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LEGISLATIVE DISTRICTING

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America never knew the rotten boroughs that John Locke called "gross absurdities" and condemned as being incompatible with the right of equal representation (Locke, 1812, at 433). Rotten boroughs were towns "of which there remain[ed] not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd [were] to be found, [but that sent] as many representatives to the grand assembly of law-makers, as a whole county numerous in people, and powerful in riches" (id., at 432).

The United States did inherit from Britain the so-called Westminster system, in which legislators are elected, usually one apiece, from geographically defined districts, with the candidate receiving the most votes declared the winner. Perhaps the system was inevitable in a time with neither full-fledged political parties nor modern devices of transportation and communication. In any event, the system has been permanently embedded in American political thought and practice.

I. FEAR OF GERRYMANDERING

The Americans soon learned that drawing of district lines had electoral consequences. Attention to this fact did not originate with Eldridge Gerry, signer of the Declaration of Independence and later governor of Massachusetts. But a cartoon in an opposition newspaper lampooning a district, allegedly shaped like a salamander, that had been created by Gerry's allies, gave the word "gerrymander" to the English language, and helped create an American tradition of distrust of both legislative districting and those who engage in it.

The word "gerrymander" has no universally accepted definition, except that it is generally a pejorative way of referring to legislative districting. The term's origin suggests a reference to districts with peculiar shapes, and this is still no doubt what the term brings to mind for many people. What excites reform sentiment is the prospect of electoral distortion resulting from manipulative line-drawing, and although such manipulation may be correlated with peculiar shapes, it need not be. The line-drawer may be able to accomplish his or her objectives just as well with evenly-drawn districts, while odd shapes may result from such "natural" considerations as the

meandering paths of rivers or even of state boundaries.

Since odd shapes may be good and regular shapes may be bad, reformers have looked for more sophisticated definitions of gerrymandering. They have tended to split over whether what makes a districting plan bad is its actual consequences, or the intent with which it was drawn. Each approach has its difficulties. A definition of gerrymander based on the consequences of a districting plan must provide some criterion that distinguishes good consequences from bad. A definition based on the intent of the author of the plan must be able to separate good motives from bad. This is not easy, since most observers recognize that it would be difficult to eliminate all traces of self-interest from the districting process. No consensus has emerged on criteria for normative evaluation of either consequences or intent in legislative districting.

Although most of the controversy over redistricting has centered on the plans themselves or on the criteria according to which they should be judged, some reformers have targeted instead the procedures by which the plans are adopted (Cain, 1984). Their proposals may include requirement of public hearings and open processes within the state legislature or a supermajority requirement that, as a practical matter, would require bipartisan assent to a redistricting bill.

More drastically, some reformers have proposed to prevent gerrymandering and to insulate line-drawing from political pressures by creating non-partisan commissions to draw district boundaries in lieu of the state legislatures. Commissions have been established in nearly a third of the states, but they have not always been non-partisan in design or performance. Proposals for commissions continue to encounter skepticism over whether a non-political approach to districting is a coherent objective, as well as the objection that the approach has the vice of its virtues, in that it removes a significant and constitutive public decision from democratic control.

II. POPULATION EQUALITY

During the middle third of the twentieth century, controversy centered on the question of unequally populated districts. The steady shift of population from rural to urban and then to suburban communities meant not only that the population within old district boundaries became increasingly unequal, but that the inequality tended systematically to favor certain interests, namely those supported by legislators from rural areas.

In some states, inequality was perpetuated by constitutional provisions requiring state legislative districts along county lines. One such provision resulted in a 90-to-1 population ratio between the most and least populated state Senate districts in California in the early 1960's. Even in states whose constitutions required periodic redistricting to equalize populations, state legislatures often failed to act. In the 1960's, many state legislative chambers were elected from the same districts that had existed in 1900.

Occasional redrawing of congressional districts was compelled by the fact that many states gained or lost House seats after each census. Nevertheless, the rurally dominated state legislatures often favored the rural areas or the incumbent congressmen, who were disproportionately from rural areas. Population disparities did not approach those that existed in the state legislatures, but there were ratios as high as 3-to-1 in the population of congressional districts within a single state.

Congress had the power to demand equal population in congressional districts, but the incumbent members of the House had little incentive to do so.

Lopsided population disparities in legislative districting aroused opposition on ideological grounds, since the disparities were as much in tension with democratic principles as in Locke's day, and on more practical grounds among those favoring urban and suburban interests, or among those – usually Democrats – whose partisan interests were adversely affected by the prevailing rural dominance in a particular state.

But it was not easy to mobilize opposition effectively. For one thing, urban and suburban interests were not necessarily united with each other and, even within the cities, interests at odds with majority urban sentiment often supported the districting status quo, as they were able to form coalitions with the prevalent rural legislators (Grodzins, 1984). What made accomplishment of the reformers' objectives through the conventional legislative process especially difficult was the need to persuade rural legislators to vote not only against the interests of their overrepresented constituents, but against their own personal interests in retaining their districts for reelection. Not surprisingly, the reformers often turned instead to the courts.

At first, it appeared they had turned into a blind alley. The most important early case to reach the Supreme Court, *Colegrove v. Green* (1946), was a challenge to unequally populated congressional districts in Illinois. The prevailing group on the Court at that time, still reacting against the excesses that had led to the Court controversy in Franklin Roosevelt's second term, was generally inclined against the activist exercise of judicial review. Justice Felix Frankfurter, the leading spokesman for this group, wrote an opinion concluding that legislative districting was a "political question," and therefore not "justiciable." Invocation of the political question doctrine, then more than a century old but still vaguely defined, meant that the federal courts would not even consider whether the practice in question violated the Constitution.

Only seven justices participated in *Colegrove,* only four of the seven voted to dismiss the constitutional claim, and only three of these four joined in Frankfurter's opinion finding the claim nonjusticiable. Nevertheless, through the 1950's, the Court dismissed numerous challenges to districting plans or related practices on *Colegrove's* authority, usually without even conducting a hearing or issuing an opinion.

By the early 1960's, midway through Earl Warren's term as Chief Justice, continued population shifts and legislative inaction had further aggravated the districting problem, while the New Deal aversion to judicial activism had faded. In *Baker v. Carr* (1962), Tennessee voters claimed that they were deprived of equal protection of the laws by state legislative districts that had not been changed since 1900. Over an eloquent dissent by Frankfurter, the Court ruled that the claim was justiciable.

Justice William Brennan, writing for the Court, correctly observed that despite its name, the political question doctrine had never prevented the Court from deciding a case simply because its subject matter involved politics. Rather, the doctrine was a technical one that had been invoked in varying circumstances when the Court had deemed its own intervention improper or inadvisable. Brennan's opinion imposed systematic bounds on the doctrine and now stands as the leading

statement of the Court's definition of justiciability.

Baker's more immediate effect was to provoke a mass of redistricting litigation. Three cases decided by the Supreme Court in the next two years set the pattern. In *Gray v. Sanders* (1963), the Court struck down a Georgia gubernatorial election system, resembling the electoral college, on the grounds that votes in some counties were weighted more heavily than in others. In *Wesberry v. Sanders* (1964), the Court ruled that congressional districts must be equally populated. *Wesberry* was decided under article I, § 2 of the Constitution, governing election of the House of Representatives, and therefore was not directly applicable to state and local elections. The climax came in *Reynolds v. Sims* (1964), in a challenge to Alabama state legislative districts, when the Court ruled that the equal protection clause of the 14th amendment imposed a standard of "one person, one vote."

Reynolds provoked a torrent of opposition and serious efforts, led by Senator Everett Dirksen (R.-Ill.), were made to amend the Constitution to permit at least one chamber of a two-house state legislature to be districted on the basis of municipal subdivisions without regard to population (Dixon, 1968). It seemed to observers at the time that the Court might be faced with a drawn-out struggle comparable to the one that followed upon the 1954 school desegregation decision.

With the benefit of hindsight, it can be seen that protracted "massive resistance" to the redistricting decisions was never a possibility. Redistricting has nothing like the emotional impact of race relations, and to the extent that the American people cared, they responded favorably to the "one person, one vote" slogan. By far the strongest resistance was among elected officials, and what the resisters failed to foresee was that after the first election in each state conducted in equally populated districts, the newly elected officials had the same vested interest in supporting the Court as the old officials had had in resisting it. The torrent turned out to be a summer storm.

Reynolds v. Sims left open several questions regarding the meaning, scope and rigor of the one person-one vote rule:

1. *Reynolds* was vague on whether what should be equalized was the total population of districts, the number of actual voters, or some other figure, such as the number of eligible voters or of citizens. The question has both practical and theoretical significance. The percentage of the population composed of resident aliens, children, and eligible non-voters tends to be larger than average among racial and ethnic minority groups. Thus, the more inclusive the group that is counted for purposes of one person, one vote, the better for these minority groups, and also for the Democratic Party that tends to receive their votes.

   More theoretically, one who conceives of elections as the aggregation of individual choices, separately determined, might favor a rule of equal numbers of voters, because counting non-voters would result in some actual votes being weighed more heavily than others. One with more of a group- or interest-oriented conception of elections would be more likely to favor a rule of equal population. In this conception, those who vote represent the interests of their ineligible and non-voting neighbors in a manner somewhat akin to the Burkean theory of virtual representation.

In *Burns v. Richardson* (1966), the Supreme Court upheld redistricting based on numbers of registered voters, but indicated a preference for equal population, which has become by far the most widely used measure.

2. *Reynolds* did not consider districting below the state level. In *Avery v. Midland County* (1968), the Warren Court decided that the one person, one vote rule applied to local government elected bodies. The more conservative Burger Court later created an exception for certain single purpose districts in *Salyer Land Co. v. Tulare Lake Basin Water Storage District* (1973) and in *Ball v. James* (1981).
3. Several states have made regular or occasional use of districts that elect two or more representatives at large, and the validity of such districts was placed in doubt by *Reynolds v. Sims*. In *Fortson v. Dorsey* (1965) the Court declined to rule that multi-member districts are automatically unconstitutional, as long as the requirement of population equality is satisfied. A district electing two members must contain twice the population of a single-member district. However, the Court has been willing to review plans that satisfy the population requirement for the possibility that multi-member districts are being used to submerge groups that would otherwise be able to elect their own representatives. *White v. Regester* (1973).
4. Probably the most-often contested issue has been how close to exact equality the districts must be to conform to the one person, one vote rule. In *Kirkpatrick v. Preisler* (1969), a challenge to Missouri congressional districts, the Court ruled that no avoidable deviation from mathematical equality would be permitted. In the 1970's, the more conservative Court continued to apply this doctrine to congressional districts, *White v. Weiser* (1973), but was more permissive in cases challenging state and local districts. Deviations from equality as high as 10 percent are permitted as a general rule, *Gaffney v. Cummings* (1973), and larger deviations, at least as high as 16 percent, may pass muster if necessary in order to conform state legislative districts to municipal boundaries. *Mahan v. Howell* (1973).

   The Court's explanation for the disparity has been that the requirements of article I, § 2, governing congressional redistricting, are more stringent than those of the equal protection clause, which governs state and local districting. Given the degree of creativity that was required to discover the one person, one vote rule in either of these clauses in the first place, the Court's claim to have discovered in addition such detailed and differentiated guidance to the rule's application may be regarded with skepticism. But the Court continues to adhere rigorously to the distinction. On a single day in 1983, the justices struck down a New Jersey congressional plan whose maximum deviation from equality was 0.69 percent, *Karcher v. Daggett,* while upholding, in a case that has limited applicability because of its peculiar background, a Wyoming state legislative plan whose maximum deviation exceeded 90 percent. *Brown v. Thomson.* What hath Locke wrought?

Aside from making or breaking the careers of a number of individual politicians, it is much less clear what, if any, were the overall effects of the one person, one vote rule on American policy and politics (Bicker, 1971). Some who hoped for a major increase in the influence of urban voters may have had their hopes frustrated by the fact that suburbs were at least as much benefited by the redistricting decisions as cities. Furthermore, malapportionment was not the only aspect of the American system giving special weight to rural areas, others including the seniority system in

Congress and the fixed apportionment of two Senators to each state. On the other hand, the fears of those who anticipated a breakdown of the Madisonian system (Bickel, 1978) have not been realized. Whatever its effects, one person-one vote now seems a settled part of the American consensus on democratic procedures.

III. GROUP CLAIMS AND DISTRICTING CRITERIA

In his opinion for the Court in *Reynolds v. Sims,* Chief Justice Warren was explicit that the right to an equally weighted vote was "individual and personal in nature." Enforcement of that right might have broad institutional consequences, but these were incidental to the Court's goal of protecting individuals against discrimination.

The Chief Justice's theoretical framework was in sharp contrast to that of Justice Potter Stewart, who concurred in the result in *Reynolds,* but dissented from one of the other districting cases decided the same day, *Lucas v. Forty-fourth Colorado General Assembly* (1964). Stewart, viewing representative government as "a process of accommodating group interests," maintained that districting should "insure effective representation . . . of the various groups and interests making up the electorate."

Significant differences flow from these competing theoretical approaches. Warren's formal conception of individual voting rights led him and the majority on the Court to insist on a more rigorous population equality requirement than Stewart favored. In other respects, however, the Warren approach called for less drastic judicial intervention into districting than the Stewart approach. For Warren, a case turned primarily on the relatively simple facts of distribution of population. Stewart, who sought substantive fairness for groups rather than formal equality for individuals, had to look beyond the numbers and consider the actual nature of political cleavages and coalitions, as well as the effects on these of the districting plan under challenge. Finally, Stewart's approach, but not Warren's, would be receptive to claims brought in the name of groups of voters contending that a districting plan conforming to the one person, one vote rule, improperly dilutes the group's political effectiveness.

In *Reynolds* and *Lucas,* over Stewart's objection, the formal individual right to an equally weighted vote was enshrined. However, this in itself did not negate the possibility that the kind of group right Stewart sought to protect would also be recognized. The two kinds of rights have different thrusts, but are not inconsistent. The controversy over the Stewart approach has continued on and off the Court down to the present day, and the result has tended to consist of an uneasy compromise, in which the possibility of constitutional protection for group rights is recognized, but the nature of the rights remains shadowy and their vindication in actual litigation is difficult.

Soon after *Reynolds,* the Stewart approach received its first breath of recognition in *Fortson v. Dorsey* (1965), in which the Court said that multi-member districts might be struck down if they "minimize or cancel out the voting strength of racial or political elements of the voting population." The Court has repeated this formulation on many occasions since, and it is the racial half of it that has borne the most fruit. The Court long has accorded racial and ethnic minorities special status under the equal protection clause, largely in recognition of the historical background of the adoption

of the fourteenth amendment, following the Civil War. Nevertheless, and despite some successes, even racial groups have found it difficult to assert successful constitutional claims against redistricting plans. Congress, in the amended Section 2 of the Voting Rights Act, has found it necessary to grant them additional protection. (*Cross-reference.*)

Meanwhile, the political half of the *Fortson* formulation lay dormant for two decades, despite the efforts of numerous social scientists to work out the basis for judicial attack on partisan gerrymandering by either of the major parties (Backstrom et al., 1978; Grofman, 1985; Baker, 1986). These and other reformers have proposed a variety of criteria by which, they contend, redistricting plans should be judged. The criteria have been categorized broadly as "formal" if they are based on the characteristics of the districts themselves, and as "result-oriented" if they look instead to the actual or expected electoral consequences of the plan considered as a whole (Lowenstein & Steinberg, 1985).

Formal criteria call for districts that are compact in shape, that have boundaries coinciding with local governments, or that constitute "communities of interest." These criteria draw their appeal from the original association of gerrymandering with odd-shaped districts. Nevertheless, they bear no direct relation to the concern of fairness to political groups, since that concern relates to the dynamics and outcomes of elections, which the formal criteria do not consider.

It has been suggested that formal criteria, especially if they are strictly applied, will prevent manipulation and distortion through districting. But reducing the options available to the district-line drawer does not inhibit "manipulation" any more than it inhibits accomplishment of benign goals, even if it is assumed there is some discernible difference between the two. Nor is there any reason to expect that formal criteria will operate neutrally among political parties and other groups. Since the case for the formal criteria aside from their possible prophylactic effect is relatively weak (ibid.), many reformers have turned instead to result-oriented criteria. These are even more varied than the formal criteria, and include the following:

1. Districts should be drawn to assure a large number of competitive elections.
2. Incumbents should be protected or, more likely from most reformist perspectives, should not be protected.
3. The "swing ratio" should be such that within a broad range a modest increase in a party's share of the statewide vote will yield a modest increase in its share of legislative seats.
4. The partisan division of seats in the legislature should be proportional to the statewide party vote.
5. The partisan division of seats should be "symmetric," meaning that a majority party may receive a disproportionate number of seats, so long as the opposing party would have received the same number of seats if it had received the same majority percentage of the votes.

Each of the result-oriented criteria is subject to both methodological and theoretical objections. The swing ratio and symmetry criteria require comparison of an actual (or projected) election result with a hypothetical result involving a different statewide partisan vote division, and there is no easily defended basis for selecting geographical distribution of the partisan vote in the hypothetical case. A plan designed for proportional results is likely to yield sharply disproportional results if the partisan split is significantly different from what was anticipated. Districts designed as

competitive may cease to be so once an incumbent is seated.

A broader concern is that each of the criteria looking to a statewide party vote does so artificially, since under the American system, voters choose among specific candidates within their districts, and their votes are not cast as part of a statewide partisan total. A voter might favor his or her local Democratic candidate based on individual characteristics, but also favor Republican control of the legislature.

Finally, some of the criteria may conflict with others. For example, a modest statewide partisan shift may cause a plan with numerous competitive districts to yield sharply disproportional results. Reformers often seek to avoid these difficulties by asserting that only the most flagrant partisan gerrymanders should be regarded as unconstitutional, and that such plans are likely to come out poorly under most of the criteria.

The first sign, other than the often repeated verbal formula of *Fortson v. Dorsey* regarding minimization or canceling out of the voting strength of racial or political groups, that the Supreme Court might entertain the constitutionalization of partisan gerrymandering came in *Karcher v. Daggett* (1983). The majority decided this case on the basis of the one person, one vote rule, but two justices, John Stevens and Lewis Powell, wrote separate opinions stating that they believed even a plan that complied with the equal population requirement might violate the equal protection clause if it treated partisan groups unfairly.

Following the Stevens-Powell lead, a lower federal court in Indiana ruled that a state legislative plan adopted by a Republican-controlled state government discriminated unconstitutionally against Democratic voters. The state appealed this decision to the Supreme Court, and waiting in the wings was a federal court challenge to the California congressional plan enacted by a Democratic-controlled legislature, probably the most controversial districting plan of the 1980's. In an unusually striking case of strange political bedfellows, the Republican National Committee supported the Indiana Democrats in the Supreme Court, while the Democratic members of the House from California urged the Court to uphold the Indiana Republican plan.

The Supreme Court's long-awaited decision in *Davis v. Bandemer* (1986) appeared to contain something for everyone. The one point on which the Court spoke clearly was to decide, by a 6-3 majority, that the gerrymandering claim under the equal protection clause was justiciable. This would not have been remarkable, given *Baker v. Carr,* except that the opponents of judicial intervention chose to cast their argument in terms of justiciability rather than to assert simply that the equal protection clause does not prohibit partisan gerrymandering. But having declared that the courthouse door was open to the plaintiffs, the Court went on to overrule the lower court decision striking down the Indiana plan. This decision was reached by a 7-2 majority that included the three justices who believed the controversy was not justiciable. Not surprisingly, given the views they expressed in *Karcher v. Daggett,* Justices Powell and Stevens would have affirmed the striking down of the Indiana plan. Justice Byron White wrote for the four-judge plurality who regarded the challenge to the Indiana plan as justiciable but insufficient on the merits. That his opinion was less than a model of limpidity is suggested by the fact that it has received at least the following interpretations:

1. The plurality opinion is so confused or self-contradictory that it gives no useful guidance to federal judges who must decide future gerrymandering controversies (Tribe, 1988).
2. Plaintiffs can prevail by showing significantly disproportional results under the challenged districting plan, but only if such results occur in at least two elections conducted under the plan (Note, 1986).
3. Despite Justice White's disclaimers, the plurality opinion either requires proportional results or will lead inexorably to the Court's imposing such a requirement (Schuck, 1987).
4. A partisan gerrymander is unconstitutional under the plurality opinion if it is intentional, severe, and non-transient in its effects (Grofman, forthcoming).
5. The gerrymandering claim recognized by the plurality is available only to outsider political groups who suffer discrimination comparable to that which has afflicted racial minorities, and therefore is unlikely to be applicable to disputes between the two major parties (Lowenstein, forthcoming).

Some impetus was given to the last of these interpretations when it was adopted by a California federal court rejecting the challenge to the congressional districting plan in that state. The Supreme Court's summary affirmance of the lower court's action (*Badham v. Eu*, 1989) validated the result, but does not necessarily commit the Supreme Court to the lower court's reasoning.

As the 1980's drew to a close, each of the national parties were mobilizing legal teams in anticipation of another round of pathbreaking redistricting litigation in the 1990's. However, aside from questions of racial discrimination, it may be that there will be few if any cases with much significance beyond the specific districting plans in question.

New justices may take a different approach, but for the time being the Supreme Court seems unreceptive to partisan gerrymandering claims from the major parties. Gerrymandering disputes are likely to be litigated in the name of population equality, as *Karcher v. Daggett* leaves open the possibility that the most minute population inequalities may leave a congressional plan vulnerable to attack from proponents of a plan with even smaller population inequality and greatly differing political consequences.

The American political system is intensely competitive. Fewer states are dominated by a single party than when the one person, one vote rule was originally imposed. Under these circumstances, it is inevitable that redistricting will be a source of controversy in many states in the 1990's and beyond. The judiciary will continue to be one battleground in the struggle, but there may be fewer blockbuster decisions with nationwide impact than in the past few decades.

The principle battlegrounds will be political. Efforts will continue to revise the procedures for redistricting, and in states that permit it, the initiative process will sometimes be used toward this end. In years ending in "1", redistricting will tend to have a pervasive impact on state legislative politics. Not least, at a time when many observers lament a perceived decline in partisan politics, the desire to control redistricting will continue to provide a significant focus for party loyalty.

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