

Redistricting 2011

One Person, One Vote: A Judicial History

As American political concepts go, the idea that each citizen is entitled to have as much political clout at the ballot box as his or her neighbor seems fundamental. "One person, one vote" is how we say it. And we assume that it's an idea as old as the crack in the Liberty Bell.

Surprisingly, this most basic of political principles did not make its debut in this country until the second half of the Twentieth Century, when the United States Supreme Court handed down a series of cases beginning with its landmark decision in *Baker v. Carr*. The year was 1962, and the political process we know as redistricting would be changed forever.

The U.S. Supreme Court Steps In

Until the Supreme Court showed a willingness to enter the fray, the federal courts were silent on the issue of redistricting. This reluctance to address the issue was based on the courts' belief that redistricting was a state issue and political, rather than judicial, in nature.

Meanwhile, state legislatures also went to great lengths to avoid the issue—and the politically charged process of redrawing district boundaries. When they did tackle the task of redistricting, they were not always successful in getting legislation passed. As a result, legislative districts became unbalanced as populations changed while district boundaries remained the same.

The effect of all this was that voters living in sparsely populated legislative districts had more political clout than their neighbors in more heavily populated districts. Because all districts elected the same number of representatives, each voter in a district with a smaller population—and a correspondingly smaller number of votes needed to elect a representative—had a more sig-

nificant impact on the legislative process than a voter in a district with a larger population, where each person's vote, in effect, counted for less. The Supreme Court ultimately felt compelled to step in to correct this situation.

Baker v. Carr

In *Baker v. Carr*, 369 U.S. 186 (1962), a group of Tennessee voters brought an action under federal law, claiming that a 1901 state statute, which apportioned seats in the Tennessee General Assembly among the state's counties, unconstitutionally deprived them of equal protection of the laws. The plaintiffs argued that population changes since 1901, coupled with the failure of the General Assembly to change the reapportionment scheme, resulted in the debasement of their votes. On appeal, the United States Supreme Court held that the apportionment plan reflected in the Tennessee statute did indeed violate the constitution.

As noteworthy as the *Baker* decision was, it did not provide specific criteria for judicial review of redistricting plans done by the states, nor did it provide any judicial remedies. Rather, the Court simply sent the case back to Tennessee, directing the state to come up with a plan that would satisfy the Court's concerns.

In cases heard subsequent to *Baker*, the Court began to develop the standards that now govern congressional and legislative redistricting. For example, the "one person, one vote" standard was actually articulated a year after *Baker* when Justice Douglas, in *Gray v. Sanders*, 372 U.S. 368 (1963), stated that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the

Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

"One Person, One Vote" Defined

As simple as the "one person, one vote" concept sounds, it took the Court a number of years to define what it means. And, as it turns out, it means different things in different contexts.

The Supreme Court has articulated two equal-population standards: Strict population equality for congressional districts and a looser "ten percent standard" for state legislative districts. The reason for the difference lies in the United States Constitution.

Congressional Districts

Article I, section 2, of the U.S. Constitution addresses congressional districts and provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . Representatives . . . shall be apportioned among the several States . . . according to their respective numbers."

In *Wesbury v. Sanders*, 376 U.S. 1 (1964), the Court held that the population of a state's congressional districts must be as nearly equal in population as practicable. In subsequent opinions, the Court clarified that "as nearly equal in population as practicable" means absolute mathematical equality. It further provided that, if a state fails to achieve absolute mathematical equality, it must either show that the variances were unavoidable or specifically justify them.

Nearly 20 years after *Wesbury*, the Court decided *Karcher v. Daggatt*, 462 U.S. 725 (1983), the leading case on population equality in congressional districts. That decision reaffirmed that there is no level of population inequality

too small to worry about when it comes to congressional districts. The decision set forth two questions to aid in determining whether a congressional redistricting plan complies with the federal Constitution, even if it fails to establish population equality among districts:

- (1) Could the population differences among the districts have been reduced or eliminated by a good-faith effort to draw districts of equal population?
- (2) If the state did not make a good-faith effort to achieve equality, can the state prove that each significant variance among the districts was necessary to achieve some legitimate goal?

In terms of legal strategy, anyone challenging a congressional redistricting plan in court must prove that the answer to the first question is "yes." If the plaintiff meets that burden of proof, the *state* must then prove that the answer to the second question is also "yes".

Therefore, a state that makes a genuine good-faith effort to draw congressional districts with virtually no population deviations should be able to defend against constitutional challenges that are based on a theory of population equality.

The Court has recognized certain state goals that might justify some population variance between congressional districts. These include such things as making districts compact, respecting county and municipal boundaries, and preserving cores of prior districts. However, it is impossible to articulate either a specific population variance or a list of state goals that the Court would deem acceptable because each state presents a unique set of circumstances.

An historical aside: In 2001, the congressional redistricting plan drawn by the Nebraska Legislature gave each of the state's three congressional districts a population of exactly 570,421.

State Legislative Districts

While Article I, section 2, of the federal Constitution addresses the population of congressional districts, state legislative districts are governed by the Equal Protection Clause of the 14th Amendment, which provides that no state shall deny any person within its jurisdiction the equal protec-

tion of the laws. As applied to redistricting, the Supreme Court has interpreted the 14th Amendment to require that a state make a good-faith effort to create population equality among its districts. In a series of cases spanning almost 50 years, the Court has elaborated on what it means by "population equality" in the context of state legislative districts.

Reynolds v. Sims, 377 U.S. 533 (1964), marked the beginning of the Court's attempt to carve out equal-population standards for state legislative districts. While stating, in *Reynolds*, that absolute mathematical equality is not a constitutional requirement at the state level, the Court went on to say that "the overriding objective must be substantial equality of population among the various districts."

However, the Court in *Reynolds* did not specify what percentage of population variance would be acceptable, stating that "what is marginally permissible in one State may be unsatisfactory in another depending upon the particular circumstances of the case."

Nine years after *Reynolds*, the Supreme Court specifically recognized that "population equality" has a different meaning in the legislative context than it does in the congressional context. In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court reasoned that, in addition to the equal-population requirement, states have other substantial considerations to take into account and should, therefore, be afforded some latitude when drawing legislative district boundaries.

In a series of cases decided between 1975 and 1983, the Court articulated and reaffirmed what is known as the "ten percent standard." Generally, the equal-population requirement for state legislative districts is satisfied as long as the population of the smallest district and the population of the largest district do not vary by more than 10 percent. (In redistricting parlance, this is known as a "10 percent overall range of deviation.") Even if a plaintiff challenging a state legislative plan can introduce evidence that a plan with a smaller overall range of deviation *could have been drawn*, the federal courts will not necessarily strike down the plan.

At the same time, lawmakers cannot assume that a legislative redistricting plan in compliance with the 10-percent

standard is immune from successful challenge. In *Larios v. Cox*, 412 U.S. 735 (2004), the Supreme Court affirmed a district court's ruling striking down Georgia legislative plans having an overall range of 9.98 percent.

Holding that the plans violated the one-person-one-vote principle, the district court found that regional protectionism—in this case, an attempt to protect rural areas of the state as well as inner-city Atlanta—along with an attempt to protect incumbents of one political party caused the plan to fail despite the fact that it had an overall range of less than 10 percent.

The court drew a distinction between regional protectionism and the protection of political subdivisions, which is generally accepted as a justification for minor deviations in population equality. Likewise, the court said protection of incumbents is legitimate only if the policy is applied in a consistent and neutral way. In essence, the *Larios* court rejected the idea that plans can be created based on any reason whatsoever as long as the overall range of deviation is less than 10 percent.

A deviation in excess of 10 percent is considered to be *prima facie* evidence of discrimination under the 14th Amendment in the case of a state legislative plan. The Supreme Court has acknowledged that a state redistricting plan with a population deviation greater than 10 percent can pass constitutional muster if the deviation is necessary to implement a "rational state policy," such as creating compact districts, respecting county and municipal boundaries, and preserving the cores of prior districts. The range of deviation, if any, in excess of 10 percent that will be allowed by the Court is based on characteristics peculiar to each state. ❖

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This is the second in a series of newsletters to be released by the Legislative Research Office in conjunction with the 2011 redistricting process. The newsletters are designed to provide interested parties with information about the history of and some of the principal legal issues related to redistricting. If you would like additional information, please contact the Legislative Research Office at 402.471.2221.