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Power in Numbers:

REAPPORTIONMENT AND THE CONSTITUTION

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NATIONAL CONSTITUTION CENTER

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The completion of the decennial census is one of the recurring rituals of American citizenship. Periodically, a packet of materials is sent to each household including a variety of questions about the number and characteristics of the people making up the household. The data that is collected is now used for a variety of reasons by the federal government. However, some people might be surprised to find out that the Constitution actually *requires* the government to conduct a census every ten years[1]. The primary reason is that an accurate count of the population of each state is necessary to determine the number of members of the House of Representatives that should be elected from that state.

It sounds straight-forward: Simply count heads and use a mathematical formula to insure that each state is represented fairly. But the subject of congressional representation, and how political power should be divided, was born in conflict at the Constitutional Convention and has been a matter of intense political controversy ever since. This white paper begins by exploring the dispute over representation at the Convention, a debate that nearly deadlocked the delegates and later spilled over into the ratification contest. The paper then looks at how the principle of proportional representation in the House of Representatives has been applied in practice, an exercise that has been complicated throughout American history by issues of race and federalism. At first, Congress left the electoral process largely to the states, with the result that some states used "at large" elections to choose their entire congressional delegations, while others elected representatives from individual districts, as all states do today. Increased federal control beginning in the 1840s imposed greater uniformity, but could not contain the politically volatile effects of shifting population and the influence of race. In the 1920s, as population shifted toward the urban industrial states and away from rural areas, a divided Congress could not agree on a new apportionment plan, even though it was constitutionally required to do so. As the 20th century unfolded, the courts played a more aggressive role on the electoral landscape, beginning with rulings in the 1930s that affected the apportionment of state legislatures. Today apportionment decisions continue to be politically charged, involving such issues as the creation of "majority-minority" electoral districts and the geographic contortions of partisan political gerrymandering. All of this modern-day conflict is rooted in the Constitution of 1787 and its subsequent amendments.

Disagreements Is Born

The idea that representation in the House would be based on anything but population would seem strange to most Americans today. But in fact, the question of how power would be distributed in the new federal legislature provoked a spirited debate at the Constitutional Convention that gathered in Philadelphia in 1787. Indeed, for a time the heated dispute over this issue threatened to derail the entire constitution-making project. A similar dispute had arisen during the process of drafting the Articles of Confederation that began more than a decade earlier. In 1776, John Dickinson's initial draft of the Articles provided that each state should have equal representation in the legislature. More nationalist members of the Continental Congress pressed instead for the creation of a regime under which representation would be apportioned according to population. However, their arguments were ultimately rejected, and the principle of equal representation was enshrined in the document that was ratified in 1781.[2]

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By contrast, the Virginia plan, submitted by Edmund Randolph to the Philadelphia convention on May 29, 1787, embraced the concept of proportional representation—the idea that larger states should have more representatives

in the legislature than smaller states.[3] Some representatives of the smaller states were appalled by this suggestion. For example, William Paterson of New Jersey viewed the principle of proportional representation as "striking at the existence of the lesser states" and argued on June 9 that "there was no more reason that a great individual state, contributing much, should have more votes than a small one, contributing little; than that a rich individual citizen should have more votes than an indigent one."[4] On June 11th, Roger Sherman of Connecticut proposed a compromise whereby representation in one house would be based on population and states would have equal representation in the other house.[5]

A number of the delegates from the smaller states showed an inclination to accept some version of this proposal. Against this background, when Rufus King of Massachusetts and James Wilson of Pennsylvania moved that the lower house be apportioned along the lines suggested by the Virginia plan, the motion carried on a 7–3 vote, with one small state (Maryland) divided.[6] Similarly, by a vote of 9–2, the delegates supported a refinement of the language which provided specifically that representation for each state in the lower house be based upon free population plus three–fifths of the slave population.[7] However, the delegates from the larger states were initially unwilling to brook any compromise on the basic issue of proportional representation. The same day that Sherman made his proposal, the delegates rejected a motion to provide for equal representation in the upper house on a 6–5 vote.[8]

The discussions became more heated when the Convention returned to the issue on June 27th. The argument raged for several days, with both sides citing theoretical and practical considerations in support of their respective positions. For example, arguing against proportional representation, Luther Martin of Maryland contended that "the [new] government ought to be formed for the states, not individuals" and asserted that, under a regime of proportional representation, "the small states would be…enslaved."[9] By contrast, James Wilson of Pennsylvania argued that the government should be "for *men*, [not] for the imaginary beings called *states*," and complained that, if the principle of proportional representation was rejected for either house of the legislature, it would "enable the minority to control, in all cases whatsoever, the sentiments and interests of the majority."[10] But the arguments apparently failed to sway many delegates on either side. On June 29th, the convention reaffirmed its support for proportional representation in the lower house by a vote of 6–4.[11] Three days later, an equally–divided convention refused to adopt the motion of Oliver Ellsworth of Connecticut providing for equal representation in the upper house,[12] notwithstanding the warning of Gunning Bedford of Delaware that the small states would not accept such a regime.[13]

The Convention Breaks Its Deadlock

With the convention thus divided and the success of the constitution–making process plainly in the balance, on July 2nd the issue of representation was committed to a committee composed of one representative from each state. On July 5th, the committee issued a report calling for the creation of a lower house apportioned along the lines that had been approved on June 11th and an upper house in which each state would have an equal voice, with the proviso that all taxing and spending measures must originate in the lower house.[14]

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The decision of the committee to embrace the concept of equal representation in the upper house brought immediate condemnation from not only Wilson and Madison, but also Gouverneur Morris of Pennsylvania.[15] However, before making a final decision on this issue, the delegates wrangled for several days over the procedure to be used for determining representation in the lower house. Some argued that the periodic reapportionment decisions should be left to the discretion of the legislature, and many contended that wealth as well as population should be considered in the apportionment process. More specifically, the delegates sparred over the question of whether slaves should be counted in the basis of representation for the lower house, with South Carolinas Pierce Butler and Charles Coatsworth Pinckney asserting that slaves should be counted equally with free people[16] and Gouverneur Morris contending that slaves should not be considered at all in determining representation.[17] But ultimately, on July 12th, the delegates approved the same formula that had initially been adopted on June 11th, providing that the representation of each state would be determined by combining the free population of the state with three–fifths of the slave population.[18]

The convention turned to the proposal for equal representation in the upper house on July 14th. Supporters of the principle of proportional representation attacked the proposal, with James Madison asserting that "the

proper foundation of government [would be] destroyed by substituting an equality in place of a proportional representation"[19] and Rufus King contending that the committee proposal violated "a clear principle that in a free government, those who are to be the objects ought to influence the operations of it."[20] By contrast, Jonathan Dayton of New Jersey declared that "the smaller states can never give up their equality"[21] and Caleb Strong of Massachusetts warned that the union itself might collapse if the committee proposal was rejected.[22] Against this background, the convention approved the concept of equal representation by a single vote on July 16th, with the delegates from North Carolina deserting their erstwhile large state allies to support the committee proposal and Massachusetts divided.[23] Although Edmund Randolph complained bitterly that the adoption of the principle of equal representation in the Senate "had embarrassed the business [of constitution-making] extremely,"[24] the delegates from the large states reluctantly acquiesced in the result, and Article I of the Constitution that was approved by the convention provided for a House of Representatives apportioned according to free population plus three-fifths of the slave population and a Senate in which each state has two representatives.

However, the decision by the convention did not end the controversy over these provisions. During the struggle over ratification, those who opposed the new constitution put forth many of the same objections to the apportionment of representatives that had been raised at the convention itself. Thus, attacking the inclusion of slaves in the basis of representation, the Antifederalist Brutus asked "if [slaves] have no share in government, why is the number of members in the assembly, to be increased on their account" and asserted that the Three Fifths Clause "will give [the Southern States] an unreasonable weight in the legislature."[25] In Pennsylvania, Samuel Bryan took a different tack, complaining that "the senate…is constituted on the most unequal principles."[26]

Even if less than entirely pleased with the resolution of apportionment issues by the convention, supporters of the Constitution were obliged to defend the convention's decisions from such attacks. Thus, in *Federalist No. 54*, Madison assumed the persona of a fictional Southern slave-owner to support the Three-Fifths Clause. He noted that many people believed that representation should be apportioned on the basis of wealth as well as population, and also the apparent unfairness of counting slaves for purposes of taxation but not representation.[27] By contrast, while observing that "the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty in the individual States and an instrument for preserving that residuary sovereignty," Madison's defense of the makeup of the Senate in *Federalist No. 62* was based primarily on an appeal to expediency. Noting that "[a] government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States," he observed that "the advice of prudence must be to embrace the lesser evil [of equal representation in the Senate]" in order to avoid the collapse of the constitution-making project.[28]

Although a number of theorists have continued to criticize the undemocratic character of the Senate, the idea of changing the equal representation of the states in that body has not gained any political traction. By contrast, even after the Constitution was ratified, the concept of considering slaves in determining representation in the House of Representatives remained controversial. Antislavery politicians pressed for repeal of the Three Fifths Clause, claiming that it gave the Southern states an unfair advantage in the House and contributed to a proslavery tilt in the policy of the federal government.[29] The controversy came to an end after the Civil War with the ratification in 1865 of the Thirteenth Amendment, which outlawed slavery itself.

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Freed Slaves and "Indians Not Taxed"

However, the abolition of slavery created a different problem for the Republicans who controlled Congress in the period immediately following the Civil War. Under the original Constitution, the ex-slaves who were freed by the Thirteenth Amendment would automatically be counted fully in determining the representation to which the former slave states were entitled in the House of Representatives, rather than having only three-fifths of their number counted as it had been while they had remained in enslaved. But at the same time, even free African-Americans were not allowed to vote in the Southern states, and the Thirteenth Amendment did nothing to change this state of affairs. Thus, if the Constitution had remained otherwise unchanged, the abolition of slavery would have had the effect of enhancing the political power of white Southerners—the same group whose decision to secede had precipitated the Civil War. Seeking to address this problem, Congress included a provision in the Fourteenth Amendment, ratified in 1868, which provided that if a state denied any group of adult male citizens the right to vote, the representation of

the state in the House of Representatives would be reduced accordingly.[30] But despite the fact that this provision was ratified, it was never enforced, and seats in the House of Representatives have continued to be allocated on the basis of population.

The Constitution also provides that "Indians not taxed" should not be included in the basis of representation. However, in 1940 it was determined that no Native Americans any longer fell into that category.[31] Thus, since that date all inhabitants of a state have been counted equally in determining the number of representatives to which that state is entitled.

In contrast to its treatment of slaves and Native Americans, the Constitution does not specifically address other aspects of the apportionment process. Article I does establish an initial allocation of representatives, mandate that a census be taken every ten years, and require Congress to reallocate representatives based on the results of each census. But while the Constitution sets the initial number of representatives at sixty–five, provides that the number of representatives not exceed one per thirty thousand inhabitants and requires that at least one representative be allocated to each state, it does not place any other limitations on the total number of representatives that are to serve in the House. Moreover, while mandating that representatives be chosen by those who have the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature," Article I is silent on the question of whether House members should be chosen at large or in single member district and how those districts should be configured in each state. Instead, the Constitution vests states with the authority to determine the "Times, Places and Manner" of congressional elections, but gives Congress the authority to displace state rules with national standards.

Against this background, when Congress first confronted the task of apportionment after the first census of 1790, it considered using the constitutional minimum of 30,000 persons as the size of each district.[32] Dividing that number into the total population of 3,615,920 indicated that the House of Representatives should contain 120 members. When that number was divided into the population of individual States, each quotient was a whole number with a fractional remainder. Thus, the use of the 30,000 divisor for Connecticut's population of 236,841 indicated that it should have 7.89 Representatives, while Rhode Island, with a population of 68,446, should have 2.28 Representatives. Because each State must be represented by a whole number of legislators, it was necessary either to disregard fractional remainders entirely or to treat some or all of them as equal to a whole Representative.

Congressional Math

In the first apportionment bill passed by Congress, an additional Representative was assigned to the nine States whose quotas had the highest fractional remainders. Thus, Connecticut's quota of 7.89 gave it 8 and Rhode Island's smaller remainder was disregarded, giving it only 2. Although that method was supported by Alexander Hamilton, Thomas Jefferson persuaded President Washington to veto the bill, in part because its allocation of eight Representatives to Connecticut exceeded the constitutional limit of one for every 30,000 persons.

In response to that veto, Congress adopted a proposal sponsored by Thomas Jefferson that disregarded fractional remainders entirely (thus giving Connecticut only 7 Representatives). To overcome the basis for the veto, the size of the House was reduced from 120 to 105 members, giving each Representative an approximate constituency of 33,000 instead of 30,000 persons. Today mathematicians sometimes refer to that method as the "method of greatest divisors," and suggest that it tends to favor large States over smaller States. The same method continued to be used for several decades as Congress reapportioned the House of Representatives after each succeeding census.

1842 was a watershed year for the establishment of federal control over elections to the House of Representatives. Prior to that time, Congress had not exercised its supervisory power over the "Time, Place and Manner" of such elections. Thus, for example, states could choose to elect their entire delegations at large through statewide elections or to select representatives individually from single member districts. By 1842, the trend was clearly toward the use of single member districts, but some states remained committed to the use of statewide elections to choose their entire delegations. However, over the bitter objections of those who complained

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that it was an unjustifiable intrusion on state sovereignty, the Apportionment Act of 1842 required all members of the House to be elected from single member districts composed of "contiguous territory."[33] This requirement was dropped from the 1850 statute, but reinstated in 1862. The Apportionment Act of 1872 added a requirement that each district contain "as nearly as practicable an equal number of inhabitants." Both requirements were included in every subsequent apportionment statute through 1911.

The 1842 statute also abandoned the use of the method of greatest divisors in allocating representatives in favor of an approach supported by Senator Daniel Webster. The Webster method took account of fractional remainders that were greater than one half by allocating "one additional representative for each State having a fraction greater than one moiety." Thus, if that method had been used in 1790, Connecticut's quota of 7.89 would have entitled it to 8 Representatives, whereas Rhode Island, with a quota of 2.28, would have received only 2. The Webster method is also described as the "method of major fractions." However, the use of this method to determine the apportionment of the House proved short-lived; the statutes passed between 1850 and 1911 instead adopted a methodology proposed by Rep. Samuel F. Vinton of Ohio, which essentially embodied the principles first put forward by Alexander Hamilton in 1790.

The events that followed the census of 1920 dramatically changed the dynamic of the reapportionment process.[34] Although the debates over the reapportionment of the House of Representatives often generated intense emotions, prior to the 1920s Congress always managed to fulfill its constitutional duty and produce an appropriate reapportionment plan soon after the results of the decennial census became available. With the exception of the Apportionment Act of 1842, each successive plan had produced an increase in the membership of the House, so that after the Apportionment Act of 1911 the membership had risen from its original 65 to 435.

By contrast, the reapportionment of the House of Representatives was delayed for almost an entire decade following the 1920 census. In large measure, the difficulties that surrounded the reapportionment process reflected the fact that the period from 1910 to 1920 had seen a major increase in the population of industrial areas with no similar increase in the population of the rural areas of the South and Midwest, which should have required a concomitant reallocation of representation in the House. As a result, even if the membership of the House had been greatly expanded, the seats of a number of members would have been endangered if the requirements of contiguity and equal population had been retained. Against this background, prior to 1929 all efforts to pass a new apportionment statute proved unsuccessful. Instead, in direct violation of the mandate of the Constitution, seats in the House continued to be apportioned according to the terms of the 1911 statute.

However, as the 1930 census approached, the effort to adopt a new apportionment statute took on increasing urgency, and in 1929 the supporters of the reapportionment effort were finally successful in pushing a new apportionment statute through Congress. The Apportionment Act of 1929 was quite unlike previous statutes dealing with the issue. The 1929 statute made no mention of either contiguity or districts of equal population. Moreover, it did not specify either the total number of representatives to be elected to the House or the method to be used in apportioning those representatives among the states. Instead, the act simply directed the President to report the results of the census and provided that, unless Congress passed a new apportionment law, representatives would be distributed among the states using the method established in the most recent statute. Thus, the statute ensured that the reapportionment process would never again be derailed by a congressional deadlock.

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Since the passage of the 1929 statute, the membership of the House has remained unchanged at 435, with the exception of a brief period after the admission of Alaska and Hawaii to the Union required an expansion to 437 members until the apportionment process that followed the next census. Congress did, however, enact significant changes in 1941, making the process entirely self-executing and replacing the previous methods of apportioning representatives with the "method of equal proportions," a complex mathematical formula developed specifically for the apportionment process by a committee of the National Academy of Sciences.[35] In addition, in 1967, Congress reinstated the requirement that representatives be chosen from single member districts. However, beginning in the mid-1960s, it was the Supreme Court that would take the lead in fundamentally altering the reapportionment landscape.

The Courts Weigh In

The idea that the federal courts should play a significant role in controversies over congressional reapportionment is of relatively recent vintage. The Supreme Court's first major foray into this area came with the decision in *Wood v. Broom*.[36] Wood was a challenge to the configuration of congressional districts that had been created by the Mississippi state legislature in 1932. The challengers argued that the districts ran afoul of the compactness, contiguity and equal population requirements of the Apportionment Act of 1911, and that by its silence the 1929 Act had implicitly left those requirements in place. Four members of the Court would have dismissed this claim on jurisdictional grounds. However, a majority of the justices reached the merits of this claim and concluded that the 1911 requirements had not survived the passage of the 1929 statute. At the same time, the majority explicitly declined to resolve the jurisdictional issues raised by the dissenters.

While the plaintiffs in *Wood* also asserted that the Mississippi apportionment plan violated the Equal Protection Clause of the Fourteenth Amendment, this claim was not even discussed in either the majority opinion or the statement of the dissenters. By contrast, Fourteen years later, the equal protection argument played a far more prominent role in *Colegrove v. Green*.[37]

Colegrove arose from a challenge to the configuration of the congressional districts in Illinois, which had been created by the state legislature in 1901 and had not been changed, despite the fact that by 1940, the largest of the districts had a population of over 900,000, while the smallest had only 112,116 residents. As in *Wood*, the plaintiffs alleged that the configuration violated not only the statutory requirements for apportionment, but also the Equal Protection Clause.

Five of the eight participating justices determined that the Court should not reach the merits of either of these claims, with four justices arguing that only Congress had the authority to overturn state decisions on congressional apportionment[38] and one concluding that the Court should only exercise jurisdiction over apportionment issues "only in the most compelling circumstances."[39] However, three justices dissented, contending that the Court should exercise jurisdiction over the challenge to the Illinois apportionment scheme and concluding that the Illinois system violated the Equal Protection Clause.[40] Within less than two decades, the idea that the Court should intervene against what it saw as unfair apportionment schemes became established doctrine.

Ironically, the earliest cases in which the Court took a more aggressive role involved the apportionment of state and local governments rather than the House of Representatives. In sharp contrast to the allocation of representatives in Congress, for most of American history the Constitution was seen as having little to say about the apportionment of state legislatures. At the time that the Constitutional Convention met, the states used a wide variety of different formulas for determining the makeup of their legislative bodies. For example, representation in both houses of the New York state legislature was determined primarily by population, while Massachusetts based representation in one house on the amount of taxes paid in a county and Delaware provided each county equal representation in both houses of its legislature.[41]

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The delegates who attended the Constitutional Convention in 1787 did not come to Philadelphia with the objective of changing this reality. Thus, it should not be surprising that the Constitution by its terms has almost nothing to say about the apportionment of state legislatures. To be sure, Art. VI, sec. 4, does require the federal government to "guarantee to every State in the Union a Republican Form of Government." However, in the parlance of the time, any government that was representative in the broadest sense would have been considered "republican," and the delegates clearly viewed all of the existing state governments as warranting this description. In any event, in 1849, the Supreme Court held that it had no authority to resolve the question of whether the government of a state was republican in form.[42] The Fifteenth and Nineteenth amendments did require states to allow members of racial minority groups and women, respectively, to vote. But none of the amendments to the Constitution specifically addressed the question of how representation in state legislatures should be apportioned.

Against this background, the idea that each state retained broad discretion to determine the structure of its own state legislature remained a central tenet of American federalism through middle of the twentieth century. As a result, the

apportionment schemes outlined in state constitutions differed greatly from one another, with some constitutions mandating that representation be based entirely on population and others focusing in whole or in part on the idea that each county should be entitled to equal representation. The situation was further complicated by the fact that state legislatures at times failed to enact statutes that would faithfully implement the standards established by the state constitution. As a result, in many states residents of rural areas wielded political power in the legislature that was far out of proportion to their numbers.

The situation in Alabama in 1962 provided a particularly striking example of this phenomenon. In that state, each county was allocated one seat in the state senate by statute. Thus, despite a state constitutional mandate that required that representation in the state senate be apportioned generally according to population, one state senator represented over 600,000 residents in Jefferson County, and one state senator also represented the 15,417 residents of Lowndes County. But prior to 1960, the Supreme Court gave no indication that it might be prepared to intervene against such regimes.

A More Aggressive Role for the Judiciary

In 1960, the decision in *Gomillion v. Lightfoot*[44] provided the first harbinger of change. *Gomillion* was a challenge to an Alabama statute that changed the shape of the boundaries of the city of Tuskegee from a square to that of "an uncouth twenty-eight-sided figure."[45] The effect of this change was to prevent virtually all African-Americans who had previously been residents of Tuskegee from voting in city elections. The plaintiffs argued that the decision of the state legislature violated the Fifteenth Amendment because it was intentionally designed to deprive African-Americans of the ability to vote in city elections. Relying on *Colegrove v. Green* among other cases, the state argued that the federal courts did not have authority to overturn state decisions establishing political boundaries.[46] The Court unanimously rejected this argument, concluding that the plaintiffs were entitled to relief if they could demonstrate that the change in boundaries had in fact been racially motivated.

Gomillion was the first case in which the Court indicated that the Constitution imposed significant limitations on the authority of the states to draw electoral districts. However, Justice Felix Frankfurter's majority opinion took great care to limit the implications of the decision. Frankfurter did not purport to overrule *Colegrove*; instead, he emphasized that the plaintiffs asserted that the Alabama statute was "not an ordinary geographic redistricting measure, even within familiar abuses of gerrymandering," but was instead designed to prevent African-Americans from voting in Tuskegee because of their race.[47] He gave no indication that the Court would take a similar view of cases in which no racial component was involved.

Nonetheless, the Court soon evinced a determination to actively supervise the apportionment process even in circumstances where racial issues were not involved. In its 1962 decision in *Baker v. Carr*--a challenge to the makeup of the Tennessee legislature--the Court rejected the arguments of Justices Frankfurter and John Marshall Harlan and for the first time held unambiguously that the federal courts had the authority to decide whether the apportionment of state legislatures violated the Constitution.[48] While the *Baker* Court did not resolve the merits of the challenge, the decision presaged a far more aggressive role for the judiciary in resolving disputes that revolved around apportionment issues.

The implicit promise of *Baker* came to fruition in 1964 with the decisions in *Wesberry v. Sanders*[49] and *Reynolds v. Sims*.[50] *Wesberry* was a challenge to the congressional apportionment scheme of the state of Georgia, where the configuration of the congressional districts had remained unchanged since 1931 and the population of the largest district was almost three times that of the smallest district. Over two dissents, the Court struck down this plan. Focusing on the constitutional mandate that the members of the House of Representatives be chosen "by the People of the several States," the majority opinion declared that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."[51] Later cases would clearly establish that even minor deviations from mathematical equality of population in congressional districts would be found to be unconstitutional.[52]

Four months after the decision in *Wesberry*, the Court took a similar stance on the apportionment of state legislatures in *Reynolds v. Sims* and several companion cases. *Reynolds* was a challenge to the makeup of

the Alabama state legislature. As already noted, although the Alabama constitution explicitly required that representation in both houses of the legislature be apportioned according to population, the state legislature had failed to adopt legislation effectuating this mandate,

legislators represent people, not trees or acres

With Justice Harlan once again dissenting, the Supreme Court concluded that the apportionment of the Alabama state legislature violated the Equal Protection Clause of the Fourteenth Amendment. Speaking for the Court, Chief Justice Earl Warren observed that "legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests"[53] and argued that "as long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[54] Expanding on this premise, Warren further contended that

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.[55]

He further asserted that

> with respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment.[56]

Based on this analysis, the *Reynolds* and the companion decision in *Lucas v. Forty-Fourth General Assembly of Colorado*[57] established the principle that both houses of each state legislature must be apportioned according to population. To be sure, unlike the Court's approach to congressional districting, subsequent decisions have allowed slight divergences from mathematical equality in the creation of state legislative districts.[58] Nonetheless, the basic principle of one person, one vote, as it has come to be known, has become firmly ensconced in the canon of constitutional law.

While *Wesberry, Reynolds* and their progeny mandated that the vote of each person would have roughly equal weight in deciding elections, these decisions did not guarantee that each racial and political group would have proportionate representation in the legislature. Under the American system, only the candidates who receive the most votes in elections are seated in the legislature. Thus, even with the uniform application of the one person, one vote principle, the vagaries of the apportionment process can leave political or minorities underrepresented or even totally unrepresented in the legislature. Often this underrepresentation is a product of what is known as "gerrymandering"—a conscious effort to draw district lines in a manner designed to create an electoral advantage for one political or racial group, and a corresponding disadvantage for another group.[59]

Gerrymanders and the Constitution

For constitutional purposes, partisan gerrymanders have been treated quite differently from districting decisions based in whole or in part on race. The Supreme Court has considered attacks on the constitutionality of partisan gerrymanders on a number of occasions since 1986.[60] While some of the justices maintain that the federal courts have no jurisdiction to even consider allegations of partisan gerrymandering,[61] a majority has indicated that such redistricting plans might be invalidated in rare circumstances.[62] However, none of the constitutional attacks has ultimately been successful.

The dispute over the reapportionment of the state of Texas in the wake of the 2000 census illustrates the complexity of the problems posed by partisan gerrymanders. When the census figures first became available, control of the Texas state government was divided between Republicans and Democrats. When the state legislature proved unable to produce a reapportionment plan that met the criteria established in *Wesberry v. Sanders*, a federal district court imposed a plan on the state in 2002. However, in 2003 the Republicans gained control of both houses of the state legislature, and after a bitter partisan battle passed a new plan which was designed to maximize the number of Republicans elected to Congress while at the same time conforming to the *Wesberry* standards. Despite the partisan motives underlying the creation of the new plan and the fact that such mid-decade redistricting was almost unprecedented, in the 2006 decision in *League of United Latin American Citizens v. Perry*, a deeply-divided Supreme Court refused to hold that the political gerrymander was unconstitutional.[63]

a deeply-divided Supreme Court refused to hold that the political gerrymander was unconstitutional

A majority of the justices did, however, conclude that the Texas legislature was required to redraw one of its congressional districts in order to avoid diluting the voting power of the state's Latino population.[64] Indeed, in general the Court has been far more willing to intervene in apportionment cases that revolve around considerations of race. In this context, legal challenges can be based not only on the Fourteenth Amendment, but also on the Fifteenth Amendment and section 2 the Voting Rights Act of 1965, each of which prohibits discrimination on the basis of race in the electoral process. Conscious attempts to limit the political influence of minority races are thus clearly illegal on both constitutional and statutory grounds. In addition, the 1982 amendments to the Act provide that an apportionment plan should be deemed to discriminate on the basis of race when "the totality of circumstances, [indicate] that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a minority race]." This provision has been interpreted to allow courts to consider not only the intent underlying the creation of apportionment plans, but also the impact that such plans have on the ability of minority groups to actually elect candidates in determining whether apportionment plans violate section 2.[65]

Section 5 of the Voting Rights Act adds an additional layer of complexity to the process. Section 5 requires that jurisdictions with a history of racial discrimination in the electoral process obtain "preclearance" from either the Justice Department or the federal courts before making any changes in procedures related to voting or elections. Preclearance can only be granted if it is determined that the change will not have the effect of diluting the voting power of minority races.

This provision automatically comes into play every ten years as states are required to reapportion both state legislative and congressional districts to take demographic changes into account. Because reapportionment is by its nature a change in the electoral process, states that are subject to the preclearance requirement must obtain approval of their redistricting plans from the Justice Department or face the prospect of defending those plans in federal court. As part of the preclearance process, Justice Department officials have often pressed states to create a substantial number of districts in which African-Americans (or in some cases Hispanic-Americans) are a majority of the voting population.[66] The theory is that, given the sharp political divisions between whites and racial minorities, the creation of such "majority-minority" districts is necessary to ensure that the interests of African-Americans and other racial minorities are adequately represented in the legislative process. At times, the districts that have been created in order to satisfy this imperative have had a very unusual shape.

Those who opposed the creation of such districts have argued that any consideration of race in the districting process violated the Fourteenth Amendment. The Supreme Court confronted this issue in a number of cases, beginning in 1993 with the decision in *Shaw .v Reno*.[67] Ultimately, in 1995, the Court concluded in *Miller v. Johnson*[68] that while race can be a factor in the redistricting process, racial concerns cannot be the "predominant" factor, subordinating "traditional race-neutral districting principles [such as] compactness, contiguity [and] respect for political subdivisions or communities defined by actual shared interests."[69]

Cases such as *Perry* and *Miller* reflect the limits of the Court's efforts to ensure that the apportionment of both Congress and the state legislatures would reflect an abstract concept of fairness. To be sure, the Constitution itself requires that representatives be distributed among the states according to population, and all players in the process must work within these parameters For example, since the 2010 census shows that the nation's population has shifted toward Republican strongholds in the South and West, the Republican Party will almost inevitably benefit from the reapportionment process. In addition, *Wesberry v. Sanders, Reynolds v. Sims* and their progeny have imposed stringent limitations on the apportionment process. But political operatives of all stripes have shown great ingenuity in working within these rules to bend the process to their own advantage. Thus, Republican gains in the 2010 state legislative elections will enhance their ability to shape districts that will increase the likelihood that members of their party will be elected to both the House of Representatives and state legislatures in the decade to come. In short, the allocation of legislative authority under the Constitution continues to be determined by a complex interaction between politics and principle.

Notes

[1] **United States Constitution**, Art. I, sec. 2, para. 3.

[2] The dispute over the basis of representation under the Articles of Confederation is described in detail in Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774–1781* (Madison, WI: University of Wisconsin Press, 1970), pp. 141–45.

[3] Max Farrand, ed., *The Records of the Federal Convention of 1787*, v. 1, p. 20 (Revised ed., 1937)

[4] *Id*. at 177–78.

[5] *Id*. at 196.

[6] *Id*. at 200.

[7] *Id*. at 201.

[8] *Id*. at 201–02.

[9] *Id*. at 437.

[10] *Id*. at 483.

[11] *Id*. at 468.

[12] *Id*. at 510.

[13] *Id*. at 491–92.

[14] *Id*. at 526.

[15] *Id*. at 527–30.

[16] *Id*. at 580–81.

[17] *Id*. at 581–82.

[18] *Id*. at 596–97.

[19] *Id*., v. 2, p.8.

[20] *Id*. at 6.

[21] *Id*. at 5.

[22] *Id*. at 7.

[23] *Id*. at 15.

[24] *Id*. at 17.

[25] Bernard Bailyn, ed., *The Debate on the Constitution: Fedralist and Antifederalist Speeches, Articles and Letters during the Struggle for Ratification, Part One*, p. 319 (1993).

[26] *Id*. at 60–61.

[27] *The Federalist Papers No. 54* (Madison), http://www.foundingfathers.info/federalistpapers/ (last visited January 2, 2011).

[28] *Id*. No. 62.

[29] See, for example, the Liberty Party Platform of 1844, http://www2.volstate.edu/socialscience/FinalDocs/Jacksonian/liberty.htm, (last visit January 6, 2011).

[30] George P. Smith, "Republican Reconstruction and Section Two of the Fourteenth Amendment," *Western Political Quarterly*, Vol. 23, No. 4 (Dec., 1970), pp. 829 ff., provides a detailed account of the background of section two.

[31] "*Method of Determining 'Indians Not Taxed'*", Opinions of the Solicitor of the Department of Interior, v. 1, pp. 990–97 (November 7, 1940.)

[32] The account of the apportionment process after the 1790 census is taken from United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992).

[33] The background of the 1842 Apportionment Act is described in detail in Nicolas Flores, "The 1842 Apportionment Act," http://archive.fairvote.org/library/history/flores/apportn.htm, last consulted January 2, 2011.

[34] Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban/Rural Conflict in the 1920s* (Athens, GA: University of Georgia Press, 1990). Orville J. Sweeting, "John Q. Tilson and the Reapportionment Act of 1929," *Western Political Quarterly*, Vol. 9, No. 2 (June, 1956) pp. 434 ff. provide detailed accounts of the events that culminated in the passage of the Reapportionment Act of 1929.

[35] The functioning of the method of equal proportions is described in detail in David C. Huckabee, "The House Apportionment Formula in Theory and Practice," CRS Report #RL30711 (October 10, 2000).

[36] 287 U.S. 1 (1932).

[37] 328 U.S. 549 (1946)

[38] *Id*. at 551–55 (opinion of Frankfurter, J.).

[39] *Id*. at 565 (Rutledge, J., concurring in the result).

[40] *Id*. at 568–74 (Black, J., dissenting).

[41] Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968), pp. 61–62.

[42] Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[43] Reynolds v. Sims, 377 U.S. 533, 546 (1964).

[44] 364 U.S. 339 (1960).

[45] *Id*. at 340.

[46] *Id*. at 340–41, 346.

[47] *Id*. at 346–47.

[48] 369 U. S. 186 (1962). The views of Frankfurter and Harlan can be found *id*. at 266–329 (Frankfurter, J., dissenting) and *id*. at 330–49 (Harlan, J., dissenting).

[49] 376 U. S. 1 (1964).

[50] 377 U.S. 533 (1964).

[51] *Wesberry*, 376 U.S. at 18.

[52] Karcher v. Daggett, 462 U.S. 726 (1983).

[53] *Id*. at 562.

[54] *Id*.

[55] *Id*. at 565.

[56] *Id*. at 565–66.

[57] 377 U.S. 713 (1964).

[58] See, for example, Gaffney v. Cummings, 412 U.S. 735 (1973).

[59] For discussions of gerrymandering, see Dixon, *supra* n. 40, at 458–63; Elmer Griffith, *The Rise and Development of the Gerrymander* (Minneapolis: Scott Foresman, 1907).

[60] League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006); Vieth v. Jubilirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986).

[61] See, for example, Davis v. Bandemer, 478 U.S. at 144–55 (opinion of O'Connor, J.).

[62] *Id*. at 118–27.

[63] *League of United Latin American Citizens*, 548 U.S. at 414–23.

[64] *Id*.

[65] Thornburg v. Gingles, 478 U.S. 30 (1978).

[66] See, for example, Reno v. Bossier Parish School Board, 520 U.S. 471 (1997).

[67] 509 U.S. 630 (1993).

[68] 515 U.S. 900 (1995).

[69] *Id*. at 916.

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