SYMPOSIUM ON REAPPORTIONMENT

Edited by Bernard Grofman, University of California, Irvine
Arend Lijphart, University of California, San Diego
Robert McKay, Aspen Institute for Humanistic Studies and
New York University School of Law
Howard Scarrow, State University of New York at Stony Brook

BACKGROUND

INTRODUCTION

Bernard Grofman, University of California, Irvine
Howard Scarrow, State University of New York at Stony Brook

In 1962 the United States Supreme Court affirmed in *Baker v. Carr*[1] that judicial redress could be sought to compel a state to reapportion its legislature. Two years later the Court applied the "one man, one vote" standard to both Congressional districts (*Wesberry v. Sanders*[2]) and state legislative districts (*Reynolds v. Sims*[3]), and in 1968 applied the standard to local governments as well (*Avery v. Midland County*[4]). In all these cases the Court asserted that the equal protection clause of the Fourteenth Amendment required that legislative districts be as nearly equal in population as practically possible.

In applying the "one man, one vote" principle during the 1960s, the Court concentrated most of its energies on elucidating the exact degree of population equality which it would require for districts at the various jurisdictional levels. It applied the most rigid standards of equality to Congressional districts (*Kirkpatrick v. Preisler*[5]) and more lenient standards for state and local districts (*Mahan v. Howell,*[6] *Abate v. Mundt*[7]). By concentrating on these questions of numerical equality, however, the Court virtually ignored the many knotty questions which were raised by its decisions. As Robert Dixon (1969) noted, the Court assumed that equal population was synonymous with equal representation and with "fair and effective representation" (a phrase articulated by Chief Justice Warren in *Reynolds*). Apart from numerical equality, the only criteria for representation schemes considered by the Court were the preservation of political subdivisions and the compactness and contiguity of territory. These criteria, however, were overshadowed in importance by the court's stress on exact population equality.

In the 1970s--by which time the doctrine of "one man, one vote" had become something of a moral platitude--the Court tentatively began to acknowledge that fair and effective representation for minority groups (Blacks and Hispanics) might not automatically be realized simply through the formula of equal population districts; the Court recognized that the type of election system (single-member districts vs. at-large districts) as well as the way district lines were drawn (concentrating vs. dispersing group

members) could affect the representation of these groups (*Whitcomb v. Chavis*[8]). With the enforcement of the Voting Rights Act of 1965 the Court's involvement in these questions became especially pronounced, and from the cases arising from the Act emerged the concept of "affirmative gerrymandering" (*United Jewish Organization of Williamsburg v. Carey*[9]). Some of the basic questions of representation and democratic theory, familiar to generations of political scientists, thereby came starkly to the fore: Can only a Black represent a Black? Are those who vote for a losing candidate still represented? Is it the individual who is represented, or is it the group of which he is a part? Can a voting bloc be more effective if it is concentrated in a few districts or scattered over many districts? Under which of these alternatives are the normative goals of democratic pluralism more likely to be realized?

In the 1970s the Court also acknowledged that the goal of fair and effective representation might be tied to the way that political parties are represented. In *Gaffney v. Cummings*[10] the Court approved a Connecticut scheme which was explicitly designed to guarantee to each party a share of the state legislative seats which was proportional to the party's share of the statewide vote. Here again the Court gave approval to a type of affirmative gerrymandering.

Paralleling the evolution of the Supreme Court's range of concerns after *Baker v. Carr,* apportionment studies by political scientists reflected equally sharp changes of perspective and focus of interest. By far the most frequent question asked by political scientists during the 1960s was what impact *Reynolds* had had on policies enacted by state legislatures. The question was the natural one to pose, since for many years political scientists had charged that malapportionment of state legislatures had skewed state policies in a conservative direction. It is understandable, accordingly, that when these early studies concluded that the impact of reapportionment had been negligible or nonexistent, these conclusions were seen as being rather startling. Yet not all students of the subject accepted the negative findings; the early studies came to be attacked for their methodology (cross-sectional analysis) as well as for their failure to distinguish between states according to the degree to which they had been malapportioned prior to *Reynolds*. In our view, the question of impact must still be regarded as open.[11]

The 1970s witnessed another change in the perspective of political scientists--a renewed interest in partisan seat-vote ratios. Such interest has traditionally been associated with the study of European-type parliamentary systems, where the government is chosen from among members of the elected parliament. However, when Dixon and other scholars began to raise the question of *what* should be equalized in systems of representation, the question of whether or not a party's share of the popular vote bore a fair relationship to its share of the legislative seats became a logical one to pose. When the Court, by its insistence on exact population equality for Congressional districts, opened the door to

to egregious partisan gerrymandering, the question assumed still greater relevance.[12]

Closely related to the inquiry into seat-vote rations was concern with party competition: Has reapportionment, with its attendant partisan gerrymandering, contributed to the decline in the number of competitive districts?[13] How many competitive districts should there be in a well-designed system--given the fact that a large number of highly competitive districts could lead to a highly disproportionate seat-vote ratio, while a small number could lead to the system being unresponsive to changes in electoral sentiment?[14]

To pose such questions is to illustrate how far the focus of interest of political scientists, just like that of the Supreme Court, has shifted since *Baker v. Carr*, and to suggest that in the 1980s questions of interest to jurists and scholars alike will be much more complex than those raised in previous periods. They will include both normative and empirical questions relating to minority representation, political party representation as a function of type of election system and of sophisticated political gerrymandering, structural issues such as choice of an appropriate group to design reapportionment schemes, the appropriate role of the courts, and data-based issues concerning the accuracy of census statistics. These concerns are reflected in the essays which follow.

Very appropriately, one of the first essays in this issue is by the late Robert Dixon. For nearly two decades Dixon had written with "pungency and wit" on the evolving doctrines of reapportionment. More than any other single individual, his writings helped shape the course of reapportionment litigation. We are privileged to print his posthumous contribution to the reapportionment debate of the 1980s, along with an appraisal and appreciation of his earlier landmark work by a scholar who knew him well and who himself made major contributions to the reapportionment literature in the 1960s and 1970s. Gordon Baker's essay traces the central themes in Dixon's work: (1) the insistence on devising criteria for "fair and effective" representation rather than taking refuge in a mindless attempt to equalize district populations down to the last decimal place and (2) the insistence that reapportionment decisions are inherently political decisions: "there are no 'neutral' lines for legislative districts" (Dixon, this volume).

In Dixon's own essay in this volume, we see both these themes stressed. Dixon points out that any fixed standard of population equality compatible with the accuracy of census data will permit a *myriad* of alternative districting schemes satisfying that standard. Moreover, these schemes may differ widely in the extent to which they satisfy criteria of meaningful representation, e.g., legislatures responsive to electoral change, minority representation in some reasonable relationship to size of the minority population, representation of 'natural' political communities. Dixon concludes his essay by arguing in favor of a bipartisan districting commission which should not be "unduly impeded by the detailed specification of 'standards'" e.g., compactness, contiguity, popu-

lation equality, nor by "attempted limitation on the kind of data that can be considered."

The third and fourth essays in our volume are a debate on "affirmative gerrymandering"--taking race or linguistic background into account for the purpose of devising districting which will provide a minority with representation in the legislature closer to its population percentage than would occur under "neutral" or "color-blind" districting. Armand Derfner argues that "race conscious apportionments may be unfortunate, but the reality of discrimination makes them necessary...(T)he persistence of racial discrimination in this society makes a Black minority qualitatively different from ethnic, political, economic or other minorities." "(W)here a minority is isolated, as with Blacks in much of the South, minority influence is essentially no influence." Derfner goes on to suggest that in cases involving minorities the special circumstances which indicate isolation and call for affirmative gerrymandering remedies include "a pattern of racial divisiveness and bloc voting in the electorate, a fairly recent history of racial discrimination" and more generally, "proof that racial issues are influential in politics to a significant degree." David Wells, in rebuttal, quotes approvingly the words of Chief Justice Burger in his dissenting opinion in *Williamsburg:* "Manipulating the racial composition of electoral districts to assure one minority or another its 'deserved' representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process." Wells then calls attention to the probability that racially designed districting will tend to sustain the existence of racial ghettoization, racially polarized voting patterns, and a reduction in the competitiveness and responsiveness of the political process.

The fifth and sixth essays deal with alternatives to single-member districts and plurality elections. Bernard Grofman reviews the theoretical and empirical arguments against multi-member districts and at-large elections and traces the Supreme Court's attempts to come to grips with the difficult question of when nonsingle-member district elections violate "one person, one vote" standards. Grofman argues forcefully that where there are one or more district minorities (whether racial or partisan), at-large elections (and to a lesser extent multimember districts with plurality elections) operate so as to deny those minorities their "fair" share of representation, insofar as the representation they receive is "at the discretion of" the majority. Grofman asserts that, in polarized situations, this is likely to leave minorities completely unrepresented. Grofman also reviews the American history of weighted voting, cumulative voting, and the single transferable vote and argues that the latter two forms of proportional election have served the needs of state or local government quite effectively in those few jurisdictions in which they were used.

Arend Lijphart's essay puts the issue of choice of election system in a comparative perspective and reminds the American reader that single-member district plurality elections are not the

most common form of democratic election system. Lijphart inventories a formidable list of criteria by which to judge the fairness of election systems and finds that no election system is uniformly best as judged by each of the criteria. He finds strongly competing claims for at-large vs. single-member district systems but finds mixed single and multimember district systems to be never optimal but always among the "second best" methods according to each of the criteria. Lijphart's perhaps most important finding is that "the different criteria of fair representation are satisfied almost perfectly by proportional representation systems using large districts." Lijphart goes on to point out that a major argument commonly made against PR, that it undermines two-party politics, is not empirically well substantiated. Lijphart concludes his essay with a provocative discussion about the feasibility of widespread use of proportional representation in the U.S.

The seventh and eighth essays in this special issue deal with evaluating the policy and partisan consequences of the legislative redistricting decisions made in the 60's and 70's. David Saffell's paper is in two parts. First, he reviews the literature on the question "Does apportionment make a difference in the nature of public policy in the American states?" Then he reports the results of a survey he conducted interrogating state senators in 49 states (who had been in office in 1967 and who were still in office in 1979) on their views as to the consequences of reapportionment for their state. With respect to the political science literature on reapportionment impact, Saffell reports mixed and rather inconclusive findings but suggests, following Bicker (1971), that methodological problems in many of the studies vitiate any clear conclusion as to the "nonimpact" of reapportionment. Saffell's own study suggests that, as perceived by state legislators, reapportionment (1) pushed state policy outputs in a liberal direction in a (bare) majority of states and was seen as making no difference in roughly one third of the states; (2) helped Democrats make gains in 41.3% of the states as compared to Republican gains in only 19.6% of the states. Of course, Saffell is reporting the *perceptions* of state legislators. Whether these knowledgeable politicians were able to separate the impact of reapportionment from other demographic and political changes in their states is an open question.

The essay by Howard Scarrow deals with a limited focus, one state (New York) and one kind of impact (party representation in the state legislature before and after reapportionment), but this narrowing allows him to arrive at clear-cut conclusions. Scarrow finds incontrovertible evidence that the pre-1966 apportionment districting schemes in New York was distinctly biased against the Democrats in both houses of the state legislature. Beginning with the first postreapportionment election of 1966, in the New York Assembly Scarrow finds it is now the Democrats who were favored, while in the Senate the first three elections after reapportionment (1966-1970) were essentially unbiased. One of Scarrow's most intriguing findings deals with New York's 1972 legislative redistricting, which has been described by knowledgeable observers as a Republican gerrymander. Scarrow finds that the pro-Republican effects of this gerrymander "wore off" quickly. Indeed in the Assembly, "anyone looking at the pattern of bias reflected in the

1976 and 1978 elections would conclude that the Democrats, not the Republicans, had designed the system." This finding suggests that intended gerrymandering may have quite unintended consequences, given demographic and political shifts in the course of a decade.

As we look ahead to mandated redistricting with 1980 census data, we can anticipate that the range of issues which will be brought to the courts will, as has been true for the cases of the mid 70's, move beyond comparatively "simple" issues of population equality to address the far more difficult questions of fair and effective representation in the context of American pluralist politics. Among the crucial issues to be addressed, if not resolved, in the decade ahead will be the litigability of challenges to districting based on claims or sophisticated political gerrymandering and the question of how to measure such gerrymandering; the feasibility and constitutionality of alternatives to single-member districting such as forms of proportional representation; the desirability of at-large election systems and perhaps also of nonpartisan elections; and the proper trade-offs among competing criteria by which districting schemes can be judged, especially the appropriateness of affirmative action gerrymandering. We believe the eight essays in the volume offer an important contribution to the ongoing debate over these issues.

NOTES

1. Baker v. Carr (1962) 369 U.S. 186.
2. Wesberry v. Sanders (1964) 376 U.S. 1.
3. Reynolds v. Sims (1964) 377 U.S. 533.
4. Avery v. Midland County (1968) 390 U.S. 474.
5. Kirkpatrick v. Preisler (1969) 394 U.S. 526.
6. Mahan v. Howell (1973) 410 U.S. 315.
7. Abate v. Mundt (1971) 403 U.S. 182.
8. Whitcomb v. Chavis (1971) 403 U.S. 124.
9. United Jewish Organizations of Williamsburg v. Carey (1977) 97 S. Ct. 996.
10. Gaffney v. Cummings (1973) 412 U.S. 735.
11. The literature is reviewed in the paper by David Saffell, below.
12. A notable landmark in this literature is Tufte (1973).
13. In addition to Tufte, the question is examined in Ferejohn (1977).
14. These and related questions are raised in Niemi and Deegan (1978).

REFERENCES

DIXON, R. (1969) "The Warren Court crusade for the Holy Grail of 'one man-one vote,'" Supreme Court Review 219-270.

FEREJOHN, J. (1977) "On the decline of competitors in Congressional elections," American Political Science Review 71: 166-176.

NIEMI, R. and J. DEEGAN, JR. (1978) "A theory of political districting," The American Political Science Review 72: 1304-1323.

TUFTE, E. (1973) "The relationship between seats and votes in two-party systems," American Political Science Review 67: 540-554.

AN HISTORICAL TOUR THROUGH THE POLITICAL THICKET: TRACING THE STEPS OF THE LATE ROBERT G. DIXON, JR.

Gordon E. Baker, University of California, Santa Barbara

There are occasions when our understanding of an institution or an historical development can be heightened by an examination of the contributions of a single individual. Such an enterprise can produce a sense of focus and direction in a kaleidoscopic and confusing scene. Such is the case with the works of Robert G. Dixon, Jr., whose life was cut short at the age of 60 on May 5, 1980. Dixon's name was so intimately associated with the subject of legislative reapportionment that his writings and activities since the early 1960's provide an invaluable reflection of the evolution of perhaps the most remarkable institutional transformation in 20th Century America.

This reapportionment revolution entailed, as few could have anticipated, an intricate nexus of politics and law. To understand and interpret such a development, Robert Dixon was uniquely qualified. His academic training had included a doctorate in political science and a degree in law. After teaching the former subject for several years, Dixon joined the faculty at George Washington University's School of Law in the nation's capital. From this vantage point he witnessed all the major arguments in the series of reapportionment cases since *Baker v. Carr*[1] in 1962, discussed the legal issues with numerous counsel in these cases, served as a consultant to several public agencies, and ultimately presented to the Supreme Court of the United States a successful brief that helped trigger a shift in judicial direction. In 1975, Dixon was named Daniel Noyes Kirby Professor of Law at Washington University in St. Louis. While his scholarship spanned a wide range of subjects (e.g., privacy, procedural safeguards, reverse discrimination), his interest and involvement in legislative reapportionment continued until the end of his days. Any future serious work on