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# The Complicated Impact of One Person, One Vote on Political Competition and Representation

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# THE COMPLICATED IMPACT OF ONE PERSON, ONE VOTE ON POLITICAL COMPETITION AND REPRESENTATION\*

NATHANIEL PERSILY,\*\* THAD KOUSSER,\*\*\* AND PATRICK EGAN\*\*\*\*

*This Article assesses the political consequences of the Supreme Court's decision in Baker v. Carr and the related cases establishing the one-person, one-vote rule for legislative redistricting. In the immediate aftermath of the decisions, analysts were surprised to find few measurable effects of the kind predicted beforehand and implicit in the Court's rationale for its intervention. Forty years of conflicting evidence and empirical study provide a murky reservoir from which to draw lessons about the impact of one person, one vote. This Article takes as its task sifting through and evaluating the existing literature, while also partially filling in some of the gaping holes that exist. Although the impact of the cases themselves may be felt today in everything from social policy favoring urban and suburban communities to the Supreme Court's intervention in and resolution of the 2000 election, this Article focuses on the effect of one person, one vote on electoral competition and legislative representation. Noting the rise in the incumbency advantage since 1966, the Article canvasses the voluminous relevant literature to conclude that one person, one vote is partially to blame for the decline in electoral competition. However, the same cannot be said, at this point, regarding party competition for control of state legislatures, which*

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*appears to have risen in the wake of one person, one vote even if not because of it.*

*Examining the impact of the Court's decisions on "representation" proves an equally difficult task, but one that this Article tackles with novel methods. First, the Article examines the impact of one person, one vote in those states that only redistricted one house in response to the Court's initial decisions. By comparing political changes that take place in the newly reapportioned house with those in the "control" house, the Article attempts to isolate the independent effect of the Supreme Court's decision. Although redistricting had no uniform partisan consequences across the nation, it did help Democrats or Republicans in particular states in predictable ways. Second, the Article looks at ten states that, before Baker, had one equitably apportioned house and one severely malapportioned house. It finds that after the one-person, one-vote cases the differences between the chambers narrowed. Third, for four state senates the Article "draws" the 1960 district lines onto the 2000 political data in order to find out whether the lines existing pre-Baker would be more or less representative than the actual 2000 lines. We find that the 1960 lines, if in place today, would often be less "biased" than the ones currently existing. From these four small empirical studies, the Article concludes that the one-person, one-vote rule had few uniform effects throughout the political system, but that in certain political contexts it interacted with other electoral and institutional variables to cause substantial political change.*

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In his memoirs, Chief Justice Earl Warren described *Baker v. Carr*<sup>1</sup> as “the most important case of [his] tenure on the Court.”<sup>2</sup> For those who thought that *Brown v. Board of Education*<sup>3</sup> might deserve the honor, Warren reminded them that equal legislative representation for African Americans would have made *Brown* unnecessary.<sup>4</sup> Address inequalities in the political process, the theory went, and substantive equality at the point of policy-making and policy benefits would follow.<sup>5</sup> Formerly the accommodating Governor of California when its senate allotted the entire city of Los Angeles just a single seat, Chief Justice Warren later “concluded that [malapportionment] was a matter for the courts to decide when I saw what effect disproportionate representation had in Tennessee and remembered my California experience.”<sup>6</sup>

Measured by their reach and sweep, the one-person, one-vote cases may represent the Court’s most dramatic intervention into politics in its history. Within just a few years, almost every legislative institution in America reorganized itself to comply with the decisions. Few, if any, precedents in American constitutional law have had similarly immediate and far-reaching effects. Within four years of *Baker*, district lines in forty-six states had been challenged in court. All but three states reapportioned their state legislatures, and nineteen redrew their congressional districts.<sup>7</sup>

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1. 369 U.S. 186 (1962).

2. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

3. 347 U.S. 483 (1954).

4. John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974). Of course, having been completely barred from voting in much of the South, African Americans at the time of *Brown* or even *Baker* often had no judicially protected right to vote. Addressing problems of vote dilution through discriminatory malapportionment could only become a primary goal of voting rights litigators once the right to cast a ballot (meaningful or not) was protected.

5. Warren himself, more than the law professors who later rationalized his political process opinions, considered the harm of malapportionment to be individual and dignitary in addition to instrumental or abstractly procedural. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (“The right to vote is personal,” quoting *United States v. Bathgate*, 246 U.S. 220, 227 (1918)); *id.* at 567 (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”).

6. WARREN, *supra* note 2, at 310.

7. Leo F. Kennedy, *Legislative Organization and Services*, in *THE COUNCIL OF*

Almost immediately following the Court's decision in *Baker*, political scientists, like politicians and pundits, began to speculate as to the likely winners and losers as a result of the new rules governing districting. Would the new regime lead to greater representation of the growing urban centers as the advocates in the cases suggested and the decisions implied? Which political party was more likely to benefit from the decisions? Would incumbents—either individual officeholders or the party controlling a given state legislature—become more vulnerable to challenges or susceptible to turnover?

The early evidence and conclusions were disappointing for those who saw in *Baker* and its progeny a "reapportionment revolution."<sup>8</sup> Observers could draw few, if any, conclusions that one group or party systematically benefited as a result of the new, more accurate apportionments, and still fewer conclusions as to the public policy changes reapportionment wrought. Moreover, to the degree one could discern systematic effects, they appeared to be perverse—going against the decisions' partial justification of "clearing the channels of political change."<sup>9</sup> Incumbents, for example, were more likely to be reelected in the post-*Baker* era than they were previously.<sup>10</sup>

In the forty years since *Baker*, a substantial body of evidence has developed concerning the effect of the one-person, one-vote rule. We may have reached a point where we can say that either we know the political effects of those decisions or we never will.<sup>11</sup> What follows in this Article is an assessment of the available evidence and literature on the impact of one person, one vote on two features of the American political system: political competition and legislative representation. We focus on competition and representation because advocates for the one-person, one-vote rule often expressed their arguments for judicial intervention in those terms.<sup>12</sup> Gerrymandering got its name, after all, from Governor Elbridge Gerry's attempt to skew district lines for the Massachusetts legislature to disadvantage

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STATE GOVERNMENTS, 18 THE BOOK OF THE STATES, 1970-71, at 57-58 (1971); Herbert Wiltsee, *Legislative Organization and Services*, in THE COUNCIL OF STATE GOVERNMENTS, 16 THE BOOK OF THE STATES, 1966-67, at 38-40 (1967).

8. GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER AND THE SUPREME COURT* (1966).

9. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-34 (1980).

10. See notes 60-76 *infra* and accompanying text.

11. Of course, because the one-person, one-vote rule continues to constrain each decennial redistricting, a new set of "effects" comes every ten years, in one sense.

12. See generally RICHARD C. CORTNER, *THE APPORTIONMENT CASES* (1970) (describing the various briefs filed in *Baker*, *Reynolds*, and the other one-person, one-vote cases).

his Federalist opponents. Likewise the unchanging rural rotten boroughs of the Tennessee counties that gave rise to *Baker* skewed representation in that state toward certain interests and away from others. More important than the pre-*Baker* advocacy for one person, one vote, subsequent theorizing about the proper role of courts in regulating politics has focused on representation and competition as criteria for judicial intervention.<sup>13</sup> We also choose these “dependent variables,” if you will, because they may be amenable to empirical tests with data that are more readily available and understandable to the average law review reader. However, because we concentrate on specific notions of competition (between candidates in districts and between parties for control of a legislature) and representation (as defined by a lack of partisan bias in the political system), we recognize that this Article leaves to others the task of investigating other important questions regarding the political effects of the one-person, one-vote cases. A comprehensive treatment of such effects would analyze (1) all subsequent judicial interventions into the political process for which those cases may have been indirect precedent,<sup>14</sup> (2) the effect of one person, one vote on procedure and

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13. See ELY, *supra* note 9 (suggesting representation reinforcement as proper role for judicial intervention); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–52 (1998) (arguing for shift of focus in cases of political regulation from a rights-based approach to an emphasis on background markets in partisan control); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) (defending judicial intrusion into the political process to promote competition); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 788–91 (2000) (describing and criticizing the “political markets” paradigm); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2189–91 (2001) (examining the effect of primary ballot access laws on competition and representation); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793–815 (2001) (arguing that competition and representational concerns justify judicial intervention to protect political party autonomy and citing other articles making similar arguments).

14. One could view *Baker* as setting the stage for the Court’s intervention into the arenas of campaign finance, ballot access, vote dilution, race and redistricting, political party regulation, and even creating the right to vote. Those that do so (perhaps including Professor Schotland, who would have us investigate these larger effects, see Roy Schotland, *The Limits of Being “Present at the Creation,”* 80 N.C. L. REV. 1505, 1511–12 (2002)) would then count among *Baker*’s effects a legal-political regime under which, for example, the following laws are unconstitutional: poll taxes, congressional term limits, regulations of most campaign expenditures (but not most contributions), most regulations of political party nomination processes, districting plans that have the intent and effect of discriminating against racial minorities or use race as “the predominant factor,” state court opinions that provide indeterminate standards for presidential election recounts, restrictive ballot access laws for minor parties and independent candidates, and ballot notations that reflect a candidate’s voting record or stances. And if these constitutional

policy outputs of both state governments and the House of Representatives,<sup>15</sup> and (3) how *Baker* may have affected distribution of power among urban, suburban, and rural constituencies.<sup>16</sup>

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rules are a product of *Baker*, then all political developments (for example, the election of our current president) or legislation that arose as a product of or in response to these rules can be considered an "effect" of the Court's intervention into the political thicket in *Baker* and its progeny. Such a game of "This is the House that Jack Built" is worth playing in another article, although we think it impossible to prove that *Baker* "caused" these legal rules or their concomitant and dramatic effects on the political process. Moreover, *Baker* was not the first case of judicial intervention into politics (see, for example, the *White Primary Cases*), so the blame (or praise) earned by *Baker*'s precedent of political intervention, at the very least, should be spread around. (The *White Primary Cases* refer to the series of cases where the Court struck down state laws, party rules, and informal mechanisms that denied African Americans the right to vote in Democratic party primaries. See *Terry v. Adams*, 345 U.S. 461, 468–70 (1953); *Smith v. Allwright*, 321 U.S. 649, 662–66 (1944); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927).)

15. Others have examined whether one person, one vote led to significant policy changes. The early consensus was against any dramatic policy change, but newer studies suggest a pro-urban policy effect. Those who found little public policy change include Herbert Jacob, *The Consequences of Malapportionment: A Note of Caution*, 43 SOC. FORCES 256, 256–61 (1964); Thomas R. Dye, *Malapportionment and Public Policy in the States*, 27 J. POL. SCI. 586, 595–601 (1965); Richard Hofferbert, *The Relation Between Public Policy and Some Structural and Environmental Variables in the American States*, 60 AM. POL. SCI. REV. 73 (1966); David Brady & Douglas Edmonds, *One Man, One Vote—So What?*, 4 TRANS-ACTION, Mar. 1967, at 941; Bryan R. Fry & Richard F. Winters, *The Politics of Redistribution*, 64 AM. POL. SCI. REV. 508 (1970); Robert S. Erikson, *Reapportionment and Policy: A Further Look at Some Intervening Variables*, 219 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 280 (1973); William E. Bicker, *The Effects of Malapportionment in the States—A Mistrail, in REAPPORTIONMENT IN THE 1970S* (Nelson W. Polsby ed., 1971) (critiquing the relevant literature). Those finding minor policy effects include Allan G. Pulsipher & James L. Weatherby, Jr., *Malapportionment, Party Competition and the Functional Distribution of Governmental Expenditures*, 62 AM. POL. SCI. REV. 1207, 1219 (1968); Roger A. Hanson & Robert E. Crew, Jr., *The Policy Impact of Reapportionment*, 8 LAW & SOC'Y REV. 69, 82–90 (1973); H. George Frederickson & Yong Hyo Cho, *Legislative Apportionment and Fiscal Policy in the American States*, 27 W. POL. Q. 5, 5–10 (1974). Modern studies that argue that the one-person, one-vote rule had major policy consequences include Mathew D. McCubbins & Thomas Schwartz, *Congress, the Courts and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. POL. SCI. 388, 409–12 (1988) (finding that congressional budget allocations were less biased in favor of rural areas after 1964); Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and the Distribution of Public Expenditures in the American States* (2000) (finding that the one-person, one-vote decisions led to a redistribution of approximately seven billion dollars to more populous counties), available at [http://econ-www.mit.edu/faculty/snyder/files/equal\\_votes\\_final.pdf](http://econ-www.mit.edu/faculty/snyder/files/equal_votes_final.pdf) (on file with the North Carolina Law Review). Also, some have argued that once the courts decalcified state political systems by forcing decennial redistricting based on equal population, state governments became "real" governments. See, e.g., Abner Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 686–87; Schotland, *supra* note 14, at 1511–12.

16. We briefly consider the relationship between urbanization and representation post-*Baker* when we examine the partisan effect of the equal population rule on state

Recognizing these limitations, this study proceeds in four parts. Part I begins with a brief explanation of the hypotheses that underlie these opinions of the Court and the arguments of their later defenders.<sup>17</sup> The arguments for one person, one vote fall into three general categories: protecting the right to an equally weighted vote, promoting electoral competition, and furthering more accurate representation.

Parts II and III examine the wealth of empirical studies of the impact of the one-person, one-vote rule on competition and representation, particularly for congressional elections.<sup>18</sup> A rather complicated story emerges from the literature, but we think certain conclusions can be drawn. The creation of the one-person, one-vote rule, acting alongside other political developments and within certain institutional contexts, had identifiable effects on competition and representation. The precise impact of one person, one vote in a given state often depended on who controlled the redistricting process (one party, both parties, or a court) and the degree of malapportionment in the pre-*Baker* legislature. Depending on who exercised control, a redistricting plan could bias the electoral system in favor of one party at the expense of another or in favor of incumbents at the expense of challengers.

In Part IV, we present some new empirical analysis of state legislative elections to examine the effect of one person, one vote on partisan competition for control of state legislatures and on representational bias.<sup>19</sup> We first look at those states that underwent changes in partisan control in their state legislatures in the mid-sixties and ask whether one person, one vote is partly responsible. Although the number of state legislative chambers changing control increased substantially in the 1960s, we cannot attribute the rise to one person, one vote. Second, we look at those states that redistricted only one house of their legislature in the wake of *Baker*.<sup>20</sup> The result for us is a valuable natural experiment in which we can hold constant (to some extent) many other variables except the instance of redistricting based on one person, one vote. We find context-specific partisan

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legislatures. We find that urban-based parties benefited from the one-person, one-vote rule. See *infra* text accompanying notes 93–102. For a more extensive analysis of these issues, see McCubbins & Schwartz, *supra* note 15, and Ansolabehere et al., *supra* note 15.

17. See *infra* notes 22–59 and accompanying text.

18. See *infra* notes 60–89 and accompanying text.

19. See *infra* notes 90–106 and accompanying text.

20. Before *Reynolds v. Sims*, 377 U.S. 533 (1964), many thought that *Baker*'s requirement of equal population applied to only one legislative house.



efforts from the move to one person, one vote. Third, we look at ten states, which, before *Baker*, had the greatest disparity in malapportionment between their two chambers—for example, where the state assembly was nearly equally apportioned and the state senate was wildly malapportioned. The advent of one person, one vote, we find, decreased political differences between the two houses in these states, such that the partisan balance in each house became more similar after equipopulous redistricting (that is, the percent Democrat of in the house became similar to the percent Democrat in the senate).

In Part V, we perform a counterfactual experiment, asking what would have happened if district lines changed by the Court's decisions were in force today.<sup>21</sup> We examine several states covered by the original one-person, one-vote cases (as well as Earl Warren's own California) and map the district lines as they existed before *Baker v. Carr* onto current political data. We then compare these counterfactual winners to the actual ones who have been victorious under the regime of one person, one vote. We find that the pre-*Baker* lines are, in most cases, more representative than the ones existing today.

This Article concludes by situating the arguments presented here in the larger literature on the regulation of politics.

Before launching into our explanation, a cautionary note is in order. From the standpoint of a political scientist attempting to study the political effects of *Baker* and its progeny, the most unfortunate aspect of the one-person, one-vote cases is their timing. The period between 1962, when the Court decided *Baker*, and the 1970 census (which was then used for the first *decennial* redistricting) is arguably the most turbulent period in American political history since the Civil War. The assassination of President Kennedy, the subsequent and related landslide election of Lyndon Johnson over Barry Goldwater in 1964, the civil rights struggle both in the streets and in Congress with the passage of the Civil Rights Act and Voting Rights Act, the related defection of Dixiecrats from the Democratic Party and concomitant rise (albeit nascent at the time) of the Republican Party in the South, the Vietnam War, and the turbulent 1968 election occurred around the same time that state governments were redrawing their lines to comply with the edicts from the Supreme Court and lower federal courts. Fundamental and transformative political changes (apart from redistricting) took place during the

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21. See *infra* notes 107–23 and accompanying text.

sixties. We therefore proceed with great care in assessing the independent importance of the shock the Supreme Court's decisions sent through the political system of that decade, as well as the enduring importance of that change (as opposed to others of that decade) for American politics over the next forty years. Nevertheless, we are now in a position to make *some* conclusions about the independent effect of the decisions, and regarding those issues over which debate continues to rage, we think it important that lawyers and legal analysts understand the terms of the debate.

### I. THE COMPETING THEORETICAL JUSTIFICATIONS FOR THE ONE-PERSON, ONE-VOTE RULE

The one-person, one-vote cases are rich reservoirs of political philosophy. One must look beyond their texts, however, to capture fully the justifications for equal population in districting. Many would look twenty-five years earlier to the famous footnote four of *United States v. Carolene Products*<sup>22</sup> for a process-reinforcement and minority-protection justification for the one-person, one-vote rule. Others might look later, to John Hart Ely's seminal work, *Democracy and Distrust*, which provided the most emphatic advocacy of a robust role for courts in cases where they could "clear[] the channels of political change."<sup>23</sup>

As we see it, three general classes of arguments support the one-person, one-vote rule. The first comes out most prominently in Chief Justice Warren's opinion for the Court in *Reynolds v. Sims*, but gets somewhat overwhelmed in the scholarly debate. That opinion emphasized the dignitary value of the right to vote and suggested that

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22. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). In footnote four, the Court stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

23. ELY, *supra* note 9, at 105-35.

malapportionment could “debase” a citizen’s right to vote, just as would a denial of the franchise altogether. The notion that malapportionment violated equal protection, per se, regardless of its political consequences, is one not amenable to empirical test (although we point out logical difficulties below).

The second and third rationales involve some assumptions about the consequences of malapportionment and imply that a world with equipopulous districting will be politically different than one without it. We categorize these interrelated rationales under the rubrics of competition and representation. By competition, we refer to the process-reinforcement argument of Ely and *Carolene Products* that malapportionment required judicial remediation because it allowed those with power to insulate themselves from competitors by rigging electoral rules against those who would replace them. The “ins” could keep the “outs” out by drawing district lines that perpetually favored the power structure of the status quo. By representation, we mean the accuracy of the translation of votes into seats. Malapportionment was thought to favor some groups, such as rural voters, at the expense of others, such as suburbanites and city dwellers. Equipopulous districting, some argued, would help minimize the distortion of expressed voter preferences caused by the corraling of interests in such a way that the composition of the legislature poorly resembled the composition of the electorate.

These concepts, as we note below,<sup>24</sup> are deceptively simple. Each carries with it a lot of normative and conceptual baggage. Before “testing” the hypotheses of *Baker v. Carr* and its progeny, however, it may be useful to point out the problems in specification and definition that these hypotheses imply.

#### A. *Malapportionment as an Assault on Individual Dignity*

The idea of malapportionment as a defect in the political process is so entrenched in our thinking that we often minimize the principle that takes up the most space in the Court’s opinions: namely, that the state should accord equal concern and respect for the *individual’s* right to vote. Although this Article is more concerned with the consequentialist thinking underlying the Court’s opinions and their later defenders, it is worth noting that the lion’s share of those opinions treat malapportionment as more than a mere systemic ill, but as a form of “invidious” discrimination and an abridgement of a fundamental right. Malapportionment constituted an assault on

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24. See *infra* notes 25–59 and accompanying text.

individual dignity, the Court held, by assigning a greater value to one member of the polity than another. This injury to individual dignity seemed to arise from several sources: an infringement on a right of basic citizenship, the state's implicit devaluing of one person's voice over another's, and the unequal distribution of political influence malapportionment caused.

In his opinion for the Court in *Reynolds*, Chief Justice Warren emphasized the "personal nature" of the right to vote. "Each citizen has an inalienable right to full and effective participation in the political process[] . . . . To the extent that a citizen's right to vote is debased," he wrote, "he is that much less a citizen."<sup>25</sup> Voting was a "human right"—one of the "basic civil rights of man" that was entitled to special protection because it was "preservative of other basic civil and political rights."<sup>26</sup> Although malapportionment did not overtly deny the franchise, it could reduce the value of an individual's vote to just a hair above zero.<sup>27</sup> The cost that malapportioned districts forced some voters to bear based on the fortuity of their

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25. *Reynolds*, 377 U.S. at 567. On June 15, 1964, the Court decided five companion cases to *Reynolds* involving challenges to legislative apportionments in Colorado, Delaware, Virginia, Maryland, and New York. See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 715–34 (1964) (Colorado); *Roman v. Sincok*, 377 U.S. 695, 697–708 (1964) (Delaware); *Davis v. Mann*, 377 U.S. 678, 680–90 (1964) (Virginia); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 658–73 (1964) (Maryland); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 635–53 (1964) (New York). In each of these companion cases, the Court echoed the concern from *Reynolds* that malapportionment abridged the individual right to vote. See *Lucas*, 377 U.S. at 736 ("An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause."); *Roman*, 377 U.S. at 711 (stating that legislative malapportionment amounts to "an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them"); *Davis*, 377 U.S. at 690 (holding that Virginia's legislative malapportionment was a violation of the Equal Protection Clause); *Tawes*, 377 U.S. at 675 (stating that "considerations of history and tradition" will not justify a violation of the Equal Protection Clause); *WMCA*, 377 U.S. at 653 ("However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside.").

26. *Reynolds*, 377 U.S. at 561–62.

27. See *id.* at 562; see also *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); cf. *Bd. of Estimate v. Morris*, 489 U.S. 688, 698 (1989) ("[A] citizen is . . . shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two."); *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 264 (1977) ("[T]he Equal Protection Clause cannot tolerate the disparity in individual voting strength that results when elected officials represent districts of unequal population.").

residence was tantamount to region-based disfranchisement. Unlike most other rights, the right to vote required a certain action by the government (namely, tabulation and aggregation on an equal basis) for the right to be protected and to gain meaning.<sup>28</sup> Therefore, so long as one agreed that the Constitution protected the right to vote,<sup>29</sup> surely it must follow that the state cannot aggregate votes in such a way as to drain the right to vote of all its meaning.

More than merely an infringement on voting rights, however, malapportionment sent the voters a signal about the value of their position in the polity. By according greater weight to some citizens' votes, the state sent a message regarding individual worth.<sup>30</sup> Of course, these harms were not merely "expressive";<sup>31</sup> they had serious instrumental consequences for the "debased" individual. The opinions speak in terms of "equal weight," equal voting "power," and an "equally effective voice," suggesting that the Court was chiefly concerned with the "inputs" of government.<sup>32</sup> By giving some voters a greater electoral voice than others, the state denied to the disfavored voters their equal opportunity to participate in the democracy. This denial of equal protection occurred merely from the number of people per district, not from any subsequent effect at the

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28. See *Reynolds*, 377 U.S. at 554–55; see also *Wisconsin v. City of New York*, 517 U.S. 1, 12 (1996) (stating that the "right to have one's vote counted" is fundamental); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Every voter's vote is entitled to be counted once. It must be correctly counted and reported."); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (concluding that the right to vote includes a right to have it counted).

29. Such a right was not fully established until after the one-person, one-vote cases, incidentally. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

30. See *Reynolds*, 377 U.S. at 557–58; see also *Gray*, 372 U.S. at 380–81 (implying that the weighting of votes based on place of residence within a state would be tantamount to unequal treatment of individuals).

31. Although, perhaps they were also expressive. See generally Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (discussing the expressive harm inflicted by bizarre districts drawn predominantly based on race).

32. See *Gray*, 372 U.S. at 380 ("Every voter's vote is entitled to be counted once. It must be correctly counted and reported. . . . '[T]he right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots."). The Court also wrote:

[O]nce the class of voters is chosen . . . we see no constitutional way by which equality of voting power may be evaded . . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing— one person, one vote.

*Id.* at 381. Many might be surprised to learn that the phrase "one person, one vote" comes from the lesser-known *Gray v. Sanders*, rather than the more prominent *Baker* or *Reynolds* (where it is later repeated).

level of representation or policy-making.<sup>33</sup>

As we will show below, a lot of assumptions underlie the Court's "equality equation": one person plus one vote = equal influence. But for now it might be worth analyzing exactly what the Court means by an equally weighted vote. It cannot mean, for example, that each citizen has a right to equal influence over the political process<sup>34</sup> or even that each voter has a right to an equal chance to have his or her preferred candidate elected.<sup>35</sup> If one were to formalize the formula for equal influence, the Court's opinion implies it would be this: each citizen ought to have the equal probability of casting a tie-breaking vote regardless of the location of his or her residence, all other things being equal.<sup>36</sup> In other words, the chief evil of malapportioned

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33. See *Reynolds*, 377 U.S. at 562-63; see also *Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives."); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) ("It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections . . ."); *Avery v. Midland County*, 390 U.S. 474, 478 (1968) ("Every qualified resident . . . has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population."); *Roman v. Sincock*, 377 U.S. 695, 708 (1964) ("[T]he Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis.").

34. A wealthy campaign contributor or powerful party aparatchik will always have more influence than a simple voter with one vote, for example.

35. The votes of Republicans in the South Bronx or Democrats in parts of the Bible Belt are almost worthless in their respective legislative districts, for all practical purposes.

36. Professor Banzhaf articulated a similar formula that has been frequently used in voting rights cases. See John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the 'One Man, One Vote' Principle*, 75 YALE L.J. 1309, 1319-24 (1966); John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 312-18 (1968); John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317, 322-35 (1965). However, the Supreme Court has rejected the "Banzhaf index" on two occasions. See *Bd. of Estimate v. Morris*, 489 U.S. 688, 697-99 (1989); *Whitcomb v. Chavis*, 403 U.S. 124, 145 (1971). *Whitcomb* rejected the Banzhaf index precisely because it held all things equal in the assessment of voting power: the index did not account for "any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." 403 U.S. at 145-46. It should be noted that the Court in *Whitcomb* did not define "equally effective voice" in terms of the probability of casting a dispositive—or tie-breaking—vote in an election. In *Whitcomb*, the Court rejected a hypothesis that claimed that voters in multi-member districts enjoyed a better chance of casting a tie-breaking vote in an election than their counterparts in single-member districts. The Court in *Whitcomb* did little more than dismiss the hypothesis as "theoretical." See *id.* at 145. In doing so, the Court permitted systems with varying numbers of representatives notwithstanding the possibility that some members of the populace enjoyed more of an opportunity to cast the dispositive ballot in a given election. In the end, the Court fell back on the still-undefined

districts is that some voters in some districts could have a greater chance of casting the dispositive vote in the election of their representative.<sup>37</sup> This formulation seems to drain the opinions of their romantic democratic quality, but this provides an explanation for what the Court means by an “equally effective voice,” a concept left asserted and undefined to this day.

If we understand equal influence in this way, we can better understand the Court’s critical analogies between malapportionment and what might be called “double voting”—the awarding of different numbers of votes to different people. At times the *Reynolds* opinion reduces to a seductive set of syllogisms. The right to vote entails more than simply casting a ballot into thin air. It involves having that ballot counted—and counted equally with those of other voters. Surely, for example, the right to vote implies that the state cannot stuff ballot boxes so as to make your vote meaningless. Likewise, it prevents the government from assigning more votes to some people based, for example, on the fortuity of where they live. If that’s true—that the government cannot give your neighbor two votes for your one—then surely the right to vote means that the government cannot place you in a more populous district such that your vote has half the weight of the voter on the other side of the district line.

Double voting and malapportionment are similar because in both cases two similarly situated individuals are given differential power to cast the tie-breaking vote in an election. The person with two votes can cast the decisive votes in an election if his preferred candidate is tied or just one vote behind the leader, whereas the voter with a single vote will only be able to cast the dispositive vote if both candidates are tied. The situation is somewhat similar to malapportionment. All other things being equal, a voter in a less populated district is more likely to cast the dispositive vote in her district’s election than would her neighbor over the district line who lives in a more populated district. In other words, a voter’s chance of affecting the outcome of an election decreases as the district’s population increases (all other things being equal). Think of it this way, would you be more likely to cast the tie-breaking vote in an election for homeroom representative or in an election for governor?

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concept, first put forth by the *Reynolds* Court as its test for unconstitutional vote dilution: “[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an *equally effective voice* in the election of members of his state legislature.” *Id.* at 141 (quoting *Reynolds*, 377 U.S. at 565) (emphasis added).

37. For a discussion by the Supreme Court regarding the mathematics of tie-breaking votes in multi-member districts, see *Whitcomb*, 403 U.S. at 144–48.

And if it is true that your chance of affecting an election's outcome will vary based on the population size of the electorate, then how can the state justify putting you in a worse position than your neighbor with regard to your chance to effect your favored outcome?

The central problem with this formulaic rationale for the one-person, one-vote rule comes from the phrase "all other things being equal," of course. Only if we control for all other political variables does population size become the dispositive factor in assessing a voter's political influence and the effectiveness of her voice. Once the model becomes more complex and realistic, it falls apart, and, as the Court itself has held, becomes impossible to operationalize.<sup>38</sup> For if the one-person, one-vote rule really means "equal voice," "equal influence," or an "equally weighted vote," it would require much more than equal numbers of people in each district. It would require that each district be equally competitive—that is, safe districts, where one party's nominee is assured the election, would seem to fall victim to the rule of equal weighting of votes. It would prevent partisan gerrymandering or other types of political or race-based vote dilution, where one group has less of an opportunity than others to elect its candidate of choice.<sup>39</sup>

The point of this somewhat tangential discussion is to show that one must look beyond the equality rationale to justify the one-person, one-vote rule.<sup>40</sup> The notion of equal voting power underlying one person, one vote, if taken to its logical conclusion, should have led the Court into much thicker thickets of regulating inequalities in political influence. Two reasons might explain the Court's reluctance to

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38. See *id.*, 403 U.S. at 145–46.

39. Professor Heather Gerken's contribution to this Symposium makes a similar argument in greater detail. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002) (suggesting the Court missed an opportunity in *Baker* to provide clear principles to enforce guarantees of political equality); see generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (discussing theory of vote dilution).

40. Of course, there are other ways of estimating the discrimination caused by malapportionment. One could focus on the reduced face time and attention that a given voter in a more populous district receives—for example, a voter in Delaware, one might argue, is more likely to meet and communicate with her senator than a voter in California or New York. Similarly, from the representative's standpoint, the "casework" required for a district would seem to vary according to a district's population—to take the same example, a senator from Delaware is more likely to be able to look into the problems of a disgruntled social security recipient in his state than would a New York or California senator in hers. Malapportionment misallocates legislative burdens, under this view, as well as electoral opportunities. These unarticulated justifications for one person, one vote, however, are not the principal egalitarian rationales that emerged in the opinion or the proceduralist ones that emerged in the post-*Baker* literature.



address many of these other topics of political inequality. First, malapportionment is much more amenable to judicially manageable standards. As John Hart Ely described the one-person, one-vote rule, "administrability is its long suit, and the more troublesome question is what else it has to recommend it."<sup>41</sup> Standards of equally sized districts are much easier to administer than would be similar ones that might be needed to regulate partisan gerrymandering, for example. Second, the one-person, one-vote decisions are about more than unequal influence; they are about remedying defects in the political process. The chief democratic defects that the one-person, one-vote decisions targeted and to which we now turn our attention are process failures concerning competition and representation.

### *B. Malapportionment as Distortion of the Political Market*

Although talk of "equal rights" may occupy more space in the one-person, one-vote cases, the "process failure" arguments have dominated the related legal debates since the 1960s. The first family of these arguments focuses on the value of competition for the political system. By allowing those with power to rig the rules of the electoral system to keep themselves in office, the argument goes, malapportionment undermined political competition, a bedrock value for a healthy democracy.<sup>42</sup> Without the constraint of equal population, linedrawers could follow Elbridge Gerry's example and freely draw lines around all of the opposition's supporters, awarding them just a few seats, while drawing smaller districts around voters more likely to elect members allegiant to the dominant party.

Competition, or lack thereof, comes in many forms in our electoral and political system, however. Not only does a rich variety of elections exist (that is, federal, state and local; and executive, legislative, and in some states, judicial) such that it is difficult to assess the competitiveness of an electoral system *in toto*, but even when we isolate the relevant candidate race, political scientists will differ as to when it becomes "competitive." If incumbents are frequently defeated, for example, but the party controlling the legislature never changes, would one call that a competitive state? Or what if most seats in the legislature are "safe" (that is, where one or the other party's nominee is guaranteed to win by a large margin), but a critical few are up for grabs and could determine control of the legislature?

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41. ELY, *supra* note 9, at 121.

42. See *Karcher v. Daggett*, 462 U.S. 725, 754 n.13 (1983) (Stevens, J., concurring) (explaining potential for competition-inhibiting gerrymanders).

The move from malapportionment to one person, one vote may have traded one type of non-competitive electoral system for another. But before assessing the damage, it might be helpful to identify the points in the political and electoral system where competition may “matter” and where malapportionment may have an impact.

At the micro level, one would focus on the competitiveness of any given legislative race: is a particular election in a particular legislative district competitive or not? The existence of multiple (or at least more than one) candidates on the ballot may be a necessary, but hardly sufficient, characteristic of a competitive electoral system. An election that forces a choice between Al Gore, Ralph Nader, and Pat Buchanan, for example, is hardly a competitive race, despite three possible choices. Although competition implies some “choice,” the number of choices does not bear directly on the competitiveness of the race if the winner of the election is, for all practical purposes, preordained. The “preordination” of an election is really what makes it non-competitive, but that phenomenon turns out to be a very tricky one to describe and to measure. Ultimately, the competitiveness of an election depends on whether one candidate or party has a much greater chance of winning than does its opponent. In many cases, it turns on the strength of incumbency and the probability that a “quality” challenger will emerge.

Political competition, like pornography, may be something difficult to define but something we know when we see it. There are two ways of “seeing” competition: one looks at competitive conditions *ex ante* and another examines the results of the election *ex post*. Before an election, if one knew nothing else about a district except the partisanship of its constituents, a “competitive” district would be one with an equal number of Democrats and Republicans, the logic being that neither party’s nominee then has a better chance (all other things being equal) of winning. The party affiliation of district residents is only a rough estimate of how they will vote between two hypothetical candidates, of course. What we really want to know is the chance that the electorate will be equally divided between two candidates once the votes are cast. That “chance” will depend on a number of factors in addition to the partisan balance in the district: the presence or absence of an incumbent running for re-election, the “quality” of the challenger, the level of campaign spending by each candidate, the national partisan swing during the election, the differential rates of turnout of each candidate’s supporters, and many other idiosyncratic “campaign” effects.

Because a competitive election is hard to predict in the abstract,

those who study legislative elections often examine electoral results to determine a district's competitiveness.<sup>43</sup> Most analysts use the margin of victory in the race to separate competitive from noncompetitive districts. Experts will differ as to the size of the margin that indicates competitiveness (5%,<sup>44</sup> 10%,<sup>45</sup> or 20%<sup>46</sup>), and any threshold is inherently arbitrary. To repeat, the numbers are used merely as a proxy for a determination of whether the loser had a good chance of winning. Moreover, numbers from one election may not be reliable in assessing the competitiveness of the district, generally, or of even the next election, in particular.<sup>47</sup>

When assessing the impact of malapportionment on individual, district-level competitiveness, those concerned with political competition focus on the ability of those who draw the lines to preordain electoral outcomes. Most often, this concern translates into an analysis of the electoral advantage conferred upon incumbents by the redistricting process: did the one-person, one-vote rule lead to a greater number of seats where incumbents were in danger of losing? This question is really just one example of the larger question: was it more or less difficult after *Baker* for those who drew district lines to draw them in such a way as to preordain the victor in the race? That victor might be a particular individual (for example, a particular incumbent) or a class of individuals (for example, potential candidates of one political party).

Individual, district-level effects were not the principal concern of the process-school that supported the shift to one person, one vote. Malapportionment presented a problem for the democratic system not principally because any given district was non-competitive, but because the legislature as a whole was dominated by a faction (usually party) whose re-election was perpetually reassured. Thus, competition for control of the *legislature* was the type of competition

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43. See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 142-46 (2001); THOMAS E. MANN, *UNSAFE AT ANY MARGIN: INTERPRETING CONGRESSIONAL ELECTIONS* 81-99 (1977); John A. Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AM. POL. SCI. REV. 166, 175 (1977); David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295, 296-97 (1974); Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 540 (1973).

44. See Mayhew, *supra* note 43, at 297.

45. See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002).

46. See Ferejohn, *supra* note 43, at 166 n.1.

47. See MANN, *supra* note 43, at 81-99; Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952-82*, 31 AM. J. POL. SCI. 126, 133 (1987).

that generated the greatest concern both on the Court and from subsequent legal analysts because it was thought to be most susceptible of manipulation by the majority party in the legislature. Control of a legislature and of the redistricting process depends on which party has a majority of legislative seats. Because the legislative majority usually must approve a new districting plan, drawing lines so as to maintain majority status is the key to calcifying the political process to ensure no political change can take place. One person, one vote would help prevent partisan gerrymandering, one might have thought, because linedrawers would be less able to overrepresent their constituencies and underrepresent those of their opponents. Thus, we would expect legislative turnover—the changing of the guard in control of a state legislature—to be more frequent once the Court stepped in and enacted the one-person, one-vote rule. We test this hypothesis in Part IV of this Article.<sup>48</sup>

### C. Malapportionment and [Mis]representation

Because malapportionment allowed those in power to draw districts to favor some candidates and parties over others, it naturally favored some “interests” and “constituencies” over others.<sup>49</sup> Malapportionment, some argued, served to skew representation in favor of those groups that constituted a small share of the population but controlled a larger number of seats in the legislature. Because districts were often drawn according to county lines, rural voters (and the party of which they were members) in less populated counties were thought to be overrepresented in the legislatures at the expense of voters in cities and suburbs.<sup>50</sup> Such malapportionment creates representational “harm” when voters in less populated districts have different interests or preferences than those in overpopulated districts. Thus, one group has a louder “voice” in the legislature despite the fact that it has fewer numbers in the population.

Representation, like competition, means different things to different people, and what constitutes “accurate” representation is

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48. See *infra* notes 90–106 and accompanying text.

49. See *Reynolds v. Sims*, 377 U.S. 533, 567 n.43 (1964) (“[W]hile currently the thrust of state legislative malapportionment results, in most States, in underrepresentation of urban and suburban areas, in earlier times cities were in fact overrepresented in a number of States.”); see also *Moody v. Flowers*, 387 U.S. 97, 102 (1967) (suggesting that malapportionment might lead to a pattern of misrepresentation); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 636 (1964) (noting the existence of a “grossly unfair weighting of both houses in the State legislature in favor of the lesser populated rural areas of the state to the great disadvantage of the densely populated urban centers of the state”).

50. See, e.g., *Reynolds*, 377 U.S. at 567 n.43; *WMCA*, 377 U.S. at 636.

among the most hotly debated topics in political philosophy.<sup>51</sup> One metric often used to measure representational distortion is the minimum percentage of the population needed to win a majority of the seats in the legislature. Thus, in a three-person legislature where two districts represent populations of ten people but a third contains eighty people, a party could win the two small districts (representing 20% of the population) but still have a majority of the seats. We present such a measurement of misrepresentation for all fifty states before *Baker v. Carr* in Table 1.

Those who study the political effects of redistricting<sup>52</sup> have isolated two distinct ideas implicit in the debate over malapportionment and misrepresentation: partisan bias and electoral responsiveness. Partisan bias is the “the degree to which an electoral system unfairly favors one political party in the translation of statewide (or nationwide) votes into the partisan division of the legislature.”<sup>53</sup> Roughly speaking, if a state’s Republicans win 50% of the votes in a legislative election statewide but win 55% of the seats, the districting plan exhibits a pro-Republican bias of 5%.<sup>54</sup> Electoral responsiveness refers to a similar concept. Gelman and King describe it as the “degree to which the partisan composition of the legislature responds to changes in voter preferences.”<sup>55</sup> It can be measured by finding “the expected seat proportion given a small change in the vote proportion.”<sup>56</sup> Thus, an electoral system that translates a 2%

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51. See generally HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967) (presenting alternative views and definitions for representation); LANI GUINIER, *TYRANNY OF THE MAJORITY* (1994) (discussing issues of race and representation).

52. See Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 542–43 (1994).

53. *Id.* at 543.

54. Estimating bias turns out to be a complicated enterprise because under plurality voting systems with single-member districts, even without gerrymandering, the proportion of seats a party wins is ordinarily greater than the proportion of votes it receives. To say a particular array of districts is “biased” assumes the existence of a baseline map without such a bias. But no such politically “neutral” map exists to compare against the biased one that was drawn. One must then surmise a natural level of bias in the system and estimate the difference between that bias and the one that actually occurs. The complexity is not relevant for our present purposes, however. For a more in-depth discussion of these issues, see Gelman & King, *supra* note 52; Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987); Gary King & Andrew Gelman, *Systemic Consequences of Incumbency Advantage in U.S. House Elections*, 35 AM. J. POL. SCI. 110 (1991).

55. Gelman & King, *supra* note 52, at 542.

56. Other measures of responsiveness can be found in Stephen Ansolabehere et al., *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21 (1992); M.G. Kendall & A. Stuart, *The Law of the Cubic Proportions in Electoral Results*, 1 BRIT. J. SOC. 183 (1950); Richard G. Niemi & Patrick Fett, *The Swing Ratio: An Explanation*

TABLE 1: State Apportionment Prior to *Baker v. Carr*

State	Last Two Apportionments Before 1960	Minimum Vote Need to Control in 1962	
		Senate	House
Alabama	1901, 1880	25.1%	25.7%
Alaska	1956, 1953	35.0	49.0
Arizona	1958, 1956	12.8	N/A
Arkansas	1951, 1941	43.8	33.3
California	1951, 1941	10.7	44.7
Colorado	1953, 1933	29.8	32.1
Connecticut	1876-H, 1941-S	33.4	12.0
Delaware	1897	22.0	18.5
Florida	1955-H, 1945	12.0	12.0
Georgia	1950, 1940	22.6	22.2
Hawaii	1959, 1958	23.4	47.8
Idaho	1951, 1941	16.6	32.7
Illinois	1955, 1901	28.7	39.9
Indiana	1921, 1915	40.4	34.8
Iowa	1927-H, 1911-S	35.2	26.9
Kansas	1959-H, 1947-S	26.8	18.5
Kentucky	1942, 1918	42.0	34.1
Louisiana	1921, 1902	33.0	44.1
Maine	1955-H, 1951-S	46.9	39.7
Maryland	1943	14.2	25.3
Massachusetts	1947-H, 1948-S	44.6	45.3
Michigan	1953, 1943	29.0	44.0
Minnesota	1959, 1913	40.1	34.5
Mississippi	1916, 1904	34.6	29.1
Missouri	1951, 1946	47.7	20.3
Montana	1943, 1939	16.1	36.6
Nebraska	1935, 1920	36.6	Unicameral
Nevada	1951, 1947	8.0	35.0
New Hampshire	1951-H, 1915-S	45.3	43.9
New Jersey	1941, 1931	19.0	46.5
New Mexico	1955, 1949	14.0	27.0
New York	1954, 1944	41.4	33.4
North Carolina	1941, 1921	36.9	27.1
North Dakota	1931, 1921	31.9	40.2
Ohio	1957, 1953	41.0	30.3
Oklahoma	1951, 1941	24.5	29.5
Oregon	1954, 1911	47.8	48.1
Pennsylvania	1953, 1921	33.1	37.7
Rhode Island	1940, 1930	18.1	46.5
South Carolina	1952, 1942	23.3	46.0
South Dakota	1951, 1947	38.3	38.5
Tennessee	1901	26.9	28.7

TABLE 1—Continued

State	Last Two Apportionments Before 1960	Minimum Vote Needed to Control in 1962	
		Senate	House
Texas	1951, 1921	30.3	38.6
Utah	1955, 1931	21.3	33.3
Vermont	1793	47.0	11.6
Virginia	1958, 1952	37.7	36.8
Washington	1957, 1931	33.9	35.3
West Virginia	1950, 1940	46.7	40.0
Wisconsin	1951, 1921	45.0	40.0
Wyoming	1931, 1921	26.9	35.8
Average		30.8%	34.0%

Notes: Basis of apportionment taken from *The Book of the States, 1962-1963, Volume 14*. (Chicago, IL: The Council of State Governments, 1963). Minimum vote needed to control house taken from *Apportionment in the Nineteen sixties*. (New York: National Municipal League, 1967). Dates of previous apportionments taken from *The Book of the States, 1960-1961, Volume 13*. (Chicago, IL: The Council of State Governments).

Republican gain in the statewide vote into a 2% gain in seats is more responsive than an electoral system that only gives the Republicans a 1% gain in seats.<sup>57</sup> Measures of responsiveness therefore indicate the ability of the electoral system to translate *changes* in voting patterns into *changes* in legislative seat allocation. Bias indicates the propensity of the electoral system “to get it right”—that is, to translate vote shares into seat shares.

Nothing in these concepts limits them to party affiliation, of course. One could just as easily examine whether an electoral system is biased in favor of rural interests or members of a particular racial or ethnic group. Any electorate can be cut in an infinite number of ways; the process of line-drawing could overrepresent any kind of interest over another.

Before moving to what political scientists have said on these subjects, we should note the tension between competition and representation in the process of drawing district lines. Advocates for

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57. Electoral responsiveness turns out to be a pretty complicated concept when used to evaluate different electoral systems. Most would agree that some change in vote share should be reflected in some change in seat share, but it is not abundantly clear that there should be a direct relationship (that is, a perfectly responsive system would not necessarily translate every 1% change in vote share into a 1% change in share of seats). Political scientists often refer to the “cube rule” as a description of electoral responsiveness. That rule provides that a party’s gain in seat share should be the cube of its gain in vote share. See sources cited in *supra* notes 54-56. Professor Schotland faults us for concentrating on bias and ignoring responsiveness in the empirical work we present later in this Article. To properly assess responsiveness we would need to embark on a lengthy, mathematically rich discussion that space considerations and our assessment of audience interest prevent. We would refer those who savor the calculus involved to the sources cited in this subsection. See *supra* note 54-56.

“electoral reform” often overlook this important fact.<sup>58</sup> It is almost impossible to design a system of districts that maximizes both representation and competitiveness. Assume, for example, that one wishes to maximize district-level competition. It can be easily done: just draw districts so that each one has about 50% Democrats and 50% Republicans. Now that all districts are “competitive,” what happens when 1% of the electorate shifts its preferences or has greater turnout, as happens, for example, when a popular presidential winner has long coattails? The result: each district narrowly elects a candidate from the same party, producing a highly unrepresentative legislature where one party wins 100% of the seats with a mere 51% of the vote per district.

Consider the other worst-case scenario—the so-called “bipartisan” or incumbent-protecting gerrymander. Under those types of schemes, incumbent Democrats and Republicans divide up the electorate into safe Democratic and safe Republican districts. The result: the legislature that emerges is quite representative (perhaps even close to proportional representation) but each election is non-competitive. More voters are “happy” with their representative (that is, the winning candidate wins by a lot), but the winner is preordained, to a large extent.<sup>59</sup>

These types of tradeoffs often infect decisions of electoral institutional design. Criticisms of the current system (for example, that “elections mean little because the decision is already made” or “we want a legislature that is responsive to the people”) often run counter to each other.

## II. BAKER'S EFFECT ON ELECTORAL COMPETITION: MALAPPORTIONMENT, THE VANISHING MARGINALS, AND THE INCUMBENCY ADVANTAGE

For those who viewed static district lines in the face of shifting populations as a hindrance to electoral competition at the district level, the one-person, one-vote rule offered some hope that with a

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58. See, e.g., Samuel Issacharoff, *In Real Elections, There Ought To Be Competition*, N.Y. TIMES, Feb. 16, 2002, at A19.

59. The Court has all but sanctioned bipartisan gerrymanders that aim for proportional representation-like results. For instance, in *Gaffney v. Cummings*, a Connecticut redistricting plan provided for “70 safe Democratic seats, 55 to 60 safe Republican seats, with the balance characterized as probable or swing Democratic or Republican or ‘just plain swing,’” 412 U.S. 735, 738 n.4 (1973), thus providing for “what was thought to be a proportionate number of Republican and Democratic legislative seats.” *Id.* at 738. The Court upheld the plan notwithstanding the existence of a clear bipartisan gerrymander. See *id.* at 735–36, 740–41.



new constitutional rule would come a more vibrant political market. One plausible hypothesis was that a move to equipopulous decennial districting would threaten individual legislators reliant on predictable constituencies and comfortable with calcified district lines. The first wave of empirical studies on the political effects of *Baker* and *Reynolds* suggested this hypothesis was wrong.

In fact, early observers found that, if anything, the reapportionment decisions added to the advantages of incumbency, rather than detracting from them. After noting that only about 13% of House races were competitive in 1970 as compared to 21% in 1950, Edward Tufte blamed redistricting:

[A] major element in the job security of incumbents is their ability to exert significant control over the drawing of district boundaries . . . . It is hardly surprising that legislators, like businessmen, collaborate with their nominal adversaries to eliminate dangerous competition. Ironically, reapportionment rulings have given incumbents new opportunities to construct secure districts for themselves, leading to a reduction in turnover . . . .

....

Many states, through recent reapportionments, have practically eliminated political competition for congressional seats—even compared to the relatively small proportion of competitive seats in the past.

....

The independent contribution of reapportionment to the job security of incumbents can also be seen directly in . . . an immediate decline in the competitiveness of the races in the first election after the new districting.<sup>60</sup>

For the period immediately following *Baker* and *Reynolds*, Tufte and others<sup>61</sup> found that the Supreme Court's one-person, one-vote

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60. Tufte, *supra* note 43, at 550–53; see also John F. Gallagher & Louis F. Weschler, *California, in IMPACT OF REAPPORTIONMENT ON THE THIRTEEN WESTERN STATES* 86 (Eleanore Bushnell ed., 1970) (finding no material effect on incumbent “political fortunes”) [hereinafter *IMPACT OF REAPPORTIONMENT*]; Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1234 (1972) (examining partisan distribution of northern congressional seats) [hereinafter Erikson, *Congressional Elections*]; Robert S. Erikson, *The Partisan Impact of State Legislative Reapportionment*, 15 MIDWEST J. POL. SCI. 57, 57 (1971) (finding that the move to equipopulous districting benefited Democrats) [hereinafter Erikson, *Partisan Impact*].

61. See, e.g., Albert D. Cover & David R. Mayhew, *Congressional Dynamics and the Decline of Competitive Congressional Elections*, in CONGRESS RECONSIDERED 62–82

rule, far from destabilizing incumbency and leading to more vibrant electoral competition, either helped House incumbents win more convincingly or at least did nothing to stand in their way. Before 1966, 61% of House incumbents would beat their opponents by twenty points or more, but by 1972 the figure had jumped to approximately 78%.<sup>62</sup> Although the 1974 election with its fallout from Watergate saw a small drop in incumbents' margin of victory, in every election since then about 70% of incumbents win by twenty points or more. Similar research revealed comparable trends in state legislative races.<sup>63</sup>

This early literature recognizing "the vanishing marginals" (that is, disappearance of competitive districts) was succeeded by more methodologically sophisticated inquires that complicated the idea of an incumbency advantage, and cast serious doubt on redistricting as the primary culprit. All agreed that incumbents were winning by bigger margins, but many disagreed that redistricting was to blame or that margins of victory were the proper measure of incumbents' security. If redistricting under the new rules was to blame for the vanishing marginals, then one would have expected the following: incumbent safety should have spiked after 1964 relative to earlier decades, incumbents whose districts were not redrawn would have been less secure than those with redrawn districts, and Senate incumbents would not have experienced a similar incumbency advantage given that they were not subject to redistricting. None of these expected phenomena appear to have occurred.

First, scholars point out that the number of marginal districts began to decline much earlier, in 1896 or 1932, not in 1966.<sup>64</sup> In 1932,

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(Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); Richard Born, *Generational Replacement and the Growth of Incumbent Reelection Margins in the U.S. House*, 73 AM. POL. SCI. REV. 811, 811 (1979); Charles S. Bullock III, *Redistricting and Congressional Stability*, 37 J. POL. 569, 575 (1975); Erikson, *Congressional Elections*, *supra* note 60; James L. Payne, *The Personal Electoral Advantage of House Incumbents, 1936-1976*, 8 AM. POL. Q. 465, 465 (1980).

62. See JACOBSON, *supra* note 43, at 27.

63. See MALCOLM E. JEWELL, REPRESENTATION IN STATE LEGISLATURES 46-48 (1982); Jerry Calvert, *Revolving Doors: Volunteerism in State Legislatures*, 52 ST. GOV'T 174, 175 (1979); Malcolm E. Jewell & David Breaux, *The Effect of Incumbency on State Legislative Elections*, 13 LEGIS. STUD. Q. 495, 495 (1988); David Ray & John Havick, *A Longitudinal Analysis of Party Competition in State Legislative Elections*, 25 AM. J. POL. SCI. 119, 119 (1981); Charles M. Tidmarch et al., *Interparty Competition in the U.S. States: Legislative Elections, 1970-1978*, 11 LEGIS. STUD. Q. 353, 361-62 (1986); Ronald E. Weber et al., *Vanishing Marginals in State Legislative Elections*, 16 LEGIS. STUD. Q. 29, 29 (1991).

64. See WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS *passim* (1970); James C. Garand & Donald A. Gross, *Changes in the Vote Margins for Congressional Candidates: A Specification of Historical Trends*, 78

for example, only about a third of congressional elections were noncompetitive (that is, where the victor won 60% or more of the vote), but in 1960 (even before *Baker*) a little more than half were.<sup>65</sup> By 1946, when most scholars begin their analysis of the post-war period, about 60% of incumbents were in "safe" districts, a figure that grew to 75% in the late sixties, around which it has fluctuated for the next thirty years. Thus, however suggestive the before-and-after photos of district marginality in 1964 may be, a longer-term view reveals a drop in marginality that began much earlier. The number of marginal districts declined somewhat abruptly in the mid-sixties, but the downward trend began much earlier. So the redistricting decisions, while certainly not preventing the decline in the number of marginal districts, could hardly have *caused* the trend.

Second, if redistricting "caused" the alleged increase in incumbent safety, then one might have expected incumbents in redrawn districts to win reelection more easily than incumbents in nonredrawn districts. John Ferejohn demonstrated the absence of this phenomenon as well.<sup>66</sup> To be sure, those states that redrew their districts experienced a large drop in the number of competitive districts, from about 51% in 1962 to 27% in 1970. But states that did not redistrict experienced a near equal drop from 51% in 1962 to 33% in 1970.<sup>67</sup> Something else—besides redistricting—appeared to have been going on around the time of one person, one vote that led to greater victory margins for incumbents.

Finally, the rise of incumbent security in Senate races at the same time as in the House casted doubt on the redistricting hypothesis.<sup>68</sup> Those who have estimated the incumbency effect find an increase in the 1960s that even exceeds that in the House. One scholar found that by 1970 Senate incumbents beat their opponents by an average of eleven percentage points—up from four percentage points in 1950.<sup>69</sup> Given that Senate districts—that is, states—do not undergo

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AM. POL. SCI. REV. 17, 20 (1984).

65. Donald A. Gross & James C. Garand, *The Vanishing Marginals: 1824-1980*, 46 J. POL. 224, 227-28 (1984).

66. Ferejohn, *supra* note 43, at 167; *see also* Bullock, *supra* note 61, at 575; Albert D. Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 AM. J. POL. SCI. 523, 523 (1977).

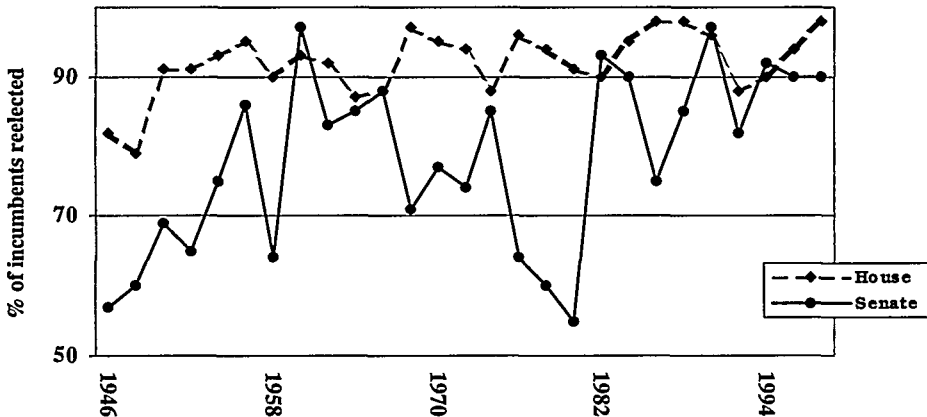
67. Cox and Katz suggest that Ferejohn underestimated the severity of the drop in marginality in newly drawn districts, although they agree that both redrawn and unchanged districts showed some drop in marginality. *See* COX & KATZ, *supra* note 45.

68. Warren Lee Kostroski, *Party and Incumbency in Postwar Senate Elections: Trends, Patterns and Models*, 67 AM. POL. SCI. REV. 1213, 1213 (1973).

69. *See id.*

redistricting, a rise in incumbency advantage in the Senate paralleling that in the House (as depicted in Figure 1) suggests that the changing importance of incumbency, rather than the new practice of line-drawing, was responsible for increasing incumbent safety.<sup>70</sup> A host of alternative explanations—such as the decline of strong party identification and the rise of a personal vote, the increase in casework, pork-barreling and credit-claiming by incumbents, the rise in resources available to officeholders, and the disappearance of quality challengers—seems to provide a better explanation for the incumbency advantage.<sup>71</sup>

**FIGURE 1: Percentage of Incumbents Reelected**



Source: GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* Tbls. 3-1, 3-2 (5th ed. 2001).

It should be noted, however, that not everyone even agrees that incumbents have been getting safer. It may be true that they are winning by bigger margins than ever—or at least since 1960. But while the marginals may have vanished, incumbents may not be safer. Just because incumbents tend, on average, to beat their opponents ever more handily does not mean that a given incumbent, after winning a huge victory, is necessarily more secure that he can do it again next time. As Tom Mann put it in the title of his book,

70. See Benjamin Highton, *Senate Elections in the United States, 1920–94*, 30 *BRIT. J. POL. SCI.* 483, 505–06 (2000); Michael Krashinsky & William J. Milne, *The Effects of Incumbency in U.S. Congressional Elections, 1950–1988*, 18 *LEGIS. STUD. Q.* 321, 321 (1993).

71. See JACOBSON, *supra* note 43, at 30–40.

sometimes incumbents feel "Unsafe at Any Margin."<sup>72</sup> In fact, Gary Jacobson has argued that incumbents are even less safe today than they were previously despite the fact that when they win, they do so by much larger margins than ever before.<sup>73</sup> Interelection vote swings have gotten larger, he argues, so an incumbent's vote share in one election is a less reliable predictor (than previously) of his likely vote share in the next election. Do not confuse incumbent safety with low average rates of competitiveness, the argument goes, because a safe seat in one election could be vulnerable in the next.

At the highest level of complexity are the arguments that redistricting actually increased competitiveness somewhat because it introduced randomness, partisan gerrymandering and a certain rhythm to quality challenger entry and incumbent exit.<sup>74</sup> Those making such arguments focus on two developments introduced by decennial redistricting: (1) the mere fact that the district map is now, in a sense, shuffled every ten years; and (2) that challengers will time their entry and incumbents will time their exit to coincide with the redistricting cycle. Although it is true that before 1962, parties in control of legislatures could target their opponents for elimination, the practice became routinized once the Court mandated decennial redistricting. The result is not only that some incumbents lose in seats newly made unsafe, but also that many simply exit once they see their heads on the chopping block. Even those who are not targeted may have their districts redrawn such that the incumbents feel it might be harder to win and now would be a good time to exit. Correlatively, quality challengers now bide their time until the next redistricting cycle—waiting to see where and when they would most likely get elected. This explanation of the rhythmic effect of decennial redistricting on incumbent exit and challenger entry has won over many, but certainly not all,<sup>75</sup> who study the incumbency advantage.

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72. See MANN, *supra* note 43, at 1–9; see also JACOBSON, *supra* note 43, at 35–36 (noting the "electoral value" of the incumbent advantage is "clearly not a constant"); Jacobson, *supra* note 47.

73. See JACOBSON, *supra* note 43, at 48; Jacobson, *supra* note 47, at 126 ("Vote margins increased without adding to incumbent security . . . because the heterogeneity of interelection vote swings increased at the same time.").

74. See COX & KATZ, *supra* note 45 (manuscript at chs. 8–9); Stephen Ansolabehere & Alan Gerber, *Incumbency Advantage and the Persistence of Legislative Majorities*, 22 LEGIS. STUD. Q. 161, 166–67 (1997); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478, 492 (1996); Jacobson, *supra* note 47, at 128.

75. See, e.g., Monica Bauer & John R. Hibbing, *Which Incumbents Lose in House Elections: A Response to Jacobson's "The Marginals Never Vanished,"* 33 AM. J. POL. SCI. 262, 262 (1989).

Given the increase since 1964 of the incumbency advantage, however one defines it and however one controls for other variables, even those who see some pro-competitive effect from redistricting see only a modest one. From all these studies of the incumbency advantage emerges the tenable proposition that redistricting under the one-person, one-vote rule either reinforced the power of incumbents or did not prevent them from using other advantages of office to strangle competition out of the electoral process. Although quite disappointing news for those who saw in *Baker* and its progeny a hope for a competitive political market, perhaps the rise in incumbent advantages would be offset by larger benefits to the political process in terms of constraining partisan gerrymandering. We explore this possibility in Part IV when we examine the effect of *Baker* on change in control of state legislatures.

### III. ONE PERSON, ONE VOTE AND THE DREAM OF ACCURATE REPRESENTATION

Most post-*Baker* defenders of the one-person, one-vote rule have focused on malapportioned legislatures' misrepresentation of certain identifiable groups of people. The principal "harm" of malapportionment was that districts varying widely in population helped produce legislatures that misrepresented the underlying political composition of the state and underrepresented urban areas, in particular.<sup>76</sup>

The first attempts to measure the partisan impact of post-*Baker* reapportionments did not find a systematic national trend in one

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76. As noted above, *see supra* note 14, we concentrate here on political representation defined by partisanship rather than representation based on levels of urbanization, as others have done and as Professor Schotland would have us do. We take this approach for several reasons. First, it is much easier to identify and measure whether a certain party has benefited or not as opposed to whether a certain type of area (rural, urban, suburban) has. We can identify legislators as belonging to one or another party, but their districts will often cover a mixture of levels of urbanization. (This problem is not insurmountable, but would require some lengthy and fancy methodological explanations that space prevents us from undertaking here.) Second, because we organize our legislative institutions along party lines and legislation tends to get passed when at least one of the parties is behind it, partisan representation is perhaps the most important measure of the political effect of one person, one vote. Party affiliation also exists as the principal political identity for most Americans and has always been the strongest predictor of vote choice, thus making *Baker's* partisan effect a good indicator of the effect of the one-person, one-vote rule on the translation of political preferences into legislative seats. Finally, as we observe later in this Article, the urban-rural cleavage often mapped onto the partisan cleavage in several states. Although neither party had a nationwide monopoly on representation of rural, urban, and suburban interests, in particular states one party often did.

partisan direction or the other.<sup>77</sup> Some found successful partisan gerrymanders<sup>78</sup> while others found unsuccessful ones<sup>79</sup> or none at all.<sup>80</sup> Who “won” as a result of the one-person, one-vote decisions appeared to depend on a number of factors: whether one party controlled the redistricting process, the degree of malapportionment in the preceding plan, the geographic dispersion or concentration of partisans of each party, and the date of the new reapportionment (for example, was the first post-*Baker* election in the midst of the 1964 Democratic landslide or the 1966 Republican retrenchment?). All appeared to recognize, however, that a Republican bias in non-southern congressional elections disappeared around the time of the one-person, one-vote decisions.<sup>81</sup> This bias produced about 6% more Republican seats in the non-southern congressional delegation than the Republicans’ vote-share should have “earned” them. By the end of the 1960s redistrictings, that figure had shrunk to under 1%. Was the new wave of redistricting to blame? And if so, how and why?

In what will likely emerge as the definitive study of the impact of the one-person, one-vote cases on elections to the U.S. House of Representatives, Gary Cox and Jonathan Katz have developed a model for 1960s redistricting that incorporates all institutional players as well as the changing partisan environment throughout the decade.<sup>82</sup> What emerges from their study are context-specific arguments that pay special attention to the “reversionary outcome” of a redistricting dispute: the plan that goes into effect if the governor and legislature cannot agree on a plan. The potential reversionary outcome, which

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77. It is interesting to note that both parties (at the national level) hailed the one-person, one-vote decisions. Democrats long thought that urban centers—a traditional power base—were underrepresented and would benefit from redistricting under equal population rules. (Actually, it turned out the suburbs were most underrepresented.) And Republicans, looking at the various congressional district maps throughout the country, noticed that their districts, on average, actually had more people in them than did the Democrats’ districts.

78. See, e.g., Ward Elliot, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 490 (1970); Erikson, *Congressional Elections*, *supra* note 60.

79. See, e.g., Richard Born, *Partisan Intentions and Election Day Realities in the Congressional Redistricting Process*, 79 AM. POL. SCI. REV. 305, 305 (1985); Bullock, *supra* note 61, at 575.

80. See, e.g., Jack L. Noragon, *Redistricting, Political Outcomes, and Gerrymandering in the 1960s*, 219 ANNALS N.Y. ACAD. SCI. 314, 330–31 (1973).

81. See, e.g., David W. Brady & Bernard Grofman, *Modeling the Swing Ratio and Bias in the U.S.: 1846–1980*, 10 POL. GEOGRAPHY 254 (1991); David W. Brady & Bernard Grofman, *Sectional Differences in Partisan Bias and Electoral Responsiveness in U.S. House Elections, 1850–1980*, 21 BRIT. J. POL. SCI. 247, 247 (1991); Erikson, *Partisan Impact*, *supra* note 60; King & Gelman, *supra* note 52.

82. COX & KATZ, *supra* note 45.

would usually be determined by a court after *Baker*, can have both direct and indirect effects on the districting plans passed in response to the Court's edict. A direct effect arises when the legislature and governor fail to agree on a district map, and then the bias of the reversionary actor (a court) will be expressed in the plan that emerges. An indirect effect arises when knowledge of the bias of the reversionary actor alters the bargaining position of the parties negotiating the redistricting plan, such that those who think the reversion will benefit them "hold out" for and usually get a better deal than their partners in negotiation would otherwise offer.

For Cox and Katz, the "reversionary outcome" after *Baker* usually meant a plan drawn by a court consisting of disproportionately Democratic appointees (given the "partisan" composition of the judiciary in the mid-sixties). Thus, they argue that the status quo before *Baker* favored Republicans (that is, prevented plans that would counteract the extant Republican bias) whenever Republicans could obstruct a Democratic or less biased redistricting plan. Once the courts got involved, however, Republicans could not rely on the existing redistricting plan as the default outcome of government inaction.<sup>83</sup> Instead, under conditions of divided government, Republicans had to negotiate a plan that their Democratic counterparts found acceptable (a "bipartisan," usually incumbent-favoring plan) or take their chances with the court that would draw the plan once the parties reached stalemate.

Much as one of us<sup>84</sup> might find the suggestion of systematic judicial partisanship generally distasteful (despite a certain recent Supreme Court debacle), Cox and Katz provide rigorous empirical support for their model.<sup>85</sup> The most interesting aspect of their findings is that courts, regardless of partisanship, were equally likely to strike down a malapportioned plan.<sup>86</sup> But partisanship crept in,

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83. *Id.* (manuscript at 123) ("The more Democratic jurists a court had, the higher the level of pro-Democratic bias in the redistricting plan it supervised.").

84. Persily, that is. One flaw in Cox and Katz's argument appears in their suggestion that each type of court (state and federal and each level of the state and federal system) would provide for a similar mode of reversion. For example, for five of their cases they describe the U.S. Supreme Court as the supervising court because that court intervened before the state could draw its lines to comply with *Baker*. But the U.S. Supreme Court has never drawn district lines. It always remands to a district court to perform the dirty work. So it seems that casting the Supreme Court as a Democratic reversion overlooks a level of complexity that would also have been obvious to the state officials who were bargaining and drawing the district lines. COX & KATZ, *supra* note 45 (manuscript at 91).

85. See generally COX & KATZ, *supra* note 45 (manuscript at 85-139).

86. *Id.* at 102 ("Holding constant a plan's malapportionment, a friendly court was not significantly more likely in principle to accept it than a hostile court.").



they say, when courts decided whether or not the rejected plan would be used for the upcoming election (usually the 1964 Democratic landslide or the 1966 Republican correction).<sup>87</sup> In other words, courts largely agreed on the legal standard, but varied considerably in how they would administer the conversion to an equitable reapportionment. Some redrew districts themselves for the next election, others threatened to do so if the legislature did not redraw the map immediately, and still others (the "friendly" courts) allowed the biased, malapportioned plan to stay in effect for the next election while the linedrawers contemplated what changes to make for future elections.

Cox and Katz arrive at the conclusion that Democratic court supervision plus an overwhelming Democratic electoral tide in 1964 swept away much of the Republican bias of non-southern congressional delegations and replaced it with a mild Democratic bias. In particular, they note that Democratic courts supervised the redrawing of the four largest Republican-controlled states—Michigan, Ohio, New Jersey, and New York—and in about two-thirds of the redistricting cases they study. The authors suggest that control of the judiciary was equally as important as control of state government. Thus, the existence of the Democratic reversion at a time when state legislatures underwent significant partisan recomposition following the 1964 Democratic landslide provided a double blow to the Republican party outside the South. Because the next two reapportionment cycles (1970 and 1980) were largely incumbent-protecting or status-quo-reinforcing gerrymanders,<sup>88</sup> moreover, the initial pro-Democratic blow had sustained effects.

Cox and Katz also use their model to explain the rise in the incumbency advantage and the vanishing of marginal districts. According to them, marginal districts decreased in large part because Democratic gerrymanders in the 1960s packed Republicans into very safe seats and bipartisan redistricting plans protected incumbents generally. By Democratic design, a large number of districts represented by Republican incumbents became noncompetitive. Correlatively, many Democratic districts actually became less Democratic (appearing, but not really being, more competitive) as

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87. *Id.* at 129.

88. See Janet Campagna & Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J. POL. 1242 (1990) (describing 1980s redistricting as status quo reinforcing); Amihai Glazer et al., *Partisan and Incumbency Effects of 1970s Congressional Redistricting*, 31 AM. J. POL. SCI. 680 (1987) (noting pro-incumbent effect of 1970s congressional redistricting).

the Democrats spread their supporters more efficiently to maximize the number of seats they would win. Thus, they contend, we can better understand why the marginals vanished, why the incumbency advantage grew (almost regardless of the competitiveness of the district) and why Democrats could maintain their hold on Congress until 1994. Of course, gerrymandering is only one part of the story. The other parts—a mid-sixties Democratic resurgence and other institutional changes that insulated incumbents—helped codify the changes brought about in the immediate post-*Baker* redistricting.

The modern consensus appears to be that in most contexts, the one-person, one-vote rule had a “pro-representational” effect.<sup>89</sup> By that we mean that the introduction of equipopulous redistricting—even when it aided a partisan gerrymander—appears to have produced legislative delegations more representative and less biased than those that existed before *Baker*. But a lot gets lost in the generalities of this discussion: any representational effect appears to vary based on context and over time. A more focused approach would attempt to isolate the political impact of post-*Baker* reapportionment from other co-dependent variables, including concomitant population growth and ideological shifts taking place during the politically turbulent sixties. The experiments we conduct in the next Part highlight these context-specific effects.

#### IV. ONE PERSON, ONE VOTE AND STATE LEGISLATIVE REPRESENTATION

Most studies of the political impact of one person, one vote examine the effect on races for U.S. Congress. In this Part we attempt to capture some of the effects of the Court’s decisions on elections to state legislatures. We begin by examining whether one person, one vote affected competition for control of state legislatures. Although many state legislative houses changed hands in the 1960s, we are unable to say whether malapportionment and its removal are to blame. Second, in order to assess the bias of malapportionment and its potential removal through court-ordered redistricting, we examine those states that redistricted only one of their legislative chambers in response to *Baker*. The data reveal electoral effects consistent with the prediction that densely populated areas gained representation post-*Baker*. The party more closely aligned with the more urban half of a state appears to have benefited the most from

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89. See generally Gelman & King, *supra* note 52 (suggesting decennial redistricting leads to higher responsiveness and lower bias).

reapportionment, although neither party benefited nationally. In addition, the magnitude of any *Baker*-induced change in the partisan makeup of a state legislative body is a product of how malapportioned the legislature was prior to redistricting. By comparing the newly redistricted chamber with the one held constant, we can better ascertain the independent effect of the move to equipopulous districting. Finally, we look at the effect of one person, one vote on bicameralism: specifically, whether the decisions had the effect of making state upper and lower houses more similar. We find greater similarity between chambers in the period after the institution of the one-person, one-vote rule, suggesting that the rule may have muted representational distortions that existed before *Baker*.

A. *The Effect of One Person, One Vote on Competition for Control of State Legislative Chambers*

As mentioned in the description of the theoretical justifications for one person, one vote, the competitiveness of an electoral system can be measured both at the district level and at the level of control of state legislatures. At least with regard to elections to the U.S. House and probably to state legislatures as well, the consensus appears to be that the move to equipopulous districting made incumbents somewhat safer and contributed to the decrease in the number of marginal (that is, competitive) districts.<sup>90</sup> As far as we know, no one has examined the effect of one person, one vote on change in control of state legislatures. As we note above, perhaps the most powerful argument in defense of one person, one vote comes from those who see court intervention as necessary to break political lock-ups and to prevent insider self-dealing that immunizes factional or partisan blocs from the cleansing effect of elections. One way to judge whether *Baker* released electorates from such political strangleholds is to examine whether *Baker* and its progeny led to greater changes in control of state legislatures. We take a first crack at answering this question and arrive at some instructive, even if preliminary and mixed, results.

Our working hypothesis is that, before *Baker*, parties in control

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90. Of course, as we note above, the story is much more complicated than we depict here. Incumbents did not uniformly benefit from the move to decennial equipopulous districting. Under conditions of divided government, all incumbents usually benefited. And when one party controlled the redistricting process, usually its incumbents became safer and several of its opponents' districts became super-safe as a result of packing. But some incumbents of the "out party" became less safe when they were targeted for removal by the party controlling the redistricting process.

of a state legislature were more likely to stay in control because they could malapportion their opponents' districts and keep them perpetually in a minority position. Parties in power could use malapportionment as a tool to maintain their dominance in the face of adverse changes in demographics and voters' party loyalties. Moreover, to the degree the malapportioned districts resulted from calcified district lines owing to representation of counties or rural interests,<sup>91</sup> one might expect less turnover due to the repeated re-election of the same party from the overrepresented districts.

If these arguments in defense of one person, one vote are correct, we should expect to see two results. First, it should be the case that legislatures changed hands more frequently in the years following *Baker*-ordered reapportionments than in the years prior. Second, this effect should have been more pronounced in the legislative chambers that were the most malapportioned prior to *Baker*-ordered redistricting. To what degree were these expectations met?

A glance at Figure 2 shows that the number of legislative chambers changing control rose in the immediate wake of *Baker*-ordered reapportionments. In the 1966 election cycle—in which a plurality of states held their first post-*Baker* legislative elections—fully thirty of the nation's ninety-nine state legislative chambers changed hands, a degree unmatched in the post-World War II era. Further analysis bears out this finding. We analyzed elections in sixty-eight legislative chambers<sup>92</sup> to examine whether state legislatures were more likely to change hands in the decade before or the decade after the first post-*Baker* reapportionment. As shown in the last row of Table 2, the mean number of turnovers per ten years per legislative chamber increased from 0.88 in the ten years prior to each chamber's first post-*Baker* reapportionment to 1.21 in the ten years afterward. The number of chambers that changed hands at least once also rose, from thirty-four to thirty-nine. Of course, these findings do not prove conclusively that *Baker*-ordered reapportionment led to increased legislative turnovers. As mentioned above, the political turmoil of the late 1960s and early

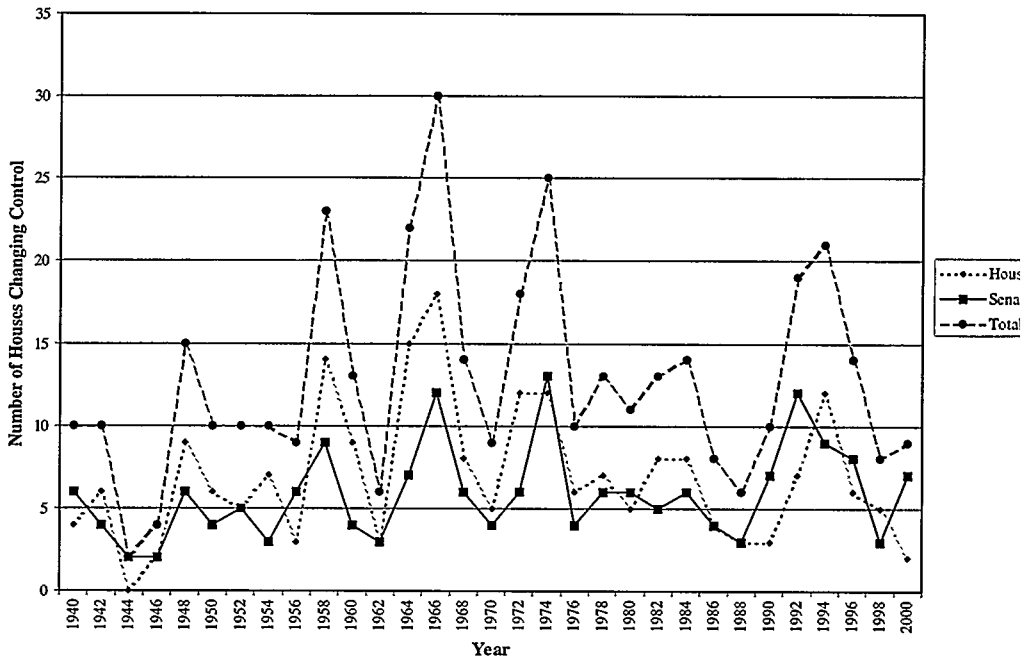
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91. See, e.g., *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 636 (1964).

92. Our analysis does not include southern states, which remained under Democratic control during the entire time period analyzed. It also does not include Alaska and Hawaii (which did not have legislative elections for the entire ten-year period prior to their *Baker*-ordered reapportionments), nor Minnesota (which held non-partisan legislative elections until 1974). Also excluded is the Arizona House, for which malapportionment data are not available. Note that the year of the first post-*Baker* reapportionment differs from state to state, and in some cases from house to senate within states.

the late 1960s and early 1970s might also have contributed to the rise in turnovers. But just as we can say that one person, one vote did not stand in the way of incumbent re-election, we can also say that it did not prevent (and perhaps contributed to) a rise in the number of state legislative chambers changing hands.

**FIGURE 2: Changes in Party Control of State Legislatures  
1940–2000**



However, contrary to advocates' expectations, whatever effects reapportionment appears to have on competition for legislative control does not vary by the degree to which state legislatures were malapportioned prior to *Baker*-ordered redistricting. We divided the sixty-eight chambers in our analysis into two equal groups: those with high and low degrees of malapportionment. As shown in Table 2, turnovers increased in both groups of states to approximately the same extent. (Interestingly, the states that were more equitably apportioned before *Baker* exhibit *higher* numbers of turnovers overall.) One might have expected that those chambers that moved from severe malapportionment to equitable apportionment might have been more likely to turn over. After all, if malapportionment was keeping the "ins" in, then equitable apportionment should have

led to a greater likelihood that the “ins” would get kicked out. We do not find that hypothesis borne out in the data.

This exploratory analysis indicates that one of the initial hopes of one-person, one-vote advocates was met: state legislative electoral competitiveness increased in the wake of *Baker*-ordered redistricting. However, contrary to advocates’ expectations, such redistricting did not have a greater effect in states that were the most malapportioned prior to *Baker*. Instead, legislative chambers with more equipopulous districts prior to *Baker* were more likely to change party hands, both before and after the first redistricting pursuant to one person, one vote.

**TABLE 2: The Effect of *Baker* on Control of State Legislatures\***

Degree of Malapportionment (% Needed to Control Chamber, 1962)	Average Number of Turnovers in Party Control		Number of Chambers that Changed Hands at Least Once	
	In Ten Years Prior to First Post- <i>Baker</i> Reapportionment	In Ten Years After First Post- <i>Baker</i> Reapportionment	In Ten Years Prior to First Post- <i>Baker</i> Reapportionment	In Ten Years After First Post- <i>Baker</i> Reapportionment
High (24.9%)	0.79	1.12	15	18
Low (40.7%)	0.97	1.29	19	21
Mean or Total	0.88	1.21	34	39

Source: NATIONAL CONFERENCE OF STATE LEGISLATURES.

\*Total Number of legislative chambers included in analysis: 68.

### B. *A Natural Experiment with One Person, One Vote*

From the review of the literature above, it should be clear that very little is gained by looking at the state of the world before *Baker v. Carr*, comparing it to the world afterward, and then blaming redistricting for the change. So much was happening in the sixties that isolating the independent effect of redistricting on any political phenomenon presents a daunting task. Some have attempted to “control” for the other aspects of the sixties upheaval by comparing states that redistricted in a certain year with those that did not, to point out, for example, that marginals vanished in both contexts. That method represents an improvement but might not capture state-specific changes as a result of the redistricting process. It is possible, for example, that the class of states that underwent redistricting differed in systematic ways from those that did not and that redistricting may have caused changes in some states that were occurring “naturally” in others.

The incremental approach of the Supreme Court’s redistricting cases allows for a different method to tackle some of the same

problems. *Baker v. Carr*, let us not forget, only indicated that malapportionment presented a justiciable question under the Equal Protection Clause.<sup>93</sup> The precise standard of equal population, and more importantly for our purposes the scope of the decision to all legislative elections, was not recognized until later cases, such as *Wesberry*<sup>94</sup> and *Reynolds*.<sup>95</sup> One plausible reading of *Baker* that many found appealing was that the decision required equipopulous districting for only one house of the state legislature. After all, what would be the purpose of bicameralism if equal protection required both houses to have the same basis of representation? Moreover, many states based their system of representation on the federal model—one body that represented regions or counties and another based more or less on population—or at least assumed that *Baker* did not cast doubt on the propriety of the analogy to the U.S. Senate. The lag in the Court's clarification that the one-person, one-vote rule applied to both houses allowed a natural experiment to take place from which we might be able to get a sense of the independent partisan effects of the shift to new districts.

Seven non-southern states held elections in which one house's lines were redrawn, but the other body's districts remained constant. By comparing the partisan shifts that took place in each house, we can separate the effects of redistricting from contemporaneous political trends. Three factors can drive the change in one party's seat share (arbitrarily, we look at the Democratic share) from one election to the next:

- (1) the change in the Democrats' share of the popular vote;
- (2) the move from malapportionment to more equitable apportionment; and
- (3) a new partisan bias brought by a political gerrymander.

In the house with constant districts, only (1) can account for shifts in the Democratic seat share. This allows us to estimate the magnitude of electoral trends, and to isolate the effect that (2) and (3) have on seat shares in the redistricted house.

The "net" effect of redistricting should follow a predictable pattern. In states where densely populated areas were poorly

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93. See *Baker v. Carr*, 369 U.S. 186, 237 (1962) ("The right asserted is within the reach of judicial protection under the Fourteenth Amendment.").

94. *Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964) (invalidating malapportioned congressional districts).

95. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (applying the one-person, one-vote rule to both houses of a state legislature).

represented pre-*Baker*, the urban-rural party alignment should determine the *direction* of the change brought by (2). The party that performs better in cities and suburbs than in rural areas should be the one that benefits when “rotten boroughs” are eliminated. To measure this alignment, we use Erikson’s score that subtracts Democratic strength in the rural half of a state from the Democratic vote share in the more urban half, in the 1964 or 1966 gubernatorial race.<sup>96</sup> The level of previous malapportionment can help determine the *magnitude* of the change brought by (2): seat shares will change most where urban and suburban voters were most severely underrepresented. Our measure of malapportionment, which appeared earlier in Table 1, comes from the National Municipal League, which reports the minimum percentage of voters needed to elect a majority to a legislative house.<sup>97</sup> Finally, the affiliations of the political actors controlling post-*Baker* reapportionment will be responsible for any partisan bias resulting from a political gerrymander (3).

We summarize the data in Table 3. Overall, the changes in legislative seat shares fit with our expectations, showing that the one-person, one-vote decisions often (but not always) brought predictable political effects.

The data reveal two interesting findings: first, neither party had a national monopoly on the urban vote; and second, the party aligned with urbanites usually benefited from the move to equipopulous districting. Contrary to some expectations, Democrats were not uniformly the party of urban America. In Arizona, Hawaii, and Alaska, Republicans were disproportionately urban.<sup>98</sup> The

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96. See Erikson, *Partisan Impact*, *supra* note 60. Erikson’s method has the unfortunate consequence of sweeping suburbs and cities together. When we refer to “urban” voters here, we mean voters in the more urban half of the state, which often includes suburbs. We hope to refine the analysis in a later paper to better answer the suburb question Professor Schotland poses in his paper. Erikson also does not provide data for Alaska, Hawaii, and New Jersey. Our own independent research concluded that Republicans were the urban party in Alaska and Hawaii, while the Democrats were the urban party in New Jersey. See NATIONAL MUNICIPAL LEAGUE, *APPORTIONMENT IN THE NINETEEN SIXTIES* (1967); David E. Clarke & William M. Dickson, *Alaska, in IMPACT OF REAPPORTIONMENT*, *supra* note 60, at 31–48; Richard L. Ender, *Alaska, in REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE FIFTY STATES* 31–35 (Leroy Hardy et al. eds., 1981) [hereinafter *REAPPORTIONMENT POLITICS*]; Richard H. Kosaki, *Hawaii, in REAPPORTIONMENT POLITICS*, *supra*, at 86–95; Norman Miller & Harold S. Roberts, *Hawaii, in IMPACT OF REAPPORTIONMENT*, *supra* note 60, at 113–36.

97. NATIONAL MUNICIPAL LEAGUE, *supra* note 96.

98. Anchorage, Phoenix, and Honolulu were all poorly represented before those states moved toward equitable apportionment and contained the states’ highest



Democrats controlling the redistricting process in Hawaii and Alaska could do nothing to stop the immediate increase in Republican representation that one person, one vote caused. A court redrew the Arizona Senate, one of the most malapportioned state houses in the country, to the inevitable benefit of Maricopa County (Phoenix) and its heavily Republican electorate in the 1966 election. In the words of two observers at the time, “[I]t seems that reapportionment has served as a catalyst releasing Republican energies latent in the Arizona political situation . . . . The results . . . have been traumatic for Democrats and exhilarating for Republicans.”<sup>99</sup>

**TABLE 3: Net Partisan Advantages from Reapportionment**

State, House, and Year of First Election After Reapportionment	Apportionment Score Pre- <i>Baker</i> (High Score Denotes Equitable Apportionment)	Who Controlled Redistricting Process?	Which Party Was Stronger in the Urban Half of the State?	Democrats' Seat Share, Reapportioned House, Before Reapportionment	Change in Democrats' Seat Share, Reapportioned House	Change in Democrats' Seat Share, Control House	Net Party Advantage from Reapportionment
Alaska Senate, 1966	35.0	Democratic	Republican	85.0%	-55.0%	-35.0%	20.0% Republican
Arizona Senate, 1966	12.8	Court	Republican	92.9%	-46.2%	-9.6%	36.6% Republican
Hawaii Senate, 1966	23.4	Democratic	Republican	64.0%	-4.0%	0%	4.0% Republican
Massachusetts House, 1964	45.3	Democratic	Slight Republican	62.5%	7.9%	2.5%	5.4% Democratic
Maine Senate, 1968	46.9	Court	Democratic	29.4%	14.4%	7.9%	6.5% Democratic
New Jersey Senate, 1965	19.0	Republican under court supervision	Democratic	28.6%	30.0%	18.3%	19.6% Democratic
Wyoming Senate, 1966	26.9	Court	Democratic	48.0%	-8.0%	-6.7%	1.3% Republican

In Massachusetts, Maine, and New Jersey, the Democrats benefited from the first equipopulous apportionment. In Massachusetts and Maine, Democratic gains were slight—given the states' history of equitable apportionment, the changes wrought by *Baker* and *Reynolds* were not too traumatic. For New Jersey, the change was significant. New Jersey's Senate was based on county

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concentrations of Republicans. See REAPPORTIONMENT POLITICS, *supra* note 96, at 31–35, 36–43, 86–94.

99. Bruce B. Mason & Leonard E. Goodall, *Arizona*, in IMPACT OF REAPPORTIONMENT, *supra* note 60, at 65–66. Republican gains in Arizona as a result of redistricting were somewhat ironic. Arizona Republicans—Goldwater-esque opponents of Warren Court activism even in the redistricting realm—did not run to court in the wake of *Baker*. A University of Arizona law student, not a representative of the Republican party, brought the case that allowed a federal court to redraw Arizona's malapportioned Senate.

lines and was one of the most malapportioned in the country.<sup>100</sup> Under "judicial pressure," the Republican legislature and governor redrew the lines to the great benefit of Democrats who were strong in urban areas.

Wyoming is somewhat of an outlier for our analysis. Democrats were stronger in Wyoming's few urban areas, according to Erikson's criteria, although others suggest that the partisan cleavage in Wyoming does not track the urban-rural cleavage.<sup>101</sup> At the time of the 1965 reapportionment, Wyoming had a divided government, with a Republican senate and governor and a Democratic house. Because the parties could not agree on a reapportionment plan, a federal court drew the lines. The slight Republican gain was probably the result of a court-ordered plan bent on upsetting the partisan balance as little as possible. As one analyst described the plan,

the court was something less than happy with the role into which it had been cast by the decision in the *Baker* case. . . . The compromise by the court of using bits and pieces of each of the major plans before the legislature and its trading of major party seats in different areas of the state seem to indicate that it was hoping to please as many people as possible.<sup>102</sup>

The plan for Wyoming appears to have been a status quo reinforcing plan, and neither party benefited greatly from the move to equitable reapportionment.

The natural experiment provided by these seven states highlights the important factors in determining the beneficiaries of one person, one vote. The more urban party in a given state appeared to benefit, although neither party can be said to have benefited nationally from equipopulous districting. A party in control of the redistricting process might be able to minimize the damage by staving off gains from the "out" party through gerrymanders within the confines of one person, one vote. Finally, the magnitude of any change as a result of *Baker* is largely a product of how malapportioned the legislature was beforehand. When district lines only needed to be

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100. See Ernest Reock, *New Jersey*, in REAPPORTIONMENT POLITICS, *supra* note 96, at 216-19.

101. See Oliver Walter, *Wyoming*, in REAPPORTIONMENT POLITICS, *supra* note 96, at 355 ("The number of farmers and ranchers in the legislature declined markedly [after reapportionment], but those lawmakers who replaced them did not demonstrate markedly different political philosophies. Wyoming is a rural and homogenous state. . . . [P]artisan divisions do not necessarily parallel rural-urban divisions.").

102. John B. Richard, *Wyoming*, in IMPACT OF REAPPORTIONMENT, *supra* note 60, at 321-22.

moved slightly to bring them to population equality, neither party would experience a windfall from the less radical change *Baker* produced in that context.

C. *The Removal of Representational Distortion and the Convergence of State Legislative Chambers*

For states in which one house was severely malapportioned compared to the other prior to *Baker v. Carr*, we hypothesize that to the extent malapportionment was causing a distortion in the translation of vote shares to seat shares, that distortion should be more pronounced in the more malapportioned chamber.<sup>103</sup> Therefore, in elections after the first post-*Baker* apportionments, we would expect the partisan makeup of state legislative chambers to become more similar. Indeed, we find convergence between chambers following the creation of the one-person, one-vote rule.

Take, for example, Vermont. In 1962, Vermont's House and Senate exhibited a greater difference in the degree of malapportionment—that is, the minimum proportion of the state's voters that could gain control of a legislative chamber—than the chambers of any other state legislature in the nation. While seats representing 47% of the state's voters were necessary to control the Vermont Senate, seats representing only 12% of voters were enough to control the Vermont House.<sup>104</sup> To the extent that malapportionment leads to representational distortion, we would expect to see such distortion in the Vermont House, but not in the Senate.

As required by *Baker* and *Reynolds*, Vermont reapportioned its legislature in 1965. In the last legislative session to meet prior to this reapportionment, Democrats controlled 40% of senate seats, and only 26% of house seats—a difference of fourteen percentage points between the two chambers. If malapportionment caused representational distortion, we would expect to see a shrinking of the difference in the partisan makeup between Vermont's two legislative chambers. In the elections of 1966, Democrats captured only 27% of the senate seats—a loss of thirteen percentage points. But they won

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103. We use the term "distortion" here instead of "bias" because our data do not allow us to distinguish between "bias" and "responsiveness" per the definition provided by Gelman and King, *supra* note 52. We therefore use "distortion" to refer to the extent to which vote shares do not equal seat shares in a legislative chamber.

104. Frank M. Bryan, *Vermont*, in REAPPORTIONMENT POLITICS, *supra* note 96, at 328 ("By 1960 . . . only 11.8 percent of Vermont's population held 51 percent of the seats and could potentially control legislation.").

37% of the house seats—a gain of eleven percentage points. The difference in proportion of seats held by Democrats in the two chambers decreased to roughly ten percentage points. In other words, in the wake of the reapportionment required by *Baker v. Carr*, the two chambers had become slightly more similar in their partisan makeup.

Was this true in other states in which one chamber was severely malapportioned compared to the other prior to *Baker v. Carr*? Table 4 shows the relevant statistics for Vermont plus the nine other states with the greatest difference in malapportionment between their two legislative chambers.<sup>105</sup> A glance at the right-hand column in Table 4 shows that of our “top ten” states, eight states’ legislative chambers became more similar in their partisan makeup in the elections immediately following their first post-*Baker* reapportionment. In the ten states, there was a twelve percentage-point difference on average

**TABLE 4: *Baker’s* Effect on the Difference in Partisan Makeup of States with Greatest Difference in Malapportionment Between Legislative Chambers**

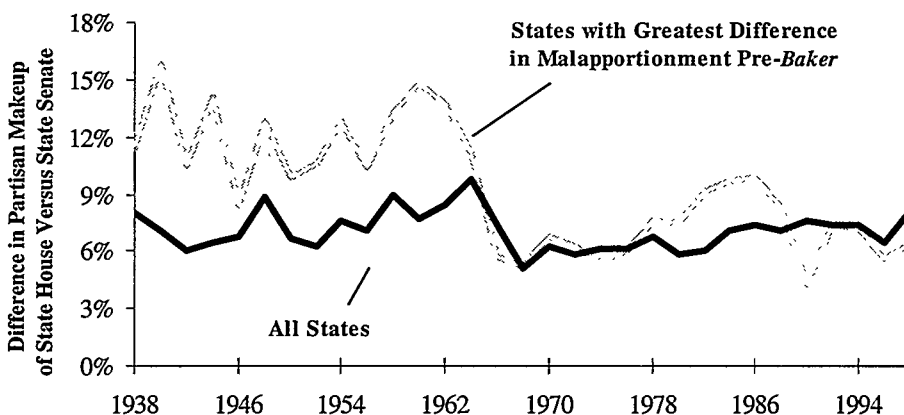
State	Minimum Percentage of Voters Needed to Control in 1962		Difference in Malapportionment Between Chambers	Election Year of First Post- <i>Baker</i> Apportionment	Pre- <i>Baker</i>			Post- <i>Baker</i>			Change in Difference Between Chambers (col. B – col. A)
	SENATE	HOUSE			Percent of Seats Held by Democrats	(A) Absolute Value of Difference Between Chambers	Percent of Seats Held by Democrats	(B) Absolute Value of Difference Between Chambers			
Vermont	47.0	11.6	35.4	1966	40.0%	26.0%	14.0%	26.7%	36.7%	10.0%	-4.0%
California	10.7	44.7	34.0	1966	62.5%	61.3%	1.3%	50.0%	52.5%	2.5%	1.3%
Rhode Island	18.1	46.3	28.4	1966	65.2%	76.0%	10.8%	70.0%	66.0%	4.0%	-6.8%
New Jersey	19.0	46.5	27.5	1966	28.6%	46.7%	18.1%	58.6%	65.0%	6.4%	-11.7%
Missouri	47.7	20.3	27.4	1966	67.6%	76.1%	8.4%	67.6%	65.6%	2.0%	-6.4%
Nevada	8.0	35.0	27.0	1966	47.1%	67.6%	20.5%	55.0%	52.5%	2.5%	-18.0%
Connecticut	33.4	12.0	21.4	1966	63.9%	37.8%	26.1%	69.4%	66.1%	3.3%	-22.8%
Montana	16.1	36.6	20.5	1966	57.1%	59.6%	2.4%	54.5%	38.5%	16.1%	13.7%
Idaho	16.6	32.7	16.1	1966	43.2%	46.8%	3.7%	37.1%	45.7%	8.6%	4.9%
Michigan	29.0	44.0	15.0	1964	32.4%	47.3%	14.9%	60.5%	66.4%	5.8%	-9.1%
Averages	24.6	33.0	25.3		50.8%	54.5%	12.0%	55.0%	55.5%	6.1%	-5.9%

105. Hawaii and South Carolina were among the ten states with the greatest difference in malapportionment between house and senate, but are not included here. This is because both states reapportioned their house and senate in different years, making our

in partisan makeup of the house and senate prior to *Baker*. After the first legislative elections post-*Baker*, the gap between chambers narrowed on average to about six percentage points.

It is possible that this change was part of a broader historical trend, and not due particularly to the effects of *Baker*. To explore this hypothesis, we plotted the average of the absolute value of the difference between the house and senate of these ten states in the period 1938 to 1998. As shown in Figure 3, the partisan makeup of the legislative chambers in these ten states became, on average, substantially more similar in the wake of *Baker v. Carr*. Between 1962 and 1966—the years in which all ten states held their first elections with post-*Baker* lines—the average difference in partisan makeup between chambers dropped from 13.7% to 5.7%. In no other period in recent U.S. history did the partisan makeup of the legislative chambers in these ten states converge so quickly. To further test whether this effect can truly be ascribed to *Baker*, we also plot the average difference in chamber partisan makeup for all state legislatures from 1938 to 1998. The result supports the convergence hypothesis: while the partisan makeup of the upper and lower houses of all state legislatures became more similar in the period immediately following *Baker*, the change is by no means as dramatic as that for the “top ten” states.

**FIGURE 3: The Convergence of State Legislative Chambers After *Baker v. Carr***



Source: National Conference of State Legislatures, Election Data.

It would appear, then, that *Baker v. Carr* did lead state legislative chambers to become more similar to each other—at least in partisan makeup. Where the severe malapportionment of one chamber may have previously given one party a greater advantage in one house than the other, such advantages were sharply reduced in the years following *Baker*.<sup>106</sup>

#### V. WHAT IF THE PRE-BAKER DISTRICTS HAD STAYED IN PLACE?

The districting scheme the Court struck down in *Baker* itself had been in place for over sixty years. Malapportioned legislatures often evolved not from deliberate attempts to overrepresent some at the expense of others, but from inertia in the face of population shifts. County lines that once offered equitable representation became more inequitable over time as the population moved from rural to urban to suburban areas. By ordering redistricting that would keep up with demographic changes reflected in each census, the Court ensured that the lifespan of a redistricting plan would never last beyond ten years. Frequent “updating” of the district lines, one would assume, would produce more accurate representation of the population. We decided to test that assumption.

For a glimpse into how the partisan makeup of legislatures might look had there been no *Baker v. Carr*, we conducted a counterfactual experiment to ask: what would happen if the district lines struck down by the one-person, one-vote cases still stood today? To explore this question, we identified three states from the original *Reynolds v. Sims* docket with voter registration data readily available by county (Delaware, Maryland, and New York). To this we added California, for which we obtained registration data from the California Statewide Database at the University of California, Berkeley. California is also appropriate for examination, as Chief Justice Warren noted in his memoirs, because its state senate was considered one of the most

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106. Two interesting findings that we do not discuss here relate to the post-*Baker* growth in the number of divided legislatures (where one party controls the upper house and another controls the lower house) and competitive or marginal chambers. Although we find that state legislative chambers are more alike in their partisan makeup since 1960, they are also more likely to be controlled by different parties. In the last twenty years the number of divided legislatures has jumped from about seven to thirteen. The rise in parity between the parties within state legislative chambers is also striking. In 1964, only eleven chambers had majority parties that controlled less than 55% of the seats, but by 2000, that number had grown to twenty-seven. Much of this might be attributed to the rise of the Republican Party in the South, but most of the current split state legislatures are in the Midwest and a large number of non-southern states have chambers with majorities barely clinging to control.

malapportioned in 1962. Its largest senate district (Los Angeles County) included more than six million people, while its smallest had only 14,000 people. The votes in districts totaling just 11% of the state's population were enough to control the senate.

In each state, we then "drew" the state senate lines in place when the *Baker* ruling came down over the current voter registration data. (We chose to use state senate lines because they were coterminous with county boundaries.) Finally, we estimated which party would win each seat through a crude approximation: the party with the registration edge in the district was presumed to win that district's seat. Where counties were divided into districts, we allocated the county's senate seats to parties according to their proportion of the registered voters in that county. Only voters registered with the Democratic or Republican Party are included in our calculations.

We conducted nothing more than a "back of the envelope" test, but the results, shown in Table 4, are illuminating. Of the four states we studied, only in Maryland can we say that the current system is superior to the pre-*Baker* districts in accurately translating votes into seats. Below, we discuss each of these states in turn.

**TABLE 5: A Comparison of the 2000 and 1960 District Maps with 2000 Partisanship Data**

State	% of Two-Party Registered Voters, 2000		State Senate Makeup, 2000			Expected State Senate Makeup, 2000 Data with Pre- <i>Baker</i> Districts		
	D	R	D	R	% of Seats Held by Dems	D	R	% of Seats Held by Dems
California	56.6%	43.4%	26	14	65.0%	21	19	52.5%
Delaware	55.9%	44.1%	13	8	54.2%	13	8	54.2%
Maryland	57.0%	29.6%	34	13	72.3%	23	6	79.3%
New York	62.2%	37.8%	25	36	41.0%	29	28	50.9%

*Delaware.* In a last-ditch attempt to equate its senate apportionment scheme with that of the U.S. Senate, Delaware's legislature adopted a constitutional amendment in 1963 that equalized senate seats among the state's three counties. Before the amendment, the state's largest county—New Castle—was allotted seven seats, and its other two counties—Kent and Sussex—five each. Counties were divided into the requisite number of districts, each of which elected one senator. In addition, two of New Castle County's

seven districts were required to be drawn outside of Wilmington, the state's largest city. The amendment gave Kent and Sussex two additional senators each, bringing the total number of senators for each county to seven. In a further complication, the new senators in Kent and Sussex would be chosen at large, rather than from geographically distinct districts. The result was that urban Wilmington residents had far fewer senators than would be allotted to them under an equipopulous scheme.<sup>107</sup>

How would this system affect the partisan makeup of Delaware's Senate today? Not one bit, according to our estimates. Democrats currently hold a thirteen to eight advantage in the Delaware Senate.<sup>108</sup> Our calculations found that the same would hold true under the crazy-quilt apportionment adopted by Delaware in 1963. We presumed that Wilmington's five seats would be held by Democrats, the other two New Castle seats by Republicans. We then allocated Kent and Sussex's senate seats to the parties according to their proportion of the registered voters in each county.<sup>109</sup> The result: an identical thirteen to eight advantage for Democrats.<sup>110</sup>

*Maryland.* The state of Maryland's pre-*Baker* Senate districting system allotted one senator to each of the state's twenty-three counties, and a total of six senators to the city of Baltimore,<sup>111</sup> which in 1960 accounted for about 16% of the state's population. To estimate the effect of these lines on the makeup of today's Maryland Senate, we allotted each county's senator to the party holding the voter registration advantage in that county.<sup>112</sup> We then allotted each

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107. Brief of Amicus Curiae United States at 28–29, *Roman v. Sincok*, 377 U.S. 695 (1964) (No. 63–307).

108. National Conference of State Legislatures, 2001 Partisan Composition of State Legislature, at <http://www.ncsl.org/ncsl/db/elect98/partcomp.cfm?years=2001> (last visited Feb. 8, 2002) (on file with North Carolina Law Review).

109. Voter Registration Data from Delaware Commissioner of Elections, at <http://www.state.de.us/election/reports/e70r2601sd.htm> (last updated May 1, 2002) (on file with the North Carolina Law Review).

110. If one pays attention to the number of seats controlled by Democrats (that is, districts in which they were a majority) under the 1960 and 2000 lines, the 1960 lines translate votes into seats more accurately than the 2000 lines. Under the 2000 lines, seventeen out of twenty-one districts (80.9%) have a Democratic plurality. Under the 1960 lines, only thirteen of twenty-one (61.9%) would be controlled by Democrats. Given that the current state percentage of Democrats is only 56.0%, the 1960 lines produce much less representational distortion.

111. Brief of Amicus Curiae Attorney General of the United States at 8–9, *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964) (No. 63–29).

112. Maryland State Board of Elections, Voter Registration Activity Yearly Report 2000, at <http://www.elections.state.md.us/pdf/vrar/2000.pdf> (last visited Apr. 3, 2002) (on file with the North Carolina Law Review).



of the six senators in heavily Democratic Baltimore to the Democrats. The result: a twenty-three to six advantage for Democrats (or 79% of seats) were 1960's lines in effect today. Democrats currently hold a thirty-four to thirteen edge (72% of seats) in the Maryland Senate, so they would actually enjoy a greater advantage if the pre-*Baker* lines still stood. The level of distortion of the system is therefore slightly less under today's apportionment than it would be under the 1960 lines.<sup>113</sup>

*New York.* New York's pre-*Baker* Senate apportionment rules are the most complicated of any state discussed here. Senators were allotted to counties roughly on the basis of population, and counties with more than one senator were divided into districts. But through an additional series of apportionment rules, the New York Constitution ensured that any county with more than 6% of the state's population would be underrepresented in the state senate.<sup>114</sup> Six counties—Bronx, Erie, Kings, Nassau, New York (that is, Manhattan) and Queens—fell into this category in 1960. The U.S. Department of Justice calculated that, in the round of redistricting to take place after the 1960 census, these six counties would receive twenty-six of fifty-seven senate seats (or 46%)—even though they together made up roughly 60% of the state's population.<sup>115</sup>

How would 1960's lines affect today's partisan makeup of the New York Senate? First, it should be noted that despite the Democrats' 62 to 38% voter registration advantage in New York,<sup>116</sup>

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113. However, if one looks instead at the number of districts in which Democrats constitute a plurality, the 1960 lines more accurately translate votes into seats. If the 1960 lines were in place Democrats would control 79.3% of the seats; under the 2000 lines Democrats constituted a plurality in 87.2% of the seats. The 1960 lines would better reflect the state's 57% Democratic majority. See Maryland State Board of Elections, Voter Registration Figures by County as of October 13, 2000, at [http://www.elections.state.md.us/pdf/vrar/0000\\_1013.pdf](http://www.elections.state.md.us/pdf/vrar/0000_1013.pdf) (last visited Mar. 13, 2002) (on file with the North Carolina Law Review).

114. For a full discussion of the apportionment system, see Brief of Amicus Curiae Department of Justice at 14–20, *WMCA v. Simon*, 370 U.S. 190 (1962) (No. 61-836).

115. *Id.* at 17. New York's complex apportionment system—and the fact that the state's redistricting in response to the 1960 census had not yet taken place when the *Baker v. Carr* decision was announced—further complicated our counterfactual analysis. Not only did we need to impute today's registration data onto the lines in place before *Baker*, we also had to hypothesize how the state might have drawn the lines in the wake of the 1960 census figures. We take our apportionment estimates from the *amicus* brief filed by the U.S. Department of Justice in New York's one-person, one-vote case (*WMCA v. Simon*), which were in turn derived from county population totals and the appropriate provisions of the New York State Constitution. *Id.* at 19, 39–46.

116. New York State Board of Elections, Voter Enrollment History by County, at <http://www.elections.state.ny.us/enrollment/enroll.htm> (last visited Feb. 8, 2002) (on file with the North Carolina Law Review).

the Republican party has historically maintained an iron grip on the state senate and currently controls the chamber with thirty-six seats to the Democrats' twenty-five. Our best estimates found that the pre-*Baker* districting scheme would bring about sweeping change: Democrats would narrowly control the senate by a twenty-nine to twenty-eight margin, owing to the registration advantage they hold in the state's urban counties.<sup>117</sup>

*California.*<sup>118</sup> Prior to the reapportionment revolution, California's senate districts were limited to one per county—leading to the gross malapportionment described above. The apportionment rules ensured that rural and agricultural counties would be over-represented in the senate compared to densely urban counties like Los Angeles and San Francisco. One would imagine that if these senate district lines were still in place today, they would confer an advantage to Republicans—and indeed this is the case. The shift, however, would not be large enough to switch control of the senate. Where Democrats currently hold a twenty-six to fourteen advantage in the California Senate, it would be narrowed to twenty-one to nineteen were senators still chosen from the districts in place in 1962.

The question remains as to which districting setup would more accurately translate votes into seats. Democrats currently make up 57% of California voters registered with one of the two major parties. They currently control 65% of the senate seats—a pro-Democratic distortion of about eight percentage points. With 1962's lines in place, Democrats would control 53% of the senate seats, for a pro-Republican distortion of about four percentage points. Therefore the distortion in California's senate districting system would actually be *less* under the pre-*Baker v. Carr* lines than it is today.

This snapshot view of Chief Justice Warren's home state suggests that the representational distortion created by county-based districts prior to *Baker v. Carr* was smaller than current levels. Figure 4 tracks the Democratic share of seats in both houses of California's legislature, along with party identification, beginning with the

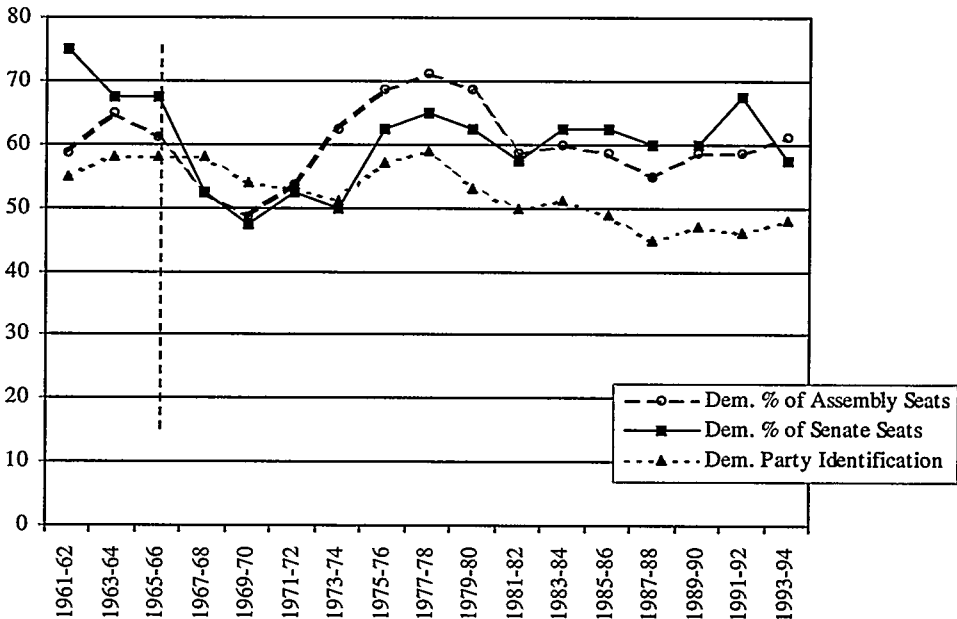
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117. New York is the only state of the four examined here where the percent of seats with Democratic pluralities under the 2000 lines is closer to the Democratic proportion of the state's electorate. Democrats constituted a plurality in thirty-three of sixty-one districts (54.1%) in 2000, but would constitute a plurality in twenty-nine of fifty-seven districts (50.9%) under the 1960 lines. The 2000 lines more accurately capture the partisan breakdown of the state.

118. Data on California are available upon request from the Statewide Database at the University of California, Berkeley, at <http://swdb.berkeley.edu>.

members elected in 1960. A vertical line marks the timing of the 1965 reapportionment of both houses.

**FIGURE 4: Party Identification and Party Control of the California Legislature, 1960–1994**



Source: David Brady & Brian Gaines, *A House Discarded? Evaluating the Case for a Unicameral California Legislature*, in *CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE* (Bruce Cain & Roger Noll eds., 1995) (providing seat shares).

When the Democrat-controlled legislature redrew its lines in a September 1965 special session,<sup>119</sup> was there an immediate partisan impact? Because the old senate districts had favored rural voters so much, and given the authors of the new plan, one might expect that Democrats would gain seats, especially in the upper chamber. The opposite occurred. The immediate impact in the senate was that the Democratic edge decreased from twenty-seven to thirteen after the 1964 elections to twenty-one to nineteen after the 1966 elections. Democratic losses were slightly smaller in the assembly, where districts had previously been based on population. In that chamber, the Democratic advantage dropped from forty-nine to thirty-one in 1964 to forty-two to thirty-eight in 1966.

Much of these Republican gains in the immediate wake of California's first post-*Baker* reapportionment can be attributed to

119. COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 64 (1966).

shifts in the electorate. Republicans won back seats in both houses, not just the formerly malapportioned senate. Their gains continued in the 1968 elections, when they took a one-seat majority in each chamber. Voters' identification with the Democratic Party dropped from 58% in 1966 to 54% in 1968, and then to 51% by 1974.<sup>120</sup> The rightward turn of California's electorate during the era of Reagan's governorship (1966–1974) seems a sufficient explanation of Republican gains in the legislature.

Still, why was there no Democratic surge in the senate when reapportionment gave full representation to urban voters and suburbanites? The absence of such a partisan effect can be accounted for by the fact that the parties did not have very different demographic bases in California at the time of *Baker v. Carr*. According to a September 1960 Field Poll, 15% of Republicans came from rural areas, 55% from cities with populations of 2,500–499,999, and 30% from cities of 500,000 and over. Almost mirroring these proportions, 17% of Democrats came from rural areas, 48% from cities with populations of 2,500–499,999, and 35% from cities of 500,000 and over.<sup>121</sup> Many voters in the agricultural Central Valley region had migrated from Oklahoma during the Great Depression, and, though conservative, retained the Democratic loyalties of their southern upbringing. In light of this evidence, it is unsurprising that the move away from a rural-dominated senate had no clear partisan effect.

Representational distortion in California's electoral system can be roughly measured by the difference between party registration in the electorate and party seat share in the legislature. This gap can be observed in Figure 4. In the immediate aftermath of the 1965 reapportionment, the gap shrank. Especially for the senate, reducing malapportionment had its intended effect of lessening bias and thus improving representation. Gradually, though, the gap between partisanship and party control began to grow again. Perhaps Democrats' control of redistricting in 1980 gave them the means to increase their electoral edge. Although *Baker v. Carr* initially reduced bias in California by correcting the senate's malapportionment, the gap in representation returned to even higher levels when district lines were frequently redrawn by political

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120. The Field Institute, *A Digest on California's Political Demography*, 5 CALIFORNIA OPINION INDEX (Nov. 1992).

121. Mervin D. Field, *California Democratic and Republican Party Members Compared*, Release No. 305, THE CALIFORNIA POLL, Sept. 28, 1960.

actors.<sup>122</sup>

*Summary.* Substituting pre-*Baker* lines for today's state senate districts does not produce any wholesale distortion in the translation of votes into seats, nor does it appear to benefit one party or another across states. This finding is all the more remarkable when one considers that our sample of four states is, if anything, biased in the direction of states in which we would expect to see the greatest improvement due to court-ordered redistricting following *Baker*. Perhaps most surprising is that in some states, the pre-*Baker* lines are actually *more* favorable to urban interests than present-day apportionments. This is because—as in the case of Maryland and New York—the share of the state population living in urban areas has fallen from 1960s levels. As “unfair” as the pre-*Baker* lines may have been to urban interests in those days, in some cases they would now produce new “rotten boroughs”—in the emptied-out neighborhoods of places like Baltimore, Erie, and New York City. The lesson learned from this imagined tour is that malapportionment, by itself, is not a sign of poor representation. Indeed, plans drawn under one person, one vote sometimes may be more biased than plans with districts that vary widely in population.<sup>123</sup>

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122. With respect to the number of districts in which Democrats constitute a majority, the 2000 lines favored the Democrats much more than the 1960 lines would have. Under the 2000 lines, Democrats have majorities in 75.0% of the districts (thirty of forty), whereas they would only have majorities in 52.5% of the districts (twenty-one of forty) if the 1960 lines remained in place. In a state where only 56.6% of the registered voters are Democrats, the 1960 lines appear much more representative. As mentioned in the footnotes above, this is true for three of the four states (California, Maryland, and Delaware). Only New York has 2000 lines where the percent of Democratic district majorities more accurately reflect the state's partisan breakdown than do the 1960 lines mapped onto 2000 data.

123. Some readers of this Article have commented that our examination of partisan representation represents a limited assessment of the representational effects of one person, one vote. Although we think examining the effect of *Baker* on *partisan* competition and representation is important, *see supra* note 76, we understand its limitations. Indeed, further research should look at the one-person, one-vote rule's effect *on the parties* as opposed to its effect on representation of the parties or competition between them. We would begin such a study with these somewhat contradictory hypotheses: (1) one person, one vote strengthened and polarized parties in the legislatures by giving party whips and cronies the power to punish defectors in each redistricting cycle; (2) the rule led to polarization of the parties in the legislature to the degree that now districts were safer and more pure (that is, more districts with 70% party majorities) so the median voter in each district was now farther away from the median voter in the state; (3) the rule weakened party organizations to the degree decennial redistricting contributed to the incumbency advantage and led to a “personal vote” for legislators; and (4) one person, one vote increased the importance of primary elections since under bipartisan gerrymanders primaries are now more likely to be the determinative elections. These hypotheses are difficult to test and are certainly in tension

## CONCLUSION

Forty years after *Baker v. Carr*, we have finally begun to understand the early political effects of the Court's one-person, one-vote rule. Unfortunately for the observer who wanted to see a tally sheet with clear winners and losers, the decisions had complicated effects that were quite context-specific. The impact of the Court's decision depended on a host of other factors and strategies other institutional actors pursued.

Just because the impact of the decisions varied from state to state and among institutional contexts does not mean that interesting, systematic effects cannot be observed or that the rationale for the Court's foray into this arena cannot be tested. For those who saw in the redistricting decisions a dream of increased electoral competition at the district level, those hopes have largely been dashed. And for those who thought one person, one vote would prevent those in control of the redistricting process from drawing lines to their advantage, decennial redistricting may have made partisan and bipartisan gerrymandering a more regularized ritual, even if change in control of state legislatures became more frequent in the post-*Baker* era. On the other hand, new research suggests that the bias (in favor of rural interests or one party's core constituencies) inherent in pre-*Baker* state legislatures and in the U.S. Congress vanished, in part because of judicial supervision of the redistricting process. Finally, *Reynolds's* rejection of the federal model for state legislatures led to duplication and similarity between lower and upper houses. Whereas, prior to *Reynolds* and its companion cases, the two houses of a state's legislature often adhered to different philosophies of representation, afterwards the bases of representation for the two houses were quite similar. Consequently, the partisan makeup of state chambers also became more similar.

*Baker* and its progeny sent an earthquake through a political system that was already being tossed and turned in so many directions. Although the turbulence of the time probably had more direct and substantial political effects, the Court's decisions helped express this turbulence in institutional forms. Already weakened by extraordinary events such as the Kennedy assassination, the 1964 election, and the Voting Rights Act, and worn down by long-term trends such as declining party identification and a rising incumbency advantage, the political system that received "one person, one vote"

found the new redistricting rules to present opportunities to magnify and codify the changes already taking place.

The lessons learned from studying the political effects of one person, one vote are both humbling and illuminating. On the one hand, lawyers and judges ought not exaggerate the rule's independent effect on the political system. Political actors usually find a way to achieve pre-existing goals even under new legal regimes. On the other, new legal rules can seriously exacerbate or help channel concurrent environmental changes. The difficult task for those of us who analyze and advocate for such changes in the law of politics is to learn from these judicial experiments so as to prevent perverse consequences the next time around. Representing as they do the most substantial intrusion of the courts into politics, the one-person, one-vote decisions deserve to be analyzed, even four decades later, so we can discover increasingly relevant lessons about the consequences of judicial regulation for legislative representation and electoral competition.