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Law Review Symposium 2011: Baker v. Carr After 50 Years: Appraising the Reapportionment Revolution: Introduction

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LAW REVIEW SYMPOSIUM 2011: *BAKER V. CARR* AFTER 50 YEARS: APPRAISING THE REAPPORTIONMENT REVOLUTION

INTRODUCTION

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Baker v. Carr[1] held that challenges to state legislative apportionment systems were subject to scrutiny under the Equal Protection Clause. Over the next two years, the Supreme Court applied this holding in a series of cases that articulated the principle of one person, one vote for elections to Congress and state legislatures.[2] As a result, redistricting and reapportionment have become regular features of American political and legal life. Every ten years, in the aftermath of the constitutionally mandated decennial census,[3] seats in the House of Representatives are reallocated and the

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1 369 U.S. 186 (1962).

2 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative districts); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districts); Gray v. Sanders, 372 U.S. 368 (1963) (primary elections to nominate candidates for U.S. Senate and statewide offices).

3 The political stakes of the decennial census have generated a fair amount of litigation. *See, e.g.*, Utah v. Evans, 536 U.S. 452 (2002); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); Wisconsin v. City of New York, 517 U.S. 1 (1996); Franklin v. Massachusetts, 505 U.S. 788 (1992); Dep't of Commerce v. Montana, 503 U.S. 442 (1992).

boundaries of state and local legislative districts must be redrawn. This process in turn has led to a steady stream of litigation.[4]

To mark the fiftieth anniversary of *Baker v. Carr*, the *Case Western Reserve Law Review* assembled a diverse group of legal scholars and social scientists to consider the meaning and implications of that landmark decision.[5] The symposium was made possible in part by a generous grant from the United States District Court for the Northern District of Ohio, for which both the *Law Review* and the Case Western Reserve University School of Law are extremely grateful. This issue contains articles that were presented at the daylong conference.[6]

The first set of articles addresses the relationship between *Baker v. Carr* and *Bush v. Gore*,[7] the case that effectively resolved the 2000 presidential election. Nelson Lund begins by focusing on the Supreme Court's debate in *Baker v. Carr* and the cases that built on it.[8] Although he briefly addresses Justice Frankfurter's well-known argument that these cases should have been dismissed as presenting nonjusticiable political questions, Professor Lund emphasizes instead Justice Harlan's substantive critique of the Court's equal protection analysis. Accepting that analysis despite what he regards as its obvious weaknesses, Professor Lund explains why *Baker*'s equal protection analysis necessarily supports the result in *Bush v. Gore*. Recognizing that his view does not enjoy broad support among legal scholars, he goes on to explain why, even if *Baker v. Carr* had not come out as it did, the result in *Bush v. Gore* was consistent with pre-*Baker* jurisprudence about voting rights.

Next, Daniel Tokaji and Owen Wolfe explain the ramifications of *Baker v. Carr* not only for legislative districting but also for federal judicial involvement in election administration, a development that builds on *Bush v. Gore* despite the Supreme Court's reluctance to rely

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[4] *See, e.g.*, Lance v. Coffman, 549 U.S. 437 (2007); Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986); Karcher v. Daggett, 462 U.S. 725 (1983).

[5] Case Western Reserve University School of Law has a modest connection to the reapportionment litigation. Two years before *Baker v. Carr* was decided, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Supreme Court struck down an Alabama law that gerrymandered African American voters out of Tuskegee, Alabama. The Court invoked *Gomillion* in *Baker*. *See* 369 U.S. at 229–31. One of the lawyers who argued *Gomillion* was Fred Gray, a 1954 graduate of this law school. *See generally* Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on* Gomillion v. Lightfoot *After Half a Century*, 50 WASHBURN L.J. 133 (2010).

[6] The symposium is also available on the Internet. *See Live Webcast*, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW, http://law.case.edu/lectures/webcast.aspx?dt=20111104 (last visited June 4, 2012).

[7] 531 U.S. 98 (2000).

[8] Nelson Lund, *From* Baker v. Carr *to* Bush v. Gore, *and Back*, 62 CASE W. RES. L. REV. 947 (2012).

on that ruling.[9] Tokaji and Wolfe contend that both cases opened the federal courts to litigation about issues that previously had been left largely to the states. Although noting the potential tensions between state and federal courts, they regard these developments as salutary because state electoral institutions—including many state courts—are in the hands of political partisans rather than those of independent officials who enjoy functional independence. Federal judges, although they are chosen through a political process, are more insulated from the vicissitudes of day-to-day partisan politics than are their state counterparts and state election officials.

The last article in this part of the issue builds on this aspect of Tokaji and Wolfe's analysis. Candice Hoke observes that one consequence of the controversy over *Bush v. Gore* was the adoption of the Help America Vote Act,[10] which was designed to prevent some of the ballot problems that gave rise to the dispute over Florida's 2000 electoral votes by encouraging the states to invest in new voting technology. Professor Hoke explains the accuracy, accountability, and security flaws that computer scientists and other engineering experts have discovered in these systems and suggests ways for lawyers and courts to use those findings to make reliable improvements in our election system.[11] She observes that the technical problems that have emerged raise questions that go well beyond ballot integrity and involve threats to meaningful access to an effective franchise.

The next set of articles comes from social scientists who address two issues related to the one person, one vote principle. The first concerns how *Baker v. Carr* might affect the drawing of district lines for partisan advantage, while the second focuses on the relative political power of individual voters, which was a central concern for the Supreme Court in *Baker v. Carr*.

The initial contribution in this section comes from my political science colleague Justin Buchler, who analyzes districting strategies in the wake of *Baker v. Carr*.[12] Professor Buchler explains that the Supreme Court's requirement of equal population constrains the ability of shrewd partisans to maximize their control of legislative bodies, but population equality alone cannot eliminate jockeying for partisan advantage in the districting process. He demonstrates

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[9] Daniel Tokaji & Owen Wolfe, Baker, Bush, *and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969 (2012).

[10] Pub. L. No. 107–252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301–15545 (2006)).

[11] Candice Hoke, *Judicial Protection of Popular Sovereignty: Redirecting Voting Technology*, 62 CASE W. RES. L. REV. 997 (2012).

[12] Justin Buchler, *Population Equality and the Imposition of Risk on Partisan Gerrymandering*, 62 CASE W. RES. L. REV. 1037 (2012).

mathematically how sophisticated legislative mapmakers can seek to pack as many voters of the minority party into a relatively small number of districts while dispersing their own supporters in a way that could give the majority party a disproportionately large number of seats. He then turns to an empirical analysis of redistricting and finds that those who control the process typically do not seek to extract the maximum possible partisan advantage. Professor Buchler suggests that real-world political parties are somewhat more risk averse than they need to be, and he suggests some explanations for this phenomenon.

In the next article, Thomas Brunell examines the implications of the Supreme Court's greater tolerance for population deviations between state legislative districts than between congressional districts.[13] Professor Brunell shows that majority parties have taken advantage of this judicial flexibility to pack supporters of the minority party into somewhat more populous state legislative districts while spreading their own supporters among somewhat less populous districts. Because the population deviations among the districts fall within the limits that the Supreme Court has at least implicitly accepted, majority parties have managed to obtain a disproportionately large share of state legislative seats. Brunell recognizes the limitations of the absolute-equality standard but contends that it is preferable to the current judicial approach.

The last piece in this part analyzes why, despite *Baker v. Carr*, individual votes continue to have unequal weight in several important respects. John Griffin and Brian Newman show that *Baker v. Carr* might have reduced the degree of voter inequality but did not eliminate the phenomenon. Voting power on this view is not simply a function of the number of persons in a district but rather a mix of factors including age, race, party affiliation, and (as the two previous articles underscore) the partisan composition of a district. Professors Griffin and Newman show that voters who are more powerful in this more nuanced sense tend to have congressional representatives who more closely support their preferred policies than do less powerful voters. They conclude by considering a range of potential reforms that

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[13] Thomas L. Brunell, *The One Person, One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting*, 62 CASE W. RES. L. REV. 1057 (2012). *Compare* Karcher v. Daggett, 462 U.S. 725, 732–33 (1983) (requiring virtually absolute equality in population for all congressional districts in a state), *and* Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (emphasizing the vital importance of population equality for all congressional districts in a state), *with* White v. Regester, 412 U.S. 755, 763–64 (1973) (allowing deviation of 9.9 percent for state legislative districts), *and* Reynolds v. Sims, 377 U.S. 533, 577–78 (1964) (suggesting that courts should show more flexibility for deviations from equality for state legislative districts than for congressional districts).

might reduce disparities in voting power among different segments of the population.

The final set of articles has a broad interdisciplinary focus. Michael Solimine, a law professor, examines the institutional context of *Baker v. Carr* and its aftermath, both immediate and long-term.[14] Professor Solimine first addresses the political context in which the case arose, noting the executive branch's involvement in the case through an amicus curiae brief and pointing out Solicitor General Archibald Cox's ambivalence about the case despite the view of President John F. Kennedy and Attorney General Robert F. Kennedy that the case could reap significant political benefits for the Democratic Party. He also explores the solicitor general's role in subsequent reapportionment cases, both those that extended and implemented *Baker* and those arising under the Voting Rights Act.[15] From there he considers the ultimately ineffectual opposition to the Supreme Court's reapportionment jurisprudence, offering a more detailed account of the failed efforts to repudiate that jurisprudence through a constitutional amendment or by elimination of federal court jurisdiction over reapportionment issues. Solimine also examines how the elimination of three-judge federal district courts managed to leave exceptions for voting rights and reapportionment cases, and he explains how the special procedures for direct appeals from three-judge courts to the Supreme Court helped to insulate *Baker v. Carr* from those who sought to repudiate that ruling.

Margo Anderson, a social and urban historian, puts *Baker v. Carr* and its progeny into broader context.[16] She begins with an account of the origins of the Census Clause[17] and the political conflicts that arose as a result of changing demographic patterns over the succeeding century and a half. Professor Anderson then turns to the implications of the reapportionment cases for the census itself, because it quickly became apparent that the legal demands imposed by judicial rulings required the Bureau of the Census to provide sophisticated data for the entire nation to facilitate the drawing of districts that could satisfy the one person, one vote rule. This led to the enactment of Public Law 94–171,[18] which authorized the Census Bureau to cooperate with state

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[14] Michael E. Solimine, *Congress, the Solicitor General, and the Path of Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109 (2012).

[15] Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb–1 (2006)).

[16] Margo Anderson, Baker v. Carr, *the Census, and the Political and Statistical Geography of the United States: The Origins and Impact of Public Law 94–171*, 62 CASE W. RES. L. REV. 1153 (2012).

[17] U.S. CONST. art. I, § 2, cl. 3.

[18] Act of Dec. 23, 1975, Pub. L. No. 94–171, 89 Stat. 1023 (codified as an amendment to

officials to produce data for small areas needed for compliance with the new constitutional districting standards. This in turn led to increasing concern for the accuracy of census data, particularly the problem of differential undercount that had disproportionate effects on certain types of communities and some segments of the population. Professor Anderson traces the legal and political controversy over these issues and shows how the Census Bureau has tried to improve the accuracy of the decennial enumeration.

In the last article, Micah Altman and Michael McDonald critically analyze the concept of equality reflected in *Baker v. Carr* and other one person, one vote cases.[19] These cases did promote districts containing equal population, but often at the cost of dividing traditional communities and producing oddly shaped constituencies that fail the tests of compactness and contiguity. Altman and McDonald review several types of redistricting approaches, including process-based rules that focus on how lines are drawn, outcome-based rules that emphasize substantive electoral results, and institution-based rules that address who actually draws the lines. In the end, all of these approaches have failed to eliminate the manipulation of district boundaries. Accordingly, these scholars ask whether technology might work better. Although they sympathize with efforts to bring technology to bear on this issue, Altman and McDonald warn that technology cannot eliminate jockeying for political advantage in the reapportionment process. At the same time, technology holds the promise of promoting greater transparency and encouraging public participation in a process that has long been dominated by politicians and party officials.

Baker v. Carr helped to transform American politics in fundamental ways, but in so doing opened up many new issues about the meaning and nature of representation that remain unresolved after half a century. The scholars who contributed to this issue do not offer easy solutions for intractable problems. They do offer sophisticated insights into why those problems remain intractable that can help informed citizens to think more clearly about the competing considerations in any districting system.

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13 U.S.C. § 141 (2006)).

[19] Micah Altman & Michael P. McDonald, *Redistricting Principles for the Twenty-First Century*, 62 CASE W. RES. L. REV. 1179 (2012).