Touro Law Review

Volume 6 | Number 1 Article 8

1989

Weighted Voting

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Recommended Citation
Emery, Richard David ,Esq. (1989) "Weighted Voting," *Touro Law Review*: Vol. 6 : No. 1 , Article 8.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol6/iss1/8

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WEIGHTED VOTING

Judge Leon Lazer:

We will now move into the last section of the program, which is probably one of the most important portions. I am going to introduce to you Richard David Emery, who brought down the New York City Board of Estimate and put it out of business and out of existence.

Richard David Emery is a partner in the firm of Lankenau Kovner & Bickford, and he spent ten years as staff attorney at the New York Civil Liberties Union. He was a *cum laude* Harlan Fiske Stone Scholar at Columbia Law School; he taught at NYU Law School. He is a member of the New York State Commission on Integrity in Government. He has written many articles and has made many speeches, a considerable number of them dealing with questions of civil liberties and criminal justice. Dick Emery appears on shows like Donahue, McNeil-Lehrer, and so on, and we are particularly privileged to have him. I have a five-page list of important cases he litigated that are published opinions. So, who better than Dick Emery to speak to us about voting rights and weighted voting.

Richard David Emery:

Now, we are down to the hard core, the end of the day. Hopefully, at the end of the short time that I have, you will understand a little bit about what *Board of Estimate v. Morris*[1] means to the issue of weighted voting. I understand, and I know firsthand, that weighted voting is extremely important in Nassau and Suffolk counties and is, in some sense, in the throes of great change and great debate.

I think that the *Board of Estimate* case has a great deal to say to those of you who represent municipalities. This case may very well change the way municipalities are represented in their county legislatures in the near future.

1. 109 S. Ct. 1433 (1989).

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What I want to do is give you an overview of the essence of the competing values underlying the history of one person-one vote as it relates to weighted voting. We will take a quick look at the New York approach, which is, as you probably know, unique in the country with regard to weighted voting. Then, we will talk about how *Board of Estimate* affects the New York approach to weighted voting.

The history of one person-one vote since *Baker v. Carr*[2] and *Reynolds v. Sims*[3] in the early sixties is a struggle of equality versus geography. This struggle started in cases dealing with rural areas, which dominated state legislatures, versus urban areas, having the greater populace. The competing interests in the struggle were those of equality and participation versus the interest of having representation of specific geographic areas. In many instances, certainly in the areas of Nassau and Suffolk counties, geographic continuity and a strong sense of community cause many to seek expression through the county representational scheme.

The tension between equality and geography is the underlying pressure or counterbalancing that affects and touches upon all the questions that underlie weighted voting in local municipal or county representation. In New York, as in most states, counties and municipalities are the legal creature of the municipal law or county law of the state legislature. Even though, in many instances, the geographic sense of "community" preceded even the creation of the state, they, nevertheless, are subject to the legal rules of the state and, certainly, they are subject to the rules of the Constitution.

The Constitution itself, however, has within it the very difficult tension that was dealt with in both *Reynolds* and *Baker*. This is the tension created by geography versus equality of representation in voting schemes. The examples are obvious. The one that everybody brings up when you talk about the *Board of Estimate* case in New York, or any of the cases that deal with one person-one vote, is: what about the Senate of the

2. 369 U.S. 186 (1962).
3. 377 U.S. 533 (1964).

United States[4] or the Electoral College[5] as examples of the violation of one person-one vote written right into the Constitution.

Surprisingly, the House of Representatives is another example because the Constitution requires, at a minimum, that every state have at least one representative.[6] Some states have such a small population that their representation violates strict compliance with one person-one vote. These exceptions have been accepted because they are written into the Constitution. The Supreme Court, when ruling upon a representational scheme, makes a good faith attempt to equalize the population of representational districts so that the representatives of those districts that sit on a legislative body, or a body exercising general governmental powers, will, in every instance, represent equal numbers of people except where there is a specific constitutional exception as with the Senate, Electoral College, and House of Representatives.

Events in New York during the sixties caused all of the problems we see today in relation to the Board of Estimate. What happened? We had the one person-one vote doctrine, but, instead of creating equal-sized population districts, votes of static geographic districts were weighted by population. This was done in the sixties to eliminate the need to cross all the traditional town lines, which would necessitate the removal of the mayors of the towns from their positions as county legislators. In other words, a town of one hundred that was represented by a mayor had ten votes, and a town of ten that was represented by another mayor had one vote. It was a straight arithmetic system.

As we know, prior to the New York Court of Appeals's decision in *Iannucci v. Board of Supervisors*,[7] this system led to absurd results. If there was one large town, or one major urban

4. The United States Constitution provides that each state shall be represented by two Senators, each Senator having one vote. U.S. CONST. art I, § 3, cl. 1.

5. The United States Constitution provides that "[e]ach State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art II, § 1, cl. 2.

6. U.S. CONST. art. I, § 2, cl. 3.

7. 20 N.Y.2d 244, 229 N.E.2d 195, 282 N.Y.S.2d 502 (1967).

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town, that town dominated the entire legislature because it, or its mayor, sitting on the county legislature, had all the votes. This meant that all the other votes were irrelevant to mustering a majority. There was also no actual legislative process. Regrettably, the consequence was the creation of an even more absurd situation, which led to the challenge of the system. The court of appeals eventually heard the challenge and listened to a mathematician, statistician, and political scientist named Banzhaf.[8] This fellow made the argument that the court should not look at the case in terms of representation of people, but in terms of the power of an individual to effect the outcome of a vote on the county legislature.[9] The court should look at it in terms of voting power, not in terms of voting representation. It is the difference between voting power, power over outcome, versus voting representation, an individual voter's right to have a representative who represents him or her equally to all people in similar districts within the same political configuration of government.

Banzhaf convinced the New York Court of Appeals that it should allow him, as well as several other computer experts, to figure out all the specific circumstances where each legislator would have had the opportunity to break a tie vote.[10] Obviously, this was all theoretical. It had nothing to do with alliances between the legislators, their politics, who might have paid off whom, or whatever. It only had to do with the theoretical opportunities that any given legislator would have to break a tie vote. It was in this circumstance that the legislator theoretically would have the voting power to determine the outcome.

Banzhaf further convinced the court of appeals that it was constitutionally required that these tie-breaking votes be distributed among the representatives by district in proportion to

8. *Id.* at 251, 229 N.E.2d at 198, 282 N.Y.S.2d at 507 (citing Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965)).

9. *Id.* (citing Banzhaf, *supra* note 8, at 318).

10. *See* Iannucci v. Board of Supervisors, 20 N.Y.2d 244, 251-54, 229 N.E.2d 195, 198-200, 282 N.Y.S.2d 502, 507-10 (1967).

population to achieve one person-one vote compliance.[11] This was a new definition of what it would take to comply with one person-one vote in New York. He convinced the court of appeals that respect for the traditional geographic boundaries could be achieved alongside respect for voting equality.[12]

The result, however, was that, in the process, voting equality had its definition changed from the original definition of voting equality, the definition that the Supreme Court traditionally has adopted. The traditional language of voting representation was not the tie-breaker's power but, rather, the equal right to participate;[13] it was the equal right to have a representative and the right to be in a district of equal size to the other districts having equal representation. That was all thrown aside by the court of appeals. The court of appeals adopted the Banzhaf analysis, which was based solely upon equality power over the outcome of a theoretical tie-breaking vote.[14]

This is where, in the mid-seventies, the whole movement towards weighted voting came to rest. It was unique to New York. It was adopted and still exists in twenty-six counties of New York,[15] and it is an extremely complex mathematical process that involves computer analysis. None of us could do it unless we had enormous amounts of software and the knowledge of how to apply that software. It is a process so complex that, of course, the courts never understand it and end up deferring entirely to the computer analysts and the people who hire the computer analysts. This was, in my view, an extremely interesting idea and an interesting foray into a method of attempting to resolve these very strong competing interests between geography and equality, in the context of one person-one vote. But, ultimately, it was doomed to failure.

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11. *Id.*

12. *See id.* at 252-54, 229 N.E.2d at 199-200, 282 N.Y.S.2d at 508-10.

13. *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964).

14. *See Iannucci*, 20 N.Y.2d at 254; 299 N.E.2d at 200, 282 N.Y.S.2d at 510.

15. *See* League of Women Voters v. Nassau County Bd. of Supervisors, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985). "Of New York State's 57 counties (outside of New York City), 24 employ weighted voting systems." *Id.* at 160 n.10. When counties inside New York City are considered, this number increases to twenty-six.

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Failure came as early as 1971, when the United States Supreme Court, in *Whitcomb v. Chavis*,[16] looked at the Banzhaf analysis in a slightly different, but revealing, context and basically rejected it in the main opinion of the case,[17] as did Justice Harlan in a concurring opinion.[18]

The concurrence is an extremely interesting opinion as it pertains to the theory of representation underlying the Supreme Court's one person-one vote cases.[19] Justice Harlan subscribed much more to the "traditional" theory than to the "outcome voting power" theory that Banzhaf advocated as early as 1971 in an amicus brief in *Whitcomb*.[20] Basically, Justice Harlan said that the outcome voting power theory does not take account of alliances; it does not take account of racial block voting among representation; and it does not take account of all kinds of various political factors that are realistic.[21] Therefore, the Court could not subscribe to it here any more than it could in that slightly different context in *Whitcomb*.

At the same time, however, the Supreme Court had summarily dismissed a case that had come up from Nassau County called *Franklin v. Krause*.[22] So there was, arguably, a conflicting view that had never been resolved by the Supreme Court on the validity of the weighted voting schemes used in New York State. The question now became, where did this lead one with respect to the current situation?

Nassau County had its system challenged by the League of Women Voters in the early 1980s.[23] That case went to the Second Circuit Court of Appeals and then to the Supreme Court where *certiorari* was denied. The Second Circuit opinion, upholding weighted voting in Nassau County, was by Judge Neaher, the same judge who wrote the district court opinion in

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16. 403 U.S. 124 (1971).
17. *Id.* at 145-46.
18. *Id.* at 169 (Harlan, J., concurring).
19. *See id.* at 165-67.
20. Brief for Appellees at 13, Whitcomb v. Chavis, 403 U.S. 124 (1971) (No. 92).
21. *See Whitcomb*, 403 U.S. at 168-69 (Harlan, J., concurring).
22. 415 U.S. 904 (1974) (dismissed for want of substantial federal question).
23. League of Women Voters v. Nassau County Bd. of Supervisors, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

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Morris.[24] He was sitting by designation on the Second Circuit when he wrote the opinion in *League of Women Voters.*

Judge Neaher upheld weighted voting under very strange circumstances where it was absolutely plain that he had no idea of what he was doing with respect to the mathematics.[25] The last column of the figures of deviations from voting equality was not considered. He discussed it at length and he totally misunderstood the meaning of the deviations.[26] There is an interesting article written by Alta Charo in Fordham Law Review that discusses it.[27] Nevertheless, the Nassau County system was upheld by the Second Circuit.[28]

Board of Estimate v. Morris,[29] the case involving the New York City Board of Estimate that ultimately went to the Supreme Court this year, was similar, but not identical, to county legislative schemes. Because the Board of Estimate had the three citywide office holders as an at-large contingent as well as representatives from different-sized geographic districts, the city argued that disparities between the different-sized districts were mitigated.[30] The only thing that really mattered to the Court was that the city had representatives from different-sized geographic districts.[31]

The New York City Corporation Counsel, in defense of the five-borough scheme in New York, where each borough president represented vastly different sized boroughs but had an equal vote, adopted an argument attempting to use the Banzhaf standard to minimize the percentage deviations from voting equality.[32] The voting equality deviations under the traditional arithmetic rule of deviations were up to 132 per-

24. *Id.* at 172.

25. *See, e.g., id.* at 156-59.

26. *Id.* at 168-72.

27. Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 785 (1985).

28. *League of Women Voters*, 737 F.2d at 172.

29. 109 S. Ct. 1433 (1989).

30. *Id.* at 1439.

31. *See id.* at 1440-43.

32. *Id.* at 1439-40.

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cent.[33] That was way beyond anything imaginable, even at the local level, where the tolerances are constitutional up to about twenty percent or so.[34] The New York City Corporation Counsel, using computer analysis and the Banzhaf system in a kind of a gerry-rigged approach to the mathematics of New York City, brought it down to 30.8 percent.[35] This was still quite a bit more than twenty percent, but, arguably, enough to go to appeal to the Supreme Court. And, that is what they did.

The Board of Estimate went to the Supreme Court using a Banzhaf analysis, trying to uphold 30.8 percent by using this outcome system as opposed to a representational system.[36] It was interesting to note that Judge Oakes of the Second Circuit attacked the Banzhaf system of voting—attacked it unmercifully, if you will—in a long discourse about how theoretical, how nonsensical, how complex, and how off-base it was.[37] Judge Oakes's approach emphasized the conflict between circuit court panels because the Second Circuit had just previously, in *League of Women Voters v. Nassau County Board of Supervisors*,[38] upheld Nassau County's scheme, which was based on a configuration of mathematical thinking similar to that in the New York scheme.[39]

When *Board of Estimate* came before the Supreme Court, Justice White faced the issue squarely. In language that can be characterized as the holding of the case, the Court point-blank rejected the notion of outcome-determinative considerations as a basis for representation and fully embraced the traditional notions of representation and participation in elections as the policy underlying one person-one vote doctrine.[40]

Let me read you just a few things. Justice White stated: "the population-based approach of our cases from *Reynolds*

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33. *Id.* at 1442.

34. *See* Avery v. Midland County, 390 U.S. 474 (1969).

35. *Board of Estimate*, 109 S. Ct. at 1440.

36. *See* Brief for Municipal Appellants and Appellant Straniere at 35-37, Board of Estimate v. Morris, 109 S. Ct. 1433 (1989) (No. 87-1022).

37. Morris v. Board of Estimate, 831 F.2d 384, 390-91 (2d Cir. 1987), *aff'd*, 109 S. Ct. 1443 (1989).

38. 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

39. *See id.* at 159.

40. Board of Estimate v. Morris, 109 S. Ct. 1433, 1440-41 (1989).

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through *Abate* should not be put aside in this case."[41] He went on to say:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.[42]

Very simple, very clear.

In criticizing the Banzhaf outcome-determinative analysis of voting power, which is, of course, what Nassau County relies on and what Suffolk County is toying with, Justice White stated:

> The difficulty was that this method did not reflect the way the board actually works in practice; rather, the method is a theoretical explanation of each board member's power to affect the outcome of board actions. It may be that in terms of assuring fair and effective representation, the equal protection approach reflected in the *Reynolds v. Sims* line of cases is itself imperfect, but it does assure that legislators will be elected by and represent citizens in districts of substantially equal size. It does not attempt to inquire whether, in terms of how the legislature actually works in practice, the districts have equal power to affect a legislative outcome. This would be a difficult and ever-changing task, and its challenge is hardly met by a mathematical calculation that itself stops short of examining the actual day-to-day operations of the legislative body.[43]

What does that mean? It means to me that the Banzhaf analysis, in the pure theoretical sense, is not going to be upheld by the Supreme Court. I think that is painfully clear, as much as we may want to preserve geographic districts in Nassau or Suffolk County through the use of weighted voting. Some other method is going to have to be adopted. It also means to me that a far more sophisticated method of weighted voting is going to have to be discovered by a mathematician, and I doubt any of us are going to come up with it. A constitutional method of weighted voting must reflect, at least in the Su-

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41. *Id.* at 1440 (referring to Reynolds v. Sims, 377 U.S. 533 (1964), and Abate v. Mundt, 403 U.S. 182 (1971)).

42. *Id.*

43. *Id.*

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preme Court's view, the actual political operations, the actual day-to-day operations, and the actual practical operations of a county legislature.

I defy anyone, mathematician, philosopher, or king, to figure out a model of representation that accurately and reasonably reflects the day-to-day practical political operations of a county legislature. It just cannot be done. What I am suggesting to you is that, for practical purposes, even though it may exist today in twenty-six counties in New York State, weighted voting is dead. Weighted voting is unconstitutional, and weighted voting, as we now know it under the Banzhaf scheme, has to be eliminated. It is unclear what ultimately will replace it.

Obviously, we do have to take cognizance of the geographic realities of these counties, and we must do it in a way that respects the notion of equal-sized districts with equal representation.

Thank you very much.

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