

Excerpts from First Declaration of Bernard Grofman in *Badham v. Eu*

I, Bernard Grofman, declare:

1. I am a professor of political science at the University of California, Irvine.

. . . I am thoroughly familiar with the congressional districts delineated in Assembly Bill 2X as implemented with the so-called March 17, Technical Changes. The congressional districts of A.B. 2X (Plan II, passed in 1983) as implemented constitute an egregious form of partisan gerrymandering.

Methods of Gerrymandering

Gerrymandering is a technique which operates to minimize or cancel out the voting strength of racial or political elements of the voting population by one or more of the following twelve methods:

- (1) Packing the voting strength of a group to insure that much of its voting strength is wasted in districts which are won by lop-sided margins—in particular, packing its strength to a greater extent than is true for the voting strength of the group controlling the district.
- (2) Fragmenting or submerging the voting strength of a group to create districts in which that group will constitute a permanent (or near certain) minority.
- (3) Reducing the re-election likelihood of some of a group's representatives by altering district boundaries to put two or more representatives from the group into the same district.
- (4) Reducing the re-election likelihood of some of a group's representatives by altering district boundaries to cut-up old districts so as to make it impossible for these representatives to continue to represent the bulk of their former constituents.
- (5) Reducing the (re)election likelihood of group representatives in previously marginal/competitive seats by, wherever practicable, reducing the group's voting strength in these seats.
- (6) Enhancing the re-election likelihood of representatives of the group in control of the redistricting process by preserving old district lines for those representatives to the greatest extent practicable, so as to benefit from name-recognition and other advantages of incumbency status such as previous campaign organizations and personal-contact networks.
- (7) Enhancing the re-election likelihood of representatives of the group in control of the redistricting process by manipulating district boundaries to shore-up the controlling group's voting strength in previously marginal/competitive seats wherever practicable.
- (8) Manipulating district boundaries so as to create an advantage in the open seats (i.e., seats with no incumbent running) for the group controlling the districting.
- (9) Unnecessarily disregarding compactness standards in drawing district lines.
- (10) Unnecessarily disregarding city, town, and county boundaries in drawing district lines.
- (11) Unnecessarily disregarding communities of interest in drawing district lines.
- (12) Unnecessarily disregarding equal population standards in drawing district lines.

In devising congressional districts in 1981 (Plan I) and in 1983 (Plan II) there is clear prima facie evidence that the Democratic majorities in the California Senate and

Assembly made use of the first 11 of these 12 methods to gerrymander to dilute Republican voting strength.¹

Three Main Factors Demonstrate the Gerrymander:

- A. tortuously shaped districts (see Map I [Map I omitted]);
- B. the decimation of (1980) Republican incumbents; and
- C. the large discrepancy between the votes received by Democratic congressional candidates (51.6%) and the proportion of seats won by Democrats in the 1982 congressional election (62.2%).

The 22 Democratic incumbents in 1980 were virtually assured re-election in 1982. Of the 21 who ran, 21 were elected. . . . The fate of 1980 Republican incumbents . . . was quite different.

In addition there is evidence pointing to the manipulation of district lines for partisan political purpose.

Plan II also insulates California's congressional representatives from public opinion and virtually eliminates the possibility of change through the electoral process, because only a handful of the districts it creates are open to political competition. Plan II's lock-in of Plan I's pattern of Democratic control via "safe" seats for both Democratic and Republican (1982) incumbents gives rise to an absence of competition that violates the norm that representation should be responsive to voter choices and

¹In my view "what defines a gerrymander is the fact that some group or groups (e.g., a given political party or a given racial/linguistic group) is discriminated against compared to one or more other groups in that a greater number of votes is needed for the former to achieve a given proportion of legislative seats than is true for the latter, and this bias is not one that can be attributed solely to the differing degree of geographic concentration among the groups" (Bernard Grofman and Howard Scarrow, "Current Issues in Reapportionment," *Law and Policy Quarterly*, Vol. 4, No. 4 (October 1982), 435-474). This is another way of saying that gerrymandering exists when votes are not accorded the same weight.

I believe that districting is inherently political and that the notion of blindfolded districting paying no attention to political outcome but only looking at formal guidelines such as compactness or equal population is fundamentally misguided. I also believe that when legislatures are controlled by what Professor David Mayhew of Yale University (David R. Mayhew, "Congressional Representation: Theory and Practice in Drawing the Districts," in Nelson Polsby (Ed.), *Reapportionment in the 1970s* (Berkeley: University of California Press, 1971)) has so aptly called "partisan lust," it is both appropriate and necessary for courts to assure effective representation to all citizens (see also Robert G. Dixon, *Democratic Representation and Reapportionment in Law and Politics* (New York: Oxford University Press, 1968), and "Fair Criteria and Procedures for Establishing Legislative Districts" in *Policy Studies Journal*, Special Issue on Reapportionment, Vol. 9, No. 6 (April 1981), 839-850, reprinted in B. Grofman, A. Lijphart, R. MacKay and H. Scarrow (Eds.), *Representation and Redistricting Issues* (1982), 7-19; and Richard G. Niemi and John Deegan, Jr., "Competition, Responsiveness and the Swing Ratio," *American Political Science Review* (1978); Gordon E. Baker, *The Reapportionment Revolution* (New York: Random House, 1966; Bernard Grofman, "For Single Member Districts Random Is Not Equal," in B. Grofman, A. Lijphart, R. MacKay, and H. Scarrow (Eds.), *Representation and Redistricting Issues* (1982), 55-58).

Like Justice White and Justice Stevens (in *Karcher*), my research on reapportionment equality is an inadequate method of judging the constitutionality of a reapportionment plan," and that an "obvious gerrymander" should not be "wholly immune from attack simply because it comes closer to perfect population equality than every competing plan."

Excerpts from First Declaration

should be free to change over time in accord with the wishes of the electorate.² It denies to all voters the opportunity to exercise an effective franchise.

A. Packing and Fragmentation of Republican Voting Strength

In the 1982 election held under Plan I, Democrats came to control the congressional delegation 28-17 (compared to a 22-21 split in 1980 under a districting plan prepared by the California Supreme Court in 1973). The districts created in Plan I and Plan II, except for a handful of marginal/competitive districts, are ones in which the present incumbents (or others of the same party) are virtually unbeatable. (By a marginal seat we mean a district which was won with less than 55% of the vote. In 1982 these were Districts 1, 6, 17, 30, 36, and 38.) They insure that, in a state which is overall highly competitive, a Democrat majority in the congressional delegation is guaranteed for the rest of the decade.

This guaranteed Democratic control of the California congressional delegation was achieved by distributing Republican vote strength so as to dilute it. Both parties have safe seats which submerge opposition voting strength and both parties waste votes in winning a number of packed seats by lop-sided margins, *but the net advantage is to the Democrats*. The Democratic advantage was created by freezing party control in 39 safe seats (including all of the newly created (open) seats)—seats which are disproportionately safe for Democrats by a 23-16 edge—and by creating only six marginal districts—which are also disproportionately favorable to the Democrats (currently 5-1 in Democratic hands, see Table F (omitted)). The 28 Democrats in 1982 won their seats with an average of 64.2% per seat while the Republicans won their seats by an average of 66.5% per seat (data shown in Tables B and E (omitted)).³ These average victory margins indicate an absence of political competition. The six seats identified in Table F are the only ones which are at all likely to change hands, as the vote margins shown in Tables B and E (omitted) make clear.⁴ Moreover, even of these six marginal seats, given the party registration figures (see Table F (omitted)), Republicans are very unlikely to pick up more than three (i.e., two more than they presently have: District 1 and District 38). Thus, even in a year of a solid Republican statewide sweep, thanks to the Democrats' skillful gerrymandering, the congressional delegation should remain with at least a 26-19 Democratic edge. Indeed, even if all

²Richard G. Niemi and John Deegan, Jr., "Competition, Responsiveness and the Swing Ratio," *American Political Science Review* (1978), 1304.

³This difference must be understood in context of the reduction of Republican seats from 21 in 1980 to 17 in 1982. As Cain (Bruce Cain, "Assessing the Partisan Effects of Redistricting," *Social Sciences Working Paper 491*, Division of Humanities and Social Sciences, California Institute of Technology, September 1983: 5) trenchantly puts it, "The key then to the partisan gerrymander is that incumbents in the party controlling redistricting will be treated differently from those in the party that does not. The average level of electoral safety might actually increase more among incumbents in the non-controlling party than among those in the controlling party since greater safety is a by-product of higher electoral inefficiency." Indeed, "If one were to consider the average gain or loss of incumbents by party, one might mistakenly conclude that the non-controlling party was better off. The point is that many of the individual incumbents in the noncontrolling party will be better off, but if the gerrymander is effective, the party as a whole will be worse off." It is important to realize that in California a combination of "partisan reconstruction" (i.e., changes in the distribution of partisan registration across districts) and "the artful removal of inconveniently placed [Republican] incumbents" was used to alter the seat distribution and make the majority party more "efficiently distributed" than the minority party (Cain, 1983: 35).

⁴Dellums (Dist.-8) may be vulnerable, but that is doubtful given his 56% success against a very well-financed Republican challenger in 1982. Moreover, the district is overwhelmingly Democratic in registration (a 34.8 percentage point Democratic registration edge in 1982) and has been made marginally more so in Plan II.

six of the marginal seats in Plan II simultaneously went Republican (rather than as is now true, having only one marginal seat, District 17, in Republican hands), the delegation would remain with a Democratic majority.

The way in which Plan I and Plan II create a Democratic partisan advantage can also be shown by looking at registration figures in Plan I and Plan II versus registration in the 1980 districts. We can see from Figure 1 (omitted) that *Republican votes are more packed into safe seats in Burton I and Burton II than they were in 1980* (the Plan I (black dashed) line and the Plan II (black dotted) line are both to the left of the 1980 (red) line in the left (overwhelmingly Republican) part of the registration distribution). On the other hand, in the middle part of the registration distribution (where competitive seats may be found) Plan I and Plan II shift the curve to the right, i.e., *makes all the potentially competitive seats more Democratic*.

B. Differential Treatment of Republican and Democratic Incumbents

The 22 Democratic incumbents in 1980 were virtually assured re-election in 1982. Of the 21 who ran, 21 were elected and the one Democrat who chose not to run (J. Burton) did so for reasons unconnected with redistricting in a seat which remained Democratic⁵ (see Table 1).

Eighteen of the 21 Democratic incumbents who ran did so from safe seats (victory margins greater than 56%). Indeed the 21 Democratic incumbents who ran and won in 1982 had an *average* victory margin of 66.2%. None of the 21 Democratic 1980 incumbents who ran in 1982 had any other incumbent put in their district.⁶ (See Table 2 (omitted); for further details see Tables A and B (omitted).)

The re-election chances of the Democratic incumbents from the three Democratic-won seats that were marginal in 1980 were enhanced in Plan I by adding net Democratic registration to these seats (+9.3 to District 5, which became District 6 in Plan I; +1.0 to D-11; +4.0 to D-36; see Table B (omitted)). Democratic vote margins increased in all three seats in the 1982 elections.

By knocking out some Republican incumbents by placing two of them together in the same district or by carving up a district so as to deny the Republican incumbent a constituency to represent, the Democrats . . . were able to achieve an important reduction in Republican strength.

The fate of 1980 Republican incumbents in Plan I and Plan II was quite different. Only 15 of the 21 Republican incumbents were permitted to keep their seats with no other incumbent put in their district, and two of these were given districts which were so changed as to make it harder (in the case of Clausen, a Republican in District 2, which became District 1 electing Bosco, a Democrat under Plan I) or impossible (in the case of Dornan, a Republican in District 27, a dramatically changed district which elected Levine, a Democrat, in new District 27) for a Republican to win. The six Republican incumbents from the six other districts won by Republicans in 1980 (20, 21, 22, 26, 33, 35) were placed together in three districts, thus turning six Republican districts into three (see Table 1).

⁵Although a geographically grotesque district but strongly Democratic seat was carved out for him three days before the filing deadline John Burton announced his decision to retire, and the seat was won by a "last minute" Democrat running an underfinanced campaign.

⁶John Burton's former seat also had no incumbent put into it.

Dornan's old District 27 was cut up into a number of pieces, leaving no logical constituency from which he could run. The new District 27 was more than 20 percentage points more Democratic prone in registration than the old 27th; and was easily won by a Democrat (Levine) with 60% of the vote. Dornan decided not to run for Congress again, but to seek other office (Barone and Ujifusa, 1983: 140). Clausen's district (old District 2, became new District 1), already marginal, had net Democratic registration strength added to it, leaving it vulnerable to a Democratic challenge. In 1982 Clausen lost the seat by 51.4-48.6%. (Author's Note: The numbers shown here correct those in the original text.)

Plan II reinforces the lock-in of seats disproportionately in the hands of the Democrats. In Plan II as in Plan I, all but six seats are safe (23 D, 16 R), and four of the six seats that were marginal in 1982 have been made more Democratic than they were in Plan I (although in two cases, only incrementally more so, see Table F). Also, District 30 which is listed in Table F as a marginal seat will probably not remain so. Martinez, who was an incumbent only for a few months, after narrowly winning a special election, was not well established in this district and was running against Rousselot, a well-financed Republican incumbent from another district who had shifted to District 30. Given the strong Democratic registration edge in Martinez' district, in the future this is likely to be a safe Democratic seat, since "it seems unlikely that a Republican will make as great an effort or do as well in future elections as Rousselot did in 1982" (Barone and Ujifusa, 1983: 66).

C. Partisan Advantage for Democrats in the Open Seats

Although only *two* new congressional seats were given to California in 1982, Plan I managed to create *five* new open seats (seats without incumbents who could run in them). (As noted in the section above, this was done by placing six Republican incumbents into three districts.) Of these five new open seats, four were won by the Democrats. All of these (except possibly for District 34, which is comfortably Democratic) were safe seats in Plan I and remain so in Plan II. (See Table E (omitted) for details.) Thus, in the new open seats the Democrats have assured a 4-1 edge for the rest of the decade.

By knocking out some Republican incumbents by placing two of them together in the same district or by carving up a district so as to deny the Republican incumbent a constituency to represent, the Democrats with Plan I were able to achieve an important reduction in Republican strength. Incumbents in a district (due to name recognition, familiarity with the district, an in-place campaign organization, media access, the franking privilege, and ability to tap campaign funds and other campaigning resources) customarily run ahead of their statewide ticket and of the vote that might be projected on the basis of partisan registration figures alone, i.e., incumbents on average run considerably better than non-incumbents.⁷ Cain argues (and I would agree) that "the displacement of incumbents is perhaps even more important to the outcome of the first post-districting election than are many changes in the underlying partisan composition caused by redistricting."⁸ Moreover, the first post-districting congressional

⁷See, e.g., Robert S. Erikson, "The Advantage of Incumbency in Congressional Elections," *Polity*, Vol. 3 (1971), 395-404; David R. Mayhew, "Congressional Representation: Theory and Practice in Drawing the Districts," in N. Polsby (ed.), *Reapportionment in the 1970s* (Berkeley: University of California Press, 1971); Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven, Conn.: Yale University Press, 1977); John A. Ferejohn, "On the Decline of Competition in Congressional Elections," *American Political Science Review*, Vol. 71 (March 1977), 166-176; Bruce E. Cain, "Assessing the Partisan Effects of Redistricting," presented at the Annual Meeting of the American Political Science Association, Chicago, September 1-4, 1983; Social Science Working Paper 491, Division of Humanities and Social Sciences, California Institute of Technology, September 1978.

⁸Bruce E. Cain, *op. cit.*

election sets in place almost all the incumbents who will play key roles in the delegation—since defeat of congressional incumbents who run for reelection is very rare (Mayhew, 1974).⁹

D. Disregarding of Standards for Redistricting

While the bizarre district fashioned for John Burton in Plan I is no longer in its original form, even New Jersey's notorious fishhook shaped Congressional District #7 (see Justice Stevens' opinion in *Karcher v. Daggett* for description) can't match California's Congressional District #32 in Plan II for monstrosity and ill-compactness. Moreover District #32 is only one of a number of glaring examples of irregularly shaped districts in Plan II which wander without any rhyme or reason over the California landscape save to pick up (or submerge) pockets of partisan voting strength. Plan II, even more than Plan I, unnecessarily disregards city and county boundaries (see, e.g., Districts 38 and 44 to name but two).

In every part of the state there are congressional districts in which Republican voting strength has been submerged by lines drawn so as to pick up pockets of concentrated Democratic strength to buttress Democratic control of a district; and there are districts in which Republicans have been packed (and their votes wasted) by lines drawn so as to pick up pockets of concentrated Republican strength to remove them from potentially competitive seats.

For example . . . (examples omitted).

[Author's Note: The remaining 23 (typed) pages of the Declaration have been omitted. They contain discussions of compactness of districts, seats-votes relationships, district competitiveness, the virtual identity in partisan terms of the 1981 and 1983 California congressional plans, the feasibility of predicting congressional election outcomes in California and the effects of incumbency advantage, and the application to California of the gerrymandering test proposed by Justice Stevens in *Karcher v. Daggett*. Also omitted from the Declaration were roughly 20 pages of tables, graphs, and maps.]

⁹David R. Mayhew, *op. cit.*