State of New Hampshire

HOUSE OF REPRESENTATIVES
33 North State Street
Legislative Office Building, Room 208
Concord, NH 03301-6334

TEL: (603) 271-3184
TDD Access: Relay NH 1-800-735-2964

COMMITTEE ON JUDICIARY

Robert H. Rowe
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November 1, 2011

Honorable Paul M. Mirski, Chairman
Special Committee on Redistricting
Legislative Office Building, Room 308
33 North State Street
Concord, NH 03301

Re: Redistricting and *Reynolds v. Sims*:
A Dissenting Opinion

Dear Chairman Mirski:

Having attended and listened to the presentations of Attorneys Edward C. Mosca and Paul J. Twomey at the meeting of your Committee on October 26, 2011, I feel compelled to second the sentiment expressed by Representative Elaine Swinford and others that in establishing House and other New Hampshire electoral districts, the Committee should "do the right thing" and reject the debilitating consequences of adherence to the mindless, judge-created "one person, one vote" standard.

The process in which your Committee is enmeshed essentially boils down to this: The least representative branch (the federal judiciary) of the least representative legislature (the U.S. Congress), whose members' political appointments are confirmed by the least representative legislative chamber (the U.S. Senate), in connivance with Senate-confirmed politically-appointed and career attorneys of the U.S. Department of Justice, are supervising - and potentially dictating - the manner by which the most representative legislature in the nation must "do" representative government. The root of this absurd situation lies, as legal absurdities so often do, in the judiciary's meddling in matters beyond its constitutional and institutional competence in the exercise of its institutional conceit - in the face of all experience to the contrary - that a majority vote of a supreme court can "solve" any perceived problem.

The seminal cases on reapportionment, as your Committee's members know only too well, are the decisions of the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), which repudiated more than a generation of precedent by ruling that state legislative districting was a federally justiciable issue; and *Reynolds v. Sims*, 377 U.S. 533 (1964), which elevated simple numerical equality among state electoral district populations (then called "one man, one vote;" today called - still inaccurately - "one person, one vote") to the preeminent position among the criteria to consider in drawing such districts. The Court immediately found, in *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 633 (1964) that, lacking any other neutral principle to guide it, a court could not rule other than to make "one person, one vote" the *only* acceptable criterion, albeit with a "permissible deviation" that is also without constitutional foundation and is applied in an entirely *ad hoc* manner, thereby violating a fundamental principle of justice that every person should have the means to know in advance what the law is.

"Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."
Edmund Burke, Address to the Electors of Bristol, 1774

In order to understand the magnitude of the constitutional legerdemain accomplished by *Baker v. Carr* and *Reynolds v. Sims* and their ill-favored progeny, it is necessary to consider the origins of its supposed constitutional basis: what an exasperated Justice Oliver Wendell Holmes characterized as the last refuge of constitutional arguments, the 14th Amendment. Modern 14th Amendment jurisprudence is premised upon the assumption that the 39th Congress voted in 1866 to hand the federal judiciary, in the form of the phrases "due process of law' and "equal protection of the law," a blank slate to do as it wished. The fallacy of this premise can be shown by reference to two factors.

First, the legislative history of the 14th Amendment makes plain that it was designed for the limited purpose of ensuring the constitutionality of the Civil Rights Act of 1866, which extended to the newly-freed slaves a set of enumerated rights deemed by Congress to be fundamental to life in civil society. In short, it was the purpose of Section 1 of the 14th Amendment, not to create new rights, but to extend to persons of color the same fundamental unalienable rights already enjoyed by white persons. By way of confirmation, in the first case to come before the Supreme Court under the 14th Amendment, *The Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873), the court stated that "[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision [the equal protection clause]." The fundamental rights enunciated in the Civil Rights Act of 1866 did *not* include the right to vote, much less the right to have one person's vote accorded equal weight with that of another person. Indeed, Section 2 of the 14th Amendment, by not forbidding but instead merely prescribing a penalty for doing so, *expressly recognized* the right of a state to deny or abridge the right to vote.

Second, the Supreme Court as an institution was in extremely low repute throughout the 1860s. Its 1857 decision in *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393, was widely regarded as gratuitous interference in a political controversy in a foolish attempt to "solve" the raging issue of slavery in the territories, interference so great as to make compromise impossible and civil war all but unavoidable. The 1861 decision of Chief Justice Roger Taney in *Ex parte Merryman*, Fed. Cases No. 9,487, denying President Lincoln's authority to suspend access to the writ of *habeas corpus*, was evaded or simply ignored. The court's 1864 decision not to review the case of *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243, was a craven judicial surrender born of the court's knowledge of and unwillingness to challenge the Lincoln Administration's determination to prevent interference with its policy of trying so-called "copperheads" by military commission, a stance the court reversed only after the Civil War was over and its decision made no difference in *Ex parte Milligan*, 7 Wall. (74 U.S.) 700 (1866). As a final blow to the court's prestige, Congress in 1869 took the extraordinary action of repealing the court's appellate jurisdiction in matters of writs of *habeas corpus*, in order to prevent the court from making the "wrong" ruling in the case of *Ex parte McCardle*, 7 Wall. (74 U.S.) 506, which case was before it and only awaiting decision.

An institution considered by Congress and the states of the victorious North to be a refuge for dilettantes and thoroughly unreliable would hardly have been entrusted with limitless discretion to recast to its own liking the criminal codes, social policies, and election laws of every state in the union. But the passing of time and the consequent loss of historical memory has enabled the Supreme Court to read into the 14th Amendment authority to do exactly that.

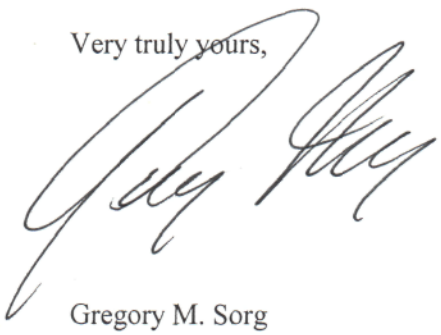
In order to believe that the 39th Congress in proposing and the states in ratifying the 14th Amendment were giving the federal judiciary authority to regulate state elections on the basis of "one person, one vote," one must also believe that Congress was repudiating the legitimacy of the principle of representation on which the U.S. Senate is based, and that many of the ratifying states were invalidating entire sections of their own constitutions enshrining the electoral practices of generations.

A half century of federal interference in state elections on the basis of the non-existent authority of the equal protection clause of the 14th Amendment has been ample to prove that it is bad policy as well as bad constitutional law. It is time that the issue was revisited, and there is no state better positioned to serve as an exemplar for change than New Hampshire. With 400 representatives to serve 1,300,000 citizens, New Hampshire's House of Representatives is easily the closest to its people of any legislative body in the nation, but even so, examples abound to show how effective representation diminishes even here when raw numbers of citizens prevail over every other principle of representation. Your Committee has heard emphatic testimony to this effect in county after county. In my very own two-member, eight-town Grafton District 3, it is easy to show how the 4,700 citizens of its six rural towns located west of Kinsman Mountain would be better represented, despite the numerical "dilution" that would occur, were those six towns formed into a single-member district and the two resort towns (and one unincorporated area) located east of it were formed into a second single-member district of 1,900 citizens.

Few judicial proceedings could be imagined more surreal than one in which the dysfunctional, unrepresentative federal government were attempting to establish its competence to challenge the efficacy of the districting decisions of the 400 elected representatives of the people of New Hampshire.

Chief Justice Warren was fundamentally wrong – as judges almost always are when they opine on the political process, with which they typically have little if any experience and to which they are institutionally and temperamentally hostile - when he premised his opinion in *Reynolds v. Sims* on what he took to be the truism that "[l]egislators represent people, not trees or acres." Legislators are elected by people, yes, but contrary to Warren's myopic ivory tower view, they do in fact represent "farms or cities or economic interests." The Warren Court had no qualms about abandoning decades, if not centuries, of precedent. It is long past time to abandon some of its.

Very truly yours,



Gregory M. Sorg
Attorney at Law
Member of the House
Grafton District 3