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Redistricting Before and After 'One Person, One Vote'

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During debate at the Montana Constitutional Convention of 1971-1972, Delegate Carman Skari of Liberty County uttered a fitting summary of the challenges inherent in the redistricting process: "There is a great difficulty in being objective here, because one man's gerrymander can be [an] other one's logical district."¹

Each political district drawn – no matter how it is drawn, or by whom, or for what reasons – will create advantages for certain people and disadvantages for others. Drawing lines that satisfy everyone is impossible. Moreover, when the lines are drawn by the very people that they will affect – generally legislators – the process itself can be opened up to charges of self-serving map-drawing, backroom deals, and the appearance of impropriety. For this reason, many states have designed redistricting processes that provide sideboards for what can and cannot be done in a redistricting plan, open the process to the public as much as possible, or even remove the task from the legislative body entirely.

In Montana, delegates to the Constitutional Convention, after living through the state's difficulties with redistricting over the years, chose to remove the task from the Legislature by creating a commission to redraw congressional and state legislative district lines.

This article will look at the history leading up to this decision, explore the constitutional standard of "one person, one vote," and highlight how Montana and other states structure their redistricting processes in pursuit of a better way to meet that standard.

Redistricting and Reapportionment

The terms "redistricting" and "reapportionment" are often used interchangeably in discussions of this topic. However, they have distinct meanings. Redistricting is the act of

drawing new political district boundaries,² while reapportionment is the distribution of seats in a legislative body among a set number of districts so that the boundaries of the district do not change but the number of members per district do.³

A useful illustration of the difference between redistricting and reapportionment is how states are allocated representation in the U.S. House of Representatives. After every decennial census and to account for population changes in the preceding 10 years, seats in the U.S. House are reapportioned to the 50 states using a formula set by Congress.⁴ Once each state is notified of the number of seats it will receive, the state then must redistrict, thus creating new or updating current boundaries to reflect any changes in population that might have occurred in the state since the last census.⁵

One Person, One Vote: a Bit of History

Population obviously has a lot to do with reapportionment and redistricting. But the principle of "one person, one vote" that is taken for granted today is a relatively recent establishment in the redistricting lexicon. Despite the fact that the U.S. Constitution originally apportioned representatives (and direct taxes) among the states by population, it also contained the "Three-Fifths

2 "Redistricting Law 2010," National Conference of State Legislatures; Nov. 2009, p. 227.

3 Ibid.

4 After each state receives one seat, the remaining seats are allocated using a formula set by Congress, which since 1941 is the Method of Equal Proportions. For information about the formula visit <http://www.census.gov/population/www/censusdata/apportionment/computing.html>. The State of Montana and several elected officials challenged in court the use of this method after the 1990 Census. Although initially victorious in federal District Court, Montana eventually lost the lawsuit when the U.S. Supreme Court ruled that Congress was within its constitutionally prescribed limits when it set the Method of Equal Proportions as the formula for apportioning representatives among the states. See *United States Department of Commerce v. Montana* (91-860), 503 U.S. 442 (1992).

5 Montana currently has only one seat in the U.S. House of Representatives. It lost a second seat after the 1990 Census and has little hope of regaining that seat in 2010, despite continued population growth. For more information, see Anthony Salvanto and Mark Gersh, "Which States Will Gain Power After Census?"; CBS News; March 25, 2010; available from: <http://www.cbsnews.com/stories/2010/03/24/politics/main6329858.shtml>; accessed June 10, 2010.

1 Verbatim Transcript; Montana Constitutional Convention; Vol. IV, p. 682.

Compromise.” That provision excluded from population counts “Indians not taxed” and counted “all other persons” (slaves) as three-fifths of a free person when calculating populations.⁶ The compromise increased the representation accorded to states that allowed slavery, but less than if each slave had been counted as a “whole person.” Not quite “one person, one vote.”

Even after the Thirteenth Amendment to the U.S. Constitution abolished slavery and the Fourteenth Amendment abolished the three-fifths calculation, states did not always distribute political representatives with population equality in mind. Many states assigned a representative to each political subunit (generally counties) and then used population counts to divvy up the remaining representatives.⁷

In Montana, the Constitution of 1889 established a “little federal system” that assigned each county one senator and apportioned membership to the House of Representatives based on population. A few years later, legislation was enacted that gave each county one representative regardless of population and apportioned the rest using a ratio related to the county’s population.⁸ Although the ratio changed throughout the years, by the 1950s and 1960s the state was badly malapportioned. Rural counties were granted far more representation by the Montana Constitution and statutes than population would otherwise dictate.⁹ Many other states faced similar situations.

The judicial branch had long stayed out of the “political thicket” of redistricting, calling the malapportionment question a political one that was not meant for “judicial determination.”¹⁰ A series of 15 U.S. Supreme Court cases in the 1960s reversed that trend,¹¹ first by declaring that

the issue was within the jurisdiction of federal courts and could be settled by judicial action, and then by setting general legal principles to guide the apportionment and districting process. These principles still provide the ground rules for any redistricting efforts.

Key among them was that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution required states to treat voters equally, regardless of where the voter lived.¹² In one landmark case, *Reynolds v. Sims*, Chief Justice Earl Warren wrote for the majority, stating:

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.¹³

Other important developments from these cases were that:

- seats in both chambers of a bicameral legislative body should be apportioned based on population;
- “little federal systems” were not constitutionally permissible;
- while mathematical precision is not required, districting should be carried out using substantial equality of population; and
- citizens could not use referenda or initiatives to create districting plans that are based on any principle other than population equality.¹⁴

Chief Justice Warren summed up the “one person, one vote” concept when he wrote:

(N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of

6 U.S. Constitution., Article I, section 2.

7 Ellis Waldron; “100 Years of Reapportionment in Montana,” 28 *Montana Law Review* 1, p. 2; Fall 1966.

8 *Ibid.*

9 For further reading on the extent of this malapportionment, see Ellis Waldron; “Legislative Reapportionment,” Constitutional Convention Memorandum No. 10; Montana Constitutional Convention Commission; 1972.

10 Justice Felix Frankfurter, writing for the Court in *Colegrove v. Green*, 328 U.S. 549 (1946). As a result of this case and others that continued to view reapportionment and redistricting as political questions best answered by state legislatures and Congress, malapportionment continued unabated for several more decades.

11 Ellis Waldron; “100 Years of Reapportionment in Montana,” 28 *Montana Law Review* 1, p. 6; Fall 1966.

12 John Dudis; “Apportionment: Past to Future,” Comment; 33 *Montana Law Review* 1, pp.109-110; Winter 1972.

13 *Reynolds v. Sims*, 377 U.S. 533 (1964).

14 John Dudis; “Apportionment: Past to Future,” Comment; 33 *Montana Law Review* 1, pp. 109-110; Winter 1972.

area alone provide an insufficient justification for deviations from the equal population principle.

Again, people, not land or trees or pastures, vote.¹⁵

For Montana, the reapportionment cases required dramatic changes in the state's method of apportioning legislators. More significantly, those changes had noticeable political effects on the makeup of future legislatures, shifting the balance of power in the state from the sparsely populated, mostly agrarian rural areas to the more densely populated and growing urban areas.

By the time the 39th Legislature met in January 1965, it already faced tough redistricting decisions. A three-judge federal district court panel, in response to a lawsuit from a Montana citizen, gave the Legislature time to deal with the malapportionment of the state before the court ruled in the matter. Understandably, given the makeup of the legislative body and the political consequences of compliance with federal law, the Legislature had difficulty redistricting itself.

In late summer of 1965, after the Legislature had adjourned without enacting a plan, the federal court issued its own plan for the 1966 elections, giving the Legislature another chance to develop a new system in 1967.¹⁶ The 1967 Legislature, whose members were elected under the judicially mandated plan, passed legislation to hold the 1968 and 1970 elections using the same districts.¹⁷ The 1972 elections were held using the same multi-member districts created in a second special session by the 1971 Legislature to elect delegates for the constitutional convention.¹⁸

1972 Constitution

The Montana Legislature's difficulty with reapportionment and redistricting provided a stark backdrop against which debate at the 1971-1972 Constitutional Convention took place. Convention delegates faced one of the central questions about redistricting: should a legislative body be

given the opportunity to determine the district boundaries for its members?

After several days and many motions, substitute motions, revised plans, and amendments, the delegates voted to create a commission to handle the apportionment and districting task, while reserving to the Legislature only the right to recommend but not require changes to the commission's plans. Majority and minority leaders in the Legislature would appoint the commission's first four members; those members would then select a fifth member. If they were unable to reach agreement on the fifth member, the Montana Supreme Court would make the appointment. None of the five members could be public officials.

When presenting the majority report of the convention's Legislative Committee to the full convention, Delegate Skari said the intention was to create a commission that

would be appointed by the legislative leadership but would be somewhat independent and autonomous. It would, in effect, bypass the Legislature from this point on. It is our aim to provide for the creation of a commission reasonably free of legislative pressure.¹⁹

Although the plan eventually adopted by the convention differed somewhat from the majority report (mostly in that it gave the Legislature the opportunity to recommend changes to the commission plan), the ultimate power of the commission to redistrict without having to gain legislative approval and the method of selecting commission members remained the same.

Other Commissions

While "one person, one vote" remains an apt maxim summing up the idea behind redistricting, the reality of drawing maps based on that principle is far more convoluted and contentious, as Montana's history illustrates. The reason is precisely that mentioned by Delegate Skari: acceptable district lines for one person can seem irrational or contrived to another.

In an attempt to solve this conundrum and ameliorate some of the perceived problems associated with a political

15 Reynolds v. Sims, 377 U.S. 533 (1964).

16 Summary from: Ellis Waldron; "100 Years of Reapportionment in Montana," 28 Montana Law Review 1, pp. 9-18; Fall 1966.

17 John Dudis; "Apportionment: Past to Future;" Comment; 33 Montana Law Review 1, p. 119; Winter 1972.

18 Ellis Waldron; "Legislative Reapportionment;" Constitutional Convention Memorandum No. 10; Montana Constitutional Convention Commission; 1972.

19 Verbatim Transcript; Montana Constitutional Convention; Vol. IV, p. 682.

body creating boundaries for its members, many states have removed the redistricting process from legislative control. Twelve other states besides Montana use some form of a commission to redistrict state legislatures. Another two create an advisory commission, while five have a backup commission should the legislature be unable to agree upon a plan.²⁰

Among the twelve states that use a primary commission, four redistrict in a manner similar to Montana. Alaska, Arizona, Idaho, and Washington have commissions composed of citizens (no public officials allowed) who are appointed in a variety of ways, but generally by political leaders in the state.²¹ Most of these states' constitutions give the commission authority over redistricting independent of the executive or legislative branch. Washington does allow its legislature to make limited amendments to the commission's plan, but only with a two-thirds vote of the legislature and only for a limited percentage of a district's population. As in Montana, commissioners in these states are prohibited from running for office for a period of time after their work is done. The length of time and specificity of the ban varies from state to state.

Among the other seven states using a primary commission method for state legislative redistricting, there are as many different structures as there are states. For example, Hawaii redistricts by commission, but public officials are not prohibited from serving on the commission. However, the commissioners are banned from becoming candidates for the state Legislature or U.S. House of Representatives for a period of time after the commission's work is completed. Hawaii also uses an advisory council to provide input from each of the state's islands. In Missouri, there are two commissions, one for each chamber. In Arkansas, the commission consists of the governor, secretary of state, and attorney general.

As the Bingo Cage Turns

The most recent addition to the commission fold is California, whose voters approved by a narrow margin

²⁰ "Redistricting Commissions: Legislative Plans;" National Conference of State Legislatures; available from: <http://www.ncsl.org/?tabid=16617>; accessed July 8, 2010.

²¹ Appointments to the Arizona commission are made by a commission that also handles appellate court appointees.

a 2008 initiative – the Voters FIRST Act (the Act)²² – to transfer authority for legislative redistricting from the legislature to a citizen commission. The upcoming redistricting cycle will be the first conducted under this new commission system. But to call the California commission “similar” to Montana's would be a stretch. Indeed, it is unlike any other commission in the nation, mainly because of the selection process for commissioners and the specificity of the criteria the Act sets out for the commission to follow when drawing plans.

On its face, the Act is enormously complex, especially compared with redistricting commissions in other states. However, the complexity is an attempt by voters to bring a level of transparency to the process, while ensuring a level of balance between the state's diverse political, social, economic, and racial interests.

The Act begins simply enough, assigning the responsibility for drawing senate, assembly, and board of equalization districts to a 14-member citizen commission and establishing certain requirements for terms of office and quorums. It gets more specific when discussing the qualifications of the citizen members, including a provision to balance the commissioners' various political affiliations between the two main parties and independent or third-party voters.

The California structure also includes a restriction commonly seen in other commission states: a ban on holding public office for a period of years after service on the commission. However, it goes a step farther than most states by creating a 5-year ban on commissioners holding any appointed office, becoming a lobbyist at any level of government, or serving as a paid staff to the legislature or a legislator.

It gets down to real details when outlining six criteria prioritized in order of importance to be used by the commission to guide its work. Most, though not all, are similar to those seen in other states, and several reflect federal case law governing redistricting.

The Act establishes a complex process for the selection of commissioners. All California registered voters who

²² A copy of the Act can be found at http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf. The rest of this section relies heavily on the text of the Act.

have voted in at least two of the last three general elections and who have been registered to vote continuously for the past 5 years with the same political party affiliation are eligible to apply to the State Auditor for a seat on the commission. The auditor's office (an office that previously had nothing to do with the redistricting process) must eliminate applicants who within 10 years previous to their application have:

- been a candidate for or elected or appointed to a federal or California state office;
- served as an officer, employee, or paid consultant of a California political party or a campaign committee for a state or federal candidate for office;
- been on a party central committee;
- been a registered lobbyist at the federal, state, or local level in California;
- been a paid congressional, legislative, or board of equalization staff member; or
- contributed \$2,000 or more to a candidate for federal, state, or local office in any year.²³

After establishing an applicant pool, the auditor's office then selects three auditors at random from a pool of state-employed auditors. These auditors narrow down the applicant pool using standards outlined in the Act. They are subject to the same conflict-of-interest provisions as the applicants. Also, one auditor must be a member of the largest party in the state, another must be a member of the second-largest state party, and one must not be affiliated with any political party.

After the selection panel winnows the applicant field to 60 qualified applicants, the list goes to four legislative leaders, who may then eliminate up to two applicants each.

Once the eliminations are made, the remaining applicants form the pool for a random drawing conducted by the state auditor. To ensure that no funny business happens at this late stage in the game, the auditor's office even issued administrative rules declaring the type and style of bingo balls to be used, as well as that the bingo cage used for the drawing must be "rotated vigorously" before any selections are made.²⁴

²³ The above restrictions also apply to members of the applicant's immediate family.

²⁴ Regulations for Voters FIRST Act; California State Auditor's Office; available from: <http://www.wedrawthelines.ca.gov/downloads/regulations.pdf>; accessed Sept. 16, 2010.

Eight commissioners, including three from each of the two largest parties and two that are not members of either party, are then selected by a random drawing of bingo balls. The eight commissioners review the remaining applicants and appoint the last six commissioners. The six must be balanced as to major party affiliation or lack thereof.

The whole selection process must be completed by Dec. 31 of the year before census results are released.

The Act provides voters one final check on the redistricting process. Under the California Constitution, Californians have 90 days after the enactment date of a law to submit a petition to the secretary of state with a specified number of signatures to request a referendum. The Act makes the commission's redistricting plans submit to this constitutional provision. If the voters decide to toss out one or all of the plans, the rejected plan will be replaced by one created by a commission of special masters appointed by the California Supreme Court.

The Act was controversial on the 2008 ballot and remains so today. In fact, voters in the upcoming general election in California will face two initiatives related to the Act. Proposition 20 would expand the commission's authority to include redistricting congressional districts in the state. Proposition 27 would return to the state legislature the ability to redistrict itself, while keeping some of the open meeting requirements and districting criteria contained in the Act.

As California's complex redistricting commission makes clear, there are many ways in which states can redistrict their political boundaries. In the end, though, all are striving to meet the same goal, that of "one person, one vote."

The Montana Commission

Legislative leaders appointed four members of the current Montana Districting and Apportionment Commission in spring 2009, in the waning days of the 61st legislative session. Those four are:

- Linda Vaughey, appointed by Senate Majority Leader Jim Peterson;
- Pat Smith, appointed by Senate Minority Leader Carol Williams;

- Joe Lamson, appointed by House Majority Leader Margaret Campbell; and
- Jon Bennion, appointed by House Minority Leader Scott Sales.

In late May 2009, the Montana Supreme Court appointed former state Supreme Court Justice Jim Regnier of Lakeside as the fifth member and presiding officer. The five commissioners held several meetings throughout 2009

and 2010 to determine how they will conduct their work after they receive census data in early 2011.

To keep informed about the commission’s work, visit its website at leg.mt.gov/districting. If you wish to receive e-mail updates about upcoming meetings and other commission activities, visit leg.mt.gov/css/Lyris/email_logon.asp and enter your e-mail address.

All interim committee meetings are held in the Capitol in Helena unless otherwise noted.

October 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7 LFC Performance Measurement Work Groups, 2 pm, Capitol	8 Legislative Finance Comm, 8:30 am, Rm 102	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24/31	25	26	27	28	29	30

November 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16 Legislative Finance Comm, time & place TBA Legislative Council, time & place TBA	17 Legislative Caucuses Legislator Orientation & Training	18 Legislator Orientation & Training	19 Legislator Orientation & Training Revenue & Transportation Comm, time & place TBA	20
21	22	23	24	25	26	27
28	29	30				

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