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# The Frequency of Redistricting in Nebraska and the Balance Between One Person, One Vote and Electoral Stability: How Often Is Too Often?

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Note

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## I. INTRODUCTION

The Nebraska Supreme Court established an important state electoral redistricting precedent in *Chambers v. Lautenbaugh*.[1] While political districts are generally redrawn following receipt by the state of new federal census figures compiled once every ten years, the court's treatment of state law in *Chambers* opens the door to more frequent redistricting of political subdivisions in order to ensure population numbers in those districts remain substantially equal between federal censuses. This necessarily means that districts may be redrawn using data that could be up to ten years old, depending on when a governing board undertakes to redraw districts. The court itself heralded the importance of its holding by ruling on what would otherwise have been a moot case.[2] Its reading of section 32-553 of the Nebraska Revised Statutes in connection with the holding is applicable to public officials who are responsible for redistricting political subdivisions.[3] Since the court's holding in *Chambers* could have wide-ranging applicability, it is important that election commissioners and other public officials responsible for redistricting in the state understand its implications.

The issues in *Chambers* implicate a larger policy consideration of balancing the need to maintain substantial population equality between electoral districts, and thus consistent voting power from one voter to the next, and the practical concern for at least temporary stability in the electoral process. On the one hand is the concern about

1. 263 Neb. 920, 644 N.W.2d 540 (2002).
2. The court relied on the public interest exception in deciding to resolve the otherwise moot case, as discussed *infra*. The public interest exception provides that:

> [T]he court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Wilcox v. City of McCook, 262 Neb. 696, 700, 634 N.W.2d 486, 489 (2001).
3. "This issue, if adjudicated, would provide future guidance for public officials, including members of the Omaha City Council who, as a result of the amendment to section 14-201.03, are now responsible for redrawing city council district boundaries. Furthermore, the similar question of whether section 32-553 limits the Omaha City Council or other appropriate legal entities to redrawing district boundaries only once every 10 years will likely arise prior to the federal decennial census in 2010. For these reasons, we determine the public interest exception to the mootness doctrine applies to this case." *Id.* at 927, 644 N.W.2d at 547.

making the process fair, and on the other is the consideration that voters generally relate to established boundaries and the officials representing them. There is also the concern that frequent redistricting can be used as a tool for partisan political gain by giving one group more advantageous territory than another. The frequency of redistricting, the age of population data used, and the proximity to an impending election are the important considerations to be made when undertaking this balancing.[4]

4. The recent experience of the Texas Legislature in redrawing that state's congressional districts after Republicans took control of the Texas Legislature following the 2002 elections has drawn national attention, mostly to the antics associated with the process, but also to the frequency of redistricting, albeit of *congressional* districts, and its political ramifications. While this note focuses on the frequency of redrawing the districts of *political subdivisions* in Nebraska, an issue framed by the Nebraska Supreme Court's decision in *Chambers*, it is important, given the similar policy concerns, to acknowledge the related discussion about the frequency of *congressional* redistricting and the extent to which it may be used as a political tool that Texas' experience has more recently initiated. *See, e.g.*, Edward Walsh, *Redrawing Districts Raises Questions: No Precedent Seen For GOP Efforts*, THE WASHINGTON POST, October 26, 2003, at A04.

In a similar vein, just as this note was going to press, the Colorado Supreme Court issued an en banc decision, *Salazar v. Davidson*, 2003 WL 22833085 (Colo. 2003), holding that Colorado's *congressional* districts could be redrawn only once — whether accomplished by the General Assembly, public initiative, or the courts — following each federal decennial census. The disupte arose when the Colorado General Assembly redrew the state's congressional districts at the end of the 2003 legislative session, replacing districts drawn by a Colorado district court when the legislature failed to do so in 2002. At issue was whether the Colorado constitution allowed for more frequent redistricting than once after each federal census. Using for its conclusion guideposts strikingly similar to those this note argues are important to the issues presented in *Chambers*, the court looked to the wording of the state constitution in its current and pre-amended, original form; the doctrine that when a timeframe is specified for redistricting, the implication is that it may not occur at other times; comparison to the state constitution's mandate for once-in-ten-years *legislative* redistricting; comparison to the practice of both congressional and legislative redistricting in other states; custom in Colorado; and significantly to matters of public policy. Again, the Colorado Supreme Court's discussion involved congressional redistricting, but its discussion of the policy concerns mirror those discussed in this note, and underscore their importance regarding political representation by district in general. The Colorado Supreme Court discussed the important policy consideration of stability in electoral districts in the context of congressional districts, but the same considerations for stability are equally applicable in *Chambers* which deals with the districts of political subdivisions.

> The framers [of the U.S. Constitution] knew that to achieve accountability, there must be stability in representation. . . . [The ten-year interval for redistricting] was short enough to achieve fair representation yet long enough to provide some stability . . . . Limiting redistricting to once every ten years maximizes stability . . . . If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constitutents voting in a diferent district in subsequent elections . . . . Moreover, the time and effort that the constitutents and the representative expend getting to know one another

The interjection of courts into what is traditionally a purely political process[5] means that the legal considerations will often be based on a number of political ones, with the most important legal ramification of *Chambers* being the power granted public officials responsible for redistricting. The court was faced with determining the meaning of the language of section 32-553, and held that the plain meaning of the statute does not limit the frequency of redistricting but gives public officials the (broad) power to ensure that the electoral districts of political subdivisions maintain substantial population equality. A narrow interpretation of the statute's language, which plausibly is owing of two possible meanings, would have involved scanning a wider legal landscape to place the language of the statute within a context that provides considerable support for limiting the frequency of redistricting.

Given policy interests in a stable electoral scheme, such as avoiding voter confusion and political manipulation, the court should have employed a narrow interpretation of the language of section 32-553. Given the wider legal and policy context within which the question of redistricting frequency arises, which includes the U.S. Supreme Court's decision in *Reynolds v. Sims*,[6] other federal court decisions, and the Nebraska Constitution, a narrow interpretation of section 32-553 in *Chambers* would likely have been a better conclusion.

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> would be wasted if the districts continually change. "A boundary that is continually moving is one that is unlikely to serve as any kind of imaginative focal point for communal identity . . ." and "redistricting thus flattens identity within a jurisdiction by preventing subcommunities from enjoying the kind of stability and sense of permanence that are necessary ingredients for communal self-identification and, ultimately, differentiation."

*Salazar*, 2003 WL 22833085, at *21-22 (quoting James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1242 (2002)). These and other policy considerations are discussed *infra* in Part IV. *But, cf.* Session v. Perry, 2004 WL 42591 (E.D. Tex. Jan. 6, 2004) (holding, in connection with Texas legislature's redrawing of congressional districts in late 2003, that neither U.S. Constitution nor federal statute limit the frequency of redrawing congressional districts to once per decade, though characterizing more frequent redistricting as "grasps of power" and stating that "Congress can assist by banning mid-decade redistricting . . .").

5. *See, e.g.,* Davis v. Bandemer, 478 U.S. 109 (1986) (discussing the history of the Court's rationale toward considering political apportionment cases justiciable where the issues presented are not merely political, but also involve important constitutional questions).

6. 377 U.S. 533 (1964).

## II. CASE PROGRESSION

### A. Factual Background

In May 2000, Douglas County Election Commissioner Scott Lautenbaugh announced plans to redraw the Omaha city council districts in preparation for the primary and general elections in April and May of 2001 using the 1990 federal census data, which was the only census data available at that time.[7] Even though the 2000 census had just been completed, the data would not be available to Lautenbaugh until around March of 2001, after the primary and just weeks before the general election in May.[8] Going into the 2001 election cycle, Omaha's council districts had become considerably unequal in population, which Commissioner Lautenbaugh attributed largely to city annexations throughout the 1990s.[9] Even before the most recent annexations in 1999, District One had a population of 50,351, District Two had a population of 48,712, District Three had a population of 46,117, District Four had a population of 48,325, District Five had a population of 53,179, and District Six had a population of 68,577.[10] In 1999, a series of annexations added an additional estimated population of 13,750, mainly to Districts Five and Six.[11] Lautenbaugh highlighted the overall population disparity between the districts in an editorial to the Omaha World-Herald, noting that after annexations District Six had a population of 77,617 while District Three had a population of 45,117.[12]

Lautenbaugh's decision to redistrict was premised on his concern that leaving the districts unchanged for the 2001 city council election invited a lawsuit. The basis for such suit would be the "one-person, one-vote" principle established by the landmark United States Supreme Court decision in *Reynolds v. Sims*.[13] *Reynolds* primarily held that the Equal Protection Clause requires both houses in bicameral state legislatures be based on population distribution and not on geographical location. The general significance of *Reynolds* is that it mandates the equality of voters' power through the drawing of election districts. The Court stated, "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct

7. Rick Ruggles, *Election Equality Pursued Political Aid Is Denied in Council Redistricting Population by Council District*, OMAHA WORLD HERALD, May 31, 2000, at 1.
8. Scott Lautenbaugh, *Redistricting Still Necessary—Now*, OMAHA WORLD-HERALD, August 5, 2000, at 13.
9. *Id.*
10. *Id.*
11. *Id.*
12. Scott Lautenbaugh, *Redistricting Still Necessary—Now*, OMAHA WORLD-HERALD, August 5, 2000, at 13.
13. 377 U.S. 533.

districts, in both houses of its legislature, as nearly of equal population as is practicable."[14] The Court also made it clear in *Board of Estimate of City of New York v. Morris*[15] that the one-person, one-vote standard applies not only to congressional and state legislative districting, but also to that of local governments. "Both state and local elections are subject to the general rule of population equality between electoral districts."[16] The idea is that the votes of individuals residing in a district with a population substantially larger than that of similar districts of a governing board are, in essence, diluted when compared to those of individuals in less populous districts.[17] According to Lautenbaugh, the situation in Omaha in 2000 was ripe for a suit based on *Reynolds* if redistricting did not occur before the 2001 city council elections.

While redistricting is a tool for the provision of an equal franchise, it is also an effective tool of partisan politics.[18] Few issues a legislative body takes up cause more political wrangling and subsequent court challenges than redistricting.[19] Redistricting decisions are com-

14. *Id.* at 577.
15. 489 U.S. 688 (1989).
16. *Id.* at 692-93.
17. *Board of Estimate of New York*, 489 U.S. at 462-63.
18. For example, see Gaffney v. Cummings, 412 U.S. 735, 753 (1973), where the court stated:

> "Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences."

19. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 541 (1994). Gelman and King relate two extraordinary accounts of the redistricting process in 1982. In Michigan, under pressure from the Michigan Supreme Court, the legislature was battling over Democratic and Republican plans. At one point, the Democrats gutted a completely irrelevant bill and replaced the body of it with their districting plan, but left the non-conspicuous title of the old bill. When the Republicans found out, all hell broke loose. During the midnight session, a Democratic senator collapsed, but refused to leave the floor until he voted, even after paramedics arrived. A Republican legislator pulled a time-delay tactic of requiring that the legal description of all 148 districts be read into the record. Despite the ploy, the Democratic legislator who had collapsed remained, voted, and the Democratic plan passed. In Illinois, the legislature nearly erupted into an all-out brawl when a

monly politically motivated, particularly when governing bodies have the power to redistrict themselves.[20] Indeed, outright gerrymandering, the practice of drawing often odd-looking political districts in order to benefit one group over another in elections, has been a part of American politics since at least 1812 when the practice got its name in an election battle between Jeffersonians and the Federalists.[21] While Lautenbaugh was not a member of the Omaha City Council, he was harshly criticized and accused of blatant partisan political tinkering for his decision to redistrict right before the 2001 city council election.

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Republican senator, outraged by the parliamentary delaying tactics used by the Democratic Senate president, charged the podium, but was stopped when sucker-punched by another Democratic senator. Reapportionment gridlock ensued. "From George Washington's first presidential veto to the present day, redistricting issues have been extremely controversial at every level of government. Most redistrictings are contested in state and federal court cases heard so late that there is insufficient time to follow the usual rules of discovery, evidence, or due process. In total, legislative redistricting is one of the most conflictual forms of regular politics in the United States short of violence."

Of course, the recent experience of the Texas Legislature in redrawing the state's congressional districts once again highlighted in dramatic fashion the often wild politics associated with redistricting. Following the 2002 state elections, Republicans took control of both houses of the Texas Legislature, and set about passing a redistricting plan to replace districts instituted by a three-judge federal court panel in late 2001. The court had acted when the Legislature failed to pass a redistricting plan earlier in 2001. *See* HOUSE RESEARCH ORGANIZATION, TEXAS HOUSE OF REPRESENTATIVES, INTERIM NEWS, NEW DISTRICTS IN PLACE FOR 2002 ELECTIONS 1 (2002). Democrats decried what they saw as a political power grab, influenced by national Republican Party leaders in Washington, D.C. Outnumbered, Democrats in the Texas House resorted to the only power they as a minority had left: deny the chamber a quorum necessary to consider the new map. In what some described as a "Keystone Kops affair," over fifty Texas House Democrats fled the chamber, and the entire state, taking refuge at a Holiday Inn just across the state line in Ardmore, Oklahoma to avoid the jurisdiction of the Texas state troopers "who had been ordered to round them up . . . ."

> Speaker Tom Craddick, a Republican, locked the House chamber to prevent further flight. Angry Republicans asked the state government to help sniff out their colleagues. The state's Department of Public Safety put out an alert asking for the public's assistance. A toll free number was set up. The Texas Rangers gave chase. . . . In the state House, legislators patched together milk cartons plastered with the faces of missing Democrats . . . . Supporters [of the fleeing Democrats] stopped by [the Holiday Inn in Ardmore] with fruit baskets.

David Barboza & Carl Hulse, *Texas' Republicans Fume: Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17. U.S. House Majority Leader Tom DeLay of Texas even encouraged the FBI to get involved to help the Texas state troopers and Texas Rangers find the missing Democrats. *Id.*

20. Frank J. Macchiarola and Joseph G. Diaz, *Minority Political Empowerment in New York City: Beyond the Voting Rights Act*, 108 POL. SCI. Q. 37, 42 (1993).
21. Mark E. Rush, *Gerrymandering: Out of the Political Thicket and Into the Quagmire*, 27 POL. SCI. AND POLITICS 682, 682 (1994) (discussing how, ironically, though the Jeffersonian legislative majority attempted to oust a Federalist representing Boston's North Shore by drawing an aesthetically suspect district, the Federalists held the district anyway).

Some council members accused Lautenbaugh of political shenanigans since both Lautenbaugh and then Omaha mayor Hal Daub were active Republicans, and council members had been "none too kind" to Daub.[22] Lautenbaugh flatly denied any political motivation behind his plan or any desire to gerrymander anyone off the council.[23]

In early June 2000, State Senator Ernie Chambers, representing Nebraska's Eleventh Legislative District (which includes much of north Omaha and the area encompassed by Omaha city council District Two), threatened to bring suit to prevent Lautenbaugh from redrawing the city council districts before the election, claiming Lautenbaugh had no legal authority to do so.[24] Chambers' legislative district boundaries coincided closely with those of city council District Two, both of which were comprised primarily of minority populations.[25] Previously, District Two had been drawn in 1990 to protect its predominately black population's voting power.[26] According to Vickie Edwards, election commissioner at that time, this was premised on federal court rulings that had indicated that, when possible, districts should be drawn such that blacks make up 65 to 75 percent of a district where their populations predominate.[27] Chambers' main concerns were that Lautenbaugh would not use federal census data in redistricting, and that black representation on the city council would be adversely affected through dilution of black voting power in District Two.[28] A showdown ensued, with Lautenbaugh arguing that redistricting was needed to simplify the shapes of districts and have them comply with the one-person, one-vote principle, and Chambers and

22. Rick Ruggles, *Election Equality Pursued Political Aid Is Denied in Council Redistricting Population by Council District*, OMAHA WORLD HERALD, May 31, 2000, at 1 (discussing Councilman Marc Kraft's belief that Lautenbaugh intended to "break up" the council in order to diminish Daub's political opposition); *see also* Rick Ruggles, *Council Seeks Meeting To Discuss Redistricting*, OMAHA WORLD-HERALD, June 1, 2000, at 1 (discussing Kraft's belief that Lautenbaugh's original concept would essentially take one council seat from east Omaha, giving it to west Omaha, and that he might have to run against fellow councilman Lormong Lo, as they would be in the same district).

23. Rick Ruggles, *Council Seeks Meeting To Discuss Redistricting*, OMAHA WORLD-HERALD, June 1, 2000, at 1.

24. Rick Ruggles, *Chambers Challenges Redistricting Plan*, OMAHA WORLD-HERALD, June 3, 2000, at 1.

25. STATE OF NEBRASKA, LEGISLATIVE DISTRICT MAP FOR DISTRICT 11, *at* http://www.unicam.state.ne.us/districts/leg_maps/district11.pdf (last visited September 10, 2003); DOUGLAS COUNTY ELECTION COMMISSIONER, OMAHA CITY COUNCIL DISTRICT 2, *at* http://www.444vote.net/districts/omahacc/omahacc.php?id=2 (last visited September 10, 2003).

26. Rick Ruggles, *Election Equality Pursued Political Aid Is Denied in Council Redistricting Population by Council District*, OMAHA WORLD HERALD, May 31, 2000, at 1.

27. *Id.*

28. Rick Ruggles, *Chambers Challenges Redistricting Plan*, OMAHA WORLD-HERALD, June 3, 2000, at 1.

civil rights leaders resisting what they saw as a threat to black voting power.[29]

By the end of June 2000, Chambers claimed that Lautenbaugh had to use 2000 census data, instead of 1990 census data, in redistricting because state law requires district boundaries to be based on the most recent census data.[30] Though at the time the most recent data was from the recently completed 2000 census, it would not be available until around March of 2001, too late to draw districts in time for the elections.[31] Thus, Lautenbaugh reiterated in an editorial that he had to move ahead, albeit using census data that was ten years old, in order to avoid being sued under the one-person, one-vote principle.[32]

Lautenbaugh's fears of being sued became a reality in late August when two Omaha businessmen filed suit to force him to redraw the electoral districts before the upcoming election.[33] Both businessmen had their development proposals stall in the city council and were looking for a change.[34] Their suit alleged a violation of the one-person, one-vote principle; one of the businessmen complained, "[redistricting] should have been done five years ago."[35]

## B. District Court Decision

On August 24, 2000, Chambers filed his suit in Douglas County District Court asking for an injunction to stop Lautenbaugh from redrawing the city council districts before the 2001 election.[36] Chambers' petition first alleged Lautenbaugh exceeded his authority as election commissioner by redrawing Omaha's city council districts for the 2001 election using 1990 census data instead of waiting for 2000 census data.[37] Second, the petition alleged Lautenbaugh exceeded his authority by redrawing the districts later than six months after the

29. *See* Rick Ruggles, *Proposal Debated Official: Intent Is to Preserve Predominantly Black District*, OMAHA WORLD-HERALD, June 10, 2000, at 1 (discussing Reverend Everett Reynolds', president of the local NAACP, vow to fight Lautenbaugh's redistricting plan if it meant reducing black voting power in Omaha's District 2).

30. Rick Ruggles, *Redistricting Timing Disputed State Sen. Ernie Chambers Says any Revisions Must Wait for 2000 Census numbers*, OMAHA WORLD-HERALD, June 30, 2000, at 19.

31. Scott Lautenbaugh, *Redistricting Still Necessary—Now*, OMAHA WORLD-HERALD, August 5, 2000, at 13.

32. *Id.*

33. Rick Ruggles, *Suit Seeks New Districts, Now*, OMAHA WORLD-HERALD, August 26, 2000, at 16.

34. Rick Ruggles, *Pair to Sue for New Districts*, OMAHA WORLD-HERALD, August 22, 2000, at 15.

35. *Id.*

36. Rick Ruggles, *Suit Seeks To Postpone Redistricting Chambers says the election commissioner must wait for numbers from the 2000 Census before redrawing the City Council map*, OMAHA WORLD-HERALD, August 25, 2000, at 15.

37. Chambers v. Lautenbaugh, 263 Neb. 920, 922-23, 644 N.W.2d 540, 544 (2002).

Legislature had reapportioned itself in 1991, which Chambers claimed was the only time frame within which Omaha's city council districts could have been redrawn under state law.[38] Chambers' petition asked the court to declare Lautenbaugh's redrawing of the districts unlawful based on these two positions.[39] He also asked the court to declare the expenditure of public funds in the redistricting process unlawful, and to declare unlawful any election of the council using the new district boundaries.[40] After having unveiled the newly re-drawn districts, Lautenbaugh demurred, alleging, *inter alia*, that Chambers had not stated a sufficient cause of action.[41]

Lautenbaugh's decision to redistrict Omaha just ahead of the release of the 2000 census data and the subsequent routine decennial redistricting of the Legislature and other political subdivisions was based on section 14-201.03 of the Revised Nebraska Statutes (2000).[42] That section provides "The election commissioner shall redraw the boundaries of [the election districts of a city of the metropolitan class], maintaining the compact and contiguous nature of each, when such districts are no longer substantially equal in population pursuant to section 32-553."[43] Lautenbaugh's position was that he had an affirmative duty based on this statute to redraw the Omaha districts because they were no longer substantially equal in population, in addition to his concerns about the one-person, one-vote standard.[44] Section 14-201.03 does not include any limiting language as to the frequency of redistricting in order to maintain substantially equal population within districts. It does, however, provide that districts shall be redrawn "pursuant to section 32-553."[45]

The Douglas County District Court followed section 14-201.03's "pursuant to" signpost and arrived at having to determine the meaning of section 32-553 of the Nebraska Revised Statutes (2000).[46] The

38. *Id.*
39. *Id.* at 923, 644 N.W.2d at 544-45.
40. *Id.*
41. *Id.*
42. The Nebraska statute reads:

> The election commissioner in any county in which is situated a city of the metropolitan class shall
>
> > divide the city into seven city council districts of compact and contiguous territory. Such districts shall be numbered consecutively from one to seven. One council member shall be elected from each such district. The election commissioner shall redraw the boundaries of such districts, maintaining the compact and contiguous nature of each, when such districts are no longer substantially equal in population pursuant to section 32-553.
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> NEB. REV. STAT. § 14-201.03 (2000) (amended 2001).

43. *Id.*
44. 263 Neb. at 923-24, 644 N.W.2d at 545.
45. NEB. REV. STAT. § 14-201.03.
46. Subsection (1) and (2) read:

relevant portion of the statute provides that where a political subdivision elects its members by districts, which Omaha does,

> such districts shall be substantially equal in population as determined by the most recent federal decennial census. Any such political subdivision . . . shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the legislative bill providing for reestablishing legislative districts.[47]

Section 14-201.03 charges the election commissioner with redrawing election districts when they are substantially unequal in population, *pursuant to section 32-553*.[48] The question for the district court was whether the language of section 32-553 meant simply that redistricting was to be determined by the most recent federal decennial census *whenever it was done, in addition to* the required redistricting within six months after the Legislature redrew its own districts; or did it mean that the most recent federal census was to be used in redistricting *and* that redistricting could only occur within six months after the Legislature redrew its own districts.[49] The district court did find it

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(1) When any political subdivision except a public power district nominates or elects members of

> the governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census. Any such political subdivision which has districts in place on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the legislative bill providing for reestablishing legislative districts. Any such political subdivision in existence on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, and which has not established any district boundaries shall establish district boundaries pursuant to this section within six months after such date. If the deadline for drawing or redrawing district boundary lines imposed by this section is not met, the procedures set forth in section 32-555 shall be followed.
>
> (2) The governing board of each such political subdivision shall be responsible for drawing its own district boundaries and shall, as nearly as possible, follow the precinct lines created by the election commissioner or county clerk after each federal decennial census, except that the election commissioner of any county in which a city of the metropolitan class is located shall draw district boundaries for such city as required under this section and section 14-201.03 and the election commissioner of any county in which a Class IV or V school district is located shall draw district boundaries for such school district as provided in this section and section 32-552.

NEB. REV. STAT. § 32-553 (2002) (revised 2001).

47. *Id.*

48. NEB. REV. STAT. § 14-201.03.

49. 263 Neb. at 924, 644 N.W.2d. at 545.

significant that neither section 14-201.02 nor section 32-553 contained limiting language as to the frequency of redistricting:

> Since there is no language limiting the redrawing of districts by the election commissioner the Court further finds that the election commissioner can redraw, if necessary, districts more than the one time required in the year that the census figures are submitted to the State by the United States Department of Commerce.[50]

On January 17, the district court sustained Lautenbaugh's demurrer and dismissed Chambers' petition with prejudice, stating it could not be amended to allege facts sufficient to constitute a cause of action because Lautenbaugh had complied with the law.[51] Chambers appealed to the Nebraska Supreme Court.

### C. Nebraska Supreme Court Decision

The Nebraska Supreme Court issued its ruling in May 2002. By this time, the primary and general elections for Omaha's city council had already taken place under Lautenbaugh's new districts; Legislative Bill 71, which transferred authority for redistricting Omaha's council districts from the Douglas County Election Commissioner to the council itself, had been passed by the Legislature; and the council had already scrapped Lautenbaugh's plan and drawn new districts for Omaha.[52] Lautenbaugh thus argued to the Supreme Court that Chambers' appeal was moot since there were no longer any issues "alive" to be determined.[53] However, the Supreme Court determined that the question Chambers' petition raised concerning how often city council districts may be redrawn was of sufficient public importance that it would, pursuant to the public interest exception,[54] issue a ruling so as to provide guidance to, in particular, elected officials in preparation for the 2010 census.[55]

The Supreme Court's decision rested on a reading of section 32-553 similar to that of the district court, giving the statutory language "its

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50. *Id.*
51. *Id.* at 922, 644 N.W.2d at 544.
52. *Id.* at 926, 644 N.W.2d at 546-47.
53. *Id.*
54. *See supra* note 2 and accompanying text.
55. *Id.* at 927, 644 N.W.2d at 547. In applying the public interest exception in *Chambers*, the court stated,

> This court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination . . . Chambers' petition raises the public issue of how often city council district boundaries may be redrawn pursuant to § 32-553. This issue, if adjudicated, would provide future guidance for public officials, including members of the Omaha City Council who, as a result of the amendment to § 14-201.03, are now responsible for redrawing city council district boundaries. Furthermore, the similar question of whether § 32-553 limits the Omaha City Council or other appropriate legal entities to redraw-

plain and ordinary meaning."[56] The Supreme Court first noted that the statute requires political subdivisions to draw districts such that they are "substantially equal in population as determined by the most recent federal decennial census."[57] The court found that the only time frame mentioned in the statute for redistricting was the six-month period following the passage of the legislative bill redistricting the state on the basis of the federal decennial census.[58] The court took the lack of specific language in the statute limiting more frequent redistricting to mean that the six-month time-frame established only a *minimum*, and not a sum-total, frequency for redistricting.[59] Indeed, the court stated, "there is no language in section 32-553 which prohibits the appropriate legal entity from redrawing district boundaries at other times to maintain substantial equality. We thus determine that section 32-553 does not limit redrawing of district boundaries to only once every 10 years."[60] Thus, the court found that Lautenbaugh's actions in redrawing the Omaha city council districts just before both the release of the 2000 census data and the council elections was in compliance with the statute.[61]

## III. ANALYSIS

### A. Overview of Nebraska Case Law

#### 1. *Preliminary Look at Section 32-553 in State ex rel. Steinke v. Lautenbaugh*[62]

*Chambers* presented the Nebraska Supreme Court with the novel question of how often electoral districts can be redrawn between censuses, and involved the companion issue of how old the data used to redraw districts can be. Such novelty is what prompted the court to invoke the public interest exception to the mootness doctrine and establish a precedent for future guidance. As such, existing Nebraska case law on the issue is of limited help, but it is important to survey the most relevant cases to help build the context.

Just weeks before issuing its ruling in *Chambers*, the court issued another ruling concerning both Lautenbaugh in his official capacity as Douglas County Election Commissioner and section 32-553. In *State*

ing district boundaries only once every 10 years will likely arise prior to the federal decennial census in 2010.

*Id.*

56. *Id.* at 931, 644 N.W.2d at 549-50.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. 263 Neb. 652, 642 N.W.2d 132 (2002).

*ex rel. Steinke v. Lautenbaugh*,[63] the court found that Lautenbaugh had overstepped his statutory authority according to section 32-553 when he redrew the Omaha Public School District boundaries following the 2000 census and switched the numbers on districts nine and ten. After the districts were redrawn, the school board member who represented district ten suddenly resided in district nine. So that district ten could elect a new representative that resided in their district, Lautenbaugh switched the numbers on the districts, since in election year 2002 only odd numbered districts would hold elections. However, this meant that John Langan, who represented what had been district nine—now renumbered to district ten—would not stand for re-election until 2004. Lautenbaugh said he made a judgment call to allow original district ten to continue to be represented by one of its residents.[64] Langan, however, filed suit to prevent Lautenbaugh's renumbering so that Langan could stand for re-election in 2002.

The case involved consideration of the meaning of section 32-553 prior to *Chambers*. The only hint the court gave concerning the issues addressed in *Chambers* came when it declared:

> Read together, §§ 32-552 and 32-553 authorize an election commissioner to draw or adjust the boundaries of school districts following a federal decennial census only as is necessary to maintain substantial population equality within the districts . . . As noted, the applicable statutes authorize the election commissioner to adjust subdistrict boundaries to maintain substantial equality in population . . . By adjusting the boundaries of what had been subdistricts Nos. 9 and 10 to reflect population changes reflected in the 2000 census data, Lautenbaugh carried out his statutory authority.[65]

Addressing the novel issue of the frequency of redistricting would wait until the court's decision in *Chambers*.

### 2. *Meaning of "Most Recent Census Data" Answered in Pelzer v. Bellevue*[66]

The Nebraska case that most parallels *Chambers* is *Pelzer v. Bellevue*.[67] In 1975, the City of Bellevue passed an ordinance redrawing the boundaries of the city's four wards.[68] The annexation of several areas, which added between 1,000 and 1,500 residents to the city, prompted the redistricting.[69] Plaintiff, a citizen of Bellevue, brought suit in district court alleging that the new districts created by the ordinance were substantially unequal in population and thus violated

63. *Id.*
64. *Id.* at 655-56, 642 N.W.2d at 136-37.
65. *Id.* at 663-64, 642 N.W.2d at 141-42.
66. 198 Neb. 19, 251 N.W.2d 662 (1977).
67. *Id.*
68. *Id.* at 20, 251 N.W.2d at 663 .
69. *Id.* at 21, 251 N.W.2d at 664.

the one-person, one-vote standard of *Reynolds*.[70] The controversy was created when the city used numbers from three different sources to derive the new districts.[71] The city had used portions of the 1970 federal census, the 1972 revision of the census, and a scheme created by a city-appointed committee to arrive at Bellevue's population for redistricting in 1975. Numbers from a special federal census in 1974 were not used.[72]

The Nebraska Supreme Court addressed the meaning of section 5-108[73] of the Nebraska Revised Statutes, the forerunner of the current section 32-553, in light of "several compelling policy reasons to support [its] holding."[74] Specifically, the court addressed the meaning of the statute's direction to utilize "the most recent federal census" in redistricting. The question with which the court was faced was whether Bellevue was required to use the 1974 special federal decennial census, given the statute's wording. The court found the legislative history of section 5-108 indicated a purpose to adhere to the one-person, one-vote standard.[75] In a holding that would appear to support Lautenbaugh's contention that he was free to use 1990 census data in redistricting Omaha in 2000, the *Pelzer* court ruled:

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70. *Id.*

71. *Id.* at 22, 251 N.W.2d at 664.

72. *Id.*

73. Nebraska Revised Statutes section 5-108 was transferred to section 32-1057 which, after 1992, became section 32-553. Compare its language to section 32-553 (note 46 *supra*), noting the nearly identical wording:

> (1) When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census. Any such city, village, county, or school district which had districts in place on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Bureau of the Census shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after such date. Any such city, village, county, or school district in existence on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Bureau of the Census and which has not established any district boundaries shall establish district boundaries pursuant to this section within six months after such date. If the deadline for drawing or redrawing district boundary lines imposed by this section is not met, the procedures set forth in section 32-1059 shall be followed.
>
> (2) The governing board of each political subdivision enumerated in this section shall be responsible for drawing its own district boundaries, except that the election commissioner of any county in which a city of the metropolitan class is located shall draw district boundaries for such city as required under this section.

74. 198 Neb. at 25, 251 N.W.2d at 665-66 (citing the reliability and objectivity of the federal census as among the policy reasons for its holding).

75. *Id.* at 23-24, 251 N.W.2d at 665.

> [T]he substantial equality of political districts in the state must be ascertained by using the most recent federal census . . . *[T]he language in section 5-108, R.R.S. 1943, "the most recent federal census," refers to the most recent federal census available to the particular locality. . .*[76]

The court cemented its holding further by declaring "[l]ocal governments cannot disregard the most recent federal census when drawing up political districts and use instead another method or basis for apportionment, even though ostensibly rational."[77]

The similarity of *Pelzer* to *Chambers* is notable. Both cities were redistricted due to population increases resulting from recent annexations. In both situations, the one-person, one-vote standard was a significant factor. Both cases dealt with determining the meaning of the same statute. In both situations it was disputed which census should be used in redistricting. While the court in *Chambers* did not mention *Pelzer* as support for such a doctrine, the court implied that use of ten-year old census data was acceptable when it stated, "In his petition, Chambers alleges . . . that Lautenbaugh 'drew such new districts by using the 1990 decennial census data.' [W]e determine that Lautenbaugh's actions in redrawing the district boundaries complied with section 32-553."[78] Instead, the court focused on the question of the permissible frequency of redistricting and whether it must be limited to a six-month period following the Legislature's redistricting of the state after the federal decennial census once every ten years. This was a potentially precedent-setting question in Nebraska.

## B. The Question of Frequency

The Nebraska Supreme Court in *Chambers* relied upon the statutory language in determining that political subdivision redistricting can be undertaken pursuant to section 32-553 more often than once every ten years. It is instructive, however, to sample redistricting precedent and practices in other jurisdictions to analyze whether the decision in *Chambers* sets Nebraska on a unique course, or whether it brings it in line with other jurisdictions in the area of redistricting.

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76. *Id.* at 25, 251 N.W.2d at 665-66. (emphasis supplied).

77. *Id.* Such a ruling would seem to preclude the Ninth Circuit's interpretation of *Reynolds* in *Garza*, *infra* note 101, that since *Reynolds* permits redistricting between censuses, data obtained from sources other than a federal census could be used. In Nebraska, *Pelzer* establishes that only federal census data may be used in redistricting.

78. 263 Neb. at 931, 644 N.W.2d at 550. Interestingly, Lautenbaugh's brief to the court, while arguing "[t]he Appellee complied with Neb. Rev. Stat. § 32-553 by using the 1990 decennial census data which at the time of redistricting was the most recent federal decennial census numbers available," did not make reference to *Pelzer*, which provides direct support for the assertion. Nor did the Supreme Court make any comparisons to *Pelzer* in its decision.

Decennial redistricting of states and their political subdivisions following the federal census is the norm in the United States.[79] Indeed, the Supreme Court in *Reynolds* in essence established such a ten-year cycle as the minimum frequency of redistricting which could stand constitutional muster under the Equal Protection Clause.[80] While *Chambers* addresses the issue of how often is *too* often for redistricting, historically most of the legal trouble with redistricting frequency has been governing bodies' reluctance to do it often enough. *Reynolds*, for instance, was prompted by the Alabama legislature failing to reapportion itself for sixty years![81] In *Colegrove v. Green*,[82] the United States Supreme Court was asked to force the Illinois State Legislature to redraw congressional districts after it had failed to do so for over 40 years.[83] Likewise, by the early 1960's and the Supreme Court's period of reapportionment cases, Tennessee's legislature had not redistricted for over 60 years,[84] Georgia for over 30 years,[85] and Delaware since 1897.[86] Other states, including South Dakota, Maryland, California, Texas, and Florida also had developed large discrepancies in voter districts through failure to redistrict.[87] The reluctance to redistrict was attributed to rural-dominated legislatures refusing to cede power to increasingly populous urban areas, resulting in a small fraction of a state's population electing a majority of the state's legislature.[88]

79. Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991) (quoting *Reynolds v. Sims*, 377 U.S. 533 (1964) ("Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States.")).

80. 377 U.S. at 583-84 (holding that while it was not setting an express minimum for redistricting to be every ten years, redistricting less frequently than that "would assuredly be constitutionally suspect"); *see also* Garza v. County of Los Angeles, 918 F.2d 763, 772 (9th Cir. 1990).

81. *Id.* at 540.

82. 328 U.S. 549 (1946).

83. *Colegrove* became an important case not for what it did, but for establishing what the Supreme Court would not do. *Colegrove* set the precedent that reapportionment issues were inherently political, and thus without the purview of justiciable controversies. Baker v. Carr, 369 U.S. 186 (1962), reversed *Colegrove* and established that apportionment disputes were justiciable under the Equal Protection Clause of the Fourteenth Amendment. *See also* note 5 *supra*.

84. *See* Baker v. Carr, 369 U.S. 186, 191 (1962).

85. *See* Wesberry v. Sanders, 376 U.S. 1, 6 (1964).

86. *See* Roman v. Sincock, 377 U.S. 695 (1964).

87. HOWARD D. NEIGHBOR, CITY COUNCIL DISTRICTING IN THE 1980'S 16 (1980).

88. *Id.* "[In 1961], 10.7 percent of the California population could elect a majority of the state senate. In Florida, at the same time, 12 percent of the population could elect a majority in both the senate and house of representatives. The worst in that respect was Nevada . . . where 8 percent of the population could elect a majority of the legislative body." *But see* FRANK M. BRYAN, POLITICS IN THE RURAL STATES: PEOPLE, PARTIES, AND PROCESSES 196 (1981) (making the case that a number of studies began to show in the 1960's and 70's that rural domination of legislatures was not a significant cause of urban problems not being addressed:

### C. One-Person, One-Vote Standard: *Reynolds v. Sims*

Equal protection challenges to apportionment schemes are based at least foundationally on the United States Supreme Court's landmark decision in *Reynolds v. Sims*,[89] which ultimately forced several states to redesign how the two houses in their legislatures were elected. The one-person, one-vote standard that came out of the case, and which Lautenbaugh was reportedly concerned about in Omaha, stated that for state election districts to pass muster under the Equal Protection Clause of the Fourteenth Amendment, they must be substantially equal in population.[90] In *Reynolds* the issue was whether states could constitutionally base districts for the state's House of Representatives on population while basing the state's Senate on geographical subdivisions, such as counties. The Court, in holding that both houses must be based on population, stated "[a]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[91]

After having held that electoral districts must be substantially equal in population, the Court went on to temper some of the implications of the decision. First, the Court said a state must make "an honest and good faith effort to construct districts . . . as nearly of equal populations as is practicable. Mathematical exactness or precision is hardly a workable constitutional requirement."[92] Second, the Court recognized that imbalance in districts just before a census would be an inevitable result of decennial apportionment, but that

> [l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system . . .In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.[93]

Third, the Court stated that it did not intend to establish decennial reapportionment as the constitutional standard, but that "compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation" and "if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."[94] Fourth, the Court

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"By 1970 the reapportionment bubble had truly burst . . . the charge against rural America - and it was precisely that - was for the most part a bum rap. In short, rural America had been convicted without a trial and with only the skimpiest circumstantial evidence.").

89. 377 U.S. 533 (1964).
90. *Id.* at 568.
91. *Id.* at 568.
92. *Id.* at 577.
93. *Id.* at 583.
94. *Id.* at 583-84.

did not state that more frequent reapportionment "would not be constitutionally permissible or practicably desirable."[95] Finally, the Court cautioned that the proximity of elections and the burden to an already engaged electoral process might militate against changing districts "mid-stream."

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirement of the court's decree.[96]

## D. Federal Courts and the Frequency Question

Against this backdrop are set most of the precedent from other jurisdictions and the federal courts with regards to the frequency, timing, and age of data used in redistricting. Most courts deciding reapportionment cases where the closeness of an election to a census has made the timing of redistricting an issue have held that the interests of one-person, one vote should usually yield to interests of predictable reapportionment and election stability. That is, even though the result may be that malapportioned districts are used for an election on the cusp of the release of new census data, the instability of more frequent redistricting or the upheaval of holding new elections based on new districts once new data is at last available are often more onerous than temporary non-compliance with the one-person, one-vote standard. Courts have generally recognized it is inevitable that near the end of a ten-year census cycle, or due to changes in a mobile population, districts will become malapportioned. Yet, it does not follow that more frequent redistricting in pursuit of the one-person, one-vote principle should be undertaken.

Taken together, prominent apportionment cases provide some general guidelines. Where there is no evidence of a legislative body *refusing* to redistrict yet finds itself facing an election "on the cusp of [a] decennial census,"[97] courts have generally been less apt to require either a redistricting before the election, or throwing out election results based on an old census and holding special elections, finding it more

95. *Id.* at 584.
96. *Id.* at 585.
97. French v. Boner, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd*, 963 F. 2d 890, 891-92 (6th Cir. 1992).

important to preserve district stability.[98] Courts have held that population shifts alone at the end of a ten-year census cycle do not create such an actionable claim.[99] In addition to preserving district stability, courts have found redistricting between censuses to be inherently inaccurate anyway, given that the data relied upon is necessarily from the last census, which may have been some years previous.[100] However, where a state fails to redistrict because of political squabbling and not due to any rational state policy, or where an existing districting scheme is found to be discriminatory, courts have been willing to step in and order an immediate redistricting even when the result will be delay of upcoming elections or using data other than census data to form new districts.[101]

98. *Id.* at 892 ("We do not believe that considerations of mathematical equality in representation or the presumption in favor of redistricting every ten years outweigh the considerations outlined above concerning the validity of four-year terms, the settled expectations of voters and elected officials, the costs of the elections, and the need for stability and continuity of office.") *See also* Fairley v. Forrest County, 814 F. Supp. 1327 (S.D. Miss. 1993) (holding that county did not have to hold new elections since 1) population deviations can occur at any time but do not necessarily require redistricting, and 2) the county had done everything it could to redraw districts for 1991 elections using 1990 data, but districting plan approved too late by Justice Department); Political Action Conference v. Daley, 976 F. 2d 335 (7th Cir. 1992) (holding Chicago's 1991 city council elections valid where they were based on 1980 census data and 1990 data did not become available until two weeks before election); Cardona v. Oakland Unified School District, 785 F. Supp. 837 (1992) (holding that where a verification of census data could require redistricting again shortly after usual decennial redistricting, City of Oakland could delay redistricting until 1993 and hold elections in the interim based on 1980 data); Wesch v Folsom, 6 F.3d 1465 (11th Cir. 1993) ("The Supreme Court has made it clear that the policy interest of promoting stability in elections dictates against redistricting too frequently . . . [C]ourts are reluctant to redistrict shortly before a new census, which might require yet another reapportionment.").

99. Fairley v Forrest County, 814 F. Supp. 1327 (S.D. Miss. 1993).

100. *See* Simkins v. Gressette, 495 F. Supp. 1075 (D.S.C. 1980) (holding that 1980 elections would not be halted until new districts drawn using 1980 data, nor would districts be redrawn using 1970 data given 10-year age of data); White v. Daniels, 909 F.2d 99 (4th Cir. 1990) (holding that districts claimed to dilute black voting strength under Voting Rights Act of 1965 would not be redrawn just before 1991 elections since elections would be disrupted and because redrawing districts would have to use 1980 data given that 1990 data was not yet available).

101. *See* Farnum v. Burns, 548 F. Supp. 769 (D.R.I. 1982) (holding that because the delay in redistricting before state senatorial elections was due to a struggle between the legislature and governor and not due to a rational state policy, court enjoined 1982 elections until new districts were drawn); Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (holding that where it was proven existing districting plan was the product of a discriminatory scheme and part of a continuing pattern of such through several decades, county had to redistrict in 1988 in preparation for 1990 elections and that any data gathered since 1980 census, or even reliable predictive data, could be used).

## E. Nebraska Constitutional Guidance

Issues of redistricting in Nebraska have often focused on redistricting the Legislature.[102] Article III, section 5 of the Nebraska Constitution provides the guidelines for Legislative redistricting,[103] but is also instructive as to the history, tradition, and intent of political redistricting in general, including that of political subdivisions, in the state. Indeed, the language of section 32-553 closely ties redistricting of political subdivisions in the state to the time-frame within which the Legislature is redistricted.[104] It is useful to examine what the Nebraska Constitution says about the frequency of redistricting to further provide policy context for the operation of section 32-553. With regard to the frequency of legislative redistricting, the Nebraska Constitution states simply, "The Legislature shall redistrict the state after each federal decennial census."[105] The language does not limit legislative apportionment to just once every ten years, that being after the federal census. It was not always so, however.

The pertinent part of Article III, section 5, up until 1966, used to read, "The Legislature may re-district the state from time to time, *not more often than once in ten years*."[106] Legislative Bill 923, passed in 1965, submitted a proposed constitutional amendment to the people of Nebraska that changed the word "may" to "shall," replaced the language of "from time to time" with "after each federal decennial census," and dropped the phrase "not more often than once in ten years." Thus, until the amendment passed in 1966, at least the Legislature was constitutionally barred from redrawing its electoral districts more than once every ten years.

In 1965, the committee and floor debate on LB 923 focused mostly on other parts of the bill that would provide for continuance of an

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102. *See, e.g.*, Hlava v Nelson, 247 Neb. 482, 528 N.W.2d 306 (1995); Dendinger v. Nelson, 247 Neb. 487, 528 N.W.2d 309 (1995); Day v Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992); Carpenter v State, 179 Neb. 628, 139 N.W.2d 541 (1966).

103. The Nebraska Constitution states:

> The Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census. The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature.

NE. CONST. art. III, § 5.

104. *See* NEB. REV. STAT. § 14-201.3

105. *Id.*

106. NE. CONST. of 1922 art III, § 5 (1965) (emphasis supplied).

elected legislator after redistricting when their district boundaries changed and whether county lines should be crossed in forming districts.[107] Senator George Syas made one of the brief comments concerning the frequency-of-redistricting language, but focused on the replacement of "may" with "shall," stating that given recent federal cases, the Legislature could no longer reapportion at will and must do it at least once every ten years. Again, the overall concern was not with the Legislature redistricting too often, but rather not often enough. Senator Elvin Adamson, in rebuttal, argued that the "may" language should be left since "it would seem rather ridiculous that you would be required to reapportion when it would make only minor change[s]" in situations where there were no population shifts beyond "proper tolerance[s]."[108] Senator Syas argued that court precedent would be enough to ensure the Legislature redistricted at least once every ten years.

Only Senator Jerome Warner directly addressed the "not more often than once in ten years" language when he argued, in support of LB 923, that given recent federal court cases and the fact that the Legislature was enacting a new apportionment plan in 1965,[109] such limiting language had to be removed "or else you will be in another problem in [the] 1971 session following the census at that time."[110] Thus, it appears the removal of the language in Article III, section 5 restricting redistricting to once every ten years was removed only so that the Legislature could redistrict following the 1970 census and then every 10 years thereafter. This would set the Legislature on its usual ten-year reapportionment schedule and avoid a potential one-person, one-vote lawsuit in 1971.[111] It is clear from the floor debate over LB 923 that senators were not contemplating removal of the limiting language in order to regularly allow for redistricting *more often than* once every ten years.[112]

107. *Hearing on LB 923 Before the Committee on Government and Military Affairs*, July 20, 1965; *Floor Debate on LB 923*, 75th Legislature, July 26, 1965.

108. *Hearing on LB 923 Before the Committee on Government and Military Affairs*, July 20, 1965, 11-12; *see also Floor Debate on LB 923*, 75th Legislature, July 26, 1965, 2922-A (where Sen. Syas later supports the change from "may" to "shall").

109. Three previous bills, two passed in 1963 and one earlier in 1965, had been declared unconstitutional under the Equal Protection Clause of the United States Constitution. *See* Carpenter v. State, 179 Neb. 628, 139 N.W.2d 541 (1966).

110. *Floor Debate on LB 923*, 75th Legislature, July 26, 1965, 2923-A.

111. *Id.*

112. A Nebraska Attorney General's Opinion in 2002 came to an opposite conclusion, but does so by concluding without explanation that "a reasonable inference is that the removal from the Constitution of the express limitation on redistricting frequency was a response to recent experience and was intended to remove the frequency limitation." The opinion, while mentioning the recent trouble the Legislature was having getting a reapportionment bill passed that would satisfy the courts, interprets instead the provision to remove the frequency limitation as a core component of the constitutional amendment, as opposed to a necessary mea-

Further guidance for the meaning of the constitutional provision comes from a neighboring jurisdiction. In 2000, in the case of *Emery v. Hunt (In re Certification of a Question of Law)*,[113] South Dakota's Supreme Court analyzed a very similar provision in their state constitution, coincidentally also enumerated Article III, section 5, in a certification from the U.S. District Court for the District of South Dakota. Two members of the Cheyenne River Sioux Tribe who were residents of Legislative District 28, which was specially divided into two smaller districts such that minority interests would be protected, brought suit in federal court. In 1996, the South Dakota Legislature had decided to do away with the special design of District 28, prompting the suit. At issue was whether the legislative bill eliminating the division of District 28 was in essence a reapportionment bill, and whether the South Dakota Constitution prohibited such reapportionment in the middle of a decennial census cycle.

South Dakota's constitution mandates that the legislature will reapportion the state in 1991 and every ten years thereafter,[114] and until 1982 it also contained the phrase "but at no other time." Thus, it was very similar to Nebraska's constitutional provision that reapportionment take place "not more often than once in ten years," which survived until 1966. The South Dakota Supreme Court held that the 1996 bill was in essence a reapportionment bill, so the only question remaining was whether such a bill could be passed since it had been only five years since the last reapportionment. A 1982 amendment to

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sure only to resolve the current reapportionment problem, despite Sen. Warner's floor debate that would indicate just that. Further, the opinion cites authority from other jurisdictions, nearly all of which indicate a limit on the frequency of redistricting in their state constitutions, but the opinion endeavors to distinguish those cases or cite differences in the language of Nebraska's provision that seem to make a difference. Most importantly, the opinion, in citing decisions from other jurisdictions, neglects to mention the 2000 decision of the South Dakota Supreme Court which came to a very different conclusion on the identical question under nearly identical circumstances. *See* Op. Att'y Gen. Neb. AG LEXIS 3 (2002).

113. 615 N.W.2d 590 (2000).

114. S.D. CONST. art. III, § 5 states:

> The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

the South Dakota Constitution had removed the language "but at no other time," and the State was arguing that the Legislature was thus free to pass a reapportionment bill in 1996 since the limiting language had been removed. In crafting its answer, the South Dakota Supreme Court looked to one of its own 1933 decisions, *Opinion of the Judges. Re Legislative Reapportionment*,[115] in which the court had compared the state's constitutional provision for redistricting with other states' at the time in determining whether the 1933 Legislature could redistrict where the 1931 Legislature had failed to do so. At that time, the "but at no other time" language was still part of the South Dakota Constitution.

> This question seems not particularly difficult, and all the cases we have discovered relevant thereto appear to point in one direction. The Constitutions of many of the states contain provisions very similar to our own with reference to the matter of apportionment. In most of them, however (in fact, in all which we have examined excepting those of Arkansas and Nebraska), we fail to find the words "but at no other time." That is to say, in most of the comparable constitutional provisions there is an affirmative mandate for action at a certain specified time but no express prohibition of action at other times. We do not, however, regard that fact as particularly material. *It seems to be held by all the courts which have had occasion to pass upon the matter that an affirmative mandate for legislative action at a specific time is an implied prohibition of action at any other time* . . . In other words, when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration . . . .[116]

In *Opinion*, the question of whether the Legislature could redistrict more than once every ten years was, as the court admitted, relatively easy to determine based on the language expressly prohibiting such.[117] But by the time the court heard *Emery*, the limiting language was gone. However, the court relied upon the implied duty principle outlined in *Opinion* and another South Dakota precedent, *Kane v Kundert*,[118] when it held that even in the absence of the limiting language, the South Dakota Legislature was confined to redistrict the state only once every ten years:

> As in *Opinion*, we determined in *Kane* that even without the express prohibition, the affirmative mandate for legislative action precludes action at any other time. The constitutional provision, as amended [in 1982], reads, in part, that "an apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991." This language is mandatory and does not contemplate that the Legislature will fail to make an apportionment every ten

115. 246 N.W. 295 (S.D. 1933).

116. *Id.* at 296.

117. In *Opinion*, however, the court allowed the 1933 Legislature to redraw South Dakota's districts even though it ran counter to the constitutional mandate to do so in 1931 and then not again for another ten years, because the 1931 Legislature had failed to do so. "[S]uch prohibition [against redistricting] is conditioned upon the prior performance of the affirmative duty and does not come into operation until the duty mandatorily imposed has been exercised." *Id.* at 296-97.

118. 371 N.W.2d 172 (S.D. 1985).

> years after 1991, nor does it provide, as interpreted in *Opinion*, and reinforced in *Kane*, for an apportionment to be made at any other time after that duty has been discharged. The Sixty-sixth Legislature, sitting in 1991, apportioned its membership by enacting SDCL 2-2-28. There is no constitutional authority for another legislative apportionment until 2001 . . . The affirmative constitutional mandate for legislative action at a specified time remains in the present version of Article III, Section 5, thereby providing an implied prohibition of action at any other time.[119]

The Nebraska and South Dakota constitutional provisions are very similar, and both have a similar history in that language limiting the frequency of redistricting to once every ten years was at one time included, then removed through amendment. The Nebraska Constitution's affirmative statement that "[t]he Legislature shall redistrict the state after each federal decennial census," implies that redistricting is to be done once every ten years, shortly after each federal decennial census. While that doesn't positively determine the question of how often districts may be redrawn, the court could have looked to the history of Article III, section 5 for guidance from a constitutional context and compared it to the approach taken by a neighboring jurisdiction, the South Dakota court's decision in *Emery*.

In looking to the history of Article III, section 5 of the Nebraska Constitution, the court may well have found the fact that the limiting language was amended out of the provision to weigh in favor of their decision that section 32-553 does not limit the frequency of redistricting. However, as discussed above, floor debate in the Legislature on LB 923, which contained the amendment, indicates the restriction was removed simply to assist in passing a redistricting plan in 1965 and to avoid a potential redistricting problem in 1971. It was not indicative of a legislative or popular desire to authorize redistricting more frequent than once every ten years. Additionally, the South Dakota Supreme Court's decision interpreting a very similar constitutional provision would have been instructive, holding, first, the removal of limiting language did not mean more frequent redistricting was now constitutional and second, an affirmative grant of power to be used at a specific time is an implied prohibition of its use at another time. Given these sources of additional context, the court could have interpreted section 32-553 against a broader constitutional backdrop, and would have had before it persuasive evidence that perhaps redistricting, be it of the Legislature or political bodies below it, is to be done not more than once every ten years.

## F. Other Statutory Guides: Redistricting Due to Annexation

In determining the meaning of section 32-553, it is worth noting Nebraska Revised Statutes section 19-3052. This statute does what

119. 615 N.W.2d at 595, 596.

would have likely avoided *Chambers* all together: it spells out exactly when, how, and who is to redistrict a municipality following the annexation of territory to the municipality. From the outset, it is to be noted that section 19-3052 applies only to cities of the first class, cities of the second class, and villages which elect members of their governing boards by districts.[120] Omaha is considered a city of the metropolitan class and thus does not fall under the provisions of section 19-3052. Yet, at least some comparison can be made between 32-553 and 19-3052 since the latter seems to address each of the issues in *Chambers*.

Section 19-3052 (1) provides that whenever a municipality annexes territory to itself and such annexation causes election districts to become substantially unequal in population, the city is to redraw the districts within 180 days after the annexation.[121] The districts are to be redrawn such that they have substantially equal population. Such redistricting is to be done using "the most recent federal decennial census."[122] Paragraphs (3) and (4) of the statute provide that if annexations would require the redrawing of districts such that they would not be complete at least 80 days prior to the primary elections, the annexations are not to take place until after the elections. It also provides that such district-altering annexations cannot occur between primary and general elections.[123] The rest of the statute states that annexations that do not create substantial population inequalities need not trigger redistricting at all. The acceptable range of population deviation is set at ten percent or less of the mean population of each district.[124]

Lautenbaugh's major contention was that Omaha's city council districts had to be redrawn prior to the 2001 city council elections because annexations throughout the 1990s had caused large disparities in population between election districts. If the spirit of section 19-3052 is applied, such would be a mandatory reason for redistricting, and it would have to be done, if deviation from the mean population were greater than 10 percent, within 180 days after the annexation and completed at least 80 days before any primary election. And yes, the most recent federal census data would be used. According to *Pelzer*,[125] that would mean the most recent federal census data available at the time, in which case it would have been the 1990 census data in Lautenbaugh's situation.

120. NEB. REV. STAT. § 19-3052 (1) (2002).

121. NEB. REV. STAT. § 19-3052 (2).

122. *Id.*

123. NEB. REV. STAT. § 19-3052 (3)-(4).

124. NEB. REV. STAT. § 19-3052 (5)(c).

125. 198 Neb. 19, 251 N.W.2d 662. *See supra* subsection III.A.2.

However, while the language of section 19-3052 does provide guidance on the specific issue of whether it is appropriate to redistrict a city following annexations, it cannot provide an adequate basis for the scope of the decision in *Chambers*. Section 19-3052 specifically provides for redistricting following annexations of territory to cities. Yet, the decision in *Chambers* is not limited only to situations involving annexations. While Lautenbaugh argued it was annexations to Omaha that had prompted him to redraw the city's districts (in which case section 19-3052 by analogy could provide useful guidance), the Nebraska Supreme Court's decision focuses on the broader issue of maintaining substantial population equality, with no stated limitations or guidelines as to necessary occurrences that would prompt redistricting.

> [T]here is no language in § 32-553 which prohibits the appropriate legal entity from redrawing district boundaries at other times to maintain substantial equality. We thus determine that § 32-553 does not limit redrawing of district boundaries to only once every 10 years.[126]

By framing the issue as "whether § 32-553 limits the Omaha City Council or other appropriate legal entities to redrawing district boundaries only once every 10 years,"[127] the court's holding goes well beyond any guidance available in section 19-3052 and opens the door to public officials redistricting whenever it appears districts are substantially unequal in population.

### G. Potential Results: Ohio's Experience

Even where statutory language unambiguously provides for redistricting of political subdivisions more frequently than once every ten years, courts have been concerned about the potential for abuse. For example, Ohio's statute addressing the division of municipal corporations into wards, section 731.06 Ohio Rev. Code Ann., provides unambiguously that "[i]n order to provide substantially equal population in each of the wards, the legislative authority may redivide the city into wards at any time,"[128] an authority the Nebraska Supreme Court has arguably granted through *Chambers* to Nebraska's political subdivisions. Such wide discretion in redistricting, however, has the potential to cause problems. In *Huenergardt v. Canton*,[129] the Ohio Court of Appeals had to play referee between two competing redistricting plans, one proposed by the Director of Public Service and one proposed by the Canton City Council. Upon failure of the Canton City Council to redistrict the city in 1981, the task statutorily fell to the Director of Public Service, who complied and submitted a plan to the County

126. 263 Neb. at 931, 644 N.W.2d at 550.
127. *Id.* at 927, 644 N.W.2d at 547.
128. OHIO REV. CODE ANN. § 731.06 (2002).
129. 1983 Ohio App. LEXIS 13094 (Ohio Ct. App. 1983).

Board of Elections. Later, the city council tried again, and this time passed a redistricting plan. The question then became which plan should prevail. The court held the language of the statute to be "clear and unequivocal"[130] that the council could redistrict the city at any time in order to maintain population equality. The court recognized it could be setting an unwanted precedent, but held it was not proper for it to consider any political ramifications:

> We recognize that the plain language of sub-section (C) could allow repetitive, wasteful, and chaotic periodic redistricting, at the whim of a city council. That may be the result here. But, as we have noted above, such result is not within the appropriate area of judicial review of legislative prerogative.[131]

Where the Ohio Court of Appeals reluctantly had to give effect to an unambiguous grant of statutory power, the result of which allows for "chaotic periodic redistricting," the Nebraska Supreme Court determined the language of Nebraska's section 32-553 to essentially mean the same thing where it may have been unnecessary to do so. The practical consequences could be at least the opportunity for similar repetitive, chaotic, or even politically abusive redistricting in Nebraska.

## IV. IMPLICATIONS

The Nebraska Supreme Court did not have to assign to section 32-553 a meaning as broad as that which the court gave it, and given a number of reasons a better outcome likely would have been to give the statute a narrower interpretation. Given its holding in *Chambers*, the court has instructed public officials across Nebraska responsible for redistricting that they may do so whenever it is necessary to maintain substantial population equality. A narrower interpretation would have been just as plausible given the language of the statutes involved.

Nebraska Revised Statutes section 14-201.03 read, at the time Chambers and Lautenbaugh went to court, "The election commission shall redraw the boundaries of [districts of cities of the metropolitan class], maintaining the compact and contiguous nature of each, when such districts are no longer substantially equal in population *pursuant to section 32-553*."[132] Nebraska Revised Statutes section 32-553 provides that any political subdivision which elects its governing board by districts shall have districts that are

> substantially equal in population as determined by the most recent federal decennial census . . . Any such political subdivision . . . shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn *within six months after the passage and ap-*

130. *Id.* at *16.
131. *Id.* at *18.
132. NEB. REV. STAT. § 14-201.03 (emphasis supplied).

*proval of the legislative bill providing for reestablishing legislative districts.*[133]

Undoubtedly the plain meaning of section 14-201.03 is to grant public officials the authority and responsibility to make sure electoral districts maintain substantial population equality; the clause "pursuant to 32-553" qualifies that authority, albeit in an ambiguous manner given the double-meaning that could be applied to the "plain language" of section 32-553. That is, given nothing more than the statutory language of section 32-553, it is plausible that the statute could be interpreted as either (1) setting a floor that redistricting be done at least within a six month time-frame after the Legislature redistricts itself, in addition to any other redistricting necessary to maintain population equality, or (2) setting a ceiling that redistricting be done *only within* a six month time-frame after the Legislature redistricts itself. Yet, given the context within which the statute operates and weighing the interests of one-person, one-vote against the interests of stability and continuity in the electoral process, particularly when an election is pending, the court, for important policy reasons, should have interpreted section 32-553 narrowly to maintain decennial reapportionment.

Frequent redistricting, although employed in pursuit of the admirable goal of substantial population equality, may cause undue voter confusion. If districts change frequently, voters, particularly those near the changing boundaries, may find themselves in different districts from one election to the next. A stable district system serves to provide people with a connection to other voters similarly situated. It also provides a stable connection to a representative for whom people have voted and have come to know as "their" representative. It also provides stability for representatives who know their constituents and their concerns and expectations. In the end, frequent redistricting that minimizes such advantages of stability may lead to voter disillusionment and frustration, reducing political participation. The problem may become particularly acute when redistricting is attempted just before an election, causing unnecessary confusion and upheaval.

Another concern is the potential for political manipulation. Redistricting is an inherently political process that can be used to control the political composition of a governing board. If the frequency of redistricting is not restricted, it may be tempting for an official or governing board to redraw districts as needed to maintain or gain a partisan advantage. It is understood that partisan politics plays a major role in even decennial reapportionment. But where it is limited to once every ten years, the process is more fundamentally tied to changes in population based on the federal census.

133. NEB. REV. STAT. § 32-553 (2000) (emphasis supplied).

> [T]he federal census is generally viewed as being a highly reliable source of information concerning population. The federal census is conducted by the Bureau of the Census, whose primary concern is the accurate ascertainment of data. It is not influenced or swayed by local politics, prejudices, or notions concerning size and prosperity.[134]

Where redistricting is allowed more often, an argument could perhaps always be made that district populations have changed substantially, necessitating a redrawing which would allow adjustments that could change the political balance of a governing board or allow minor adjustments to ensure incumbents remain. Thus, redistricting may become as important as voting in determining the composition of a governing board.

For a number of reasons, the legal context of section 32-553 suggests it should have been interpreted as limiting reapportionment to once every ten years. That context includes other jurisdictions' precedence, the United States Supreme Court's landmark decision in *Reynolds v Sims*, and Nebraska constitutional considerations.

First, the United States Supreme Court's decision in *Reynolds v Sims*[135] sets a constitutionally-permissible minimum of reapportionment at once every ten years, and while it says more frequent reapportionment is not precluded and may even be desirable, considerations of stability and continuity in the electoral system, particularly where an election is up-coming, may advise against it. The Court explicitly acknowledged that near the end of a ten-year census period, electoral districts will inevitably have become unequal in population, but such is not a valid reason, independent of others, for redistricting just before a new census or, particularly, an election.

Second, courts in other jurisdictions and federal appeals courts deciding reapportionment cases where the closeness of an election to a census has made the timing of redistricting an issue have held that the interests of one-person, one vote should usually yield to interests of predictable reapportionment and election stability. Courts have generally recognized it is inevitable that near the end of a ten-year census cycle, districts will become malapportioned. Yet, more frequent redistricting in pursuit of the one-person, one-vote principle is not prescribed so long as the state has a rational reapportionment plan. In fact, courts have held that where a state has a rational policy for doing so, reapportionment may even be delayed beyond the usual ten-year cycle.

Third, where courts have required more frequent redistricting, it is usually in response to previous discriminatory practices in drawing districts or where a state has not shown a rational policy reason for delaying redistricting beyond a federal census.

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134. Pelzer v. Bellevue, 198 Neb. 19, 25, 251 N.W.2d 662, 665-66 (1977).
135. 377 U.S. 533 (1963).

Fourth, Article III, section 5 of the Nebraska Constitution provides that the Legislature is to redistrict the state following each federal decennial census. In prescribing the frequency of legislative redistricting, this constitutional provision also provides important context useful in determining questions of frequency in redistricting political subdivisions, which section 32-553 ties to the time-frame within which the Legislature is redistricted. The history of Article III, section 5 shows it used to include additional language affirmatively precluding the state from redistricting more often than once every ten years. Though that language has been removed through amendment, the intent may remain. Committee and floor debate on that amendment shows only that the wording was likely removed to avoid a potential redistricting problem in 1971 as the Legislature grappled with trying to implement a constitutionally acceptable redistricting plan in 1965. Additionally, the South Dakota Supreme Court recently interpreted a very similar section of their constitution, where almost identical limiting language had also been removed through amendment. That court, however, held that the absence of the language made no difference, and that "even without the express prohibition, the affirmative mandate for legislative action precludes action at any other time."[136]

Finally, where Nebraska statutes do provide specifically for more frequent redistricting of cities, it is limited to situations where there have been annexations. The court's holding in *Chambers* makes no such limitation, and instead is directed to "public officials" who will likely face redistricting questions prior to 2010. In Ohio, where a statute does unambiguously give governing boards authority to redistrict at any time, the Ohio Court of Appeals has held such could lead to "repetitive, wasteful, and chaotic periodic redistricting, at the whim of a city council."[137] The potential for similar abuse of the frequency of the redistricting process, be it by elected officials or constituencies forcing frequent redistricting for political gain, now may exist in Nebraska after *Chambers*.

## V. CONCLUSION

Resolution of the question, "Is redistricting in Nebraska limited to once every ten years?" in *Chambers* could plausibly have been answered either way given the language of Nebraska Revised Statutes section 32-553. In focusing on the plain language of the statute as opposed to its ambiguity, the court missed the opportunity to examine the broader practical context in which the statute operates and, consequently, perhaps a more preferred answer in light of the policy reasons. The result is that election commissioners and public officials

136. 615 N.W.2d at 595-96.
137. 1983 Ohio App. LEXIS 13094 at *18.

around the state must now understand they have been given at the same time broader power to shape the politics of their political subdivisions and heightened responsibility to ensure that electoral districts are substantially equal in population. Lautenbaugh faced two lawsuits, one attempting to force him to redistrict, one attempting to enjoin him from doing so. The lawsuit attempting to enjoin redistricting failed, and at the same time public officials were handed greater responsibility for maintaining population equality. Could this provide grounds for future lawsuits to force officials to redistrict more frequently so that substantial population equality is maintained? What would constitute substantial equality? These are questions *Chambers* did not answer, but perhaps raised. What is certain is that election commissioners and public officials can no longer assume that decennial reapportionment is sufficient to maintain substantial population equality of electoral districts, and may need to reassess their redistricting plans to meet that goal.