

REYNOLDS RECONSIDERED

Guy-Uriel E. Charles & Luis Fuentes-Rohwer

In the years following his resignation from the Court, Chief Justice Warren was often asked about the case he considered to be the most important of his tenure. The obvious answer would have been the canonical *Brown v. Board of Education*,¹ the racial equality case that defined the Warren Court at the time and continues to define it more than half a century later. Instead, as the Chief Justice wrote in his memoirs, the “accolade should go to the case of *Baker v. Carr* (1962), which was the progenitor of the ‘one man, one vote’ rule.”² The case of the “one man, one vote rule” to which he was referring is of course, *Reynolds v. Sims*.³ According to the Chief Justice, “if we had already had universal voting, then we wouldn’t have had many of the problems *Brown* attempted to correct.”⁴ Or put a different way, “*Baker v. Carr* made blacks a part of our political system.”⁵ Warren was of the view that racial inequality was directly related to political inequality. As he stated, “[m]any of our problems would have been solved a long time ago if everyone had the right to vote, and his vote counted the same as everybody else’s.”⁶ Moreover and importantly, had the Court addressed the problem of political inequality, the barriers to racial inequality “could have been solved through the political process rather than through the courts.”⁷

Warren’s argument has great intuitive appeal and certainly finds some, though not full, support from the political process school. According to the political process school, substantive rights are best protected not by courts but by the political process.⁸ The role of the courts is to ensure that the channels of political change remain open.⁹ As long as the channels of the

1. 347 U.S. 483 (1954).

2. CHIEF JUSTICE EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977) (discussing *Baker v. Carr*, 369 U.S. 98 (1962)).

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

4. Jack Slater, *1954 Revisited*, *EBONY MAGAZINE*, May 1974, at 126.

5. *Id.*

6. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 279 (1993).

7. JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 209 (1979).

8. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

9. *Id.*

political process remain open, voters can use those channels to obtain the substantive change they seek.

There is no doubt that the democratic processes across the states were clearly blocked from the late nineteenth century to the second half of the twentieth century when the Court declared malapportionment unconstitutional. Mass migrations to the cities, coupled with refusals to redraw districting lines, had left state legislatures in the hands of entrenched political minorities with no incentive to vote themselves out of political power. By and large, legislative bodies did not reflect the ideological or partisan distribution of their constituencies. In response, *Baker v. Carr* brought the federal courts to the redistricting arena. *Reynolds v. Sims* and its companion cases revolutionized the nation.

By many accounts, though the reapportionment revolution was controversial at the time, the retrospective evaluation of the Court's entrance into the political thicket has been extremely positive. The one person, one vote principle is almost universally regarded as a central principle of political equality, and few today defend malapportionment. More tellingly, even fewer still would advocate a return to the not-so-good old days of yore.

Reynolds and the apportionment cases are thus rightly lauded for bringing equality principles to bear on the design and composition of electoral structures. And for declaring and defending the principle of population equality, the Court has, on the whole, vindicated its decision to enter the political thicket. The Court's engagement with democratic politics is especially justifiable if one focuses only on judicial supervision of malapportionment questions.¹⁰

This aspect of *Reynolds* and the reapportionment cases—the obvious correctness of population equality and its judicial defense—is widely appreciated and now appears self-evident. Much has been said about population equality as a core democratic principle—at least core to democracies in the modern era—that not much more need to be said. But there are facets of *Reynolds* and the reapportionment cases that have not been rendered fully discernible and therefore cannot be fully appreciated.

Reynolds and the reapportionment cases are like a Wagnerian opera. They contain a series of leitmotifs having to do with the role of the Court in democratic politics, the availability of judicial standards, the problem of political entrenchment, the sometimes challenge of partisanship, the vexing problem of race, the nature of political rights, and the like. As importantly, these leitmotifs are present not just in the reapportionment context but are the recurring themes of the Court's involvement in regulating democratic

10. Contrast *Reynolds* here with *Bush v. Gore*, 531 U.S. 98 (2000), which was controversial at the time and remains so today, almost two decades hence.

politics. Almost all of the difficulties and pressures that are raised by the court-centricity of the law of democracy—indeed even the court-centricity itself—is a function of both the Court’s decision to enter the political thicket in such a muscular way and of the underlying political pathologies that necessitated judicial supervision. *Reynolds* and the reapportionment cases raise fundamental questions and tensions that are appendant or appurtenant to judicial supervision of democratic politics. There is a structural path-dependence to the law of democracy and we can trace the steps back directly to *Reynolds* and the apportionment cases. Though the law of democracy as a field and election law as an area of study have not come to terms with these fundamental issues, they continue to haunt us today. Our aim here is to make legible these fundamental questions and tensions posed by *Reynolds* and the apportionment cases by laying them bare. Less ambitiously, we also want to suggest, in a reductionist way, the lessons we ought to take now slightly more than fifty years removed from the Court’s most serious romp through democratic politics.

In this Essay we revisit *Reynolds v. Sims* and contextualize the revolution that it engendered. Revisiting *Reynolds* enables us to see that the same issues that confronted the Court in 1964 continue to confront us and the Court to this day. Relatedly, the story of *Reynolds* and the themes of *Reynolds* are also the story and themes of election law as a field. As a framing device, we present the foundational questions and tensions generated from *Reynolds* and by extension judicial supervision of democratic politics as a series of dualities and dichotomies induced by the Court’s involvement in regulating democratic politics. Questions about the utility of judicial involvement in democratic politics tend to oscillate between the two parts of a duality.

Consider as illustrative the initial question of whether courts ought to be involved in regulating democratic politics at all (or even whether courts ought to be involved in regulating particular sectors of democratic politics). A fundamental question presented by *Reynolds* and the reapportionment cases is whether the Constitution, which contains very little regarding the fundamental rules of democracy, authorizes the Court to say anything authoritative and determinative about the manner in which power is apportioned either between and among groups or between and among different institutional political actors. The Court’s tendency when confronted with the difficult question of whether to supervise an area of democratic politics is to vacillate between confessions of judicial impotence to remedy a supposed deficiency of the democratic process and professions of institutional confidence that it is uniquely suited to take on the pressing democratic problem *du jour*. Thus, this question presents a duality, institutional impotence versus judicial hubris or muscularity.

Debates over judicial supervision of democracy tend to oscillate between that duality.

Similarly, there are dualities around the question of the availability of judicial standards, which brings up the classic rules versus standards debate. Moreover, election law has wrestled, since *Baker and Reynolds*, with the problem of political entrenchment and has vacillated between the twin impulses of trusting and distrusting political insiders, a classic agency problem. Additionally, as students of law and politics have recognized, election law sometimes struggles with discerning when is race the proper lens through which to view questions of democratic politics or whether they are viewed through another lens such as partisanship. Other dualities include whether political rights are individual rights or structural rights are individual in the nature of political rights, and when should democratic politics reflect populism impulses as against when should democratic politics reflect republican impulses. We focus on three of these dualities in this Essay.

Part I provides some brief context about the state of malapportionment. Part II focuses on *Baker v. Carr*. Part III turns to *Reynolds*. Part IV explores what *Reynolds* and the reapportionment cases signify for American democracy.

I. THE POLITICAL SETTING: A LOOK AT THE STATES

In his 1960 study on reapportionment and state constitutions, Gordon Baker wrote that “[f]ew problems of state government recur so persistently as the apportionment of legislative representation.”¹¹ The problem was acute and wide-ranging. In Alabama, for example, counties with populations ranging from 48,018 to 50,718 were given one state representative each in the state House, while counties ranging from 13,462 to 15,286 were each awarded two state representatives.¹² Similarly, in Tennessee, counties with populations ranging between 2,340 and 25,316 had the same representation.¹³ This pattern repeated across the states. There was little apparent rationality in the distribution of seats in state legislatures and congressional delegations. The reasons were two-fold.

First, it is important to remember the historic role played by geographic communities as units of representation.¹⁴ Dating back to colonial times and the original thirteen colonies, legislators were selected from counties (or, in

11. GORDON E. BAKER, *STATE CONSTITUTIONS: REAPPORTIONMENT*, at vii (1960).

12. *Reynolds v. Sims*, 377 U.S. 533, 568 n.45 (1964).

13. *Baker v. Carr*, 369 U.S. 186, 254–55 (1962) (Clark, J., concurring).

14. See James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts To Control Gerrymandering*, 37 RUTGERS L.J. 881, 900 (2006).

the case of New England, from towns). This approach was supported by a theory of representation that was inherently communal, a theory that recognized and reflected “the force of localism, the view that every community should have . . . a distinct and substantial[] voice in the state legislature.”¹⁵ More importantly, this was a theory that recognized community as borne of shared geographic closeness. According to Jim Gardner, this theory proceeded on the premise that

people who live in close physical proximity inevitably share certain kinds of activities, and that the bonds created through these shared activities give rise to a community of interest that is deeply connected to, built upon the matrix of, even induced by, the particular locality in which the members live.¹⁶

This theory ultimately gave rise to the right to geographic representation.

The nineteenth century witnessed a switch away from county representation and towards districts as the units of representation. State senate representation moved away from geography as early as 1792 and “declined rapidly” after 1800.¹⁷ This switch was in direct response to population growth within the states. Turning to districts allowed states to avoid serious population inequalities across represented counties while at the same time containing the growth of their senate as a legislative body. In other words, districting provided much needed flexibility. State house representation also moved away from geography and towards districts, but half a century later. This change was motivated by the lure of population equality across relevant units. Under a districted plan, states could either divide overpopulated counties into smaller districts or else combine sparsely-populated counties into multicounty districts.¹⁸ Even after these changes, however, it remained the case that “local government units should be kept intact for purposes of representation.”¹⁹

Second, the history of malapportionment is also deeply influenced by the Great Migration, the massive population shift that began in the aftermath of World War I.²⁰ Whether caused by the industrial opportunities

15. GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* 27 (1966). Nick Stephanopoulos terms this the “theory of communal representation.” Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1390 (2012).

16. Gardner, *supra* note 14, at 950.

17. *Id.* at 902.

18. *See id.* at 901–02.

19. *Id.* at 914.

20. *See* JAMES R. GROSSMAN, *LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION* (1989); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1992); ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010).

created by the war or to escape from racial violence and oppression,²¹ blacks began to leave the South and move towards the North and the West in record numbers.²² The numbers grew rapidly, from roughly 200,000 in the 1900s to 500,000 in the 1910s.²³ By 1960, the number would stand at nearly five million blacks.²⁴ This migration led to an obvious transformation in the Black population, “from rural areas in the South to urban areas in the North and Midwest.”²⁵

Crucial to our larger story is the reaction that this great migration engendered. As blacks moved from the rural South to the urban North, whites began to exit the cities and settle in the suburbs.²⁶ Federal housing and highway policies played a central role in this story, favoring the demands and interests of middle class whites while ignoring the needs of the now-racialized cities.²⁷ Violence and racism also played a role, of course. But the larger point is that the federal government took sides in this continuous flight from the cities. The story of the suburbs in the postwar period is a story of race and exit.²⁸ It is an old and familiar story.

It is easy to see how the move away from geographic representation coupled with the great urban migration after the First World War turned the Tennessee redistricting plan into a “crazy quilt.”²⁹ The districting lines that the Supreme Court examined in the 1960s had been drawn long before, prior to the mass exodus from rural America to the cities. That fact alone meant that the existing districts would no longer follow a logical pattern. The irrationality of the plan was compounded by the use of a new metric—population—to evaluate plans drawn on the logic of geography. This is what the Court did in *Baker v. Carr* when it compared populations between

21. See Jack Temple Kirby, *The Southern Exodus, 1910–1960: A Primer for Historians*, 49 J. S. HIST. 585, 589–90 (1983) (discussing some of the factors that led to the migration).

22. See DAVID A. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860–1915*, at 470 (1976) (discussing the city of Cleveland and various other Ohio cities); GROSSMAN, *supra* note 20, at 4 (discussing Chicago and Detroit); DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at 70, 78 Table 5.2 (1982); ALLAN H. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890–1920*, at 40 (1967).

23. See MCADAM, *supra* note 22, at 78 Table 5.2.

24. *Id.*

25. ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 205 (2003).

26. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1994).

27. See KATZ, *supra* note 26, at 134–35; MASSEY & DENTON, *supra* note 26, at 44–55.

28. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 284 (2007) (“There is no question . . . that race played a major role in the great wave of postwar suburban exit.”).

29. *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring) (contending that “Tennessee’s apportionment is a crazy quilt without rational basis”).

counties and could not find a good reason for their gross disparities. In his concurring opinion, for example, Justice Douglas wrote that “a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County.”³⁰ Justice Frankfurter objected precisely on this ground, to no avail.³¹ Population, rather than geography, had become the sine qua non of representation.

This problem was not unique to the state of Tennessee. The same was true in Alabama,³² Colorado,³³ Maryland,³⁴ and across the country.³⁵ This is how then-Senator John F. Kennedy put it, in an essay in the *New York Times Magazine* published in 1958:

[T]he urban majority is, politically, a minority and the rural minority dominates the polls. Of all the discriminations against the urban areas, the most fundamental and the most blatant is political: the apportionment of representatives in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and fair proportionate voice in government to which they are entitled. The failure of our governments to respond to the problems of the cities reflects this basic political discrimination. . . . Our legislatures still represent the rural majority of half a century ago, not the urban majority of today.³⁶

This was the crux of the issue: the existing districting lines had been drawn long ago and remained in place in the face of mass migrations to the

30. *Id.* at 245 (Douglas, J., concurring). The Court made a similar argument in *Gray v. Sanders*, 372 U.S. 368 (1963), where it objected to Georgia’s county unit system because it “weigh[ed] the rural vote more heavily than the urban vote and . . . some small rural counties heavier than other larger rural counties.” *Id.* at 379.

31. *See Baker*, 369 U.S. at 300 (“What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing.”).

32. *See Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. 1962).

33. *See Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 729 (1964) (“Divergences from population-based representation in the [state] Senate are growing continually wider, since the underrepresented districts in the Denver, Pueblo, and Colorado Springs metropolitan areas are rapidly gaining in population, while many of the overrepresented rural districts have tended to decline in population continuously in recent years.”).

34. *See Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 664 (1964); *Md. Comm. for Fair Representation v. Tawes*, 180 A.2d 656 (Md. 1962).

35. *See Anthony Lewis, Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1057 (1958) (“[I]nequalities in representation are still with us and flourishing. The districts from which members of the forty-eight state legislatures are elected are, on the average, substantially less representative of population today than they were a generation ago. In congressional districts, too, disparities in population are increasing.”).

36. John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 37.

cities. This led to a massive underrepresentation of urban centers. Population disparities between districts grew to unseemly and unexplainable levels. More importantly for our story, it led to an even larger underrepresentation of suburban political power.³⁷ Or in the words of J. Anthony Lukas, writing in the wake of the 1960 census, in specific reference to the massive population growth in the suburbs around Baltimore, “Maryland[] suburbanites have purchased split-level splendor at the price of gradual political disfranchisement.”³⁸

Seen this way, it is important to understand what plaintiffs were asking courts to do in the years prior to *Baker v. Carr*. They were not claiming that their votes had been denied, nor were they claiming that their preferred candidates had lost. Rather, they were making *governance* claims.³⁹ As Pam Karlan astutely pointed out, “[t]heir real complaint is that their voice is diluted at the post-election process of official decision making.”⁴⁰ In other words, plaintiffs were unable to exercise their governance rights as reflected in their status as the majority in their particular states. Though a majority, they did not have a proportional or even a fair share of their state’s legislative power.⁴¹ They were asking the courts to give them what the political process would not, but what their reading of democratic theory demanded.

The Supreme Court wanted no part of this problem. As far back as 1903, the Court made clear that it would take no part in debates over political rights, even if these rights involved larger constitutional questions. In *Giles v. Harris*, for example, the Court refused to stand in the way of an allegation that “the great mass of the white population intends to keep the blacks from voting.”⁴² According to Justices Holmes, who wrote for a majority of the Court, “[u]nless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.”⁴³ Four decades later, the Court similarly counseled in *Colegrove v. Green* that “[c]ourts ought not to enter this political thicket. The remedy for unfairness in districting is to

37. See PAUL T. DAVID AND RALPH EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE: A STATISTICAL INVESTIGATION OF LONG-TERM TRENDS IN STATE LEGISLATIVE REPRESENTATION (1961).

38. J. Anthony Lukas, *Barnyard Government in Maryland*, 26 REP. 31, 31 (1962).

39. See Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 251–52.

40. *Id.* at 251.

41. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1725 (1993).

42. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

43. *Id.*

secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”⁴⁴

The problem for the reformers at the time was that the federal courts offered them their only chance. The political process was essentially foreclosed to them. The case of Tennessee is emblematic. Entrenched politicians had no incentive to alter the district lines and governors and state courts refused to intervene.⁴⁵ Also, the state did not allow for initiative or referenda. Prospects of reform looked bleak in the mid-1950s. A three-judge panel in Minnesota in the case of *Magraw v. Donovan*, however, reinvigorated their efforts. In the face of longstanding precedent,⁴⁶ the panel concluded that it had jurisdiction “because of the federal constitutional issue asserted.”⁴⁷ The panel reviewed the evidence and also concluded that “substantial inequality exists in the present composition of Minnesota legislative districts.”⁴⁸ But the panel fell short of granting the relief requested, in order to give the state legislature an opportunity to act in accordance with the state constitution. It retained jurisdiction in case the Minnesota legislature failed to act.

Magraw v. Donovan gave the Tennessee reformers much hope. They began litigation that would change the face of the nation. On November 23, 1959, a three-judge federal district court heard arguments on *Baker v. Carr*. They denied relief to the plaintiffs a month later.⁴⁹ The plaintiffs appealed. In the interim—November 14, 1960, to be exact—the Supreme Court decided *Gomillion v. Lightfoot*, the infamous Tuskegee gerrymander case.⁵⁰ This case presented a serious challenge to Justice Frankfurter’s theory of non-intervention. The facts are well known: the city of Tuskegee had a population of 5,397 blacks and 1,310 whites; of these, only 400 blacks and 600 whites were qualified to vote.⁵¹ After the state legislature altered the boundaries of the city “from a square to an uncouth twenty-eight-sided

44. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

45. *Kidd v. McCannless*, 292 S.W.2d 40 (Tenn. 1956), *appeal dismissed*, 352 U.S. 920 (1956).

46. *See, e.g.*, *Matthews v. Handley*, 361 U.S. 127 (1959) (mem.), *aff’g* 179 F. Supp. 470 (N.D. Ind. 1959); *Hartsfield v. Sloan*, 357 U.S. 916 (1958) (mem.); *Radford v. Gary*, 352 U.S. 991 (1957) (mem.), *aff’g* 145 F. Supp. 541 (W.D. Okla. 1956); *Kidd v. McCannless*, 352 U.S. 920 (1956) (mem.), *dismissing appeal from* 292 S.W.2d 40 (Tenn. 1956); *Cox v. Peters*, 342 U.S. 936 (1952) (mem.), *dismissing appeal from* 67 S.E.2d 579 (Ga. 1951); *Tedesco v. Bd. of Supervisors of Elections*, 339 U.S. 940 (1950) (mem.), *dismissing appeal from* 43 So. 2d 514 (La. Ct. App. 1949); *MacDougall v. Green*, 335 U.S. 281 (1948) (per curiam), *overruled in part* by *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (mem.); *Turman v. Duckworth*, 329 U.S. 675 (1946) (mem.), *aff’g* 68 F. Supp. 744 (N.D. Ga. 1946); *Cook v. Fortson*, 329 U.S. 675 (1946) (mem.), *dismissing appeal from* 68 F. Supp. 624 (N.D. Ga. 1946).

47. *Magraw v. Donovan*, 163 F. Supp. 184, 187 (D. Minn. 1958).

48. *Id.*

49. *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959).

50. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

51. *Gomillion v. Lightfoot*, 167 F. Supp. 405, 407 (M.D. Ala. 1958).

figure”⁵²—or what the plaintiffs termed a “sea dragon”⁵³—only four or five qualified black voters remained within the redrawn city limits.⁵⁴ No white qualified voters were removed.

The district court dismissed the action on the view that it had no authority to act.⁵⁵ The court of appeals affirmed.⁵⁶ The Supreme Court granted certiorari. In a post-*Brown* world, it seemed inconceivable that a state could do to its black voters what Alabama had done. And yet, this was a replay of not only *Colegrove v. Green* but also *Giles v. Harris*. The parties’ briefs to the Court drew precisely these lines. The plaintiffs argued that this was a deliberate violation of the Fourteenth and Fifteenth Amendments, rather than, as in *Colegrove*, a case about statewide redistricting or the distribution of electoral power.⁵⁷ They argued, further, that the case did not present the “delicate issue of federal-state relationship”⁵⁸ because the state act was in clear violation of the U.S. Constitution. There was also no avenue of relief for the plaintiffs, as in *Colegrove*, nor was there a question about granting relief. If the Court struck down the new map, the old map would then take its place. The state responded as expected: this was a “purely political matter within the absolute power of the State Legislature.”⁵⁹ These facts were also, as in *Giles*, “beyond the scope of traditional limits of proceedings in equity.”⁶⁰ This was the state’s way to remind the Justices that “relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”⁶¹

Thus, the question for the Supreme Court—and particularly for Justice Frankfurter—was how to limit the Court to intervention in race cases, and only race cases, while at the same time ensuring that the Court will not set out to regulate the law of democracy writ large. Would deciding *Gomillion* open the door to *Baker* and redistricting questions more generally? In his concurring opinion in *Gomillion*, Judge Wisdom wrote that “*Colegrove v. Green* and *South v. Peters* may be distinguishable at the periphery. At the center these cases and the instant case are the same.”⁶² Solicitor General

52. *Gomillion*, 364 U.S. at 340.

53. Brief for Petitioners at 4, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (No. 32), 1960 WL 98593 at *4.

54. *Gomillion*, 167 F. Supp. at 407.

55. *Id.* at 410.

56. *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959) *rev'd*, 364 U.S. 339 (1960).

57. Brief for Petitioners at 6, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (No. 32).

58. *Id.* at 16.

59. Brief for Respondents at 4, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (No. 32).

60. *Id.* at 4 (citing *Giles v. Harris*, 189 U.S. 475 (1903)).

61. *Giles*, 189 U.S. at 488.

62. *Gomillion*, 270 F.2d at 613 (Wisdom, J., concurring).

Cox similarly told the Justices that “in principle the case of *Gomillion* and *Lightfoot* is very similar to us. I did not see why a case should be more justiciable because it arose under the Fifteenth Amendment rather than the Fourteenth. And it does not seem to me that the . . . principle should be limited to racial discrimination.”⁶³

Justice Frankfurter disagreed. As he wrote for a unanimous Court, *Gomillion* was “wholly different” from *Colegrove*.⁶⁴ He distinguished the cases on various grounds. First, Justice Frankfurter went to great lengths to compartmentalize *Gomillion* as a Fifteenth Amendment case. In his mind, this would remove the case “out of the so-called ‘political’ arena and into the conventional sphere of constitutional litigation.”⁶⁵ This was a crucial distinction in the case and for the future of political questions more generally. In a communication he wrote in response to Justice Whittaker’s draft of a concurring opinion, which argued that the case was best understood as a Fourteenth Amendment case, Frankfurter argued:

Displacing voters from Division A, where they enjoyed rights through the ballot which they would not enjoy in Division B, presents in fact a very different situation from originally making two divisions, A and B, and thereby placing different voters in the two divisions. If the situation is different in fact I know of nothing that precludes it from being different in law. Displacing takes away, deprives of, theretofore existing rights. To do so on the basis of race is explicitly prohibited by the Fifteenth Amendment.⁶⁶

Justice Whittaker responded to this argument in a subsequent draft. He was not persuaded.⁶⁷

Justice Frankfurter offered three further distinctions. First, *Colegrove* arose under Article I, which gave Congress “exclusive authority” to decide

63. Oral Reargument, Part 1 at 1:39:30, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), http://www.oyez.org/cases/1960-1969/1960/1960_6#reargument-1 [hereinafter *Baker* Oral Reargument Part 1].

64. *Gomillion*, 364 U.S. at 346.

65. *Id.* at 346–47.

66. Frankfurter Memorandum, *Gomillion v. Lightfoot*, Nov. 4, 1960, William J. Brennan Papers, Manuscript Division, Library of Congress, box I: 50, file 32.

67. See *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (contending, in response to Justice Frankfurter’s insistence, that his view of the case “would not involve . . . the *Colegrove* problem”). Tellingly, he added this mention of *Colegrove* in response to Justice Frankfurter’s memo from a week before. Compare Whittaker draft opinion, *Gomillion v. Lightfoot* 2, Nov. 3, 1960, Brennan Papers, box I: 50, file 32 with Whittaker draft opinion, *Gomillion v. Lightfoot* 2, Nov. 11, 1960, Brennan Papers, box I: 50, file 32. Solicitor General Cox similarly told the Court during the second oral argument in *Baker*, “it seems to us that in principle the case of *Gomillion* and *Lightfoot* is very similar to us. I did not see why a case should be more justiciable because it arose under the Fifteenth Amendment rather than the Fourteenth.” *Baker* Oral Reargument Part 1, *supra* note 63 at 1:39:30.

the matter.⁶⁸ Yet the same may not be said of the “discriminatory denial of the municipal suffrage alleged here.”⁶⁹ Second, the partisan struggles in *Colegrove* “underlie so many disputes over statewide apportionment throughout the country.”⁷⁰ The facts involved a nation-wide issue. In contrast, *Gomillion* “solely concerns state-imposed racial discrimination in a specific locale.”⁷¹ Finally, the remedies in each case are different. The plaintiffs in *Gomillion* were targeted due to their race, which meant that “familiar legal remedies are available as relief.”⁷² In contrast, the Illinois plaintiffs in *Colegrove* suffered discrimination through inaction. Also, intervention in *Colegrove* may result in at-large elections, which was contrary to congressional will. In *Gomillion*, however, invalidation of the new plan would only mean that the city would revert to its old plan.⁷³

But the distinctions were not as persuasive as Justice Frankfurter might have wished. His assurances aside, the logic of his position, and particularly the notion that relief for unfair redistricting must be found within the political process, “seemed considerably less compelling.”⁷⁴ A week later, on November 21, the Court noted probable jurisdiction in *Baker v. Carr*.⁷⁵

II. THE COURT ENTERS THE FAMED THICKET AT LAST: *BAKER V. CARR*

On June 20, 1955, the Commission on Intergovernmental Relations issued its final report to President Eisenhower on the relationship between the states and the national government.⁷⁶ The Commission, commonly known as the Kestnbaum Commission, identified malapportionment as one of the leading reasons for the plight of the cities and the loss of “power and influence” by state governments.⁷⁷ The Commission noted the growth of the cities and the representative imbalance in favor of rural areas. The long term goal was “an equitable system of representation that will strengthen State government.”⁷⁸

68. Frankfurter draft opinion, *Gomillion v. Lightfoot* 8, Nov. 10, 1960, Earl Warren Papers, Manuscript Division, Library of Congress, box 471, file 32.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Stephen Ansolabehere & Samuel Issacharoff, *The Story of Baker v. Carr*, in CONSTITUTIONAL LAW STORIES 278 (Michael Dorf ed., 2d ed. 2009).

75. *Baker v. Carr*, 364 U.S. 898 (1960) (mem).

76. COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS (1955).

77. *Id.* at 38.

78. *Id.* at 39.

Leading voices took to the mass media to reinforce this message. Writing for the *New York Times Magazine* in 1958, then-Senator John F. Kennedy cited the Kestnbaum Report when assailing malapportionment as the “Shame of the States.”⁷⁹ Months after Kennedy’s essay was published, the *Christian Science Monitor* ran a five-part series on state legislative malapportionment⁸⁰ and a four-part series on congressional malapportionment the following year.⁸¹ And on the eve of Kennedy’s inauguration as president, on January 5, 1961, Edward R. Murrow hosted a CBS hour-long special entitled “Our Election Day Illusions: The Beat Majority.”⁸² The first half of the special focused on malapportionment.

Three months later, on April 19, the Supreme Court heard oral arguments in *Baker v. Carr*. Charles Rhyne immediately framed his argument for the plaintiffs as “an individual voting rights case.”⁸³ He made this argument in response to the then-accepted position that courts had no power to intervene. His response was unequivocal: “there exist[s] no judicial no-man’s-land in connection with constitutional rights of individual[s under] the Fourteenth Amendment.”⁸⁴ Judicial intervention was particularly warranted in this case because there was no other way for the plaintiffs to get out of this “illegal straightjacket.”⁸⁵ The state legislature would not do it; it had not done it since 1901 and “it’s almost beyond question” that it would change its ways then.⁸⁶ The state courts would not do it because to do so “would destroy the Legislature and destroy the government of Tennessee.”⁸⁷ The governor could only ask the legislature to act, which Tennessee governors had done repeatedly. They had been ignored each time. Reformers could try to amend the state constitution, but passage was also unrealistic. The process required passage of the amendment by the state legislature, first by majority rule and then, after a

79. Kennedy, *supra* note 36, at 37–38.

80. See George B. Merry, *Minority Rule: Challenge to Democracy*, CHRISTIAN SCI. MONITOR, Oct. 2, 1958, at 13; George B. Merry, *Inequities Exposed in State Voting Scales*, CHRISTIAN SCI. MONITOR, Oct. 6, 1958, at 15; George B. Merry, *Rural-Urban Imbalance Aired in Legislatures*, CHRISTIAN SCI. MONITOR, Oct. 9, 1958, at 5; George B. Merry, *Battles Waged to Reapportion State Legislatures*, CHRISTIAN SCI. MONITOR, Oct. 13, 1958, at 7; George B. Merry, *More States Face Up to Reapportionment Responsibilities*, CHRISTIAN SCI. MONITOR, Oct. 16, 1958, at 3.

81. See George B. Merry, *How Minorities Help Shape Congress*, CHRISTIAN SCI. MONITOR, June 2, 1959, at 9; George B. Merry, *Rotten’ Boroughs Elect Party Chiefs*, CHRISTIAN SCI. MONITOR, June 4, 1959, at 3; George B. Merry, *Gerrymandering Lingers Across U.S.*, CHRISTIAN SCI. MONITOR, June 13, 1959, at 10; George B. Merry, *Population Shifts Hint Redistricting*, CHRISTIAN SCI. MONITOR, June 16, 1959, at 10.

82. *Our Election Day Illusions: The Beat Majority* (CBS television broadcast Jan. 5, 1961).

83. Oral Argument Apr. 19, 1961 at 00:15, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), http://oyez.org/cases/1960-1969/1960/1960_6#argument-1 [hereinafter *Baker* Oral Argument].

84. *Id.* at 01:05.

85. *Id.* at 25:45.

86. *Id.* at 19:29.

87. *Id.* at 19:47.

six-month period, by two-thirds vote.⁸⁸ Finally, there was no initiative or referendum in Tennessee. In sum, the federal courts offered the last hope.

In response, the state took the side of the law as then understood: the federal courts lacked jurisdiction to decide redistricting questions, which are essentially “political or . . . legislative question[s].”⁸⁹ This was *Colegrove v. Green*. This was also *Kidd v. McCannless*,⁹⁰ decided five years before. At the time of the oral argument, on April 19, 1961, this was clearly the best legal argument.

In his argument on behalf of the United States, Solicitor General Archibald Cox took the side of the reformers. He argued for justiciability, and he also argued that the case raised constitutional questions that merited a judicial remedy. For our purposes, Solicitor General Cox’s argument is significant for how he frames the issue that would play a central role not only during the *Baker* litigation but also *Reynolds*. Time and again, he argued that the right in the case was “the right to be free from arbitrary discrimination in the exercise of the franchise which is sufficiently personal to give the victims of the discrimination standing to sue.”⁹¹ He repeated this point often. This was a case about the right “to be free from hostile or capricious discrimination by a state”;⁹² about constitutional proscriptions against “arbitrary and capricious distinctions affecting the right to vote.”⁹³ He was clear that mathematical equality in the apportionment of seats to both state houses “is not the Fourteenth Amendment requirement. Our history makes it plain”⁹⁴ All the state needed to do was have a rational basis for its plan.⁹⁵ Charles Rhyne agreed.⁹⁶

Before concluding, Solicitor General Cox made three arguments that counseled against dismissal of the litigation. First, this was not a difficult

88. TENN CONST. art. XI, § 3.

89. Oral Argument Apr. 20, 1961, at 05:15, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), <https://www.oyez.org/cases/1960/6#reargument-1>.

90. *Kidd v. McCannless*, 292 S.W.2d 40, 44 (Tenn. 1956), *appeal dismissed*, 352 U.S. 920 (1956).

91. *Baker* Oral Argument, *supra* note 83, at 46:01.

92. *Id.* at 52:36.

93. *Id.* at 53:11; *see id.* at 56:34 (“Now, I say that where the apportionment that the State has departs from the only ostensible basis on which the apportionment is based, by that degree—that this is such an egregious error that it stands on the face of it as arbitrary and capricious.”); *id.* at 1:14:01 (“[I]t should not be hard to decide whether this is or is not arbitrary and capricious . . .”).

94. *Id.* at 55:10.

95. *See id.* at 57:10 (“Tennessee came in at the trial on the merits of this case [to] show to some other rational foundation for what it is done”); *id.* at 57:55 (“The only federal right that I’m speaking to is the right to have some rational basis for the apportionment”); *id.* at 59:30 (“[A]nd, so, here, if some other rational basis is pointed out at some stage of the case”); *id.* at 1:00:25 (“Well, perhaps where it’s entirely irrational . . . the results don’t conform to the Fourteenth Amendment.”); *id.* at 1:01:29 (“[T]he Equal Protection Clause requires a reasonable classification. And I suppose that means when it has something rational behind it.”).

96. *Id.* at 12:57 (“We don’t contend that you have to have the exact mathematical equality at all, but as near as maybe practical”).

case. The Tennessee Constitution provides for population as “the only ostensible basis for an apportionment . . . [a]nd the existing apportionment clearly, egregiously departs from that standard.”⁹⁷ The only question for the courts was to decide whether the facts were “arbitrary and capricious.” On these facts, and absent any other standard from the Tennessee Constitution, “it should not be hard to decide” this question.⁹⁸ Second, the wrong was very serious. He reminded the Court that the existing apportionment gave control of the state to one-third of Tennessee voters, and that some counties have nineteen or twenty times the vote of other counties. This was the kind of wrong that called for judicial involvement. “We’ve often been reminded, and quite right, that the ultimate safeguard of constitutional rights is a vigilant electorate. But where the wrong goes to the existence or distribution of the franchise, then the electorate can do nothing to protect itself.”⁹⁹ This was a classic political process question, a case “where one can[not] look to the working of the political process to solve the violation of a constitutional right.”¹⁰⁰ This was the end of the line for the reformers.

Finally, there was no other remedy available in the state. In this vein, the Solicitor General urged caution. All he asked was for the Court to send the case back to the lower court panel for a decision. The panel would then go through three stages: a jurisdictional ruling; a ruling on the merits; and whether relief, if any, is appropriate. According to the Solicitor General, the state legislature took the position that “nobody [can] touch[us].”¹⁰¹ All it would take was for the federal court to take jurisdiction, and “that in itself will generate great forces for a change.”¹⁰² This was key. Earlier in the oral argument, Cox explained that all the Court needed to do was enjoin all state officials connected with elections from carrying out any future elections under the 1901 Act. Subsequently, the Governor would call the legislature into a special session, where it would then “perform its legislative function.”¹⁰³ Justice Harlan, taking a page out of *Colegrove* and *Giles*, immediately asked: “Supposing they don’t do that, then what will the Court do?”¹⁰⁴ This was the leading reason behind the political question doctrine, its *raison d’être*.¹⁰⁵ It is important to note where the Court was at the time of *Baker*, in 1961: in the midst of the *Brown* revolution, seeking to

97. *Id.* at 1:13:45.

98. *Id.* at 1:14:01.

99. *Id.* at 1:15:00.

100. *Id.* at 1:16:12.

101. *See id.* at 1:30:17.

102. *Id.* at 1:30:22.

103. *Id.* at 39:51.

104. *Id.* at 41:51.

105. *See Luis Fuentes-Rohwer, Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1914 (2005).

implement the desegregation mandate. The impact of their decisions must have weighed heavily on the Justices' minds.

The Solicitor General responded that a further declaratory judgment on the invalidity of the 1901 Act would be enough. After that, "we certainly think that the Legislature would act."¹⁰⁶ Minutes later, he closed his portion of the argument along similar lines: "If the federal court takes jurisdiction, that in itself will generate great forces for a change."¹⁰⁷ This was unquestionably an optimistic view. Nobody could be sure of what the state legislature would do, in Tennessee or elsewhere. But Solicitor General Cox was confident about what the legislature would do.

If the Court goes on to the merits and holds that there is a [sic] constitutional apportionment, I should be amazed if the Tennessee Legislature didn't act. After all, the force of the principle of legitimacy, the solemn adjudication that there is a constitutional obligation carries a great effect with most of the people in this country.¹⁰⁸

At the conference the following day, on April 20, Justice Frankfurter argued passionately against court intervention.¹⁰⁹ Justices Clark and Harlan took his side.¹¹⁰ On the other side stood Justices Douglas and Black, both of whom dissented in *Colegrove*, and were joined by Justice Brennan and the Chief Justice.¹¹¹ Justice Whittaker sided with the justiciability camp but was unwilling to join a simple majority of five Justices. This placed the decision on Justice Stewart, who was not yet ready to take a side. Needing more time, the Court scheduled the case for reargument the following term. The Court so ordered a week after this first conference.¹¹²

In the interim, Justice Frankfurter drafted a sixty-page memorandum, which he circulated to his colleagues the day after reargument. Justice Brennan responded with his own memo, which showed the arbitrary disparities between districts. Neither memorandum appears to have had much influence, at least at first.

The Court heard the second argument on October 9, 1961.¹¹³ The themes were familiar ones. Early in the session, Charles Rhyne reiterated that the reformers were "not arguing for absolute mathematical equality

106. *Baker* Oral Argument, *supra* note 83, at 42:05.

107. *Id.* at 1:30:20.

108. *Id.* at 1:30:29.

109. Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 30-31 (1997).

110. *Id.* at 31.

111. *Id.* at 32.

112. *Baker v. Carr*, 366 U.S. 907, 907 (1961).

113. Lewis, *supra* note 109, at 31.

here. We're saying we have a mathematical formula in the Tennessee Constitution. But we are asking for the reasonable equality required by the Fourteenth Amendment."¹¹⁴ Moments later, when asked whether he found that "the Fourteenth Amendment requires that each person's vote in the state be given equal weight," his answer was simply this: "Reasonable equality."¹¹⁵ Tom Osborn argued similarly that, on these facts, "[n]o rational basis can be discovered."¹¹⁶ This was a common theme throughout.

Solicitor General Cox similarly assured the Justices that states would retain much flexibility in the redistricting process. Judicial involvement need not mean that the courts must control the process. In his view, states "certainly would apportion and have great freedom to apportion according to their own theories. As we try to suggest in our brief, the job of making the apportionment is something which is up to the individual state legislature."¹¹⁷ To be sure, population equality would have a role to play in the case. But as he underscored moments later, "ours is not a purely mathematical argument. We recognized that although one should start with equality of voting weight under our tradition that that's not the end of the question."¹¹⁸ This was in line with what he said during the first oral argument. This is the necessary question of standards. How would the lower courts determine when a redistricting plan violated the Fourteenth Amendment? The Solicitor General's answer is illuminating, yet familiar: "[T]he first step is simply to inquire whether there is any rational justification or any coherent purpose for the discrimination or differentiation of something other than sheer caprice or indifference or the perpetuation of unjustified political power."¹¹⁹ On the facts present, there was no justification offered—a point with which counsel for the state agreed,¹²⁰ and of which Justice Brennan reminded his fellow Justices in a subsequent memorandum to the conference.¹²¹ Absent a justification, the judicial inquiry would end.

During the October 13 post-argument conference, the sides held firm: Justices Frankfurter, Harlan, Clark, and Whittaker (absent a fifth vote on the other side) on one side, Justices Black, Douglas, Brennan, and the Chief

114. *Baker Oral Reargument Part 1*, *supra* note 63, at 21:17.

115. *Id.* at 35:59; *see also id.* at 42:27 ("[T]here is no reasonable basis for the voting discrimination which is laid out in this complaint. And the defendants offer no justification for it and they cannot offer it on these facts.").

116. Oral Reargument, Part 2 at 1:45:41, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), http://www.oyez.org/cases/1960-1969/1960_6 [hereinafter *Baker Oral Reargument Part 2*].

117. *Baker Oral Reargument Part 1*, *supra* note 63, at 1:32:15.

118. *Id.* at 1:38:12.

119. *Id.* at 1:13:29.

120. *Baker Oral Reargument, Part 2*, *supra* note 116, at 1:12:04.

121. Memorandum to the Conference, *Baker v. Carr* 1, Oct. 12, 1961, Brennan Papers, box I: 50, file 6.

Justice on the other. Of note, Justice Clark argued at the conference that he did not agree with the claim of the reformers that they had exhausted all avenues of relief. For example, they had yet to “invoke the ample powers of Congress.”¹²² The reformers had yet to make this problem a campaign issue.¹²³

Once Justice Stewart made up his mind and sided with Justice Brennan, the Court stood poised to reverse *Colegrove*. The Chief Justice then assigned the task of writing the opinion to Justice Brennan. On January 22, 1962, Justice Brennan sent the first printed draft of the opinion to Justice Stewart. In a memorandum attached to the draft, Justice Brennan wrote the following note:

You will note that I stop with the holding that the complaint states a justiciable cause of action of a denial of equal protection of the laws according to familiar equal protection criteria. As drafted it defers consideration of the application of those criteria and the matter of remedy for the determination in the first instance of the District Court after the proofs are in.¹²⁴

This assurance was enough for Justice Stewart, and the small majority held together.

On February 2, Justice Clark wrote to Justice Brennan asking him to delay the case while he worked on a separate opinion in addition to Justice Frankfurter’s dissent. During the course of writing this opinion, however, Justice Clark changed his mind. As Burke Mathes, his law clerk, explained:

In the process of writing his dissent he explored the argument that other remedies were available. He just concluded that there weren’t any. I think he surprised himself. He felt badly doing that to Justice Frankfurter, whom he so often joined, at that late stage. But afterward he felt good—felt he had done the right thing.¹²⁵

This view put Justice Clark on the side of the reformers. There was no reasonable way for the reformers in Tennessee to escape this legislative straightjacket. If the Court declined the invitation, this was the end of the road.

122. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

123. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 848–49 (Dell Dickson ed., 2001).

124. Memorandum to Justice Stewart, *Baker v. Carr*, Jan. 22, 1962, Brennan Papers, box I: 50, file 6.

125. Telephone Interview with Burke W. Mathes, Jr., president, Cambridge Signal Technology, Inc. (Aug. 29, 1997), *quoted in* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 35 (1997).

Once Justice Clark changed his mind, all the pieces quickly fell into place. With this vote, Justice Whittaker would side with the Brennan camp and make it 6–3, maybe 7–2 if Justice Stewart stayed on board. In the end, Justice Whittaker did not figure into the final decision, and Justice Stewart remained with the majority, making it a 6–2 decision.¹²⁶ The Court was coming to the political thicket at last.

We cannot overstate the significance of *Baker v. Carr*. The case opened the door to legal questions that had long been kept out of the federal courts. It brought the federal courts and the federal Constitution to bear on questions of politics. But this was only half the question. Far more important was the question of judicial standards. How would the Justices approach these questions? More specifically, how would they choose to regulate questions and issues that had long been within the purview of political actors? How aggressive would the Justices choose to regulate redistricting questions and, by extension, the Law of Democracy writ large?

In line with the arguments of both Solicitor General Cox and the plaintiffs' lawyers, the Court appeared to take a deferential approach. As part of the discussion of the six factors that rendered a question a "political question," the Court offered the following:

Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.¹²⁷

This was low-level rationality review. This was a sensible way to approach a very sensitive topic. How to decide from among the many relevant considerations, from equality of population to the design of a stable two-party system or the balancing of urban and rural interests?¹²⁸ The Court did not enshrine any one theory of representation over any other,¹²⁹ nor did it lay down rules for policy-makers to follow.¹³⁰ Instead,

126. *Baker v. Carr*, 369 U.S. 186 (1962).

127. *Id.* at 226; *see also id.* at 254 (Clark, J., concurring) (concluding that "Tennessee's apportionment is a crazy quilt without rational basis").

128. *See* Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 42 (1962).

129. *See* Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 467–68 (2004).

130. Bickel, *supra* note 128.

the Court offered to intervene only at the margins, for those extreme cases best understood as a “temper tantrum.”¹³¹

Notably, Justice Douglas argued that this was a new standard, as “[w]e have usually said ‘invidious discrimination.’”¹³² And yet, he also assured us that “[u]niversal equality is not the test; there is room for weighting.”¹³³ As the Court remanded the case to the district court to decide the case in accordance with its opinion, it remained to be seen what the future might bring. But nothing from the Court’s opinion indicated that “the heavens were likely to fall as a result of the ruling that the federal courts may—and indeed must—hear suits brought by properly qualified voters to challenge state legislative apportionments that allegedly denied them the equal protection of the laws.”¹³⁴ One thing was clear: population equality would play a role into the future. Litigants, and the nation, could not be sure of how much of a role it would be.

It remained to be seen how the state legislatures would respond to the Court’s pronouncement in *Baker*. This was clearly on the Justices’ minds. At the first oral argument in *Baker*, Solicitor General Cox assured the Justices that, by the end of his allotted time, the states would comply with a constitutional ruling:

If the federal court takes jurisdiction, that in itself will generate great forces for a change. If the Court goes on to the merits and holds that there is an unconstitutional apportionment, I should be amazed if the Tennessee Legislature didn’t act. After all, the force of the principle of legitimacy, the solemn adjudication that there is a constitutional obligation carries a great effect with most of the people in this country.¹³⁵

The topic arose again during the second oral argument. A Justice asked the solicitor general: “And do you foresee . . . that all the 30 odd states . . . would at once say, ‘Aye, aye’, and would at once apportion according to your theory?”¹³⁶ His response is illustrative of both how he thought the states would respond to the ruling in the short term and what he thought the Court should ask of the states: “[T]hey certainly would apportion, and have great freedom to apportion, according to their own theories The job of

131. *Id.* at 43.

132. Memorandum to Justice Brennan, *Baker v. Carr*, Jan. 31, 1962, William O. Douglas Papers, Manuscript Division, Library of Congress, box 1266, file 6.

133. *Baker v. Carr*, 369 U.S. 186, 244–45 (1962) (Douglas, J., concurring).

134. Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255, 257 (1964).

135. *Baker* Oral Argument, *supra* note 83, at 1:30:19.

136. *Baker* Oral Reargument, Part 1, *supra* note 63, at 1:32:02.

making the apportionment is something which is up to the individual state legislature.”¹³⁷

The solicitor general was proven right. The reaction to the Court’s decision was immediate and positive, “nothing short of astonishing.”¹³⁸ “Instead of resistance or at best begrudging acceptance of a clearly stated principle, as had been the case with *Brown*, the apportionment decision induced an immediate, widespread, indeed eager, rush toward legislative and judicial implementation of a principle that may have been implicit, but was certainly not articulated.”¹³⁹

The case of Tennessee is illustrative. The federal district court panel received the mandate from the Supreme Court on April 23, 1962, four weeks after the Court’s decision in *Baker*, and scheduled a pre-trial conference for May 7.¹⁴⁰ At the conference, the attorney general of Tennessee informed the court that the Governor of Tennessee intended to call a special session of the general assembly to consider the state’s response to the ruling.¹⁴¹ Three weeks later, the general assembly convened in special session and enacted two separate reapportionment acts, each for the house and senate seats. The Governor approved both acts on June 7, 1962.

The response from the states was nothing short of remarkable. Note that Tennessee legislature managed to do in the three-and-a-half months after the *Baker* decision what it had refused to do in the prior sixty-one years. Other states reacted similarly. By the first week of September, plaintiffs had brought lawsuits in at least twenty-two states.¹⁴² And by the end of 1962, a scant nine months after *Baker*, litigation had begun in thirty-five states.¹⁴³ Redistricting, according to the *New York Times*, was “burning like a prairie fire across the nation.”¹⁴⁴

Robert McCloskey tried to make sense of this reaction. The best he could surmise was “the conjecture that the Court here happened to hit upon what the students of public opinion might call a latent consensus.”¹⁴⁵ The Court, in other words, got lucky. It caught a wave of public opinion at the

137. *Id.* at 1:32:15.

138. Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962).

139. Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 645–46 (1963).

140. *Baker v. Carr*, 206 F. Supp. 341, 343 (M.D. Tenn. 1962).

141. *Id.*

142. See Laymond Robinson, *22 States Battle on Redistricting: Fight Spurred by High Court Ruling is Spreading Fast*, N.Y. TIMES, Aug. 6, 1962, at 23.

143. McKay, *supra* note 139, at 646, 706–10 (containing an appendix that summarizes the litigation through 1962).

144. Robinson, *supra* note 142, at 23.

145. McCloskey, *supra* note 138, at 59.

proper time and rode it. But this only began the inquiry for the long-term regulation of the political thicket. It still remained an open question whether the Justices would follow the path of mathematical equality, as Douglas and Black had argued for many years, or whether they would follow the path of rationality, as the Solicitor General counseled and the *Baker* opinion assured us. This was not an easy question. What did political equality mean?

The lower courts were clearly struggling with the tension between these two approaches. Rationality review demanded deference to the implied institutional competence of political actors. According to Anthony Lewis, for example, plaintiffs must first make a showing that the existing population inequality exceeded “reasonable legislative discretion.”¹⁴⁶ Upon this showing, the burden would shift to the states to show that they had a “rational, nondiscriminatory basis”¹⁴⁷ for the challenged plan. In contrast, population equality demanded a far more assertive approach from the courts, as well as the elevation of one principle of representation over all others. The two approaches could co-exist, to be sure, but not easily. Population equality mattered, as reflected by the many charts and figures used by the plaintiffs in the *Baker* litigation, and which were included by Justice Brennan in the appendix to his opinion.¹⁴⁸ But population equality was only the starting point. States could deviate from population so long as they did so reasonably and rationally. Justice Douglas made precisely this point in his concurring opinion, when he remarked that “[u]niversal equality is not the test; there is room for weighting.”¹⁴⁹ It remained to be seen how committed the Warren Court would remain to this view.

Courts wrestled with this tension in the aftermath of *Baker*. Most challenged plans were measured against the population standard, and courts struck down a majority of them. But the one lesson of this period is that courts were all over the map. Some courts upheld plans that deviated from strict population equality while other courts struck down plans with smaller population variances. Of the first fifteen cases decided in the wake of *Baker*, eleven struck down the existing redistricting plans while four upheld them.¹⁵⁰ And yet, “[t]he tremendous variance in statistics and legal reasoning running through these fifteen cases, however, makes identification of a coherent doctrine or numerical standard next to impossible.”¹⁵¹ This meant, according to Alexander Bickel, that “[t]he

146. Lewis, *supra* note 35, at 1086.

147. *Id.*

148. See, e.g., *Baker v. Carr*, 369 U.S. 186, 237–41 (1962) (appendix to opinion of the Court).

149. *Id.* at 244–45 (Douglas, J., concurring).

150. Arthur L. Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 97 (1962).

151. *Id.*

rationality test led nowhere; and within the year the Supreme Court had abandoned it.”¹⁵²

This was a crucial moment in the reapportionment revolution. The rationality test had been trumpeted by the reformers, from Anthony Lewis and Charles Rhyne to Solicitor General Cox, as the obvious solution to the question of standards. During the oral arguments, in fact, they had assured the Justices time and again that mathematical equality was not required. But as he looked to the future, Justice Brennan well understood that rationality was not the answer.

Proceeding incrementally would result in a painful and confused process, and one that might ultimately fail. Addressing the apportionment problem required a single absolute standard. The Court’s standard had to ensure equality and had to be easily and unambiguously applied. Equally important, it must be rooted in constitutional principles and fundamental rights.¹⁵³

Once the courts abandoned the rationality test, there was one obvious replacement. “There was, Brennan understood even in the spring of 1962, just one such standard: equality.”¹⁵⁴

The Justices were soon flooded with cases and they needed to settle on how to approach them. They could not decide them piecemeal, because how they decided some questions might foreclose others. So the Justices, and particularly Chief Justice Warren and Justice Brennan, decided to wait until they could settle on a constitutional test. The Court had two cases on its docket at the time it decided *Baker*—a challenge to Michigan’s redistricting plan¹⁵⁵ and a challenge to New York’s apportionment of its state senate¹⁵⁶—and it vacated the judgments for consideration in light of *Baker*. The courts had dismissed both claims for lack of jurisdiction, which meant that this remand was simply an order to hold hearings on the merits. The cases would come back to the Court the following year. This disposition would buy the Justices much needed time.

There was one exception to this strategy: Georgia’s primary election law and the county-unit rule. The law, known as the Neill Primary Act, dated back to 1917 and governed state-wide primary races, such as governor, lieutenant governor, and U.S. Senator. Under the law, unit votes

152. Alexander M. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970S, at 57, 64 (Nelson W. Polsby ed., 1971).

153. STEPHEN ANSOLABEHERE & JAMES M. SNYDER JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 165 (2008).

154. *Id.*

155. *Scholle v. Hare*, 369 U.S. 429 (1962).

156. *WMCA, Inc. v. Simon*, 370 U.S. 190 (1962).

were assigned to the various counties according to population.¹⁵⁷ The eight most populous counties received six unit votes each; the next thirty counties received four unit votes; and the rest of the counties received two units a piece. In turn, the candidate who won the county's popular vote received all the unit votes from that county, and the candidate who received the most unit votes won the nomination. What follows is quite familiar. When the law was first enacted, the state of Georgia had 159 counties, of which 121 were rural counties with less than 30% of the population. These rural counties controlled 242 unit votes, or around 60% of the total unit votes. In contrast, by 1960 the eight most populous counties had 40% of the state's population yet less than 12% of the unit votes. The disparities between counties made little sense. Fulton County, with 556,326 residents, received six unit votes, or 1.46% of the total of 410 unit votes; whereas the smallest county in Georgia, Echols County, with 1,876 residents, received two unit votes, or 0.48% of the total.¹⁵⁸ This was a classic "crazy quilt." Even after the state amended the law on the same day that the District Court heard the case, the resulting disparities were irrational as measured by population totals.

On appeal, the Supreme Court concluded that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."¹⁵⁹ Most importantly, the Court offered for the first time its definition of political equality as required by the Constitution: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."¹⁶⁰ This was significant. To be sure, and as Justice Stewart underscored in his concurring opinion, this case involved the selection of a representative for a statewide constituency.¹⁶¹ This was not *Baker v. Carr*, which involved the drawing of district lines—and thus the forming of geographic constituencies—from which representatives would be chosen. But as Robert Dixon told Archibald Cox years later, the case "nevertheless coined the easily transferable 'one man—

157. Neill Primary Act §§ 34-3212–34-3218, GA. CODE ANN. (Supp. 1917), *repealed* by 34 GA. CODE ANN. § 2001 (1970).

158. *See Gray v. Sanders*, 372 U.S. 368, 371–73 (1963).

159. *Id.* at 379.

160. *Id.* at 381.

161. *Id.* at 382.

one vote' phrase, and conditioned all that followed."¹⁶² Once the Court took this step, the road to mathematical equality became much easier.

The Court decided *Gray v. Sanders* on March 18, 1963.¹⁶³ This was a significant time in the South, and the state of Alabama in particular, as the setting for *Reynolds v. Sims*. The Birmingham campaign was just beginning, a nonviolent movement designed to bring attention to the city of Birmingham by the Southern Christian Leadership Conference. This was a crucial moment in civil rights history. On April 12, Dr. King was arrested by Birmingham police for demonstrating without a permit, and four days later he penned his canonical "Letter from Birmingham Jail." On September 15, white supremacists set off a bomb at the Sixteenth Street Baptist Church. Four young girls were killed. The summer of '63 was significant in other ways. President Kennedy delivered a speech on civil rights as he defended his decision to send the National Guard to the University of Alabama; James Meredith graduated from Ole Miss; and in August, Dr. King delivered his transcendental "I Have a Dream" speech in Washington, D.C.

The civil rights movement was pressing the country to finally confront and remedy the effects of its racial past. Not coincidentally, the mantra of the movement, as coined by Student Nonviolent Coordinating Committee President John Lewis, was "one man, one vote." As he told the crowd during his speech at the March on Washington in August 1963, "'One Man, One Vote' is the African cry. It is ours, too. It must be ours."¹⁶⁴ At the same time, lawyers in Birmingham and across the country were asking the Supreme Court to force rural elites, under the guise of equal protection, to give up power to urbanites and, ultimately, suburbanites. Both avenues of reform complemented each other, and either one alone would not be enough. The movement sought to register eligible citizens, but their subsequent votes would prove meaningless if legislatures were not forced to reconfigure the severely malapportioned district lines. The Court and the movement would have to work together.

By the summer of '63, the Court had five cases on its docket: the Georgia congressional representation case and four redistricting cases from Alabama, Maryland, New York, and Virginia. The Court was ready to tackle the issue head-on. It had to answer three questions. First, what standard would guide courts and legislatures into the future? Would the Justices impose a rigid mathematical requirement, or would they follow a more flexible approach, as *Baker* promised and the Solicitor General

162. J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 115 (2014).

163. 372 U.S. 368 (1963).

164. SMITH, *supra* note 162, at 100.

exhorted? Second, what role would the federal analogy play in the future? Would the Justices allow one house in a bicameral legislature to deviate from the metric of population? And third, would it make any constitutional difference whether the resulting malapportionment was a result of legislative inaction?

The Court noted probable jurisdiction in *Reynolds v. Sims* and its companion cases on June 10, 1963.¹⁶⁵ The following day, as George Wallace made his notorious stand at the schoolhouse door, the Court scheduled oral arguments for the week of November 12. With the 1964 election looming, the Court stood ready to answer these questions.

III. REYNOLDS

Through the summer and fall of '63, the Court noted probable jurisdiction on two more cases—one from Delaware, the other from Colorado. The Delaware case, *Roman v. Sinocock*, asked whether malapportionment could be justified by the state's original compact, dating back to the time when the three counties in the state had created the state.¹⁶⁶ This was an easy case, and many observers wondered why the Court had accepted this case at all. The Court ultimately voted 8–1 to strike down Delaware's plan.¹⁶⁷ Only Justice Harlan dissented.

The Colorado case would prove conceptually difficult. One of the leading reasons that led some of the Justices to vote with the majority in *Baker* was the lack of available avenues of reform. This was a classic legislative straight-jacket. The Colorado case would force the Court to test that position. The redistricting plan at issue in *Lucas v. Forty-Fourth General Assembly of Colorado* had been passed by a state-wide initiative, and it had only resulted in small population inequalities.¹⁶⁸ The case would ask the Justices to consider whether majorities within a state could choose for themselves whether to redistrict under terms other than population.

As the Justices looked to the future and the resolution of these various cases, a Brennan clerk, Stephen Barnett, wrote a 350-page brief that ultimately became the Justices' guide.¹⁶⁹ After parsing through every judicial standard proposed by judges, scholars, and commentators, Barnett settled on Solicitor General Cox's standard as the only acceptable standard. This was the "arbitrary and capricious" standard that Cox had advocated in the *Baker* litigation and which he continued to advocate moving forward,

165. *Reynolds v. Sims*, 374 U.S. 802 (1963) (mem).

166. *Roman v. Sinocock*, 377 U.S. 695 (1964).

167. *Id.* at 712.

168. *See Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 715 (1964).

169. *See ANSOLABEHRE & SNYDER*, *supra* note 153, at 172.

whether in briefs, internal memoranda, or future oral arguments. Cox did not wish for the Court to adopt a strict population standard, and thus invalidate a majority of state legislatures then in existence. Instead, population would provide an initial benchmark through which to evaluate redistricting plans. States may deviate from population equality, but they must have a legitimate and rational reason for doing so.

The virtues of this standard were obvious. Chief among them was its flexibility. This was also its main drawback, because it would lead to inconsistent results. It would permit some grossly malapportioned plans, as in the New York litigation, while striking down fairer plans, as in the Virginia case. The standard lacked consistency, which depending on how one viewed the Court's intervention, could be a virtue, but could also be a negative. This was precisely the virtue offered by strict population equality, a standard preferred by some Justices and many of the reformers. The standard would certainly be consistent, and it would also be easy to implement.

This was the choice facing the Court on November 12, 1963, when it heard oral arguments over the course of four days on five cases: *Reynolds v. Sims*,¹⁷⁰ which challenged the apportionment of the Alabama state legislature; *WMCA v. Lomenzo*,¹⁷¹ a case challenging New York's apportionment formula; *Maryland Committee for Fair Representation v. Tawes*,¹⁷² challenging Maryland's malapportionment; *Davis v. Mann*,¹⁷³ which challenged Virginia's apportionment statute; and *Wesberry v. Sanders*,¹⁷⁴ the Georgia congressional case. The Court devoted nearly sixteen hours, over the course of five days, to the question of legislative apportionment. This was unprecedented for a single issue in the Court's history.

The argument split along familiar issues. The reformers pointed to population as the starting point. According to Chuck Morgan, the lead attorney in *Reynolds*,

the one standard that is measurable in each instance leaving the less room for doubt and the less room for question insofar as each of the state legislatures of this nation are concerned, is the ascertainable standard of how many people are there in a

170. 377 U.S. 533 (1964).

171. 377 U.S. 633 (1964).

172. 377 U.S. 656 (1964).

173. 377 U.S. 678 (1964).

174. 376 U.S. 1 (1964).

legislative district or how many people are there in a representative seat.¹⁷⁵

The Court might allow “administrative deviation,” but the leeway must not be “gross.”¹⁷⁶ In addition, the reformers were largely willing to follow the federal analogy, and thus allow more flexibility in one of the two state houses. Not so for John McConnell or Chuck Morgan, who told the Justices that population must be the basis for both houses of a state legislature. But they were clearly in the minority.

Expectedly, Solicitor General Cox offered the Justices a flexible standard. He also began with population as the baseline and the “crazy quilt” test. He argued further that equal protection is violated when the state incorporates a rule that expressly violates constitutional limits, or is invidious or else “irrelevant to any permissible purpose of legislative apportionment.”¹⁷⁷ Finally, a reapportionment plan may not subordinate representation to a degree that results in minority rule. Cox wanted the Justices to decide no more than necessary. As for the future, he counseled “that what guidelines there are should emerge from deciding the minimum required in each of these cases and that the invitation to set forth general abstract rule is not one that I’m pressing in front of the Court.”¹⁷⁸

Predictably, attorneys for the state defended their plans. Some of the attorneys argued that their states’ plans were in fact rational. This was a difficult argument. In the Alabama case, the state Attorney General, Richmond Flowers, conceded as much:

I do not believe that there is a citizen or an official of Alabama that could argue under any shadow of fairness or justice that apportionment of the legislature of Alabama under the 1901 Constitution as it is here today or as when this suit started is anything but unfair, unjust and even approaches the ridiculous.¹⁷⁹

The attorneys also asked the Court to reconsider *Baker v. Carr*. And they pointed out that no objective criteria existed; to decide these cases was to take sides in political disputes. That is, “[i]f you go strictly to a population basis, then the larger, or densely populated counties, would have a stranglehold on the Alabama Legislature on a one man, one vote basis

175. Oral Argument Part 1 at 58:16, *Reynolds v. Sims*, 377 U.S. 533 (1964) (No. 23), http://www.oyez.org/cases/1960-1969/1963/1963_23 [hereinafter *Reynolds* Oral Argument].

176. *Id.* at 30:35.

177. Oral Argument Part 1 at 62:28, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) (No. 20), http://www.oyez.org/cases/1960-1969/1963/1963_20.

178. Oral Argument Part 1 at 64:48, *Md. Comm. For Fair Representation v. Tawes*, 377 U.S. 656 (1964) (No. 29), http://www.oyez.org/cases/1960-1969/1963/1963_29.

179. *Reynolds* Oral Argument, *supra* note 175, at 39:09.

and the people in the rural areas would not have any say so in their own government.”¹⁸⁰ There would be no escaping this apparent dilemma.

By the close of the arguments on Tuesday, the choices for the Justices were thus clear: a Frankfurterian retreat in the face of political risk; a population rule with varying degrees of rigidity; or a more cautious approach that allowed for state experimentation. The replacement of Justice Frankfurter with Justice Goldberg seemed to ensure that the Court would extend *Baker* to its logical conclusion. It was not clear quite yet, however, what that conclusion might be.

In the last conference of the Thanksgiving break, the Justices agreed to strike down all redistricting plans in their docket. But the Justices had yet to settle on a standard. Rather than wait for a consensus to emerge, and at Justice Black’s insistence, the Court decided the Georgia congressional redistricting case, *Wesberry v. Sanders*,¹⁸¹ on February 17, 1964.

Georgia congressional districts suffered from the same malapportionment as most other plans across the country, state and federal, and for similar reasons. For a way to handle the problem, Justice Black explicitly turned away from the Fourteenth Amendment and to Article I, Section Two of the Constitution, which states that House members must be selected “by the People of the several States.”¹⁸² From this language, a six-member majority concluded that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”¹⁸³ To hold otherwise, and allow vote dilution at the district level, would be in clear tension with “fundamental ideas of democratic government.”¹⁸⁴ It would also mean that the House was not “elected ‘by the People.’”¹⁸⁵

This was a remarkable decision. For one, the Court had explicitly overruled *Colegrove v. Green*. Most brazenly, and as Justice Harlan pointed out in dissent, *Wesberry* placed into question the constitutionality of the membership of the House. “I had not expected to witness the day,” he began his dissent, “when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives.”¹⁸⁶ By his count, the decision called into question the validity of 398 representatives from 37 states. The decision, in other words, left “a ‘constitutional’ House of 37 members now sitting.”¹⁸⁷ The Justices were no longer afraid to take on powerful political

180. *Id.* at 13:24.

181. 376 U.S. 1 (1964).

182. *Id.* at 3 (quoting U.S. CONST. art. I, § 2, cl. 1).

183. *Id.* at 7–8.

184. *Id.* at 8.

185. *Id.*

186. *Id.* at 20 (Harlan, J., dissenting).

187. *Id.* at 21.

institutions, even a coordinate branch of the national government. They had come a long way since 1946.

More importantly, the Justices had inched a step closer towards demanding population equality across the country. It was only a matter of time, even if both Georgia cases could be easily distinguished. Population would be the starting point. But questions still remained. For example, how much flexibility would the Justices allow local jurisdictions, if any flexibility at all? Would the Justices authorize states to follow the federal analogy? And what role would the “straightjacket” argument play into the future? That is, might the Justices allow state majorities to allocate seats across the state away from population?

There was no doubt that after *Wesberry*, “[t]he reapportionment revolution was now in full swing.”¹⁸⁸ Where the revolution would ultimately go, and how extensive its demands would be, was left to the pen and constitutional imagination of the Chief Justice.

The story of *Reynolds v. Sims* is really the story of Chief Justice Warren’s odyssey. This is a great yet misunderstood story. In 1948, as Governor of California and Republican nominee for the vice presidency, Warren gave a speech that essentially killed efforts to redistrict in the state. He argued against a strict population basis for representation and for the value of counties. This was in line with the old debate. “Many California counties are far more important in the life of the State than their population bears to the entire population of the State. It is for this reason that I have never been in favor of restricting the representation in the senate to a strictly population basis.”¹⁸⁹ Instead, he continued, and for “the same reason that the Founding Fathers of our country gave balanced representation to the States of the Union—equal representation in one house and proportionate representation based on population in the other.”¹⁹⁰ This was an argument for the federal compromise.

By 1963–1964, however, he appears to have had a change of heart. But to so argue, or to brand him a hypocrite, as many did at the time, would be to misunderstand the questions as Earl Warren understood them. He did not change his mind, nor was he wrong for accepting the federal compromise during his term as governor. They were not the same questions. In other words, it is best to understand Warren, and the questions he faced, as matters of institutional competence and epistemic authority.

As a governor, Warren had to consider the needs of his state as a whole. He had to balance constituencies, whether urban or rural, north or south, parties and ideologies. He had to govern a large and complex state.

188. ANSOLABEHERE & SNYDER, *supra* note 153, at 175.

189. *Redistricting: A Warren View in '48*, U.S. NEWS & WORLD REP., July 6, 1964, at 34.

190. *Id.*

Warren himself wrote in his autobiography that the issue as governor “was frankly a matter of political expediency.”¹⁹¹

In contrast, Chief Justice Warren had to contend with very different complexities. Once the Court came into the thicket in *Baker*, it had to find a line between malapportionments that amount to crazy quilts and those that remain within rational (i.e., constitutional) limits. In other words, Chief Justice Warren had to delineate the demands of constitutional equality. This is how Warren put the distinction to Francis Beytagh, his law clerk at the time: “I never really thought very much about it then. As a political matter it seemed to me to be a sensible arrangement. But now, as a constitutional matter, with the point of view of the responsibilities of a Justice, I kind of got to look at it differently.”¹⁹²

A few years ago, while doing research in the Library of Congress, we made a very interesting find among the papers of Chief Justice Warren: a handwritten memo delineating his thought process as he arrived at equipopulation as the proper standard for redistricting units. Warren told his former law clerk, Jesse Choper, that he had not started with equal population in mind but “[a]fter a while I just couldn’t see any other way, any other principle that would handle the situation.”¹⁹³ The memo offers a window into how Warren arrived at this decision. Remember the two big questions he faced: how flexible must the population standard be; and what to do about the federal analogy, and whether one of the two houses of a state legislature may deviate from strict population equality? Here was his answer, in full:

1. There can be no formula for determining whether equal protection has been afforded.
2. Many laws result in harshness as to some people yet must meet the test of the Constitution
3. However, we have held in *Baker v. Carr* that it is our province to ensure equal protection in this area.
4. We must have some starting point.
5. That starting point is whether it meets our conception of a Republican form of government
6. The basic factor of a representative form of government is that it is representative
7. To me that means fair representation of all who are governed
8. We have held in *Saunders* that as to individuals it means absolute equality

191. WARREN, *supra* note 2, at 310.

192. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 504 (1983).

193. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 436 (1997).

9. Now we are forced with constitutes fair representation of units of government
10. That takes us into the complexities of government which precludes a rigid rule
11. There must be some room for play in the joints
12. But it should not lead us away from the principle of equality
13. So I start with the premise of equal representation
14. The Constitution recognizes it in Article I and 14th Amendment
15. Therefore in determining constitutionality of any system of apportionment we must take it by the four corners and determine whether there has been an effort to achieve equality of representation
16. If so – ok. If not – unconstitutional
17. This does not tie the states to any form of representation – bicameral – unicameral
18. It merely means that under whatever the form of representative government it must be equally rep.
19. To what extent can there be room for play in the joints.
20. Cannot set out all
21. We must relate the question to the political structure of that state
22. If that structure does not violate constitutional principles, the method of apportionment can be justified if it does not achieve invidious discrimination
23. If its basic principle is to accord a maximum amount of home rule through cities or counties or districts it may do so if it is approximate equality
24. But it cannot so apportion as to give more power to one than another on the basis that it is entitled to wield more power than others.
25. This cannot be done because of
 - 1: the class of citizenship
 - 2: the area involved
 - 3: economic interests
 - 4: rural, urban, etc.
26. All of these considerations are involved in at least one of these cases
27. The state can provide for representation of every unit but it cannot limit the size of the representative body so as to discriminate
28. In the NY case it does exactly that thing

29. The formula was fixed as of 1894 and so fixed that the more populous the cities became, the greater the disparity in their proportionate representation. This is invidious.

30. This is not the so-called federal plan because neither house is apportioned according to population

31. The NY system is not a crazy quilt system. it is deliberate discrimination

32. Also there is no adequate political remedy. the constitutional convention cannot be voted on but once every 20 years and that is not an adequate remedy.

33. The discrimination is therefore built in.

34. it is now 38% Senate 37% House¹⁹⁴

This memo is important for a number of reasons. First is the fact that well into the spring of 1964, Chief Justice Warren was still trying to figure out where he stood on these questions. The issue was hardly settled. Second is his concession that the population standard must be flexible; “there must be some room for play in the joints.” This is another way of saying, like Justice Douglas and others before him, that population was only the starting point. Many Justices, and the Chief Justice must be included among them, would point to invidious discrimination as the moment when the state had gone too far. But that was a conclusion, not a useful standard. Standing alone, the term “invidious discrimination” meant nothing.

Finally, Warren appears to implicitly accept the federal analogy when he writes that the New York plan “is not the so-called federal plan because neither house is apportioned according to population.” Were one of the houses apportioned on a population basis, it might meet with his approval.

On June 15, 1964, the Justices announced the decision in *Reynolds v. Sims* and its companion cases.¹⁹⁵ The Chief Justice worried that the leading case was from the state of Alabama. He did not want the public to think that he had a vendetta against the South. Perceptions were important. 1964 was the year of Freedom Summer, a voter registration project in Mississippi, and June 15 in particular was the day that the first three hundred volunteers arrived. More tragically, Michael Schwerner, Andrew Goodman, and James Chaney disappeared the next day. Warren had reason to worry.

But *Reynolds* offered the Court the cleanest set of facts possible, unencumbered by side issues. The facts were also familiar ones. The state

194. Notes Made by Chief Justice Warren, *Reynolds v. Sims*, Earl Warren Papers, Library of Congress, box 608, file 508.

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

had apportioned back in 1901, in line with the state Constitution, and then refused to reapportion since.¹⁹⁶ The resulting plan was a crazy quilt. Some counties with populations as large as 109,047 had two representatives in the state house, as did counties with as few as 13,462. Lowndes County, with a population of 15,417, had two representatives and one senator. In contrast, Jefferson County, with a population of 634,864, had seven representatives and also one senator. The disparities across the state plan were manifold. The plaintiffs alleged that the disparities amounted to unconstitutional discrimination under the 14th Amendment and the state constitution.¹⁹⁷

With the benefit of hindsight, *Reynolds* was almost preordained. But writing at the time, Anthony Lewis expressed the view that “[f]ew Supreme Court decisions have stunned this hardened capital city as has yesterday’s ruling that state legislative districts must be substantially equal in population.”¹⁹⁸ The Supreme Court concluded, in an 8–1 decision, that population was the constitutional starting point and the controlling criterion for assessing the constitutionality of state apportionment plans.¹⁹⁹ Both *Gray* and *Wesberry* featured prominently in the Court’s decision. In fact, the Court treated both cases as establishing a constitutional baseline of equality. *Reynolds* was only recognizing what prior cases, and our constitutional history, established as a “fundamental principle of representative government.”²⁰⁰ This was a baseline of *substantial* equality, however. For the future, the question was whether states may move away from this baseline. This was the question that *Reynolds* and its companion cases set out to answer.

This is where the Court’s oft-cited passage makes sense: “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”²⁰¹ As easily as that, the Court essentially removed all existing considerations outside of population for creating legislative districts. To be sure, the Court agreed that a state may create district lines along existing political subdivision lines. This would help guard against the creation of gerrymandered districts. But the Court immediately cautioned that states may not submerge population in the pursuit of this objective. Justice Harlan dissented precisely on this point.

196. *See id.* at 540.

197. *See id.* at 541.

198. Anthony Lewis, *Districts Ruling Shocks Capital*, N.Y. TIMES, June 17, 1964, at 29.

199. *Reynolds*, 377 U.S. at 567.

200. *Id.* at 560.

201. *Id.* at 562.

In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

- (1) history;
- (2) "economic or other sorts of group interests";
- (3) area;
- (4) geographical considerations;
- (5) a desire "to insure effective representation for sparsely settled areas";
- (6) "availability of access of citizens to their representatives";
- (7) theories of bicameralism (except those approved by the Court);
- (8) occupation;
- (9) "an attempt to balance urban and rural power."
- (10) the preference of a majority of voters in the State.

....

I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them.²⁰²

The last consideration—"the preference of a majority of voters in the State"—is particularly troubling.²⁰³ This was the principle established by *Lucas v. Forty-Fourth General Assembly of Colorado*.²⁰⁴ *Lucas* asked the Court to consider whether modern-day majorities may relax the equal population rule as applied to their particular states. This was not Tennessee, nor was it Alabama or many of the states involved in the reapportionment cases. But that fact did not make any difference to the Justices, who responded glibly that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."²⁰⁵

202. *Id.* at 622–23 (Harlan, J., dissenting) (footnotes omitted).

203. *Id.* at 623.

204. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 713 (1964).

205. *Id.* at 736–37.

Population had thus become the sine qua non of legislative districting. Both houses of a bicameral state legislature must be apportioned on a population basis. As a result, *Reynolds* and its companion cases declared “unconstitutional the legislatures of most of the 50 States.”²⁰⁶

At root, *Reynolds* is a deeply ironic case. The Court paid lip service to the notion that the case sought to protect the right of qualified citizens to vote, and “to have their votes counted.”²⁰⁷ But *Reynolds* is best understood as a governance case. The Court ensured that white suburban majorities enjoyed the right to govern that was their due. But the irony sets in once we see how the Court got there. Early in the opinion, Warren essentially turned to the Fifteenth Amendment, and cases such as *Gomillion*, the White Primary Cases,²⁰⁸ *U.S. v. Classic*,²⁰⁹ and *Guinn v. United States*,²¹⁰ in order to recognize a Fourteenth Amendment governance right.²¹¹ Majorities have a right to govern, and minorities are amply protected by our constitutional system. Representative government demands no less.

Looking ahead, vital questions remained.²¹² How strictly would the Court apply the equality principle? Would the case extend to other institutions, such as city councils, county commissions, or school boards? And finally, would the Court continue on the road to political equality and “seek to apply constitutional controls to gerrymandering”?²¹³ This was a much harder question, and seemed “far less amenable to constitutional adjudication than apportioning numbers of representatives to geographical districts.”²¹⁴ This was the next logical step in the reapportionment revolution. And after *Wesberry* and *Reynolds*, was there anything the Court could not do?

In an internal memorandum to Attorney General Kennedy in August 1963, Solicitor General Cox offered his prediction about the reapportionment revolution. He stated: “[M]y appraisal of sentiment within the legal profession – and probably outside – is that while the invalidation of the egregiously malapportioned legislatures would command a consensus of opinion, a ‘one man—one vote’ decision would precipitate a major constitutional crisis causing an enormous drop in public support for

206. *Id.* at 746 (Stewart, J., dissenting).

207. *Reynolds*, 377 U.S. at 554.

208. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

209. 313 U.S. 299 (1941).

210. 238 U.S. 347 (1915).

211. *Reynolds*, 377 U.S. at 554–555.

212. See ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 120–23 (1968).

213. *Id.* at 123.

214. *Id.*

the Court.”²¹⁵ This is a prediction in line with earlier concerns expressed by Justices Homes and Frankfurter, and even Alexander Hamilton in his well-known Federalist 78²¹⁶: the Court must be cautious in its approach to questions of politics. The Justices have neither the sword nor the purse, but only judgment and the belief that their decisions are demanded by higher law. They must never compromise this belief.

Solicitor General Cox’s concerns were ultimately misplaced. Compliance was almost immediate, almost unparalleled in the history of the Court. According to Herbert Wechsler, in fact, “no decision in the history of the judicial process ever has achieved so much so soon.”²¹⁷ Crucially, the equipopulation revolution was positively received by the public at large. The public supported the Court in great numbers.²¹⁸ In fact, as far as public opinion was concerned, *Reynolds* was an unqualified success.

As expected, elite opinion responded very differently. Writing in the summer of 1964, Anthony Lewis explained that “[t]he curious thing about the current furor . . . is that [*Reynolds*] cannot really be shown to have aroused large-scale opposition among the public This would seem to be strictly a politicians’ rebellion.”²¹⁹ The reaction began soon after the Court decided *Baker v. Carr*, when the Council of State Governments proposed three constitutional amendments. The Council came two states short of the thirty-four states needed to call a constitutional convention.²²⁰ In specific response to *Reynolds*, the 1964 Republican platform called for “a Constitutional amendment, as well as legislation, enabling states having bicameral legislatures to apportion one House on bases of their choosing, including factors other than population.”²²¹

During the presidential campaign that year, Barry Goldwater similarly criticized the Court as part of his larger critique about the Warren Court and its judicial overreaching. He complained that the reapportionment cases would “have a more dangerous effect than anything that’s happened

215. SMITH, *supra* note 162, at 165 (quoting Memorandum from Solicitor Gen. Archibald Cox to Attorney Gen. Robert F. Kennedy 18–19 (Aug. 19, 1963)).

216. THE FEDERALIST NO. 78 (Alexander Hamilton).

217. Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, 12 TEX. Q. 25 (Supp. 1968).

218. See Joshua Fougere, Stephen Ansolabehere & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 ELECTION L.J. 325, 325 (2010).

219. Anthony Lewis, *Congress v. the Court – Issue Joined on Redistricting*, N.Y. TIMES, Aug. 16, 1964, at E3.

220. See ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION (1964).

221. William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 428 (2002) (quoting DONALD BRUCE JOHNSON, 2 NATIONAL PARTY PLATFORMS, 1960–1976, at 686 (1978)).

throughout the course of our Republic.”²²² More specifically, he argued that *Reynolds* would “destroy the representative vote of the small States, populationwise. It’s going to destroy the suburban vote . . . the farmer, the miner, the forester’s vote, and place it all in the concentration of boss-controlled cities, mostly in the East . . . where we find crime on the streets.”²²³

Congressional leaders responded similarly.²²⁴ Multiple bills were introduced in Congress limiting the jurisdiction of the Court or delaying implementation of court orders. The Senate even took the unusual step of reducing a pay increase for the Justices by \$5,000. Senator Dirksen led the opposition in the Senate, introducing a constitutional amendment that mirrored the 1964 Republican platform. But Dirksen could not secure the requisite two-thirds majority. Dirksen re-introduced an amendment the following year, which fell nine votes short. Dirksen tried a third time. By the summer of 1966, however, forty-six states had complied with the Court’s ruling and the four remaining states were expected to comply in the near future. The fight appeared over. Senator Dirksen then attempted to call a constitutional convention but could not reach the requisite number of states by the time of his death in 1969. The reapportionment revolution was not only underway but almost over even as it began. Few were left to put up a fight.

IV. *REYNOLDS* AND THE FUTURE OF AMERICAN DEMOCRACY

An important question about *Reynolds* and the reapportionment revolution is whether the Court’s intervention made much of a difference in terms of changing policy and the distribution of resources. The political science literature on the policy and electoral consequences of the reapportionment revolution has been all over the map. Moreover, the results may differ depending upon whether one is looking at the effects of malapportionment of the state legislatures or the effect of malapportionment of the United States House of Representatives. Scholars critical of malapportionment generally argued that “legislative malapportionment is largely responsible for or connected with lack of party competition, divided government, unfair distribution of funds, and

222. *Id.* at 429 (quoting Barry M. Goldwater, Speech Before the Committee on Commerce, United States Senate, 89th Cong. 1st Sess., in 3 CAMPAIGN ’64. THE SPEECHES, REMARKS, PRESS CONFERENCES, AND RELATED PAPERS OF SENATOR BARRY M. GOLDWATER, JULY 16 THROUGH NOVEMBER 4, 1964, at 170 (1965)).

223. *Id.*

224. For a terrific account of this reaction, see RICHARD C. CORTNER, *THE APPORTIONMENT CASES* (1970), chapter 9.

unprogressive legislation.”²²⁵ As Ward Elliott wrote in an early assessment of the reapportionment revolution:

In 1962 it was conventional wisdom among the *cognoscenti* . . . that Malapportionment was to blame for the worst problems of government at every level. It was supposed to have reduced city dwellers to second-class citizens, and to have stifled urgently needed reforms like home rule, slum clearance, metropolitan transit, annexation, labor and welfare legislation, civil rights laws, equal tax laws, and equal expenditures on schools and roads.²²⁶

One political scientist, writing after *Baker* but before the bulk of the Court’s reapportionment decisions, expected the reapportionment revolution to have at least three effects.²²⁷ First, at the very least, reapportionment at the state level was expected to increase the representation of urban and suburban areas over that of rural areas.²²⁸ Second, reapportionment was expected to impact the political structure of the state and affect the competition between the two dominant parties.²²⁹ Third, reapportionment was expected to have distributional effects on state public policy.²³⁰ In particular, observers expected reapportionment to produce public policy benefits that reflected the preferences of urban and suburban voters. It is the third expectation of reapportionment that captured the attention of most researchers.

Early work by numerous political scientists concluded that reapportionment did not or was not likely to have any distributional effects, especially at the state level.²³¹ For example, Thomas Dye’s study, which sought to determine the effects of malapportionment on both the public

225. Herbert Jacob, *The Consequences of Malapportionment: A Note of Caution*, 43 SOC. FORCES 256, 257 (1964) (listing the defects most attributed to malapportionment in the late fifties and early sixties).

226. Ward Elliott, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 474–75 (1970).

227. Malcolm E. Jewel, *Political Pattern in Apportionment*, in POLITICS OF REAPPORTIONMENT 1 (1962).

228. *Id.* at 17–18.

229. *Id.* at 19–21.

230. *Id.* at 18–19.

231. See, e.g., David Brady & Douglas Edmonds, *One Man, One Vote—so What?*, 4 TRANSACTION 941 (1967); Glen T. Broach, *A Comparative Dimensional Voting Analysis of Partisan and Urban-Rural Voting in States Legislatures*, 34 J. POL. 905, 920 (1972); Thomas R. Dye, *Malapportionment and Public Policy in the States*, 27 J. POL. 586, 599 (1965); Robert S. Erikson, *The Partisan Impact of State Legislative Reapportionment*, 15 MIDWEST J. POL. SCI. 57, 57 (1971); Brian R. Fry & Richard F. Winters, *The Politics of Redistribution*, 64 AM. J. POL. SCI. 508, 522 (1970); Richard I. Hofferbert, *The Relation Between Public Policy and Some Structural and Environmental Variables in the American States*, 60 AM. POL. SCI. REV. 73 (1966); Jacob, *supra* note 225, at 256; David Knoke & Constance Henry, *Political Structure of Rural America*, 429 ANNALS AM. ACAD. POL. & SOC. SCI. 51, 57 (1977).

policy in all fifty states and on party competition, concluded that “the policy choices of malapportioned legislatures are not noticeably different from the policy choices of well-apportioned legislatures.”²³² But the conclusions of the early studies were not uniform. Some scholars were able to find political and distributional effects. For example, Robert Erikson’s study of the impact of reapportionment on the party composition of state legislatures concluded that reapportionment helped the Democratic Party gain seats at the expense of the Republican Party.²³³ The partisan effect was particularly pronounced in the most malapportioned states. Similarly, Douglas Feig concluded that reapportionment was responsible for increased state expenditures in local education and in public welfare.²³⁴ Feig’s study was part of a growing list of early work that found at least some effects of reapportionment and also raised questions about the methodological limitations of some of the earlier studies.²³⁵

As a general matter, later studies, many using more sophisticated methodological analysis, have been less equivocal about the effects of reapportionment. For example, Mathew McCubbins and Thomas Schwartz concluded that reapportionment impacted Congressional budget allocations in favor of metropolitan areas and against urban areas.²³⁶ The McCubbins and Schwartz study is one of several important recent studies reinforcing the conclusion that the design of electoral institutions matter.²³⁷ The

232. Dye, *supra* note 231.

233. Erikson, *supra* note 231.

234. Douglas G. Feig, *Expenditures in the American States: The Impact of Court-Ordered Legislative Reapportionment*, 6 AM. POL. Q. 309, 320 (1978).

235. See, e.g., Roger A. Hanson & Robert E. Crew, Jr., *The Policy Impact of Reapportionment*, 8 L. & SOC’Y REV. 69, 90 (1974); Allan G. Pulsipher & James L. Weatherby, Jr., *Malapportionment, Party Competition, and the Functional Distribution of Government Expenditures*, 62 AM. POL. SCI. REV. 1207, 1219 (1968); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 62 AM. POL. SCI. REV. 880, 896–99 (1969).

236. Mathew D. McCubbins & Thomas Schwartz, *Congress, the Courts, and Public Policy: Consequences of One Man, One Vote Rule*, 32 AM. J. POL. SCI. 388, 409–12 (1988). McCubbins and Schwartz found that the congressional redistricting that occurred as a consequence of the reapportionment cases contributed to the reallocation of federal policy benefits from rural to non-rural citizens. They pointed to shifts in agricultural, regulatory, and transportation as reflecting substantive benefits wrought by congressional reapportionment in favor of non-rural residents.

237. See, e.g., STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* (2008); GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 6 (2002); Stephen Ansolabehere & James M. Snyder Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433, 453–56 (2004); Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part II: The Impact of the Reapportionment Revolution on Congress and State Legislatures*, 15 J. CONTEMP. LEGAL ISSUES 199, 206 (2006); Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1351–52 (2002).

reapportionment revolution mattered for political representation,²³⁸ it mattered for politics,²³⁹ and it mattered for public policy.²⁴⁰

Though it is true that *Baker, Reynolds*, and the reapportionment cases are important because of their impact on the political process, it is also true that the impact of the reapportionment revolution was not sufficiently systematic and was too contextual for the reapportionment cases to be notable on the basis of their political impact alone. Thus, in assessing the reapportionment cases, it is not sufficient to consider political impact alone. *Baker, Reynolds*, and the apportionment cases are consequential because they represent the promise that courts are a necessary and credible institution for addressing the inevitable pathologies of democratic politics. If the Court can compel the restructuring of the political institutions of the upper and lower houses in all of the states, the House of Representatives, and even local governmental units such as school districts, how can there be any limits to the questions that the Court can or should tackle?²⁴¹ The reapportionment cases created an expectation of the Court as a *deus ex machina*, an exogenous force, the god that would deliver us all from the predicaments created by our political rulers. This is a legacy of the reapportionment cases, the Court is always part of the background discussion on questions of law in politics, no matter the question.

Additionally, and relatedly, *Baker, Reynolds*, and the reapportionment cases reflect the lens through which the Court and students of law and politics understand the terms of judicial involvement in democratic politics. The foundational questions and tensions that attend the Court's involvement in supervising democratic politics have their roots in the reapportionment cases. We describe these tensions as dualities and dichotomies. Each duality pulls the Court in two opposing directions. Moreover, the dualities are non-ideological. That is, sometimes the liberals or the conservatives on the Court will prefer one side of the duality and sometimes they'll prefer the other. Outcomes do not invariably track one side of the duality. These dualities enable the pull-push dynamic that sometimes attends the Court's law and politics jurisprudence. These dualities also provide some explanation for why there is often so little consistency in the Court's law and politics jurisprudence and why it is

238. See, e.g., Persily et al., *supra* note 237.

239. See, e.g., COX & KATZ, *supra* note 237.

240. See, e.g., McCubbins & Schwartz, *supra* note 236.

241. See, e.g., Persily et al., *supra* note 237, at 1303 & n.14 (“One could view *Baker* as setting the stage for the Court’s intervention into the arenas of campaign finance, ballot access, vote dilution, race and redistricting, political party regulation, and even creating the right to vote.”).

extremely difficult to articulate an overarching theory of the Court's jurisprudence in this area.²⁴²

Take first the preliminary question of whether courts ought to have a role as supervisors of the ground rules of democratic politics. Until the reapportionment cases—that is, for the vast majority of the history of the United States—the Supreme Court refrained from refereeing disputes over the ground rules of the political process. This posture was understandable for many reasons. The Constitution has very little to say about the types of political disputes that have eventually found their way onto the Court's docket. This includes disputes over political representation, the apportionment of political power, the cabining of political power, the criteria pursuant to which the state can determine who can participate in democratic politics, and the like. Moreover, when the Constitution speaks clearly about the ground rules of democratic politics, its prescriptions are often as much to state as to federal actors.²⁴³ And those directives are clearly to legislatures and not to courts. When the Constitution's prescriptions are more ambiguous, it is unclear whether its directives are aimed in any way toward courts or whether they are exclusively concerned with guiding the behavior of other democratic actors.²⁴⁴ Further still, even where the Constitution seems to speak to courts, for example in the area of racial discrimination in voting per the Fifteenth Amendment, courts, in comparison to legislatures, have limited institutional ability to root out entrenched structural discrimination. It was not until the passage of the Voting Rights Act of 1965 that the United States made significant progress on reducing racial discrimination in voting, notwithstanding the adoption of the Fifteenth Amendment in 1870.²⁴⁵ As compared to legislatures, courts may be at an institutional disadvantage in addressing the structural pathologies of the political process.

Thus, for a very long time, the Court's official position on the question of supervision of democratic politics was one of institutional abstention. Institutional abstention, as judicial posture, is animated by the general worry that the Court, because of a particularly unique institutional fragility, is a specifically vulnerable institution when it engages democratic politics. This posture of judicial restraint is justified by a number of rationalizations,

242. One explanation for why it is difficult to articulate the Court's overarching theory of democratic politics and to ascertain its contours is because the Court does not have one. *See, e.g.*, James A. Gardner, *Partitioning and Rights: The Supreme Court's Accidental Jurisprudence of Democratic Process*, 42 FLA. ST. U. L. REV. 61 (2014).

243. *See, e.g., id.* at 73.

244. *See, for example*, the Guarantee Clause in Article IV, Section 4, which the Court has held nonjusticiable. *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding that Guarantee Clause claims are nonjusticiable political questions).

245. *See, e.g.*, Guy-Uriel E. Charles and Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015).

reflecting an assumption about the nature of the Court's institutional fragility, such as the Court's sense of its own institutional impotence, or that the Court does not have a constitutional mandate to decide democratic disputes,²⁴⁶ or that the Court lacks the institutional competence to resolve fundamental democratic questions,²⁴⁷ or that it is politically prudent for the Court to absent itself from political disputes among the political branches²⁴⁸ so as not to politicize the Court in a way that would undermine the Court's core functions,²⁴⁹ or whatever justification that would rationalize institutional abstention. Whatever the justification, the pull of judicial abstention facilitated the Court's hands-off approach to the problems of democratic politics.

But the pull of judicial abstention was not and is not a unique force. The pressure that the Court as an institution has experienced and continues to experience with respect to its role in democratic politics is not unidirectional. The Court was and is also being pulled, in the opposite direction, by a similarly powerful force urging the Court to engage in the political process. Tugging the Court away from abstention is a force that we will call judicial democratic exceptionalism, which is the conception that the Court is the only institution capable of resolving the pathologies of the political process. At the heart of exceptionalism is the contention that the Court is uniquely situated as an institution to supervise the democratic process because the Court is inoculated from whatever the pathology du jour that is afflicting the democratic processes and leading to the current political problem.

Sometimes the Court gives in to abstention, sometimes it gives in to exceptionalism. Like institutional abstention, the justifications for judicial exceptionalism are manifold. Justifications include the argument that the Constitution has assigned a particular role to the Court, or John Hart Ely's process theory, or the Issacharoff-Pildes partisan lock-up theory, or some notion of constitutional pluralism,²⁵⁰ or political theory, or a straightforward articulation of the principal-agent problem,²⁵¹ or, as in *Bush v. Gore*, the argument that Court is the only institution that can resolve a

246. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 71–72, 139, 153–54 (2003).

247. Heather K. Gerken & Michael S. Kang, *Déjà vu all over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86 (2013); Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1099–1100 (2007).

248. See generally Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2003).

249. See generally Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

250. See, e.g., *id.*

251. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

political impasse, or whatever justification that would rationalize the Court's engagement with democratic politics.

Judicial democratic exceptionalism is the product of the reapportionment cases, though some might argue that it has its roots earlier in the cases addressing racial discrimination in the political process, cases such as *Gomillion v. Lightfoot* and the White Primary Cases. A recurring question in the Court's law and politics cases and in the field of law and politics is whether we learn anything about the Court's ability to regulate democratic politics from the Court's cases addressing racial discrimination in the political process.²⁵² The Court itself has been split on that question. In *Colegrove v. Green*, the Frankfurter-led majority argued that the racial cases were inapposite.²⁵³ In *Baker v. Carr*, the Brennan-led majority relied heavily on *Gomillion v. Lightfoot* in support of its argument that political equality cases were justiciable.²⁵⁴ The racial cases are particularly relevant to the institutional exceptionalism argument because they arrived at a time when the political processes were completely unresponsive to the menace of racial discrimination in democratic politics, as well as in all areas of life.²⁵⁵ Thus, the contention that the Court was the only available option and that it had an obligation to enforce the Fifteenth Amendment's prohibition on race discrimination in voting was compelling. Nevertheless, even if one believed that *Gomillion*, the White Primary Cases, and other racial discrimination cases offered a glimpse of the possibilities for judicial intervention, the reapportionment cases were gamechangers.

Reynolds was a moment of creation.²⁵⁶ In *Gomillion* and the White Primary Cases the Court selectively intervened in the political process to tackle particular instances of local discrimination and negative state laws or local ordinances. In *Reynolds* and the reapportionment cases, the Court sought to remake the electoral processes of the nation and imposed its will on the whole country—all of the states, including local electoral structures, and the United States House of Representatives. The Court acted boldly and muscularly in *Reynolds* in order to curb the worst political excesses.

Reynolds is similar to the Warren-era case that preceded it, *Brown v. Board of Education*.²⁵⁷ *Brown* sought to restructure American society to make it consistent with the Court's understanding of the Constitution's conception of racial equality. *Brown* was obviously a critical intervention.

252. See, e.g., *Vieth v. Jubilerer*, 541 U.S. 267 (2004).

253. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

254. *Baker v. Carr*, 369 U.S. 186, 229–31 (1962).

255. We will return shortly to the question of whether race is an appropriate guide for political participation cases that do not involve race.

256. See generally Roy A. Schotland, *The Limits of Being "Present at the Creation"*, 80 N.C. L. REV. 1505 (2002).

257. 347 U.S. 483 (1954).

Likewise, *Reynolds* sought to restructure the political process to make it consistent with the Court's understanding of the Constitution's conception of political equality. It too was a critical intervention. Both cases hover like a brooding omnipresence over American society and American politics respectively. Their appearance promised much and they were full of possibilities.

The Court's aggressive posture in regulating the Law of Democracy remains with us to this day. *Reynolds* raised the expectation that there is no aspect of democratic politics that is off limits to judicial intervention. If the Court could intervene in the political process in this way, in such grand fashion, and arguably so successfully, the Court must be uniquely positioned to resolve any and all of the excesses of democratic politics. This is how the Court ended up resolving a presidential dispute in the 2000 Presidential elections. *Reynolds* is the umbilical cord that nourished *Bush v. Gore*. "The Court's initial incursion into the political thicket convinced it that the judiciary, and not the political process, even once it had been freed of the stranglehold of malapportionment, should continually regulate the fundamental rules of political engagement. In short, one person, one vote has encouraged the Court's hubris."²⁵⁸ This is the expectation that *Reynolds* and the reapportionment cases created.²⁵⁹

Reynolds birthed institutional exceptionalism and by doing so, it created the tension with an equally strong expectation of judicial abstention, rooted in almost 150 years of judicial inaction in democratic politics. With each issue, the Court is now confronted with two opposing and arguably equal impulses, abstention and exception. This is the first duality.

A second duality is one very familiar to law and it is the traditional debate between rules versus standards.²⁶⁰ When a Court or decisionmaker is applying a legal directive to resolve a problem, such as the regulation of democratic politics including democratic politics, it must decide what legal directive applies to the problem or it must prescribe some legal directive to guide judges, other political actors, and other interested observers.²⁶¹ For

258. Pamela S. Karlan & Daniel R. Ortiz, *Constitutional Farce*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 180 (William N. Eskridge, Jr. & Sanford V. Levinson eds., 1998).

259. To return to the *Brown* analogy, from our view, neither case lived up to the expectation that it engendered that it would fully remake American society in its respective domain. The Court has never tackled systematic racial discrimination in American life in the manner in promised by *Brown*. Similarly, the Court has never tackled political inequality in the deep transformative manner promised by *Reynolds*.

260. See, e.g., Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Justices of Rule and Standards*, 106 HARV. L. REV. 22 (1992).

261. See, e.g., Sullivan, *supra* note 260, at 57 ("Law translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts.").

example, in the reapportionment context, when the Court decided that the design of electoral institutions was subject to a constitutional command of political equality, it had to articulate the substantive content of that command. In formulating the substantive content of the command, the Court also had to decide the level of specificity at which it would articulate the directive, whether the directive would be articulated at a very high level of generality—a standard—or high degree of specificity—a rule.

From the rules/standards literature we know that there are costs and benefits to both approaches. “Rules are more costly to promulgate than standards because rules involve advance determinations of the law’s content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law’s content.”²⁶² If it is important to know the content of a legal directive *ex ante* for a problem that recurs frequently, then a rule is generally better than a standard. If a legal directive is being applied to a problem that is varied and complex with multiple permutations and knowledge about the content of the legal directive is easily learned *ex post*, a standard is generally better than a rule. Rules are thought to limit discretion, whereas standards facilitate discretion and allow decisionmakers to take into account a range of factors, especially when the decisionmaker is trustworthy.²⁶³

When the Court decided to intervene in democratic politics in 1964, the Supreme Court faced a challenging and classic choice between standards and rules.²⁶⁴ One option was to follow the path left open in *Baker v. Carr*. This path would posit the Court as deferential to political decisions made elsewhere and would warrant intervention only when the resulting discrimination “reflects no policy, but simply arbitrary and capricious action.”²⁶⁵ This was a “well developed and familiar”²⁶⁶ judicial standard. A second option was for the Court to impose a more aggressive and assertive set of principles on state legislatures. The obvious candidate for adoption was the “one person, one vote” rule. The Court chose a rule in *Reynolds*, though it could have easily chosen a standard.

262. Kaplow, *supra* note 260, at 562–63.

263. Sullivan, *supra* note 260, at 57.

264. See Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 78–79 (2002); Sullivan, *supra* note 260.

265. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

266. *Id.*; see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 673 (1966) (Black, J., dissenting) (“The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not ‘irrational,’ ‘irrelevant,’ ‘unreasonable,’ ‘arbitrary,’ or ‘invidious.’”); ELY, *supra* note 8, at 121 (stating that “the usual demand of the Equal Protection Clause is simply that the discrimination in question be rationally explainable”).

“One person, one vote” was an attractive option, not least because it was a terrific slogan to rally the nation behind the Court and the Court’s latest incursion into a new and quite difficult political terrain. One person, one vote seemed like a universal constitutional principle of equality. As a constitutional principle, it had intuitive appeal. Moreover, and as importantly, it was administrable; lower courts could easily apply it.²⁶⁷ “One person, one vote” became the law of the land.

The Warren Court took what appeared to be the path of least resistance. We sympathize with the Court’s initial impulse. Were the Court to implement a rationality standard, its role in political questions of this sort would seem interminable, messy, even unbounded. Every redistricting plan would be the subject of litigation and outcomes might be difficult to decipher a priori. In contrast, “one person, one vote” offered the promise of surgical intervention,²⁶⁸ a rule that even a sixth grader might apply.²⁶⁹ It is rigid, to be sure, but simple to apply and predictable in its results. Consequently, and most importantly, the rule would allow courts to play a lessened role into the future. This is an area where the Justices inevitably face criticisms that political considerations and ideology influence their decisions. Rules shield the Justices from these criticisms.

But in choosing rules over standards in *Reynolds* and in the reapportionment cases, the Court may have either intuited that law and politics disputes are best addressed via rules or the Court may have created a preference for using rules to decide law and politics disputes. Whether the Court’s reach for the one person, one vote principle reflects its intuition that law and politics disputes are best resolved by the articulation of a rule as opposed to a standard, or whether the Court created an expectation in *Reynolds* that law and politics disputes will be resolved via rules over standards, a preference for rules over standards seems to exist in election law. Consider some examples.

The Court has declined to impose limits on the problem of political gerrymandering in large part because it has not been able to settle on the

267. But “the more troublesome question,” as John Hart Ely famously quipped, “is what else it has to recommend it.” See ELY, *supra* note 8, at 121; see also Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1270 (2002) (“My goal in this Essay is to express some of my own uncertainties about what the term one person, one vote actually does, or, just as much to the point, *should*, mean.”).

268. But maybe not. See Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1441 (2002) (“[B]right-line rules may [] result in more *widespread* judicial interference in the political process than broad theories because only the latter offer grounds for discerning sensible limiting principles and making contextual judgments regarding application of the equality norm.”).

269. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 750 (1964) (Stewart, J., joined by Clark, J., dissenting) (complaining that “the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic”).

political gerrymandering analog to reapportionment's one person, one vote principle.²⁷⁰ In *Vieth v. Jubilerer*,²⁷¹ four Justices concluded that political gerrymandering claims were not justiciable because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims" currently exists.²⁷² These four, Justice Scalia, who penned the controlling plurality opinion, Chief Justice Rehnquist, and Justices O'Connor and Thomas, were interested in a rule similar to the one person, one vote rule. Four other Justices would find political gerrymandering claims justiciable.²⁷³ These four, Justices Stevens, Breyer, Souter, and Ginsburg, were comfortable articulating a standard to decide such claims, though they articulated three different standards among them.²⁷⁴ The ninth Justice, Justice Kennedy, agreed with the plurality that the plaintiffs' claims must be dismissed, but disagreed with the plurality that political gerrymandering claims were not justiciable.²⁷⁵ Justice Kennedy concluded that a non-justiciability determination would be premature because of the possibility that "some limited and precise rationale" might emerge that would enable courts to decide these disputes.²⁷⁶ Tempted by the allure of the one person, one vote principle, Justice Kennedy longed for "rules to limit and confine judicial intervention."²⁷⁷ *Reynolds* nourished Justice Kennedy's search for "principled, well-accepted rules of fairness" and "a manageable standard for assessing burdens on representational rights."²⁷⁸ Justice Kennedy explicitly used the reapportionment cases as direct comparators.²⁷⁹ He chided the plurality of lacking the "patient approach of *Baker v. Carr*."²⁸⁰ Like Banquo's ghost at Macbeth's banquet, "one person, one vote" silently, accusingly, and maddeningly haunts the Court in *Vieth*.

270. Indeed, some Justices have recognized that malapportionment and partisan gerrymandering are related problems and understand the equipopulation principle as something of a limitation on partisan gerrymandering. See *Reynolds v. Sims*, 377 U.S. at 578–79 ("indiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering"); *Cox v. Larios*, 542 U.S. 947, 949–50 (2004) (Stevens, J., joined by Breyer, J., concurring) ("After our recent decision in *Vieth v. Jubilerer*, 541 U.S. 267 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength."); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1648 (1993).

271. 541 U.S. 267 (2004).

272. *Id.* at 281.

273. See generally *id.* at 317–368.

274. See *id.*

275. *Id.* at 317 (Kennedy, J., concurring).

276. *Id.* at 306.

277. *Id.* at 307.

278. *Id.* at 308.

279. See *id.* at 311.

280. *Id.*

Or consider the campaign finance context. In *Buckley v. Valeo*, the Court addressed the constitutionality of Congress's landmark campaign finance reform statute, the Federal Election Campaign Act of 1974 (FECA).²⁸¹ FECA was a comprehensive regulatory scheme that regulated both the supply of campaign financing and the demand for campaign supply; FECA imposed monetary caps on both campaign contributions and campaign expenditures. The Court announced a rule-like framework in *Buckley* that has generally governed campaign finance regulations for almost forty years. Contribution limitations are generally permissible and expenditure limitations are generally unconstitutional.

Or take section 2 of the Voting Rights Act, which governs the problem of racial vote dilution. In 1982 Congress amended section 2 of the Voting Rights Act to provide that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color”²⁸² Subsection (b) of section 2 stated that a plaintiff makes a claim for vote dilution where “based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” because of race.²⁸³ The Senate Judicial Committee report provided some additional guidance in the form of a number of “typical factors” that would indicate a violation of section 2. In promulgating a revised section 2, Congress opted for a standard (or number of standards) to determine whether section 2 is violated. But in *Thornburg v. Gingles*,²⁸⁴ its first case interpreting the revised section 2, the Court refined Congress's approach and introduced a rule-like framework to ascertain racial vote dilution.²⁸⁵ Plaintiffs must establish three conditions to make out a vote dilution claim post-*Gingles*. First, they must show that the minority group is sufficiently large and compact to fit within a single-member district; second, they must show that the minority group is politically cohesive; and third, they must show that the majority group votes as a bloc to defeat the minority group's candidate of choice.²⁸⁶ It is not farfetched to attribute section 2's stunning success to the Court's ability to smartly convert an amorphous set of congressional standards into a rule-like framework in *Gingles*.

The tug between rules and standards is the second duality. *Reynolds* gave rise to (or reflected) a presumed preference for rules over standards,

281. 424 U.S. 1 (1976).

282. 42 U.S.C. § 1973(a) (2012).

283. *Id.* § 1973(b).

284. 478 U.S. 30 (1986).

285. *See id.* at 50–51.

286. *See Abrams v. Johnson*, 521 U.S. 74, 90–91 (1997).

even where rules are hard to formulate and standards are ready at hand. The absence of rules seems to paralyze election law, even in the presence of standards. One cannot help but wonder whether the Court's election law jurisprudence would be more comfortable with standards had the Court chosen the path opened up in *Baker*. And one wonders whether a preference for standards would have led to a much more interventionist role for the Court in American electoral politics.

The third duality is the race and politics divide. Election law sometimes struggles to understand how to characterize race-tinged political controversies. Sometimes election law frames these issues as racial problems and sometimes it frames them as ordinary conflicts of democratic politics. These frames matter because the framing itself can often be outcome-determinative. Recall here the first duality, the Court is often pulled between abstaining from deciding problems of democratic politics and believing that it is exceptionally poised to address the pathologies of democratic politics. This tension does not exist in the race cases. As a general matter, electoral disputes framed in the register of race are entitled to judicial attention. The only way to avoid judicial scrutiny is to frame them in the register of normal politics. Consider here two prominent examples, *Whitcomb v. Chavis*²⁸⁷ and *White v. Regester*.²⁸⁸

In *Whitcomb v. Chavis*, the plaintiffs sought to invalidate under the Equal Protection Clause a multimember district in Marion County, Indiana.²⁸⁹ The plaintiffs alleged, *inter alia*, that the multimember district diluted the votes of the African American population located within the district.²⁹⁰ The Court rejected the claim and reversed the decision of the district court, in part because it concluded that "there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination."²⁹¹ Additionally, the Court noted that there is "nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen."²⁹² The Court explained that the black voters lost, not because they were black but because they were aligned with a political party that lost political power as a result of a legitimate political contest in which one

287. 403 U.S. 124 (1971).

288. 412 U.S. 755 (1973).

289. See *Whitcomb*, 403 U.S. at 127-29.

290. See *id.*

291. *Id.* at 149.

292. *Id.*

party is expected to win and another is expected to lose.²⁹³ Put differently, these plaintiffs were legitimate political process losers and not victims of racial discrimination. Consequently, the Court was not interested in offering them any relief.²⁹⁴

By contrast, in *White v. Regester*, the Court upheld a district court's findings that multimember districts in Texas violated the Equal Protection Clause.²⁹⁵ The Court read *Whitcomb* to stand for the proposition that plaintiffs challenging multimember districts on vote dilution grounds must "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."²⁹⁶ The Court distinguished *Whitcomb* on the ground that the lower court in *White* found evidence that voters of color were generally excluded from the political process and suffered from a history of racial discrimination.²⁹⁷ Because the plaintiffs in *White* were successfully able to frame their claims in racial terms, they prevailed. This is the race versus politics duality.

CONCLUSION

The story of *Reynolds v. Sims* is generally a story of population equality. The case is widely considered a triumph of judicial intervention in the face of severe democratic pathologies. We are happy to share in the conventional wisdom. But we think that this is a limited view of the case and the revolution it spawned. *Reynolds* is the most important case in the Democracy canon. This is because after *Reynolds*, the Supreme Court set itself on a confident and assertive path through the political process, taking on any and all questions. More than fifty years later, we are still coming to terms with the full implications of that decision.

293. *Id.* at 153 ("The failure of the ghetto to have legislative seats in proportion to its populations emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.")

294. *Id.* at 154–55 ("The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.")

295. *White v. Regester*, 412 U.S. 755, at 765–70 (1973).

296. *Id.* at 766.

297. *See, e.g., id.* at 768–69.