The History of Redistricting in Oregon

TESTIMONY BEFORE THE HOUSE SPECIAL COMMITTEE ON REDISTRICTING
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EARLY HISTORY: 1857-1952

- Article IV, Section 6 originally provided that Legislature would be "apportioned among the several counties according to the number of white population in each."
  - The framers chose population over territory as the basis for apportionment, but legislators were assigned to counties, not districts.
    - At statehood, eleven of the more populous counties were allotted two or more Representatives (Marion and Linn each received four Representatives), and three counties (Lane, Marion, and Linn) received two Senators. As a result, in these counties, the legislators were elected in county-wide, multi-member elections.
    - At the other population extreme, small counties needed to be grouped together to create a multi-county senate or representative district with one Representative or Senator representing the conjoined counties.
  - The relevant population was described in a race-conscious manner, excluding African-American, Latinx, Asian-American, and Native American residents from the population count.

EARLY HISTORY: 1857-1952

- Article IV, Section 2 caps the Senate at 30 members and the House of Representatives at 60 members.
  - By 1878, the two houses had reached their constitutional maximums.
  - As a result, redistricting would henceforth be a zero-sum endeavor: one county's gain would necessarily have to come at another's loss.
- Although required to redistrict the Legislature every 10 years in accordance with population, the Legislature didn't do so and often redistricted only when a new county was formed or when a rural county in a joint district wished to be switched to a different district.
  - The last time prior to 1952 that Multnomah county – the largest and fastest growing county -- received additional Representatives was in 1921, and its increase came at the expense of Marion county, which was the second most populous (and still-growing) county. The last time Multnomah county received an additional Senator was in 1907 (and that was not really an additional one since it came from a joint Multnomah-Clackamas district that was discontinued).
- The Legislature only redistricted the House in 1931 (mainly to reconfigure the representation of rural counties in multi-county districts). It did not redistrict either house in 1941 or 1951.

EARLY HISTORY: 1857-1952

- Malapportionment became increasingly more severe, with rural counties significantly overrepresented and the more populous urban counties underrepresented.
  - In 1950, Multnomah County with 471,537 people (out of a state population of 1.521 million) still was allotted only 13 Representatives and 6 Senators, meaning that each Representative in Multnomah county represented 36,272 residents and each Senator 78,590 people.
  - In contrast, the 18 counties in eastern Oregon with only 16% of the state's population comprised 27% of the Legislature. Baker county's 16,175 inhabitants received one Senator, and Wallowa county's 7,264 inhabitants received their own Representative.
- Courts viewed themselves as powerless to require the Legislature to redistrict in accordance with the state constitution. Neuberger v. Lambert (Multnomah Cir. Ct. 1946).

1952 CONSTITUTIONAL AMENDMENT

- After the Legislature failed to redistrict in 1951, the People overwhelmingly proposed and approved an initiative in 1952 to ensure redistricting would take place every ten years after the federal Census (Measure 18).
- Article IV, Section 6 is amended to remove the race-conscious language – apportionment shall be made on the basis of population, not just white population: the Legislature shall be "apportioned among the several counties according to the population in each."
- If the Legislature fails to adopt a redistricting plan by July 1, the task falls to the Secretary of State.
- The Oregon Supreme Court is given original jurisdiction to review compliance with the state constitution's requirements regarding redistricting.
- Counties remain the basis for apportionment, leaving populous counties with multi-member elections.
- The Amendment itself establishes its own reapportionment for the rest of the 1950s. Multnomah County receives one more Senator and three more Representatives. Marion and Lane also receive additional Senators and Representatives.

1955 STATUTE

- To reduce the complexity and length of ballots, the Legislature authorizes Multnomah county to be divided into subdistricts.
  - Multnomah County was divided into five subdistricts, four of which elected three Representatives and one of which elected four Representatives.
  - Note that the subdistricts did not produce single-member districts; the subdistricts still were multi-member districts, just smaller ones than the county itself.
  - The subdistricts were not equal in population, and, in 1966, the Oregon Supreme Court declared that the subdistricts needed to be made more equal. Cook v. McCall.

1961 REDISTRICTING

- Legislature produced a plan, but it was struck down by Oregon Supreme Court because of population inequality. In re Legislative Apportionment, 364 P.2d 1004 (Or. 1961).
- The population inequality was the result of the "Major Fraction" provision of Article IV, Section 6. The ideal population of a legislative seat was determined by dividing the state population by the number of legislators, and then each county's population was divided by that ideal number. Counties would invariably have some remainder left over, and the state constitution provided that if the remainder was .500 or above, the county would receive another Senator or Representative (i.e., a rounding-up principle).
- The problem in 1961 was that there were more counties with major fractions than minor fractions, which would have produced a legislature with more members than allowed (33 Senators and 64 Representatives).
- The Legislature solved the problem by reducing the number of seats that Multnomah, Lane, and Jackson counties were entitled to receive. For instance, Multnomah with a senate ratio of 8.868 should have received nine Senators, but the Legislature kept Multnomah's allotment the same as provided in the 1952 amendment – i.e., seven senators.
- The Oregon Supreme Court invalidated the Legislature's plan. The court acknowledged that the Legislature cannot always comply with the major fraction formula in order to comply with the cap on membership, but the Legislature may not eliminate a whole number (as it did for Multnomah county). The court left it to the Secretary of State to devise a new plan to deal with major fractions. The court noted that there were several ways to do so, such as prioritizing the counties with the highest major fraction or following the major fraction principle only for the least populous county(ies), such as those with a ratio of less than 1.0.

1961 REDISTRICTING

- The Secretary of State proposes a new plan that combines more of the small counties into multi-county districts and gives Multnomah an eighth Senator (but not ninth Senator). The Secretary eliminates Multnomah's major fraction, effectively following the court's suggestion that the most populous counties lose the benefit of the major fraction first.
- As a result, the Secretary's plan still results in malapportionment: Multnomah's eight senators each represent 65,361 people, while Josephine county's one senator represents 29,917 inhabitants.
- The Oregon Supreme Court upholds the Secretary's plan.

THE REAPPORTIONMENT REVOLUTION

- In the early 1960s, the U.S. Supreme Court launches the reapportionment revolution, invalidating legislative malapportionment across the nation. Baker v. Carr (1962); Reynolds v. Sims (1964). This is the one-person, one-vote principle – state legislative districts must be drawn to equalize population within each district.
- Subsequent cases establish something along the lines of a 10% rule: State legislative redistricting plans with a maximum deviation of more than 10% are almost always invalidated.
  - To calculate the maximum deviation of a plan, the deviation from the ideal population of the least populous district is added to the deviation from the ideal of the most populous district.
    - To illustrate: Suppose the ideal population for districts is 100,000. Suppose the smallest district has 92,400 people (i.e., a deviation of 7.6%) and the most populous district has a population of 103,700 (i.e., a deviation of 3.7%). The maximum deviation is therefore 11.3%.
  - The 10% rule is just a rule of thumb, not a safe harbor. Even districting plans with less than a 10% maximum deviation may be unconstitutional if the deviation is not produced out of a need to follow other, legitimate districting criteria.

1971 REDISTRICTING

- Legislature failed to produce a plan (because the two houses were controlled by different parties). The Secretary of State therefore produced a plan, but it was struck down on a minor point by the Oregon Supreme Court. Hovet v. Myers, 489 P.2d 684 (Or. 1971).
- Single-member districts. To comply with the U.S. Constitution's "one-person, one-vote" requirement, the Secretary of State divided the state into single-member districts that did not obey county lines. The Oregon Supreme Court upheld the Secretary's power to do so.
- For Senate districts, the Secretary of State decided to nest two Representative districts within one Senate district, thereby creating the districting policy we know today.
- Residency. Article IV, Section 8 requires legislators to be a resident of their district for a year prior to election day. With the creation of single-member districts in populous counties, it was not clear whether legislators had to be residents just of the county or their particular district. The Secretary tried to avoid ousting incumbent legislators redistricted out of their district by labeling the districts "subdistricts," which were then lumped into districts, thereby potentially allowing legislators to live outside their particular subdistrict. The Court declares that the Secretary has no power to create "subdistricts" and orders the Secretary to redraft the plan to label all subdistricts as districts.
  - A month later, the Court held that the residency requirement did apply to single-member districts – to run for re-election in their new district, a candidate had to prove residency for a year in the district that they sought to represent, not just the county in which the district was located. Roberts v. Myers, 489 P.2d 1148 (Or. 1971). A subsequent amendment to Art. IV, Section 8 temporarily waives this requirement for legislators redistricted out of their district.

1979 STATUTE

Legislature adopts ORS 181.010 to govern redistricting, which provides:

"(1) Each district, as nearly as practicable, shall:

(a) Be contiguous;

(b) Be of equal population;

(c) Utilize existing geographic or political boundaries;

(d) Not divide communities of common interest; and

(e) Be connected by transportation links.

(2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.

(3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.

(4) Two state House of Representative districts shall be wholly included within a single state senatorial district."

Initially, this statute was viewed as not enforceable by the Oregon Supreme Court, but the 1986 Constitutional Amendment changed that, at least as applied to redistricting plans adopted by the Secretary of State.

1981 REDISTRICTING

- Legislature adopted a plan, but it was invalidated by Oregon Supreme Court. McCall v. Legislative Assembly, 634 P.2d 223 (Or. 1981).
- **Gap in Senate Representation**. The Legislature's plan produced a senate district composed of inhabitants of a district who elected their senator in 1978 but who would not elect a new senator until 1986. The problem was not the six-year gap in election – that may happen for any given voter who is switched to a new senate district – but rather the fact that there would be no senator for those residents between 1982 and 1984. Thus, the Secretary of State was ordered to draft a modified plan that assigned a holdover senator (someone elected in 1980 whose term would continue to 1984) to represent the new district.
  - What does that mean for you? The senate districts that will hold elections in 2024 must be assigned a senator elected in 2020.
  - Article IV, Section 8 creates a temporary residency waiver for legislators assigned to a district in which their residence is not located, but the legislator must relocate to their new district by January 1, 2022 in order to run for reelection.
  - The redrawing of Senate district lines will inevitably mean some voters will go six years between senate elections (i.e., voters who last elected a senator in 2018 but who are put in a district that will not vote again until 2024), but that does not violate either the U.S. or Oregon constitutions. Republican Party of Oregon v. Keisling, 959 F.2d 144 (9th Cir. 1992).
  - The representation gap problem cannot arise with the House, all of whose members are subject to election with the new redistricting.

1986 CONSTITUTIONAL AMENDMENT

- The Legislature referred a proposed constitutional amendment to the People, which the People approved in 1986. The amendment addressed some of the flaws that the preceding redistrictings had exposed – it was corrective rather than revolutionary in nature.
- Article IV, Section 6(1) now provides that legislators shall be "apportioned among legislative districts according to population. A senatorial district shall consist of two representative districts. Any Senator whose term continues through the next odd-numbered year regular legislative session after the operative date of the reapportionment shall be specifically assigned to a senatorial district…."
  - Legislators are apportioned to districts, not counties, as has been done in practice since 1971.
  - Senate districts are composed of two House districts, constitutionalizing both the 1979 statute and the 1971 Secretary of State policy.
  - All holdover Senators must be assigned to a district, thereby confirming the requirement of McCall v. Legislative Assembly.
  - The major fractions policy, which was unenforceable anyway, is deleted.

1986 CONSTITUTIONAL AMENDMENT

- Article IV, Section 6(2) and (3) clarify the timing and process for the Secretary of State to adopt a plan if the Legislature fails to do so and for judicial review of any plan.
  - Legislature must still adopt a plan by July 1 or else that task falls to the Secretary of State.
  - Petition for judicial review must be filed by August 1 for legislatively adopted plans or September 15 for plans adopted by the Secretary of State.
  - The Secretary of State must conduct public hearings on a plan (whether due to failure of the Legislature to adopt a plan or judicial invalidation of a legislatively-adopted plan).
  - The plan can be reviewed for compliance with all applicable law, including ORS 181.010 (thereby overturning part of McCall v. Legislative Assembly).
- Article IV, Section 6(4) makes redistricting exempt from initiative or referendum (i.e., this is the exclusive process for redistricting).
- Article IV, Section 6(5) clarifies that holdover senators can be recalled by voters in the new district to which they were assigned (and only those voters).

1991 REDISTRICTING

- Legislature failed to adopt a plan (because the two houses were controlled by different parties). The Secretary of State adopted a plan that made equal population a priority (+/-1% deviation).
- The Oregon Supreme Court upheld the vast bulk of the plan, concluding that the Secretary's prioritization of equal population was permissible. The five statutory criteria of ORS 181.010(1) need not be treated equally, though they cannot be ignored either. Ater v. Keisling, 819 P.2d 296 (Or. 1991).
- There were two, small flaws in the Secretary's plan that the Court ordered corrected. First, "floating" census blocks that had been mistakenly placed in Clackamas county by the Census Bureau had to be relocated to the Multnomah districts in which they were in fact located – i.e., contiguity must be obeyed. Second, a Portland neighborhood that had been split, impacting three homes, should have been kept intact (the "communities of common interest" criterion).
  - Contiguity is easily followed – the error here was the Census Bureau's and unintentional.
  - Neighborhoods are not sacrosanct. The flaw here was unintentional (again the byproduct of the Census Bureau erroneously putting those three homes in a different census tract) and its correction was easy to accomplish given how few individuals were affected.

2001 REDISTRICTING

- Legislature adopted a plan, but the Governor vetoed it, leading to the Secretary of State producing the plan. The Oregon Supreme Court upheld all but one, small part of the Secretary's plan. Hartung v. Bradbury, 33 P.3d 972 (Or. 2001).
- The Oregon Supreme Court upheld the Governor's authority to veto reapportionment bills.
- The Oregon Supreme Court rejected the argument that either the federal or state constitution requires perfect population equality among districts (the Secretary of State's plan, as in 1991, had a +/-1% deviation).
- All of the challenges to where the Secretary drew district lines allegedly dividing communities or ignoring county lines were rejected. The court recognized that there are different ways of defining relevant communities, particularly in highly-urbanized areas, and the interrelationship of districts necessarily requires that the Legislature or Secretary be accorded a good deal of latitude to make the inevitably difficult choices. There is no perfect plan, and honoring one community or political subdivision line in one area of a proposed district will impact other parts of the proposed district, potentially requiring the district line to divide other communities in the district or ignore political subdivision lines elsewhere.
- Similarly, there is a good deal of discretion in choosing which House districts to combine to produce a senate district.
- The court rejected a partisan gerrymandering claim, noting that ORS 181.010 only bans plans made with the "purpose" of advantaging a political party. The fact that plan had the effect of switching the partisan composition of several districts was not sufficient evidence of such a purpose.

2001 REDISTRICTING

- The only defect found by the court was the inclusion in a district of a census tract where the Census Bureau had obviously made a mistake. The tract listed a zero population, but it contained a federal prison and obviously had a non-zero population, which could have led the district to be more populous than allowable under the Secretary's +/- 1% guidelines.

2011 REDISTRICTING

- Legislature adopted a plan, which was not challenged in court.
  - This is the only instance since the 1952 constitutional amendment authorizing judicial review of a redistricting plan that there has not been a lawsuit challenging the state legislative redistricting.

HISTORICAL SUMMARY

- Since the passage of the 1952 amendment, there have been six redistrictings.
  - The Legislature has adopted a plan four times. Two of them have been invalidated by the Oregon Supreme Court, and one was vetoed by the governor. Only in 2011 did the Legislature adopt a plan that actually went into effect since the 1952 amendment.
- The Oregon Supreme Court has been very deferential regarding the drawing of single-member district lines. The court has invalidated particular district lines only where the U.S. Census Bureau had made a clear mistake with regard to the location or population of a particular census tract.
- The Oregon Supreme Court has only reviewed reapportionment plans adopted by the Secretary of State, not Legislature, for compliance with ORS 181.010. It is unclear whether ORS 181.010 binds the Legislature as it does the Secretary of State. A new reapportionment plan could be viewed as tacitly (if not expressly) repealing the applicability of ORS 181.010 to that round of redistricting. The Oregon Supreme Court in McCall mentioned this possibility but did not pass upon it.

CONGRESSIONAL REDISTRICTING

- President Biden will release the congressional reapportionment soon. The formula for determining how many congressional seats each state receives is set by federal statute, but it is the actual census data of every state that is the unknown here.
  - It is likely – but not guaranteed – that Oregon will receive a sixth congressional district. That depends on the population growth in all 50 states, not just Oregon.
- There are several differences regarding the congressional redistricting process:
  - The deviation from perfect population equality must be de minimis and justified by legitimate districting criteria. Wesberry v. Sanders. Recently the U.S. Supreme Court upheld a West Virginia plan with a maximum deviation of 0.79%, but the Court characterized the case as exceptional.
  - If the Legislature fails to adopt a plan, the task does not fall to the Secretary of State but to a federal court or a special, five-judge state court per ORS 188.125. In 2001, for instance, the federal congressional district lines were drawn by a Multnomah Circuit Court judge.
  - Judicial review of a Legislatively-adopted congressional districting plan begins in federal court or the special, five-judge state court provided for in ORS 188.125, with right of appeal to the Oregon Supreme Court. The task of correcting any defects in the Legislatively-adopted plan falls to the court, not Secretary of State.

QUESTIONS