



## CHAPTER SIX

# *Democracy*

Ask the average person what democracy means and she is likely to reply “majority rule.” Ask her what political equality means and she is likely to reply “one person, one vote.” But neither majority rule nor one person, one vote has the kind of historical or constitutional pedigree that most people assume. To the contrary, most states until the 1960s flouted the principle of one-person, one-vote either by design or through inaction. Many states retained legislative district boundaries first drawn at the turn of the twentieth century long after their populations had shifted dramatically. Still other states, even if they went through the motions of redrawing legislative district boundaries after each census, crafted the new districts to perpetuate the existing allocation of power, often relying on state constitutional provisions that deliberately diminished the voting strength of urban areas.<sup>1</sup>

In 1962, when the Supreme Court launched what came to be known as the “reapportionment revolution,” typical examples of how seats were allocated include the following: in Maryland, a majority of the state senate could be elected from districts containing only 14.1% of the state’s population; in Colorado and New York, a majority of the lower house of the state legislature could be elected from districts containing roughly a third of those states’ populations; in Connecticut, each of the state’s sixty-nine towns had equal representation in the state house, which meant that Colebrook (population 592 in 1960) elected two representatives, as did Hartford (population 177,397).<sup>2</sup>

The systematic effects of malapportionment permeated the political system. Across the country, legislatures controlled by representatives from small towns failed to respond fairly to the needs of urban and suburban residents. In the South, government remained firmly in the grip of reactionary legislators

from rural hamlets who formed the backbone of Massive Resistance. Chief Justice Earl Warren remarked that if the Supreme Court had completed the reapportionment revolution a decade earlier, *Brown v. Board of Education* might have been unnecessary since more progressive elements in the South could have dismantled Jim Crow through the political process.<sup>3</sup> At the national level, power within Congress was distorted by the fact that many of the most senior members of the House of Representatives were elected from underpopulated districts drawn by unrepresentative state legislatures. Under these circumstances, it is no small irony that 1962—the year the Warren Court turned in earnest to the problem of apportionment—also marked the publication of Alexander Bickel's *The Least Dangerous Branch*, whose influential critique of judicial review rested on claims about the “countermajoritarian difficulty” of courts overriding legislatures. When Bickel wrote, there was ample reason to question whether legislative judgments in fact reflected the views of contemporary popular majorities.

Today the reapportionment cases are widely accepted as faithful interpretations of the constitutional principles of self-government and equality. They have even won praise by conservative judges and scholars who criticize the Warren and Burger Courts' interventions into other legal and social institutions.<sup>4</sup> And yet, the decisions cannot be explained by appealing to clear textual commands or by invoking original applications of the Constitution. Instead, the decisions illustrate how courts properly interpret the Constitution's text and principles when confronted with changing social conditions and practical circumstances of inequality. Further, the Court's efforts were part of an evolving conversation that ultimately engaged the political branches in providing greater democracy through legislation to enforce the Reconstruction Amendments.

When the Warren Court confronted congressional and state legislative malapportionment, it was well aware of the practice's pedigree. In 1946, the Court in *Colegrove v. Green* had confronted disparities as large as eight-to-one in the population of congressional districts within a state but had refused to intervene in what Justice Frankfurter memorably called “this political thicket.”<sup>5</sup> Noting that “[t]hroughout our history . . . the most glaring disparities have prevailed as to the contours and the population of districts,” the Court held that malapportionment raised a nonjusticiable political question under the Guarantee Clause and that responsibility for addressing the problem belonged to Congress.<sup>6</sup>

By the 1960s, it had become clear that the political process was incapable of fixing itself. Elected officials at the state and federal levels proved largely impervious to appeals from people they did not represent in the first place. Thus, in *Baker v. Carr*,<sup>7</sup> the Supreme Court revisited whether there was a role for judicial review in overseeing the creation of legislative districts. *Baker* challenged Tennessee's state legislative apportionment. Crafted in 1901 and resistant to revision ever since, the plan created legislative districts that by mid-century encompassed wildly different populations. For example, Decatur County's 5,563 citizens had the same number of representatives as Carter County's 23,303 citizens, and while Moore County had one representative for every 1,170 citizens, Rutherford County had one representative for every 12,658 citizens.<sup>8</sup> Tennessee's initial bias against urban areas, together with population growth and movement over the intervening sixty years, resulted in what Justice Clark described as "a topsy-turvical of gigantic proportions" and "a crazy quilt without rational basis."<sup>9</sup>

In *Baker*, the Court sidestepped the Guarantee Clause and instead relied on the Equal Protection Clause. That clause, the Court explained, protects individuals against arbitrary state discrimination, and "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."<sup>10</sup> This conclusion itself marked a refusal to be limited to original applications, as the Fourteenth Amendment was not generally understood at the time of its drafting to reach political rights through the Equal Protection Clause. Indeed, part of the reason for the reduction-of-representation clause in Section 2 of the Fourteenth Amendment and for the Fifteenth Amendment's prohibition on racial discrimination in voting was the Framers' concern that the Equal Protection Clause alone did not protect the voting rights of freedmen.

The *Baker* Court also knew that allocation of political power on criteria other than population was common in our nation's experience. The United States Senate, for example, allocates two seats to each state regardless of its population. Moreover, at the time the Fourteenth Amendment was ratified, a majority of states used factors other than population to allocate seats in their legislative bodies. Even among the ten readmitted southern states, whose new constitutions might be thought to illustrate the requirements of the Reconstruction Amendments, only four used population as the sole determinant of apportionment.<sup>11</sup> The Court's decision to permit constitutional challenges to

malapportionment thus depended on an interpretation of the Equal Protection Clause that went beyond the original understanding of the Fourteenth Amendment's applicability. In order to apply the equal protection principle barring "discrimination [that] reflects no policy, but simply arbitrary and capricious action,"<sup>12</sup> the Court had to determine whether geography, protection of rural interests, or other criteria besides population equality comprise arbitrary bases for apportionment, notwithstanding their assumed validity when the Fourteenth Amendment was ratified.

Over the next two years, the Court interpreted the Constitution to establish apportionment criteria that we take for granted today. In *Wesberry v. Sanders*, the Court construed Article I, Section 2, which provides that members of the House of Representatives be chosen "by the People of the several States," to require that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>13</sup> According to the Court, "[t]o say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government."<sup>14</sup> This conclusion, the Court explained, follows from Article I, Section 2 even though its text does not expressly command a particular apportionment rule:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. In urging the people to adopt the Constitution, Madison said in No. 57 of *The Federalist*:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

Readers surely could have fairly taken this to mean, "one person, one vote."<sup>15</sup>

Four months later, in *Reynolds v. Sims*, the Court interpreted the Equal Protection Clause to require a similar equalization of population in state legislative districts.<sup>16</sup> The Court again reached its conclusion by invoking fundamental principles of democracy and equality rather than the original understanding of the Fourteenth Amendment:

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.<sup>17</sup>

Despite Justice Stewart's complaint that legislative apportionment "is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic,"<sup>18</sup> the principle of one person, one vote had an elegant simplicity that quickly garnered widespread support. Like other constitutional rules (such as *Miranda*<sup>19</sup>) that conservatives have decried as judicial activism, one person, one vote reflects the pragmatic wisdom of the Warren Court. The declaration of a bright-line rule enabled the political branches to understand their obligations and to respond to the principle of political equality in a more systematic way. By focusing on the mathematical weight of individual voters' ballots, the Court avoided the murkier political thicket in which questions regarding the allocation of political power lurked. Yet, by tying the constitutionality of districting schemes to population data, the Court effectively motivated periodic review of how political power is allocated. The decennial census compels reapportionment of virtually every legislative body in response to population shifts every ten years, and legislators' instincts for self-preservation create powerful incentives for them to address malapportionment before the courts intervene.

The idea behind one person, one vote was not merely to ensure abstract equality among individual voters. Whereas malapportionment often gave numerical minorities a stranglehold on government decision-making, one person, one vote was intended to assure that "in a society ostensibly grounded on representative government, . . . a majority of the people of a State could elect a majority of that State's legislators."<sup>20</sup> Moreover, Chief Justice Warren thought that one person, one vote would help ensure that "henceforth elections would reflect the collective public interest . . . rather than the machinations of special interests."<sup>21</sup> To be sure, this ambition has not been fully realized. Increasingly sophisticated redistricting techniques soon gave rise to the "equipopulous

gerrymander”—an apportionment plan that complies with one person, one vote but carves lines with surgical precision to create districts designed to elect or defeat candidates from particular parties or constituencies.

Nevertheless, the Court’s reinvigoration of the Equal Protection Clause as a source of political values spurred a national dialogue on the meaning of political equality. In *Reynolds v. Sims*, the Court observed that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>22</sup> Soon thereafter, the Court acknowledged that even where a redistricting plan complied with one person, one vote, “[i]t might well be that, designedly or otherwise, a [particular] apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”<sup>23</sup> Thus, the reapportionment cases prompted the Court and eventually Congress to address not only quantitative but also qualitative vote dilution.<sup>24</sup>

The Court initially took the lead in developing a theory of qualitative vote dilution. In *White v. Regester*, the Court struck down a Texas state redistricting plan even though it complied with one person, one vote because the way districts were drawn in black and Latino areas meant that minority voters “had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”<sup>25</sup> In *City of Mobile v. Bolden*, however, a four-Justice plurality offered a narrow interpretation of the constitutional provisions that prohibit racial discrimination in voting, construing the Fifteenth Amendment to protect only the right to “register and vote without hindrance” and reading the Equal Protection Clause to require that plaintiffs prove that the challenged election was “conceived or operated as a purposeful device to further racial discrimination.”<sup>26</sup>

Two years later, Congress responded to *Bolden*’s limited focus on intentional discrimination with an amended version of Section 2 of the Voting Rights Act that embraced a group-disadvantaging conception of political equality. The 1982 amendments to Section 2 provide that a voting rights violation is established when a plaintiff shows that the challenged practice “results in” discrimination.<sup>27</sup> Thus Congress made clear that not only discriminatory intent but also discriminatory *results* undermine the Fourteenth and Fifteenth Amendment guarantees of equal voting rights.<sup>28</sup> In its final Term, the Burger Court ratified this group-disadvantaging perspective when it acknowledged

that Congress, in amending Section 2, had “dispositively reject[ed] the position of the plurality in [*Bolden*], which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.”<sup>29</sup> The Court accepted Congress’s directive that adjudication of Section 2 claims must proceed from “a functional view of the political process” and must undertake “a searching practical evaluation of the past and present reality” within the defendant jurisdiction.<sup>30</sup> Factors that are probative of voting discrimination include (but are not limited to) racial bloc voting, the responsiveness of elected officials to a minority group’s concerns, and socioeconomic disparities that might impair a minority group’s ability to participate effectively in the political process.<sup>31</sup>

The 1982 amendments had a transformative effect on representative democracy. At the time Section 2 was amended, a sizeable majority of municipal elections were conducted on an at-large basis, and most southern states elected at least some state legislators from multimember districts. Within a decade, most jurisdictions with substantial minority populations had switched to a system with at least some single-member districts, and state legislatures were elected entirely from single-member districts, some of which were majority black or Hispanic. By the post-1990 round of redistricting, blacks and Hispanics had progressed from being all but locked out of the political process to serving as key members of state redistricting committees, many of which produced more representative state legislatures and congressional delegations. Elected bodies across the nation now have minority legislative caucuses and minority governing officials. Minority legislators, in turn, have enhanced the responsiveness of our laws and policies to the needs and interests of minority communities, further enabling those communities to participate effectively in the political process.

Although many challenges remain in ensuring fairness at all levels of the political process, judicial interpretation of the Constitution has facilitated significant progress toward the development of truly representative political institutions. The Supreme Court has played this important role not by adhering to strict construction of constitutional text or by applying constitutional provisions as they would have been applied when ratified. In applying the textual command of equal protection of the laws and the underlying principles of representative democracy, the Court’s reapportionment decisions are primarily concerned with giving the Constitution practical meaning in a

society of shifting demographics as well as historic and contemporary inequality. When the Court unduly narrowed the constitutional principle of political equality in *City of Mobile v. Bolden*, Congress supplied a necessary corrective to which the Court subsequently deferred. This trajectory of interpretation illustrates the evolutionary process by which our courts, together with the political branches, faithfully apply the Constitution's text and principles to a changing world.