The Gerrymander Origin, Conception and Re-emergence

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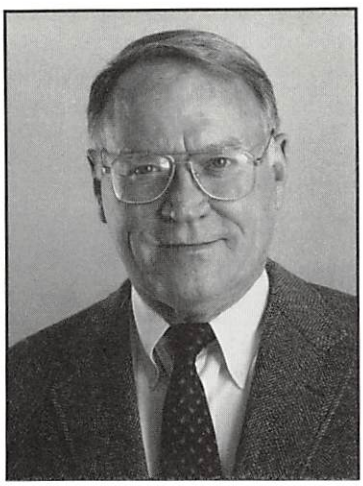

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The Gerrymander: Origin, Conception and Re-emergence

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PREFACE

The 1980s have cast a disturbing shadow over American Democracy. Representative government is threatened by a creature no more human than the space monster in the movie, "Aliens" — The Technocratic Gerrymander.

The lifeblood of this monster is manipulation and control. By definition, the technocrat uses available technology to accomplish his objectives, but without consideration of the people whom it purports to serve. The gerrymander is a manipulation of electoral district boundaries to achieve political control.

The union of technology and manipulative politics in redistricting is the basis of many of the problems in our representative process today. Declining voter participation, single issue politics, rancorous partisanship, non-competitive politics, the exclusion of women and minorities from our legislatures, the "behind the scenes" politics that have burrowed deeper and deeper into the fabric of American public policy — all have their roots in abusive redistricting. And in today's world the words *abusive* and *redistricting* are not separable.

For our system of representative government to serve the people, WE MUST GUARD THE GUARDIANS. Otherwise, we may as well retreat back to the days of the Feudal System, allow our politicians to assume the role of nobles and hope that their technocratic servants will allow them to follow a policy of noblesse oblige, Just think! No elections or campaigns would be necessary, people would be born into office.

Sound crazy? Look at the statistics on tenure in your state delegation in Congress or in your state legislature, We allow our politicians to determine what areas they are going to represent. No wonder they are continuously reelected, regardless of outrageous behavior!

After years of extensive research and study, the author of this booklet — Professor Leroy Hardy — has concluded that, if we do not rethink and reconstruct the way legislative districts are drawn, voter participation will continue to decline and "imperial legislators" will proliferate. There has only been one other time in U.S. history when fair representation was in greater danger; and the citizens of that era responded by having a tea party in Boston Harbor.

In the months ahead, many critics will come forward and challenge the author's premises on redistricting. Few, however, will offer any real solutions to the problem.

No more than the rest of us, politicians should never be judges in their own interest. As James Madison states in **The Federalist**, "If men were angles, no government would be necessary." We need to control out little angles in government. We need to impose some laws on our lawmakers when they redistrict — otherwise our whole system of the rule of law will be jeopardized and democracy will diminish.

The Gerrymander: Origin, Conception and Re-emergence, is an in-depth, copiously illustrated analysis of abusive redistricting, describing the symptoms, tracing the history and defining the types of gerrymanders.

Of course seeing is believing, so please read on!

The Gerrymander: Origin, Conception and Re-emergence

ANOTHER ROUND OF REDISTRICTING has occurred between the first appearance of these "considerations" in 1977 and the present.[1] It can be characterized as the decade of the modern gerrymander. The species has proliferated beyond imagination and the original gerrymonster has become a hydra-headed creature.

Thus, despite the great expectations fostered by landmark cases such as *Baker v. Carr*,[2] *Reynolds v. Sims*,[3] and *Wesberry v. Sanders*,[4] the quest for representative government is still frustrated by political manipulation commonly known as gerrymandering. An unusual configuration on an electoral district map elicits laughter or raised eyebrows and even the politically ill-informed may startle companions with the word gerrymander.

Its political impact causes legal dilemmas that seemingly defy resolution. As early as 1962 Dean Phil Neal of the Yale Law School alluded to gerrymandering as the next problem to be met in the reapportionment controversy,[5] and in the interim, the courts have often grappled with the problem and timidly let go.

Unfortunately, despite the multitude of pages in law journals, political science periodicals and other academic treatises, where cases are properly noted and the cruelty to representative government is deplored, judges are still left without guidance for reaching a solution of the gerrymandering problem. Another symposium in the 1980s rehashed the same topic.[6] The court again joined in the gerrymander argument and after *Bandemer*[7] people still wonder: What did the court mean? Later, many of the same authorities produced another symposium, with great expectation that the court would follow the lead of political scientists.[8] But *Badham v. Eu*[9] offered little clarification. Apparently the justices for different reasons decided to follow leads guaranteed to go nowhere and to hope for

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1. Parts of this commentary originally appeared as "Considering the Gerrymander," 4 *Pepperdine Law Review*, 243-284 (1977); hereafter cited as *Considering*. The writer is indebted to his CSULB colleague Robert A. Hayes for his helpful comments on the original article. The revision and updating was aided by insightful comments of Alan Heslop and George Blair, his associates at the Rose Institute, and Vice President Don Henriksen of Claremont McKenna College.

2. 369 U.S. 186 (1962).

3. 377 U.S. 533 (1964).

4. 376 U.S. 1 (1964).

5. Neal, Phil, "Baker v. Carr: Politics in Search of Law", 1962 *Supreme Court Review* 252 (1962). Robert G. Dixon, Jr., refers to gerrymandering as our present 'second round' of apportionment litigation in his excellent *Democratic Representation: Reapportionment in Law and Politics*, (New York, NY: Oxford University Press, 1968), p. 466; hereafter cited as *Democratic Representation*.

6. "Symposium: Gerrymandering and the Courts" 33 UCLA Law Review 1-281 (October 1985).

7. Davis V. Bandemer 106 F. CT. 2797.

8. Grofman, Bernard, ed., "Gerrymandering: Badham v. Eu, *Political Science Goes to Court*," 18 *PS* 538-581; hereafter cited as *Political Science Goes to Court*.

9. Badham v. Eu 694 F. Supp. 644 (N.D. Cal. 1988).

responsible legislative behavior. Terminological difficulties and misconceptions have led the experts into digressions from the principal issue. Thus the writer has been inclined to believe a rethinking of the gerrymander is necessary. How do we define gerrymanders? How can they be eradicated?

A review of articles, books, and monographs about redistricting revealed a dearth of practical, constructive proposals for change in the political system.[10] Indeed, the proponderant scholarship seems to conclude: it's process, it's incremental, it's pluralistic, it's okay. Why is it that when a noted scholar proclaims political science has a great contribution to make, the Supreme Court ignores the scholarly wisdom? Clearly, in *Badham v. Eu* the Justices looked elsewhere.

At least four aspects of political science writings have contributed to misunderstandings:

1. imprecise language;
2. the current use of "process" as an analytical device to replace behavioralism;
3. the neglect of historical and theoretical underpinnings of the system which is inherent in behaviorial or process approaches; and
4. the failure to take the final step in the biological analogy.

Definitions:

Definitions are crucial to clarify what is to be investigated and how to explain the experiment. Rethinking definitions is equally important to clarify *status quo* statements. For good reason, individuals who benefit from the confusion about redistricting do not want the subject analyzed on the basis of empirical evidence. If their illusive definitions hold, their advantages can be maintained by a political hoax.

The first step to re-focus attention on the redistricting problem is to recognize that reapportionment is not the issue. The courts have spoken: one person, one vote has been largely accepted as the basis for apportionment since defeat of the Dirksen Amendment in 1968—twenty years ago.

The problem has shifted to the implementation of apportionment, namely, redistricting.[11] The question is: Why is redistricting a problem after each decennial census? The answer is simple: incumbents and their supporters resist redistricting which may jeopardize their advantages.

Problems With Process Analysis:

Current process analysis, by its nature, produces rationalizations for what might be termed pluralistic incrementalism. Stability is defined as realpolitik. In the case of redistricting, stability means perpetuation of incumbents. Their experience is labelled as "quality input" but without evidence of the basis by which quality is determined.[12]

Complex formulae are billed as conclusive proof but often the results are jargonized so as to be unintelligible to the non-behavioralist, judges or the citizenry.

Historical and Theoretical Neglect:

In addition, behavioralism and process analysis typically disregard historical and theoretical underpinnings of a system. This often leads to plunging ahead in the quest for the holy grail,

10. An annotated bibliography of over 5,000 items was initially prepared prior to 1981. It is now being updated for publication prior to the 1991 redistricting.

11. The writer is aware of the technical point that apportionment must be adjusted every ten years; hence it could be called reapportionment. But reapportionment has a broader meaning in a historical context. Past representative battles should not be confused with current problems. The current issue is redistricting, which should be the focus of our attention.

12. This aspect is discussed in Hardy, Leroy C. and Alan Heslop, *Redistricting Reform: An Action Program*, (Claremont, CA: Rose Institute, Claremont McKenna College, 1989); hereafter cited as *Action Program*.

with no idea of what the holy grail is. Alternatively, critical thinking is initiated without factual substance.

Forgetting the Cures:

Finally, "process" scientists often fail to consider the curative aspect of science, accepting, along with behavioralists, the current stability as inevitable incrementalism.

If a disease is found, the natural scientist tries to find a cure rather than to accept the condition found. Too often, political scientists are satisfied with the recording of results. The failure to finish the scientific experiment robs political science of its potential to provide political solutions to society. Thus, the profession fails to fulfill its social responsibilities. This monograph suggests some steps toward clarification of the gerrymander dilemma.

COINING A POLITICAL TERM

The origin of the term gerrymander is an oft-told tale of American politics.[13] In 1812 the Democratic-Republican Party redistricted the State of Massachusetts to the detriment of the opposition Federalist Party. Elbridge Gerry was governor. One district had a peculiarly distorted contour, as was clearly seen when *The Boston Weekly Messenger* published a map of it. Soon afterward, the shape of the district was examined and discussed at a dinner party where someone remarked, "The district needed wings, and Mr. Tisdale, the artist, readily provided them making the map of the district resemble a prehistoric monster." Thereupon one of the guests suggested the name "salamander" was appropriate. Someone else, probably Mr. Alsop, responded with, "Gerrymander is what you mean." Thus a term was coined that has since been variously used as a noun and/or verb in American political life.[14]

Whether Governor Gerry had any influence in the actual creation of the district is questionable.[15] Still, he was a prominent political actor of the time, and thus this illustrious dissenting founding father, later Vice-President, defender of the idea of popular government and annual elections, acquired an undeserved reputation for the "evil".[16] To attribute gerrymandering to the governor ignores the fact that rivalry between the legislature (which normally has responsibility for drawing district lines) and the executive was then more intense than it is now. Executive interference would surely have been resisted.[17] The political creature known as a "gerrymander" was surely devised by a legislature composed of individuals vitally interested in their own electoral prospects.

Although Massachusetts' 1812 distortion is the classic example, Mr. Elmer C. Griffith long ago revealed that the techniques which produce gerrymanders had already long been practiced in America. He ascertained that the first known

13. Among the better accounts of the use of the term are: Griffith, Elmer C. *Rise of the Gerrymander in the United States*, (New York, NY: Arno Press, 1974 reprint of Chicago, IL: Scott-Foresman, 1907), Chapter 1; hereafter cited as *Rise of Gerrymander*; Luce, Robert, *Legislative Principles*, (Boston, MA: Houghton-Mifflin, 1930) p. 395; and Griffin, Henry F. "The Gerrymander," 97 *Outlook* 186-193 (January 8, 1911); hereafter cited as *Gerrymander*.

14. Idem., Griffin, *Gerrymander*. Not as well known is the short duration of the infamous predator. In the Spring 1813 elections the Federalists captured the district which prompted a cartoon in the form of a skeleton labled: *"Hatched 1812. Died 1813."* The cartoon is reproduced in Griffin, *Gerrymander* and redrawn in Illustration 2, page 5. Likewise overlooked is the fact that gerrymander did not appear in Webster's Dictionary until 1862. One authority attributes the delay to Gerry's widow's residence near the famous lexiconer's relatives [Mencken, H.L., Supplement I — *The American Language*, (New York: NY: Alfred A. Knopf, 1961) p. 291.]

15. Billias, George Athan, Elbridge Gerry: *Founding Father and Republican Statesman*, (New York; NY: McGraw-Hill Book Company Publishers, 1976) p. 317.

16. Griffith, *Rise of Gerrymander*, 26.

17. Dixon, *Democratic Representation*, p. 459, notes Gerry was in doubt about his veto right in the matter; citing Luce, Robert *Legislative Principles*, (Boston, MA: Houghton-Mifflin, 1930) pp. 397-98).

appearance of a district which could have been called a gerrymander occurred in Pennsylvania as early as 1705.[18] In North Carolina in 1732, gerrymanders were constructed to favor one section of the colony over another.[19] One of the cleverest of the gerrymanders of the early period was discovered to have existed in New Jersey in 1798.[20] Another five were noted in New York between 1802 and 1809.[21] James Madison faced a gerrymander monster created by Patrick Henry who hoped to frustrate the career of the future President.[22]

The "Infamous" Gerrymander

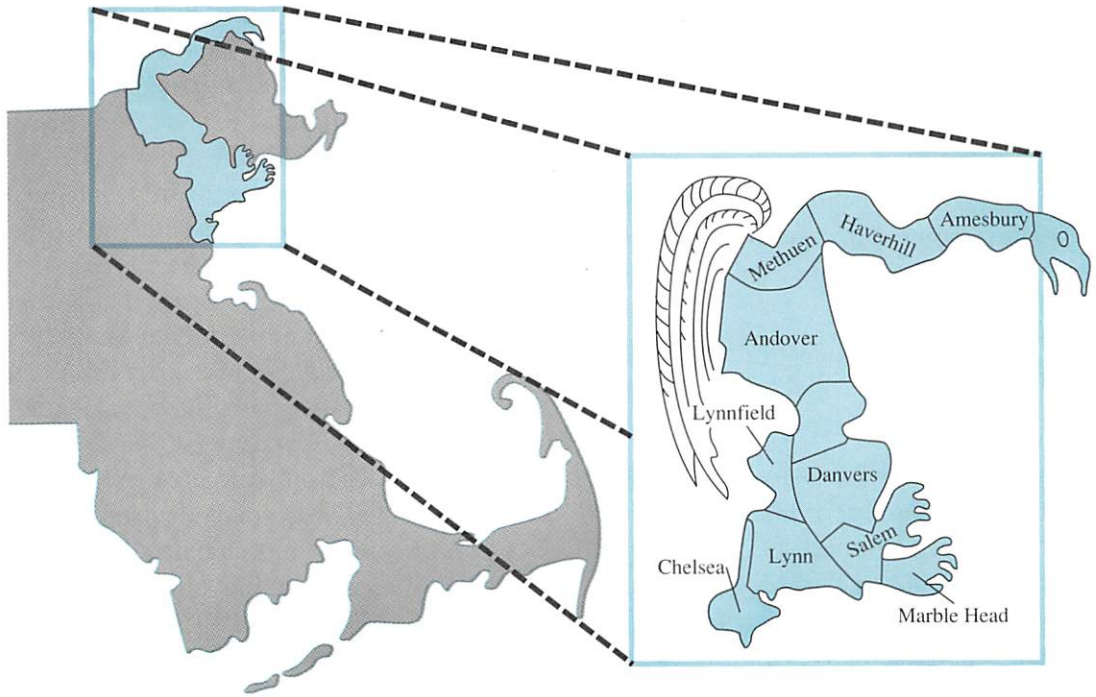

ILLUSTRATION 1

18. *Ibid.* at 28.

19. *Ibid.* at 47.

20. *Ibid.* at 57-59.

21. *Ibid.* at 31-32.

22. Tyler observed that mere fortune prevented another founding father from having his name blighted by the term "henrymander": Tyler, Moses C., *Life of Henry*, (New York, NY: F. Unger Publishing Company, (1966) p. 352. Of passing interest is the fact that James Madison's second Vice-President was none other than Elbridge Gerry. Another President, William McKinley, also met the gerrymander several times. After frequent efforts of similar design the Democratic redistricting of 1890 in Ohio accomplished McKinley's defeat. MacNeil reports: "The people of Ohio resented McKinley's ouster and promptly elected him governor. His overwhelming victory in the gubernatorial race led to his nomination and election as President in 1896"; MacNeil, Neil, *Forge of Democracy: The House of Representatives*, (New York, NY: D. McKay 1963) p. 140. See also Brooks, Robert C., *Political Parties and Electoral Problems*, (New York, NY: Harpers and Brothers Publishers, 3rd ed., 1933) p. 477, hereafter cited as *Political Parties*.

Definitions:

But what is a gerrymander? According to *Encyclopedia Britannica*, a gerrymander is an action "to alter unfairly or abnormally, as the political map of a state, etc." As a noun, the term is "an unnatural and arbitrary redistricting of a state or county."[23] The fifteenth edition says that gerrymandering is a term used in U.S. politics "to describe the drawing of boundaries of electoral districts, wards, and other subdivisions, in order to give an unfair advantage to one party over its rivals."[24] The same edition makes the point that the 1812 action tended to consolidate the Federalist votes into new senatorial districts to give disproportionate representation to the rival Democratic-Republicans.[25]

Webster says that to gerrymander is "to divide (a state, county, etc.) into election districts or other civil divisions in an unnatural and unfair way, with a view to give one political party an advantage over its opponent, or for some other

The Forgotten Skeleton
Hatched 1812. Died 1813.

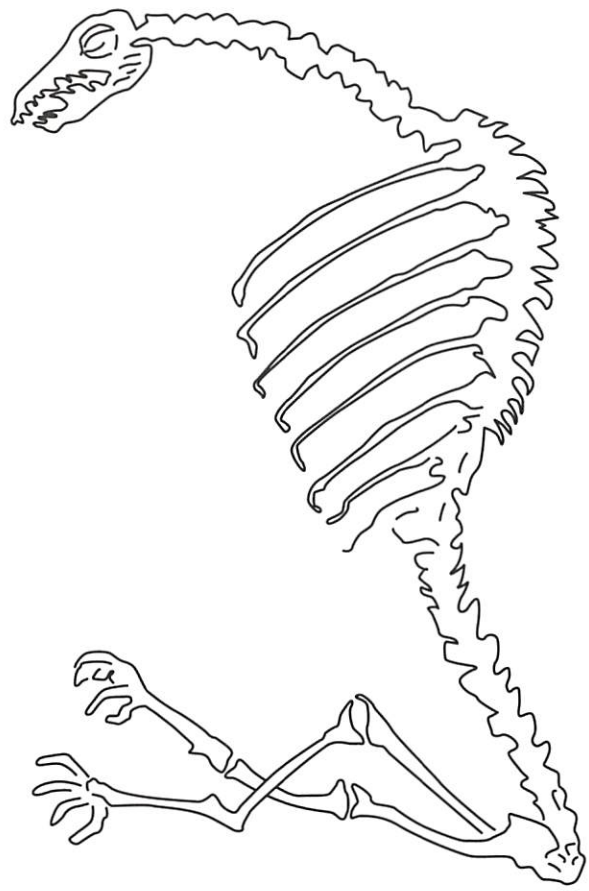

ILLUSTRATION 2

23. 10 *Encyclopedia Britannica*, 1314 (New York, NY: Encyclopedia Britannica, Inc., 1945).

24. 4 *Encyclopedia Britannica*, 509 (New York, NY: Encyclopedia Britannica, Inc., 1975)

25. *Idem.*

improper purpose... hence to manipulate, as fact argument, etc., in order to gain an unfair advantage or to reach unwarranted conclusions.[26]

The *Encyclopedia of the Social Sciences* article on gerrymandering describes the process as:

> The abuse of power whereby the political party dominant at the time in a legislature arranges constituencies unequally so that its voting strength may count for as much as possible at elections and that of the other party or parties for as little as possible. To accomplish this design it masses the voters of the opposing parties in a small number of districts and so distributes its own voters that they can carry a large number of districts by small majorities.[27]

Certain common characterizations emerge from "authoritative" books.[28] Gerrymandering is a technique used for partisan purpose in the creation of constituencies. As a noun, the gerrymander is accompanied by qualifiers of "arbitrary" and "unnatural." As a verb, gerrymandering indicates a redistricting process which has been manipulated by the creation of constituencies which are arbitrary, unnatural and unfair (in an unequal vote sense).

Part of the confusion about redistricting and gerrymanders stems from the loose, interchangeable use of terminology. The late Professor Robert Dixon, Jr. observed that any redistricting is a gerrymander because any line drawn on a political map represents an electoral advantage for someone. Fifteen years earlier, Dr. Ivan Hinderaker had made basically the same observation in relationship to the California redistricting of 1951. Similar observations could be made, and are being made, today.

But to say that all redistricting is gerrymandering confuses the issue. A common political term is made meaningless as a device to refine political and legal thinking. Gerrymanders are a form of political manipulation similar to bribery, vote stuffing, etc. To say gerrymanders occur under any circumstances, or everyone does it, is to claim gang rape is not rape because everyone does it. When investigating partisan gerrymanders, such as in Indiana and California, the quest for eradication is not solved by concluding they are everywhere. A creature which jeopardizes the environment requires more precise anatomical dissection, or an investigation of "crat tracks" of the gerrycrat.

If gerrymandering practices are to be controlled, the species must be analyzed to delineate its variations. At the same time, more precise terminology in relation to the gerrymander technique will better distinguish it from other forms of electoral manipulation. Courts and citizens will be able to understand its worst features.

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26. *Webster's New International Dictionary*, 1052 (2nd ed. 1947).

27. Seligman, Edwin, RA., *Encyclopedia of the Social Sciences*, (New York, NY: Macmillan, 1931), Volume 6, p. 638.

28. See also *Random House Dictionary*, (New York, NY: Random House, Inc., 1967), p. 594 and Sills, David L., ed., *International Encyclopedia of the Social Sciences*, (New York, NY: Macmillan and Free Press, 1968), Volume 1, p. 38.

CLASSIFICATION

On the basis of a study of congressional districts from 1870 to the present and the author's participation in the creation of districts in several redistrictings, the following classification is suggested to clarify thinking about gerrymanders—the major abuse of current redistricting.[29]

I. Silent Gerrymanders: Prehistoric Monsters of Twenty Years Ago
   A. Inaction
   B. Constitutional

II. Current Species
   A. Composition
      1. Concentration-of-them
      2. Concentration-of-us
      3. Dispersal-of-them
      4. Dispersal-of-us
   B. Form—Elongation or Shoestring
   C. Purpose
      1. Elimination/Isolation
      2. Projection

In each case, the adjective describes the technique used to create a political gain or advantage. Any effort to control gerrymanders, or to eliminate them, must consider their nature, their characteristics and their purposes.

The Spawning Environment:

Often attention on the gerrymander as a species is diverted by referring to the entire process of redistricting as a partisan, bi-partisan, or nonpartisan gerrymander. Mixing the entire package of redistricting, which may include gerrymanders, with the discussion of specific gerrymanders only serves to confuse the issues. Gerrymanders are individual in nature and their characteristics must be carefully analyzed. The redistricting process (partisan, bipartisan, or nonpartisan), which is the spawning grounds for gerrymanders, must be treated separately.

Another basic problem in analyzing redistricting stems from the interchangeable use of the terms "reapportionment", "redistricting", and "gerrymandering". Gerrymanders are distortions of representation by redistricting practices. This was the original meaning of the term, from the Massachusetts example of 1812.

In the late nineteenth century and early twentieth century the term was often applied to inaction by the legislature or the inability to act because of constitutional provisions. Thus, what was being discussed was not redistricting. The problem was the failure, or the inability to redistrict.

The trilogy cases (see below) eliminated the reapportionment problem and required redistricting. Thus gerrymanders re-emerged as a political problem because courts required redistricting to take place. Prior to the cases, legislators could accomplish their political purposes by simply not acting. The gradual insistence on the one-person one-vote criterion did not allow the ease of inaction. Legislators, for a multitude of reasons, reverted to gerrymanders (more comparable to the original 1812 action that originally prompted the use of the

29. This classification was originally developed in the author's Ph.D. dissertation: Hardy, Leroy C., *The California Reapportionment of 1951*, (unpublished Ph.D. dissertation, University of California, Los Angeles, 1955) p. 391; hereafter cited as *Reapportionment of 1951*. The initial pattern was elaborated in a paper delivered at the 1961 American Political Science Association Convention: Hardy, Leroy C., *The Theory and Practice of Reapportionment*, (mimeographed paper for the American Political Science Association, September 1960). The present classification represents a development on the basis of five redistricting experiences since that time. Other similar classifications have been produced, the most frequently cited being: Hacker, Andrew, *Congressional Districting, The Issue of Equal Representation*, (Washington, D.C.: Brookings Institution, 1st edition, 1963), p. 46. See also Brunn, Stanley V., *Geography and Regions of Politics in America*, (New York, NY: Harper and Row, 1974), pp. 168-71; hereafter cited as *Regions*; Keefe, William and Morris Ogul, *The American Legislative Process: Congress and the States*, (Englewoods Cliffs, NJ: Prentice Hall, 2nd edition 1968), pp. 80-82.

term gerrymander) as a means to rig the system for their own advantages. As the following examples indicate, gerrymandering returned with a vengeance and proliferated beyond belief.

A REVIEW OF GERRYMANDER TYPES

An understanding of gerrymandering is facilitated by a brief discussion of each type and a perusal of maps illustrating each type.

Silent gerrymanders, which caused the major distortion of representation prior to the trilogy cases of the Warren Court in the 1960s,[30] were of two types:

1. by legislative inaction; and
2. by constitutional provisions.

Silent Gerrymanders by Legislative Inaction:

A silent gerrymander resulted from the failure of a redistricting body (normally the legislature) to redistrict the state despite significant population changes. Two classic "political question" cases centered on legislative inaction. *Colegrove v. Green* [1946] concerned the failure of the Illinois legislature to change congressional districts after 1901.[31] *Baker v. Carr* [1962] challenged the Tennessee legislature's inaction in state legislative districts after 1901.[32] The Supreme Court had refused to take jurisdiction in the *Colegrove v. Green* [1946] case; but in 1962 the Supreme Court ordered lower courts to review their previous decisions and the so-called reapportionment revolution began.

Throughout the nation many silent gerrymanders came into existence between 1910 and 1929 because Congress failed to reapportion the national legislative districts in accordance with the 1920 Census.[33] Districts based upon the population of 1911 were left unchanged. Several states retained representation their population no longer justified, while other states were denied representation their population increases warranted. Notable in the former category was Missouri and in the latter California.

Failure of the Congress to act was coupled with a similar reluctance of many states to alter their legislative districts. California was also a prime example in the state legislative category. In the early 1920s Southern California and urban areas in general continued to grow more rapidly than other parts of the state. Northern and rural legislators refused to redistrict the state, despite constitutional provisions requiring a reapportionment every ten years, with representation in both houses to be based on population.[34] Districts no longer justified by population, or denied representation despite population increases, became silent gerrymanders.

Resistance on the national and state levels to reapportionment was an attempt to ignore the great American transition from a rural to an urban society. *"Status quo"* elements naturally fought vigorously against realignment of districts which would deplete their political power. In state after state population as the basis for representation in both houses meant that the

30. *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Wesberry v. Sanders*, 376 U.S. 1 (1964).

31. 328 U.S. 549 (1946).

32. 369 U.S. 186 (1962).

33. An overview of the congressional picture is found in Tanner, E., *Congressional Reapportionment, 1910 to 1930*, (unpublished Ph.D. dissertation University of Texas, Austin, 1937). The definitive coverage of this period in the California context is: Bemis, George, *Representation in the California Legislature, 1911-1931*, (unpublished Ph.D. dissertation, University of California, Berkeley, 1935); See also Hichborn, Fred, *Story of the California Legislature of 1921* (1935) and Ahl, Frances, "Reapportionment in California," 22 *American Political Science Review*, 978 (1928). An overview of the California picture is included in Hardy, *Reapportionment of 1951*, 21-37, which is liberally paraphrased in Allen, Don, Sr., *Legislative Sourcebook*, (Sacramento, CA: State Printing Office, 1965) Chapter I; hereafter cited as *Sourcebook*.

34. California Constitution Article 4 Section 6 (West 1954) (as enacted in 1879).

newly populated areas would ultimately take control of the legislature. California's solution to the impasse was approval of an initiative measure to change the basis of representation in the upper house. Rural and northern elements were thereby given dominance in the Senate by the introduction of area as the basis of representation.[35]

Silent Gerrymanders by Constitutional Mandates:

Often the legislative refusal to adjust districts to population shifts [rural to urban] was sanctioned by constitutional clauses which limited a county's representation.

In many cases the constitutional gerrymanders were the result of 19th Century constitutions which predated a major rural-urban conflict. The silent gerrymanders simply grew as demographic change accelerated and the constitutions were not altered to accommodate growth.

In other cases the constitutional gerrymander was the last desperate effort of rural forces to hold back urban influence, often rationalized in terms of the values of rural life in contrast to urban culture with its influx of foreign values. The restrictions on urban groups took many forms, most notably the limitation of the percentage of representatives from any one county, or one representative for each county regardless of its population, or provision for area representation in one house. The latter technique was often rationalized as the "federal analogy." If the U.S. government had states represented in the U.S. Senate equally, regardless of population, rural forces in some states argued counties could be equally (or approximately) represented in State Senate.[36]

California in the early 20th Century was a prime example of a rural and sectional society in crisis. As population flooded into the urban areas and into southern California a system based on population in both legislative houses threatened the *status quo* establishment of San Francisco and northern California. As mentioned above, the solution in the 1920s stalemate was a constitutional change limiting any county's representation to one senator in the upper house and no more than three counties in any one senatorial district.

In this process, a new sub-species of gerrymander was created—the constitutional gerrymander.[37] The silent gerrymanders, because of legislative inaction, were now embodied in the constitution which made actions almost impossible. In effect, the constitutionally-stipulated criterion (for at least one house) made alteration of districts (or constituencies) impossible. Compromise was bought at a great price. The democratic promise of "one person, one vote" was exchanged for acres and trees in the "cow counties." As the population continued to shift toward urban areas, the distance from "one person, one vote" increased — now with constitutional sanction, whereas the former silent gerrymanders could have been altered by legislative action. Constitutional stipulations allowed little alteration of senate districts and virtually froze representation in the upper house regardless of future population shifts.

Similar demographic change and lack of legislative response brought on a decade of inaction on the national level. The impasse was finally resolved by the Automatic Reapportionment Act in 1929 on the threshold of another census. The delay in normal adjustments in 1920 meant that changes in 1930 would be more drastic and

35. *California Constitution* Article 4 Section 6 (West 1954) (as amended in 1926).

36. The falacious nature of the analogy was intellectually demolished in *Reynolds v. Sims* in 1964.

37. Tyler, Gus and David I. Wells, entitle their useful chapter, New York: 'Constitutionally Republican', in *The Politics of Reapportionment*, by Jewell Malcolm, ed., (New York, NY: Atherton Press, 1962) p. 221, hereafter cited as *Politics of Reapportionment*. Possibly the classic example of the constitutional gerrymander was the county-unit rule in Georgia; see Gosnell, Harold, "The Gerrymander System in Georgia," 11 *Social Forces* 570-73 (1933) and *Gray v. Sanders*, 374 U.S. 368 (1963). Gosnell termed the unit rule in Georgia a "double-barrel" gerrymander.

likewise significant. States, denied representation in 1920, gained more if their growth continued, while states continuing their relative decline in relationship to national growth patterns lost more. By way of illustration, California increased its representation from 11 to 20, four of nine going to Los Angeles County, whereas Missouri lost three seats. The inaction, broken only after years of difficult negotiation, must be considered from the perspective that national legislators were unwilling to yield representation to urban areas in the "grand depository" of the democratic principle, despite the fact that the U.S. Senate protected small states on the basis of the federal principle. In sum, the rural *status quo* elements wanted advantages in both houses.

National legislators were not alone in their footdragging. Despite the acquiescence to constitutional gerrymanders in one house by many states, obstructive reluctance to redistrict was still manifest on the state level, and congressional districts were not necessarily balanced. Conservative forces inside and outside the state legislatures continually blocked action and silent gerrymanders proliferated. As noted above, two significant cases—*Colegrove v. Green*[38] and *Baker v. Carr*[39]—originated from legislative inaction that spawned silent gerrymanders. In *Colegrove* the complaint centered on congressional districts in Illinois that had not been reapportioned since 1901, while in *Baker* the Tennessee state legislative districts also had not been altered since that date.[40] In Tennessee, for example, the Shelby County district in 1901 had a population of 153,557 compared to the White County district's 15,577. By 1960 the former district had 627,019 people while the latter district had 14,157. In California the smallest state senatorial district in 1930 had 7,915 people compared to Los Angeles' 2,208,492, or a ratio of 1 to 279; but by 1960 the smallest had 14,294 and Los Angeles 6,380,711, or a ratio of almost 1 to 450.[41]

In response to such flagrant disparities and the failure of legislatures to act, the federal courts moved into the reapportionment thicket[42] and eventually struck down the state constitutional stipulations that implemented the constitutional gerrymanders. Thus the courts served as the powerful legal exterminators of the silent and constitutional gerrymanders. *Reynolds v. Sims* in 1964 declared such constitutional techniques unconstitutional. Legislatures were to represent persons—one person, one vote—not acres and trees.

Even with a relatively equal basis for redistricting after each census, the disparities may still exist and possibly grow during the decade. Some extremes may occur, such as the 13th California Congressional district (1961) which was underpopulated with 368,100 people in 1960 and overpopulated with 565,400 by 1966, but such variations will be the exception, rather than the rule. Indeed, technically if the growth occurs between regular redistricting actions (i.e. between censuses) it is not a gerrymander, since the original district was relatively equal to other electoral units of that time.[44] Continual redistricting is hardly warranted, and the stability of district identity probably outweighs the advantage of interim tinkering. Even assuming that the term "silent gerrymander" is inappro-

38. 328 U.S. 549 (1946).

39. 369 U.S. 186 (1962).

40. The *Baker v. Carr* litigation is reviewed in Graham, Gene, *One Man, One Vote: Baker v. Carr and the American Levellers*, (New York. NY: Random House, 1972).

41. Hardy, Leroy C. and Charles Sohner, "Constitutional Challenge and Political Response: California Reapportionment, 1965," 10 *Western Political Quarterly 733* (1970); hereinafter cited as *Hardy and Sohner*.

42. *Reynolds v. Sims*, 377 U.S. 533 (1964) and companion cases.

43. All references to "districts" are to Congressional districts unless otherwise specified.

44. In the haste to deal with current circumstances redistricters seldom have the time or foresight to gerrymander into the future, though the CA 42-CD (1981 and 1982) may have been one such example.

Tennesse's Shelby County Compared To White County

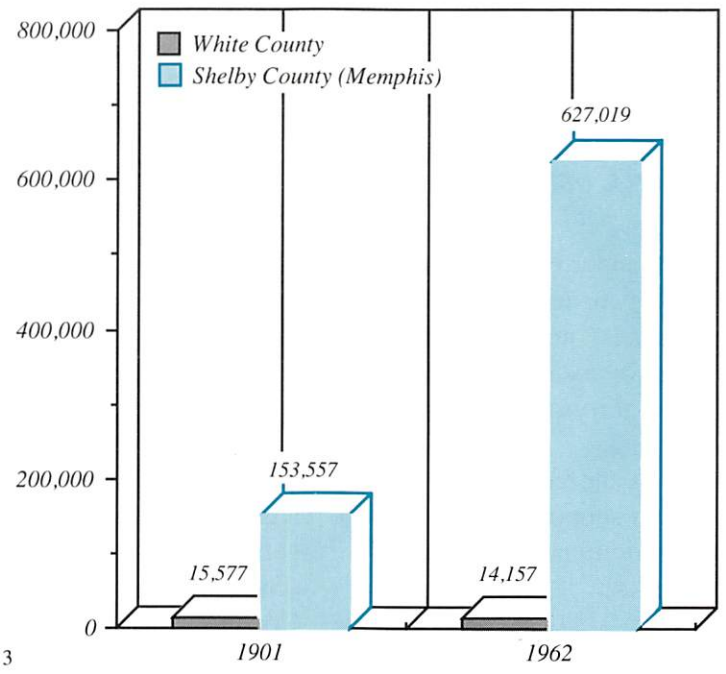


ILLUSTRATION 3

California's Smallest State Senatorial District Compared To Los Angeles State Senatorial District

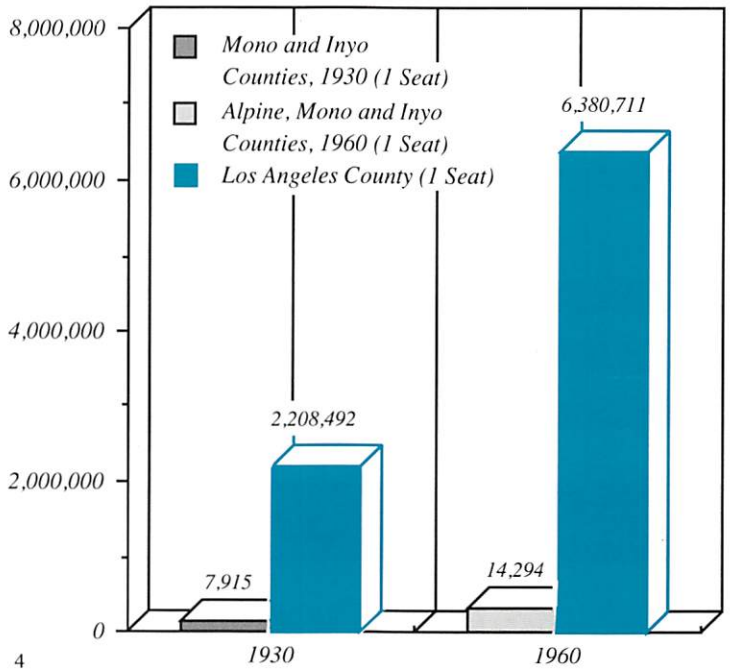


ILLUSTRATION 4

priately used, it would be a species of short lifespan. Population growth and mobility are natural during a decade, and they hardly warrant a continual effort at precise equality. Actually, the lack of precise figures, or at least common figures that redistricting actors will accept, discourages redistricting efforts between censuses.

Gerrymanders by Composition—Concentration:

A concentration gerrymander consolidates the strength of a political party or an ethnic group in a district, or in a few districts, normally to minimize representation for opposition voters [the "concentration-of-them-gerrymander"].

In less common situations, the redistricting party may concentrate its own supporters in an area where the other party predominates [the concentration-of-us-gerrymander].

Ethnic politics since the 1960's have brought about another sub-species of the concentration gerrymander: the minority concentration gerrymander. This type is often called the "affirmative action" gerrymander. As a gerrymander device it can be used to promote ethnic representation or it can be used to concentrate ethnic groups in a "benevolent" manner, while at the same time minimizing their political influence by concentrating the ethnic group in a minimum number of districts.

With opposition concentrated in a minimum number of districts, the other districts become less competitive or, in other words, dominated by the party doing the redistricting. The principle of the concentration gerrymander can best be illustrated by a hypothetical situation (See Illustration 5). In extreme form, Party B's majority vote could be deprived of its majority by judicious concentration of its strength in the one district.

In a factual example, the 1951 Republican legislature in California created concentration gerrymanders of profound effect on the representation of the Democrats in Los Angeles County.[45] Los Angeles Democratic voters were concentrated in large congressional districts of about 425,000 each, while Republican areas were carved into districts of 225,000 each. Over the decade this provided the Democrats with four of twelve Congressmen representing Los Angeles County. Although in elections the

Hypothetical Gerrymandering

	Party A Controlling Redistricting	*Party B Minority in Redistricting*
District 1	115,000*	90,000
District 2	115,00*	100,000
District 3	50,000	203,000*
District 4	118,000*	110,000
District 5	102,000*	97,000
	500,000	600,000
% of Total Vote % of Representation	45.4 80.0	54.5 20.0

**The winner.*

ILLUSTRATION 5

45. Hardy, *Reapportionment of 1951*, 249-77, 404-08.

Democratic vote was approximately fifty percent of the total vote, Democrats were unable to elect six of the twelve congressmen because their strength was heavily concentrated in four districts. In 1958, when the Democratic percentage of the total vote went up to nearly 60%, the Democrats were able to obtain only five of the twelve congressmen or 41.66% of the representation.

In 1961 the Democrats, a majority in the state legislature, accomplished a reversal of the 1951 Republican concentration effort. Republicans in 1962, 1964, and even 1966 with a Republican surge, received less representation than their proportion of the vote (e.g. 1962, 48.2% of the vote, 34.2% of the representation; in 1964, 47.0% of the vote, 39.5% of the representation; in 1966, 53.7% of the vote, 44.7% of the representation).[46] Both parties, thus, employed the concentration gerrymander efficiently, but a subtle difference can be noted. The Republicans in the 1951 reapportionment used the concentration of population and of Democratic voters to accomplish their aims. In 1961 the Democrats created relatively equally populated districts with one exception, but Republican voters were heavily concentrated in only a few districts.[47]

Although the concentration variety of the gerrymander usually applies the technique being used by the dominant political group against the opposition party, occasions may exist when the redistricters concentrate themselves. While Republicans in California were concentrating Democrats in 1951, Republicans in New York were consolidating their own strength in Brooklyn to insure the election of one Republican in the overwhelmingly Democratic area.[48] The result was the "silk-stocking" 12th district in New York. It is difficult to determine whether the term "stocking" is meant to describe its weird shape or the type of wealthier citizen that populated the district.

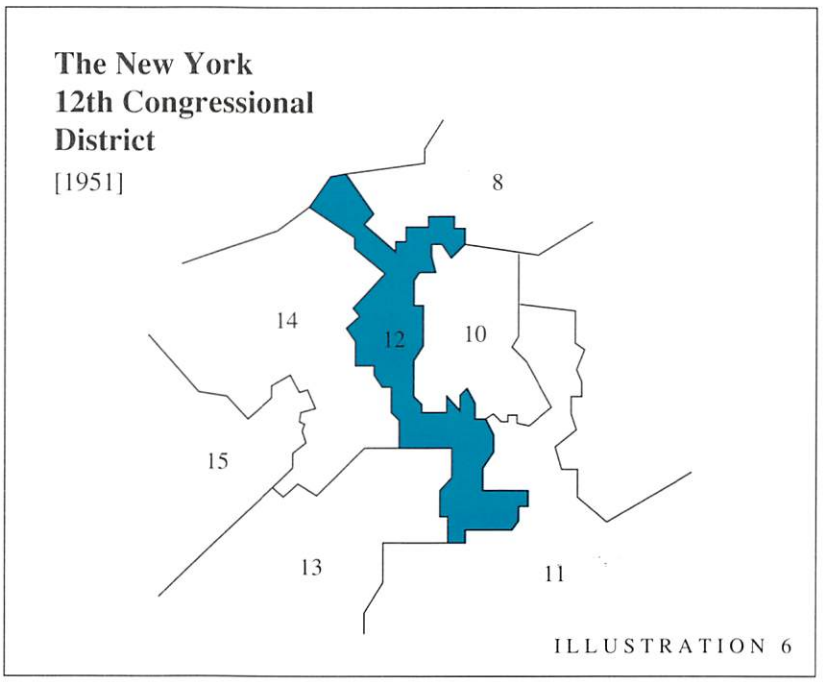


ILLUSTRATION 6

46. Allen, *Sourcebook*, p. 30, surveys the statewide disparities between 1952 and 1964. The 1966 percentages were computed independently.

47. *Report of the Assembly Interim Committee On Elections and Reapportionment*, 1961, (Sacramento, CA: State Printing Office, 1961) p. 29.

48. Roberts, "The Donkey, the Elephant and the Gerrymander," 7 *The Reporter*, September 16, 1952 at 30-33; and Tyler and Wells, in *Politics of Reapportionment*, p. 224. The Republican dilemma in the inner cities is reflected in the necessity of using the same technique in Queens to save a Republican seat in 1961; see *New York Times*, February 28, 1968.

Though concentration gerrymanders can be sub-divided into two categories (the concentration-of-you gerrymander and the concentration-of-us gerrymander), in terms of techniques a distinction can be drawn between the concentration of population and the concentration of opposition vote. In the former the disparities of population accomplish the purpose, while in the latter the districts are relatively equal in population but the voters of one party are stacked in a few districts. In light of the population criterion now being applied by the court, population distortion becomes less feasible; thus current concentration gerrymanders predominantly concentrate voters.

Ethnic politics of the 1960s and 1970s have brought about another sub-species of the concentration gerrymander: the minority concentration gerrymander.[49] The evolution of this sub-specie is a reflection of American politics in the post-war World War II era. The California situation is a graphic portrayal of the problems and issues. In 1951 Republicans concentrated Black voters in a small number of districts, but in only a very few districts did their numbers encourage the election of Blacks. In Los Angeles the Black population was subdivided to prevent the election of a Black congressman. The Republican action was branded as "ghettoization" and deplored as contrary to American ideals and the dreams of an integrated society. Black spokesmen proclaimed desires to vote for "the man" rather than for minority representation.[50]

By the 1961 reapportionment Black spokesmen had organized a "two-four" committee (two congressmen and four assemblymen) to actively demand Black representation.[51] By 1971 Latino activists were calling for representation to correspond with their 15% of the total population. Whereas in 1951, minority spokepersons called for representation without ethnic connotations, by 1961 and subsequent redistrictings, minority leaders were calling for their concentration to obtain representation.

The expectation that people would vote for the "person" regardless of whether he/she was Black, Latino or white, had yielded to the acceptance of the political reality that concentration of ethnic minorities probably was a more realistic approach to their political aspirations. The demands created serious problems for the Democratic Party, in whose coalition the minorities were often included. If minority strength was concentrated, the Democratic strength in other districts was weakened. The concentration-of-us had dangerous potentials.

At the same time the concentration of minority strength had further implications for minorities themselves. Did the desire for a few Blacks in the legislature (national or state) and the need to concentrate Black voters to accomplish that goal, outweigh the advantage of having several white legislators whose partial Black constituency would require their attention to Black issues? Whatever the merits of the latter viewpoint, the dilemma has been resolved in many metropolitan areas by the creation of districts which concentrate minorities. Whether such districts are unnatural, arbitrary, or unfair depends on the viewer's perspective.

Concentration-of-them Gerrymanders:

Republicans' redistricting in 1951 concentrated Democrats in the 26th C.D. Note necks and the arrow indicating an in-cumbent's home in an affluent neighborhood.

49. Wells, David, "Affirmative Gerrymandering: Malignant or Benign," (paper delivered at Conference on Representation and Apportionment in the 1980s," June 11-15, 1980, San Diego, California) and "Affirmative Gerrymandering Compounds Districting Problems," 67 *National Civic Review* 10 (January 1978).

50. Hardy, *Reapportionment in 1951*, p. 370.

51. See Hardy and Heslop, *West Side Story - Murder.*

The California 26th Congressional District

[1951]

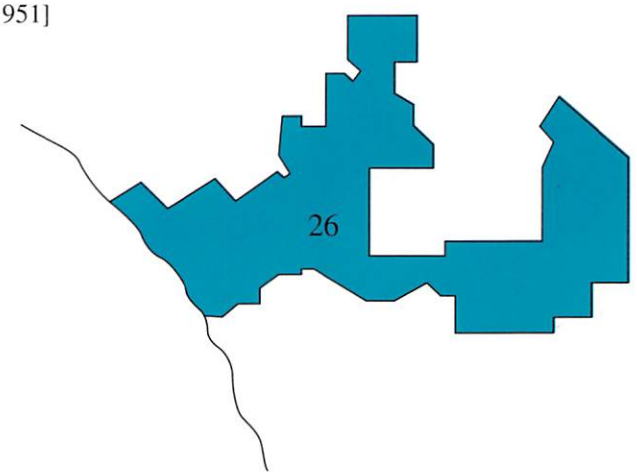


ILLUSTRATION 7

The California 28th Congressional District

[1961]

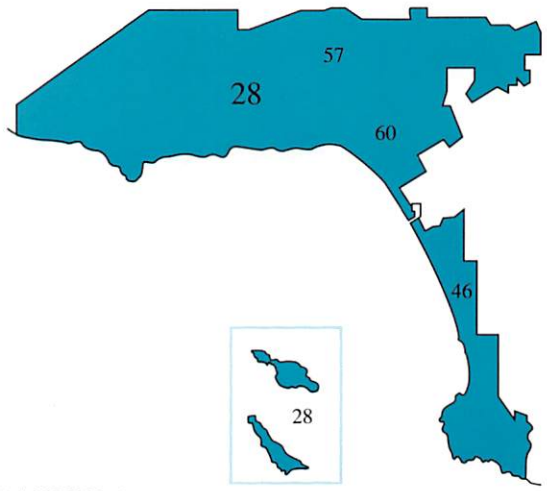


ILLUSTRATION 8

Democrats' redistricting in 1961 concentrated Republicans in three assembly districts making up the 28th C.D. Note the neck which at high tide almost separated parts of the district.

The Proposed California 42nd Congressional District

[1981]

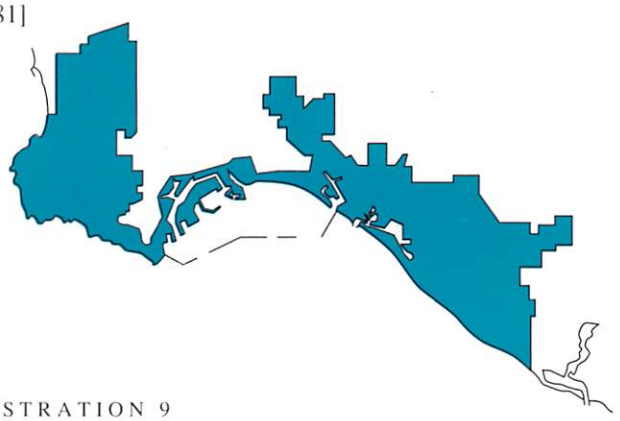


ILLUSTRATION 9

Democrats' redistricting in 1981 concentrated Republicans in the 42nd C.D. The district was rejected by voters in a 1982 referendum.

The "Corrected" California 42nd Congressional District

[1982]

ILLUSTRATION 10

Democrats' redistricting in December of 1982 concentrated Republicans in the 42nd C.D. The district was "corrected" after voters rejected the early monstrosity. Compare the districts. Note the necks and the elongations.

Concentration-of-us Gerrymanders:

California Democrats redistricting in 1961: Black Democrats were concentrated by Democrats in the 29th C.D. in a sea of white Republicans and Democrats:

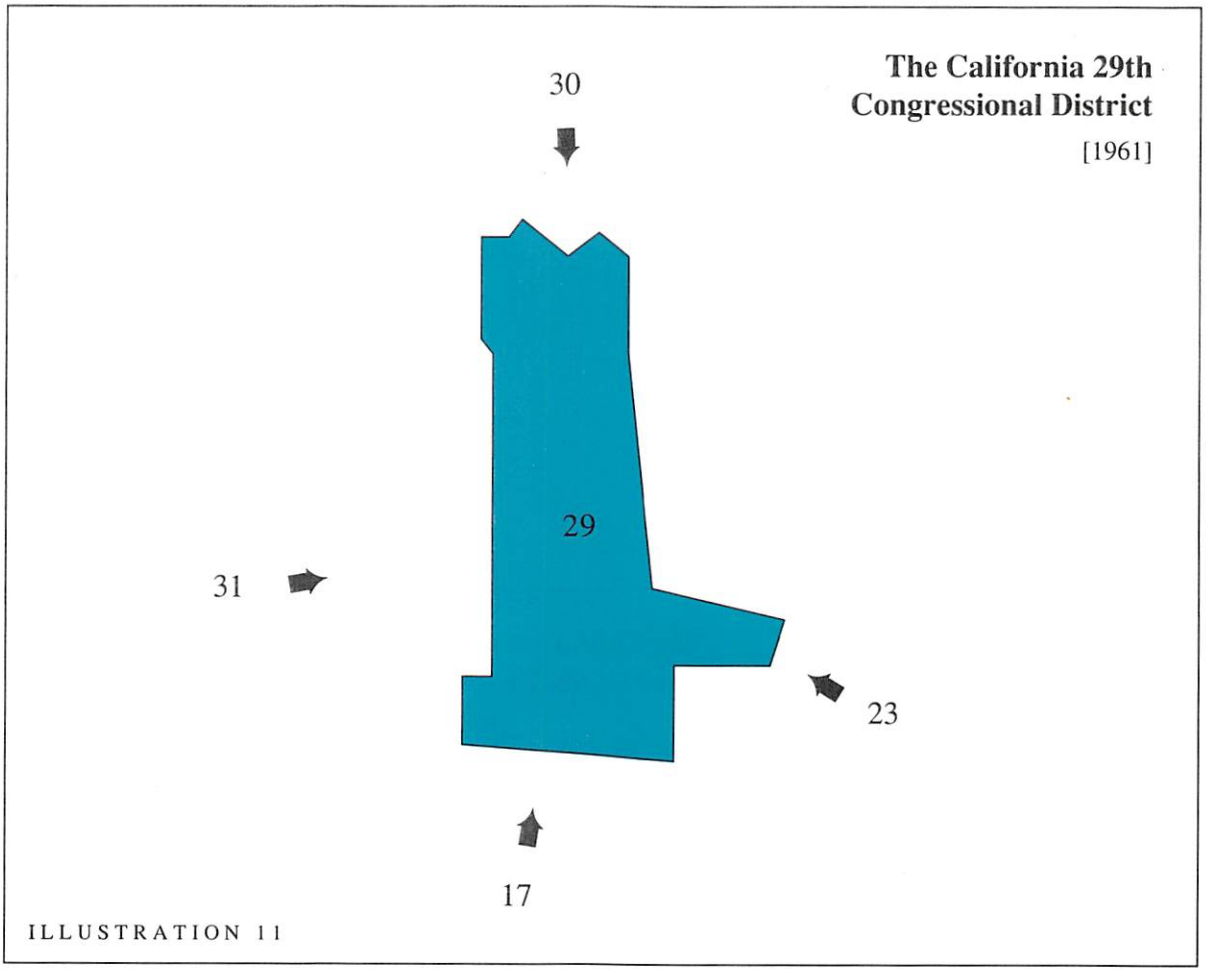
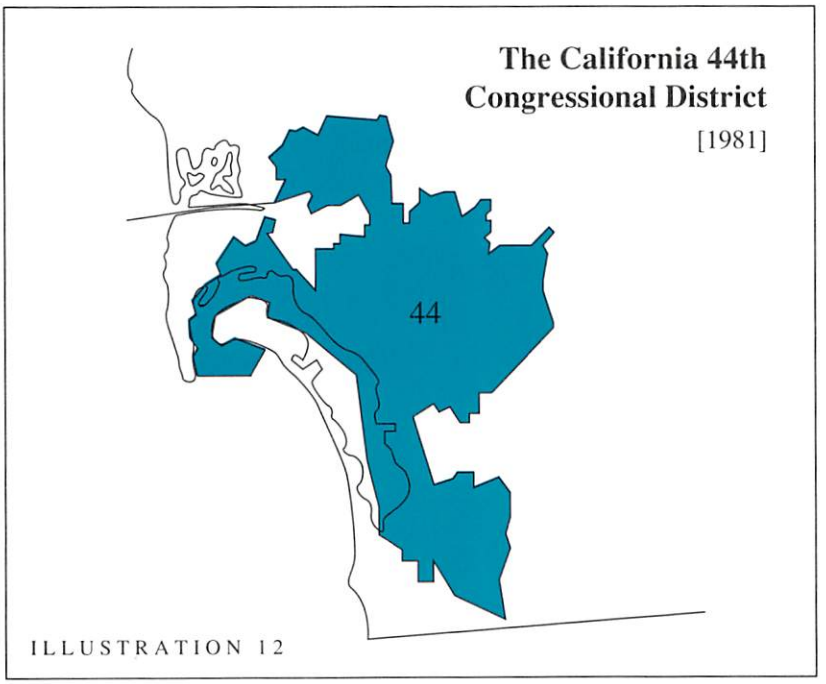
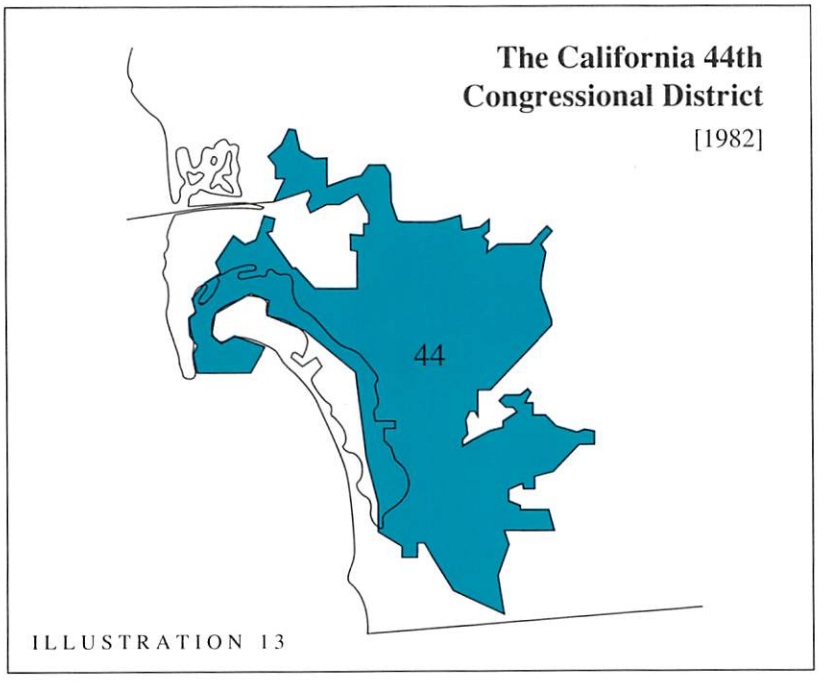


ILLUSTRATION 11



Democrats concentrate themselves in San Diego's 44th C.D.



Democrats further concentrated themselves in San Diego's 44th C.D. to meet voters' protests in the 1982 referendum.

Gerrymanders by Form:

Elongated or Shoe String Gerrymanders

Such a district implies the boundaries of the constituency are long and rambling, with narrow connections ["necks"]. If such a district is created for a political advantage—hence, properly called a gerrymander—it usually is done to concentrate voters. The Republicans in 1951 did this in the California 26th C.D. and the New York 12th C.D. The same technique could be used to disperse strength or to eliminate it, but the more common practice is to concentrate, which reveals the political purpose.

Shoestring districts, however, are probably the most confusing and misinterpreted. Their odd shapes almost immediately elicit the term gerrymander. Often the district is not a gerrymander, but the configuration may prompt that characterization, as in the "saddlebag" and "belt line" districts in Illinois, the "dumb-bell" in Pennsylvania, the "staircase" in Indiana, or the "hammer" in Missouri.[52]

An extended narrow district hemmed in by mountains, or consisting of a long valley, may be natural and far from arbitrary even though not compact on a map. In a colorful speech, a California legislator deplored the inclusion of Santa Catalina and San Clemente Islands in his district.[53] The islands had insignificant population but were part of Los Angeles County and had to be attached to one of the Los Angeles districts. He said he only wanted a district not an empire. He begged the redistricters to return the goats and sheep and give him back his constituents "who split their infinitives and dangle their participles." Again, the key is intent. The islands removed from the mainland would appear odd under any circumstance.

Fascinating examples of peculiar-shaped districts with animated features made up a "political zoo" in a 1951 *Life* article.[54] Analysis of the districts would reveal, however, that natural geographical features shaped many of them and did not necessarily constitute gerrymanders (See Illustration 14). In Professor Brunn's book a figure entitled "Gerrymandered Congressional Districts"[55] included four California districts three of which would hardly qualify as gerrymanders though their shape seemed odd. The indentations and extensions reflect whole counties whose integrity was respected, as well as the peculiar population concentrations that required jumping mountain ranges somewhere.

Similarly, it was inaccurate to term the California 2nd C.D. (1951, 1961) a gerrymander.[56] The 350-mile long district, involving nineteen counties looked like a gerrymander because of its sprawling nature; but when the sparsely populated counties of similar rural interests are acknowledged to be a large geographical unit, and defined as such by the Census Bureau, the gerrymander features become minimal. Even the frequently cited California 28th District (1961) (which made more textbooks than any other district since Gerry's vintage piece until its successor, the 27th C.D. in 1981 and 1982) could be defined as a grouping of independent coastal cities with common interests that warranted special consideration.

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52. Reinsch, P., *American Legislatures and Legislative Methods*, (New York, NY: The Century Company, 1913) p. 202; Bryce, James, 1 *The American Commonwealth*, (New York: Macmillan and Co., 1985) Vol I, p. 124. The "galloping horse" and the "lop-eared rabbit" have been located in a Delaware case that includes an extensive analysis of gerrymandering practices *Sincock v. Gately*, 262 F. Supp. 739 (D. Del. 1967). Unfortunately, often the provision of a name designation suffices for analysis, which is obviously a misnomer.

53. *Inglewood Daily News*, March 21, 1951; *Los Angeles Examiner*, March 28, 1951; *Hollywood Citizen News*, March 28, 1951; and Hardy personal memorabilia re: 1951 reapportionment.

54. "Speaking of Pictures, Congressional Districts in the Gerrymandering Zoo," *Life* (April 16, 1951) at 10.

55. Brunn, *Regions*, p. 169.

56. This example was the favorite, but erroneous example of the late Peter Odegard.

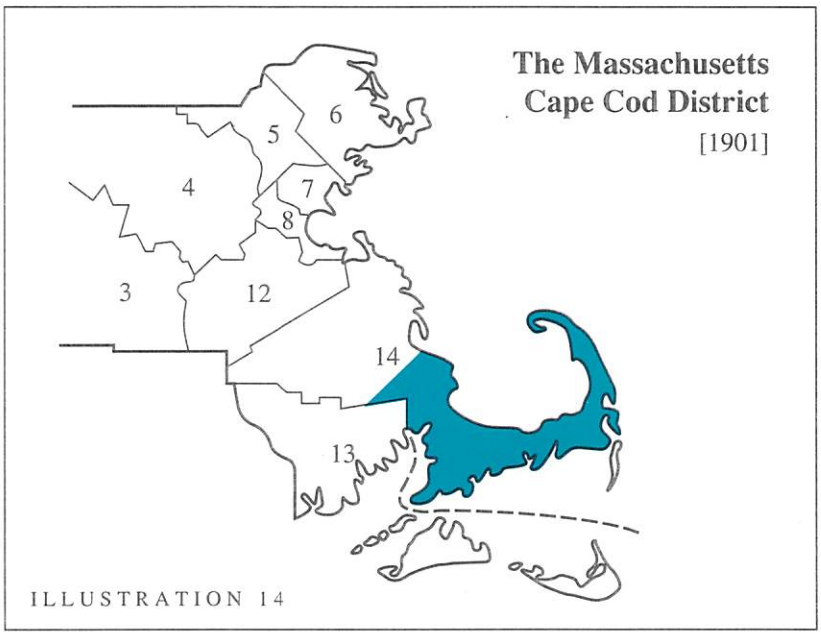


ILLUSTRATION 14

Note: Any district which includes the Cape Cod peninsula will naturally be elongated. It is neither arbitrary or unnatural.

A consideration of the demographic origins of districts is sometimes helpful in judging elongation of districts, which are as frequently in urban as in rural areas. Often a review of earlier districts reveals compact districts in metropolitan core areas.[57] Gradually the districts became elongated. The explanation is partly demographic and partly political.

Incumbents, who are usually the redistricters and who also vote on the proposals, are naturally interested in perpetuating their positions. As population moves outward to the suburbs and represents a larger percentage of the total area, population adjustments warrant consolidation of central districts. If the number of legislators remains the same, new districts must be created in the outlying areas. But each new district in the suburbs may mean one less seat in the inner city that currently has a representative who has a vote on the redistricting proposals. Such a shift means liquidation of his district, and probably a no vote on redistricting legislation.

A happier solution is the elongated district. Incumbents residing in the core area can continue their districts, which are declining in relationship to total population, by extending their political boundaries into the suburbs by elongation. Sufficient population may be acquired to justify the continuation of their positions; thus, often unnatural districts result from the natural inclination of politicians to perpetuate themselves.

An alternative to the elongation rearrangement is the consolidation of the inner city districts and the creation of new districts in the suburbs. An incumbent of the former district may transfer his political base to a new area whose population may be responsive to his aspirations to continue in public office. This is especially true of white politicians in areas of minority influx. In 1971, Representative Barry from New York even offered his seniority to California by attempting to transfer his incumbency to a new California district.

57. This is discussed in Hardy and Heslop: *West Side Story - Murder.*

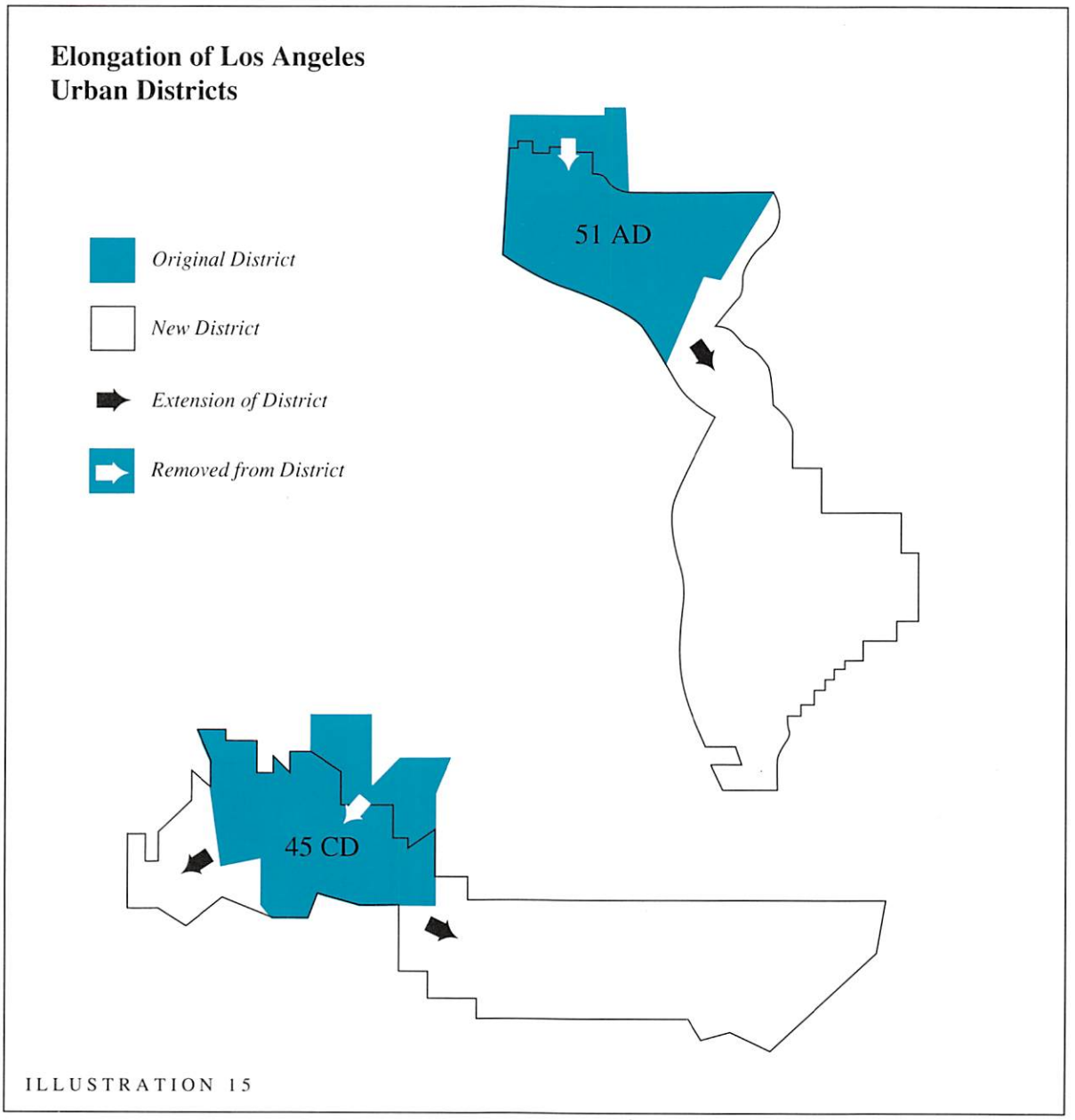


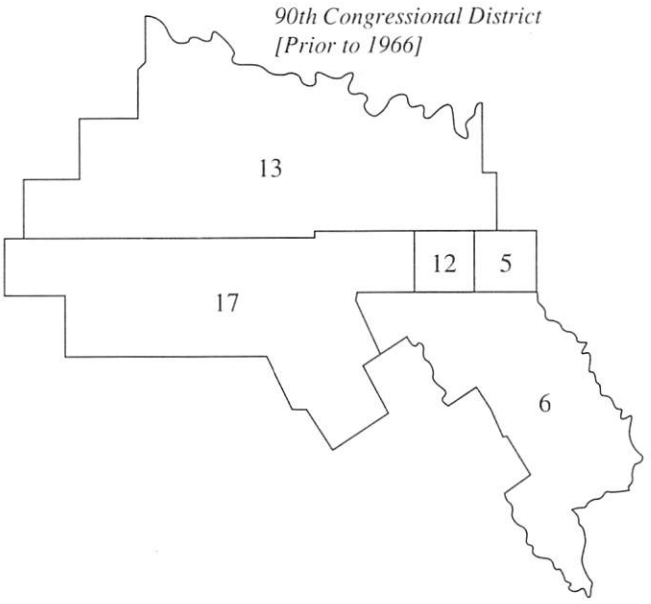
ILLUSTRATION 15

The efforts of core area politicians to perpetuate themselves might be termed an urban elongation gerrymander. The potential of the technique in reverse has not been ignored by rural interests. Rural districts scheduled for liquidation can be continued by insertion into the metropolitan core area to attain sufficient population for their justification. The rural elongation gerrymander is demonstrated by the congressional districting in the Dallas and Fort Worth area. (See Illustration 16, page 22).

The result of the urban or rural elongation gerrymander denies the growing areas (suburban or urban) their own representation, while the areas of decline (the core and rural) continue their power.

Elongation of Texas Rural Districts in the Dallas Area

[1964 and 1966]



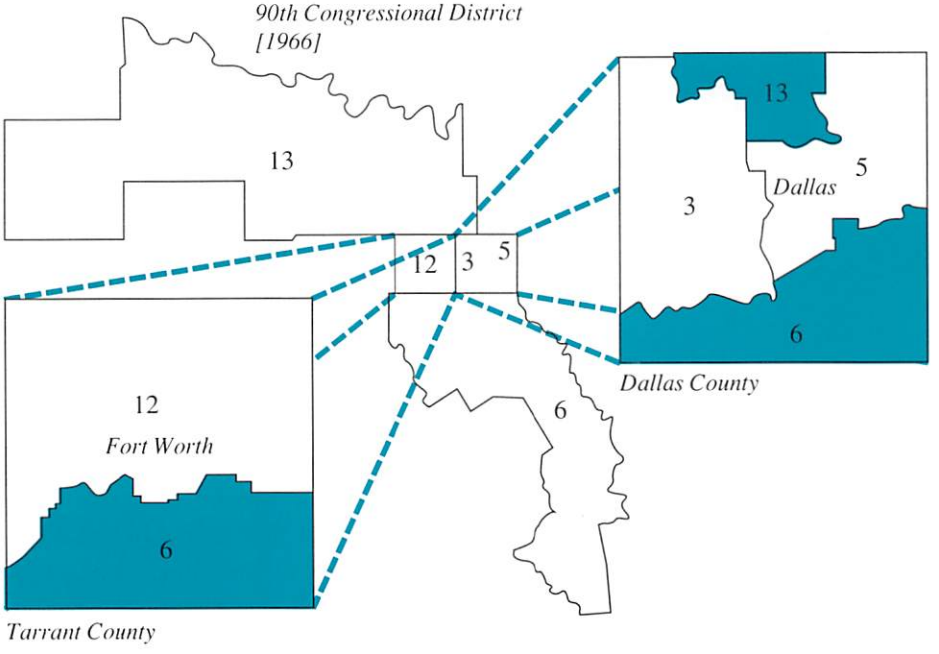


ILLUSTRATION 16

The rationale of dividing the core area can extend to the local level of government. Supervisorial districts often divide the urban or metropolitan center to minimize its domination, or to postpone the impact of the one person, one vote decisions. In California's rural San Benito County incumbent rural supervisors were jeopardized by gross under population. A solution was found for one rural supervisor's problem by a narrow highway corridor from his farm residence into the heart of the one urban cluster, Hollister.

The 1961 and 1965 adjustments for the Republican incumbent's benefit took place under Democratic redistricting of the "old-fashioned sweetheart school." As demographic shifts continued, the "new breed" of redistricters clearly indicated their intent and purpose—liquidation. It was a clue to the future. The court plan brought the number back into its general vicinity not unlike the proposed AD of the 1971-73 vintage. The 61st AD incumbent found a new court created congressional district helpful and his associate occupied the 57th AD, which had previously been relocated for his benefit in the beach area. Such are the opportunities of neutral court actions. Is it any wonder most legislators will do anything to avoid court imposed districts?

An interim arrangement between the elongated district and the new district dilemma is the "slinky" district. Like the toy of the same name, the incumbent gives up a portion of his original district and picks up population by a slight expansion of his district outward. In the next redistricting he gives up more of his original base and compensates by further extensions, and so on. A prime example of this technique is the evolution of the California 57th Assembly District (1951, 1961, 1965).

Thus, an elongation district may be a gerrymander or it may not be. Its purpose is the key which requires more than superficial analysis. The map configuration may be misleading. On the other hand, the elongation maybe enlightening. Look back at the 1951 California 26th C.D. [Illustration 7, page 15] and note the necks and the bump, or the 1961 California 28th C.D. [Illustration 8, page 15] and its necks, or the 1981/1982 California 42nd C.D. [Illustrations 9 and 10, page 16].

Consider carefully, the liquidation of the slinky. There may be a clue to the future.

Gerrymanders by Composition: Dispersal Gerrymanders

A dispersal gerrymander is the reverse of the concentration gerrymander. An effort is made to divide an opponent's strength [dispersal-of-them] to give the more dominant vote to the other party. Or, a dominant party's strength is diffused [dispersal-of-us] into as many districts as possible to ensure election of its candidates.

If carefully arranged, the dispersal gerrymander can maximize political potential. Theoretically, a party of relatively equal strength could be completely denied representation if its strength could be equally dispersed to make it a minority in all districts [Illustration 5, page 12]. More usually, the dispersal technique is combined with a concentration arrangement in a minimum number of districts. The party which is competitive in the total vote may become a distant second party in terms of representation.

If the dominant party maintains its majorities, which is likely in view of the original redistricting, it can perpetuate its political base by further redistricting, or it can simply refuse to enact new redistricting legislation. It is the latter approach that allowed rural legislators (usually Republicans in the North and Democrats in the South) to continue their power into the 1960s. It is also the method by which Ohio and Michigan Republicans have benefitted from redistricting practices. By the 1980s, Democrats were employing similar techniques most notably in California.[58]

58. This is discussed in Hardy and Heslop: *West Side Story - Murder.*

If the Democrats had been in control of the 1951 New York redistricting, and Republican 12th Congressional District existed, the easy solution would have been to disperse the Republicans among the Democratic districts and gain another Democratic seat in the process.

In terms of concrete examples of the dispersal techniques, the famous North Carolina "bacon-strip" districts are instructive.[59]

Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic interests prevail along with historical precedents. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats chose the dispersal alternative. A few Republican counties are grouped with Democratic counties in the central section of the state. The effect created one-county-wide congressional districts that run horizontally across the state, creating bacon strips. Although the technique paid off for decades the adjustments in the 1960s backfired as a result of public rejection of the infamous practices when applied to a popular Republican.[60]

From a political viewpoint the dispersal gerrymander is the most desirable. Effectively employed, an opponent can be weakened significantly beyond his true strength. It is, however, a dangerous technique. As David Mayhew observes:

> The reason is that parties with absolute control over districting tend to be very greedy. A controlling party normally concedes a minimum of very safe districts to the opposition and then tries to salvage as many as possible for its own adherents. In this latter effort there is a tendency to spread electoral resources too thinly.[61]

North Carolina
"Bacon" Districts

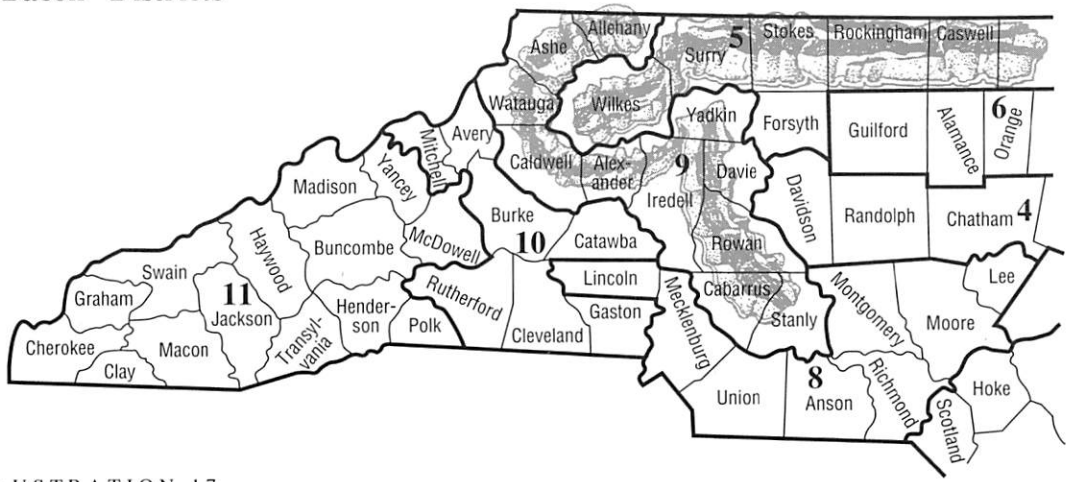


ILLUSTRATION 17

59. Orr, Donald, Jr., *Congressional Redistricting: The North Carolina Experience*, (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hall, 1969); Orr, Donald, Jr., "The Persistence of the Gerrymander in North Carolina Congressional Redistricting," 9 *Southeastern Geographer* 29-54 (1969); hereafter, cited *Persistence*; and Edsall, Preston, North Carolina: `This Bill or Nothing,' in *Politics of Reapportionment*, at 191-203.

60. Orr, *Persistence*, 29-37.

61. D. Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in Polsby, Nelson, *Reapportionment In the 1970s*, (Berkeley, CA: University of California Press, 1971), p. 277; hereafter cited as Reapportionment in 1970s.

Numerous examples can be cited. For example, in California the 25th and 27th Congressional Districts (1961) were created to satisfy the personal ambitions of state legislators for congressional careers. Both districts were marginally Democratic and fell to Republicans in 1964 and 1966. In Indiana redistricting for the 1970s the effective dispersals won seven of the eleven seats in 1972, aided potentially by the Nixon landslide. In the reversal trend in 1974 following Watergate, the Democrats captured nine of the eleven seats.

Similar results can be noted in Iowa during the same period. Even more revealing is the long record of the Missouri congressional districts (1901-1931) where the Democrats dominated the representation by dispersal gerrymanders, but in the Republican landslide years (1904, 1918, 1920, and 1928) the Republicans gained substantially. Similarly, in 1942 and 1946 the Republicans swept the Democratic dispersals of the 1930s and 1940s.[62]

These lessons are not lost on politicians. The safe district is preferable. Dispersal gerrymanders are dangerous, especially in years of political change. Redistricting measures are passed by incumbents to whom dispersals constitute dangers beyond one's control. Persons creating redistricting proposals, seeking widespread support among their colleagues with whom they will work in the next decade, are aware of the desire (continuation in office) and fear (defeat).

Such conditions favor what Mayhew has termed the bipartisan gerrymander and the individual gerrymander.[63] With strong party organizations equally balanced, one party dominating one house and the other party the second house, or with one party controlling the executive and the other party regulating the legislature, the party leaders work out mutually satisfying redistricting proposals. Typically, such political strategies produce concentrated gerrymanders, with a few marginal districts, in order to avoid jeopardizing the balance. With weak party organizations, or in one-party states, the negotiations tend to be on an individual basis, hence the term "individual gerrymander," or a "sweetheart" bill. The California congressional redistrictings of 1967[64] and 1971 are classics.

The conceived dangers of the dispersal technique and the prevalent bipartisan and individual practices, point to one of the major misconceptions about gerrymandering. Though the dispersal technique can be highly effective, the political inclinations of incumbents move in opposite directions. Though the redistricting process and its malfunctioning in the form of gerrymanders may be conceived as a partisan exercise in which the actors can manipulate unchecked for the party's advantage, the bipartisan and club-like legislative atmosphere presents powerful deterrents to effective partisan action. Many redistricting and gerrymander misconceptions are perpetuated because academicians lack a sense of reality based on the political actualities which shape a redistricting measure.

It is not insignificant that in 1951 California Republicans were able to maximize their congressional districts by dispersal techniques while their state legislative districts worked less well. Democrats in 1961 were equally successful. Indicative of the new technological era, the 1981 and 1982 California districts attest to the manipulative techniques of the dispersal[65] in conjunction with the concentration technique.

Now, consider the districts which surrounded the concentrated Republican 42nd C.D. and the subtle re-tuning of lines to disperse Democratic strength.

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62. See Appendix I.

63. *Reapportionment in 1970s*, 277-84.

64. The 1967 California redistricting is analyzed in Hardy, Leroy, "Congressional Redistricting in California, 1965-67: The Quilting Bee and Crazy Quilts," 10 *San Diego Law Review* 757-92 (1973); hereafter cited as *Crazy Quilts*.

65. This is discussed in Hardy and Heslop: *West Side Story - Murder*.

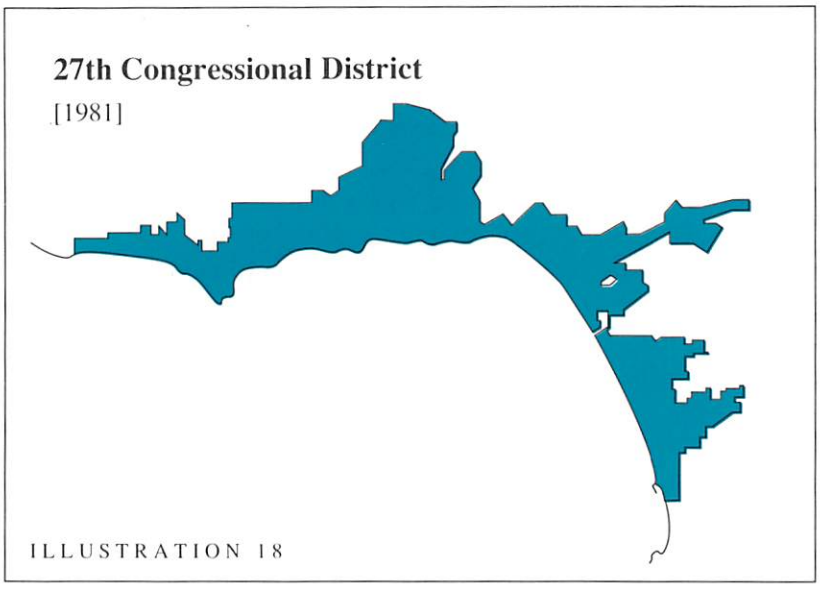


ILLUSTRATION 18

27th C.D. [1981] defeated by referendum. Note the necks:

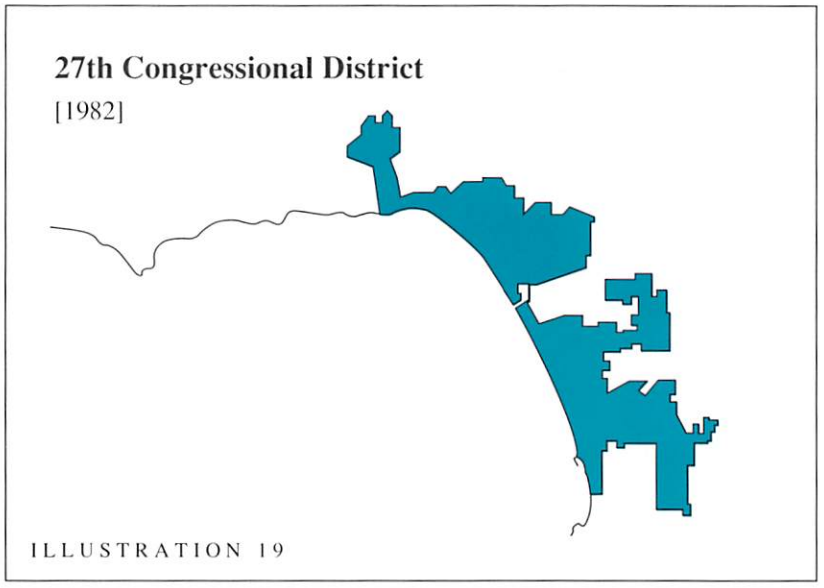


ILLUSTRATION 19

27th C.D. [1982] "corrected" to meet the public's objections:

Would you say an improvement was made in response to the voters' expressed opposition to Illustration 18? Compare the necks in Illustration 18 to Illustration 19.

32nd Congressional District
[1981]

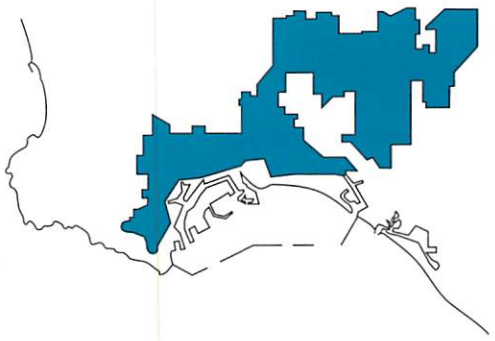


ILLUSTRATION 20

32nd C.D. [1981] defeated by referendum. Note the necks:

Compare the necks in Illustration 20 to Illustration 21.

32nd Congressional District
[1982]

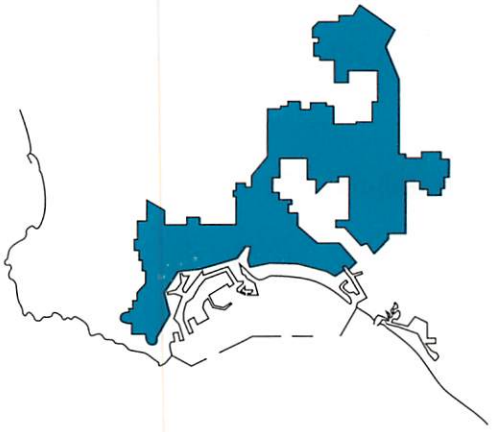


ILLUSTRATION 21

Some Fundamental Questions

Note the additional neck in the "improved" district—500 yards wide for 4 miles. Was this what the public wanted when it defeated overwhelmingly the 1981 districts by referendum?

Did this alteration create a more responsive district?

How can citizens organize in this district?

How are the voters reached in this district? Who benefitted from this district? Was it the incumbent?

True, the Latino percentage marginally increased in the 32nd C.D.; but what happened to the Black percentage in the 29th C.D. WHY? Where can the greatest Latino growth be expected to occur?

38th Congressional District

[1981]

ILLUSTRATION 22

38th C.D. [1981] defeated by referendum although cities were basically unified. The incumbent was re-elected by 52.4% in 1982

38th Congressional District

[1982]

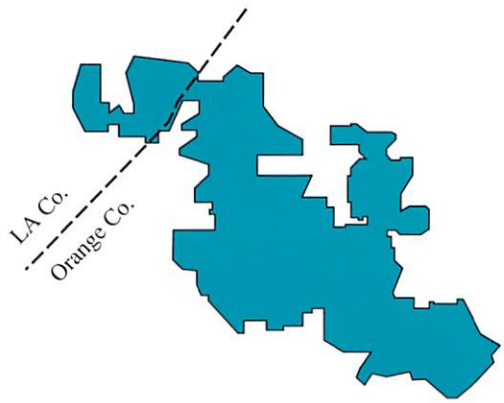


ILLUSTRATION 23

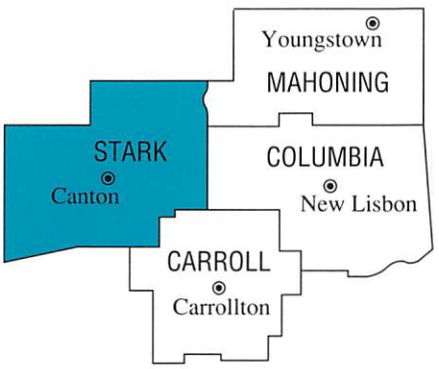
38th C.D. [1982] to "correct" for the public's objections. Note the additional extensions, necks, and the crossing of a county line:

Gerrymanders by Purpose—Elimination

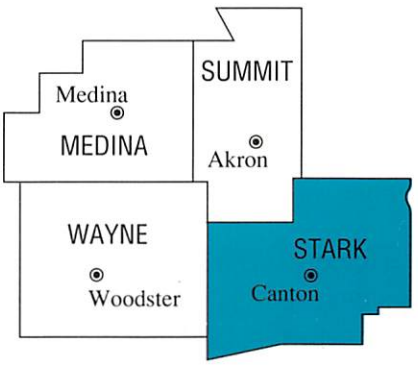
Dispersal and concentration of voters are also employed to create a fifth type of gerrymander. The elimination gerrymander is designed for the purpose of isolating an incumbent from his base of support to make re-election unlikely or more difficult. Faced with a difficult re-election battle, the incumbent may retire rather than put up a fight under adverse circumstances, or run for higher office.

Sometimes the strategy of elimination may backfire, or success in a race for higher office may lead to greater accomplishments. President McKinley, faced with a fourth district realignment to his detriment, ran for the governorship of Ohio, which promoted his presidential bid.[66]

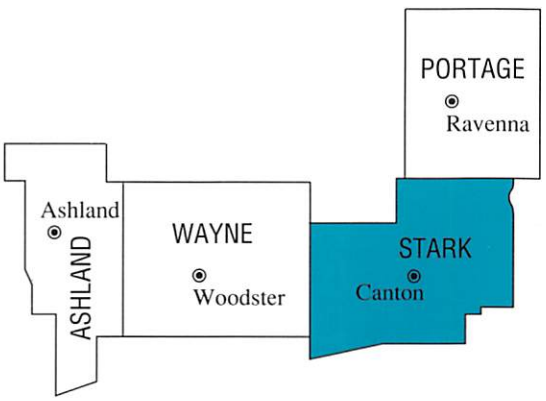
The Gerrymandering of McKinley's District



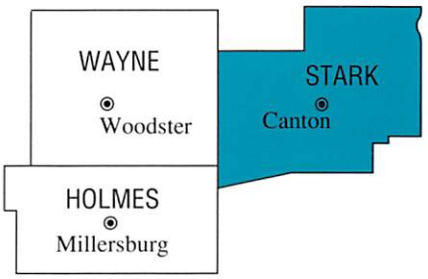
The Normal District as in 1876, 1880, 1882, 1886 and 1888.



The District as Gerrymandered in 1884.



The District as Gerrymandered in 1878.



The District as Gerrymandered in 1890.

ILLUSTRATION 24

66. Olcott, Charles Summer, *Life of McKinley* (New York, NY: Houghton-Mifflin, 1901), Volume 1 p. 82; cited by Brooks, *Political Parties*.

A classic example of this technique occurred in three San Francisco assembly districts in 1951.[67] The loss of two seats in San Francisco required a complete reorganization of the districts. In the process three Democratic assemblymen found themselves in three different districts, with their former neighbors each having substantial portions of another's districts. [See Illustration 25, page 31].

In the same redistricting, the two San Francisco congressional districts shifted axis, making re-election of Democratic Congressman Frank R. Havenner difficult. In a similar effort against another liberal Democrat, the Republicans, in 1951, stripped the California 18th District (1941) of the northern Democratic sections, which had assured Congressman Clyde Doyle of his victories in 1944 and 1948. Fortunately for Congressman Doyle a new district was available into which he moved and won.[68] Congressman Havenner was not so fortunate.

The generally successful purging of the liberal Democratic ranks in 1951 was not forgotten by the Democrats in 1961. In the latter year the Democrats reconstructed the districts of two members of the John Birch Society to make their re-elections difficult. A third Republican also found his district altered to deny him re-election.[69] As a political ploy two other Republican congressmen and four assemblymen in the same locality were threatened with extinction by the same technique. Compromises in the final bills modified the proposals and won several Republican votes for the Democratic redistricting plans.[70]

The elimination gerrymander requires careful analysis to determine the nature of the action. When a state loses a seat, or seats, obviously a district will have to be eliminated, but its incumbent is not necessarily gerrymandered out of office. On the other hand when the political entity retains the same number of districts and one of the incumbents is not reelected, an elimination gerrymander may be a factor.

When an entity gains representation, as Los Angeles County did in 1951, 1961, and 1981, and, when one or more of the incumbents finds his district eliminated or re-organized to his detriment, an elimination gerrymander exists. The elimination gerrymander may also be used against a non-member of the legislature. If an incumbent anticipates a potential opponent in the next primary or general election, the legislator may attempt to draw him out of the new district. In 1951 a former assemblyman residing in the City of Hawthorne was an incumbent's potential opponent. When the lines were redrawn, the City of Hawthorne was removed from the district and a potential bid by a rival was thereby rendered unlikely.[71]

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67. Hardy, *Reapportionment of 1951*, 134-53, 155-59 and map on 393.

68. *Ibid.*, 255-58; concerning the Havenner problem see the *Holtville Tribune*, March 8, 1951 and the *San Francisco Sun Reporter*, March 21, 1951.

69. These observations are drawn from personal experiences as consultant to the California Assembly in the 1961 redistricting. The purging of liberal Democrats in 1951 and conservative Republicans in 1961 suggests that the morality gerrymander may be a subspecies of the elimination gerrymander. The technique is used to eliminate individuals whose political morality does not correspond to that of the redistricters.

    As a speculative footnote, one might point to the parallel of the McKinley efforts in a period of Democratic decline and the 1961-1981 Democratic efforts in California to rid themselves of their nemesis, right-wing Republicans. When the concentrated Republican 42nd C.D. became vacant with the resignation of Congressman Lungren, after his failure to attain approval for his treasurer's nomination, he was replaced with a conservative Republican who beat a liberal Republican and a moderate Republican (a former Democrat) for the Republican nomination. Despite repeated Democratic efforts to eliminate conservative Republicans by redistricting manipulations, their staying power has been facilitated by the concentration efforts of recent redistrictings. Thus, the dispersal to eliminate Republican incumbents in some areas has been coupled with concentration of Republicans in other areas. In the latter areas, the conservative activists have gained footholds in the primaries which have come to haunt the Democrats whose statewide strength continues to wane.

70. This is discussed in Hardy and Heslop: *West Side Story - Murder.*

71. Hardy, *Reapportionment of 1951*, p. 230.

When a state loses a seat, or seats, and someone has to go, it is sometimes surprising how readily incumbents can agree on who it should be—first, anyone but me, and, second, the member who generally bothers his colleagues for one reason or another. Often the agreement is bipartisan.

In more fortunate circumstances, at least for the incumbents, one of the members may decide to retire. In 1971 the retirement of an incumbent eased the loss of one seat in Ohio.[72] If the seniority of the older member is deemed valuable, the youngest freshman may be the sacrificial lamb.

Often the hand of death may settle the issue. Alabama, faced with the loss of one seat in 1971, found the Democratic legislators considering the elimination of the seat of Republican William L. Dickinson. The question was in which Democratic district should his base be placed, the 3rd or the 4th. Incumbent George W. Andrews of the 3rd died, and the dilemma was solved.[73]

The nature of the elimination gerrymander is especially revealing in a state whose congressional districts are increasing. One can take the position that the elimination of districts is inevitable in a state of declining population; but, in California despite increases, elimination is common. Someone must go; but who is the question and the decision will be determined by the redistricting designs. Several California incumbents whose districts did not have to be drastically altered, nonetheless were inconvenienced by redistricting and frequently eliminated.

Republicans redistricting in 1951:
The 1941 District frequently elected a liberal Democrat. The 1951 District shifted the political axis in San Francisco. The liberal was defeated in 1952.

San Francisco Elimination Gerrymander
5th Congressional District
[1951]

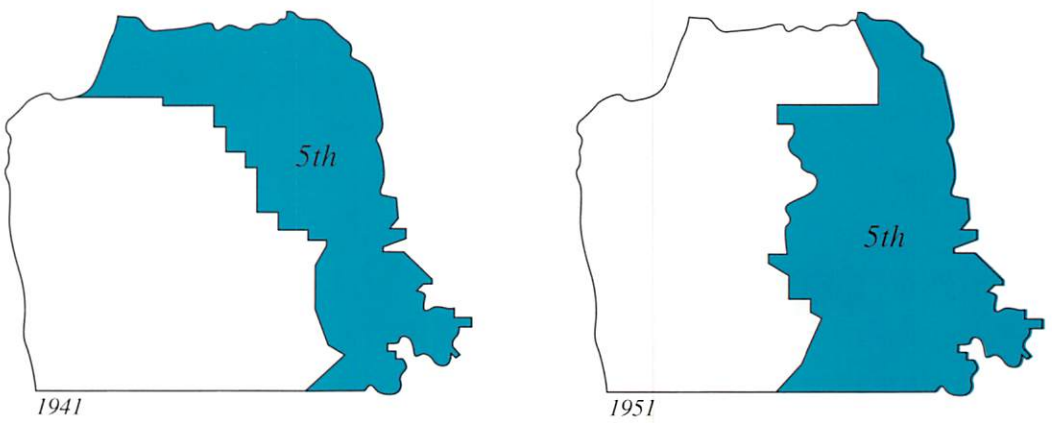

ILLUSTRATION 25

72. *Congressional Districts in the 1970s*, (Washington, DC: Congressional Quarterly, Inc. 1973), p. 147.

73. *Ibid.*, 9.

Democrats' redistricting in 1961:
The 1951 District elected a conservative Republican in 1960. The 1961 District removed Republican territory. The conservative was defeated in 1962 by a Democratic assemblyman who voted for the redistricting bill.

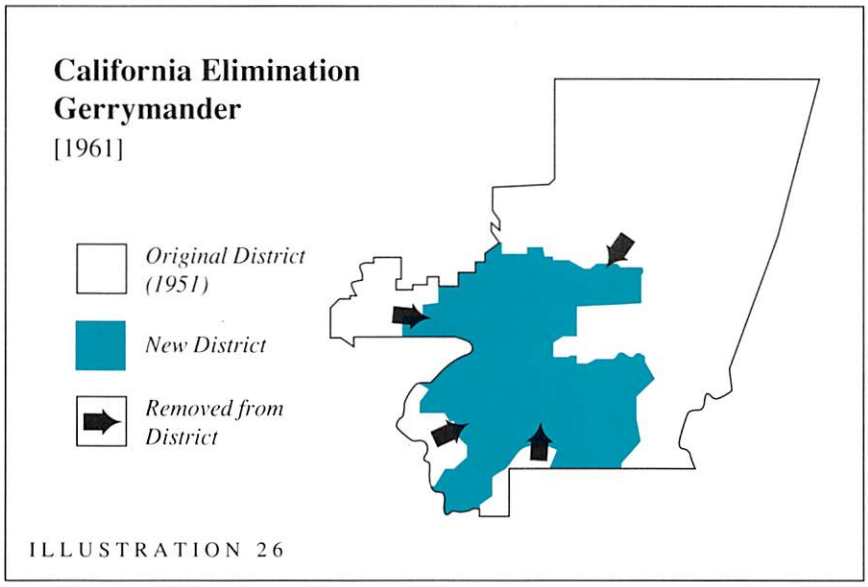

ILLUSTRATION 26

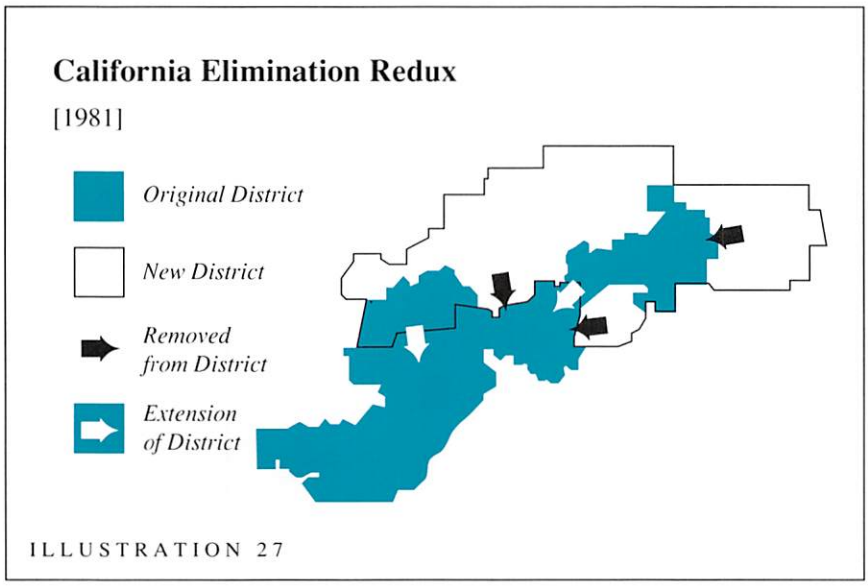

ILLUSTRATION 27

In the 1970s the same conservative returned to Congress from another district. In 1981 his district is consolidated with another district and he is defeated in 1982.

Gerrymander by Purpose—Projection

Often related to the elimination species is the projection gerrymander—a district designed to fulfill the political ambitions of an individual. A legislator may be such a person. He will have a vote on the redistricting legislation. During a redistricting action capitol rumors will abound in speculation about who wants to go to congress, especially when new seats are available.

Numerous legislators have found redistricting a vehicle for their congressional ambitions. In 1951 Republican Gubser moved to Washington.[74] Even Democrats Hagen, Moss and Condon made the big time under less favorable circumstances.

Democrats Leggett, Hawkins, Cameron, Brown, Wilson and Hanna became Congressmen in 1962, and were soon joined by Burton and Rees. Only one Republican state legislator benefitted from the initial 1971 changes. In 1982, Democratic Assemblymen Berman, Levine, Lehman and Bosco became Congressmen.

Outsiders friendly to the dominant party may have ambitions for the congressional seats, or for the state legislature itself, and the redistricters may respond to such desires. Sometimes the managers of the redistricting legislation will use the projection gerrymander to elevate their internal rivals to federal posts, thus removing them from the state legislature. A district designed specifically for an individual would qualify as a projection gerrymander, which in some cases may also be the elimination gerrymander of another.

One of the most fascinating projection gerrymanders of the 1970s centered on the California 38th Congressional District (1971).[75] The new 38th was one of five new congressional districts California was entitled to in 1971. It had the potential of being one of the two Democratic districts in the bipartisan program to split the gain of five: two Democratic, two Republican and one party-neutral. Among the Democrats interested in the district were four prominent contenders—the son of a political "fat-cat", a former congressman whose seat was now occupied, a leader in the local Mexican-American community, and the former congressional candidate in the local area who had been barely defeated in 1970.

As the legislation wandered through the legislative process, the lines of the proposed 38th changed daily, and toward the end, hourly. Each of the contenders had his supporters for various reasons—the struggle was a microcosm of Demcratic coalition politics. Ideological liberals fought for their champion, labor leaders for their candidate, Mexican-Americans for theirs, with Blacks supporting each element from time to time. With a Democratic majority of one in the state senate and two in the Assembly, each element had its veto, and the lines shifted accordingly—the liberal out, the Mexican-American in with his local area, the

74. Other Republicans seeking elevation to the national legislature were less successful. Assemblyman Conrad, who had diligently created a Congressional district for himself, found the Los Angeles Times had other plans when it threw its support to another candidate. Another Republican congressional hopeful, William Grant lost his primary bid for Republican nomination, while winning the Democratic nomination under crossfiling. Under that unusual system, if a candidate of one party lost his own party's nomination, he could not be the candidate of the other party. In 1954 Grant returned to the Assembly.

Ironically, the 1951 Republican redistricting, which was regarded as a partisan coup, elevated only Gubsen to Congress. The success was in cementing marginal seats occupied by Republican incumbents, while concentrating Democrats in over populated districts.

75. These observations are drawn from personal experiences as consultant to the California congressional delegation, 1970-1972.

former candidate in and out. In the final bill, all the contenders were in and all fought for the primary nomination. The liberal former Congressman won.

Unfortunately for the analysis of elimination and projection gerrymanders, the motivations of the participants cannot easily be assessed. Few individuals will openly talk of their plans in advance on the record for fear that constituents from the old district may feel neglected, or rejected, or consider their representative too ambitious. On the other hand, the ultimate redistricting action may force a state legislator to look elsewhere for his political future. One state legislator in 1951 reported that his state assembly district was made so difficult for him that the new congressional district was more appealing than certain defeat in his current legislative district.[76]

Fortunately, courts do not have to deal with elimination or projection gerrymanders; but any classification of gerrymanders must acknowledge such districts for completeness. Redistricting is a process by which representation of the electorate is assured through periodic adjustments to new circumstances and notable demographic shifts. In practice, redistricting is often an act for the perpetuation of incumbents, or for the ambition of bystanders. Courts would not, presumably, take jurisdiction over a complaint that so-and-so had been denied his seat. However, the courts may face decisions about the gerrymander in general, in which case an awareness of the political element in all its facets is worth noting.

Although projection plans are usually cloaked in the recesses of back rooms the arrogance of power occasionally reveals the crass greed of party hacks. The districts merely reveal their contempt for the democratic process. One other 1971 effort at projection was notable in California.

In an area of population decline, which normally would lose a district, or require the expansion of a district, a new district suddenly appeared with the prospective candidate a political ally of the reapportionment chairman and the brother of the chief consultant.

1971 planned projection:

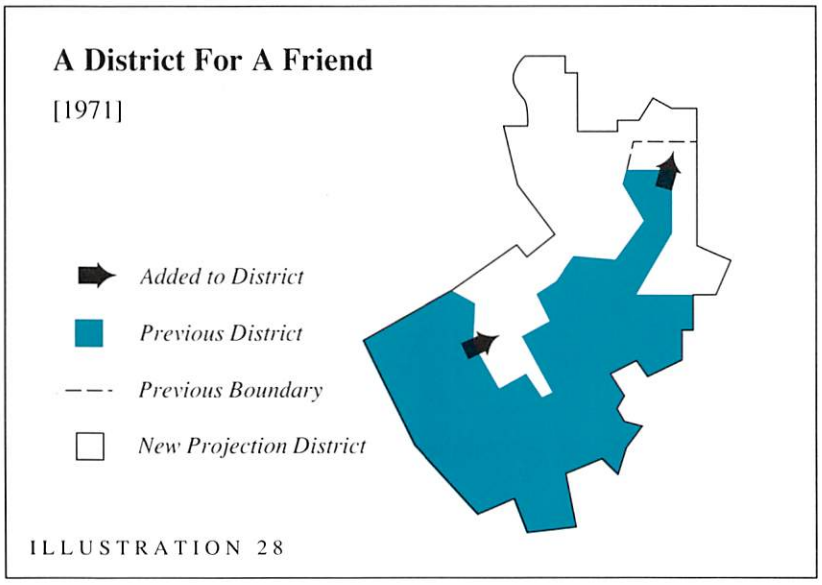

ILLUSTRATION 28

76. Personal interview with Congressman-elect Robert Condon, December, 1952.

Not only did the district enter into the bill, it became a litmus test for a power play. A seat for Berman (a non-legislator) became non-negotiable. Probably some legislators wondered "why him and not me?"

Occasionally the crumbs will be tossed. Consider 1981. The one district specifically created to project a Latino into office is instructive both as an illustration of the elimination gerrymander and of the projection gerrymander. (See Illustration 27, page 32).

Beginning point: Three Democrats and Four Republicans.

Demographic realities: No significant population increase was available for an additional district; therefore, to gain a seat someone had to be eliminated. The four Republican districts were consolidated into two. One Democratic district [30th C.D.] absorbed part of the Republican 26 C.D. [see Illustration 27, page 32] and moved into Democratic areas to the south and west. A new district was created from portions of the old Democratic 30th C.D. and Democratic portions of the former Republican districts [26th, 33rd, and the 35th].

Result: Four Democrats and Three Republicans.

ANALYSIS BEYOND TAXONOMY:

A classification system of gerrymanders can be made more meaningful by considering other aspects of redistricting, past and present. The ramifications will be analyzed from three perspectives:

1. initial considerations;
2. redistricting practices, past and present; and
3. methods to identify gerrymanders.

Initial Considerations

Three aspects are worth initial notation:

1. the inadequacy of number analysis;
2. malapportionment was not gerrymandering in the true sense; and
3. political realities.

Number Analysis: First, equity of a redistricting cannot be judged solely on the basis of statewide registration figures. Not every district can be created with a 50-50 registration, especially in a state where the registration figures are 60-40, or 70-30. In any state, certain areas will have preponderant registrations in one direction or another, e.g., Black areas may have 90-10 Democratic registrations, Latino areas 70-30, while wealthy foothill communities, or ocean front properties may have a 30-70 ratio in favor of the Republicans.

If the total state or county registration was 58% Democratic and 42% Republican, districts reflecting the overall ratio could be created only by dividing the natural community areas to link overwhelmingly Democratic areas with overwhelming Republican areas. The district lines to create such a condition would be rambling, extended, and probably narrow. Natural communities would be split by unnatural lines to achieve a theoretical norm that in the name of the concept (e.g., representative government) would destroy the concept (by creation of unnatural areas impossible to represent or to understand). It would be comparable to the person who demands proportional representation from a single-member district system. In order to create proportional representation, gerrymanders would have to be created to alleviate the system that itself has been called a gerrymander.[77]

The search for mathematical exactitude presents another numbers game which has reached ridiculous levels of academic futility. Added to

77. The ethnic percentage analysis is likewise misleading, especially if the ethnic group is dispersed throughout the area.

the charade are academic and legal arguments based on census figures which are acknowledged to be imprecise.

When the 1980 figures must be used for actions in the late 1980s, when the population changes are substantial but exactitude is demanded on the basis of old figures, the numerical analysis reaches even more ludicrous levels.[78]

Malapportionment election systems were not necessarily gerrymanders: Prior to the 1960s revolutionary cases, the term gerrymander was frequently used to cover a multitude of sins. In particular, it was common to describe representative systems based on area as gerrymanders because great numerical disparities existed between districts based on counties regardless of population.[79]

Without resolving the "correct" interpretation of that academic exercise, the point is the apportionment system may have been inequitable and unfair to the interests concentrated in the resultant districts, but until the court entered the picture, the apportionment system was the legal framework upon which the government system was built. In many cases the assumed inequitable and unfair apportionment system that was inappropriately called a gerrymander had been approved by popular vote. Not until the trilogy cases and their offspring effectively eliminated silent gerrymanders were the redistricting practices deemed to be *illegal.*

Court decisions on the federal level[80] and on the state level[81] in 1964 and 1965 have in effect negated past constitutional rules relative to the grouping of whole counties and assembly districts. Such negation was the only means by which equality of population could be achieved. Ironically, more equitable districts have been created to the pleasure of "number-counters", but the opportunity for gerrymandering has increased—and has been utilitized.[82] As Justice White observed:

> Today's decision on the one hand requires precise adherence to admittedly inexact census figures, and on the other downgrades a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.[83]

Political Realities: The final, but crucial, initial consideration beyond the taxomony, is the often intangible political factor which often hinges on incumbency. Gerrymanders have political impact but the political essence is often found in the career perspectives of individuals. Though it is common to lump all the districts as a party coup, the districts are usually built on individual wants which may be at cross purposes to party interests.

Almost every situation since the 1950s, and probably earlier, points up the importance of incumbency. Incumbency is an important—if not *the* important—element in district creation, where gerrymanders are spawned. State legislators are in an advantageous position in the process—they normally vote on their future districts. Congressmen also attempt, with vary-

78. Similar observations could be made about naming peculiar shapes as gerrymanders without analysis.

79. The relevance of these observations to California is discussed in "Considering the Gerrymander," pp. 265-66.

80. *Reynolds v. Sims*, 377 U.S. 695 (1964) and companion cases; *Wesberry v. Sanders*, 376 U.S. 1 (1964).

81. Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1964).

82. An interesting analysis of the potentials for gerrymandering is found in S. Slingsby, *The Gerrymander: Its Rise, Use and Potential*, (unpublished Ph.D. dissertation, Claremont Graduate School 1967).

83. Wells v. Rockefeller, 397 U.S. 542 (1969).

84. Hardy, *Crazy Quilts*, 757-92.

ing degrees of success, to protect their incumbency with only secondary concern for the party interests as such.[84]

Thus a congressman with a heavy registration of his party can give surplus party voters to marginal districts for party advantage. Most congressmen profess such willingness, but their actions often are not convincing. Frequently they are motivated by the following description:

> Every politician and office-holder dreads change; his particular obsession is an overhauling and revision of political boundaries which may endanger re-election prospects or necessitate more active cultivation of altered districts. It requires only a few years for even second-rate congressmen to establish contacts with mothers, babies, and "the boys" to build up an organization and catalogue his district so that keeping it happy and safe is an easy job; others do it for him, as a rule. The addition of another ward, or even a few blocs, is as perilous as a leap in the dark. It means making new friends, subsidizing new political hangers-on and a lot of doorbell-ringing and hand shaking that is most distasteful...they are in no mood to exert themselves. Maintenance of the established order, the usual majorities—these are the things which delight a congressman's bulging heart.
>
> Then again, enlargement of a man's district may pit him against a popular and ambitious foe, either for nomination or re-election.[85]

That was written in 1926!

When evaluating gerrymanders, the self-interest must always be kept in mind. Often it reveals the reason for the redistricting boundaries, e.g., the incumbent's home may be at the edge of the district or his potential opponent just outside the line. Of course, many of the reasons are lost in the mysteries of politics, but others are evident. The citizen and the scholar are frequently surprised by the trivial reasons for the creation of a line.[86] A few examples may be noted: desire to dispense with a certain local dedicated precinct worker ("she loses more votes than she gains"), to retain a mother's residence in the district ("at least I can count on her vote"—the district was overwhelmingly of his party), to keep his home (or potential home) in the new district, or the confidence of camaraderie ("they love me down there"—so much so that they ousted him in the next primary!), a home in an more efficient area which had to be included in a Democrat's district, a Treasurer's home which in a matter of one election shifted from one end of the district to the other, etc.[87]

Although the few examples of the trivial "reasons" for inclusion or exclusion are graphic, and only scratch the tip of the iceberg, the implications for the process should be considered. Why should the residence of one's mother, or one's treasurer be a consideration for a district which will last a decade?

If self-interest can be employed, it will be. Only the employment of neutral guidelines will minimize lines based on the most trivial reasons.[88] So how does the prevalence of the political realities clarify the gerrymandering technique? It can lead to the status quo position: it's politics and nothing can be done about it. On the other hand, knowledge of the political realities can lead to constructive proposals to avoid what incumbents and their supporters claim is inevitable. If you accept their position, you acquiesce in their rule with no resistance, which is exactly what they desire.

Studies suggest that the usual allusion to gerrymandering as a process which political parties use to bolster their power may be a gross oversimplification. It assumes a strong political party organization to implement the party

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85. Tucker, Ray T., "Our Delinquent Congress" 47 *New Republic* 13 (May 26, 1926).

86. Hardy, *Crazy Quilts*, 785-88. Factors involved in the preparation of the 1965 redistricting legislation are discussed in Hardy and Sohner.

87. Cain, *Puzzle, passim*, brings several other samples to light in the first phase of the 1981-82 California charade. Monograph #3 of this series will add other examples.

88. See Hardy and Heslop: *A.C.T.I.O.N. Program.*

will. Legislators who do the redistricting are not prone to commit political hari-kari but rather are motivated by self-preservation. Only secondarily is their political party's welfare of concern, if they are not interested in other opportunities.[89] This becomes most apparent when entrenched incumbents desire more of their own kind (political party, ethnic, religious, etc.) despite overwhelming numbers already in their districts. Their existing surpluses, or eagerly sought additions, might assist adjacent marginal districts. But party is usually second to staff.[90]

Because congressional redistricting is one step removed from the state legislators it is not surprising that a party's interests can better be handled when congressional districts are involved.[91] This proved even more true in 1981 when irresponsible bureaucratic technicians in Indiana and California had a field day with the technocratic advances without county boundary control.

Although politicians are in a gambling game, the solid bets are favored. Thus, though dispersal gerrymanders would maximize the party's strength, concentration gerrymanders are favored by the incumbents. Experience in California, in the 1951 and 1961 and subsequent redistrictings, as well as in other states, establishes the primary interests of the incumbents in their own preservation. California incumbents, especially in the State Assembly in 1951 and 1961, voted for state legislative districts favorable to their re-election and, in turn, bound themselves to vote for overpopulated congressional districts. In each case, when Democrats voted for Republican measures in 1951 and Republicans voted for Democratic proposals in 1961, their citizens were proportionately disenfranchised, and in some cases their political party was disadvantaged.[92]

A notable shift occurred in 1981 though the same ploy was employed in 1971-73. In the legislative redistrictings of 1951 and 1961,

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89. This aspect is discussed in Hardy, "Considering the Gerrymander." An earlier study of the Illinois reapportionment practices identified districts that were created with the following interests in mind: (a) individual preservation, i.e., the creation of a "safe" district for incumbents; (b) mutual preservation between incumbents, frequently cutting across party lines; (c) the preservation of political power by the majority party; and (d) preservation of blocs (such as the "farm bloc" or the "rural bloc") in the legislature without regard for party lines [Steiner, G. and S. Gove, *The Legislature Redistricts Illinois*, (Urbana, IL: University of Illinois Press, 1956), p. 7].

    Thomas Page, in a study of Kansas reapportionment, noted that the shaping of Congressional districts kept the metropolitan centers separate, preserved incumbency, and disturbed as few political boundaries as possible [Page, Thomas, *Legislative Apportionment in Kansas*, (Emporia, KA: University of Kansas Press, 1952) p. 51]. Charles Young, in his study of local political redistricting, lists the following factors in the redistricting process (in order of importance): (a) mutual self protection (2) protection of incumbents in other legislative bodies (such as congressmen or state senators), (3) protection of regional interests, (4) maintenance of rural dominance, (5) preservation of localism, (6) recognition of geographical barriers and demographic data, and (7) manipulation of districts for the advantage of political parties [Young, Charles, *The Politics of Political Boundary Making*, (unpublished Ph.D. dissertation, UCLA, 1959) P. 369-388].

    Contrary to the usual generalization about the gerrymander as a technique for achieving partisan advantage, it is significant that manipulation of districts for the advantage of political parties is last on Young's list, and is not outstanding in the two others. A perusal of recent literature and the *Congressional Quarterly* accounts of congressional redistricting in the 1960s and 1970s or the political almanacs of the 1970s and 1980s does not suggest a need to alter the system of priorities.

90. A notable exception to this rule was the sacrifice of key territory from Philip Burton's California 5th C.D. to his brother's 6th C.D. in 1981. Ironically and tragically, the more competitive 5th C.D. was targeted by Republicans. Though Phil Burton won, he died in April 1983 still dreaming of the Majority leadership which the 1981-82 redistrictings might have facilitiated. His brother John decided not to run in the improved 6th C.D. for which Phil sacrificed his territory.

    Even acknowledging the willingness of an incumbent to sacrifice his territory, the brotherly gesture was hardly solely party oriented.

91. Hardy, *Crazy Quilts*, 789-90.

92. This is discussed in Hardy and Heslop" *West Side Story - A Murder.*

despite efforts, shifts in power occurred to maximize political advantage. Even in the court ordered plans of 1973, which presumably were not politically motivated, significant shifts occurred with the tides of public involvement. The definitive story of the first part of the 1981 redistricting propounded the thesis that redistricting rectifies itself. Even a Supreme Court judge leaned upon the thin reed. Unfortunately, the thesis was erroneous though heralded as definitive. Electoral statistics prove the point.

Again the courts are not called upon to judge whether a redistricting protects or destroys incumbency. Redistricting exists to provide representation in line with the normative values of the society, not to provide positions for politicians who might otherwise not be able to fulfill their ambitions. However, courts evaluating gerrymanders must be aware of the personal motivation that often creates unnatural and arbitrary lines. Even when the court's agents do the redistricting, the criteria of judgment may be helpful to reveal gerrymandering practices that presumably should not exist in a court ordered plan.

Redistricting Practices— Past And Present

An initial consideration of the political essence of the gerrymander leads naturally to a more detailed review of redistricting practices. Obviously the current re-emergence of gerrymanders is most relevant, but a review of the hiatus between 1900 and 1964 is important.

Appendix I provides a detailed analysis of how silent gerrymanders worked in Missouri during that period. In essence, the silent gerrymanders of 1901 maintained political power without action until 1931. Subsequently, with minor modifications and population disparities which were tolerated, the old system continued to preserve political power without significant changes. The Missouri example was duplicated with little deviation until the 1960s in most states.

The trilogy cases, however, required new techniques. The gerrymander, fashioned anew with each census, required a return to practices traditionally associated with the gerrymander. Two interlocking changes brought gerrymanders based on action to the fore as a threat to representative government. Apportionment formulae were no longer the impediments. "One person, one vote" was the criterion.

Legal recognition of the population criterion required the breaking of county lines. That fundamental change dovetailed with an emergent technology. The result was devastating for representative government. Not only were the "gerrys" with personal survival involved, but technological vendors and datagogues entered the thicket which had become more illusive than clarified.

Redistricting Practices — The Current Dilemmas

Monograph 3 in this series analyzes an urban area in detail. Here it will suffice to summarize the main features of urban redistricting in the modern period. Before doing so, however, two major changes should be noted about developments since the so-called reapportionment revolution:

1. The need to split counties to achieve population equality, especially in urban or metropolitan areas; and
2. the development of modern technology.

A reapportionment revolution occurred by the legal insistence on the population criterion. As is true of most revolutions, the substance often turns out to be less than the expectations. The revolution was required because of the hypocrisy between rural dominance and population decline. The ludicrous inconsistency could not be ignored.

Status quo groups, however, merely had to regroup under new circumstances. The transition was eased by the natural inclinations of politi-

cians to find the means of political survival. Advancement of lower house members to upper house positions maintained similar attitudes; but also contributing to the gradual transition was the rediscovery of the gerrymander. Urban incumbents could elongate their districts into suburbs. Rural incumbents could inject their districts into suburbs and/or urban areas.

Fundamental, of course, to the lack of a revolution was the similarity of attitudes between rural and suburban people. They were united against the urban core.

With legal sanction to split counties to achieve population equality, politicians entered an area without limits. Despite the adoption of guidelines,[93] politicians did not find their manipulations inhibited. After all, the consitutional requirements of compactness, contiguity, and population equality had not prevented the actions which ultimately required the revolution. Why should the *thermidor*[94] be any different? Provisions for community interest were equally inviting to be disregarded without any procedural basis for interpretation.

In addition to feeling unbound by the moral imperatives of the system or its constitutional stipulations, technological experts, upon whom politicians allow themselves to become dependent, suddenly found a new device to facilitate disregard for rule of law. New technological equipment not only facilitated exactitude, it allowed the incorporation of political data beyond the wildest dreams of former gerrycrats.

In sum, the loophole of county splitting without restrictions allowed technicians, without supervision or moral standards, to engage in unconscionable actions covered by bureaucratic subterfuge.

To understand the political hoax being used to cloak current redistricting practices, three facets of redistricting must be rethought:

1. conditions shaping current redistricting;
2. the use of the term "political;" and
3. the fallacies, diversions and outright frauds being employed to confuse the issue.

How the Redistricting Problem Reemerged in the Late 20th Century

Analysis of redistricting since the trilogy cases often overlooks the connection between divisions of counties and technology.

Population equality required the splitting of counties after *Reynolds v. Sims*. Although whole counties created population inequalities, whether by constitutional stipulations or inaction, the whole county requirements limited the ability to extend districts prior to the landmark cases.

Technological developments occurring at approximately the same time dovetailed with the political opportunities that demographic changes had unleashed. Not only could computers process population data quickly for precise population exactitude, the technology could process enormous amounts of political data as well.

If the political aspects were given equal weight to the stipulated population criterion, the abuse of county splitting was compounded by the abuse of precision technology. The death knell was rung for democratic republican redistricting.

Courts had ultimately entered into what was labelled a political thicket as the hypocrisy of the disparities between populations and rural control became ever more apparent, and the legislative *status quo* refused to honor the prem-

93. In California Proposition #6, overwhelmingly approved by the electorate in 1980, provided "good" criteria. Yet the 1981 and 1982 actions which violated the spirit of the law proceeded with an obstacle.

94. Thermidor refers to the period in the revolutionary cycle when conditions seem to return to the pre-revolutionary pattern.

ises upon which a democratic republic was based. Legislators had failed to respond to the moral imperatives of democracy which forced the Court into action. The subsequent actions hardly indicate a rise to the challenge; indeed, with new technology, their lusts know no bounds.

Population equality required the breakup of counties, normally with no limitations on fragmentation, or configuration. Again legislators were given the opportunity to recognize the premises upon which the system was based — one person, one vote.

Grouping Counties Before The Trilogy Cases

ILLUSTRATION 29

Before the trilogy cases, counties generally had to be treated as whole units, as illustrated in Diagram I.

After *Reynolds v. Sims*, population equality required splitting of counties, generally without restrictions. Theoretically, the following could take place.

Potential Splitting of Counties After The Trilogy Cases

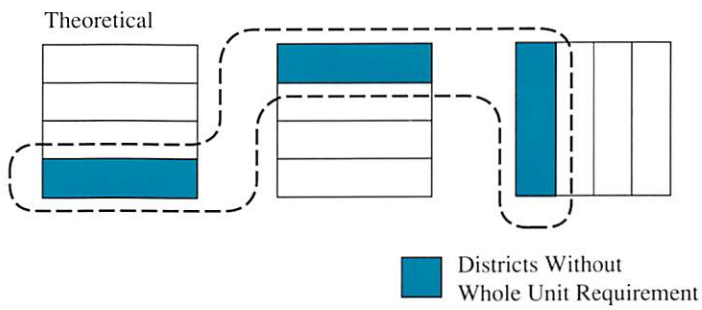

ILLUSTRATION 30

Ridiculous? Look at this creature of the irresponsible GerryCrat:

The district was proposed in 1971, passed by legislature, vetoed by governor.

California's 69th Assembly District

[1971]

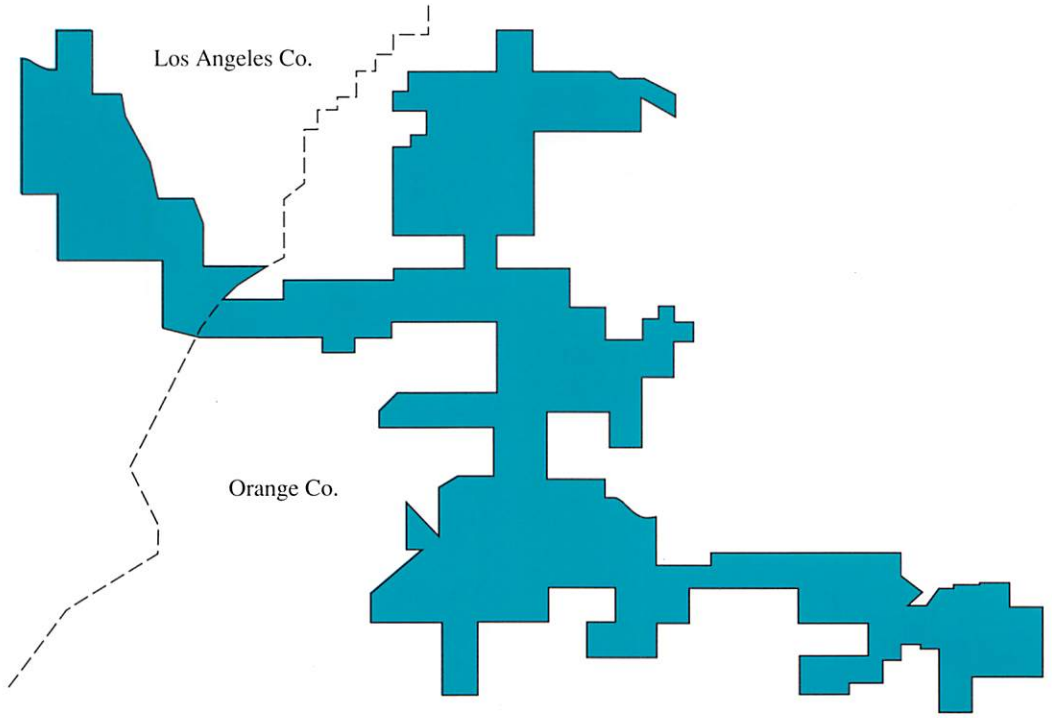

ILLUSTRATION 31

Illustration 32, page 43, shows a district that was passed by legislature, approved by governor, rejected by the people.

The creator said it was his contribution to modern art. Commenting on the gallery of monstrosities produced in 1981 and 1982, the Speaker of the California Assembly commented: He preferred a Picasso creation to good government aesthetics. Rather than take a stand on rule of law, the Speaker's consultant preferred rule of men and deplored the failure of the "good" government plan to consider the

Now look at a 1981:

ILLUSTRATION 32

Speaker's home.[95] When in 1990, the parties vie for the governorship to protect redistricting interests, one gubernatorial candidate has commented: redistricting is political, you cannot do anything about it.[96]

After a decade of governance under the results of 1981-82 redistricting charades, a leader-aspirant, himself a lawyer committed to the rule of law, seems to accept a rule of men, his men. The step-by-step pantomime of the district modifications clearly portray the chicanery of GerryCrats as artists. The substance is hardly the equivalent of modern art. It might be treated as a whitewash with tints.

95. Cain, *Puzzle*, p. 14.

96. Attorney General John Van de Kamp, Press Conference, August 9, 1989.

Technology and Redistricting

Before computer technology came to have a major impact on politics, politicians and their staffs usually spread out maps on their office floors and, using adding machines to do their arithmatic, slowly built new districts.

Such a procedure was not only laborious, it also prevented full political advantage. Often the plans would be built on the basis of the most primitive political and demographic information. Politicians backed their hunches after "eye-balling" a few statistics, or simply guessed what the political impact might be of adding or subtracting territory from districts.

When politicians could break counties and do so with precision by the use of computer technology, the days of old fashioned redistricting were numbered.

In redistricting, most decisions must be made sequentially: one boundary change requires another and so forth. The computer can speed each decision, linking it with an infinite number of other factors, to accelerate the redistricting process; but the vast array of alternatives produces unlimited potential for manipulation and accelerates the whole process. More alternatives with an infinite variety of input information can be considered.

The systems can be made user-oriented — tailored to the specific needs and interests of legislative users. Extensive data bases, including those used in statewide election campaigns with large quantities of politically relevant information, can be made available within seconds.

In essence, conditions (required divisions of counties and the ability to do so with infinite possibilities) created common interests between politicians and bureaucratic technicians. In typical bureaucratic fashion misleading explanations had to be developed to cover up unconscionable actions in the classical form of mirrors and blue smoke. The principal smoke screens cluster around six themes:

1. only by rigging the system can experienced, qualified people be retained;
2. compact districts will destroy minority representation opportunity;
3. some cities and counties have to be split and we know best;
4. we will take care of you like we did before;
5. we must be protected from the people to be courageous and to defend; and
6. focus on one district or person and declare it to be an exception.

Any analysis of the diversions in relationship to the theoretical premises of a democratic system clearly points up the hypocrisy of *status quo* defenders and their sympathizers.[97]

The difference between the Missouri examples and the modern chicanery practices can best be illustrated by two events in California's 1971 charade.

Los Angeles County districts had previously been controlled by the requirements of construction of districts within a county and "nesting" (grouping together) congressional district and assembly districts.[98]

After the court decisions of the early 1960s requiring population equality, the whole county and assembly district provisions were not limiting. Initial redistricting took advantage of the

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97. See Hardy and Heslop: *Redistricting Reform: An Action Program.*

98. The construction of districts within counties in effect required the transfer of whole districts to counties of growth, now districts can be elongated into suburban counties. The nesting required linkage between districts and more limitations on action. With state senatorial districts added to the grab bag the district creations were almost boundless. Some current proposed initiatives require such nesting. Its political complexity is probably the flaw in such proposals.

greater latitude, especially in terms of congressional districts. Since the 1971 and 1973 bills did not become law, it is useless to discuss individual districts. Illustrations 33 and 34 provide a few examples. The record, however, is worthy of consideration because of its lessons which many did not observe. Two illustrations demonstrate the intent of redistrictors and the potential of the unregulated redistricting.

Probably more time was spent on the two bizarre proposals than all the other districts in Los Angeles County. One might speculate whether the legislative negotiations in 1971-73 would have been more successful if equal treatment had been given to all districts rather than the two blatant grasps for power. But the proposed districts demonstrate beyond doubt the arrogance of power.

The 69th AD (Illustration 31, page 42) of Assemblyman Kenneth Cory merely shows the extent to which technicians thought blackmail was possible.

A Few Examples Of Districts Proposed By Legislators In 1971-1973

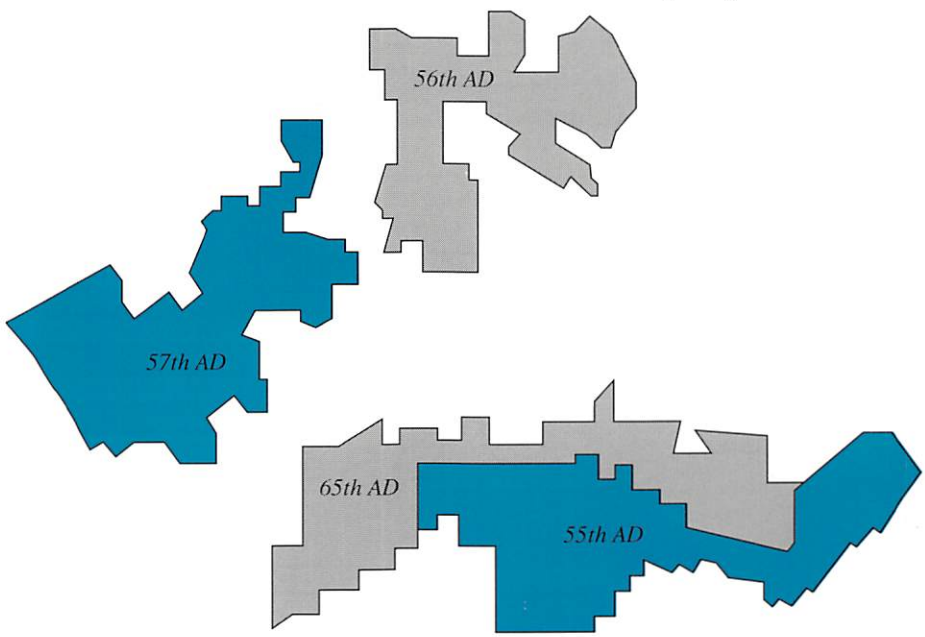

ILLUSTRATION 33

The design speaks a thousand words. Who could justify the district? Do such districts create representative government?

On the westside, the equally crass grab for power was demonstrated by the projection gerrymander for the political ally of Chairman and brother of the chief consultant. See Illustration 28, page 34, The Proposed Projection For a Friend.

Not only were the power bids unconscionable, the hyprocrisy became more blatant when the Democrats declared the districts were non-negotiable. Other districts could potentially be altered but not the 69th and 57th ADs.

Such blackmail is not the magic on which compromise is built. The stalemate in the legislature and between the legislatures and the executive was inevitable.

Other 1971-1973 Proposals
(A Bi-Partisan Proposal)

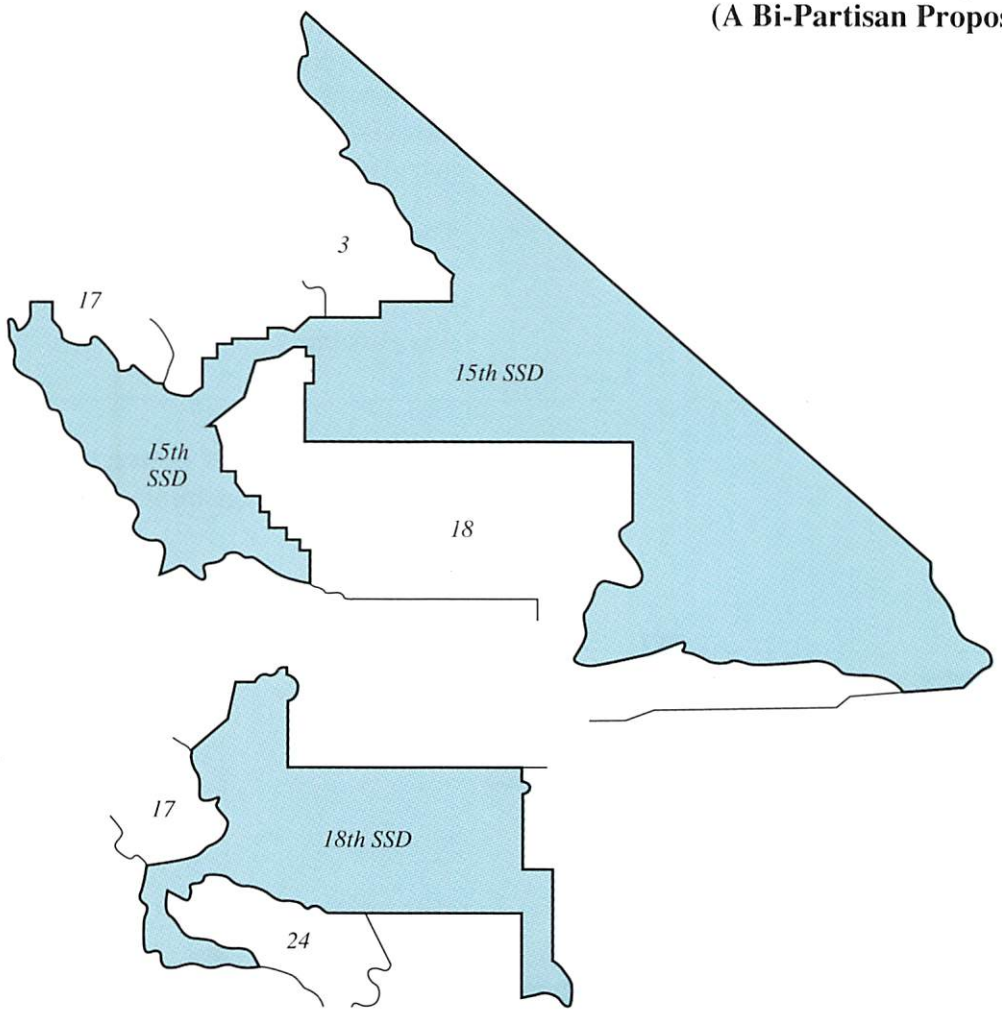

ILLUSTRATION 34

The Political Essence

As implied earlier, as the courts move deeper into the political thicket, to challenge the gerrymander monster, their decisions concerning the eradication of the predator will be facilitated by precise terminology and by clear guidelines. A classification of gerrymanders and their subspecies has been suggested to promote more positive assessment. The procedure for political analysis by the use of maps and district lines will assist the detection.

Gerrymanders can be properly and accurately identified if their political nature is made clear and the obsession with numbers and configurations is supplemented with essential information. On the other hand, if significant gerrymanders do not appear and electoral disparities warrant concern, a judgment of the electoral system's inequities may be appropriate, and another series of logical questions may be considered about the electoral system — not redistricting practices.

Unfortunately, however, when dealing with the gerrymander, the political dilemma remains. How much politics can be allowed in a process which touches the fundamental political heartbeat —survival of the representative system — as well as the survival of the political actor who is also the designer of the representation pattern? Who commits political suicide? Given the natural inclinations of politicians to ensure their own survival — with proper genuflections to representative government — when should the courts interfere?

Identifying Types of Gerrymanders

A decade ago the following identifying analysis was made and is still valid as a rudimentary means to identify key features of gerrymanders.

In the past decade, a venerable academic "cottage industry" has attempted with a multitude of esoteric, sophisticated and complex formulae to solve the gerrymander dilemma. One method is summarized by its supporters as comparable to putting a rubber band around a polygon, as if birth control of gerrymanders could be regulated by a rubber band. The crucial fact is that birth has already taken place before the rubber band can be used. Other experts have suggested other formulae.

If scholars since turn of the last century have noted the gerrymander species and their effects, if attention has been drawn to the unconscionable re-emergence of gerrymanders in 1982 (in defiance of 60% of the public's votes for referenda), if corrective suggestions from the simple to the sophisticated and erudite proposals of acknowledged political science authorities have been made — if all this has occurred, why hasn't anything been done to detect or resolve the gerrymander issue?

The answer is simple. Despite the multitude of symposia by legal and academic scholars, there is no agreement on which of the profound, or simple, methods of detection is correct. Each proposal has some validity; but as groups of non-political scientists have substantiated, none of the current proposals is without serious mathematical, logical, or intellectual flaws.

The basic problem is two-fold: first, the failure to recognize each gerrymander is unique and cannot be resolved by formula; and second, the anatomical features of the species [typically elongated necks] must be prevented from growing. To eradicate gerrymanders created by gerrycrats, legal contraceptives must be used in advance of the birth or rape.

Detection of the presence of gerrymanders—this predator of representative government—is assisted by the acknowledgement of the distinctive features of the principal species of gerrymander and their sub-species. Some forms are quickly recognized. Formerly, if a state (or any other political entity that is to be subdivided into districts) had not been redistricted for several years (with at least one census intervening) and the population changes were signifi-

cant, a silent gerrymander came into existence. Legislators, if the Constitution called for population representation, chose not to correct inequities for political reasons—to deny new groups representation, to perpetuate the power of declining groups, or to avoid elimination of incumbents who would be replaced by representatives from newly populated regions. The principle has been the same whether the reluctant actors resided in rotten boroughs in 18th century England, rural districts in early 20th century America, or the metropolitan ghettos of the late 20th century.

When a few districts give overwhelming votes, varying from the state norms, to one party and the remaining districts go to the competing party with less significant opposition, the concentration gerrymander exists. When the vote between the two parties is relatively equal but one of the parties wins all the seats, or has a significant proportion, the dispersal gerrymander has been employed.

Superficially, when a congressman does not return after a redistricting, it is easy to assume an elimination gerrymander may have been created. Likewise, if a quick perusal of a map reveals long narrow districts that string across an entire state or community, the term gerrymander may come quickly to mind. True though all the situations may be, the detection of gerrymanders, especially the less apparent ones, requires more detailed investigation.

The generalizations point to two difficulties which complicate gerrymander detection:

1. the simplification of the problem into numbers and shapes;

2. the obfuscation between electoral systems and districting practices.

Though the literature on reapportionment, gerrymanders, and redistricting is extensive[99] the articles often stop with an analysis—sometimes esoteric—of numbers. During the 1950s arguments were waged over the proper statistics to reflect accurately malapportionment. Among the principal schemes were population variance ratios and minimum population necessary to win majority control.[100] The American Political Science Association Committee on Congress urged a maximum deviation of 15 per cent.[101] Even more ingenious were the geographical schemes to judge compactness.[102] Unfortunately, the numerical and shape criteria only touched the surface of analysis.

The fundamental problem with the formula detection is the fact that gerrymanders are individual in nature. Together a group of individual gerrymanders may distort electoral outcomes, which may jeopardize the representative quality of the redistricting; but the overall evaluation does not point to the nature of the individual gerrymander. To eradicate gerrymanders requires knowledge of their specific character-

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99. Silva, Ruth and William C. Boyd, *Selected Bibliography on Legislative Apportionment and Distrincting* (1968).

100. Among the principal schemes are: Dauer, Manning J. and Robert G. Kelsay, "Unrepresentative States," 44 *National Municipal Review* 571-75, 587 (Dec. 1955); David, Paul T. and Ralph Eisenburg, Devaluation of the Urban and Suburban Vote (1961); Schubert, Glendon and Charles Press, "Measuring Malapportionment," 58 *American Political Science Review* 302-27 (1964); Clem, Alan L., "Measuring Legislative Malapportionment," 7 *Midwest Journal Political Science* 125-44 (1963); *see also* Clem, Alan L., "Problems of Measuring and Achieving Equality of Representation in State Legislatures," 42 *Nebraska Law Review* 622-43 (1963).

101. "The Reapportionment of Congress," 45 *American Political Science Review* 153-57 (1951).

102. Reock, Ernest, "Measuring `Compactness' as a Requirement of Legislative Apportionment," 5 *Midwest Journal Political Science* 70-74 (1961); Schwartzberg, Joseph E., "Reapportionment, Gerrymanders and the Notion of Compactness," 50 *Minnesota Law Review* 443-52 (1966). Most of the recent efforts to judge compactness have been ably described and analyzed in an unpublished paper by Horn, David, Charles R. Hampton, and Anthony J. Vanderberg, "Measuring Compactness of Political Districts: An Evaluation of Proposed Methods."(mimeographed). This is available by requests to Ohio Center for Political Research, 5819 Scott Road, New Marshfield, Ohio, 45766.

istics and the anatomical features which sustain their existence. If a common organ is discovered, its removal will provide the system's cure by eradication of the species which causes the dysfunction. The key element in a gerrymander is its political intent or purpose, which the previous classification reflects. The numerical disparity or the shape may be indicative, but the gerrymander's essence is its politics.

Similarly, a careful distinction must be made between the disparity of votes received and representation obtained on the basis of the electoral system and inequities caused by redistricting manipulation of the electoral system. In essence, a single member district system cannot produce proportioned representation. So not all distorted electoral results stem from gerrymanders.

Both impediments to understanding gerrymanders (confusion of numbers and shapes and the electoral system with redistricting practices) divert analysis from the essence. Though the political nature of the gerrymander is deemed revealed by the numerical and configuration analysis, or checked by the detailed stipulation of procedures,[103] the essential political nature is neglected.

Gerrymanders will be understood by political analysis. The important numbers are votes, not people. For that reason a study of voting behavior is required. With computers and a sufficient number of key-punch operators and time, the analysis can be carried far, but the basic needs are limited. First, voting patterns must be determined for the major units within the state (e.g., counties first, then subunits, such as cities, or townships, and ultimately precincts within divided urban areas). One typical election may suffice, but a series of elections is preferable to minimize the influence of exceptional deviations (because of incumbency, poorly financed opposition, weak opponents, etc.) on an election deemed typical.[104]

To assess voting behavior, one party's vote should be chosen and graduated. Democrats prefer to think in terms of Democratic percentages, and Republicans the reverse. A six-fold breakdown of party strength is desirable; for example, based on Democratic results, the classification would be Strong Democratic—more than 60%; Democratic—55-55.9%; Leans Democratic—50-54.9%; Leans Republican—45-49.9%; Republican—40-44.9%; and Strong Republican—less than 40% Democratic. An eight-fold graduation can be accommodated with provision for a Safe Democratic category for more than 67%, and Safe Republican where the Democratic vote is less than 33%. Each category is then assigned a color, such as dark blue for Strong Democratic, medium blue for Democratic: light blue for Leans Democratic; light red for Leans Republican; medium red for Republican, and dark red for Strong Republican. A symbol in the dark blue and dark red units can indicate the safe categories in the respective extremes.

If each district is colored according to its vote percentage, the coloring may graphically reveal the nature of the redistricting practices. If the total vote of all districts is relatively close—e.g., 50% for Party A and 50% for Party B—and most of the districts are colored in the leaning B category, a dispersal technique has been implemented. Or if the same closeness prevails, but one or two of the districts are heavily in A category (e.g., strong or safe for A), a concentration technique has been employed. The initial district revelations can be supplemented by coloring the basic units used to create the districts (e.g., counties, or census tracts, or townships) in the same graduation scheme. Such a coloring will generally reveal concentrations of party strength, e.g., a group of Democratic or Republican counties.

103. See Hardy and Heslop: *Redistricting Reform: An Action Program.*

104. Among the most perceptive analysis of the problem is being done by David Horn and his Associates in the Ohio Center for Political Research.

If the district lines are drawn around the concentrations of one party, the ultimate product is a concentration gerrymander. If the concentration of one party is dispersed, the result is a dispersal pattern. Moreover, if the district lines between neighboring districts are analyzed, the cut edge may be revealing. If on one side of the line units are of one color, while on the other side units are of another color, a concentration is suggested. If the district goes down the middle between units of the same color, a dispersal technique is being utilized. When counties are split, color differences between the county parts located in different districts may show the political purpose. An analysis of district extremities may also be revealing. If one end, especially in the case of the elongated districts, is of one party color and the other end of the opposite color, a dispersal method has been employed.

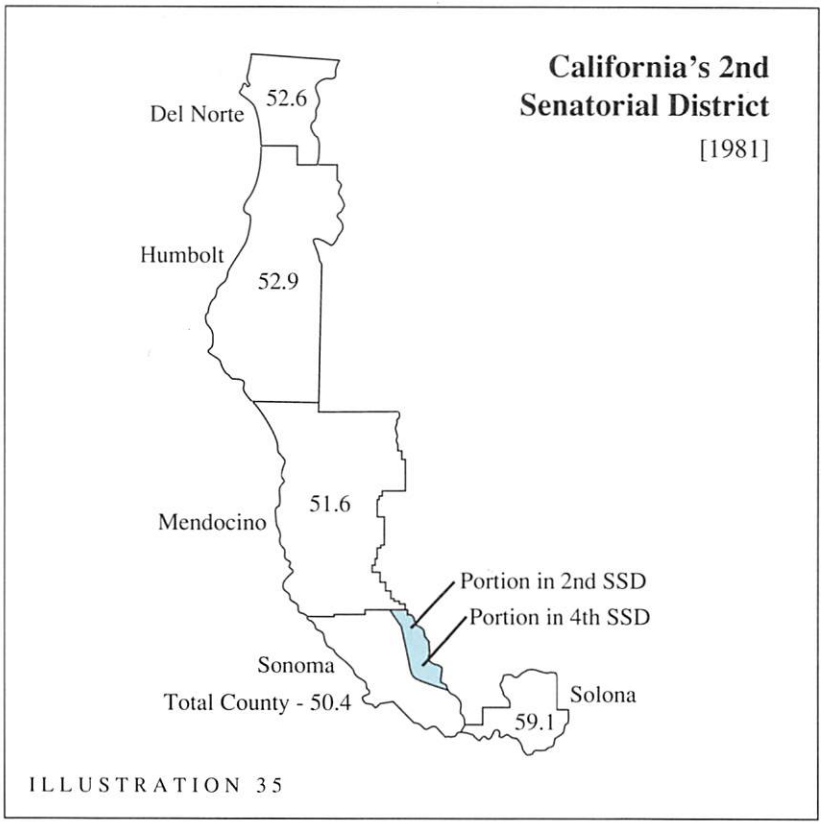

ILLUSTRATION 35

Or if the district is predominantly of one color, with an occasional patch of the opposite color, a dispersal method has been used. In contrast, a consistency of color, or slight variations of the same color, reveals the concentration pattern. When such districts are compared to neighboring districts, the purpose or the technique may become even more graphic; e.g., one district of one color, in the midst of a sea of districts of the opposite, reveals concentration either to ensure the redistricting party's representation, (New York 12th CD, 1951), or to minimize the opposite party's power by its concentration, (California's 26th CD, 1951).

Patchwork New York

[1951]

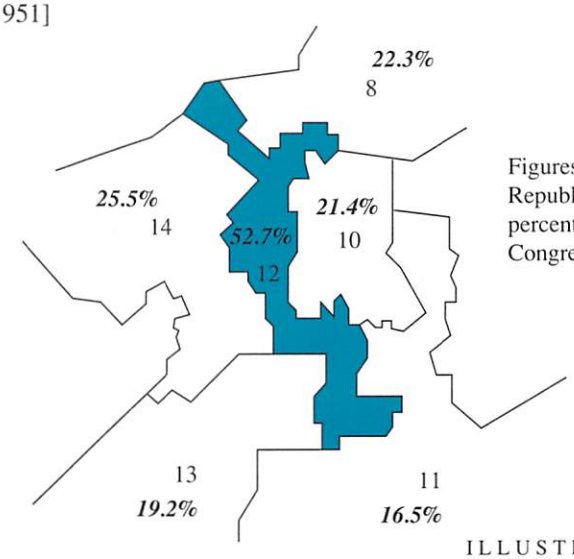

ILLUSTRATION 36

Determination of Democratic and Republican areas and an analysis of the overlay of district lines on the voting behavior maps often graphically discloses the types of gerrymanders employed. Also useful for analysis may be the district "family-tree." (see Illustration 37, page 52)[105] By plotting the evolution of districts over a period of time, and comparing the period before the redistricting to the immediate after-

105. Chart IV is one of several used in the analysis of Los Angeles County districts. See Hardy and Heslop *West Side Story — A Murder.*

math, elimination gerrymanders and redistricting designed to weaken the political strength of certain segments of the population (e.g. partisan, minority groups, etc.) can be detected. The "family-tree" technique may not be as useful for the immediate problems that a court faces, but it is helpful in substantiating the classifications here developed.

It can be argued legitimately that the suggested analysis is more pertinent to determinations after the fact, or for the purposes of long-term analysis. A court often faces the problem of determining the effect of a redistricting that has not yet been tested, for example, before an election has been held. Awareness of the analytical possibilities, however, can allow the

Political Genetic Blocks For 1941

CD	Results 1932-1940	Political Status of ADs 1932-1940				Results 1932-1940
11	RDDR,RD	RRRRR (47)	RRRRR (43)	RRRRR (48)	DDDDD (42)	RDDR,RD
12	DDDDD	RRDRR (49)	RRRRR (53)	RRRRR (50)	DDDDD (51)	DDRRR
13	DD,DR,D,DR	DDDDR (54)	DRRRR (56)	RDDDD (45)	?DDDD (52)	DDDDD
14	DDDDD	DDDDR (64)	RDDDD (55)	DDDDD (44)		DDDDD
15	RDDDD	RRRRR (58)	RDDDD (63)	DDDDD (65)	RRRRR (57)	DR,R,RD, RD, RD
16	D,DR,D RD,RD	RRRRR (59)	RRRRR (60)	RRDDD (46)	RDDDD (61?)	DDRRR
17	DDDDD	DDDDD (67)	DDDDD (68)	DDDDD (66)		DDDDD
18	DDRRR	DDDDD (69)	RDDDD (70)	RRDDR (71)		RDRDD

NOTE: Five elections occurred between the 1931 and 1941 redistricting. The results are symbolized by D (for Democrat) and R (for Republican). The designation DR, or RD, symbolizes a cross-filing nomination, if D is first a Democrat won both the Democratic and Republican nominations, and if the R is first a Republican won both the Republican and Democratic nominations. The crossfiling results are not listed for the ADs, but they were more numerous. The number under the AD groupings indicates the AD number.

A careful study of the groupings reveals the subtle efforts of the redistricters in a bipartisan atmosphere to relieve Democratic pressures on the 11th and 12th CDs, while giving the Democrats the one new seat in 1941, the 19th CD made up of the 52nd and 51st ADs.

ILLUSTRATION 37

court to project the effects on the basis of past voting behavior, which is the basis upon which redistricters operate. Voting statistics of immediate past elections can hypothetically be constructed on the basis of the new district lines to assess probable results.[106]

If the Missouri examples of the past are guides, the concentration gerrymander is most detrimental to the representative system. It does not alter. On the other hand, the dispersal gerrymander, though generally disadvantageous to one party, has certain redeeming features. Dispersal districts are potentially competitive. Incumbents must be alert to the continual danger of an upset by strong and/or well financed opponents, or other elements of adversity. Lengthy incumbency may even lead some elected officials to believe they are invincible and to forget the marginality of their district, which may lead to their defeat.

If that perspective is accepted and the court centers its attention on the essential districting nature of the gerrymander problem, the court might establish its own guidelines to minimize concentration gerrymanders. Or if the court does the redistricting to rectify inequities it could take districts adjacent to the endangering species, consolidate two, three or more districts as the case warranted, and then redraw the lines in the area of gerrymander infestation to ensure more competition.

It is the political intent that must be kept in mind in both detection and eradication. If the advantages of the concentration gerrymander are offset by its potential breakup and neutralization by the court, through consolidation with dispersal districts and re-division to achieve more competitive districts, the incentive to create the concentration gerrymander declines.

But what of the dispersal gerrymander? The long-term competitive features may prove corrective, but the court might help here as well. One possibility for state legislative seats would be to provide additional court-appointed representatives selected from the defeated party's top runners to serve as incumbents from at-large constituencies to make the number of representatives correspond to the percentage of party vote for all districts.[107] As at-large incumbents such representatives would be potentially more effective contenders in the district where they had previously been defeated. Since the additional legislator's tenure would depend on the temporary judicial balancing act, the at-large representatives would have an incentive to push for redistricting. Besides, the district incumbents would desire to redistrict more equitably to eliminate the at-large incumbent threat.

Much of the commentary about redistricting has focused on the districting process as a means to achieve representation. It is also a method to obtain a competitive party system.[108] The court must assess not only whether the gerrymander distorts the representative character of the political system but also whether the manipulation makes it non-competitive. Inadequate though political parties may be in the representation of popular will, political parties are the vehicles which express political feeling throughout the electoral system. If the political opinion of thousands of individuals (especially in trading one set of political lead-

106. Horn and Associates techniques are highly suggestive. Political scientists can learn much from scientists in the hard sciences.

107. The proposed interim step might seem an unwarranted judicial interference with the electoral process, but the legislature could easily rectify the situation by a prompt redistricting to eliminate the gerrymandering effects; thus only one election need be affected by the court action. The United States Supreme Court has registered approval of similar "minor changes in a legislature's size." *See, Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 n.10 (1972) and cases cited therein. The proposed temporary remedy would seem no more drastic.

108. R. Dixon, Jr., *Democratic Representation*, p. 460-63.

ers for another) is denied expression through district manipulation, there is a clear effect on the grand depository of the essential democratic principle and its agents. When the public will is thwarted at its source the activities of political parties are made meaningless.

Specifically, the effects of redistricting on the political process can be listed as follows:

1. Districts have become sprawling in nature with numerous "necks" which fragment communities and limit citizens' ability to participate in grassroots politics.

2. The nature of the districts requires media campaigns which go to the highest bidder.

3. Money follows incumbency.

4. Districts become non-competitive.

5. Non-competitive districts make difficult the fielding of viable alternative candidates, either in the primary or the general election.

6. Safe districts become fiefdoms which make incumbents disinterested in statewide or national issues.

7. Ideological bias is created in districts of overwhelming majorities of either party. Moderates lose interest in ideological stalemates.

8. Lack of interest and participation are the inevitable outcomes. Who wants to play a rigged game? Who even watches a game when the victor is known in advance?

9. Non-competitive politics guarantees stalemate, indifference and disgust. Government consists of a discredited geriatric party bureaucracy made up of bureaucratic legislators who follow their bureaucratic leaders.

CONCLUSION

As the court edges further into the recesses of redistricting, it is essential to reconsider basic concepts and to use terms correctly, or at least consistently. If the judicial officials recognize the different dimensions of the districting problem, separation may be easier between thistle and holly in the thicket. It is essential to cut through the verbiage and pontification that have contributed significantly to the confusion of issues and methods of detection.

Definitions

A fundamental error about gerrymandering is the failure to differentiate among reapportionment, malapportionment, redistricting, and gerrymandering.

Apportionment is the original allocation of political power on the basis of criteria of representation established by the electoral system; reapportionment is the periodic adjustment of the criteria to new circumstance often brought on by social, economic, and demographic changes; malapportionment is a system of apportionment that does not correspond to current conditions, or a reapportionment that violates the criteria of the original apportionment formulas.

In the first type of malapportionment, new normative thought may be required to determine the proper form of representation. That is, should the single member district system be replaced by a multi-member district system? Should the proportional representation system be substituted for the majority-plurality system? The second type of malapportionment needs only a redoing in accordance with the apportionnmet formula. Redistricting is a process by which districts are re-designed to implement the apportionment formula. Finally, gerrymandering is a manipulation of districts for political purposes (concentration, dispersal, elimination and projection) that creates a distortion of election results. Thus, gerrymandering is a form of "maldistricting."

In short, apportionment and reapportionment are formulae; malapportionment and redistricting are processes; and gerrymandering is a technique.

A Classification

The proposed classification system's emphasis on the qualifiers (silent, concentration, dispersal, elimination, and projection) focuses attention on the political technique being employed. If the court determines the existence of a gerrymander, the second step is to determine the maldistricting effect on the normative apportionment formula. Is the gerrymander distorting the apportionment system to the detriment of the system's basic tenets? If the gerrymandering problem is approached in this manner, the court can then determine where detrimental gerrymanders exist and proceed to eradicate them. It is not necessary to declare the whole redistricting process invalid — only the specific gerrymander, or gerrymanders need be so labeled. The remedy can take the forms suggested. Additional representatives can approximately equate the electoral votes, or court orders to redraw lines among adjacent districts can correct the gerrymander by a complete redrawing of the districts.

Numerical or geographical guidelines are useful in focusing attention on potential political manipulation - that is, on where gerrymanders may be located. But to identify gerrymanders it is essential to assess the political effect. To count on arithmetic and cartography analysis as the guidelines to minimize gerrymanders is a will-o-the-wisp. Heretofore, analysis based on numerical disparities, apparent violations of compactness, or personalities, has not shown that the essence of gerrymandering is best portrayed by an emphasis on the purpose of the redistricting—controlling the opposition's voting strength.

If the redistricting distorts the electoral results, the logical next question is how the strength is diluted. Reference to political data and voting behavior immediately conjures up the specter of the infamous political question. The court has traditionally stayed clear of questions involving co-equal branches and the politics of the people.[109] However, within the "political thicket" the only means to clear the underbrush is to deal with political data. The classification system and analysis suggested will assist the court in an objective assessment of the problem. Events in the 1980s point up the proliferation of the species, the revealing necks, and the lack of change despite national electoral change. Technological advances which allow the incorporation of political data on a larger scale with more precision has a stranglehold on the systems's survival.

The United States Supreme Court has proclaimed that one-person, one-vote is the basis for apportionment. If the electoral system distorts the criteria, as the "little federal" plan did, then it is unconstitutional. If the district lines of the electoral system are manipulated to distort representation, it is a form of political corruption that must be checked, preferably by statutory law or popular initiative, but otherwise by the court in the manner outlined. If the courts recognize the difference between unrepresentative electoral systems and the manipulation of an existing electoral system, judges must identify the endangering species, the gerrymander. The slaying of gerrymanders may allow luxuriant growth to transform the thicket into a rose garden.

Slaying the Gerrymander

As virtually all practioner conferences emphasize, the 1991 exercise promises to be the most controversial, complex and ligitious of all time. The reason is obvious. With the courts reluc-

109. The literature on political questions is extensive; *see in particular* Post, C., *The Supreme Court and Political Questions*, (Balitmore, MD: John Hopkins University Press, 1936) and Strum, Pamela, *The Supreme Court and "Political Questions:" A Study in Judicial Evasion*, (University, AL. University of Alabama Press, 1974). The bibliography in the latter is especially helpful.

tantly in the thicket, in most cases, interpretations of law depend on alternative solutions which have common ground but different proposals based on the ligitant's intent. The only way to resolve the issue of redistricting is to establish neutral procedures based on random selection. In that manner a rule of men can be replaced by rule of law. The result will return the political process to its proper role—the resolution of human problems based on political action in the public arena rather than a bureaucratic closet.

A new element for the eradication of gerrymanders is A.C.T.I.O.N. Guidelines. This procedural technique offers an easy neutralization of redistricting by its variable beginning point and its alternative direction potential.[110] Its great promise rests with its neutralization and the ease with which it can be implemented. In the 25 years since the landmark cases, courts have been hamstrung by cost and time restraints,

A.C.T.I.O.N. Guidelines can be implemented in a matter of hours at minimal cost. Courts will no longer have to choose between alternative political plans. By choosing the sequencing beginning points by lot and the direction by a flip of the coin, the redistricting procedure becomes as neutral as is humanly possible. The playing field of democracy is shaped by chance rather than the deliberate manipulation of lines for incumbent or partisan purpose. A review of current districts in Indiana, California, Ohio, etc., leaves no doubt of the degree to which Gerrycrats have come to control the process on which representative government depends. A rule of men has replaced rule of law.

Districts are to represent people, not incumbents and their masters. They have not just stolen bases, they have stolen the people's whole game. So what is to be done? This analysis of the gerrymander has frequently noted the presence of elongated "necks" in the anatomical features of the gerrymander. What do the necks connect? The life sustaining neck connects political areas which otherwise would be separate. If it is agreed that gerrymanders are detrimental to the preservation of representative government, the surgeon must eliminate the neck to allow the survival of the system.

The solution is to restructure the anatomical features to emphasize "reasonable" compactness which relate common areas for effective political action by citizens. Citizens must be able to hold their representative accountable. Compact, contiguous and community-oriented districts will return competition to the political system because the necks have been severed. It is not just bringing registration figures into closer relationship with societal norms. The most important feature is to give citizens the means to oppose the prevailing system.

The A.C.T.I.O.N. Guidelines establish neutral procedures (a rule of law) which create reasonably compact districts. The beginning point and the direction of district creation depend on random selection. The rule of men, with all the personal self-serving features referred to above, is replaced by rule of law. The focus of the redistricting process is on the representation of people in a manner to encourage their participation in a political game in which competition will be exciting and worthy of their involvement.

In some states a change would advance Republicans; in other states Democrats would benefit. Similar observations can be made for liberal or conservative dispositions. Either/or distinctions can be carried in the racial, religious, gender dilemmas, but the issue is neither Black nor white, Democratic or Republican, liberal or conservative. A means (a procedure) must be found to neutralize the redistricting element in the political system. The political controversies must be fought on the

110. See Hardy and Heslop: *Redistricting Reform: An Action Program.*

playing field where the player struggles before people to win public opinion on the basis of facts and information. A system based on the assumption of rationality must encourage participants to think and to participate.

A redistricting system in which leaders, academics and lawyers say you cannot change politics is not democratic. For a bureaucrat to take that position is understandable. But if you follow the bureaucrat's rule and repeat his/her self-serving rationale, you lose. When the current leadership in any state adopts the bureaucratic stance, citizens sense the hypocrisy. As V.O. Key observed: voters are not fools.[111] Only politicians who ignore the essential wisdom of the people to detect chicanery and the essential desire to do right, are capable of creating conditions which require ACTION. A.C.T.I.O.N. Guidelines are the first steps to return government to the people and to encourage their participation. Survival requires participation of all in a multi-cultural society in a democratic context.

111. Key, V.O., Jr., *The Responsible Electorate: Rationality in Presidential Voting 1936-1960*, (Cambridge, MA: Belknap Press of Harvard University Press, 1966) p. 7.

APPENDIX 1

Redistricting Practices: An Historical Illustration

Before dealing with the crucial question of how much politics is too much politics and how much is remedial, the utility of the classification scheme needs to be tested in a practical situations. An historical example and a current example are used as illustrations. Congressional districts in Missouri have been selected for the historical illustration because of its reputation for gerrymandering, the available literature on redistricting practices and voting behavior,[112] additional convenient voting data, court actions,[113] and one long period of redistricting stability (1901 - 1931).

Analysis requires a preliminary statement about the political regions of Missouri during the period of reference.[114] Several writers agree that the Republican strength in Missouri rests in the southwestern hill country, the northern farm counties adjacent to Iowa, the German settlements south of the Missouri River in eastern Missouri, in St. Louis County, and formerly in the city of St. Louis. Conversely, Democratic sections are located in the northeast counties ("Little Dixie"), north of the Missouri River, in the area of central Missouri, and in Kansas City.

Alternative methods of assessment (presidential elections since 1876, composite percentages of statewide contests since 1952, and spot checks of various local, state, and national elections since 1884) confirm the regional dispositions. County variations occur among the different studies, and alterations are being made manifest, but the historical patterns did not significantly change. Often the Democratic molds are traced to southern (slave) settlements of the 1840s and 1850s, whereas the Republican areas derive from the arrival of Tennessee mountaineers (non-slave) in southwestern Missouri and Iowa-like settlements in northern Missouri.[115]

Chart IV indicates the gradual growth and decline of Missouri's congressional representation. Redistricting actions since 1891, when the districts began to assume peculiar shapes, took place in 1891, 1901, 1934, 1950, 1960, 1966, 1971, and 1973. The first two accommodated growth, and the subsequent redistrictings dealt with population decline. The long period from 1901 to 1931 provides a stable district pattern to test the political impact over several elections. In 1931 a redistricting stalemate over the loss of three congressional seats forced at-large elections.[116]

Chart V gives an analysis of the types of districts created in the major redistricting actions. The dominant dispersal technique contributed to overwhelming Democratic preponderance in the congressional delegation, despite the

112. Among the better sources are: Crisler, Robert M. "Republican Areas in Missouri," 42 *Missouri Historial Review* 299-309 (1948); Harris, Morran D. *Political Trends in Missouri, 1900-1954: A Study of Local, Regional, and Statewide Political Trends in Missouri Since 1900* (unpublished M.A. thesis, University of Missouri, 1956); Karsch, Robert, *The Government of Missouri* (12th ed. 1974) (the chapter on political parties in each edition of this work is helpful and provides political analysis over various periods); Kostbade, J. Trenton, Geography and Politics in Missouri (unpublished Ph.D. dissertation, University of Missouri, 1957; and Sauer, C.O., "Geography and the Gerrymander," *12 American Political Science Review* 403-26 (1918). Good general overviews are included in the Fenton, John, Politics in the Border States, (New Orleans, LA: The Hauser Press, 1957) Chs. 6-7; and Peirce, Neal, *The Great Plains States of America*, (New York, NY: W.W. Norton, 1973) p. 29-78.

113. State *ex rel.* Halliburton v. Roach, 230 Mo. 480, 130 S.W. 689 (1910); State *ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912).

114. Especially useful are the works by Crisler, Harris and Kostbade.

115. Idem.

116. Short, Lloyd, "Congressional Redistricting in Missouri," 25 *American Political Science Review*, 634-49 (1931).

Source: The Statistical History of the United States From Colonial Times to the Present, (New York: Basic Books, Inc., Publishers, 1976), p. 1085.

Missouri Congressional Representation

Census	*Number of Congressmen*
Fourth (1820)	1
Fifth (1830)	2
Sixth (1840)	5
Seventh (1850)	7
Eighth (1860)	9
Ninth (1870)	13
Tenth (1880)	14
Eleventh (1890)	15
Twelfth (1900)	16
Thirteenth (1910)	16
Fourteenth (1920)	16*
Fifteenth (1930)	13
Sixteenth (1940)	13
Seventeenth (1950)	11
Eighteenth (1960)	10
Nineteenth (1970)	10

**No reapportionment was made in 1920.*

ILLUSTRATION 38

closeness of the statewide votes. Concentration gerrymanders are also apparent, notably the 10th (1901 - 1931) and the 7th Districts (1934).

Going beyond the superficial, however, the detailed district practices are instructive. The Democratic success between 1890 and 1930 is largely attributable to the judicious dispersal of the southwestern Republican strength among four districts, (6th, 7th, 14th and 16th) and the division of the northern Republican areas among three districts (1st, 2nd, and 3rd). The German Republican concentrations in eastern Missouri were cautiously divided among Democratic districts based north of the Missouri River. Generally, the districts were vertical to allow Democratic majorities in northern counties to dip into the Republican sections with one-county-wide inserts. Opponents of the Democratic arrangement, in turn, generally proposed a horizontal arrangement and proposed that Republican nucleus areas absorb Democratic counties in numbers to favor elections of Republicans.[117] Chart V also demonstrates that the appropriate gerrymander classification clearly emerges from more detailed analysis of the county units and district lines.

117. *Ibid.* at 640. Mr. Short analyzed the Republican proposal in this manner: Thus by a skillful concentration of opposition voting strength in three districts, the creation of at least six rather closely divided districts, and virtual certainty of carrying all four districts in St. Louis city and county in addition to one district in each of the north-central, south-central and south-western sections, the Republican legislative leaders had assured their party of at least seven or eight of the sixteen representatives even in a Democratic year, and thirteen or more in a Republican landslide such as occurred in 1920.

Missouri Congressional Districts
[1901-1931]

District Number [1901-1931]	Dominant Party	Times Other Party Wins	Elections Other Party Wins	Victory Percentages: Times No Contest	Less Than 50%	50.1% - 52.9%	53% - 54.9%	Over 55.0%	Number of Different Congressman	Incumbents Defeated	Incumbents Returned After Defeat	Type of District
1	D	1	'20	0	0	4	5	6	3	2	1	Democrat***
2	D	0		2	0	1	2	12	2	0	0	Democrat***
3	D	2	'04, '20	0	0	9	2	4	5	1	0	Dispersal
4	D	7	'04, '20-30	0	0	6	5	4	5	1	0	Dispersal
5	D	5	'04, '06, '20 '24, '28	0	0	8	1	6	7	6	1*	Dispersal
6	D	2	'20, '28	0	0	6	7	2	4	4	1**	Democrat***
7	D	3	'04, '20, '28	0	4	9	1	1	5	6	3**	Dispersal
8	D	2	'20, '22	0	1	7	4	3	3	2	1	Dispersal
9	D	1	'20	0	0	5	3	7	3	1	0	Democrat***
10	R	0		1	0	0	0	15	4	0	0	Republican Concentration
11	D	2	'06, '10	2	2	7	1	6	7	2	0	Dispersal
12	D	2	'02, '04	1	1	2	0	13	4	0	0	Democrat***
13	D	6	'04, '08, '18 '20, '24, '28	0	2	11	1	1	8	9	3	Dispersal
14	D	6	'04, '08, '18 '20, '24, '28	0	4	7	0	4	8	8	2	Dispersal
15	R	6	'02, '06, '10 '12, '14, '16	0	5	2	0	8	8	4	0	Dispersal
16	D	5	'04, '08, '18 '20, '28	0	1	10	2	2	6	5	2	Dispersal

* *Won three separate times.*
** *Won two separate times.*
*** *District with significant population advantages for the dominant party.*

ILLUSTRATION 39

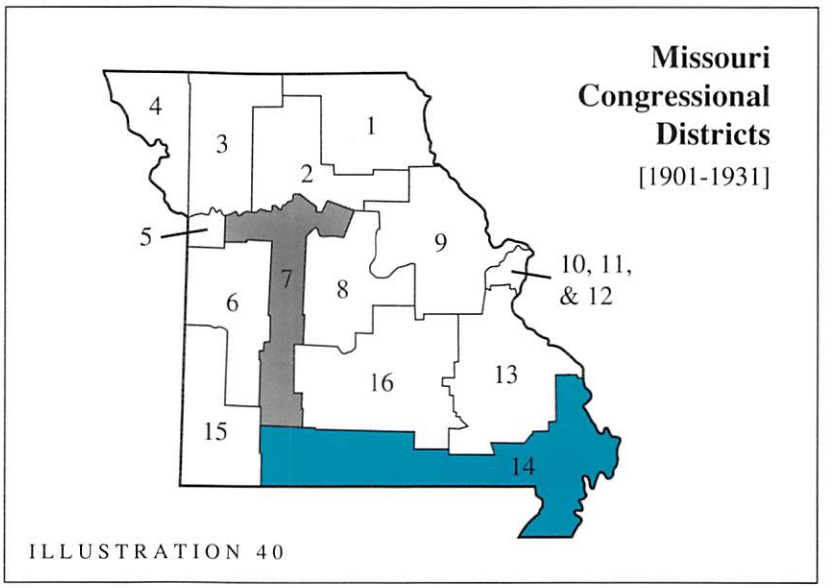

ILLUSTRATION 40

From a political viewpoint another important feature of the usually efficient Democratic dispersal plan was its weakness. In the years of Republican landslides, (e.g., 1904, 1908, 1920, and 1928) or when Republican presidential nominees disrupted traditional Democratic voting patterns in the Southern Baptist counties most districts went Republican. Possibly because of that circumstance, especially the regularity in the 1920s, the Republicans were concentrated in the 7th congressional district in the 1933 redistricting. Rather than risk the danger of Republican victories in several districts, the threat was consolidated in one district that Republicans could win while Democrats would normally carry the other districts. In subsequent realignments, with rare exception, the 7th congressional district remained a Republican bastion, and each redistricting stacked on additional Republican counties as Missouri continued to lose congressional representation. Dispersal districts prevailed elsewhere, with the continual vulnerability to landslides, such as occurred again in 1942 and 1946.

The unpredictable shifts with the dispersal patterns warrant special note in development of guidelines for future courts venturing into the political thicket. In particular, attention is focused on the period of 1901 - 1931, during which time 240 elections took place within districts originally created and maintained by Democrats (see Illustration 39, page 60). Clearly the Democrats dominated, winning 161 of the contests. In 103 of the 240 contests the margin of victory was in the 47.0 to 53.0 range. When frequent vote differences were less than 2,500 voters (in other words, a shift of 1,251 votes would have altered the outcome), the closeness of the contests is even more significant. In twelve of the sixteen districts each party won on at least two or more occasions, and such switches were frequent. Fifty-one incumbents were defeated. Nine of the sixteen districts had five or more congressmen. In other words only the 2nd and 10th districts were totally safe. In the fourteen other districts the fight was potentially close. Beneath the Democratic preponderance was a competitive system. Each congressman had to be aware of a potential landslide, or other adversity, and several paid the price. Few were safe. The best defense was attention to the district. This does not resolve the inevitable disparities between actual statewide votes and the representation obtained under the single-member district system, but it does adds a dimension to evaluation of gerrymander effects.