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### Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote

Pamela S. Karlan

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REAPPORTIONMENT, NONAPPORTIONMENT, AND  
RECOVERING SOME LOST HISTORY OF ONE PERSON, ONE  
VOTE

PAMELA S. KARLAN\*

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\* Kenneth and Harle Montgomery Professor of Public Interest Law and Co-Director, Supreme Court Litigation Clinic, Stanford Law School. I thank Jim Blacksher, Viola Canales, Steve Kamp, and Rick Pildes for helpful comments and suggestions and Leizel Ching from Stanford Law School's Robert Crown Law Library for the most exceptional research help.

## INTRODUCTION

I don't know whether it was Yogi Berra or Niels Bohr who first said it—if either of them did—but it's tough to make predictions, especially about the future.<sup>1</sup> That is certainly true about the next round of congressional *redistricting*—the process of drawing the boundaries of the districts from which members of the House of Representatives will be elected. In most states, control over drawing the lines will depend on the outcome of gubernatorial and state legislative elections in 2018 and 2020. And as has been true since the Supreme Court's decision in *Wesberry v. Sanders*,<sup>2</sup> the line-drawers will once again be crafting their maps under a set of legal constraints that has changed since the previous round. Mapmakers in the South and Southwest are free from the preclearance requirement and prohibition on racial retrogression that governed the last five redistricting cycles.<sup>3</sup> The Supreme Court has, yet again, refined the contours of its doctrine forbidding excessive reliance on racial considerations.<sup>4</sup> Depending on the Court's decisions in *Gill v. Whitford* and *Benisek v. Lamone*, states may face new limits on the degree of permissible partisanship in the redistricting process.<sup>5</sup> The interactive effects of all these rule changes are hard to predict. And just as in prior decades, there are likely to be some unanticipated changes as well.

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1. Compare *The Perils of Prediction*, *ECONOMIST* (May 31, 2007), <http://www.economist.com/node/9253918> [<https://perma.cc/4W89-26JV>] (ascribing the observation to Berra), with *THE YALE BOOK OF QUOTATIONS* 92 (Fred R. Shapiro ed., 2006) (ascribing the observation to Bohr).

2. See 376 U.S. 1 (1964).

3. See 52 U.S.C. § 10303 (Supp. III 2016) (imposing the preclearance and nonretrogression requirements); *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding that the coverage formula that determines which jurisdictions must comply with section 5 is now unconstitutional).

4. See *Cooper v. Harris*, 137 S. Ct. 1455, 1478-81 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-99 (2017). That doctrine originated in *Shaw v. Reno*, 509 U.S. 630, 649 (1993). For the evolution of the *Shaw* doctrine, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 906-40, 974-79 (5th ed. 2016).

5. See *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (agreeing to hear the merits of a challenge to Wisconsin's state legislative redistricting plan), *argued*, No. 16-1161 (U.S. Oct. 3, 2017); *Benisek v. Lamone*, 138 S. Ct. 543 (2017) (mem.) (agreeing to hear the merits of a challenge to a Maryland congressional district), *argued*, No. 17-333 (U.S. Mar. 28, 2018).

But when it comes to congressional *reapportionment*—that is, the process of allocating seats in the House of Representatives among the states<sup>6</sup>—there seems to be no real uncertainty. Since 1941, that process has been the paradigmatic “machine that would go of itself.”<sup>7</sup> Sometime in early 2021, the President will “transmit to the Congress a statement” of each state’s population “and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to

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6. Although the terms “redistricting” and “reapportionment” are often used interchangeably, as a technical matter, they are not synonymous: “Apportionment,’ in the technical sense, refers solely to the process of allocating legislators among several areas or political subdivisions, while ‘districting’ entails the actual drafting of district lines. Thus, Congress ‘apportions’ Representatives among the states, while the states ‘district’ by actually drawing the congressional district lines.” Kilgarlin v. Martin, 252 F. Supp. 404, 410 n.1 (S.D. Tex. 1966) (three-judge court) (quoting Comment, Baker v. Carr and Legislative Apportionments: A Problem of Standards, 72 YALE L.J. 968, 970 n.24 (1963)), *rev’d on other grounds sub nom.* Kilgarlin v. Hill, 386 U.S. 120 (1967); *see also* ROYCE CROCKER, CONG. RESEARCH SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 1 n.1 (2012) (“The *reapportionment* or *apportionment* process actually refers to assigning seats in the House of Representatives among the states based on population counts from the decennial census, and is carried out at the national government level. The *redistricting* process, or the drawing of boundaries for congressional districts, occurs within states, and is conducted by the states.”).

7. JAMES RUSSELL LOWELL, *The Place of the Independent in Politics*, in LITERARY AND POLITICAL ADDRESSES 190, 207 (1890). Russell used this term to describe the entire Constitution—or at least the approach average Americans took to constitutional questions. *See id.* His condemnation of the politics of inattention in the 1880s has parallels in our current climate:

But I think there is a growing doubt whether we are not ceasing to produce [statesmen], whether perhaps we are not losing the power to produce them. The tricks of management are more and more superseding the science of government. Our methods force the growth of two kinds of politicians to the crowding out of all other varieties,—him who is called *practical*, and him of the corner grocery. The one trades in that counterfeit of public opinion which the other manufactures. Both work in the dark, and there is need that some one should turn the light of his policeman’s lantern on their doings.... Could we only have a travelling exhibition of our Bosses, and say to the American people, “Behold the shapers of your national destiny!” A single despot would be cheaper, and probably better looking. It is a natural impulse to turn away one’s eyes from these flesh-flies that fatten on the sores of our body politic, and plant there the eggs of their disgustful and infectious progeny. But it is the lesson of the day that a yielding to this repulsion by the intelligent and refined is a mainly efficient cause of the evil, and must be overcome, at whatever cost of selfish ease and aesthetic comfort, ere the evil can be hopefully dealt with.

*Id.* at 198-99.

receive less than one Member.”<sup>8</sup> And roughly a fortnight thereafter, unless Congress acts to stop him, the Clerk of the House will send each governor “a certificate of the number of Representatives to which such State is entitled.”<sup>9</sup> Reapportionment will be over; redistricting will be underway.<sup>10</sup>

It was not always so. In fact, the post-2020 round of reapportionment will mark the centennial of the most striking episode in the history of American reapportionment: Congress’s failure, for the entire 1920s, to reallocate seats to reflect the census results.<sup>11</sup> The reasons for this failure, and the consequences of Congress’s ultimate response, continue to shape our politics today.

Historians and political scientists have written excellent studies of apportionment that address the nonapportionment post-1920.<sup>12</sup> But none of these studies focuses directly on the doctrinal concerns that informed, and then flowed from, these developments. This Article aims to fill that space. I begin by describing the constitutional structure of apportionment, the questions the Constitution left open, and how those questions were resolved prior to 1920. I then turn to what happened in the 1920s and why. Finally, I explore the aftermath of Congress’s ultimate solution, and how that solution set the stage for the Reapportionment Revolution of the 1960s. The story is interesting in its own right, but I also suggest ways in which

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8. 2 U.S.C. § 2a(a) (2012).

9. *Id.* § 2a(b).

10. Given the current state of U.S. politics, perhaps nothing is really certain. *See, e.g.*, Ariel Malka & Yphtach Lelkes, *In a New Poll, Half of Republicans Say They Would Support Postponing the 2020 Election if Trump Proposed It*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/?utm\\_term=.9a79a42cdf5](https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/?utm_term=.9a79a42cdf5) [https://perma.cc/9658-YUQ7]. And observers have expressed concern that inadequate funding will undermine the Census Bureau’s ability to conduct the full and accurate count necessary to distribute the seats properly. *See* Tara Bahrapour, *Census Watchers Warn of a Crisis if Funding for 2020 Count Is Not Increased*, WASH. POST (Apr. 18, 2017), [https://www.washingtonpost.com/local/social-issues/census-watchers-warn-of-crisis-if-funding-for-2020-count-is-not-increased/2017/04/17/e6cc170a-20d6-11e7-a0a7-8b2a45e3dc84\\_story.html?utm\\_term=.0e28cbb6fb61](https://www.washingtonpost.com/local/social-issues/census-watchers-warn-of-crisis-if-funding-for-2020-count-is-not-increased/2017/04/17/e6cc170a-20d6-11e7-a0a7-8b2a45e3dc84_story.html?utm_term=.0e28cbb6fb61) [https://perma.cc/3N7Z-HV5Z].

11. *See infra* Part II.

12. I found the following particularly useful: MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* (1988); MICHEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* (2d ed. 2001); CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S* (1990); and LAURENCE F. SCHMECKEBIER, *CONGRESSIONAL APPORTIONMENT* (1941).

the upcoming redistricting will present many of the same questions that the nation faced a century before.

### I. THE EVOLUTION OF APPORTIONMENT BEFORE 1920

The original Constitution provided for the apportionment of seats in the House of Representatives in Article I, Section 2, Clause 3:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.<sup>13</sup>

Several things about the Apportionment Clause bear note. First, it clearly requires that seats in the House be allocated on the basis of population<sup>14</sup>—in contrast to the Senate, where each state is given two seats regardless of its size.<sup>15</sup> And inherent in the conjunction of apportionment “according to their respective Numbers,” and the requirement for decennial “[e]numeration,” is the expectation that those apportionments will change over time to reflect relative shifts in states’ populations.<sup>16</sup>

Second, while the Apportionment Clause sets lower and upper boundaries on the number of seats in the House—each state must have at least one,<sup>17</sup> so today the smallest House would have fifty

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13. U.S. CONST. art. I, § 2, cl. 3. The provision also determined the number of representatives each state would have until the first enumeration was completed, ranging from one member from Delaware and Rhode Island to ten from Virginia. *See id.*

14. *See id.*

15. *See id.* art. I, § 3, cl. 1. Indeed, “equal Suffrage in the Senate” is the one remaining unamendable part of the Constitution. *Id.* art. V (providing that “no State, without its Consent”—and what state *would* consent?—can be deprived of its equal position).

16. *See id.* art. I, § 2, cl. 3.

17. *See id.*

members, and the total number cannot exceed something north of ten thousand!<sup>18</sup>—it leaves the exact number unspecified. Implicitly, determination of that number is confided to Congress and the political process.

Finally, and most glaring to modern readers, in determining a state's representational base, the original Apportionment Clause counts slaves as three-fifths of a person for purposes of determining a state's population.<sup>19</sup> Today, when people think about the three-fifths clause, they condemn it for the way in which it devalues the personhood of African American slaves. To be sure, the Framers deserve condemnation for denying the full humanity of Black people, but that is not why they inserted this particular clause into the document. Rather, the clause was designed to *reduce* the political power of the slave states relative to the free states, by discounting their slave population—who of course would have had no say in how the representatives apportioned to those states would be selected.<sup>20</sup>

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18. According to the Census Bureau, the total population of the United States on April 1, 2010—the date of the last census—was 308,745,538. See *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/J6PU-YRUU>]. That number divided by 30,000 is 10,291.51793333. See U.S. CONST. art I, § 2, cl. 3.

President George Washington vetoed the first post-1790 apportionment on the grounds that it violated the one representative per 30,000 inhabitants restriction because, although the ratio of the nation's total population to the number of representatives complied with the restriction, the way the seats were allocated meant that some *states* received more representatives than their state population divided by thirty thousand would produce. See *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 449 & n.17 (1992) (describing that history). To my mind, David Currie persuasively explains why using the national population, rather than the population of individual states, is the correct reading of the proviso. See David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 613-14 (1996). But given the current size of the House, the historical debate is of only academic interest.

19. See U.S. CONST. art I, § 2, cl. 3.

20. DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009). As Professor David Waldstricher notes:

Africans and their descendants were not being defined as three-fifths of a person, as is sometimes said, for that would have implied that the men among them deserved three-fifths of a vote, when they had none, or had three-fifths of a person's rights before the law, when they had much less than that, usually. Rather, their presence was being acknowledged as a source of power and of wealth, *for their owners*.

*Id.* at 4-5; see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 89-90 (2005) (explaining that northern representatives at the constitutional convention pressed for the three-fifths clause because otherwise the South would have received additional representatives based on its slave population).

In any case, both the presence and the ultimate elimination of the three-fifths clause show how racial considerations and sectional competition have consistently inflected apportionment in America.<sup>21</sup> And today, observers invoke the three-fifths clause to criticize the practice of counting prisoners for apportionment purposes where they are incarcerated, rather than in the communities from which they came.<sup>22</sup> Prisoners, who are disproportionately persons of color, serve as electoral ballast in majority-white districts whose residents have very different interests from theirs.<sup>23</sup>

But for all the Apportionment Clause does, there is one important issue on which it is silent: it does not specify the precise method for allocating seats beyond saying it should be based on the states' "respective"—that is, relative—populations.<sup>24</sup> Because state populations are not exact multiples of one another, "[n]o method of apportionment ... can assign representatives to the several states in *exact* proportion to their respective numbers."<sup>25</sup> There are many methods for "what to do about the fractions."<sup>26</sup> And the choice among them matters, because it determines which states get the last couple of seats up for grabs.<sup>27</sup> Different formulas may systematically advantage smaller states over larger ones or vice versa.<sup>28</sup> In the context of

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21. For discussion of the repudiation of the three-fifths requirement after the Civil War, see *infra* text accompanying notes 49-57.

22. See NAACP LEGAL DEF. AND EDUC. FUND, INC., PRISON-BASED GERRYMANDERING & THE DISTORTION OF OUR DEMOCRACY 2 (2010).

23. See *id.* at 1-3; Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 362 (2011); John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237, 262 (2011). For the most comprehensive discussion of this issue, see generally *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/> [<https://perma.cc/MQ2F-RT2V>]. For one particularly striking example, see Emily Bazelon & Peter Wagner, *Census' Cell Count Steals Voting Power*, PRISON POL'Y INITIATIVE (Sept. 8, 2004), <https://www.prisonpolicy.org/blog/2004/09/08/newsday/> [<https://perma.cc/A2YB-7LYY>] (reporting that in New York, there are seven state senate districts whose populations satisfy one person, one vote only because prisoners are counted, and that the senator from one of those districts "says that he ignores letters from inmates in order to spend his time on the corrections workers he sees as his real constituents" and supports draconian drug laws that fill the state's prisons).

24. See U.S. CONST. art I, § 2, cl. 3.

25. C.W. Doten et al., *Report Upon the Apportionment of Representatives*, 17 Q. PUBLICATIONS AM. STAT. ASS'N 1004, 1008 (1921).

26. BALINSKI & YOUNG, *supra* note 12, at 1.

27. See *id.* at 2.

28. See, e.g., *id.* at 13.

a particular census, different formulas may give the final seat to a safely Democratic state or a safely Republican one, thereby changing the partisan makeup of Congress.<sup>29</sup>

Between the post-1790 census and 1920, Congress considered, and ultimately used, several different formulas.<sup>30</sup> Each time, the Members were acutely aware of the distributional consequences of choosing one formula over the alternatives.<sup>31</sup> Moreover, in every decade prior to 1920, not only did Congress pick the apportionment formula, but it also determined the number of seats to be apportioned, changing that number each time.<sup>32</sup> Perhaps predictably, with the exception of the post-1840 apportionment, Congress consistently increased the number of seats.<sup>33</sup> And between 1870 and

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29. *See id.* at 2.

30. For narrative accounts of the decennial reapportionments, see U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 448-52 (1992); ANDERSON, *supra* note 12; BALINSKI & YOUNG, *supra* note 12, at 7-56; and SCHMECKEBIER, *supra* note 12, at 107-24. The Census Bureau has collected the decennial apportionment legislation on its website. *See Apportionment Legislation 1790-1830*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/apportionment/apportionment\\_legislation\\_1790\\_-\\_1830.html](https://www.census.gov/history/www/reference/apportionment/apportionment_legislation_1790_-_1830.html) [<https://perma.cc/7L6V-GVZ2>] (collecting apportionment legislation from 1790 to 1830); *Apportionment Legislation 1840-1880*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/apportionment/apportionment\\_legislation\\_1840\\_-\\_1880.html](https://www.census.gov/history/www/reference/apportionment/apportionment_legislation_1840_-_1880.html) [<https://perma.cc/EY2D-3GLQ>] (collecting apportionment legislation from 1840 to 1880); *Apportionment Legislation 1890-Present*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/reference/apportionment/apportionment\\_legislation\\_1890\\_-\\_present.html](https://www.census.gov/history/www/reference/apportionment/apportionment_legislation_1890_-_present.html) [<https://perma.cc/FDU6-PXPX>] (collecting apportionment legislation since 1890).

31. *See, e.g.*, BALINSKI & YOUNG, *supra* note 12, at 21, 35.

32. *See* Byron J. Harden, Note, *House of the Rising Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives*, 51 WASHBURN L.J. 73, 78 & n.38 (2011); Comment, *Apportionment of the House of Representatives*, 58 YALE L.J. 1360, 1362 (1949); *see also* Charles A. Kromkowski & John A. Kromkowski, Commentary, *Why 435? A Question of Political Arithmetic*, 24 POLITY 129, 132-33 (1991).

33. *See* BALINSKI & YOUNG, *supra* note 12, at 34-35. The first Congress, as part of the package that became the Bill of Rights (as well as the far more recently ratified Twenty-Seventh Amendment) also proposed an amendment—which, had it been ratified, would have been the First Amendment—that would have provided additional direction regarding the size of the House. S. JOURNAL, 1st Cong., 1st Sess. 96-97 (1789). (“[T]here shall be one representative for every thirty thousand, until the number shall amount to one hundred: after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.”).

1920, it chose increases that interacted with the apportionment formula to ensure that no state actually lost a seat.<sup>34</sup>

Article I, Section 4 of the Constitution—the Elections Clause—gives Congress the power to “make or alter” the “Manner of holding Elections” for members of the House.<sup>35</sup> Congress’s first major exercise of this power came in 1842, when it required, after heated debate involving both constitutional and policy-based arguments, that states elect their representatives from single-member districts.<sup>36</sup>

With the move to single-member districts, the question arose as to whether Congress should also provide direction on how districts should be drawn.<sup>37</sup> Initially, the Senate adopted a proviso “[t]hat such districts shall be, as nearly as practicable, equal in the number of their inhabitants.”<sup>38</sup> Supporters of the proposal argued “that the general principle was so clear and obvious, that no one could deny its propriety”: equal representation required same-sized districts.<sup>39</sup> And they warned that without such a requirement, each district

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34. See EAGLES, *supra* note 12, at 28-30; Kromkowski & Kromkowski, *supra* note 32, at 136, 138 tbl.IV.

35. U.S. CONST. art. I, § 4, cl. 1.

36. See Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491 (providing that in every state entitled to more than one representative, the representatives “shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative”). This requirement has been carried through in each successive apportionment. For discussions of the motivations behind, and arguments over, the 1842 Act’s single-member district requirement, see ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 43-55 (2013); ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850*, at 129-31 (1987); Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 637-39, 641-42 (2008); and Johanna Nicol Shields, *Whigs Reform the “Bear Garden”: Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 355, 359-63 (1985).

37. See CONG. GLOBE, 27th Cong., 2d Sess. 601-02 (1842).

38. *Id.* at 601.

39. *Id.* at 610 (statement of Sen. Robert Walker (D-Miss.)). Prefiguring Chief Justice Earl Warren’s insistence in *Reynolds v. Sims* that “[l]egislators represent people, not trees or acres,” 377 U.S. 533, 562 (1964), Senator Walker contrasted the general consensus that Congress could require the single-member districts to be composed of contiguous territory with the disagreement over whether it could also require equal populations:

[G]entlemen were disposed to pay more respect to the dirt, and mud, and earth, of which the counties were composed, than to human beings. All their attention was directed to the geographical divisions, but no regard was paid to the freemen that live and breathe upon the soil—no regard to population.

CONG. GLOBE, 27th Cong., 2d Sess. 610 (1842).

might “contain any number” of inhabitants, with states manipulating district boundaries so that two parties with equal numbers of supporters might control very different numbers of districts.<sup>40</sup>

Almost immediately, however, strong opposition emerged. Some of the opposition came from legislators who thought that, for what we would see as values of federalism, states ought to decide how to allocate their seats.<sup>41</sup> Others pointed to the impossibility of drawing equipopulous districts without splitting or joining political subdivisions like counties and cities.<sup>42</sup> Ultimately, the provision was deleted.<sup>43</sup> The single-member districts had to be composed of geographically contiguous territory, but there were no other federal statutory constraints on their configuration.<sup>44</sup>

Even without the imposition of the equal population constraint, the decision to require districted elections had profound consequences going forward.<sup>45</sup> It meant the decline in one-party state delegations at the very moment when competitive two-party politics was emerging.<sup>46</sup> And by requiring every state to draw—and, if it received additional seats after a new census, to redraw—its districts,<sup>47</sup> the requirement for districted elections increased the opportunities for gerrymandering, particularly given the lack of any statutory constraint on district populations.<sup>48</sup>

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40. CONG. GLOBE, 27th Cong., 2d Sess. 601 (1842) (statement of Sen. Thomas Hart Benton (D-Mo.)); *see also id.* at 608 (reiterating this risk during the debate over reconsideration).

41. *See id.* at 602 (statements of Sens. William Merrick (Whig-Md.) and Richard Bayard (Whig-Del.)).

42. *See id.* (statement of Sen. Nathaniel Tallmadge (Whig-N.Y.)).

43. *See id.* (documenting only twenty-one senators voted in favor of the provision while twenty-four voted against it).

44. *See* ENGSTROM, *supra* note 36, at 103.

45. Interestingly, in the immediate next election, four of the seven states that had been electing their delegations at large—Georgia, Mississippi, Missouri, and New Hampshire—ignored the new requirement and sent delegations made up completely of Democrats. *See id.* at 54. The Whigs, who had pushed through the districting requirement, objected, but because the Democrats now controlled the House, they seated all four delegations. *Id.* By 1846, however, every state came into compliance. *See id.* at 55.

46. *See id.* at 44 (noting that by 1840, shifting factionalism in American politics had been replaced with two national parties with “coherent and contrasting platforms”).

47. *See id.* at 46.

48. Indeed, as Robert Dixon observed, in several important senses, “[a]ll [d]istricting [i]s ‘[g]errymandering,’” because it usually alters—and is intended to alter—the results that would occur if the election was conducted at large. *See* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968).

After the Civil War, apportionment changed again. The Thirteenth Amendment's abolition of slavery would have automatically nullified the three-fifths clause of Article I, Section 2, because there were no longer inhabitants of the United States who were *not* "free Persons."<sup>49</sup> But the Fourteenth Amendment drove home that point, providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."<sup>50</sup>

The Reconstruction Congress was, however, concerned that southern states would nonetheless continue to disenfranchise Black people<sup>51</sup>—in which case, emancipation would actually *increase* the bonus they received on account of their Black inhabitants.<sup>52</sup> Congress wrestled with the idea of changing the apportionment base from population to number of voters to avoid this problem.<sup>53</sup> But there was strong opposition from New England, both because it "had a disproportionately large number of women (who were universally excluded from voting at the time) due to an extensive emigration of her males to the West"<sup>54</sup> and because many of its states imposed more restrictions on the franchise than some of the newer states.<sup>55</sup>

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49. See U.S. CONST. art. I, § 2, cl. 3.

50. *Id.* amend. XIV, § 2. For discussions of Section 2, see Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 955-61 (2008); Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1087-90 (2017); Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149 (2015); and Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 445-59 (2015). For a detailed account of Section 2's legislative history, see George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961).

51. See Maggs, *supra* note 50, at 1084, 1087.

52. See Zuckerman, *supra* note 50, at 110.

53. See *id.* at 100, 105.

54. *Id.* at 95. George Zuckerman reprinted a chart of all the forms of disenfranchisement of male, adult citizens that existed in the several states as of 1869, presented during the congressional debate over apportionment following the upcoming census. *Id.* at 108.

55. See *id.* at 95. As part of the 1870 census, the enumerators were asked to provide statistics about the levels of adult male disenfranchisement in the states. ANDERSON, *supra* note 12, at 79-80. The statistics look like absolute garbage overall. See *id.* at 80; Zuckerman, *supra* note 50, at 110-12. And they were compiled before the Fifteenth Amendment, which forbid disenfranchisement on the basis of race, went into effect. See Zuckerman, *supra* note 50, at 110. Nonetheless, it may be telling that Rhode Island was reported to have the highest

Ultimately, Congress settled instead on including in the Fourteenth Amendment a reduction-of-representation clause.<sup>56</sup> That clause provided that when a state “denied” any male adult citizen the right to vote—“or in any way abridged” that right “except for participation in rebellion, or other crime”—the state’s “basis of representation” would be “reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”<sup>57</sup>

It was against this backdrop of constitutional changes to apportionment, compounded by profound demographic shifts, that Congress took up the first post-Civil War apportionment. In the 1872 Apportionment Act,<sup>58</sup> Congress monkeyed quite a bit with the numbers, giving several states additional seats to which the apportionment formula did not entitle them.<sup>59</sup> The Act repeated, but without any enforcement mechanism, the reduction of representation requirement from the Fourteenth Amendment.<sup>60</sup>

The 1872 Act also included, for the first time, a requirement that the districts drawn in states entitled to more than one seat “contain[] as nearly as practicable an equal number of inhabitants.”<sup>61</sup> This was one person, one vote *avant la lettre*.

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overall rate—apparently due to its requirement that electors own a certain value of realty. *See id.* at 112. After 1870, the census never again included questions designed to determine rates of disenfranchisement. *See* ANDERSON, *supra* note 12, at 81.

56. *See* U.S. CONST. amend. XIV, § 2.

57. *Id.*

58. Act of Feb. 2, 1872, ch. 11, 17 Stat. 28.

59. *See* ANDERSON, *supra* note 12, at 80; BALINSKI & YOUNG, *supra* note 12, at 37 (stating that “[i]n the ... 1870s no real method was used” and instead the results of the conventional formula “were altered to satisfy the greed of certain states”).

60. Act of Feb. 2, 1872 § 6. For a valuable, recent discussion of the background to the 1872 Act, see Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. (forthcoming 2018) (manuscript at 23-30), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3017614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017614) [<https://perma.cc/BF5Z-WGH6>]. Professor Magliocca also argues that the current apportionment statute is unconstitutional, because it makes no provision for determining the level of disenfranchisement and then applying the reduction-of-representation penalty. *See id.* (manuscript at 59).

61. *See* Act of Feb. 2, 1872 § 2. Section 2 of the 1872 Act also provided that if a state gained seats and did not draw a sufficient number of districts, the additional seats would be elected at large. *See id.* Prior to the 1872 Act, if a state was awarded additional seats, it would forfeit those seats if it did not redraw its districts, because all representatives were required to be elected from districts and no district could elect more than one representative. *See* ENGSTROM, *supra* note 36, at 64. This part of section 2 had several perhaps unintended consequences. First, it eliminated a powerful disincentive against refusals to redistrict,

The requirement was proposed by Representative James H. Platt, Jr., a Republican from Virginia, who had settled there after serving as a lieutenant colonel in the Union Army during the Civil War.<sup>62</sup> His argument echoed points made during the debate over the 1842 Act, although neither he nor anyone else seemed aware of the earlier proposal:

[N]othing [would] prevent a State, if it chooses to do so, from making half a State one congressional district and dividing the rest of the State among the other members. They can make one district containing any population they choose, and other districts with as small a population as they choose.<sup>63</sup>

Perhaps surprisingly—for example, during the same session, members of Congress debated at some length whether to set a uniform national election day<sup>64</sup>—this significant change “provoked no discussion or dissension in either Congress or the press.”<sup>65</sup>

As with the reduction-of-representation provision contained in the 1872 Act, there was no express enforcement mechanism for the equal inhabitants requirement.<sup>66</sup> Still, the requirement seems to

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because a state would no longer lose seats. *See id.* at 72. Second, it allowed for the strategic and partisan use of at-large seats. *See id.* at 74.

62. *PLATT, James Henry, Jr., (1837-1894)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000380> [<https://perma.cc/22QE-JRQD>].

63. CONG. GLOBE, 42d Cong., 2d Sess. 141 (1871).

64. *See id.* at 137-38.

65. *See* PETER H. ARGERSINGER, REPRESENTATION AND INEQUALITY IN LATE NINETEENTH-CENTURY AMERICA: THE POLITICS OF APPORTIONMENT 14 (2012). Having written that there was no discussion, Professor Argersinger immediately, and somewhat confusingly, claimed that the requirement “was seen not as an innovation but as an explicit statement of a ‘just’ principle and in accord with contemporary decisions on equal (male) suffrage and free elections” without identifying who was doing the seeing. *See id.* I have been unable to find any discussion in the scholarly literature as to why this provision was added. Zuckerman’s account of the 1869-72 debates over apportionment is quite extensive but never addresses this issue. *See generally* Zuckerman, *supra* note 50. Nor do any of the more general accounts of reapportionment provided by the sources cited previously in note 12. Anthony McGann and his colleagues suggest, by negative implication, some connection to Reconstruction. *See* ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 184 (2016) (stating with respect to Congress’s imposition of the equal population requirement in 1872, “Reconstruction ended soon after, and this was never enforced”).

66. *See generally* Act of Feb. 2, 1872, ch. 11.

have at least some hortatory effect: the average population deviation among districts “dipped to around 7 percent between 1872 and 1900,” from over 10 percent in 1842.<sup>67</sup>

The 1911 Apportionment Act marked the culmination of the first period of federal reapportionment legislation and its features are fairly representative of congressional approaches up to that point. Congress decided to create a House with 433 members, because that was the smallest number it could use that would not reduce the size of any state’s delegation.<sup>68</sup> It also provided that the number would increase to 435 if New Mexico and Arizona became states within the decade, giving each new state a single representative.<sup>69</sup> It chose to apportion the seats using the “[m]ethod of [m]ajor [f]ractions” recently proposed by Walter F. Willcox, a professor of economics and statistics at Cornell,<sup>70</sup> a method designed to “secure[] approximate equality of representation per million inhabitants” measured in absolute terms<sup>71</sup> that mildly advantaged larger states over smaller ones.<sup>72</sup> And in keeping with provisions it had included since the post-1870 apportionment, it required “[t]hat in each State entitled ... to more than one [seat], the Representatives to the [next Congress] and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.”<sup>73</sup>

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67. ENGSTROM, *supra* note 36, at 154. That number shot up to over 20 percent in 1932 and 1942, after the Supreme Court relieved states of any obligation to comply with equal population principles. See *Wood v. Broom*, 287 U.S. 1, 7 (1932); ENGSTROM, *supra* note 36, at 154.

68. BALINSKI & YOUNG, *supra* note 12, at 47.

69. See Act of Aug. 8, 1911, ch. 5, § 2, 37 Stat. 13, 14.

70. See Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1028, 1035-38 (1929). Willcox’s method of major fractions resembles the method proposed by Daniel Webster and used in the post-1840 apportionment. See *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 450-51 (1992). See generally PAT HUNLEY, U.S. CENSUS BUREAU, STATISTICS 2014-04, PROOF OF EQUIVALENCE OF WEBSTER’S METHOD AND WILLCOX’S METHOD OF MAJOR FRACTIONS (2014), <https://www.census.gov/srd/papers/pdf/RRS2014-04.pdf> [<https://perma.cc/G6SB-HNTP>]. For accessible explanations of the different methods, see SCHMECKEBIER, *supra* note 12, at 12-58; and *Congressional Apportionment: Historical Perspective*, U.S. CENSUS BUREAU, <https://www.census.gov/population/apportionment/about/history.html> [<https://perma.cc/3S4F-NDQU>]. For accounts of the emergence of social scientific and statistical study of apportionment methods and the roles of Willcox, Edward V. Huntington, and Joseph A. Hill, see BALINSKI & YOUNG, *supra* note 12, at 46-50; and EAGLES, *supra* note 12, at 42-45.

71. Chafee, *supra* note 70, at 1036.

72. ANDERSON, *supra* note 12, at 152.

73. Act of Aug. 8, 1911, ch. 5, § 3. For prior versions of the equipopulosity requirement,

## II. THE STALEMATE OF THE 1920S

The United States of 1920, like the United States of today, was a nation characterized by unease and polarization. Americans lacked “their former confidence in democracy or religion.”<sup>74</sup> There was deep distrust between the growing and increasingly cosmopolitan cities and declining small towns in the Midwest and the South.<sup>75</sup> Walter Lippman described a tension between “the new urban civilization with its irresistible economic and scientific and mass power” and “the older American village civilization making its last stand against what to it looks like an alien invasion.”<sup>76</sup> Traditionalists perceived a threat “from enclaves of the foreign-born, not yet adapted to American ways,”<sup>77</sup> immigrants who seemed racially different from their predecessors.<sup>78</sup> The urban-rural tensions played out in substantive differences over everything from morals legislation—most notably Prohibition—to tax and trade policy.<sup>79</sup>

The census of 1920 gave concrete proof of these perceptions. For the first time, a majority of the American population lived in urban places.<sup>80</sup> Not only that: the urban population had grown by nineteen million people during the decade, while the rural population had actually shrunk by five million.<sup>81</sup> For the first time, the census

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see Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734; Act of Feb. 7, 1891, ch. 16, § 3, 26 Stat. 735, 735; Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5, 6; and Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28.

74. WILLIAM E. LEUCHTENBERG, *THE PERILS OF PROSPERITY, 1914-1932*, at 203 (2d ed. 1993).

75. See EAGLES, *supra* note 12, at 3-4.

76. *Id.* at 4-5 (quoting WALTER LIPPMAN, *MEN OF DESTINY* 28 (Transaction Publishers 2003) (1927)); see also Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902/> [<https://perma.cc/4WED-JMDE>] (comparing the political landscape as we approach 2020 to the landscape of 1920).

77. LEUCHTENBERG, *supra* note 74, at 203.

78. ANDERSON, *supra* note 12, at 137.

79. BALINSKI & YOUNG, *supra* note 12, at 51-52 (citing 70 CONG. REC. 9087 (1928) (speech of Rep. Emmanuel Celler (D-N.Y.))).

80. ANDERSON, *supra* note 12, at 134. Note that this included what we would now think of as small towns of anything over 2500 inhabitants. *Id.*

81. BALINSKI & YOUNG, *supra* note 12, at 51.

published “complete returns on citizenship of the foreign born,” and they showed a rapidly changing America.<sup>82</sup>

When Congress turned to reapportionment, it found that the huge swings in population produced by both immigration and internal migration during World War I meant that the size of the House would have to swell from 435 to 483 to avoid taking seats away from at least one state.<sup>83</sup> If the House size remained at 435, roughly a dozen states were likely to lose seats, and political power would transfer to large, urban, northeastern states and away from states in the Midwest and South.<sup>84</sup> Population shifts also threatened continued Republican control over Congress.<sup>85</sup> Further, with the admission of New Mexico and Arizona, there was no longer the possibility of creating additional western states in the continental United States to counterbalance the eastern population.<sup>86</sup>

At the same time, there was strong opposition to such a massive increase; the *New Republic*, for example, charged that the House “functions badly enough” at the current size and “did not need more members to add ‘their oratory to the legislative babel.’”<sup>87</sup>

The demographic realities might have been sufficient on their own to produce a stalemate, but they were further complicated by arguments about the representational base. Civil rights leaders and maverick Massachusetts Representative George Holden Tinkham sought an inquiry into Black disenfranchisement in the South.<sup>88</sup> They pressed the argument that the Fourteenth Amendment’s reduction-of-representation clause should come into play to reduce southern states’ representation in the House.<sup>89</sup> By 1920, the South had completed the project of essentially disenfranchising its Black

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82. SCHMECKEBIER, *supra* note 12, at 87.

83. See BALINSKI & YOUNG, *supra* note 12, at 50-51; EAGLES, *supra* note 12, at 33-34.

84. See BALINSKI & YOUNG, *supra* note 12, at 51; EAGLES, *supra* note 12, at 33.

85. ANDERSON, *supra* note 12, at 138-39.

86. *Id.*

87. EAGLES, *supra* note 12, at 33 (quoting NEW REPUBLIC, Oct. 20, 1920, at 177).

88. *Id.* at 34. I knew nothing about Tinkham before I began the research for this Article, but he is surely one of the quirkiest individuals ever to serve in public office. For a profile of this never-campaigning Boston Brahmin whose “favorite attitude” was “[o]pposition” and who was “so strong ... that plaster casts of his arms, shoulders, and back were sent to Chicago in 1893 to be exhibited” at the World’s Fair, see Will Lang, *Tinkham the Mighty Hunter: Boston’s Congressman Bags Votes Like Tigers but Never Campaigns*, LIFE, Dec. 16, 1940, at 69, <http://tinyurl.com/Tinkham> [<https://perma.cc/496C-GJ3F>].

89. EAGLES, *supra* note 12, at 34; see also Magliocca, *supra* note 60 (manuscript at 31-34).

population.<sup>90</sup> The ensuing disparities in voting rates were staggering. During debates in the House, a representative from West Virginia—then, as now, an overwhelmingly white state<sup>91</sup>—pointed out that in his district, eighty-five thousand votes had been cast in the 1920 election; he contrasted that number with the statewide totals in South Carolina and Mississippi—the two states with the highest proportion of Black residents.<sup>92</sup> In the former, only sixty-eight thousand votes had been cast statewide for all seven of South Carolina’s seats combined; in the latter, seventy-one thousand votes had been spread among eight seats.<sup>93</sup>

Southern representatives responded with bald-faced denials and racist comments.<sup>94</sup> But they, joined by representatives from predominantly rural states that were at risk of losing seats, also argued for their own change to the representational base: excluding noncitizens.<sup>95</sup> Their arguments contain echoes of contemporary debates over immigration. Representative Edward C. Little from Kansas expressed concern that reapportionment would “turn this government over to the cities where ignorance, poverty, vice, and crime are staring you in the face.”<sup>96</sup> He argued that “[i]t is not best for America that her councils be dominated by semicivilized foreign colonies in Boston, New York, Chicago.”<sup>97</sup> His compatriot Hays B.

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90. See Tolson, *supra* note 50, at 466.

91. Compare Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* tbl.49 (U.S. Census Bureau, Working Paper No. 76, 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.html> [https://perma.cc/VNB9-6ETR], with *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WV> [https://perma.cc/DPB2-JTKY] (statistics through July 1, 2016).

92. See EAGLES, *supra* note 12, at 47.

93. *Id.* Similarly, fewer votes had been cast in eleven southern states combined than in Illinois, but with apportionment based on total population, those states had been given five times the number of seats that Illinois had. *Id.* at 34.

A generation later, the numbers were equally striking. As of 1938, nationwide the votes cast for representatives expressed as a percentage of the population was 29.6, but only 6.8 for the southern states. SCHMECKEBIER, *supra* note 12, at 91. It took 35,439 votes to elect Mississippi’s seven representatives, but 730,024 votes to elect Kansas’s seven representatives. *Id.* And in 1954, the year of *Brown v. Board of Education*, 347 U.S. 483 (1954), in thirteen majority-Black counties in Mississippi, only fourteen Black voters *total* cast ballots. Zuckerman, *supra* note 50, at 124.

94. See EAGLES, *supra* note 12, at 47-48.

95. See ANDERSON, *supra* note 12, at 151, 156.

96. EAGLES, *supra* note 12, at 38 (quoting 60 CONG. REC. 1648 (1921)).

97. *Id.*

White “claimed that counting 1 million aliens who ‘are probably technically subject to deportation ... might vitiate the morality of the apportionment.’”<sup>98</sup> Senator James Thomas Heflin of Alabama called aliens “crooks, criminals, kidnapers, bandits, terrorists, racketeers, and ‘refuse of foreign countries’ and claimed that most came to the United States illegally” and therefore should not be included in the representational base.<sup>99</sup> His colleague Hugo Black—who later became a champion of one person, one vote, writing the opinion for the Court in *Wesberry v. Sanders* that required Georgia to redraw its congressional districts<sup>100</sup>—“denied that the Constitution required reapportionment every ten years”<sup>101</sup> and also “demanded ‘an enumeration of aliens lawfully in the United States and aliens unlawfully in the United States.’”<sup>102</sup>

After the initial failure to reapportion, the House took no action between 1921 and 1925 on reallocating seats among the states. In 1926, the Chairman of the House Committee on the Census, Representative Hart Fenn from Connecticut, essentially gave up on the prospect of achieving a reapportionment based on the 1920 census and turned instead to the idea of a permanent, prospective reapportionment bill before the 1930 census.<sup>103</sup> Senator Arthur Vandenberg from Michigan pressed the idea as well, and in 1929, Congress adopted a prospective apportionment bill to govern the post-1930 apportionment and any future apportionment should Congress “fail[] to enact a law apportioning Representatives among the several States.”<sup>104</sup>

The Reapportionment and Census Act of 1929 delegated to the President the duty of informing Congress of “the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made.”<sup>105</sup> The Act directed the President to calculate this number by reference to potentially three different formulas: “the method used in the

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98. *Id.* at 61.

99. *Id.* at 77 (quoting 71 CONG. REC. 2054 (1929)).

100. 376 U.S. 1, 7-8, 18 (1964).

101. EAGLES, *supra* note 12, at 76.

102. BALINSKI & YOUNG, *supra* note 12, at 57 (quoting 71 CONG. REC. 2078 (1929)).

103. See ANDERSON, *supra* note 12, at 153-55.

104. Act of June 18, 1929, ch. 28, § 22(b), 46 Stat. 21, 26-27.

105. *Id.* § 22(a). By contrast, in earlier apportionment bills, the number of seats allocated to each state was expressly laid out. See Harden, *supra* note 32, at 78 & n.38.

last preceding apportionment,”<sup>106</sup> “the method known as the method of major fractions,”<sup>107</sup> and “the method known as the method of equal proportions.”<sup>108</sup> Unless Congress agreed otherwise, the seats would then be allocated using “the method used in the last preceding apportionment.”<sup>109</sup>

Toward the end of the process of adopting the permanent reapportionment bill, there were a number of compromises. Proposals for excluding either disenfranchised citizens or aliens from the representational base were defeated.<sup>110</sup> And Representative Fenn made one change that was to have a major impact on American politics. He omitted the requirement, brought forward from the 1911 Apportionment Act, that “districts ‘be composed of contiguous and compact territory and contain as nearly as practicable the same number of individuals.’”<sup>111</sup>

It is not entirely clear why the equal-population requirement was deleted. There was virtually no debate on the floor and no comment from the press.<sup>112</sup>

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106. Act of June 18, 1929 § 22(a)(1).

107. *Id.* § 22(a)(2). This was also the method used in the last apportionment. *See supra* text accompanying notes 69-73.

108. Act of June 18, 1929 § 22(a)(3).

109. *Id.* § 22(b). Because the 1911 apportionment had used the method of major fractions, *see supra* note 71 and accompanying text, the President reported two calculations to Congress in 1931. *See* BALINSKI & YOUNG, *supra* note 12, at 57. Fortunately, those calculations resulted in identical allocations of seats that time. *See id.* In 1941, however, the two methods produced different apportionments with respect to one seat. *See id.* at 57, 58 tbl.6.3. Unsurprisingly, a Congress controlled by Democrats chose to use the method of equal proportions, which gave the final seat to overwhelmingly Democratic Arkansas rather than predominantly Republican Michigan, and it amended the 1929 Act to make the method of equal proportions the sole method of calculating the apportionment. *See id.* at 58; *see also* Act of Nov. 15, 1941, ch. 470, § 22(a), 55 Stat. 761, 761-62 (codified as amended at 2 U.S.C. § 2a(a) (2012)); Mark M. Bell, Student Article, *Webster Plus One: Solving the “Impossible” Apportionment Debate*, 36 OHIO N.U. L. REV. 139, 151 (2010) (describing the 1941 process).

110. *See* EAGLES, *supra* note 12, at 80.

111. ANDERSON, *supra* note 12, at 155.

112. *See* EAGLES, *supra* note 12, at 72. The Supreme Court was later to claim “that the omission was deliberate” and made “after debate.” *Wood v. Broom*, 287 U.S. 1, 7 (1932). I checked all the pages of the *Congressional Record* cited by the Court. On most of them, I found nothing about the equal-population requirement. I found only one statement made on the floor directly addressing why the requirement should be removed. Representative Ralph Lozier (D-Mo.) stated that the requirement, along with directives about how states should handle the election of an increased or decreased number of representatives until they completed a new redistricting, was “violative of the letter and spirit of constitutional mandate.” 70 CONG. REC. 1496 (1929). He asserted that:

Professor Margo Anderson, a scholar of the census, has suggested that Congress's focus was on apportionment, rather than districting:

Some congressmen felt that the language was extraneous. Others argued that the language from old reapportionment bills not specifically repealed by the current bill would remain in force and thus that there was no need to repeat the language. Overall, passage of a viable reapportionment bill was the only question at hand. Districting seemed relatively unimportant.<sup>113</sup>

But Professor Charles W. Eagles, who has written the most detailed history of the post-1920 nonapportionment, has hypothesized that the deletion may have been the product of a backroom deal to permit rural members to preserve their seats, even if their districts were losing population.<sup>114</sup>

In any event, the precommitment strategy worked, and the post-1930 apportionment proceeded uneventfully—at least as a procedural matter.<sup>115</sup> As a substantive matter, it saw a massive shift in political power. California's delegation shot from eleven members to twenty; meanwhile, twenty-one states lost seats.<sup>116</sup> And in 1941, Congress revised the permanent apportionment bill to provide that seats would be allocated using the method of equal proportions.<sup>117</sup> The modern statutory process for reapportionment was thereby

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The only power that Congress is given by the Constitution with reference to apportionment of Representatives is to apportion the representation among the several States in proportion to the numbers or population. That duty done, the power of Congress ends, and Congress has no power to determine in what manner the several States exercise their sovereign rights in selecting their Representatives in Congress .... [N]o man who has even a speaking acquaintance with the Constitution will get on this floor and defend the provisions.

*Id.*

113. ANDERSON, *supra* note 12, at 155.

114. *See* EAGLES, *supra* note 12, at 72-73.

115. *See id.* at 73.

116. ANDERSON, *supra* note 12, at 157.

117. *See* Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761, 761-62 (codified as amended at 2 U.S.C. § 2a(a) (2012)).

settled and has remained essentially the same for the past seventy-five years,<sup>118</sup> even as the processes of redistricting have undergone a series of revolutions.

### III. THE IRONY OF 1929

Perhaps not surprisingly, given that they were responding (or refusing to respond) to twenty years of profound demographic and cultural change, the congressional districting plans states drew following the 1931 reapportionment prompted litigation. Ironically, although lower courts struck down a number of plans with gross population disparities, the Supreme Court read the Apportionment Act of 1929 to permit the very entrenchment within states that the Act counteracted among them.

The lead case before the Court came from Mississippi. As a result of the 1930 census, Mississippi's congressional delegation shrank from eight to seven members.<sup>119</sup> "In 1932, after long and acrimonious battle, it appeared that the Legislature would never agree on any redistricting plan" but "[a]t the last minute, the matter was settled by combining the Seventh and Eighth Districts."<sup>120</sup>

It would have been possible to apportion Mississippi into seven districts "having approximately the same number of inhabitants."<sup>121</sup> But the total populations of the new districts varied dramatically. There were fewer than two hundred thousand people in the Fourth Congressional District but roughly four hundred thousand people in

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118. The current version of the apportionment statute, *see* 2 U.S.C. § 2a(a) (2012), is essentially similar to the 1941 version with respect to how seats are allocated.

119. *See* *Wood v. Broom*, 287 U.S. 1, 4 (1932).

120. *Connor v. Johnson*, 279 F. Supp. 619, 620 (S.D. Miss. 1966) (three-judge court) (per curiam), *aff'd*, 386 U.S. 483 (1967); *see also* *Wood v. State*, 142 So. 747, 761 (Miss. 1932) (Cook, J., dissenting) (charging that "there [had been] no real attempt on the part of the Legislature to redistrict the entire state, but rather it merely combined two of the then existing districts lying in the south central and southwestern part of the state into one, leaving the remaining districts practically as they were from 1912 to 1932").

Mississippi adopted the same tactic in its post-1960 congressional redistricting. As a result of the census, Mississippi went from six districts to five. The State simply combined the preexisting Second and Third Congressional Districts, leaving the other districts untouched. FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, at 43, 44 map 2.2, 45 map 2.3 (1990).

121. *Broom v. Wood*, 1 F. Supp. 134, 135 (S.D. Miss. 1932) (three-judge court), *rev'd*, 287 U.S. 1 (1932).

the Third,<sup>122</sup> a district centered on the overwhelmingly Black Delta.<sup>123</sup>

A voter who lived in the significantly overpopulated Seventh District, Stewart C. Broom, brought suit. He claimed that the population disparities violated section 3 of the Apportionment Act of 1911. He did not claim directly that the Constitution required equality of population among districts. Relying on the Supreme Court's recent decision in *Smiley v. Holm*, which had held that in a state that lost House seats, "unless and until new districts are created, all representatives allotted to the State must be elected by the State at

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122. *Id.*

123. See PARKER, *supra* note 120, at 43, 44 map 2.2.

large,”<sup>124</sup> he sought injunctive relief against use of the new districts in the upcoming election.

The district court agreed. It held that the constraints on districting contained in the 1911 Act were “mandatory and must be followed by the states in fixing congressional districts.”<sup>125</sup> Because Mississippi’s congressional map was “clearly violative” of the Act, the plaintiff was entitled to an injunction.<sup>126</sup>

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124. 285 U.S. 355, 374-75 (1932). *Smiley* involved a challenge to the post-1930 congressional redistricting in Minnesota, another state that had lost a seat. *See id.* at 361-62. For a discussion of the fascinating background to the case, see Benedict J. Schweigert, Note, “*Now For a Clean Sweep!*”: *Smiley v. Holm*, *Partisan Gerrymandering, and At-Large Congressional Elections*, 107 MICH. L. REV. 133, 141-49 (2008). Republicans controlled the state legislature, but the governorship was held by a member of the more progressive Farmer-Labor Party. *See id.* at 141-42. The legislature enacted a gerrymandered plan designed to insulate the state’s incumbent Republican congressmen by packing Farmer-Labor supporters into a single, dramatically overpopulated district. *See id.* at 146. When the governor vetoed the bill, Republicans argued that the veto was ineffective because the Constitution conferred the power to prescribe “[t]he Times, Places and Manner of holding Elections for ... Representatives” on “the Legislature” of the state, U.S. CONST. art. I, § 4, c.1, giving no role to the governor. *See Schweigert, supra*, at 148-49.

The Supreme Court disagreed unanimously, holding that redistricting was ordinary legislation, and that if the state’s ordinary legislative process provided for a gubernatorial veto—as Minnesota’s did—then that veto would be effective. *See Smiley*, 285 U.S. at 371-75. The Court then found that Minnesota therefore had no districting plan in place, the governor having vetoed the new nine-seat plan and the prior ten-seat plan being “not at all adapted to the new apportionment.” *See id.* at 374-75. Accordingly, the only way to conduct elections was at large. *See id.* Because there was no districting plan, “[q]uestions in relation to the application of the standards defined in section 3 of the Act of 1911 to a redistricting statute, if such a statute should hereafter be enacted, [were] wholly abstract,” *id.* at 375, and the Court did not therefore answer the question “whether the Act of Congress of August 8, 1911, [was] still in force,” *id.* at 373.

Minnesota was not the only state that ended up electing members of the House at large after the 1931 reapportionment. Missouri lost three seats in the apportionment, and after the governor vetoed a new redistricting bill, the state supreme court held that the State was required to elect its delegation at large. *See State ex rel. Carroll v. Becker*, 45 S.W.2d 533, 533-35 (Mo.), *aff’d sub nom. Carroll v. Becker*, 285 U.S. 380 (1932). And after New York gained two seats, the state legislature tried to redraw the map through concurrent resolutions, rather than through ordinary legislation submitted to the governor. *See Koenig v. Flynn*, 179 N.E. 705, 706 (N.Y.), *aff’d*, 285 U.S. 375 (1932). The state’s highest court rejected the attempt, and held that forty-three of the forty-five Congressmen were “to be elected according to the districts created” by New York’s 1911 redistricting statute with the other two being “elected at large by the entire state.” *Id.* at 708. The Supreme Court affirmed both decisions on the strength of *Smiley*. *See Carroll*, 285 U.S. at 382; *Koenig v. Flynn*, 285 U.S. 375, 379 (1932).

125. *Broom*, 1 F. Supp. at 135.

126. *Id.* at 135-36.

The post-1930 congressional redistricting in Kentucky followed a similar path.<sup>127</sup> Kentucky's allocation had gone from eleven seats to nine—a particularly sharp drop.<sup>128</sup> Given the State's total population, equipopulous districts would have had roughly 290,000 inhabitants each.<sup>129</sup> The State decided to put all of Jefferson County (Louisville) in a single district despite its population of 355,000 people, which was more than enough for a single district but not nearly enough to constitute two full districts.<sup>130</sup> There were 119 remaining counties, only five of which had populations over 60,000, with the average county having a population of 19,000.<sup>131</sup>

A three-judge district court found that:

In view of this situation, the Legislature was confronted with no difficulty whatever in dividing these one hundred and nineteen counties into eight congressional districts of substantially equal population, and this without the necessity of dividing any county; and the topography of the state presents no obstacle to carving these districts out of contiguous and compact territory.<sup>132</sup>

Indeed, the plaintiffs presented a map showing eight districts, each composed of contiguous whole counties, with population differences of less than 4000 between the most populous and the least.<sup>133</sup> But the State instead created adjacent districts with population disparities of up to 114,000 inhabitants.<sup>134</sup>

The district court had no trouble concluding that Kentucky's redistricting violated section 3 of the 1911 Apportionment Act.<sup>135</sup> Given "practical considerations against throwing a part of this county into another congressional district,"<sup>136</sup> it thought the legislature's decision to put all of Jefferson County in a single, overpopulated district should not "be regarded as a violation of the spirit of the

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127. The facts here are taken from *Hume v. Mahan*, 1 F. Supp. 142, 149-50 (E.D. Ky.), *rev'd*, 287 U.S. 575 (1932).

128. *See id.* at 149.

129. *See id.*

130. *See id.*

131. *See id.* at 149-50.

132. *Id.* at 150.

133. *See id.*

134. *See id.*

135. *See id.* at 150-51.

136. *Id.* at 149.

federal act.”<sup>137</sup> What it could not countenance was what the legislature did with the rest of the state.<sup>138</sup> Not only had the legislature drawn districts with dramatically different populations, but it had also drawn ones that “outrageously violate[d] the requirement of compactness of territory.”<sup>139</sup> Comparing the Fifth District to “a French style telephone,” with some counties “strung along the river forming the handle” and still others “forming the mouthpiece and receiver respectively,” the court concluded that “a visual examination of the outlines upon the map” was “sufficient to repel any presumption of a good-faith attempt on the part of the Legislature to comply with section 3 of the Act of August 8, 1911.”<sup>140</sup> As a result, the court declared the entire redistricting act invalid.<sup>141</sup>

And yet, when the issue whether states were required to pursue population equality among districts reached the Supreme Court, in the poetically captioned *Wood v. Broom*, the Supreme Court upheld the Mississippi map.<sup>142</sup> Answering the question left open in *Smiley*, the Court declared that because the 1911 Act’s insistence on equal population requirements had been omitted from the Reapportionment Act of 1929, the requirement “did not outlast the apportionment to which [it] related.”<sup>143</sup> Based on its decision in *Wood v.*

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137. *Id.* When the Supreme Court ultimately imposed equipopulousity as a constitutional requirement, it treated political subdivision boundaries differently with respect to congressional districts and state legislative districts. *See Mahan v. Howell*, 410 U.S. 315, 321, *modified*, 411 U.S. 922 (1973). With respect to state legislative district boundaries, the Court has generally permitted total population deviations of up to 10 percent, in part to permit states to take local political subdivision boundaries into account in drawing districts. *See id.* at 320-22. By contrast, the Court has generally required states to achieve the maximum “practicable” equality with respect to congressional districts. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see Karcher v. Daggett*, 462 U.S. 725, 728, 739-40 (1983) (holding that a plan with a total population deviation of 0.6984 percent did not meet this standard because it would have been possible to craft a plan with a smaller deviation). More recently, the Court upheld a West Virginia congressional redistricting plan where the deviation was 0.79 percent, in part because the plan was designed to avoid splitting the state’s counties. *See Tennant v. Jefferson Cty. Comm’n*, 567 U.S. 758, 764 (2012) (per curiam).

138. *See Hume*, 1 F. Supp. at 150-51.

139. *Id.* at 150.

140. *Id.*

141. *See id.* at 150-51.

142. 287 U.S. 1, 6-8 (1932).

143. *See id.* at 8. As I suggested earlier, the Court’s assertion that the “legislative history [of the 1929 Act] shows that the omission was deliberate” and made “after debate,” *id.* at 7, exaggerates a bit. *See supra* note 112 and accompanying text. To be sure, the omission was deliberate, in the sense that Representative Fenn made a motion to strike out the section of

*Broom*, the Supreme Court subsequently reversed the decree in the Kentucky case as well, directing the court to dismiss the complaint.<sup>144</sup>

The Supreme Court's brief opinion in *Wood v. Broom*—issued just five days after oral argument<sup>145</sup>—did not advert to a striking passage in Mississippi's brief defending the post-1930 map. In addition to arguing that the plaintiff's claim was nonjusticiable because control over congressional districting was confided to Congress and the state legislatures, the State argued that the plan in fact achieved approximate equality "as to number of qualified electors."<sup>146</sup> And how were those electors described? As "native whites."<sup>147</sup> By 1932, Mississippi had effectively disenfranchised its

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the bill containing the requirement, and that proposed amendment was agreed to. *See* 70 CONG. REC. 1604 (1929). But there was virtually no debate on this particular decision. *See* EAGLES, *supra* note 12, at 72.

Broom argued, relying on the Court's reservation of the question in *Smiley v. Holm*, that "the standards defined in section 3 of the act of 1911" were still in force. 285 U.S. 355, 373, 375 (1932); *see also* Brief for Appellee at 21-22, *Wood*, 287 U.S. 1 (No. 424). He asserted that because nothing in the 1929 Act "conflict[ed] with Section 3" that provision should not be seen as having been expressly or impliedly repealed. Brief for Appellee, *supra*, at 21-22, 25. Broom's brief contains a touchingly apologetic conclusion in which his counsel states that the brief "does not measure up to our ideas of what a brief should be and contain" because of the "necessary haste involved in its preparation." *Id.* at 36. And haste there indeed was: the entire proceeding in the Supreme Court took less than a month, *see Wood*, 287 U.S. at 1, and Broom's attorneys had to write their brief without seeing the appellant's brief first. *See* Brief for Appellee, *supra*, at 3. In general, "repeals by implication are not favored." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). The Supreme Court long ago held that

when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.

*Red Rock v. Henry*, 106 U.S. 596, 601-02 (1883). Clearly, the 1929 Act replaced the actual apportionment of representatives in the 1911 Act. *See Smiley*, 285 U.S. at 373. But it would have been entirely possible to continue giving effect to the sections of the 1911 Act—like the equipopulousity requirement in section 3 or the requirement in section 4 that states continue to use the existing districts until new districts were drawn and elect any additional representatives at large—that did not directly allocate seats. *See* Act of Aug. 8, 1911, ch. 5, §§ 3-4, 37 Stat. 13, 14. Nothing about the 1929 Act therefore *required* the Court to hold that section 3 of the 1911 Act had been repealed. *See, e.g., Smiley*, 285 U.S. at 373.

144. *Mahan v. Hume*, 287 U.S. 575, 576 (1932) (per curiam).

145. *See Wood*, 287 U.S. at 1.

146. *See* Brief for Appellants at 130, *Wood*, 287 U.S. 1 (No. 424).

147. *Id.*

Black population.<sup>148</sup> So although the Third Congressional District, located in the Mississippi Delta, had a disproportionately large total population, it had relatively few voters.<sup>149</sup> The Supreme Court completely ignored the racial dynamics behind the Mississippi map. *Wood v. Broom* effectively took federal courts out of the business of policing congressional district boundaries.<sup>150</sup> And given the difficulties Congress had had in reaching any kind of agreement on apportionment, the decision also effectively took Congress out of the business as well. Over the next several decades, the degree of population imbalance among districts within a state increased.<sup>151</sup> The growing inequality among districts—and the demographic transformation of the United States during and after World War II into a suburban nation—meant there was little likelihood that Congress would restore an equal-population requirement that would result in members losing their seats.<sup>152</sup>

The post-1930 congressional redistricting fared differently in state courts. Virginia's constitutions had had requirements for equipopulous congressional districts for more than a century, antedating both the federal requirements for districted elections and the federal directives about the configuration of districts. The Constitution of 1830 had required that Virginia's seats "be apportioned as nearly as may be amongst the several counties, cities, boroughs, and towns of the State, according to their respective numbers."<sup>153</sup> That provision

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148. See *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) ("Within the field of permissible action under the limitations imposed by the federal constitution, [Mississippi's Constitutional Convention of 1890] swept the circle of expedients to obstruct the exercise of the franchise by the negro race."). Mississippi did so through a series of laws—later revised to make them even more discriminatory—involving literacy tests, durational residency requirements, criminal disenfranchisement provisions, and poll taxes. See PARKER, *supra* note 120, at 27. As late as 1964, only 6.4 percent of Black adults in Mississippi were registered to vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

149. See SCHMECKEBIER, *supra* note 12, at 92. The Third Congressional District contained almost a third of the state's Black population and had 46 percent more residents than the average Mississippi congressional district. See *id.* In 1938, only 2172 voters cast ballots, even though there were 55,571 whites of voting age and 168,452 Blacks of voting age within the district. *Id.*

150. See, e.g., *Mahan v. Hume*, 287 U.S. 575, 576 (1932) (per curiam) (dismissing the case on the grounds of *Woods v. Broom*).

151. See ENGSTROM, *supra* note 36, at 154 fig.8.3 (providing deviation figures by decade).

152. See *id.* at 152 fig.8.1, 153 fig.8.2, 154 fig.8.3, 167-70; see also ANDERSON, *supra* note 12, at 157.

153. See *Brown v. Saunders*, 166 S.E. 105, 109 (Va. 1932) (quoting VA. CONST. of 1830 art.

was carried forward into the Commonwealth's subsequent constitutions. The version in the Constitution of 1902 mirrored the requirement in the 1911 Federal Apportionment Act: congressional districts were to be "composed of contiguous and compact territory, containing as near as practicable an equal number of inhabitants."<sup>154</sup> The Commonwealth's post-1860, post-1870, and post-1880 maps were striking for their degree of population equality, particularly given Virginia's "unbroken custom to refrain from dividing any county or city into separate districts."<sup>155</sup>

Like Mississippi, Virginia lost one of its congressional seats following the 1930 census. And like Mississippi, it responded not by redrawing its entire map, but essentially through a "compromise" that combined two of the preexisting districts to create a district that was "the largest in the State and by far the most unwieldy politically."<sup>156</sup> The upshot was a plan where the largest district was more than 67,000 people above the ideal district size of "269,092-1/9,"<sup>157</sup> and the smallest was more than 85,000 people below.

Several Republican candidates challenged the plan as violative of both section 3 of the 1911 Reapportionment Act and section 55 of the Virginia Constitution. Recognizing that there were "divergent views" among other state and federal courts "both as to whether or not there is in effect any regulation by Congress, and as to the authority of Congress to make such regulation,"<sup>158</sup> the court resolved

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III, § 6). Like the original Art. I, § 2 of the Federal Constitution, the Virginia provision contained a three-fifths clause. *Id.*

154. VA. CONST. of 1902, art. IV, § 55.

155. *Brown*, 166 S.E. at 107-08. For statistics about the district populations, see *id.* at 110 n.1. In 1868—not surprisingly, Virginia only drew its post-1860 districts once it was re-admitted to the Union following the Civil War—for example, the ideal district size would have been 152,489.75 people. The least populous district was only 5662 people below the ideal and the most populous district was only 8244 people above the ideal. *Id.* The deviations in the 1872 plan and the 1883 plans were of similar magnitudes. The population disparities began to rise with the post-1890 redistricting. *See id.*

156. J.K. Irving, Jr., *Virginia Is Puzzled Over Redistricting*, N.Y. TIMES, June 5, 1932 at E5, <https://timesmachine.nytimes.com/timesmachine/1932/06/05/100755108.html?pageNumber=67> [<https://perma.cc/PJE3-K6RQ>]. More precisely, the Virginia plan combined the old Seventh and Tenth Districts, with the exception of three small counties, which were sent to the Sixth District (a district that was also, albeit only slightly, overpopulated). *See Brown*, 166 S.E. at 111.

157. *Brown*, 166 S.E. at 106.

158. *Id.* at 109.

the case entirely on state constitutional grounds. While “[m]athematical exactness” was not required, especially in light of the reasons not to split cities or counties between districts, section 55 required an attempt “in good faith” to satisfy principle of practical population equality.<sup>159</sup>

The court rejected the government’s argument that congressional redistricting was “a legislative matter, ... not subject to judicial review.”<sup>160</sup> While the job of drawing districts was, “in a sense, political,” and the legislature thus had “necessarily wide discretion,” the limits section 55 placed “on the discretion of the Legislature” were judicially enforceable.<sup>161</sup> Although there might be close cases, the court had “no uncertainty” about its conclusion given the map before it: “The inequality is obvious, indisputable, and excessive.”<sup>162</sup> The legislature could easily have drawn districts with more equal populations through simply moving some counties into adjacent districts.

Having found the district configurations unconstitutional, the court was faced with the question of remedy. Precisely because drawing districts was a legislative duty, the court concluded that it “necessarily follow[ed]” from the absence of a valid legislative redistricting, that “it will be necessary for the electors in the state at large to select the nine members to represent the state in the national Legislature.”<sup>163</sup> The 1932 congressional elections in Virginia were thus conducted at large, with the Commonwealth’s one Republican representative losing his seat—at the time, the sole seat held by his party in the entire South.<sup>164</sup> By 1934, the Commonwealth returned to districted elections.<sup>165</sup>

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159. *Id.* at 110.

160. *Id.* at 106.

161. *Id.* at 107.

162. *Id.* at 111.

163. *Id.*

164. Virginius Dabney, *Virginia Court Rule Dashes G.O.P. Hopes*, N.Y. TIMES, October 3, 1932, at E5, <https://timesmachine.nytimes.com/timesmachine/1932/10/23/100868651.html?pageNumber=73> [<https://perma.cc/FVG7-63RM>].

165. See Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 779 (2013).

The next time the Virginia Supreme Court addressed the requirements of section 55 came decades later. In *Wilkins v. Davis*, the court addressed the constitutionality of Virginia’s 1952 congressional districting legislation. 139 S.E.2d 849 (1965). Those districts were retained

In Illinois, however, a decision striking down a post-1930 redistricting on malapportionment grounds remained in effect, with even more ironic consequences.<sup>166</sup> The size of Illinois's congressional delegation remained unchanged between 1910 and 1930, with twenty-seven members.<sup>167</sup> Nevertheless, Illinois redrew its congressional districts in 1931.<sup>168</sup> And it created districts whose populations ranged from 158,738 in the smallest district to 541,785 in the largest.<sup>169</sup>

The Supreme Court of Illinois struck down the plan on both federal and state law grounds. With respect to federal law, the court had "no hesitancy" in concluding that the equipopulousity requirement in the 1911 Apportionment Act remained "in full force and effect."<sup>170</sup> It viewed the 1929 Act as directed solely at apportionment, making no provision one way or the other "with reference to the manner of electing representatives."<sup>171</sup> It saw nothing in the 1929 Act to "justif[y] the claim that it repealed the act of 1911, either in

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without change after the 1960 census when a gubernatorial commission reported that "[t]o bring the districts to approximately equal population would involve changes of doubtful practicality, the dissolution of districts which have the greatest community of interest, and mean a radical restructuring of the State." *Id.* at 852. The Virginia Supreme Court acknowledged that redrawing the districts might undercut the interest in having districts reflect cohesive "communit[ies] of interest." *Id.* at 853. But citing *Brown v. Saunders*, it declared that "community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution. There must be, as nearly as practicable, an equal number of inhabitants in the districts." *Id.* Because it was possible to achieve far more equality of population by redrawing the boundaries between districts, the plan was unconstitutional. (The court also emphasized that in light of the U.S. Supreme Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), requiring equipopulous congressional districts as a matter of federal constitutional law, the Virginia plan was doubly unconstitutional. *Wilkins*, 139 S.E.2d at 854.) Once again, however, the court declined to order the State to redraw the districts, providing instead only that at-large elections would be used until such a plan was drawn. *Id.* at 855.

166. See *Moran v. Bowley*, 179 N.E. 526, 526-27, 532 (Ill. 1932).

167. See Brief and Argument for Appellants at 19, *Colegrove v. Green*, 328 U.S. 549 (1946) (No. 804). And yet, because of the State's failure to draw additional congressional districts when its delegation increased from twenty-five in 1901 to twenty-seven in 1910, the State had been electing twenty-five representatives from districts and two at-large. See *id.* at 9 tbl.I, 19.

168. See *id.* at 19.

169. See *Moran*, 179 N.E. at 527; Brief and Argument for Appellants, *supra* note 167, at 19.

170. See *Moran*, 179 N.E. at 531.

171. *Id.* at 530.

express terms or by implication ... so far as it relates to the formation of congressional districts.”<sup>172</sup> To the contrary, the Illinois court thought

[t]he conclusion [was] irresistible that Congress wanted to make decennial apportionments a certainty and did not intend to release its control over the manner of electing representatives. We cannot bring ourselves to the belief that Congress intended to forsake the field of legislation which it had completely occupied for more than half a century.<sup>173</sup>

Because it would have been eminently possible to reallocate counties between adjacent districts to create more equipopulous ones, the 1931 map violated federal law.<sup>174</sup>

But even if it had not, the court held that the 1931 Illinois re-districting act violated a provision of the Illinois Constitution that required all elections to be “free and equal.”<sup>175</sup> The court explained that “[e]lections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot.”<sup>176</sup> Because districts with different numbers of “inhabitants will work inequality in right of suffrage and of power in elections of the representatives in Congress,” the 1931 redistricting act was “not only obnoxious to the laws of Congress but to the Constitution of this state.”<sup>177</sup>

But the Illinois court’s decision long predated the rise of structural reform injunctions in which courts either required the legislature to develop a new proposal or drew the districts themselves. Thus, the decision had the perverse consequence of simply reinstating the preexisting 1901 congressional map, which had even greater population disparities, but which had not been challenged.<sup>178</sup>

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172. *Id.* at 530-31.

173. *Id.* at 530.

174. *See id.* at 531-32.

175. *See* ILL. CONST. of 1870, art. II, § 18; *see also Moran*, 179 N.E. at 531-32.

176. *Id.* at 531.

177. *Id.* at 532.

178. *See* Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1068-69 (1958); *see also* Brief and Argument for Appellants, *supra* note 167, at 20 (noting that the result of “*Moran v. Bowley* ... was that the Court left in full force and effect the much more offensive and flagrant Act of 1901, whose Congressional Districts were far more unequal and discriminatory than even those set up in the 1931 Act” and that in the face of

And when a new group of plaintiffs later did challenge those 1901 districts, the Illinois Supreme Court retreated. Citing the intervening decision in *Wood v. Broom*, the Illinois court held “that there were no Federal restrictions or limitations on the legislature in the apportionment of the State for the election of representatives to the House of Representatives in the Congress of the United States.”<sup>179</sup> It then overruled its earlier position that the state constitutional guaranty of equality in elections created an enforceable right, stating that that command was “primarily addressed to the legislative branch of the government.”<sup>180</sup> To argue that “every vote cast in one district [sh]ould have the same effect as every vote cast in every other district, is to assert a millennium which cannot be reached.”<sup>181</sup>

That 1901 Illinois congressional map lay at the heart of the Supreme Court’s far better-known decision in *Colegrove v. Green*,<sup>182</sup> the place where most contemporary discussions of redistricting and reapportionment begin.<sup>183</sup> In *Colegrove*, a seven-member Court rejected a federal constitutional and statutory challenge to the Illinois map.<sup>184</sup> Justice Felix Frankfurter’s opinion announcing the judgment of the Court<sup>185</sup> famously urged his colleagues “not to enter this

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this “ridiculous result, ... one can only exclaim with Cicero: ‘O! Tempora, O! Mores!’”).

In an episode that was more Julius Caesar and *Et tu, Brute?* than Cicero’s orations, when a judge tried to stop a litigant in a foreclosure suit from arguing about the legislature’s failure to redistrict, the litigant pulled a gun and shot and killed the opposing lawyer. *See Lawyer Is Slain in Chicago Court: Litigant, Obsessed with Political Theory, Shoots at Judge Also, but Misses Him*, N.Y. TIMES, Jan. 14, 1936, at L3. He explained that he killed the lawyer “to bring forcibly to public attention his contention that the Supreme Court of Illinois was an illegal body because of failure to reapportion legislative districts.” *Id.*; *cf.* *Colegrove v. Green*, 64 F. Supp. 632, 633 (N.D. Ill.) (three-judge court) (per curiam) (remarking that Illinois’s forty-year refusal to redistrict “provokes, if it does not invite the resort to arms if appeals to reason or the patriotism of the individuals are too long ignored”), *aff’d*, 328 U.S. 549 (1946).

179. *Daly v. Madison County*, 38 N.E.2d 160, 164 (Ill. 1941).

180. *Id.* at 167.

181. *Id.*

182. 328 U.S. 549 (1946).

183. *See* Lewis, *supra* note 178, at 1058.

184. *See Colegrove*, 328 U.S. at 554, 556 (plurality opinion).

185. Justice Frankfurter wrote for himself and Justices Stanley Reed and Harold Burton. *See id.* at 550. Justice Hugo Black wrote a dissent, joined by Justices William Douglas and Francis Murphy. *See id.* at 566, 574 (Black, J., dissenting). Justice Black would have held that the continued use of the 1901 districts violated both Article I, Section 2 of the Constitution and the Fourteenth Amendment because of the “glaringly unequal representation in the Congress” it produced. *See id.* at 570-71. For these three Justices, “the constitutionally guaranteed right to vote and the right to have one’s vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately

political thicket.”<sup>186</sup> That thicket, however, had already been trimmed by the Court, as the Justice implicitly acknowledged when he began his opinion by stating that the case could be “dispose[d] of ... on the authority of *Wood v. Broom*.”<sup>187</sup> Indeed, the Justice doubled down on the claim that the same Congress that had so carefully considered which apportionment methods best served population equality among the states had decided to abandon any insistence on population equality within a state.<sup>188</sup> He emphasized that “seven Congressional elections” had subsequently taken place—including two under the post-1940 apportionment—and “[n]o manifestation has been shown by Congress even to question the correctness of that which seemed compelling to this Court in enforcing the will of Congress in *Wood v. Broom*.”<sup>189</sup>

But Justice Frankfurter went further. Not only did he reject the idea that there was an affirmative federal statutory command to draw districts with equal population, but he asserted that courts should never intervene in redistricting controversies because they

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equal weight to each vote cast.” *Id.* at 570. Justice Wiley Rutledge cast the deciding vote. *See id.* at 564-66 (Rutledge, J.). Unlike the Frankfurter bloc, he assumed that the underlying claim was justiciable, but he thought that equitable considerations militated in favor of dismissing the suit because the only remedy he saw was to require the State to conduct its congressional elections at large, depriving “Illinois citizens of [the] representation by districts which the prevailing policy of Congress commands.” *See id.* While this would provide abstract equality of representation, “the cure sought may be worse than the disease.” *Id.* at 566.

186. *See id.* at 556 (plurality opinion).

187. *See id.* at 551.

188. *See id.* Professor Margo Anderson, a leading historian of the census, has argued that this duality was entirely intentional:

And so the ultimate “solution” to the reapportionment crisis created by the growing power of the urban population of the nation was to reapportion congressional seats among the states but to allow the states themselves to malapportion those seats within the states.... [Congress] would cheat and change the rules of the apportionment game to preserve rural and small-town dominance of legislative halls for another generation. These actions eventually precipitated another reapportionment crisis, the “reapportionment revolution” of the 1960s.

ANDERSON, *supra* note 12, at 157.

189. *Colegrove*, 328 U.S. at 551 (plurality opinion). It seems entirely plausible that Congress would similarly have acquiesced if the Supreme Court had affirmed the Mississippi and Kentucky federal courts that had struck down those two states’ post-1930 congressional redistrictings. Congressional inertia, particularly after the bruising battle that had eventually been ended by the permanent Apportionment Act of 1929, is not a particularly powerful sign that the Court properly gleaned Congress’s original intentions.

involve an issue “of a peculiarly political nature and therefore not meet for judicial determination.”<sup>190</sup>

Justice Frankfurter’s historical support for this proposition came not from battles over redistricting, but from the history of apportionment. He began by asserting that “[t]he one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests.”<sup>191</sup> He then pointed to the Apportionments Clause directive that Congress apportion seats according to respective population and wrote that “Congress has at times been heedless of this command and not apportioned according to the requirements of the Census.”<sup>192</sup> But as we have already seen, there had been only one such time—after the 1920 census.<sup>193</sup> And while it was true that states had frequently disregarded Congress’s directives that districts be compact and have roughly equal numbers of inhabitants, the Justice’s position that courts could not enforce such directives ultimately seemed to rest not so much on the political nature of the plaintiffs’ claims, but rather on the limited nature of courts’ remedial powers:

[N]o court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first.<sup>194</sup>

In any event, *Colegrove* postponed the Court’s intervention into the redistricting process for a generation.<sup>195</sup> And when that intervention

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190. *See id.* at 552.

191. *Id.* at 554.

192. *Id.* at 554-55.

193. *See supra* Part II.

194. *Colegrove*, 328 U.S. at 553 (plurality opinion).

195. *See* J. DOUGLAS SMITH, ON DEMOCRACY’S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT “ONE PERSON, ONE VOTE” TO THE UNITED STATES 5-6 (2014).

came, it began with a decision, *Gomillion v. Lightfoot*, whose author insisted it was “not *Colegrove v. Green*.”<sup>196</sup>

A major impetus for the Court’s entry into the political thicket was its sense that underpopulated districts produced reactionary policies, most notably in the Jim Crow South.<sup>197</sup> Chief Justice Warren “used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary.”<sup>198</sup> The connection between districts frozen in time and the inability of legislatures to address pressing national concerns was well understood.<sup>199</sup> Although the Court framed its decisions in the one-person, one-vote cases in rhetorically individualistic terms, everyone understood their racial implications.<sup>200</sup> A primary consequence of the one-person, one-vote cases was that they required decennial redistricting focused on population equality, realigning that process with the decennial reapportionment also focused on population equality.<sup>201</sup>

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196. 364 U.S. 339, 347 (1960).

197. See SMITH, *supra* note 195, at 5-6.

198. John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974). Coincidentally, 1954 was also the year when population disparities among congressional districts “prompted one observer ... to refer to the lower chamber of Congress as the ‘House of Un-Representatives.’” See SMITH, *supra* note 195, at 17.

199. See SMITH, *supra* note 195, at 5 (describing how “malapportionment served as a cornerstone of white supremacy, ensuring the overrepresentation of the most ardent segregationists”); *id.* at 131 (noting that in their brief in *Gray v. Sanders*, 372 U.S. 368 (1963), a malapportionment-based challenge to Georgia’s county unit system, the plaintiffs “explicitly ma[de] the connection between [numerical] minority control and racial discrimination”); Lewis, *supra* note 178, at 1065-66 (commenting on the consequences of malapportioned state legislatures for civil rights); John F. Kennedy, *The Shame of the States*, N.Y. TIMES, May 18, 1958, at 12, 37-38, <http://tinyurl.com/JFK-Shame> [<https://perma.cc/A2JE-5WA5>] (discussing congressional failure to pass legislation regarding housing, education, and labor).

200. See Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 419 (2015).

201. In his dissent in *Wesberry v. Sanders*, the case imposing a constitutional requirement of equipopulousity for congressional districts, Justice Harlan invoked the history of apportionment legislation to argue that “the Court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment.” 376 U.S. 1, 42 (1964) (Harlan, J., dissenting).

For a period of about 50 years, ... Congress, by repeated legislative act, imposed on the States the requirement that congressional districts be equal in population. (This, of course, is the very requirement which the Court now declares to have been constitutionally required of the States all along without implementing legislation.) Subsequently, after giving express attention to the problem, Congress eliminated that requirement, with the intention of permitting

## CONCLUSION: FROM 1920 TO 2020

As we move into the round of post-2020 reapportionment and re-districting, what lessons can we draw from the experience of 1920? The relative stability of the permanent Reapportionment Act of 1929, which has remained essentially the same through decades that saw fundamental transformations of American society and politics,<sup>202</sup> suggests the wisdom of a precommitment strategy behind even a modest veil of ignorance. It is striking that Congress managed to craft a default regime for reapportionment after more than a century of heated contention, but that few jurisdictions have managed to produce anything remotely similar with regard to re-districting.

The historical experience with reapportionment also reminds us that there can be a series of unintentional consequences over time from choices about apportionment and redistricting processes.<sup>203</sup> The Supreme Court's decision in *Wood v. Broom* contributed to the growing inequality among district populations that created the pressure for its later declaration of a constitutional constraint on the configuration of districts.

So, too, with the reliance on expert views to choose apportionment rules. Both apportionment methods approved in the 1929 Reapportionment Act—the method of major fractions and the method of equal proportions (since 1941, the only approved method)<sup>204</sup>—were proposed by relatively disinterested scholars.<sup>205</sup> The Speaker of the House sought to break the logjam by asking a National Academy of

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the States to find their own solutions. Since then, despite repeated efforts to obtain congressional action again, Congress has continued to leave the problem and its solution to the States. It cannot be contended, therefore, that the Court's decision today fills a gap left by the Congress. On the contrary, the Court substitutes its own judgment for that of the Congress.

*Id.* at 45.

202. See *supra* Part II.

203. See ENGSTROM, *supra* note 36, at 43-44 (pointing out that the decision to require the use of single-member districts in the 1842 Act was the upshot of the Whigs' control over the apportionment process and their desire to maintain their House majority in light of changing conditions, showing how "even the seemingly most fundamental of political institutions can be created out of short-term political considerations").

204. See 2 U.S.C. § 2a(a) (2012).

205. See *supra* notes 70-73 and accompanying text.

Sciences panel to address the question, and Congress ultimately accepted the panel's advice.<sup>206</sup> But by 1941, politics returned to the process, and Congress chose the method of equal proportions as the sole default measure because it transferred a seat from a Republican-dominated state to a solidly Democratic one.<sup>207</sup> We can expect in the post-2020 round of redistricting that social scientists will again offer redistricting criteria. It will be especially interesting to see whether the Supreme Court adopts any of the measures of excessive partisanship that have been recently offered by scholars.<sup>208</sup> If it does, we should expect partisan interests to seek to use the methods and measures in the service of seeking political advantage in the redistricting process.

At the opposite end of the empirical spectrum, just as we saw claims of miscounts, fraud, and manipulation with respect to the census figures in 1920,<sup>209</sup> we might expect to see similar resistance to the evidence post-2020. This resistance may be a reflection of an era where politicians are already raising unsupported claims of voter fraud and miscounted ballots.<sup>210</sup>

This feeds into a climate of rising anti-immigration sentiment. The interaction of apportionment issues and immigration issues that characterized the 1920s may well reappear during the post-2020 round of redistricting. In 2016, the Supreme Court confronted a version of this issue in *Evenwel v. Abbott*.<sup>211</sup> A group of Texas voters who lived in state legislative districts with particularly high percentages of registered voters brought suit, claiming that Texas should be required to equalize the number of *eligible voters*, rather than the number of *inhabitants* within each district.<sup>212</sup> As with the analogous claim in the post-1920 debate, the choice would have major political consequences, redistributing seats away from

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206. See BALINSKI & YOUNG, *supra* note 12, at 55-56.

207. See *supra* note 109.

208. See ISSACHAROFF ET AL., *supra* note 4, at 687-91 (summarizing some of the more notable proposals).

209. See EAGLES, *supra* note 12, at 38-39, 45-46.

210. See generally Jenna Johnson & Matt Zapotosky, *Trump Seeks 'Major Investigation' into Unsupported Claims of Voter Fraud*, WASH. POST (Jan. 25, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/01/25/trump-seeks-major-investigation-into-unsupported-claims-of-voter-fraud/?utm\\_term=.53684ce6b877](https://www.washingtonpost.com/news/post-politics/wp/2017/01/25/trump-seeks-major-investigation-into-unsupported-claims-of-voter-fraud/?utm_term=.53684ce6b877) [<https://perma.cc/QB7X-PWHG>].

211. 136 S. Ct. 1120 (2016). In the interest of full disclosure, I note that I participated in drafting the United States' amicus brief in this case.

212. See *id.* at 1123.

communities with large numbers of noncitizens and toward whiter, and generally more conservative, communities.

Justice Ruth Bader Ginsburg's opinion for the Court rejected the plaintiffs' claims.<sup>213</sup> Focusing initially on the history of congressional apportionment, she pointed out that both the Framers and the Reconstruction Congress that proposed the Fourteenth Amendment used a population base, rather than a voter base, for allocating seats in the House.<sup>214</sup> Using a population base for state-level redistricting was consistent with this constitutional history.<sup>215</sup> But the Court pointedly did not resolve whether "[s]tates *may* draw districts to equalize voter-eligible population rather than total population."<sup>216</sup> I predict we will see efforts in several jurisdictions with growing immigrant populations to use citizen-based, rather than total population-based, numbers for drawing districts.<sup>217</sup> Those efforts will raise, once again, fundamental questions about representation and equality in a democracy.

Finally, we can expect that race will continue to play a significant role, both express and implicit, in our politics. I would not be surprised to see renewed attention post-2020, as we saw post-1920, to Section 2 of the Fourteenth Amendment—not so much with respect to a realistic possibility that any state will actually lose seats in Congress, but rather as a device for focusing attention on the various ways in which some states have moved to depress voter turnout, particularly among poor and minority communities.

Understanding the complex history of the post-1920 reapportionment is hardly a roadmap to the post-2020 round. But as C.S. Lewis reminded us long ago, understanding the past is valuable not because "the past has any magic about it, but because we cannot study the future, and yet need something to set against the present, to remind us that ... much which seems certain to the uneducated

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213. *See id.* at 1123, 1132.

214. *See id.* at 1127-29.

215. *See id.* at 1124, 1128.

216. *Id.* at 1133 (emphasis added).

217. *See* Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1403-15 (2017) (discussing the practical problems with switching the basis of districting).

is merely temporary fashion.”<sup>218</sup> Understanding how that reapportionment played out, in a time of polarization, uncertainty, inequality, and cultural conflict, may give us at least a little traction as we confront the question of how to allocate political power in yet another such time.

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218. C.S. LEWIS, *Learning in War-Time*, in *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 43, 50-51 (1949).