Washington University Law Review

Volume 17 | Issue 3

January 1932

Recent Controversies Regarding Congressional Districts

Isidor Loeb

RECENT CONTROVERSIES REGARDING CONGRESSIONAL DISTRICTS

By Isidor Loeb

Section 22 of an Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representatives in Congress, approved June 18, 1929,[1] establishes an automatic procedure for apportioning representatives among the states in case the Congress fails to perform this duty after each decennial census. It provides that within one week after the beginning of the second regular session of each Congress, held after the taking of each census, the President shall transmit to Congress a statement showing the number of representatives to which each state would be entitled under an apportionment of the then existing number of representatives made in each of three different ways. If such Congress fails to pass an apportionment act, each state shall be entitled to the number of representatives based upon the method used in the last preceding apportionment. This was intended to prevent the failure to reapportion representatives that occurred after the Census of 1920. It also settled the serious problem of the increasing size of the House by limiting it to the existing number unless Congress increases it. This automatic plan was followed in 1931, after Congress failed to pass a reapportionment act.

The solution of these problems was soon followed by the appearance of a new aspect of an old evil. Under the Constitution, representatives are apportioned among the several states[2] but nothing is provided regarding the division of the states into districts for the purpose of electing representatives. At first the states were left free to determine this question under their power to prescribe the manner of holding elections for representatives.[3] In 1842, Congress exercised its power to "make or alter such regulations"[4] by providing that each state should be divided into districts equal in number to the number of repre-

[1] 46 Stat. 26, 2 U. S. C. A. 2a.
[2] Const. U. S. Amend. 14, Sec. 2.
[3] Const. U. S. Art. 1, Sec. 4, clause 1.
[4] *Ibid.*

sentatives to which it was entitled and that no district should elect more than one representative.[5] The Apportionment Act of 1911 provides in section 4, "that in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act."[6]

The Act of 1842 left the arrangement of the districts to the states except that it required that they should be "composed of contiguous territory."[7] Subsequent acts added to this provision and the Apportionment Act of 1911, section 3, provides that districts shall be "composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants."[8] This modification was undoubtedly intended to check the evil of "gerrymandering" that had developed in many states. Notwithstanding this specific mandate, state legislatures for partisan purposes, have continued to establish districts that reveal great inequalities in population and exhibit bizarre geographical features that are far from conforming to the test of "compact territory."

Congress may have the power to eliminate gerrymandering by creating the congressional districts in each state and the House of Representatives, under its power to judge the elections of its members,[9] could refuse to seat representatives from districts that were improperly laid out, but neither action has been seriously suggested.

Failure to secure equitable districting from state legislatures has led to appeal to the courts. Congressional redistricting acts have been held invalid in a number of states because of inequalities in the population of the districts. The most recent case of this character arose in Illinois after the legislature, in 1931, passed an act dividing the State into twenty-seven dis-

[5] 5 Stat. 491.
[6] 37 Stat. 14, 2 U. S. C. A. 4.
[7] 5 Stat. 491.
[8] 37 Stat. 14, 2 U. S. C. A. 3.
[9] Const. U. S. Art. 1, Sec. 5, Clause 1.

tricts for the election of representatives under the Congressional Apportionment Act of 1929. Certain taxpayers applied for an injunction to restrain the Secretary of State and a county clerk from expending public moneys in carrying out the provisions of the legislative act on the ground that it was unconstitutional. The circuit court granted the injunction and, upon appeal, its decree was affirmed by the Illinois Supreme Court.[10]

The court ruled against the contention that the Apportionment Act of 1929 had repealed the Act of 1911 which contained the requirement for districts "containing as nearly as practicable an equal number of inhabitants." It held that as the state redistricting act provided too great variation in population of the districts it was invalid because of conflict with the Apportionment Act of 1911. The redistricting act, also was held to be in conflict with the state constitution.

As the number of representatives to which Illinois is entitled under the Apportionment Act of 1929 is the same as under the Act of 1911 the result of this decision is that members will be elected as before, two at large and the remainder from the twenty-five districts provided by previous Illinois legislation.

In three other states controversies have arisen under the Apportionment Act of 1929 regarding the participation of the governor in the redistricting of the state.[11] In one of these, New York, which gained two representatives, the result may not prove serious as the former districts would continue and the two additional members may be elected at large.

The situation, however, is quite different in Minnesota and Missouri which lost one and three representatives respectively. In these states it is possible that the controversy may result in the non-existence of any valid districts so that all of the representatives must be elected at large on a general ticket.

In Missouri, at least, other serious controversies may arise regarding matters of purely state concern. Constitutional provisions relating to the initiative and referendum require that petitions for either shall be signed by a certain percent of the legal

[10] Moran v. Bowley (Ill. 1932) 179 N. E. 526.

[11] The redistricting acts of the states were compiled by William Tyler Page, Clerk of the House of Representatives and published in 1931 by the Government Printing Office in a pamphlet entitled: REGULATIONS OF THE LEGISLATURES OF CERTAIN STATES PRESCRIBING CONGRESSIONAL DISTRICTS.

voters in each of two-thirds of the Congressional districts.[12] Hence it may prove impossible to submit any act of the next General Assembly to the referendum or to initiate any legislative act or constitutional amendment. If the next legislature passes a redistricting act it would become effective ninety days after the adjournment of the session. This would make it possible to file initiative petitions unless the session was prolonged but it would be doubtful whether any act could be suspended by referendum petitions as these must be filed not more than ninety days after the adjournment of the session.

Another difficulty would grow out of the primary election law which provides that the state committee of each political party shall consist of members elected by the congressional district committees[13] which probably could not be validly constituted if there were no districts. There are also some state boards, such as the Missouri State Board of Agriculture,[14] the members of which must be apportioned among the congressional districts.

A case involving a similar question to that at issue in these three states arose in South Dakota in 1910. A redistricting act was suspended under the referendum provision of the state constitution. A candidate for Congress in one of the new districts contended that as Article I, Section 4 of the Constitution of the United States gave the "legislature" the power to prescribe the manner of holding elections for representatives, the referendum provision was not applicable to the redistricting act. The Supreme Court of South Dakota in the case of *Schrader v. Polley*[15] held that the word "legislature" meant the lawmaking power and that the redistricting act would not be valid unless ratified by the voters.

In the case of *Davis v. Hildebrant*[16] the Supreme Court of the United States, in 1916, sustained a decision of the Ohio Supreme Court holding invalid a redistricting act which had been rejected by the voters under the referendum provision of the state constitution. This case turned upon the clause in the Apportionment Act of 1911 which provided that redistricting

[12] Const. Mo. Art. 4, Sec. 57.
[13] R. S. Mo. (1929) sec. 10282.
[14] R. S. Mo. (1929) sec. 12349.
[15] Schrader v. Polley (1910) 26 S. D. 5, 127 N. W. 848.
[16] 241 U. S. 565.

should be made in the state "in the manner provided by the laws thereof"[17] and the Court did not consider the meaning of the term "legislature" in Article I, Section 4, of the Constitution.

Minnesota was the first of the three states in which the recent controversy was taken into the courts. The legislature, in 1931, had passed a bill dividing the state into nine congressional districts. This bill when presented to the governor had been vetoed by him on the ground of inequalities. The house of representatives when it received the governor's veto passed a resolution ordering the bill to be filed with the secretary of state. The latter treated it as a valid act and received the filing fee of a candidate from one of the congressional districts created by it. A petition for an injunction to restrain the secretary of state from accepting filing fees for such districts on the ground that the act was invalid was presented to the district court. The latter sustained a demurrer to the petition and an appeal was taken to the Supreme Court which affirmed the decision of the district court on October 9, 1931.[18]

The court disposed of the argument that the districts provided are so arbitrary and unfair as to be in conflict with the Federal law. It held that the Apportionment Act of 1929 had entirely repealed the Apportionment Act of 1911 and that the provision in the former requiring apportionment "by the method used in the last preceding apportionment . . . related exclusively to the arithmetical method of computation." As the requirement of the Act of 1911 for "districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants" was no longer in effect the states were free from any limitation by Federal law regarding the manner of arranging the districts. As this is "a political and discretionary power granted by the Federal Constitution" it is not subject to control by state constitutional provisions and "is beyond the reach of the judiciary."

The court then considered the fundamental issue of the veto of the governor and the failure to pass the bill over his veto. It held that in the absence of any regulation by Congress, the power "to prescribe congressional districts rests exclusively and

[17] N. 6 above.

[18] State ex rel. Smiley v. Holm (Minn. 1931) 238 N. W. 494.

solely in the language of Section 4, Article I, of the United States Constitution"[19] and that the question depended upon the meaning of the term "legislature" in that section. The intention of the framers of the Constitution is decisive of this question. The court held that they did not regard the governor as a part of the legislature and that in many other parts of the Constitution, *e. g.* those relating to the election of United States Senators,[20] and the ratification of constitutional amendments,[21] they used the term legislature as exclusive of the governor and the lawmaking power and that this construction had been approved by the United States Supreme Court.[22]

The court properly criticized the theory in *Schrader v. Polley*[23] that the power of the state to prescribe the manner of electing representatives was a reserved power subject to limitation by the state constitution, but its statement, that the second ground for that opinion, that the term "legislature" meant the lawmaking power "seems to have been overruled by Hawke v. Smith," appears to be erroneous.

The court also considered the case of *Davis v. Hildebrant*[24] and held that as the Act of 1911 had been repealed and as the Act of 1929 contained no provision that redistricting should be made in the state "in the manner provided by the laws thereof," that opinion had no application to the pending case.

As it believed that the term "legislature" in Article I, Section 4 of the Constitution means the representative body and is not synonymous with the lawmaking power and does not include the governor the court sustained the decision of the district court holding the redistricting act of 1931 valid. Two justices dissented on the ground that redistricting by the state must be by legislation in which the governor participates.

In New York, the legislature passed a concurrent resolution dividing the state into 45 congressional districts. This was not

[19] "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof."

[20] Art. 1, Sec. 3.

[21] Art. 5.

[22] Hawke v. Smith (1920) 253 U. S. 221, in which it was held that the ratification of the Eighteenth Amendment by the Ohio Legislature was not subject to the referendum provision of the state constitution.

[23] N. 15 above.

[24] N. 16 above.

presented to the governor for his approval but was filed with the secretary of state. An application for a mandamus directing the secretary of state to certify in election notices that representatives are to be elected in the new districts was denied at a Special Term of the Supreme Court. This decision was affirmed by the Appellate Division and, upon appeal to the Court of Appeals, was unanimously affirmed by that body on February 9, 1932.[25]

The court construed the term "legislature" in Article I, Section 4 of the Constitution, to mean the lawmaking power which includes the governor. It held that uniform practice in all of the states in the matter of redistricting, while not conclusive, was satisfactory evidence that the power is rightfully exercised. It drew a distinction between the functions of a legislature in choosing senators, ratifying constitutional amendments, etc., and "the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the state, called the lawmaking power—such, for instance, as dividing the state into congressional districts and directing the people where, when and how to vote." As the governor did not participate in the redistricting provided in the resolution it was not an act of the legislature as a lawmaking body and is null and void.

The court also expressed the opinion that the Apportionment Act of 1929 was not intended to repeal the Act of 1911. "The two should be read together, if possible. One provided for the method of election and the other merely for the number of representatives." Hence the two additional representatives allotted to New York under the provisions of the Act of 1929 may be elected at large and the others from the old districts as provided by section 4 of the 1911 Act.[26]

In Missouri the legislature passed a bill dividing the state into 13 congressional districts. This was submitted to the governor and returned with his disapproval. A proceeding by mandamus to compel the secretary of state to receive and file a declaration of candidacy for nomination as representative from one of the districts provided by this bill was quashed by a unanimous vote of the Supreme Court on January 4, 1932.[27]

[25] Koenig v. Flynn (N. Y. 1932) 179 N. E. 705.
[26] See *ante* p. 212 for the provisions of this section.
[27] State ex rel. Carroll v. Becker (Mo. 1932) 45 S. W. (2d) 533.

The court holds that the power to prescribe the manner of holding elections for representatives that is given to the legislature by Article I, Section 4 of the Constitution can be exercised only in the enactment of a law. The court agrees with the South Dakota and New York courts that the term "legislature" in Article I, Section 4 of the Constitution means the lawmaking body. It holds that the power to prescribe the manner of holding elections for representatives can be exercised only in the enactment of a law in which the governor participates. Some of the things falling within its scope, such as, qualifications of judges and form of ballots can be provided only by establishing a rule. While these may be different from the forming of districts, "the 'manner of holding elections' includes everything that comes within the meaning of those words. . . The word 'Legislature' cannot mean one thing for one of such duties and another thing for the rest." The bill passed by the two houses is not a legislative act as it was vetoed by the governor.

The court disagreed with the Minnesota Court not only in the meaning of the word "legislature" but also as regards the Apportionment Act of 1911 which it held was not repealed by the Act of 1929. It calls attention to the fact that the latter, in section 21, expressly repeals certain acts "and all other laws or parts of laws inconsistent with the provisions of this Act." As the Act of 1911 was not expressly repealed and as sections 3 and 4 of that act are not inconsistent with the Act of 1929 it follows that they are still in effect. "Since the number of representatives for Missouri has been reduced the former districts no longer exist and representatives must be elected at large."

The Minnesota, Missouri and New York cases have been taken to the Supreme Court of the United States for review. That Court heard arguments on the Minnesota cases early in March and the two other cases were argued during the last of that month. As the decision will affect the filing of declarations of candidacy for representatives it is probable that it will be handed down in the near future.

It appears clear that the decision will turn on the meaning of the word "legislature" in Article I, Section 4 of the Constitution. It seems equally probable that the Court will sustain the well reasoned opinions of the Missouri Supreme Court and the New York Court of Appeals and will reverse the decision of the Min-

nesota Supreme Court. The following statement in the opinion of the Court in *Hawke v. Smith*[28] would seem to lead to such result:

> Article I, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

If the Supreme Court announces a decision of this kind in a short time it will be possible for the governor in each of the three states to call a special session of the legislature to enact a redistricting bill which would be effective in the elections of this year. The situation in New York is not so serious as to justify the resulting expense to the state. In Minnesota and Missouri, however, it would appear highly desirable to avoid the election at large of all representatives to say nothing of the other complications that will exist as a result of a failure to provide congressional districts.

If, on the other hand, the Supreme Court sustains the Minnesota decision, it would seem, the legislature, as a representative body, would be authorized to pass all laws affecting the times, places and manner of holding elections for United States Senators and Representatives without any participation on the part of the governor but subject to such modification as Congress might make. This of course would not apply to laws affecting state elections and, as these are usually held at the same time and place, the practical effect, probably, would be limited to congressional redistricting acts.

Addenda

Proof was being read on this article when the United States Supreme Court handed down its decisions in the above cases on April 11. The Court was unanimous (Mr. Justice Cardozo not participating) in reversing the decision of the Minnesota Supreme Court[29] and affirming the decisions in the Missouri[30] and New York[31] cases. The opinion of the Court is given in the

[28] N. 22 above, 231.
[29] Smiley v. Holm (1932) 52 S. Ct. 397.
[30] Koenig v. Flynn (1932) 52 S. Ct. 403.
[31] Carroll v. Becker (1932) 52 S. Ct. 402.

Minnesota case, the decisions in the other cases being sustained on the grounds stated in that opinion.

The opinion of the Court follows those of the Missouri Supreme Court and the New York Court of Appeals. It holds that the term "legislature" in Article I, Section 4 of the Constitution refers not to the "body" but to the function to be performed and that the latter is that of lawmaking. Long and continuous practice in the states supports this interpretation. Referring to the case of *Davis v. Hildebrant*,[32] the Court said:

> It is manifest that the Congress has no power to alter article I, section 4, and that the Act of 1911, in its reference to State laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the State to determine what should constitute its legislative process that the validity of the requirement of the State Constitution of Ohio, in its application to congressional elections, was sustained.

As each state has the power of defining its lawmaking power it follows that it may make the action of the legislature in congressional redistricting subject to the veto power of the governor.

The Court also followed the Missouri and New York courts in holding that the Apportionment Act of 1911 had not been wholly replaced by the Apportionment Act of 1929. Sections 1 and 2 of the former Act, making specific provisions for the apportionment under the thirteenth census, are, of course, superseded. This is not true of the remaining sections unless they are inconsistent with the Act of 1929. As section 4 of the Act of 1911 is not inconsistent with the Act of 1929 the two additional representatives in New York may be elected at large as provided by that section. In Minnesota and Missouri, where the number of representatives has been decreased "unless and until new districts are created, all Representatives . . . must be elected . . . at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 can not be regarded as intended to have a different import."

---

[32] N. 16 above.