NEBRASKA REDISTRICTING 2021

Supreme Court: "One Person, One Vote"

LEGISLATIVE RESEARCH OFFICE

A redistricting primer from the Legislative Research Office

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"One person, one vote" refers to the idea that one person's voting power ought to be roughly equivalent to another person's within the same state. 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 U.S. Supreme Court handed down a series of cases beginning with *Baker v. Carr,* 369 U.S. 186 (1962), a landmark decision that would change redistricting forever.

The Supreme Court Steps In

Until the 1960s, both courts and state legislatures went to great lengths to avoid the politically charged process of redrawing district boundaries. When they did tackle the task of redistricting, they sometimes failed to get legislation passed. As a result, legislative districts became unbalanced as populations changed and district boundaries remained the same.

Because all districts elect the same number of representatives, each vote cast in a district with a smaller population has a more significant impact on the legislative outcome than a vote cast in a district with a larger population. This creates an imbalance that gives voters in sparsely populated legislative districts more political influence than their neighbors in more heavily populated districts. Ultimately, the Supreme Court felt compelled to step in.

Baker v. Carr

In 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 under the law. The plaintiffs in *Baker* argued that population changes since 1901, coupled with the failure to change the reapportionment process, resulted in the dilution of their votes.

On appeal, the Supreme Court held that the apportionment plan reflected in the Tennessee statute did indeed violate the U.S. Constitution. It did not, however, provide any judicial remedies and simply sent the case back to Tennessee, directing the state to come up with a plan that would satisfy the Court's concerns.

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 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 *Westbury* the Court decided *Karcher v. Daggett*, 462 U.S. 725 (1983), the leading case on population equality in congressional districts. That decision reaffirmed that when it comes to congressional districts, any level of population equality, no matter how small, is still a cause for concern.

The *Karcher* decision sets forth two questions to aid in determining whether a congressional redistricting plan complies with the U.S. Constitution, even if it fails to establish population equality among districts. First, could the population differences among the districts have been reduced or eliminated by a good-faith effort to draw districts of equal population? Second, 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?

Anyone challenging a congressional redistricting plan in court must prove the answer to the first question is "yes." If the plaintiff meets that burden of proof, it must then prove that the answer to the second question is also "yes." If a state makes a genuine good-faith effort to draw congressional districts with virtually no population deviations, it should be able to defend itself against a constitutional challenge based on the theory of population equality.

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

State Legislative Districts

Establishment of state legislative districts is governed by the Equal Protection Clause of the Fourteenth Amendment, which provides that no state shall deny any person within its jurisdiction equal protection under the law. As applied to redistricting, the Supreme Court has interpreted the Fourteenth Amendment to require that a state make a good-faith effort to create population equality among its districts. In a series of cases spanning over 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 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." The Court 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 held that "population equality" has a different meaning in the legislative context than it does in the congressional context. In *Mahan v. Maxwell*, 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 be afforded some latitude when drawing legislative 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 that is in compliance with the 10 percent standard is immune to a successful court 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 deviation 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 deviation range of less than 10 percent.

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

In the case of a state legislative plan, a deviation range in excess of 10 percent is considered to be prima facie evidence of discrimination under the Fourteenth Amendment. The Supreme Court has acknowledged that a state redistricting plan with a population deviation range greater than 10 percent can pass constitutional muster if the deviation is necessary to implement a "rational state policy." The amount of deviation, if any, in excess of 10 percent that will be allowed by the Court is based on each state's particular characteristics.

In their efforts to comply with the population equality requirements identified in the *Reynolds* and *Wesberry* cases, states have predominantly used total population as the unit for calculating population equality for redistricting plans. In 2011, the plaintiffs in *Evenwel v. Abbott,* 136 S. Ct. 1120 (2016), challenged Texas' 2011 redistricting plan, claiming that its use of total population violated the Equal Protection Clause because it discriminated against voters in districts with low immigrant populations by giving voters in districts with large immigrant populations a disproportionately weighted vote.

While in the *Evenwel* case the Supreme Court held that a state's use of total population data is a permissible metric for calculating compliance with the "one person, one vote" requirement established in the *Reynolds* and *Wesberry* cases, the Court did not prohibit the states from using other forms of data such as citizen voting age data or registered voter data.