My How We Have Changed: The Evolution of Redistricting Law

In the Beginning….

Lively debate has occurred over whether or not legislatures during the earliest days of the Republic embraced the idea of equal population of electoral districts. One thing we do know—by 1900, most did not.

The late 19th and early 20th centuries saw a great influx of immigrants that mostly settled in larger cities. Growing cities were a threat to the established powers that often were located in smaller, rural counties. A solution to the problem was to freeze reapportionment activities. Prior to the 1960s, many states had not engaged in redistricting or reapportionment since the early 1900s. Two states, Delaware and Mississippi, actually set their apportionments out in their constitutions thereby making these very difficult to change. A few examples of the last apportionment activity dates by state are listed in the following table.

State	Last Apportionment[1]
Alabama	1901
Delaware	1897*
Indiana	1915
Iowa	1927
Louisiana	1921
Mississippi	1915*
Tennessee	1901

*Apportionments set out in the state constitution.

Courts were reluctant to take action regarding redistricting/reapportionment, citing a variety of reasons. These reasons included:

- Separation of powers;
- No equity on the face of the bill; and,
- Justiciability, often included in a no equity on the face of the bill argument.

In some cases, courts concluded thar cases were justiciable, but their powers to fashion a remedy were limited resulting in either the court ordering at large elections, elections under an older plan, or concluding that a court in equity could exercise discretion and not act in the matter. The latter is a form of balancing the hardships. Sometimes courts also consider the public interest before deciding on whether or not a remedy is appropriate.[2]

[1] The Complicated Impact of One Person, One Vote on Political Competition and Representation , Nathaniel Persily Thad Kousser Patrick Egan 80 *North Carolina Law Review* Number 4, May 2002, p. 1329.

[2] Doug Rendleman, "The Triumph of Equity Revisited: The Stages of Equitable Discretion," *Nevada Law Journal*, Vol. 15, 1396, 1425-429, Summer 2015.

In Congressional matters, two significant cases, *Wood v. Broom*[3] and *Colegrove v. Green*[4] all but foreclosed legal action addressing congressional redistricting until the 1960s. This was a matter for state legislatures or for Congress.

a. While courts are deferring to legislatures in reapportionment and redistricting cases, federal courts are entering into a new era of protection of individual rights.

The Lochner Era: beginning in 1905, Federal courts began to actively engage in the protection of property interests asserted by plaintiffs in cases challenging the constitutionality of economic regulation.[5] Additionally, federal courts began to extend protection of the Bill of Rights to persons aggrieved by state actions infringing on personal liberties, including First Amendment violations.[6]

New Deal Era: In the face of decades of pointed criticism from law schools and many attorneys and politicians, federal courts began to lessen their scrutiny of regulatory schemes established by Congress and several states, see *U.S. v. Carolene Products.*[7] However, *Carolene Products* contains the famous footnote 4 that states:

> *There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the 14th Amendment.* (See *Stromberg v. California,* 283 U. S. 359, 283 U. S. 369-370; and *Lovell v. Griffin,* 303 U. S. 444, 303 U. S. 452.)
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> *It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U. S. 536; Nixon v. Condon, 286 U. S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U. S. 697, 283 U. S. 713-714, 283 U. S. 718-720, 283 U. S. 722; Grosjean v. American Press Co., 297 U. S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 283 U. S. 369; Fiske v. Kansas, 274 U. S. 380; Whitney v. California, 274 U. S. 357, 274 U. S. 373-378; Herndon v. Lowry, 301 U. S. 242, and see Holmes, J., in*

[3] 287 US 1 (1932).
[4] 328 US 529 (1946).
[5] 198 US 45 (1905).
[6] See *Meyer v. Nebraska*, 262 US 390 (1923)—14th Amendment Due Process protects those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." See also *Pierce v. Society of Sisters,* 268 US 510 (1925)—protects against arbitrary infringements of liberties, and *Gitlow v. New York*, 268 US 652 (1925)—first amendment protections are applicable in cases involving state statutes.
[7] 304 US 144 (1938).

> *Gitlow v. New York, 268 U. S. 652, 268 U. S. 673; as to prohibition of peaceable assembly, see De Jonges v. Oregon, 299 U. S. 353, 299 U. S. 365.*
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> *Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U. S. 510, or national, Meyer v. Nebraska, 262 U. S. 390; Bartels v. Iowa, 262 U. S. 404; Farrington v. Tokushige, 273 U. S. 284, or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare 17 U. S. Maryland, 4 Wheat. 316, 17 U. S. 428; South Carolina v. Barnwell Bros., 303 U. S. 177, 303 U. S. 184, n 2, and cases cited.*[8]

This footnote outlined an analytical approach to addressing challenges to state statutes and local ordinances. Entire theories of constitutional law have been built around Footnote 4.

b. ***Colegrove vs. Green*: where theories collide.**

In *Colegrove,*[9] seven members[10] of the United States Supreme Court accounted from three separate opinions on the questions of whether or not the courts should become involved in Illinois' congressional redistricting. Illinois had not redistricted its delegation since 1901.

Speaking for himself and Justices Reed and Burton, Justice Frankfurter concluded that the *Broom* case mentioned above was controlling and that the court had no jurisdiction. For changes to be mandated, either Congress would have to act by setting districting standards, or the individual legislatures would have to address the population imbalances.

Alternatively, Frankfurter noted that the four justices who separately concurred in *Broom* concluded that there was no equity on the face of the bill. For Justice Frankfurter, this was an invitation to conclude that not only are Congressional redistricting matters outside the jurisdiction of the court, but redistricting/reapportionment matters in general are non-justiciable. This logic was similar to that applied in several state and lower federal court cases during the first half of the 20th century. Specifically of note was the following passage:

> *We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in*

[8] Supra.
[9] *Colegrove v. Green*, supra.
[10] When *Colegrove* was decided, the Chief Justice's position was vacant, and Justice Robert Jackson was out of the country performing the functions of Chief Prosecutor for the Nuremburg War Crimes Tribunal.

> *controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination.*

Further, Justice Frankurter noted:

> *To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action…*

Justice Black, writing for himself and Justices Douglas and Murphy, would have found that the courts should have issued a declaratory judgment against the state of Illinois. Of significance for the future, he noted:

> *It is difficult for me to see why the 1901 State Apportionment Act does not deny appellants equal protection of the laws. The failure of the Legislature to reapportion the congressional election districts for forty years, despite census figures indicating great changes in the distribution of the population, has resulted in election districts the populations of which range from 112,000 to 900,000. One of the appellants lives in a district of more than 900,000 people. His vote is consequently much less effective than that of each of the citizens living in the district of 112,000. And such a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment. The 1901 State Apportionment Act, if applied to the next election, would thus result in a wholly indefensible discrimination against appellants and all other voters in heavily populated districts. The equal protection clause of the Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. See Nixon v. Herndon, 273 U. S. 536, 273 U. S. 541; Nixon v. Condon, 286 U. S. 73. No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will, in some instances, have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.*

Justice Rutledge concurred in the result only of the Frankfurter plurality. He concluded that there was no equity on the face of the bill, but did not conclude that the cause was not justiciable, or that the cause was one where the court had no jurisdiction. He did apply the standard of discretion that courts in equity often apply in cases for extraordinary remedies, and opined that

in this case, the courts should not proceed. Language in his concurrence raises the possibility that there might not have been sufficient time to craft a proper remedy given the closeness to election time.

In conclusion, a majority did not involve the court in the Illinois redistricting matter, but a majority refused to conclude that the court had no jurisdiction and found that these cases were justiciable.

c. ***Baker v. Carr***: where the courts choose to be thrust into the political thicket. Courts have jurisdiction over these matters and claims are justiciable.

While several cases dealing with electoral matters were dealt with in the 1950s that treated the Frankfurter opinion in *Colegrove* as controlling, the court once again faced an issue of reapportionment in *Baker v. Carr*,[11] a challenge to the apportionment of the Tennessee General Assembly based on the Equal Protection Clause.

For the majority, Justice Brennan wrote that the court had jurisdiction over the subject matter, the parties had standing, and that the controversy was justiciable. Noting that Justice Rutledge in *Colegrove* concluded that the controversy was justiciable, the majority concluded that a right protected by the 14th Amendment could be defended in the federal courts. Justice Brennan associated political question issues with separation of powers and concluded that determining whether or not it was a violation of the U.S. Constitution was a matter for the courts.

Justice Frankfurter and Harlan dissented. Both believing that the formulation of a remedy would be problematic as too many political choices had to be made. By virtue of *Baker*, the court chose to enter into the thicket contra Justice Frankfurter.

d. One-person, One-Vote, a political thicket, a principle in search of a pedigree, neither, or maybe all of them.

1. Now we are in the thicket! It was for subsequent decisions to decide what neutral principle of law would be offered up as a basis for evaluating the apportionment of legislatures. In *Colegrove*, Justice Black hinted at population equality, but how much equality?

2. *Gray v. Sanders*[12]

In *Gray* the Supreme Court struck down the Georgia "unit system" that was used to elect nominees for statewide office. Under the unit, votes were allocated to counties, but less populated rural counties carried more weight in the system than did more populous counties.

[11] 369 US 186 (1962).
[12] 372 U.S. 368 (1963).

Justice Douglas writing for six members of the majority found this practice violated the Equal Protection Clause of the 14th Amendment. He noted:

a. The Equal Protection Clause requires that, once a geographical unit for which a representative is to be chosen is designated, all who participate in the election must have an equal vote—whatever their race; whatever their sex; whatever their occupation; whatever their income, and wherever their home may be in that geographical unit.

b. The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as an allocation of Senators irrespective of population and the use of the electoral college in the choice of a President.

c. The 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.

In dissent, Justice Harlan noted that:

a. One-Person, One-Vote has never been the universally accepted political philosophy in England, the American Colonies, or in the United States.

b. A violation of the Equal Protection Clause cannot be found in the mere circumstance that the Georgia County Unit System results in disproportionate vote weighting. It "is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness.

3 Nonetheless, the doctrine has become part of our constitutional law and language. Cases such as *Wesberry v Sanders,*[13] and *Reynolds v. Simms*[14] have applied the principle, and Justice Frankfurter to the contrary, the principle has been relatively easy to apply so long as we are counting people. Since these cases, we have been left to iron out details such as permissible deviation in noncongressional cases. A presumptive constitutionality of non-congressional district populations plus or minus 5% off of the idealized district.

But….we accept as a given that this is the law, but wherein lies the basis for this important part of constitutional doctrine?

4 Test or history? Clearly there is nothing specific in the Equal Protection Clause about One-Person, One-Vote. A good textualist like Black might have made a good go at making the argument for it inhering in the concept of equal protection, but Douglas really does not make

[13] 376 U.S. 1 (1964)
[14] 377 U.S. 533 (1964)

a compelling argument from text or history for incorporating one-person, one-vote through the Equal Protection Clause.

a. We know that there was some consideration of population equality in the early days of the republic, but is there enough history to support a conclusion that the principle is part of the requirement of equal protection? Justice Harlan in *Gray* makes a forceful argument that it is not.

b. Justice Douglas makes a passing comment about the *Declaration of Independence* and the *Gettysburg Address* in *Gray* as a basis for One-Person, One-Vote, this is not developed here or elsewhere.

c. Nonetheless, Chief Justice Warren considered the reapportionment cases to be his greatest achievements.

5. A structural argument?

a. As for a basis in the Constitution for One-Person, One-Vote, history and text appear fruitless. Structure seems to be the best source for the doctrine. One of the renowned constitutional theorists of the last 50 years, John Hart Ely, offered a defense of a Carolene Products-based theory of constitutional adjudication that relied on constitutional structure as the basis for protecting individuals and minorities from marginalization by those in power[15]. Professor Pamela Karlan has noted about Ely's theory:

> *In Democracy and Distrust, Ely presented an argument, rooted in footnote four of Carolene Products and exemplified by the Warren Court, for "a participation-oriented, representation-reinforcing approach to judicial review. "This approach, Ely claimed, would avoid both the cramped perspective of clause-bound interpretivism and the self-referential value imposition of contextual theories. It would instead be guided by a recognition that the original structure and subsequent amendment of the Constitution revealed it to be a document concerned with the "process of government," 'particularly with the allocation of decision-making power.*[16]

b. We note that the doctrine of One-Person, One-Vote is often criticized as not reaching many of the perceived woes of redistricting. These include forms of gerrymandering. At the root of these concerns is how one decides which persons end up in which districts. One can hear Justice Frankfurter chiding the generations on entering into the political thicket.

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[15] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, Harvard Univ. Press, Cambridge MA, 1980.

[16] See Pamela Karlan, "John Hart Ely and the Problem of Gerrymandering: The Lion in Winter," *Yale Law Journal*, Volume 114, p. 1329 (2005).

6. The Voting Right Act of 1965 (VRA) and Redistricting

a. Today we redistricters always think about the VRA. Unless you live in a racially and ethnically homogenous place, the VRA is not going to be far from your thoughts when you work on a plan. We think about the thrust of Section 2, we think about the extent to which retrogression is still a viable argument against us, we think about our obligations under the VRA and its interplay with equal protections. We forget that there was a time when this may not have been an issue.

b. The VRA and the beginning

Clearly the original 1965 enactment met head on issues related to vote denials and abridgement that had occurred in several jurisdictions . This issue was dealt with through section 5's requirement of preclearance for jurisdictions set out as covered jurisdictions in section 4. Section 2 was essentially a recitation of the requirement of the 15th Amendment's protection against racially based impairments on suffrage rights.

While voter registration increased in the covered jurisdictions as a result of the Voting Rights Act, several electoral practices were observed that appear to represent end runs against the VRA. The elimination of electoral districts to be replaced with at-large elections, and the elimination of elected positions for appointed positions became a matter for litigation.

Several cases merit discussion, as well as the amendments to the Voting Rights Act that were adopted in 1982. The cases we must consider are:

- *Allen v. Board of Elections*;[17]
- *Beer v. US*;[18] and,
- *Bolden v. City of Mobile*.[19]

***Allen v. Board of Elections*:** In *Allen*, SCOTUS ruled 8-1 that certain changes in election practices adopted in Mississippi and Virginia fell within the scope of the VRA's Section 5 preclearance. Of particular interests are the Mississippi changes that provided for eliminating electoral districts for county boards of supervisors and providing for at-large election of such persons. Mississippi also eliminated several elected school superintendent positions.

[17] 393 U.S. 544 (1969).
[18] 425 U.S. 130 (1976).
[19] 446 U.S. 55 (1980).

Relying heavily on the statutory definition of voting as encompassing "all action necessary to make a vote effective," (393 U. S., at 565-566), and the broad remedial purposes of the Voting Rights Act of 1965, the Court held that a change from district to at-large voting for county supervisors, a change that made an important county office appointive rather than elective, and a change that altered the requirements for independent candidates, were all covered voting practices. (Id., at 569-571.)

Thus, Section 5 was not limited to changes directly affecting the casting of a ballot. Id., at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." See *Reynolds v. Sims*, 377 U. S. 533, 555 [1964]).

Thus, the court effectively expanded the scope of the act to cover more than just voting registration and other practices related to the casting of a vote**. Actions that diluted the voting power of minorities fell into the scope of the VRA's Section 5.**

Beer v. U.S.: The post 1970 census New Orleans city council apportionment was filed with the U.S. District Court of the District of Columbia for preclearance. The plan contained two majority-minority districts, and one majority-minority VAP district. It also contained two at-large districts that had been in effect since the 1954 charter amendments. In 1974, the District Court denied pre-clearance under Section 5, and the city appealed. SCOTUS ruled for the City. The Supreme Court reasoned that Section 5 applied only to proposed changes in voting procedures and that the plan did not violate Section 5 because it enhanced the position of racial minorities with respect to their effective exercise of their right to vote. In this case, the long-standing use of at large districts coupled with the facet the plan enhanced minority opportunity to elect candidates made the plan non-retrogressive.

Bolden v. City of Mobile: Mobile had a city government composed of at-large elected commissioners. This system had been authorized by the Alabama legislature in 1911. Petitioners challenged this arrangement under the 15th Amendment contending that an at large system violated their voting rights. SCOTUS rule 6-3 that the plaintiffs failed to meet their burden in an action based on the 14th or 15th amendments. In order to prevail, under the 15th Amendment, the petitioners would have to show that they were denied the ability to register and vote.

Under the 14th amendment, they would have to show that the electoral scheme was erected purposefully to discriminate against the petitioners. This they were not able to do. Disproportionate effects or impacts are not enough.

c. **VRA Amendment in 1982:** In part to overturn the Bolden requirement of showing a discriminatory purpose in vote dilution cases, Congress adopted several amendments to the VRA in 1982. This included reenactment of Sections 5, making Section 2 have national applicability, but perhaps most importantly, Section 2 was amended to bar voting practices that have the effect of excluding a racial group from the political process. Thus

Section 2 cases for vote dilution could proceed even though they could not meet the *Bolden* tests.

After the 1982 amendments, naturally major case law followed. Of particular interests to us are *Thornburg v. Gingles,*[20] and *Bartlett v. Strickland.*[21]

Gingles is a major case rendered after the 1982 amendments. Following *Gingles* it became clear that plaintiffs could bring Section 2 challenges by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2 (a), as amended, prohibits a state or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2 (b), as amended, provides that Section 2 (a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

To establish a Section 2 claim, plaintiffs had to meet several threshold criteria. These criteria included:

- the minority population is insular;
- it is politically cohesive; and,
- racial block voting prevents the minorities from electing the candidates of their choice.

Now we see taking shape the Section 2 analysis to which we have become accustomed. To find both cohesiveness and block voting, an analysis of voting behaviors in relevant elections becomes an important part of our redistricting analysis.

In *Bartlett,* the court was faced with another case involving vote dilution. *Bartlett* stands for the proposition that in addition to the *Gingles* test "prongs" the minority should be sufficiently large enough to constitute a majority in a single-member district, That is, the minority is required to constitute more than 50% of the voting population in the relevant area. The section did not authorize special protection to the minority's right to form political coalitions where minority voters could not elect their candidate of choice based on their own votes and without assistance from others. Such protection would impose an unworkable requirement for complex political predictions tied to race-based assumptions.

Now the terrain looks somewhat familiar.

[20] 478 U.S. 30 (1986).
[21] 556 U.S. 1, (2009).