> The census data contain more than 250 racial categories, most of which are not represented in significant numbers in North Dakota.<sup>72</sup> The committee decided to eliminate all racial categories with fewer than 500 individuals statewide.<sup>73</sup>

#### IV. DEMOGRAPHIC CHALLENGES TO REDISTRICTING

The continued shift of population from the state's rural areas to its urban centers presented the legislature with one of its greatest redistricting challenges. To meet the guidelines under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Supreme Court in *Reynolds v. Sims*<sup>74</sup> stated that legislative districts must be substantially equal in population.<sup>75</sup> The Supreme Court further defined the *Reynolds* standard in the 1970s, in *Mahan v. Howell*,<sup>76</sup> *Gaffney v. Cummings*<sup>77</sup> and *White v. Regester*,<sup>78</sup> by requiring legislative districts to differ by no more than 10% from the smallest to the largest, unless justified by some "rational state policy."<sup>79</sup> However, some flexibility is allowed if the state can justify the need by showing a deviation will "permit the State to pursue other legitimate objectives such as 'maintaining the integrity of various political subdivisions,'"<sup>80</sup> or to avoid splitting political subdivisions.<sup>81</sup>

In *Chapman v. Meier (Chapman I)*,<sup>82</sup> the U.S. District Court allowed North Dakota's "total variance" (overall range) among districts to exceed

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 377 U.S. 533 (1964).

75. *Reynolds*, 377 U.S. at 579.

76. 410 U.S. 315 (1973).

77. 412 U.S. 735 (1973).

78. *White v. Regester*, 412 U.S. 755 (1973).

79. *Mahan*, 410 U.S. at 325; *Gaffney*, 412 U.S. at 742; *White*, 412 U.S. at 762.

80. *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Reynolds*, 377 U.S. at 568).

81. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993).

82. 372 F. Supp. 363 (D. N.D. 1972).

10%.<sup>83</sup> Less than a year later, the Supreme Court decided *Mahan v. Howell*.<sup>84</sup> In *Mahan*, the Court stated that a population variance of more than 10% in redistricting the State of Virginia was constitutional because it served to implement a rational state policy.<sup>85</sup> The Court came to a different conclusion when it decided *Chapman v. Meier (Chapman II)*.<sup>86</sup> North Dakota's variance of 20% among districts was not justified because of the state's sparse population and its desire both to preserve political subdivision boundaries and to continue an asserted tradition of dividing the state along political subdivision lines and along the Missouri River.<sup>87</sup> The Supreme Court reversed the decision in *Chapman I* and remanded the case, stating that if the legislature did not enact a constitutionally acceptable plan then the district court must resolve the issue.<sup>88</sup> The redistricting challenge North Dakota faced because of the disproportional shift in the state's population was made more difficult by the holding in *Chapman II*.<sup>89</sup> There were three major challenges for the redistricting committee as a result of the state's population change between 1990 and 2000.

The first challenge was redistribution. Rural districts in the state lost substantial numbers while urban districts gained.<sup>90</sup> Nearly two-thirds of the 49 legislative districts lost population during the past decade, as noted in Table 1.<sup>91</sup> Based on the state's 2000 census population of 642,200, the ideal size of a district was 13,106 for a forty-nine legislative district structure.<sup>92</sup> This meant that districts could vary, on average, by 655 people in order to stay within the 10% threshold.<sup>93</sup> Thus, those districts falling outside a range from 12,451 to 13,761 needed the most attention.<sup>94</sup> According to Table 1, 22 of the state's 49 districts, roughly half, fell below the noted tolerance level while an additional nine districts exceeded the upper limit.<sup>95</sup> The level of loss among the declining districts was most

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83. See generally *Chapman I*, 372 F. Supp. 363.

84. See generally *Mahan*, 410 U.S. 315.

85. *Id.* at 325 (implementing a state "policy of maintaining the integrity of political subdivision lines").

86. 420 U.S. 1 (1975).

87. *Chapman II*, 420 U.S. at 21-26.

88. *Id.* at 27.

89. *Id.*

90. See *infra* page 708-09, tbl. 1, N.D. State Data Center, N.D. State Univ., *North Dakota State Legislative Districts: Land Area and Population Counts, 1990 and 2000* [hereinafter Table 1].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

problematic with half exceeding 10% or 1500 people.<sup>96</sup> In contrast, six of the nine districts that exceeded the upper population limit grew by more than 20%.<sup>97</sup> District 41 in south Fargo, which more than doubled its population base during the past census, best illustrates an example of the extreme disparity in population growth.<sup>98</sup>

A second major challenge faced by the redistricting committee was the extremely large size of rural districts. Nearly half or twenty-two of the legislative districts encompassed an area that exceeded 1000 square miles.<sup>99</sup> Based on the 2000 census, all but nine of these twenty-two extremely large districts lacked sufficient population base to meet the lower limit guideline under the 10% rule.<sup>100</sup> An additional problem was that most of these extremely large districts border another state.<sup>101</sup> This meant that options for expanding the district to meet the required threshold were limited.<sup>102</sup> To make matters worse, most of these extremely large districts border each other, further limiting expansion options.<sup>103</sup> For example, District 39 in the southwestern corner of the state lost nearly 1900 people during the last decade.<sup>104</sup> It is bounded to the west by Montana and to the south by South Dakota.<sup>105</sup> Expansion options were limited to the north because it abuts District 2, which lost over 2100 people.<sup>106</sup> Similarly, options were limited to the east because the adjacent districts also lost population; District 35 lost nearly 1500 people while District 36 lost nearly 800 people.<sup>107</sup> This same distributional issue arose in most of the legislative districts along the northern and southern borders of the state.<sup>108</sup> In short, if the number of legislative districts were not altered, redistricting efforts would have created a distinct domino effect of encroachment into the districts surrounding larger urban centers.<sup>109</sup>

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96. *Id.*

97. *Id.*

98. *Id.*

99. U.S. Census Bureau, Census 2000, Summary File 1 (SF1) 100-Percent Data, available at <http://factfinder.census.gov/home/en/sf1.html> (last visited Dec. 29, 2001) [hereinafter Census 2000 Summary File 1]; see also Table 1, *supra* note 90.

100. Table 1, *supra* note 90.

101. See *North Dakota Legislative Districts Based on 1990 Boundaries: Percent Change in Total Population, 1990 to 2000*, N.D. State Data Center, N.D. State Univ. (map on file with author).

102. *Id.*

103. *Id.*

104. Table 1, *supra* note 90.

105. N.D. Legislative Dist. map, *supra* note 101.

106. Table 1, *supra* note 90.

107. *Id.*

108. N.D. Legislative Dist. map, *supra* note 101.

109. *Id.*

A final challenge for those redistricting North Dakota was the need to preserve minority districts, especially those that conformed to Native American Reservation boundaries. Four Districts, 4, 9, 12, and 35, had Native American populations that exceeded 3000.<sup>110</sup> Districts 4 and 9 were very close to the necessary population thresholds; thus significant pressure was placed on committee members to maintain their boundaries.<sup>111</sup> In contrast, Districts 12 and 35 had losses of 1130 and 1457 people respectively, thus boundary changes were likely to be made.<sup>112</sup>

Aligned with the Native American boundary issue was the potential complication of how data on minorities were derived.<sup>113</sup> The U.S. Office of Management and Budget changed questions regarding race and ethnic identity on the 2000 census form in order to be in compliance with its October 1997 decision.<sup>114</sup> In brief, individuals were permitted to choose more than one of several race categories (White, African American or Black, American Indian or Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, Other Race).<sup>115</sup> The new standard reflects the growing number of multi-racial individuals in the United States.<sup>116</sup> In addition, the new standard requires federal agencies to include a separate question so people of any race can indicate whether they identify as being of Hispanic/Latino origin.<sup>117</sup> The multiple race category did not significantly increase the minority population in the state or in any specific legislative district.<sup>118</sup> For example, the number of Native Americans in North Dakota identified using a single race category (consistent with previous censuses) was 31,329 according to the 2000 census; those identified using the multiple classification were 35,228.<sup>119</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. *See, e.g.,* Constance F. Citro, *Advisory Committees*, in *ENCYCLOPEDIA OF THE U.S. CENSUS 14*, 18 (Margo J. Anderson ed., 2000) (showing efforts by the U.S. Census Bureau to reach minority communities).

114. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

115. *Id.*

116. *Id.*

117. *Id.*

118. Census 2000 Summary File 1, *supra* note 99.

119. *Id.* It is interesting to note that nearly half of the increase, using the multiple classification scheme, resided in the state's three metropolitan centers, with the addition of Minot. *Id.*

## V. CONCLUSION

The prolonged out-migration of people from the rural areas of the state continues to challenge the reapportionment process in North Dakota. Some may argue that we have reached a situation where logistically equal representation under the state's current legislative structure is questionable. When considering the apportionment process, several issues arise. Are residents appropriately served by a reapportionment plan in which the territory that their legislators must cover ranges from two square miles to nearly 5000 square miles?<sup>120</sup> Are the interests of the state appropriately served by a reapportionment plan that intentionally attempts to maintain urban and rural boundaries? Is the legislative process best served by a two-house system even though the length of terms and territory served by both houses are the same? Several alternative reapportionment options are available to the legislature that address these concerns.

One alternative that has been used in the past is to simply increase the number of legislative districts.<sup>121</sup> Unfortunately, increasing the number of districts in the state will have only a marginal effect. Since the number of residents within a district is constant, the disparities created by the disproportional losses in the rural areas will still exist, thus forcing boundary changes. However, this option should offer some relief by reducing the amount of territory that will have to be added to the largest districts. Perhaps the greatest barrier to this approach is the sentiment within the legislature to maintain cost efficiencies achieved through keeping the number of legislative districts as small as possible.

A second alternative is to integrate urban and rural districts. The Supreme Court has held in *Abate v. Mundt*<sup>122</sup> that preserving the integrity of political subdivisions may justify an apportionment plan that departs from numerical equality.<sup>123</sup> However, in cases where sparse population creates large inequities, the Court is less tolerant of maintaining political subdivisions in apportionment plans.<sup>124</sup> The size disparities in many western North Dakota districts may be reaching that threshold. Perhaps equally important is the political advantage that integrated districts may hold for the state. An integrated legislative district may encourage representatives to more aggressively view public policy from both urban and rural contexts.

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120. See N.D. Legislative Dist. map, *supra* note 101.

121. FUGLESTEN, *supra* note 22.

122. 403 U.S. 182 (1971).

123. *Abate*, 403 U.S. at 185.

124. *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

Interdependence among urban and rural areas of the state will be advanced if legislators represent both urban and rural interests.

A third alternative is to consider split districts for the lower house of the legislature. Currently, the senator and both representatives of a district could live on the same block within their district. Although this has not occurred, nor is it likely to occur, it does illustrate the lack of parameters established for insuring an equitable distribution of representation within districts. At a time where nearly half of the legislative districts encompass an area that exceeds 1000 square miles, it would seem appropriate to consider the value of split districts. However, this is clearly not a viable solution given the recent overwhelming defeat of a resolution to consider such action.<sup>125</sup>

Perhaps the most bold and obviously controversial approach is to reconsider the need for two houses of the legislature. At present, the upper and lower house members serve the same term of office.<sup>126</sup> Legislators from the same district serve the same people.<sup>127</sup> Would residents in the state be better served if representation were more equally distributed geographically through one house? The continued population shift from rural areas of the state to the largest cities within the state begs the question. Perhaps it is time to take that question seriously.

Ironically, the solution adopted by the committee and passed by the Fifty-seventh Legislative Assembly of North Dakota in special session was to reduce the number of districts to 47, thereby increasing the ideal district size to 13,664 and eliminating much of the need for boundary changes.<sup>128</sup>

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125. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, HOUSE JOURNAL 332 (2001).

126. N.D. CONST. art. IV, § 4.

127. *Id.* § 2.

128. STATE OF N.D., 57TH LEGISLATIVE ASSEMBLY, SENATE & HOUSE JOURNALS, SPECIAL SESSION 2001, at 1837-52; see also *New North Dakota Legislative Districts (1-47)*, N.D. State Data Center, N.D. State Univ., available at <http://www.state.nd.us/lr/redistmaps113001/pop.pdf> (Mar. 26, 2002) (showing a map and table of the forty-seven legislative districts).

**Table 1**  
**North Dakota State Legislative Districts:**  
**Land Area and Population Counts, 1990 and 2000<sup>129</sup>**

Legislative District No.	Land Area (square miles)	Total Population			
		1990	2000	Change: 1990-2000	
				Numeric	Percent
1	13	13,448	12,842	-606	-4.5
2	4,559	13,582	11,444	-2,138	-15.7
3	221	13,176	13,538	362	2.7
4	4,179	12,659	12,432	-227	-1.8
5	8	13,188	15,047	1,859	14.1
6	2,876	13,020	11,409	-1,611	-12.4
7	3,354	12,983	12,108	-875	-6.7
8	1,855	13,608	14,117	509	3.7
9	942	12,772	13,674	902	7.1
10	2,159	12,628	11,131	-1,497	-11.9
11	3	12,897	11,975	-922	-7.1
12	3,267	12,746	11,616	-1,130	-8.9
13	18	12,525	15,148	2,623	20.9
14	4,972	13,506	11,614	-1,892	-14.0
15	1,092	13,432	12,702	-730	-5.4
16	1,011	13,573	12,359	-1,214	-8.9
17	46	13,535	12,743	-792	-5.9
18	24	13,526	10,068	-3,458	-25.6
19	974	13,275	10,440	-2,835	-21.4
20	1,416	13,106	13,129	23	0.2
21	8	13,421	12,810	-611	-4.6
22	1,503	12,727	13,217	490	3.9
23	3,287	13,353	11,387	-1,966	-14.7
24	1,520	12,545	11,775	-770	-6.1
25	680	12,891	12,857	-34	-0.3
26	2,309	12,994	12,160	-834	-6.4
27	1,925	12,758	12,545	-213	-1.7
28	4,203	13,163	11,179	-1,984	-15.1
29	2,935	13,317	12,826	-491	-3.7

129. Legislative districts are based on 1990 boundaries. Square miles may not sum to total due to rounding. Data Source: U.S. Census Bureau. Prepared by: North Dakota State Data Center, NDSU, Fargo, ND.

Legislative District No.	Land Area (square miles)	Total Population			
		1990	2000	Change: 1990-2000	
				Numeric	Percent
30	43	13,324	15,922	2,598	19.5
31	2,620	12,472	13,365	893	7.2
32	4	13,537	12,693	-844	-6.2
33	2,070	13,060	11,405	-1,655	-12.7
34	5	12,478	12,909	431	3.5
35	4,234	12,679	11,222	-1,457	-11.5
36	2,640	13,097	12,312	-785	-6.0
37	9	12,459	12,826	367	2.9
38	149	12,689	12,421	-268	-2.1
39	7,239	13,226	11,351	-1,875	-14.2
40	58	12,646	11,842	-804	-6.4
41	29	12,657	27,970	15,313	121.0
42	2	13,444	13,199	-245	-1.8
43	12	13,525	15,896	2,371	17.5
44	2	12,583	11,716	-867	-6.9
45	16	12,554	12,693	139	1.1
46	17	12,534	16,720	4,186	33.4
47	25	13,347	16,082	2,735	20.5
48	8	12,907	12,841	-66	-0.5
49	16	13,228	16,523	3,295	24.9
<b>Statewide Total</b>	<b>68,994</b>	<b>638,800</b>	<b>642,200</b>	<b>3,400</b>	<b>0.5</b>

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