

# THE HISTORY OF REDISTRICTING

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# THE HISTORY OF REDISTRICTING

- I. The History of Redistricting before Baker v. Carr (1962)
- II. The Redistricting Revolution of the 1960s
- III. The New Gerrymandering since the 1970s

# I. THE HISTORY OF REDISTRICTING BEFORE BAKER V. CARR (1962)



- 1) There was a great deal of diversity in election law (including redistricting) in the early history of the republic.
- 2) The pre-20<sup>th</sup> century era was truly different in many ways; among the most glaring was with respect to the issue of drawing district lines for seats in the U.S. House of Representatives.
- 3) Except for the early 1840's cycle, Congress consistently increased the number of seats in the House so as to make sure that no state actually lost a seat.

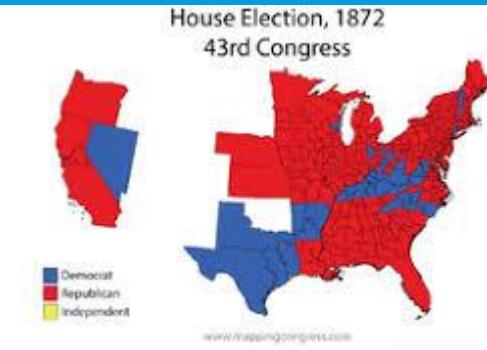
## I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



Henry Clay

- 4) The early 1840's was an exception because it was then that Congress first decided to require by law that all states elect their House representatives from single-member districts.
- 5) With the move to single-member districts only, the question arose as to whether Congress should provide direction on *how* House districts should be drawn.
- 6) A proposal to require equal-population districts was hotly debated and then defeated, partly on federalism grounds and partly because doing so would have required splitting or joining political subdivisions such as counties and cities.

# I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



- 7) By requiring every state to draw single-member districts, and redraw them after each census, without requiring equal-population districts, Congress in 1842 created greater opportunities for gerrymandering.
- 8) Thirty years later Congress passed another major law in this area that provided that:
  - A) states that denied the vote to adult males would suffer a proportional reduction in House seats; and
  - B) required the states to draw House districts that contained “as nearly as practicable an equal number of inhabitants.”
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## I. REDISTRICTING BEFORE BAKER V. CARR CONT.

- 9) Neither of those requirements included any enforcement mechanism.
- 10) Even so, they seemed to have slowed disfranchisement of black men (for the next twenty to thirty years) and to have promoted more population equality in House districts (the average population deviation among districts dipped from over 10% in 1842 to around 7% from 1872 to 1900).



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# I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



- 11) But as the 20<sup>th</sup> century opened, the redistricting situation was transformed in the following ways:
  - A) as memories of the Civil War faded, the Southern states forged ahead with efforts to exclude almost all black people from the electorate, a process that was completed by 1920;
  - B) as the House grew to over 400 members, a consensus arose that its size had to be limited; and so in 1911 it was fixed at 433 (with two more seats to be added if Arizona and New Mexico became states over the next decade, which they did); and
  - C) states began refusing to reapportion their House and state legislative districts after each census (and Congress in 1911 removed the equal-population requirement for House districts).

## I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



- 12) Thus began the era of ever greater population disparities in House and state legislative districts that eventually provoked the U.S. Supreme Court to issue the Baker ruling.
- 13) The era of gross population disparities had multiple causes, among the most important of which were that:
  - A)southern states had excluded most black voters; and
  - B)northern states refused to reapportion lest the political power of rural areas and small towns decline relative to that of the cities.

## I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



- 14) That so many city residents were newly arrived immigrants from southern and eastern Europe only intensified that anti-urban bias in the rural and small-town parts of the North, where most big cities were located.
- 15) That anti-immigrant sentiment was shared in the South, whose political leaders feared losing House seats to northern states filled with new immigrants; and some prominent southern politicians argued in the 1920's that resident aliens ought not to be counted for the purpose of congressional representation.

## I. REDISTRICTING BEFORE BAKER V. CARR, CONT.



16) As African Americans moved northward into the big cities in the so-called “Great Migration” that began during World War I and continued thereafter, northern urban areas came to seem “foreign” in yet another way to mostly white rural and small town residents in the northern states.

17) And when the Democrats became the new national majority party in the 1930s and '40s, resistance to redistricting in the northern states grew even more intense, because that would have meant reducing the power of the Republican party (which was dominant in the rural areas and small towns) and increasing the power of the Democrats (who were dominant in the cities).

## II. THE REDISTRICTING REVOLUTION OF THE 1960S



- 1) The Baker ruling held that the U.S. Supreme Court had the power to resolve legal challenges to the constitutionality of failing to reapportion after every census, which had given rise to grossly unequal districts (in terms of population size).
- 2) Subsequent decisions such as Gray v. Sanders (1963), Reynolds v. Sims (1964) and Wesberry v. Sanders (1964) found that the Constitution required every state to reapportion after each census and that with the singular exception of U.S. Senate seats, all state and federal legislative districts must be equal-population ones.

## II. THE REDISTRICTING REVOLUTION OF THE 1960S



- 3) Scholars tend to agree today that what helped prompt the Court to act in the mid-1960s was:
- A) growing racial unrest in the country, stemming in part from redistricting schemes that reduced black voting power;
- B) growing support for redistricting in the burgeoning suburbs, whose residents were becoming grossly underrepresented; and
- C) the fading of resistance to redistricting based on hostility to immigrants as the fraction of the population that was foreign born reached the lowest level in modern U.S. history.

### III. THE NEW GERRYMANDERING SINCE THE 1970S



- 1)Once the equal-population rules were fully applied in the second half of the 1960s (and the Voting Rights Act of 1965 allowed black people to register and vote in the Southern states), a new redistricting era opened.
- 2)What helped drive a new kind of gerrymandering then was greater national parity between the two major parties, as the Democrats ceased to be dominant and the Republicans tried to become so.
- 3)An era of intense two-party competition at the national (and often at the state) level dawned in the 1970s and intensified in the 1980s.



### III. THE NEW GERRYMANDERING, CONT.

Apple Computer

- 4)It was then that the power of computing and ever more sophisticated computer software were deployed to promote partisan advantage within the constraint imposed by the equal-population requirement for legislative districts.
- 5)The pioneers in this effort were two California politicos, Phil Burton and Howard Berman.
- 6)Strongly partisan Democrats, they were determined to preserve and maximize Democratic majorities in the California General Assembly and in the state's U.S. House of Representatives delegation even as the California Republican Party grew stronger electorally in the 1970s and '80s.

### III. THE NEW GERRYMANDERING, CONT.

- 7)The stakes were unusually high for both major parties nationally, because California had become the most populous state in the 1960s and acquired the biggest U.S. House delegation in American history.
- 8)Burton and Berman used the kind of sophisticated computing hardware software being developed in Silicon Valley and other, similar places, to craft bizarrely shaped legislative districts that maximized Democratic electoral advantage while still adhering to the equal-population requirement.



### III. THE NEW GERRYMANDERING, CONT.



- 9)The Republicans responded (where they controlled redistricting) in kind, beginning a process of divorcing legislative districts from local government boundaries and geographic compactness when necessary in order to maximize partisan advantage.
- 10)By the second decade of the 21<sup>st</sup> century, the pre-Baker pattern had, to a degree, returned, in the sense that state and federal legislative districting schemes in many states enhanced the power of small towns and rural areas (which tend to be strongly Republican) and reduced the power of the major metros (which tend to be Democratic strongholds), usually by cutting cities into pie-shaped pieces that linked slices of central cities with outlying exurbs.

### III. THE NEW GERRYMANDERING, CONT.



- 11) The pre-Baker pattern has also returned in the sense that the U.S. Supreme Court has refused to decide lawsuits challenging the new excessively partisan gerrymanders.
- 12) A plurality decision in a Pennsylvania case, Veith v. Jubilirer (2004) seemed to say the Court would stay out of such matters because figuring out how much partisan advantage is too much is too hard to do.
- 13) The Court recently decided a pair of major redistricting cases that gave majority support to that earlier conclusion, and so it seems likely last.

### III. THE NEW GERRYMANDERING, CONT.



- 13) Complicating things even more is that redistricting schemes that enhance the power of rural areas (and thus confer partisan advantage on the Republicans) can and do meet other goals.
- 14) Gerrymandering of that sort tends, for example, to enhance the power of agricultural interests, which arguably makes sense in states where farming is important to the state's economy but employs relatively few people.
- 15) Enhancing the power of small towns and rural areas can also help legislative bodies enact certain kinds of social legislation protective of the young because small towns and rural areas tend to be the most morally traditional places, and thus the most supportive of restrictions on such things as drinking, gambling, and prostitution.

### III. THE NEW GERRYMANDERING, CONT.



- 16) Those kinds of considerations make federal judicial intervention into redistricting even less likely for the foreseeable future.
- 17) *State* courts and *state* constitutions are another matter; in states where the constitutional text lends support to legal challenges to bizarrely drawn districts that confer partisan advantage, the judiciary might well intervene, unless those drawing the districts reform the process.
- 18) Voters might also rebel, in the sense of punishing the party seen as most responsible for the gerrymandering if state legislative bodies begin passing laws that seem outside the political mainstream, or try to block ballot questions to enact laws that the legislature refuses to pass but that a clear majority of voters strongly desires.

# SUGGESTIONS FOR FURTHER READING

- 1)For the early period through the 1920's, see Pamela S. Karlan, "Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote," William & Mary Law Review 59 (Issue 5): 1921-59 (2018).
- 2)For the period from the early 20<sup>th</sup> century through the present, see David Stebenne, "Re-mapping American Politics: The Redistricting Revolution Fifty Years Later," Origins 5 (issue 5): 1-9 (February 2012).