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The 1960 census, like that of 1930 and 1950, resulted in a reduction in Kentucky s congressional representation. From 1950 to 1960 the state's population rose by 3.2 per cent, while the national gain was 18.5 per cent. Consequently, Kentucky lost one of its eight congressmen, after efforts by some congressmen, including Kentucky's Frank Chelf, failed to persuade Congress to increase the size of the House of Representatives.

Between the 1950 and 1960 census Kentucky passed two districting laws. The Wetherby administration in 1952 secured legislative approval for new districts necessitated by the loss of a congressman, and the Chandler administration in 1956 brought about revisions in the 1952 districts.[1] In terms of 1960 population, the eight districts existing in 1960 varied from 303,431 to 610,947 Five of them ranged from 303,431 to 329,116; the Sixth and Seventh Districts were 411,459 and 420,816, respectively; and the largest district was the Third (Jefferson County)

In redistricting, the 1962 Legislature faced several problems: How much greater equality in district populations could be attained without seriously disturbing existing districts or forcing more than the minimum number of incumbents to oppose each other? Which two congressmen should be forced into a contest? How should the Legislature deal with Jefferson County, which was much too large for a single district and much too small for two districts?

PASSAGE OF REDISTRICTING ACT

On February 20, 1962, Governor Bert T. Combs presented to a joint session of the Legislature his plan for redistricting, which was subsequently enacted into law without change.[2] It combined

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[1] See Appendix for maps illustrating congressional districts before and after the 1962 change.

into one district a large part of the Fourth and Fifth Districts, including the home counties of both incumbents, Frank Chelf and Brent Spence. A few counties in these two districts were shifted to other districts: the Second (four counties), and the Sixth and Seventh (three counties each) In addition the Eighth (renumbered the Fifth) gained one county from the Fourth and two from the Sixth, while three counties were moved from the Second to the First. The plan could accurately be described as a "minimum change" plan, designed to disturb incumbents and their districts as little as possible. While some districts were protected from basic change by geography (the First and perhaps the Seventh), others were protected by the political strength of incumbents or (in the case of the Eighth) the opposition that would be aroused by any effort to split the traditionally Republican District. The Fourth and Fifth were most vulnerable. Congressman Brent Spence in the Fifth District was 87, and there was some expectation that he would retire, as in fact he did before the primary election.

The only opposition to the Governor's plan in the legislature came from Northern Kentucky Democrats, who introduced a plan to divide the Fourth District into three parts, while leaving the Fifth District virtually unchanged except for the addition of some Jefferson County suburbs. After some debate, the Legislature adopted the Goverors plan by substantial margins. It had the approval of the five Democratic congressmen whose districts were not being merged, and who had been carefully consulted during the drafting of the plan. The Governor's plan satisfied Republicans because it did not materially change the solidly Republican Eighth (now Fifth) District, and because it left unchanged the marginal Third District (Jefferson County) Largely because the plan took such careful account of nearly all political interests involved, it passed without the bitter and prolonged controversy that was typical in so many of the states that were forced to redistrict by the 1960 census.

THE RESULTS

The new districts range from 350,839 to 610,947 Three districts vary from the average district population between 5 and 10

[2] Ky. Acts 1962, ch. 98.

per cent, and three others between 16 and 19 per cent, while Jefferson County is 41 per cent over the average. The First, Second, and Eighth (now Fifth) are still underpopulated by about the same percentage margins as before, while the other districts are somewhat closer to average size than previously If Jefferson County is not considered, the variations of the other districts from an average of six districts is somewhat less. It would have been mathematically and geographically easy to provide much greater population equality among these six districts, but it would have been most difficult to do so without disturbing the political status quo. Except for the oversized district containing Jefferson County, the population variations among districts is considerably less than can be found in many states that carried out at least a partial redistricting following the 1960 census.

From a population standpoint, the underrepresentation of Jefferson County is serious, particularly because it is an area of rapid growth. If present population trends continue in that county and in the whole state, the Third District will be nearly twice as large in population as the average state district by 1970. In the past, states have seldom redistricted following a census unless they gained or lost a congressman; but in Kentucky, if the present seven seats are retained, a redistricting to give Jefferson County a second congressman would seem essential in 1972, assuming that its growth continues at the present pace. Perhaps by that time the impact of *Baker v. Carr*[3] will have been sufficient to assure decennial redistricting of congressional districts in all states.

It would have been possible to divide Jefferson County, giving Louisville one congressman and giving another to the rest of the county and to surrounding counties, some of which are in a sense suburbs of Louisville. There was apparently little sentiment in Jefferson County for such a plan. The Governor told the legislature that residents of that county in both parties "with virtual unanimity" would prefer to remain in a single district. The Republicans had a particularly strong reason for opposing partition, because it would make the Louisville district safely Democratic, while the Republican suburbs in Jefferson County

[3] 369 U.S. 186 (1962).

might be swallowed up by the surrounding Democratic counties. The present Jefferson County district is politically a marginal one that has elected more Republican than Democratic congressmen in recent years. In effect, under the new districting law, Jefferson County remains voluntarily underrepresented.

THE JUDICIAL VIEWPOINT

The congressional districting plan was conceived and enacted before the *Baker v. Carr*[4] decision, and there was no evidence that its authors were worried about judicial scrutiny There was precedent in Kentucky, however, for judicial nullification of a congressional districting act. In 1932 the state legislature passed a law reducing the congressional districts from eleven to nine. The law was challenged in both the federal and state courts as a violation of a 1911 law passed by Congress, requiring that districts be compact, contiguous and as nearly equal in population as practical.[5]

In July of 1932 the Franklin Circuit Court invalidated the districting act and in September the federal district court for Eastern Kentucky also invalidated it.[6] On October 13, 1932, however, the Supreme Court ruled in a Mississippi districting case that the provisions of the 1911 law requiring contiguity, compactness, and equality were no longer in force because a 1929 congressional act on districting did not contain such provisions.[7] In November the nine Kentucky congressmen were elected at large. The following month the Supreme Court applied the Mississippi ruling to Kentucky, restoring the state's districting act,[8] and the Kentucky Court of Appeals promptly overruled the Franklin Circuit Court. Not until 1934, however, were the congressmen elected by districts.

The 1952 Kentucky congressional districting act was tested in the state courts to determine whether the population inequalities

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[4] *Ibid.*

[5] An account of the involved judicial history of the act is found in Burchell v. State Bd. of Election Comm'rs, 68 S.W.2d 427 (Ky. 1934).

[6] Hume v. Mahan, 1 F Supp. 142 (1932). The federal district court ruled that the districting law violated both the standards of population equality and compactness established by Congress in 1911. It noted there were three districts under 245,000 and three over 338,000, and it said that several districts were formed into unusual shapes, one resembling a French-style telephone.

[7] Wood v. Broom, 287 U.S. 1 (1932).

[8] Mahan v. Hume, 287 U.S. 575 (1932).

among districts violated the state constitutional provision that "all elections shall be free and equal."[9] The Court of Appeals, noting that exact population equality was impossible, held the act invalid.[10]

The 1962 districting act was also tested in the state courts, in *Watts v. Carter*[11] Once again the only question was whether it violated the state constitutional standard of "free and equal" elections.[12] There was no reference to the fourteenth amendment "equal protection" clause. Franklin Circuit Court Judge Henry Meigs held that the act was valid. On March 23, 1962, three days before the *Baker v. Carr*[13] decision, the Kentucky Court of Appeals ruled that the act did not violate the state constitution.

Speaking for the court, Judge John S. Palmore noted that *Baker v. Carr* was still pending in the Supreme Court, but stated that malapportionment can be so flagrant that the "duty of the courts to uphold the constitutional rights of equality under the law will override their traditional reluctance to enter the political thicket."[14] He noted that Congress no longer required compact districts, and therefore legislative discretion could not be "limited by considerations purely esthetic."[15] The sole question was population equality The court did not find that the inequalities resulting from the 1962 law were so flagrant as to violate the standard of "free and equal"[16] elections. Judge Palmore thought that the single district for Jefferson County was justifiable: "Considering, however, the special problems and disadvantages inherent in splitting up a single densely-populated county and grafting a slice of it onto another and dissimilar district, we are unable to say that the solution chosen by the legislature was clearly arbitrary and unreasonable."[17]

Since the *Baker v. Carr* decision, which applied directly only to *legislative* apportionment, a federal court in Wisconsin has ordered congressional redistricting and a federal court in Georgia has refused to issue such an order, in a divided opinion in which

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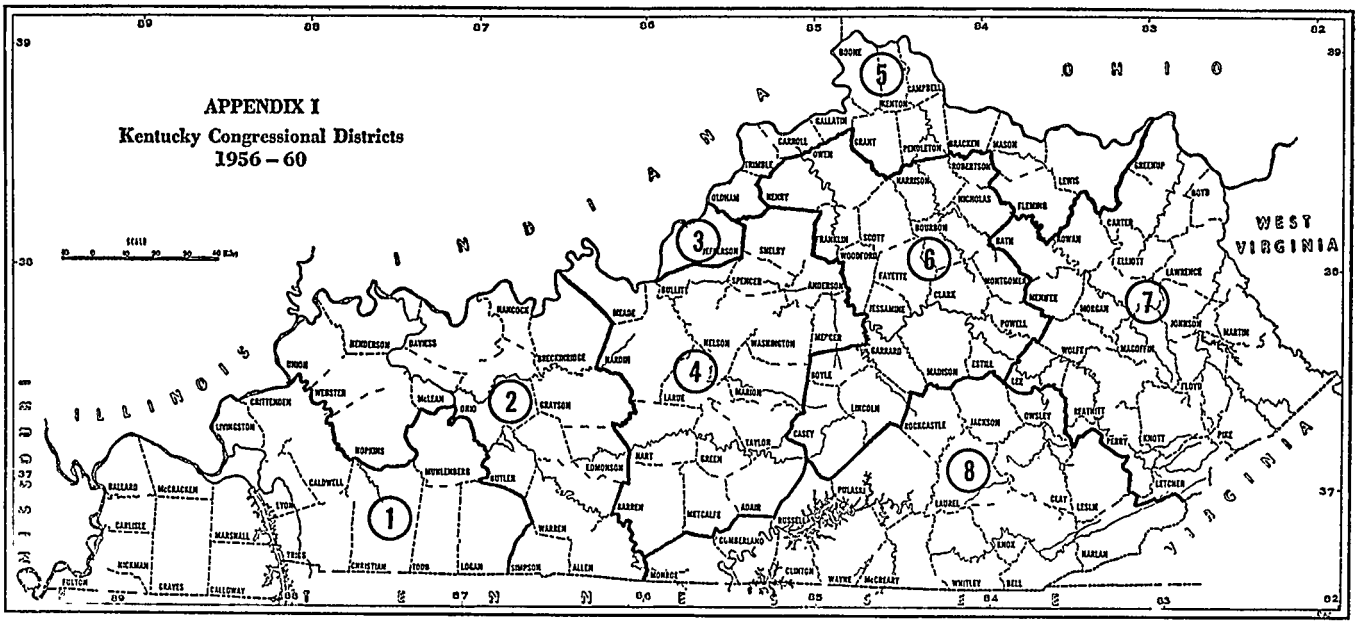
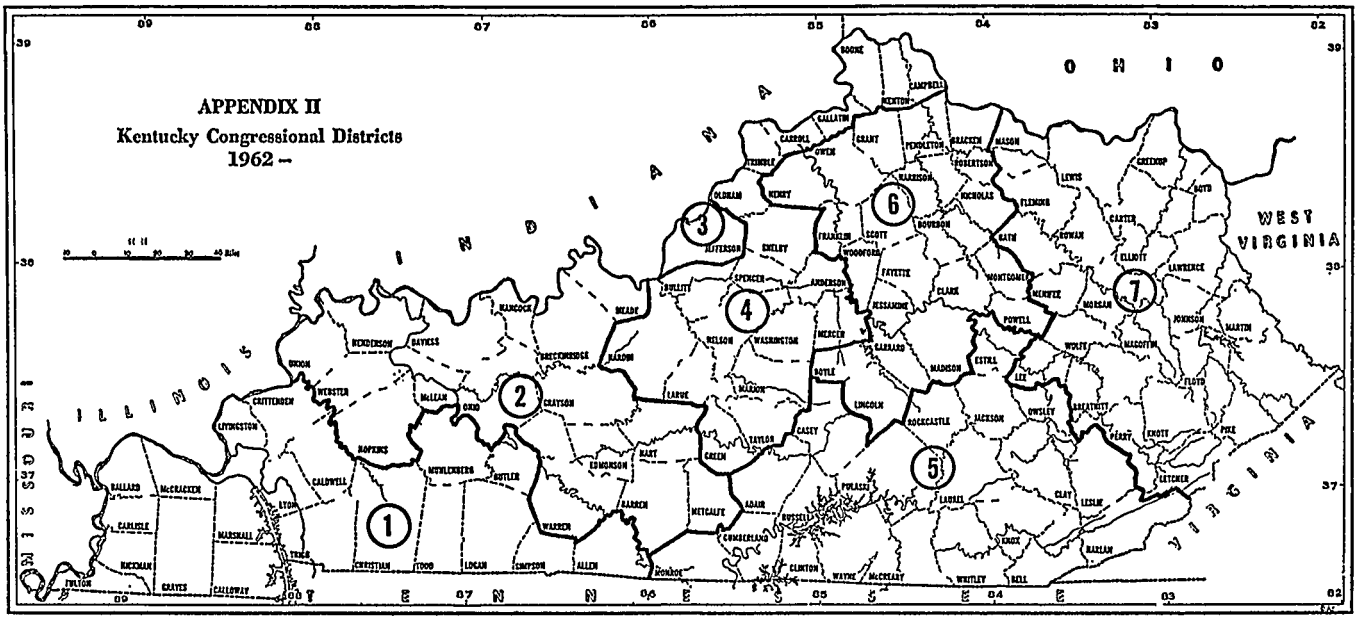
[9] Ky. Const. §6.
[10] Watts v. O'Connell, 247 S.W.2d 531 (Ky. 1952).
[11] 355 S.W.2d 657 (Ky. 1962).
[12] Mahan v. Hume, 287 U.S. 575 (1932).
[13] 369 U.S. 186 (1962).
[14] Watts v. Carter, 355 S.W.2d 657, 658 (Ky. 1962).
[15] *Id.* at 659.
[16] Mahan v. Hume, 287 U.S. 575 (1932).
[17] Watts v. Carter, 355 S.W.2d 657, 658 (Ky. 1962).

the majority expressed doubt that the court should grant relief when congressional districts were involved. The decision in *Watts v. Carter* does not shed any light on the unresolved questions involving judicial review of congressional districting under the equal protection clause of the fourteenth amendment because Kentucky's constitution requires a standard of equality for all elections held in the state.

The *Watts v. Carter* decision is important, however, because it provides a clue to the standards that courts may be expected to use in determining how equal congressional districts must be and what factors justify inequality The equal protection clause of the fourteenth amendment is no more specific than and rather similar to the "free and equal elections" provision of the Kentucky constitution. Inequalities in congressional districting, even at their greatest, are much less than those common in many state legislatures. It seems probable that moderate inequalities in congressional districts will prove less vulnerable to judicial attack than legislative malapportionment is. However, when unequal congressional districts result from legislative failure to redistrict every decade, the courts are more likely to decide that the inequalities are arbitrary and unreasonable.[18]

[18] On August 19 a group of voters in the Third and Fourth Districts filed a suit in the federal district court in Lexington challenging the constitutionality of the 1962 redistricting as a violation of the fourteenth amendment, because of the unequal population in the new districts. The plaintiffs asked for at-large elections in 1962. A three-judge court was set up to hear the case.


APPENDIX I
Kentucky Congressional Districts
1956 – 60
ILLINOIS
INDIANA
OHIO
WEST VIRGINIA
VIRGINIA
TENNESSEE
1
2
3
4
5
6
7
8


APPENDIX II
Kentucky Congressional Districts
1962 –
OHIO
INDIANA
ILLINOIS
MISSOURI
WEST VIRGINIA
VIRGINIA
TENNESSEE
1
2
3
4
5
6
7