Case Western Reserve Law Review

Volume 62 | Issue 4

2012

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ABSTRACT

The Supreme Court's decision in Baker v. Carr *unleashed the Reapportionment Revolution, which was largely driven by litigation in the lower federal courts, with periodic additional guidance by the Court. That litigation continues to the present day, revived every decade by new census data and further complicated by the demands of the Voting Rights Act and other factors. Less appreciated has been the role of Congress and the president in influencing that litigation.* Baker *was initially quite controversial in some circles, and that hostility was manifested by bills introduced in Congress that would have restricted the impact of the case. But the bills did not pass, the opposition soon receded, and* Baker *came to be supported by most policymakers and the public. In 1976 Congress abolished the much criticized three-judge district court, but demonstrated its support for* Baker *by expressly leaving it intact as a forum for the litigation of reapportionment cases. The reasons for that decision are not clear, but one appears to be to reduce the pressures on one judge in such politically charged cases by making three judges responsible. Likewise, the president, through amicus curiae briefs filed by Solicitor General Archibald Cox, supported the result in* Baker *and influenced the doctrinal development of subsequent reapportionment*

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cases. Those briefs also appear to have provided political support for federal court intrusion on apportionment matters previously left to state politics. This article addresses the consequences of these actions by Congress and the president on federal court reapportionment cases since Baker *and situates that interbranch interaction in the academic literature focusing on the institutional context and aftermath of Supreme Court decisions.*

INTRODUCTION

Baker v. Carr[1] held that federal courts could hear suits challenging the legality of malapportioned state legislatures under the Equal Protection Clause of the Fourteenth Amendment. Today, the decision is firmly in the lauded canon of landmark Supreme Court decisions, and the "one person, one vote" principle it inaugurated for the apportionment of legislative bodies is now so well accepted that contemporary writers find it "hard to imagine what all the constitutional fuss was about."[2] The standard version of the reception of *Baker* is that it was almost immediately popular among elites and the general public, in sharp contrast to other important decisions of the Warren Court. The Supreme Court in *Reynolds v. Sims*[3] and other cases fleshed out the "one person, one vote" standard, and it was implemented quickly by litigation in the lower federal courts and state courts in over half the states.[4] Opposition in Congress and elsewhere, such as it was, soon melted away, and *Baker* was well accepted by virtually everyone in only a few years.[5] In subsequent decades the Supreme Court, and lower courts, struggled with whether and how to apply *Baker* and its progeny to more complicated and contentious issues like politically or racially gerrymandered districts, so litigation

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[1] 369 U.S. 186 (1962).

[2] Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES 297 (Michael C. Dorf ed., 2004).

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

[4] *See* Ansolabehere & Issacharoff, *supra* note 2, at 320–22 (discussing how eager states were for reapportionment, as proven by thirty-four of them beginning litigation against state legislature apportionment schemes within nine months of the *Baker* ruling).

[5] For the accepted story on the aftermath of *Baker*, see, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 268–70 (2009) (noting that an angry Congress shoved aside all other business to deal with the Court's ruling in Baker); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 126–27 (2006) (discussing the predictability of Congress' reaction following the *Baker* and *Reynolds* decisions, which was an attempt by the House of Representatives to overturn it by constitutional amendment); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 901–02 n.177 (2011) (stating that in 1964 William Tuck, a Virginia Democrat introduced a measure in the House of Representatives to "eliminate federal jurisdiction over reapportionment cases," but the Senate rejected the measure).

under the Voting Rights Act of 1965 ("VRA") began to dominate reapportionment cases.[6] But the core principle of "one person, one vote," having its genesis in *Baker*, appears unscathed.

This version of the aftermath of *Baker* is accurate as far as it goes, but the premise of this Article is that the story is a richer and more complicated one. In particular, my goal is to unpack the notion that the reapportionment decisions were relatively uncontroversial at the time and later. The full story of the reaction to *Baker* is beyond the scope of the present Article,[7] but I will focus on how the other branches of the federal government interacted with the Court at the time of the decision and reacted to *Baker* in the 1960s, 1970s, and later. The congressional and presidential reaction to *Baker* will place *Baker* in a broader context, and explain how those branches affect reapportionment litigation to the present day.

Before addressing how the other branches confronted *Baker* and subsequent cases, Part II of the Article considers how the apparent emerging scholarly consensus that the Supreme Court, more often than not, is a majoritarian institution, pertains to the reapportionment cases. Is *Baker* rightly understood as an example of the majoritarian thesis? To what extent did *Baker*, then and now, reflect and garner support among interested publics? Part II turns to the Executive Branch's interaction with *Baker* and subsequent cases and begins with Solicitor General ("SG") Cox's amicus curiae brief filed in the case, which supported the result reached by the majority. The consensus is that the brief played a role, and perhaps a crucial one, in the result reached and the eventual widespread support for reapportionment.[8] Part II also addresses how the SG filed amicus briefs in subsequent reapportionment and other election law cases and the apparent influence of those filings on the Court.

Part III addresses Congress's reaction to *Baker*. Congress's initial reaction was hostile as Congress introduced bills to overturn or limit the impact of the decision.[9] This hostility, however, faded away quickly, and subsequent congressional actions can be seen as

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[6] *See* ANTHONY A. PEACOCK, DECONSTRUCTING THE REPUBLIC: VOTING RIGHTS, THE SUPREME COURT, AND THE FOUNDERS' REPUBLICANISM RECONSIDERED 41–42 (2008) (discussing how *Baker v. Carr* and the reapportionment cases, together with the Voting Rights Act of 1965 and litigation thereunder, opened contentious and ongoing debates over the structures and functions of many aspects of the American electoral system).

[7] For useful histories of *Baker* and the reaction to it, see generally STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS (2008); Ansolabehere & Issacharoff, *supra* note 2; RICHARD C. CORTNER, THE APPORTIONMENT CASES (1970); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968).

[8] *See infra* notes 65–66 and accompanying text.

[9] ROSEN, *supra* note 5, at 126–27.

supportive of the decision.[10] *Baker* and other reapportionment cases were initiated in three-judge district courts, with direct appeals to the Supreme Court.[11] Likewise, the VRA required some states with a history of discriminatory election laws, mostly in the South, to clear changes to those laws with the Attorney General or a three-judge district court in the District of Columbia, with direct appeals to the Court. That provision remains intact.[12] Congress repealed the three-judge district court for other cases in 1976, but expressly left it intact for reapportionment cases. Part III considers how the congressional adoption of that specialized forum for the adjudication of these cases can be seen, in part, as special solicitude for, and even protection of, the federal judges adjudicating these cases. Part IV concludes the Article.

I. *BAKER V. CARR* AND THE MAJORITARIAN THESIS

Alexander Bickel of Yale Law School famously argued that judicial review of the actions of federal and state governments should be limited since it was, as he saw it, counter-majoritarian in nature.[13] Whether in fact Supreme Court decisions, and decisions of lower courts, are on the whole properly characterized that way has been the subject of extended academic debate. For example, Barry Friedman has recently argued that most Supreme Court decisions over time are properly regarded as being majoritarian and generally reflecting the wishes of and being supported by the American public.[14] To consider how the debaters treat *Baker v. Carr* is instructive.

Friedman begins by briefly summarizing the doctrinal developments before and after *Baker*.[15] Sixteen years prior to *Baker*, the Court had held, in a plurality opinion by Justice Felix Frankfurther, in the factually similar case of *Colegrove v. Green*,[16] that the dangers of courts entering a "political thicket" precluded judicial review of legislative malapportionment.[17] *Baker*, in a majority opinion by Justice William Brennan, distinguished *Colegrove*, holding that such suits did not involve nonjusticiable political questions, since judicially manageable standards could be fashioned

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[10] *See infra* notes 116–137 and accompanying text.

[11] *See infra* note 136 and accompanying text.

[12] *See* sources cited *infra* note 145.

[13] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[14] FRIEDMAN, *supra* note 5.

[15] *Id.* at 267–68.

[16] 328 U.S. 549 (1946).

[17] *Id.* at 556. *Colegrove* was a challenge based on the Guarantee Clause, U.S. CONST., art. IV, § 4, but the Court held the challenge to be nonjusticiable. 328 U.S. at 556.

under the Equal Protection Clause.[18] Justice Frankfurter (joined by Justice John M. Harlan) dissented vigorously and at length. Frankfurter argued, among other things, that holding such cases to be justiciable was a sharp break from precedent (i.e., *Colegrove*) and historical practice and would involve federal courts in "political entanglements" better left for resolution to the elected branches of government.[19] Frankfurter predicted that such entanglements would lessen public confidence in the Court and that state legislatures would resist implementation.[20] Cases following *Baker* established and applied the one-person, one-vote principle, requiring the redrawing of many districts for state legislatures and districts of the U.S. House of Representatives within states.[21]

Friedman observes that many federal and state legislators had been elected in districts that clearly violated the one-person, one-vote principle, so opposition from those incumbents was predictable. Bills were introduced in Congress to limit *Baker*, while a coalition of the states, representing state governments, also proposed constitutional amendments to limit the impact of the decision. Some academics, such as Bickel, also criticized the decision and predicted that compliance would be lengthy and difficult.[22] But the opposition soon faded and the critics were proven wrong. Compliance "was remarkably quick," since litigation in lower federal and state courts was soon initiated and orders requiring the redrawing of districts promptly followed.[23] Friedman concludes that the "public loved these decisions. . . . Academics could whine about the decisions, and legislators could grumble as they were reapportioned out of a job, but the Supreme Court had read its public well: frustration over the issue had been building in the body politic for a long time."[24]

It does not denigrate Friedman's lively and insightful account of *Baker* and its aftermath to question whether the case fits so neatly into the majoritarian model. Critics of that model have raised a number of concerns about the theory and application of the model as a whole and to particular cases. For example, when a court decision is said to

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[18] 369 U.S. 186, 226 (1962).

[19] *Id*. at 267 (Frankfurter, J., dissenting).

[20] *Id*. at 267–68.

[21] For a full doctrinal discussion of *Colegrove*, *Baker*, and *Baker*'s progeny, see MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, VOTING RIGHTS AND ELECTION LAW 107–224 (2010).

[22] FRIEDMAN, *supra* note 5, at 268–69.

[23] *Id*. at 269.

[24] *Id*. Friedman also points out that the dysfunctions of gerrymandering had been reported in the popular press in the period up to *Baker* and that the Kennedy administration had supported the plaintiffs in *Baker* when the SG filed an amicus brief. *Id*. at 270.

represent or reflect the majority view, does that mean a pre-existing majority, a later one, or one formed or informed by the decision itself?[25] Likewise, is evidence of a majority taken from public opinion polls, other national political institutions (i.e., Congress or the president), state and local governments, interest groups, or some combination of the above?[26] The majoritarian model also does not often make clear how life-tenured federal judges are affected or influenced by pressure from these majorities.[27]

Consider how some of these concerns can be applied to the story of *Baker v. Carr*. The reapportionment decisions with their popular support are often contrasted to other, far more controversial decisions of the Warren Court.[28] But *Baker* also shared characteristics with its counter-majoritarian cousins. While *Baker* dealt with a legislature in Tennessee that had not reapportioned in over fifty years, leading to differences in the population of urban and rural electoral districts, not all states were similarly passive. Indeed, it can be said that in many states "the electorate supported malapportionment."[29] Prior to 1962, in at least ten states, the public voted on initiatives that would have reapportioned legislatures to reflect changes in population, and all but one failed.[30] Whether or not due to the results of an initiative, in 1962 virtually all state legislatures were malapportioned and violated the upcoming one-person, one-vote standard.[31] To be sure, it cannot be said that many in the general public, directly or through their elected representatives, supported overtly malapportioned legislative bodies. Indeed, it is often observed that prior to *Baker*, the self-interest of

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[25] Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 116. Pildes argues that the "lack of a precise definition of the relevant majority enables majoritarians to claim that almost any decision of the Court reflects majoritarian views, since there is almost always some 'majority' to which one can appeal in asserting that the Court's decisions reflect 'majority' views." *Id*.

[26] *Id*. at 119.

[27] *Id*. at 126–39; Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

[28] *E.g.*, CORTNER, *supra* note 7, at 256–65 (contrasting implementation of reapportionment and school desegregation decisions); FRIEDMAN, *supra* note 5, at 267 (contrasting decisions striking down mandatory public school prayer with reapportionment decisions); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1122 n.98 (2002) (contrasting the public support for *Baker* with the controversy surrounding *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

[29] Ansolabehere & Issacharoff, *supra* note 2, at 305.

[30] *Id*. One study of these initiatives attributes their defeat not to "competing normative theories of representation but, rather, simple political self-interest." Jonathan Woon, *Direct Democracy and the Selection of Representative Institutions: Voter Support for Apportionment Initiatives, 1924–62*, 7 ST. POL. & POL'Y Q. 167, 183 (2007). That is, voting was largely determined on whether particular counties would gain or lose seats in the legislature under the redistricting called for by the initiative. *Id*.

[31] ANSOLABEHERE & SNYDER, *supra* note 7, at 3.

incumbent state legislators led to their passivity in not redrawing electoral lines without the mandate of a court. But it can be said *Baker* shattered the status quo on apportionment, which suggests that it did not simply codify the views of the majority of the American public.[32]

The upheaval of *Baker* is also reflected in the views of then prominent academic critics. The aforementioned Alexander Bickel was foremost among those critics. Not long after *Baker* was decided, Bickel lamented that the decision would lead to a one-size-fits-all solution for the apportionment of legislative districts. In a "diverse, federated country," he argued, states should be free to decide to draw districts that reflect not only equality of individual votes, but other values he considered rational, such as maintaining representation of political parties or particular geographic areas.[33] Bickel was not alone in criticizing *Baker* on the basis that it would lead to endless litigation and (as Frankfurter argued) would improperly involve federal courts in the purportedly highly political enterprise of drawing district lines.[34] More recent and even sympathetic academics do not necessarily absolve *Baker* of all sins. Leading scholars have persuasively argued that *Baker* and the subsequent one-person, one-vote rule are difficult to defend as proper constitutional interpretation on textual or originalist grounds. When the Fourteenth Amendment was adopted, it was difficult to argue that the drafters, ratifiers, or general public thought that the Equal Protection Clause would outlaw the then malapportioned legislatures.[35] And the text of the Fourteenth and Fifteenth Amendments can be understood to forbid official discrimination against the voting rights of African Americans, but leave intact other inequality in the allocation of voting rights.[36] Some years later, *Baker* and the one-person, one-vote principle were

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[32] LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 262 (2009) ("The Court's entry into the political thicket was awesome. . . .").

[33] Alexander M. Bickel, *The Durability of* Colegrove v. Green, 72 YALE L.J. 39, 40, 42–43 (1962).

[34] *See* ANSOLABEHERE & SNYDER, *supra* note 7, at 167–68 (summarizing views of academic critics of *Baker*); FRIEDMAN, *supra* note 5, at 269 (summarizing views of academic critics of *Baker*).

[35] ROSEN, *supra* note 5, at 125–26; David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1260.

[36] ROSEN, *supra* note 5, at 126; Luis Fuentes-Rohwer, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157, 1171–72 (2011); Strauss, *supra* note 35, at 1260–61 & n.58. These writers typically rely on Justice Harlan's opinions in some of the reapportionment cases, e.g., Reynolds v. Sims, 377 U.S. 533, 590–91 (1964) (Harlan, J., dissenting), while acknowledging that some scholars have taken issue with Harlan's views, e.g., William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV., at 33, 85.

embraced by most of the legal academy when they were defended by John Hart Ely as an example of his influential representation-reinforcing normative defense of constitutional review. He argued that the Court is right to step in and strike down laws that limit public participation in the political process.[37] The reapportionment decisions under this theory are best seen as judicial intervention to make an arguably nonmajoritarian political system *more* majoritarian.[38]

My point here is not to deny that *Baker* came to be approved by almost all of the public (however we measure that term) or by most of the interested elites.[39] Fifty years later, *Baker* and the one-person,

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[37] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980).

[38] *Id.* at 120–24. For further discussion of Ely's influence on the academic view of the reapportionment decisions, see Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 288–89 (2010); Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333–34 (2005); compare STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 44–45 (2008) (arguing that a cadre of younger liberal law professors in the 1960s and 1970s, like Ely, mobilized to defend in scholarship the egalitarian decisions of the Warren Court, including *Baker v. Carr*). It is difficult but not impossible to find modern scholars skeptical, at least to some degree, of the reapportionment cases. *See, e.g.*, PEACOCK, *supra* note 6, at 3–5 (summarizing wide-ranging criticism of reapportionment and VRA cases on the basis that, among other things, the right to an equal vote found in the former cases is in tension with the right to equal and effective representation found in the latter cases); ROSEN, *supra* note 5, at 127–29 (discussing how the one-person, one-vote principle "opened up a series of unanswered questions," including the permissible amount of deviation from that principle and did not eliminate and even facilitated political gerrymandering); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106 (2000) (arguing that reapportionment cases are better grounded in the Guarantee Clause, rather than the Equal Protection Clause).

[39] Most, but not all. It is worth noting that some influential conservative legal voices remained critical of the reapportionment decisions many years later. For one example, Robert Bork in 1990 criticized the cases for their "egalitarianism and . . . disregard for the Constitution." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 84 (1990). While the one-person, one-vote principle, stated in the abstract, "sounds admirable," in his view, it was not admirable to force it "upon people who have chosen democratically to arrange their state governments in part upon a different principle." *Id.* Bork continues that he is not opposed as such to the one-person, one-vote principle, but argues, echoing the dissents in *Baker*, *Reynolds*, and other cases, that the Equal Protection Clause was not a principled basis to judicially superintend the drawing of district lines by state legislatures, and that is was not irrational or unconstitutional for states to "want to provide representation for people in certain localities, perhaps because they had distinctive economic interests or social views that might be overlooked in a purely majoritarian legislature." *Id.* at 86–87. Another example would be Supreme Court Justice Samuel A. Alito, Jr. While applying for a position with the Department of Justice's Office of Legal Counsel during the Reagan Administration, Alito submitted a letter in which he discussed his interest in legal issues and volunteered his opposition to some Warren Court decisions, including the reapportionment cases. This criticism came up frequently in his confirmation hearings for the Supreme Court. *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 687 (2006) ("It is difficult to imagine in this day and age any serious objection to the rights identified in [*Baker* and subsequent reapportionment] cases.") (statement of Samuel Issacharoff,

one-vote principle seem to be well accepted by the general public, even if their knowledge of redistricting in general is not deeply informed.[40] Rather, I am suggesting that the usual assertions that the reapportionment decisions were quickly accepted are basically true, but understate the counter-majoritarian (in all senses of that term) nature of the decision, and some of the initial opposition to the decisions. In other words, the decision was not inevitable and, like any controversial decision, was contingent on any number of factors. For that reason, it is useful to reexamine how the other branches of the federal government were involved in the adjudication of, and reacted to, the reapportionment cases. Executive involvement and congressional opposition (and then a lack thereof) played a significant role in shaping and implementing the law of reapportionment declared by the Court. The next parts of this Article address the role of the other branches in the reapportionment revolution.

II. THE PRESIDENTIAL SAFEGUARDS OF *BAKER V. CARR*

Throughout American history, the executive branch has sought to influence the composition and decision making of the Supreme Court, and the lower federal courts, in myriad ways.[41] Regarding the

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Professor of Constitutional Law, New York University). In his testimony, Alito stated, notwithstanding his earlier views (informed in part by his reading Bickel's work in college, *id.* at 519–20), that he fully accepted the reapportionment cases, *id.* at 380, and explained his previous criticism as based not so much on the principle of one-person, one-vote, but rather on its arguably overly strict application in cases like *Karcher v. Daggett*, 462 U.S. 725 (1983), which struck down a districting plan in New Jersey, Alito's home state. *Id.* at 381–84, 501–02. *See also* PEACOCK, *supra* note 6, at 1 (arguing that "no serious discussion of the reapportionment cases took place during the confirmation hearings [on Alito's Supreme Court nomination]"). A final example might be Justice Clarence Thomas, whose concurring opinion in the VRA case of *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J., joined by Scalia, J., concurring), argued that section 2 of the VRA should not be construed to cover vote dilution claims. In the course of that opinion, he favorably referred to Justice Frankfurter's dissent in *Baker v. Carr*, *id.* at 896–97, indirectly suggesting that he (and perhaps Justice Scalia, who joined the opinion) might be willing to revisit the correctness of that case and of the one-person, one-vote principle. *See* Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 120 n.82 (1994) (making this point).

[40] *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 133, 151 (1980) (discussing public opinions polls from the 1960s on the reapportionment cases); CORTNER, *supra* note 7, at 237 n.57 (same). For more recent polls indicating support for the one-person, one-vote principle, see Joshua Fougere, Stephen Ansolabehere & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 ELECTION L.J. 325, 325 & n.2 (2010).

[41] *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (focusing on the relationship between the executive and judicial branches); Mark C. Miller, *The Interactions Between the Federal Courts and the Other Branches*, *in* EXPLORING JUDICIAL POLITICS 274 (Mark C. Miller ed., 2009) (exploring the interactions between the courts and the two other branches of government); Jeb Barnes,

Supreme Court, the most obvious method is presidential appointments. Another way to influence decision making, increasingly used in the past half-century, is through amicus curiae briefs filed by the SG in Supreme Court cases where the United States is not a party. In the 1950s, the Supreme Court modified its rules to make the filing of amicus briefs easier, and the SG (unlike other parties) is permitted to file such a brief without the permission of the Court or of the parties to a particular case, at both the certiorari and merits stages of a case.[42] Since then, the SG has taken the opportunity to file many such briefs, especially (though not only) in high-profile cases. The professionalism of the SG and the perceived high quality of the SG's amicus briefs have apparently come to be seen by the Court itself as a useful and objective source of information for the Court, so much so that the SG is sometimes referred to as the Tenth Justice.[43] Similarly, the SG and the Administration he or she represents have not been shy about advocating, via amicus briefs, the policy objectives of that particular administration.[44]

Thus, the SG's amicus activity has both an objective and an advocatory component, though how that plays out in the decision to file an amicus brief, and the position advocated in that brief, has depended on the sometimes different and shifting policy goals of

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Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making, 10 ANN. REV. POL. SCI. 25 (2007) (reviewing studies that explore the interaction of the branches of government).

[42] EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 512–17, 734–35 (9th ed. 2007); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761–67 (2000). The relative ease of filing amicus briefs in the Supreme Court, and the justices' frequent reliance on those briefs, has not been without controversy. *See* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 35–37 (2011) (discussing whether judicial reliance on amicus briefs is consistent with the adversarial system).

[43] LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987). The "Tenth Justice" analogy has been a matter of dispute, on both descriptive and normative grounds. *See, e.g.*, Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW. & CONTEMP. PROBS. 61, 62 (1998); Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or a Zealous Advocate?*, 121 YALE L.J. 725 (2011).

[44] *See* Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General, 1953–2002*, 31 POL'Y STUD. J. 253 (2003) (empirical study of SG's amicus briefs filed in civil rights cases in the Supreme Court); Stephen S. Meinhold & Steven A. Shull, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 527 (1998) (discussing ways of measuring how SG advances the president's policy agenda); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1306–15 (2000) (discussing SG's amicus briefs filed in important civil rights cases in the Truman, Eisenhower, and Kennedy Administrations); James L. Copper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675 (1990) (empirical study of SG's amicus filings in different historical periods).

particular presidents and SGs.[45] The Court, no matter its ideological composition or that of the executive, appears to place significant weight on the views of the SG. The Court sometimes requests the views of the SG, via amicus brief, on whether the Court should grant review in a case where the United States is not a party.[46] Overall, the SG has participated as amicus on the merits in up to thirty or more cases in recent Terms, no small matter given the shrunken docket of the Court since the early 1990s.[47] The SG's amicus briefs seemingly have been especially influential on the Court as a whole and on individual justices, as reflected in the high rate of agreement between the Court's decisions and the SG's positions and the frequent citation of such briefs in the Court's opinions.[48] The success of the SG as amicus has been variously attributed to the expertise and experience of the SG's office, the ideological confluence of the respective policy positions of the SG and of the Court in a particular case, and the strategic behavior of the justices, seeking political cover regarding the anticipated reaction to a decision by another branch of government.[49]

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[45] *See* Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317, 321–322 (2006) (positing that amicus activity "var[ies] across a number of dimensions" and that while "[s]ome cases will likely reflect direct presidential influence," other "cases will inspire presidential indifference" and accordingly reflect more closely the positions of the SG). *See generally* RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 11 (2003) (engaging in a study of the manner in which the solicitor general balances law and politics); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 1 (1992) (recounting the manner in which "the work of the nation's lawyer . . . serve[s] as an integral component of executive policy making").

[46] Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35 (2010); David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009).

[47] *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1353–60 (2010) (discussing the SG's amicus activity in the Rehnquist and Roberts Courts). For a general overview of the Court's shrunken docket in recent decades, see Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

[48] *See* Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POL. RES. Q. 765 (2011) (empirical study of the influence of SG amicus brief at the certiorari stage); Rebecca E. Deen et al., *The Solicitor General as* Amicus *1953–2000: How Influential?*, 87 JUDICATURE 60 (2003) (documenting success rates of SG's amicus briefs in merits cases); Kearney & Merrill, *supra* note 42, at 760 (stating that the Court cited SG amicus brief in 40 percent of cases in which such a brief was filed, the highest citation rate of amicus briefs filed by frequent institutional litigants).

[49] *See* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT 104–06, 180–82 (2008) (addressing ideological confluence, institutional deference, and professional expertise as explanations for success of the SG as amicus in the Supreme Court); Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005) (same); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566–68 (2010) (arguing that the Court is usually only concerned with elite opinion, and often obtains

A. The Solicitor General as Amicus in the Early Reapportionment Cases

How the SG has participated in the reapportionment cases provides a useful case study of the advocacy of the Executive branch and its effect upon the Judicial branch. The SG in the Truman administration got off to a slow start by not participating in *Colegrove v. Green*, which had challenged the apportionment of congressional districts in Illinois.[50] But the Eisenhower administration, which had notably filed an amicus brief supporting desegregation in *Brown v. Board of Education*,[51] showed more interest in election law cases, which culminated in *Baker*. The SG filed an amicus brief in *Gomillion v. Lightfoot*[52] supporting a challenge to a gerrymander of the boundaries of the city of Tuskegee in Alabama. The Supreme Court unanimously held the gerrymander to be unconstitutional because it was meant to restrict the rights of African American voters.[53]

At the same time *Gomillion* was being argued and decided, the SG in the outgoing Eisenhower administration and officials in the incoming Kennedy Administration were closely following the *Baker* litigation in the lower courts.[54] Indeed, the plaintiffs in *Baker* lobbied officials in the Eisenhower administration to intervene on their side as an amicus in the case, in part due to the purported political advantages to Republicans that might accrue in the case.[55] The Kennedy administration showed an even greater interest in the case, due in part to the personal interest of the new president, and of his brother

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such opinion through amicus briefs); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing strategic model); Omari Scott Simmons, *Picking Friends From the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 197–202 (2009) (arguing that amicus participation increases the legitimacy of the Court by providing affected groups the ability to apparently participate in the decision-making process).

[50] 328 U.S. 549, 550 (1946). Late in the Truman administration the SG filed an amicus brief in a case challenging the Georgia county unit system of apportionment, but that unsuccessful challenge culminated in a per curiam dismissal by the Supreme Court. Cox v. Peters, 342 U.S. 936 (1952) (per curiam); *see* CORTNER, *supra* note 7, at 76–77 (discussing Solicitor General Philip Perlman's intervention as amicus curiae in *Cox v. Peters*). The Georgia system was later struck down in *Gray v. Sanders*, 372 U.S. 368 (1963).

[51] 347 U.S. 483, 485 (1954). For a discussion of the SG's amicus brief in *Brown*, see Waxman, *supra* note 44, at 1307–08.

[52] 364 U.S. 339, 340 (1960).

[53] *Id*. at 347–348. For a discussion of *Gomillion* and the SG's brief, see CORTNER, *supra* note 7, at 84–86. The *Gomillion* Court did not cite the SG's brief.

[54] *Id*. at 89.

[55] *Id*. at 77–78. The argument was made that the case presented an opportunity for the administration to "identify itself with the popular rights of people," and that urban voters represented by the plaintiffs might appreciate the help of Republicans. *Id*. at 77.

Robert, the attorney general.[56] The new administration concluded, not surprisingly, that the many malapportioned state legislatures worked mainly to the benefit of GOP-leaning rural voters, so victory for plaintiffs in *Baker* would inure to the benefit of Democratic-leaning urban voters.[57]

Eventually the Kennedy administration filed amicus briefs recommending that the Court note probable jurisdiction of the direct appeal by the plaintiffs from the adverse decision of the three-judge district court and supporting the plaintiffs on the merits.[58] Despite the interest of his superiors, the new Solicitor General, Archibald Cox of Harvard Law School, was reluctant to file an amicus brief that backed the plaintiffs in sweeping terms.[59] His doubts were due, in part, to having been mentored by then-Professor Frankfurter at Harvard and also due to Cox's genuine uncertainty about recommending that federal courts intervene in reapportionment cases.[60] Eventually he filed a brief that narrowly argued that federal courts had jurisdiction to hear reapportionment claims under the Equal Protection Clause (thus distinguishing *Colegrove*) and avoided addressing how federal courts should order reapportionment.[61]

The majority of the Court, in an opinion by Justice Brennan, ruled for the plaintiffs on the relatively narrow ground that federal courts had jurisdiction over such claims, which were not barred by the political question doctrine.[62] Justices Clark, Douglas, and Stewart filed opinions concurring with the majority, while Justices Frankfurter and Harlan dissented.[63] The majority opinion thus mirrored many of

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[56] *Id*. at 84.

[57] *See id*. (observing that Senator John F. Kennedy had written an article in the *New York Times Magazine* in 1958 critical of malapportionment); ANSOLABEHERE & SNYDER, *supra* note 7, at 4–6, 128–29 (discussing lobbying of the new administration on this issue); CORTNER, *supra* note 7, at 89–91 (same); Bruce J. Terris, *Attorney General Kennedy Versus Solicitor General Cox: The Formulation of the Federal Government's Position in the Reapportionment Cases*, 32 J. SUP. CT. HIST. 335, 337 (2007) (discussing presumed political interests of the Administration).

[58] Terris, *supra* note 57, at 337.

[59] *Id*.

[60] *See id.* (stating that Cox had "deep-seated doubt" about using the courts to solve the malapportionment issue); ANSOLABEHERE & SNYDER, *supra* note 7, at 133 (stating that Frankfurter was a mentor to Cox).

[61] ANSOLABEHERE & SNYDER, *supra* note 7, at 133–39 (discussing brief and oral argument by Cox in *Baker*); CORTNER, *supra* note 7, at 103–16 (same). One contemporary observer noted that after the second oral argument in *Baker*, Cox, after enduring sharp questioning from Frankfurter in the oral argument, whispered that "Felix Frankfurter is right." Terris, *supra* note 57, at 337.

[62] 369 U.S. 186, 237 (1961).

[63] *Id*. at 241 (Douglas, J., concurring); *id*. at 251 (Clark, J., concurring); *id*. at 265 (Stewart, J., concurring); *id*. at 266 (Frankfurter, J., dissenting); *id*. at 330 (Harlan, J., dissenting).

the arguments pressed by Cox. There was, and is, widespread belief that the justices in the majority were heavily influenced by the SG,[64] and indeed subsequent accounts of the internal deliberations of the justices in *Baker* seem to confirm that influence.[65] That said, there is no explicit reference to the SG's amicus brief in any of the opinions. A citation to or discussion of the SG's amicus briefs in Court opinions is a reasonable proxy for measuring the influence of such a brief, but it should be used with caution. The justices might be influenced by the brief and not mention it in an opinion, and similarly a stray citation of the brief in the opinion might be the work of an overzealous law clerk and not demonstrate any particular influence. The Court might reach a particular result anyway, whether or not advocated by the SG, or anyone else.[66]

However much the SG's brief in *Baker* was influential, the Kennedy administration continued to pay close attention to the subsequent reapportionment cases. President Kennedy publicly praised the decision,[67] and his brother the attorney general took the rare step of arguing for the United States as amicus in the next important case, *Gray v. Sanders*, which involved a challenge to the Georgia county-unit system for Democratic primaries in which certain counties were given certain designated votes, which discriminated against the more populous counties. [68] The Court struck down the system, for the first time explicitly employing the "one

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[64] *See, e.g.*, ANSOLABEHERE & SNYDER, *supra* note 7, at 144–45, 151 (arguing that SG's arguments influenced the discussions of the justices after the second oral argument and the drafting of the majority opinion); DIXON, *supra* note 7, at 177 (noting that the SG's amicus briefs and participation in oral arguments in the reapportionment cases "tended to shape the Court's perception of the issues and indeed to dominate the litigation at certain stages"); Terris, *supra* note 57, at 341 (noting that the Department of Justice assumed that the amicus brief had "greatly influenced" the decision); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 588–89 (2005) (discussing how the Kennedy administration encouraged the Court to intervene in legislative apportionment, to overcome entrenched interests which favored malapportioned legislatures).

[65] *See* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 844–51 (Del Dickson ed., 2001) (several justices referred to the SG's position in conference discussions on *Baker*); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 413–14 (1983) (same). *But see* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 184–91 (2010) (extensively discussing Brennan's drafting of the *Baker* opinion with no mention of the SG's amicus brief).

[66] *See* Kearney & Merrill, *supra* note 42, at 767–87 (discussing citations to, adoptions of arguments in, and other measures of influence of amicus briefs on the Court).

[67] CORTNER, *supra* note 7, at 146–47; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 204 (2000).

[68] 372 U.S. 368, 370 (1963).

person, one vote" rationale.[69] This time only Justice Harlan in dissent briefly mentioned the SG's amicus brief.[70]

Despite the success of the SG's amicus filings in *Baker* and *Gray*, Cox remained ambivalent about aggressively pushing the one-person, one-vote rationale with its attendant consequence of federal courts inevitably striking down the districting of many state legislatures. His ambivalence did not prove noteworthy in *Wesberry v. Sanders*,[71] where the Court struck down the malapportioned districts in Georgia for the U.S. House of Representatives, on the ground that the power delegated to states in Article I, section 2 of the Constitution required that states draw such districts to comply with the one-person, one-vote principle. The SG filed an amicus brief simply calling for a remand for a resolution on the merits, the lower court having dismissed the case on political question grounds, and there was no mention of the brief in the Court's opinion.[72]

In 1964, the Court finally directly confronted a challenge to state legislative districts in *Reynolds v. Sims*[73] and five companion cases,[74] and there the Court required that those districts comply with the one-person, one-vote principle. The SG filed an amicus brief that applied to all six cases,[75] but there was vigorous debate within the Department of Justice on the arguments to be made.[76] Cox was reluctant to argue that application of a strict one-person, one-vote principle was constitutionally demanded.[77] He was particularly troubled by the argument that *both* houses of a state legislature must conform to that principle (when both chambers of the federal legislature did not),[78] and by the fact that in the case from Colorado, the voters had approved by referendum the malapportioned districts.[79] After much discussion, Cox drafted the amicus brief, and while not arguing for strict application of the principle, the brief did argue that

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[69] *Id*. at 381.

[70] *Id*. at 383 n.3 (Harlan, J., dissenting). For a discussion of the SG's amicus filing in *Gray* and RFK's argument, see CORTNER, *supra* note 7, at 192–93; Terris, *supra* note 57, at 338–39.

[71] 376 U.S. 1 (1964).

[72] For discussion of the SG's amicus opinion in *Wesberry*, see CORTNER, *supra* note 7, at 226; Terris, *supra* note 57, at 339–40.

[73] 377 U.S. 533 (1964).

[74] WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964).

[75] ANSOLABEHERE & SNYDER *supra* note 7, at 171.

[76] Helen J. Knowles, *May It Please the Court? The Solicitor General's Not-So-"Special" Relationship: Archibald Cox and the 1963–1964 Reapportionment Cases*, 31 J. SUP. CT. HIST. 279, 283 (2006).

[77] *Id.* at 291.

[78] ANSOLABEHERE & SNYDER, *supra* note 7, at 170.

[79] CORTNER, *supra* note 7, at 215.

malapportionment that led to "gross inequalities" among voters, and which was based on irrational reasons should not be permitted.[80] The Court majority found for the plaintiffs in all of the cases and did strictly apply the one-person, one-vote rationale.[81] Given that the Court was essentially rejecting the milder position advanced by the SG, it is not surprising that the only reference to the SG's amicus brief in the opinions is one in a dissenting opinion.[82]

The conventional wisdom is that the SG's amicus briefs had a significant influence on the decision making of the justices in the reapportionment cases from 1960 to 1964. But the available evidence for this proposition is mixed. The Court followed the advice of the brief in some instances, but not in others. If influence there was, it was not much reflected in citations to or discussion of the briefs in the opinions, and it is not clear if the Court would have reached the same results even in the absence of briefing by the SG. On the other hand, a deeper investigation of the drafting of these opinions and their political context and aftermath might shed greater light on the influence of the SG's brief. A full exploration of those factors is beyond the scope of the present article. However, Part IV of this Article will consider congressional reaction to the reapportionment cases, and the eventual muted reaction to the decisions by that body may have been due, in part, to the support generally given the decisions by the president and the SG.

B. The Solicitor General as Amicus in the Later Reapportionment and Other Election Law Cases

A fuller appreciation for the SG's role as amicus in the Supreme Court can be gained by examining the filing of such briefs and the Court's apparent use of the briefs, in the reapportionment, VRA, and other election law cases decided since 1964. Richard Hasen has compiled a list of such cases from 1901 to 2009,[83] and I determined

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[80] *See* ANSOLABEHERE & SNYDER, *supra* note 7, at 172–74 (discussing the SG's approach in the consolidated cases). *See also* CORTNER, *supra* note 7, at 215–17 (same); Knowles, *supra* note 76, at 279 (discussing drafting of the SG's amicus brief).

[81] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[82] Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 7–60 n.16 (1964) (Stewart, J., dissenting).

[83] *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 166–75 (2003) (listing cases from 1900 to 2000); Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001–2010: A Legacy of* Bush v. Gore *or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 332–33 (2011) (listing cases from 2001 to 2010). I added a case decided in 2011, *Arizona Free Enterprise Club v. Bennett*, 131 S. Ct. 2806 (2011). In many of the cases listed by Hasen, the United States or a federal agency (e.g., the Federal Election Commission) was a party, so the SG was already representing a party and did not have the option to file an amicus brief. My examination was

which of those cases from 1960 to the present the SG had filed an amicus brief, whether the Court majority agreed with the position taken by the SG, and whether one or more opinions in a particular case cited or discussed the SG's amicus brief. The results are compiled in the Appendix to this Article.[84]

First, consider some overall trends found in that data. From 1960 to 2011, the SG filed amicus briefs in fifty election law cases, out of 189 cases in which the United States (or an agency thereof) was not a party.[85] The Court agreed with the positions advanced in thirty-four of those briefs, an impressive record of congruence matched by that found in all of the cases in which the SG files an amicus brief.[86] One or more opinions cited or discussed the SG's amicus brief in twenty-eight of the cases, an even higher rate than that found for the SG's amicus briefs in all cases.[87]

The SG filed amicus briefs in several of the post–1964 reapportionment cases that considered various issues on the application of the one-person, one-vote principle.[88] Most of the cases were decided in the 1960s and 1970s, since the one-person, one-vote principle came to be fairly settled by that point. In contrast, by the late 1960s, cases under the VRA, and those brought under the Fourteenth and Fifteenth Amendments with regard to the effect on redistricting on African Americans (and other minorities) came to occupy much of the Court's agenda.[89] The SG filed amicus briefs in a number of the

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limited to those cases in which the SG did not represent a party, and had discretion to participate as an amicus.

[84] *See infra* p. 41.

[85] As the Appendix indicates, I counted one case when the Court rendered two or more decisions on similar issues on the same day (e.g., *Reynolds v. Sims* and its companion cases), since the SG typically filed one amicus brief for all of those decisions, when a brief was filed at all. By examining each SG amicus brief, I also determined whether the Court had previously called for the views of the SG (i.e., CVSG). *See supra* note 46. Some studies of SG amicus activity exclude cases where there was a CVSG, since "such invitations are most appropriately viewed as mandatory filings and therefore not subject to the SG's discretion." Chris Nicholson & Paul M. Collins, Jr., *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RES. 382, 396 (2008) (citation omitted). Only 7 of the 50 cases in the present study were determined to have a CVSG, and that relatively small number did not justify excluding those cases. There have been fewer CVSGs in recent years. *See* Cordray & Cordray, *supra* note 47, at 1331–32, 1344.

[86] *See supra* note 48 and accompanying text.

[87] Kearney & Merrill, *supra* note 42, at 760 (Court cited SG amicus brief in 40 percent of cases in which such a brief was filed).

[88] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (propriety of mid–decade reapportionment); Growe v. Emison, 507 U.S. 25 (1993) (deference federal courts should give to state courts in reapportionment litigation); Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (applicability of one-person, one-vote principle to local governmental unit); Avery v. Midland Cnty., 390 U.S. 474 (1968) (same).

[89] *See* DIMINO, SMITH & SOLIMINE, *supra* note 21, at 225–26, 285–288 (describing

leading cases in that category,[90] and in cases involving other election law issues.[91]

As noted above, the Court citing or discussing the SG's amicus brief in the opinions is both an over- and under-inclusive proxy for the apparent influence of that brief.[92] But it can be a useful starting point to measure influence. On that score, some leading cases do not refer to the SG's amicus brief.[93] Those that do cite the brief sometimes make only passing and seemingly inconsequential references,[94] but in others the Court seems to have been particularly influenced by the brief, as measured by the frequency and depth of citation to and discussion of the brief.[95]

Whether the Court agrees with the SG's position is another measure of influence. While the overall agreement rate seems impressive, there are notable exceptions where the Court departed

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increasing litigation under the VRA, and constitutional amendments, with regard to districting and race).

[90] *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009) (obligation to create crossover districts under section 2 of the VRA); Riley v. Kennedy, 553 U.S. 406 (2008) (electoral changes subject to preclearance under section 5 of the VRA); Shaw v. Hunt, 517 U.S. 899 (1996) (racial gerrymandering); Lopez v. Monterey Cty., 525 U.S. 266 (1999) (applying section 5 of the VRA); Voinovich v. Quilter, 507 U.S. 146 (1993) (minority–majority districts as court remedy); Thornburg v. Gingles, 478 U.S. 30 (1986) (application of 1982 amendments to section 2 of the VRA); City of Mobile v. Bolden, 446 U.S. 55 (1980) (challenge under Fifteenth Amendment to at–large electoral system); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (private right of action available to enforce VRA).

[91] *E.g.*, Ariz. Free Enter. Club v. Bennett, 131 S. Ct. 2806, 2813 (2011) (holding that a state's public financing provision that equalized electoral funding in state campaigns was unconstitutional); Crawford v. Marion Cnty. Election Bd., 128 S. Ct. 1610, 1615 (2008) (holding that the state's voter identification law was constitutional); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 395–96 (2000) (concluding that state limits on contributions to state campaigns was constitutional); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (holding that a state-owned broadcaster could constitutionally exclude a political candidate from televised debates in a nonpublic forum); Chandler v. Miller, 520 U.S. 305 (1997) (holding that a state requirement for drug testing of candidates did not fit with the types of searched permitted by the Constitution); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (holding that state-passed term limits for members of Congress violated the Constitution); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that a state's poll tax was unconstitutional).

[92] *See supra* notes 60–64 accompanying text.

[93] *E.g.*, *League of United Latin Am. Citizens*, 548 U.S. 399; *Thornton*, 514 U.S. at 779; Clark v. Roemer, 500 U.S. 646 (1991) (VRA application to state judicial elections); *Bolden*, 446 U.S. 55; *Harper*, 383 U.S. 663.

[94] *E.g.*, *Bartlett*, 556 U.S. at 19 (referring briefly to the SG amicus brief); Branch v. Smith, 538 U.S. 254, 266 (2003) (same); Hathorn v. Lovorn, 457 U.S. 255, 261 n.8, 268 n.22 (1982) (same).

[95] *E.g.*, *Lopez*, 525 U.S. at 281 (finding it "especially relevant" that the SG's amicus reads the section 5 preclearance requirement "as we do"); Morse v. Republican Party of Va., 517 U.S. 186, 231–32 (1996) ("attach[ing] significance" to the SG's amicus position that private litigants could enforce the VRA); *Allen*, 393 U.S. at 557 n.23 (finding it "significant" that the SG amicus brief urges that private litigants should have standing to sue in order to enforce the VRA).

from that position,[96] sometimes with the Court expressly countering the SG's amicus brief.[97] The disagreement can of course be a function of the different jurisprudential positions of a majority of the Court and the SG at any given point. Those positions were compatible in *Baker* and the other early reapportionment cases, but there was divergence in later voting rights cases as the composition of the Court changed and new presidents were elected.[98]

The SG did not participate as amicus in all of the reapportionment or other election law cases after 1964.[99] No doubt, a confluence of political and practical considerations played roles in decisions whether the SG should file such briefs in any given case. These considerations include whether the Court requested the views of the when it was deciding whether to review a lower court decision, the general ideological positions of the president and of Congress, and the

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[96] *E.g.*, *Bennett*, 131 S. Ct. at 2824 (directly opposing SG's amicus brief by holding that public financing for state elections is unconstitutional); Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 493, 500 (1992) (affirming the District Court's decision that the section five preclearance was unnecessary when the SG amicus brief argued for reversal); *Bolden*, 446 U.S. at 57, 65 (reversing the lower courts in holding that the at-large electoral systems were constitutional, whereas the SG and amicus brief argued for affirmance of the lower court); Morris v. Gressette, 432 U.S. 491, 507 n.24 (1977) (stating that, although the SG's amicus suggests limited judicial review in certain circumstances, the Court concluded that Congress's intent was to exclude all judicial review of Attorney General's decision on preclearance under section five of VRA).

[97] *E.g.*, Chandler v. Miller, 520 U.S. 305, 313 (1997) (expressly rejecting the SG's amicus suggestion of mootness); *Presley*, 502 U.S. at 501, 504–05 (also arguing and concluding against the SG's amicus brief and reasoning); *id.* at 514 & n.8 (Stevens, J., dissenting) (arguing that prior cases call for "considerable deference," albeit not "acquiescence," to the Attorney General's, and impliedly the SG's, views as amicus in VRA cases) (citing Perkins v. Matthews, 400 U.S. 379, 390–91 (1971)); Thornburg v. Gingles, 478 U.S. 30, 43 n.7, 55, 61–62, 78 (1986) (disagreeing with various positions taken by the SG in the amicus brief); *Morris*, 432 U.S. at 507 n.24 (also rejecting the SG's suggestion. *Compare* Riley v. Kennedy, 553 U.S. 406, 421 (2008) (majority opinion stating that the SG's amicus brief provides a concession and viewing the brief with criticism), *with id.* at 1988 (Stevens, J., dissenting) (favorably citing the same amicus brief). *Compare Bennett*, 131 S. Ct. at 2824 (discussing "flaws" in the arguments made by the SG's amicus brief), *with id*. at 2842 n.11 (Kagan, J., dissenting) (favorably citing the same amicus brief).

[98] For one prominent example, consider in the Reagan Administration, the SG as amicus (in a brief filed at the invitation of the Court) argued for a narrow interpretation of the 1982 amendments to the VRA. *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 104–05 (1991) (SG Fried describing his negative reaction to a broader effects test instead of a narrow construction of the VRA); PACELLE, *supra* note 45, at 164 (describing SG Fried's attack on precedence and focusing on a narrow view of the 1982 amendments to the VRA). A majority of the Court rejected the SG's position in *Thornburg*. *See* 478 U.S. at 43 n.7, 55, 61–62, 78 (expressly opposing the SG's arguments). The SG in the Clinton Administration, in contrast, took a more liberal position as amicus in some election law cases. *See* PACELLE, *supra* note 45, at 182–92 (discussing SG's amicus filings in Holder v. Hall, 512 U.S. 874, 876 (1994), which discussed vote dilution under section 2 of the VRA, and Shaw v. Hunt, 517 U.S. 899, 901–902 (1996), which discussed racial gerrymandering).

[99] *See, e.g.*, Ball v. James, 451 U.S. 355, 356 (1981) (showing a reapportionment or election law case after 1964 where the SG did not submit an amicus brief).

perceived importance of the case.[100] Perhaps it is surprising that the SG as amicus participated in as many cases as he did. When the United States is not a party to the suit, or when the suit does not seem to directly affect any particular interest of the federal government, it may not be obvious why the SG is filing an amicus brief at all. Similarly, while, as in *Baker*, the SG's decision to file a brief is often attributed to stark political considerations that are not expressly referenced by the SG in the amicus brief or otherwise. Indeed, the politically charged nature of cases may sometimes lead the SG, contra *Baker*, to decline to file an amicus brief.[101]

Consider the statements of the "interests of the United States" found in the amicus filings of the SG in these cases. No such statement is found in the SG's amicus briefs filed in *Baker*. But at oral argument in the case, Cox soothingly told the Court the United States was participating because it involved the constitutional rights of "a large number of citizens both in Tennessee and elsewhere," the "integrity of the electoral process," and "of course, a difficult and delicate question concerning the proper role of the judiciary" in reviewing reapportionment cases.[102] Similar reasons are found in the SG's briefs filed in later reapportionment cases.[103] In contrast, the SG's briefs filed in VRA cases state that the United States' interest flows from the attorney general being statutorily designated to enforce provisions of the VRA.[104] The outcome of such a case, even when the United States is not a party, can affect how the attorney general will enforce the VRA in other litigation.

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[100] *See* Pacelle, *supra* note 45, at 319–25 (stating the different factors that play into whether the SG submits an amicus brief in a particular case).

[101] Consider that the SG did not file amicus briefs in the two major cases concerning the justiciability of federal court suits against partisan gerrymandering, *Davis v. Bandemer*, 478 U.S. 109 (1986), and *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and that the SG did not participate as amicus in *Bush v. Gore*, 531 U.S. 98 (2000). The SG did participate as amicus in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, but his brief addressed only the VRA issue, not the challenge to the propriety of a mid-decade redistricting. *See* Brief for the United States as Amicus Curiae Supporting Appellees at 9–11, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (Nos. 05–204, 05–276, 05–439), 2006 WL 271820, at *III (providing an overview of the brief's legal arguments).

[102] ANSOLABEHERE & SNYDER, *supra* note 7, at 137.

[103] *See, e.g.*, Brief for the United States as Amicus Curiae at 3–4, Gray v. Sanders, 372 U.S. 368 (1963) (No. 112), 1962 WL 115856, at *3 (discussing the United State's reasons for participating); Brief for the United States as Amicus Curiae at 3–4, Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (No. 938), 1969 WL 136918, at *3–4 (same).

[104] *E.g.*, Brief for the United States as Amicus Curiae Supporting Appellees at 1, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (Nos. 05–204, 05–276, 05–439), 2006 WL 271820, at *1; Brief for the United States as Amicus Curiae Supporting Appellants at 1, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83–1968), 1985 WL 669641, at *1; Brief for the United States as Amicus Curiae at 1, McDaniel v. Sanchez, 452 U.S. 130 (1981) (No. 80–180), 1980 WL 339768, at *1.

In other words, in the latter cases the United States has a direct interest, while in the former the governmental interest is, at best, indirect. This dichotomy is reflective of the decision of the SG to file an amicus brief in any case. In the latter cases, the government may be concerned with its enforcement powers, or otherwise have some direct interest, while in the former cases, the government is pursuing a broader political or social agenda, unrelated to any direct interest of or impact on the federal government.[105] As noted, *Baker* and the other early reapportionment cases clearly fell into the broader political agenda category, and to their credit, the officials in the three presidential administrations who filed the briefs made no pretense otherwise.[106] Still, the amicus filings in some post-*Baker* cases pushed the category to almost the logical breaking point. Consider the SG filing amicus briefs in the cases in the late 1960s and early 1970s regarding whether the one-person, one-vote principle applied to the districts for local governmental units.[107] What possible interest could the federal government have in the outcome of such a case?[108]

Commentary on *Baker v. Carr* and its contemporary cases has been right to focus on the SG's amicus briefs filed in those cases, since there is some evidence that the briefs influenced the decision making of the justices, and perhaps in other ways. This Article extends that discussion to the SG's amicus filings in later reapportionment and other election law cases. The nature and extent of that influence, both in *Baker* and later cases, is a complex matter that resists easy generalization. Whether and how the Court, or individual justices, were influenced in any given case can depend on,

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[105] Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 599 (1986); Pacelle, *supra* note 45, at 320.

[106] An exception to this generalization might be *Wesberry v. Sanders*, 376 U.S. 1 (1964), which involved the state drawing of districts for elections to the U.S. House of Representatives. The SG's amicus brief in that case observed that the "federal government's interest is perhaps even greater in this case than in *Baker v. Carr* since fair representation in the federal legislature, Congress itself, is involved." Brief for the United States as Amicus Curiae at 2, Wesberry v. Sanders, 376 U.S. 1 (1964) (No. 22), 1963 WL 105668, at *2. Perhaps Congress itself should have filed an amicus brief in the case, rather than relying on the SG. *See* Amanda Frost, *Congress in Court*, 59 UCLA L. Rev. 914 (2012).

[107] *See, e.g.*, Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (SG filed a brief); Avery v. Midland Cnty., 390 U.S. 474 (1968); Sailors v. Bd. of Educ., 387 U.S. 105 (1967) (same).

[108] In contrasting the "institutional" and "administration" roles of the SG, David Strauss notes that under some conceptions of the former role, the Executive Branch arguably had no particular interest in reapportionment cases, and thus should not have filed amicus briefs in those cases. David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 L. & CONTEMP. PROB., Winter 1998, at 165, 171. He argues, in contrast, that if the reapportionment cases had been brought under the Guarantee Clause, which states that the "*United States* shall guarantee to every State . . . a republican Form of Government," U.S. CONST. art. IV, § 4 (emphasis added), then there would have been a better argument for a federal government interest in those cases. Strauss, *supra* note 108, at 171 n.11.

among other things, the legal and political context of the case prior to the decision, the dynamics among the justices in deciding the case and rendering a decision, the reaction anticipated by the Court, and the actual reaction to the case. Perhaps we should ask whether influence goes in the other direction as well, or even instead. The decision of the SG to file an amicus brief, and the content of that brief, might be influenced in part by the expectation that the Court wants such a brief or to satisfy constituencies other than the Court.[109]

III. THE CONGRESSIONAL SAFEGUARDS OF *BAKER V. CARR*

So far, this Article has been largely Court-centric, focusing on the Supreme Court's decisions and the activity of the litigants and amici in particular cases. A full understanding of the Reapportionment Revolution also requires an appreciation of actors affected by the cases, but not directly involved in a particular case. The focus of the present section of this Article is on Congress.

The Constitution's Elections Clause[110] vests power in Congress to regulate the process of electing members of Congress within each state, with the default power vested in the states themselves. Congress has enacted statutes under that Clause, ranging from an 1842 law that mandates that states electing more than one member of the House of Representatives do so by districts[111] to the Help America Vote Act of 2002.[112] On the whole, though, the states have been the principal regulators of congressional and state legislative elections. Nonetheless, the possibility of congressional action has played a prominent role in reapportionment litigation. Justice Frankfurter in *Colegrove* emphasized that Congress had authority to regulate the drawing of districts for congressional elections within states, and argued that courts entering this "political thicket" would invade the prerogatives of Congress.[113] Other opinions have similarly referenced

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[109] Graham, *supra* note 44, at 266; Pacelle, *supra* note 45, at 319. As noted earlier, the Court sometimes requests that the SG file an amicus brief in the case. *See supra* note 46 and accompanying text.

[110] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[111] 1842 Apportionment Act, ch. 47, 5 Stat. 491 (1842).

[112] Help America Vote Act of 2002, Pub. L. No. 107–252, 116 Stat. 1666 (codified as amended at 42 U.S.C. § 15301 (2006)). For other examples of congressional action under the Elections Clause, see Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 5 (2010).

[113] Colegrove v. Green, 328 U.S. 549, 553–56 (1946).

the Elections Clause in calling for judicial noninterference in some reapportionment litigation.[114]

A. Congressional Reaction to the Reapportionment Cases in the 1960s

Congress considered various statutory and constitutional responses in the wake of *Baker*. As previously observed,[115] the standard account is that some opposition in Congress arose in the immediate aftermath of the reapportionment cases, but it soon melted away given the popularity of those decisions and the lack of support for restrictions within Congress itself. That account is accurate as far as it goes, but, to some extent, it understates the depth and complexity of congressional reaction to the reapportionment and related cases.

Many state governmental officials, and interest groups representing states, mobilized in the immediate aftermath of *Baker*. Most notable were proposals by the Council of State Governments to amend the Constitution to abolish all substantive guarantees against malapportionment, to establish a "Court of the Union," comprised of all fifty states' supreme court chief justices with the power to review Supreme Court decisions, and to make it easier to amend the Constitution.[116] Much discussion on these proposals took place at various public and private venues in 1962 and 1963, and seventeen state legislatures eventually passed resolutions calling for passage of one or more of them.[117] But the proposals attracted relatively little attention to begin with, and upon encountering opposition from President Kennedy, the American Bar Association, and other leaders and elites from across the political spectrum, the movement behind the proposals lost steam.[118]

Congress apparently paid relatively little attention to *Baker* itself, but its attention picked up after the 1963 and 1964 decisions, particularly *Reynolds v. Sims* and its companion cases, which reached the merits of *Baker*-sanctioned attacks on state drawing of legislative districts, including those for the U.S. House of Representatives. Not

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[114] *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 275–77 (2004) (explaining that the Election Clause suggested that Congress, not the courts, had the primary role in regulating political gerrymandering of congressional districts); Wesberry v. Sanders, 376 U.S. 1, 42–45 (1964) (Harlan, J., dissenting) (noting that the Elections Clause suggested that the one-person, one-vote principle did not apply to drawing of districts for the House of Representatives).

[115] *See supra* note 5 and accompanying text.

[116] William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 534–35 (2002).

[117] For an extremely useful and detailed account of the state reaction to *Baker*, see *id.* at 529–52.

[118] *Id*. at 552–85.

surprisingly, the bipartisan opposition was particularly animated in some quarters of the House, since some incumbents there (unlike in the Senate) electorally benefitted from malapportioned districts. Opposition in the House was led by Democratic Representative William Tuck of Virginia, and in the Senate by Everett Dirksen, the Republican Minority leader from Illinois. Numerous bills were introduced in both chambers, which would have variously limited the jurisdiction of the federal courts over reapportionment cases, or delayed the implementation of court orders requiring reapportionment. A bill to limit federal court jurisdiction over such cases passed the House by the comfortable margin of 242 to 148, with the support of Southern Democrats and conservative Republicans, but proposals for similar limits languished in the Senate, despite the support of Dirksen. Once again, a variety of groups across the political spectrum, inside and outside of Congress, opposed the proposals.[119]

The reapportionment decisions were also discussed in the 1964 presidential campaign. President Lyndon Baines Johnson, at least through his agents in the Department of Justice, expressed opposition to the bills in Congress, but the issue was not addressed in the platform of the Democratic Party, and he said little about the cases during the campaign.[120] In contrast, the conservative Republican nominee for president, Senator Barry Goldwater, criticized the reapportionment cases as part of his broader critique of Warren Court decisions which, he argued, demonstrated judicial overreaching and invaded the prerogatives of the states. The Republican platform supported measures that would permit at least one part of a bicameral legislature to be malapportioned, and thus limit or overrule cases like *Reynolds v. Sims*.[121] President Johnson said little in response, but various luminaries in the legal establishment criticized Goldwater on that front, and ultimately Goldwater's "sharp criticisms of the Court probably had little impact on the election."[122]

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[119] For detailed accounts of the activity in Congress in 1964, see ANSOLABEHERE & SNYDER, *supra* note 7, at 178–80, CORTNER, *supra* note 7, at 236–42, DIXON, *supra* note 7, at 385–86, 394–97, and Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964).

[120] McKay, *supra* note 119, at 266–67. Earlier, top officials from the Department of Justice, including SG Cox, had met with the aides of Senators Dirksen and Mike Mansfield to discuss a "compromise" bill which only would have placed time limits on the implementation of federal court orders in reapportionment cases. But this compromise encountered opposition as well. *Id*. at 263–65.

[121] William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 427–33 (2002).

[122] *Id*. at 434.

With the seating of a new Congress in 1965, Senator Dirksen renewed his efforts to propose a Constitutional amendment that matched the provision in the 1964 Republican platform. In August of that year, the proposal passed the Senate fifty-nine to thirty-nine, but that was seven votes short of the minimum necessary to send it to the states. Opposition outside of Congress continued to fester, but it too faded, in part due to the many court-ordered reapportionments that were taking place.[123] By 1968, one or both houses in the legislatures of forty-nine states had been reapportioned, either by court order or due to the voluntary actions of legislators.[124] And to some degree the response to *Baker* was overtaken by the far more negative reaction to contemporary Warren Court decisions involving school prayer and criminal justice.[125]

So, the congressional reaction to *Baker* and its progeny was somewhat more complicated and extended than usually presented. What accounted for the ultimately muted response by Congress, and how was the Court affected by that response? On the former question, scholars of Court-congressional relations have identified several factors that may explain the reaction in Congress, through jurisdiction-curbing legislative proposals or otherwise, to Court

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[123] For details on the activity of supporters and opponents of the anti–reapportionment proposals inside and outside of Congress, see ANSOLABEHERE & SNYDER, *supra* note 7, at 180–82, CORTNER, *supra* note 7, at 242–46, and DIXON, *supra* note 7, at 402–15. Dirksen continued efforts to pass his proposal. It passed the Senate again in 1966, albeit by fifty–five to thirty–eight—less than a two–thirds supermajority. Formal opposition to the reapportionment cases largely ended with Dirksen's death in 1969. By that time, though, it appears that no less than thirty–three of the required thirty–four state legislatures had issued calls for the convening of a constitutional convention to consider adopting the Dirksen proposal or its equivalent. CORTNER, *supra* note 7, at 246. *Cf.* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 765–89 (1993) (listing thirty–two states which at one time had issued such calls). See Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968) and Michael Stokes Paulsen, *How to Count to Thirty–four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J. L. & PUB. POL'Y 837 (2011) for commentary regarding whether such calls are still legally viable.

[124] CORTNER, *supra* note 7, at 253.

[125] *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 565–68 (1996) (highlighting Supreme Court decisions that enhanced civil liberties and the subsequent reactions of the political right); CORTNER, *supra* note 7, at 223–26 (discussing how the opposition to Court decisions on religion and criminal justice during this period also increased the number of critics of the Court). To be sure, there might well have been connections between the more controversial Warren Court decisions and the reapportionment cases, but the strictly doctrinal connections were limited. *See, e.g.*, Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV., 59, 83–84 (acknowledging that reapportionment cases "say nothing explicit about race," but arguing that malapportioned legislatures were to the political detriment of urban blacks, and linking cases to broader racial agenda of the Warren Court); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869 (1964) (drawing connections between *Brown* and *Baker*).

decisions. These factors include the policy agenda of Congress and its view of the policy consequences of Court decisions; differing views of proper constitutional interpretation between members of Congress and the majority of the Court; the salience of particular issues; the presence or absence of interest group activity on an issue; and the support (or lack thereof) inside and outside of Congress for the Court's attention to and resolution of a particular issue.[126]

Application of these factors sheds greater light on the response of Congress to the reapportionment cases and the ultimate failure of the constitutional and statutory proposals to overturn or limit the decisions or restrict the jurisdiction of the federal courts. We can stipulate that at least some of the negative response by some members of Congress was simply due to substantive disagreement with the interpretation of the relevant constitutional provisions by the majority of the Court.[127] Other opposition was driven by the anticipated electoral or policy consequences of the inevitable reapportioned nature of state legislatures, and of the districts for House members.[128]

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[126] For more extensive discussion of these factors, see generally CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE (2006) (providing discussion about the emerging trends for Congress and the Court to try and exert control over the other); Neal Devins, *Congress and Judicial Supremacy*, in THE POLITICS OF JUDICIAL INDEPENDENCE 45 (Bruce Peabody ed., 2011) (examining Congress's willingness to criticize the Court's decision making but hesitancy to take action that restricts the Court's authority); Miller, *supra* note 41 (highlighting the intersection of law and politics and the different methods political scientists use to study that intersection); Grove, *supra* note 5, at 883–84 (pointing out how the confirmation procedures for justices ensure their political views align, at least in part, with some members of the legislature and consequently are at odds with the views of others).

[127] *See* CORTNER, *supra* note 7, at 243 (discussing congressional hearings on the Dirksen amendment); DIXON, *supra* note 7, at 386 (commenting on the development of the measure introduced by Dirksen). In contrast, at least one prominent contemporary observer dismissed the constitutional discussion as grandstanding, since (referring to the Tuck bill) he opined that the House did not "seriously intend the enactment of this drastic legislation." McKay, *supra* note 119, at 269. But that observation should be tempered by the fact that the same observer later enthusiastically endorsed the reapportionment cases; *see generally* Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968) (providing remarks on why the reapportionment cases were so successful and how the results were, comparatively, so easily achieved). This is an illustration of the difficulty of objectively determining how seriously Congress discharges its obligation to consider constitutional issues in the legislative process. *See generally* Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737 (2011) (arguing that congressional committees in recent years have paid less and less attention to Constitutional issues); Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525, 525 (2009) (arguing that asking "whether Congress is capable of conscientious, responsible constitutional interpretation" is not the proper question); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983) (discussing how Congress should be more active in evaluating potential constitutional shortcomings of legislation); Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?*, 89 B.U. L. REV. 499 (2009) (contending "conceptual problems and institutional features" within Congress make it difficult to determine whether Congress has the ability to appropriately consider Constitutional issues).

[128] CORTNER, *supra* note 7, at 244–45.

On the other hand, there was ideological support for the decisions in Congress and leading interest groups.[129] And the likely political consequences of the decisions generated support for the reapportionment decisions in Congress and the executive branch.[130] Indeed, it has been argued that many of the reapportioned legislatures in the 1960s largely inured to the electoral benefit of Democrats (as the Kennedy administration had predicted), because many then extant malapportioned plans had favored Republicans.[131] Though there were Democrats of many different ideological stripes in the 1960s, that party nonetheless controlled both chambers of Congress and the presidency during the decade until 1969. All of these factors combined with the support for the reapportionment cases from the interested public to doom congressional proposals to restrict the cases.

How much did the Supreme Court react to the anticipated or actual congressional opposition when rendering the reapportionment cases? On balance, the answer seems to be very little. The opinions characteristically say nothing about this topic, though several of the justices, in the course of public remarks, unusually made direct and critical reference to the earlier opposition to *Baker* at the state level.[132] Addressing this issue from a broader perspective, empirical studies have suggested that the Court, to certain degrees, *does* take into account the anticipated or actual negative reaction in Congress when it renders constitutional law decisions.[133] But even if that is true as a whole, it does not characterize the Court's reapportionment cases. Part of the reason, it would seem, is that a majority of the Court was not oblivious to the support of the executive branch, principally though not only through the SG's amicus briefs. The justices were

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[129] *Id.* at 243.

[130] Members of Congress may welcome Supreme Court intervention in order to overcome entrenched political opponents. The inherent difficulty of nonjudicial means for legislators to change malapportioned legislatures is a classic example. Whittington, *supra* note 64, at 587–89. The president may find it appropriate to oppose restrictions on federal court jurisdiction, since federal courts are an important venue for executive enforcement of federal law, or simply a forum to advance his general policy objectives. *See* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012).

[131] GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 22–24 (2002).

[132] CORTNER, *supra* note 7, at 223, 225 (reporting criticisms in speeches in 1963 by Chief Justice Warren, and Justices Brennan and Goldberg).

[133] *See* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 18–24 (2011) (noting how the Supreme Court uses court–curbing bills, among other things, to understand its current level of institutional legitimacy and public support); Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (describing how the Court, at least in part, takes into account the current support for legislation in Congress when considering constitutional challenges to that legislation).

presumably also not oblivious to the Democratic majorities in Congress at the time, which might have led them to conclude that efforts to limit federal court involvement on this issue were unlikely to succeed. Most of negative reaction in Congress, it might be said, came too late: immediately after *Baker* or even *Wesberry* (decided in February of 1964) would have been the optimal time for opponents to strike. But most of the reaction took place after *Reynolds* and its companion cases in June of 1964 and reapportionment of congressional and state legislative districts, was well underway in 1964 and 1965.[134]

In some ways, the Court itself controlled the rapidity of this line of decisions. All of the reapportionment decisions starting with *Baker* were direct appeals from decisions of three-judge district courts, and the Court could not have been unaware of that fact and the rapid nature of appeals from such decisions, as compared to the normal appellate process. The Court was able to promptly accept review of such appeals and decide them in relatively quick fashion.[135] A long series of reapportionment cases strung out over several years, in contrast, might have given opponents, inside and outside of Congress, more time to effectively mobilize. Finally, to some extent the constitutional heavy lifting was accomplished in the 1964 cases. The Court would continue to decide reapportionment cases throughout the 1960s, but many were not blockbuster decisions.[136] The relatively clear mandate of the one-person, one-vote principle, and the complete enforcement and (if perhaps grudging in some places) compliance by other political institutions (i.e., federal and state courts, and state legislatures) combined to limit the controversy over the decisions.

B. The Three-Judge District Court in Reapportionment and Voting Rights Act Cases

The story of the institution of the three-judge district court illustrates how Congress has influenced reapportionment litigation by

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[134] ANSOLABEHERE & SNYDER, *supra* note 7, at 178–82 (describing reapportionment activities in 1964 and 1965).

[135] *Id.* at 170–72 (describing how many reapportionment challenges were filed and litigated before three–judge district courts shortly after *Baker* was decided in March of 1962 or already being litigated before *Baker*, with many direct appeals of such cases reaching the Court in 1963 and 1964); CORTNER, *supra* note 7, at 184–86 (providing further details on the apportionment cases that were on the road to the Court shortly after *Baker*); *id.* at 192 n.1 (shortly after *Reynolds* and its companion cases were decided, the Court disposed of and remanded by per curiam opinions pending appeals from reapportionment decisions from nine states).

[136] Michael E. Solimine, *The Causes and Consequences of the Reapportionment Revolution*, 1 ELECTION L.J. 579, 581 (2002) [hereinafter Solimine, *Causes*] (reviewing COX & KATZ, *supra* note 131, noting that the Court did not again decide any important reapportionment cases involving congressional districting until the late 1960s and 1970s).

providing a special forum for the litigation of those cases. Congress did not intentionally set out to do so. The story begins long before *Baker* in 1908, when the Court decided *Ex parte Young*,[137] holding that federal judges could enjoin the enforcement of state statutes (regulating railroad rates) which violated federal constitutional rights of railroads. The case was extremely controversial for its time, since it clarified that states could be sued in federal courts (by enjoining state officials),[138] and was perceived as yet another decision by a conservative Court striking down Progressive Era legislation.[139] Congress responded to the decision by creating a three-judge district court to hear *Ex parte Young*-like challenges to statewide legislation. The court consisted of a district judge before whom the case was originally filed, joined by two other judges (typically one circuit judge and one district judge, usually from the same state) appointed by the Chief Judge of the relevant circuit, with a direct appeal of its decision to the Supreme Court. The premise behind the court was that three judges, rather than one, might better consider the important and delicate task of assessing the constitutionality of state statutes; that any such decision might be better received than a decision by a sole district judge; and that a direct appeal would make it easier for the Supreme Court to promptly resolve the case.[140]

While originally framed as a liberal break on conservative federal judges to protect state prerogatives, in subsequent decades the three-judge district court in some quarters came to constitute almost the opposite premise. After World War II, many civil rights cases in Southern states, challenging state provisions that discriminated against African Americans, were litigated before such courts. The attorneys that brought such suits came to conclude that they were more likely to succeed before three federal judges, as opposed to just one, possibly hostile jurist, with the added benefit of a prompt direct appeal to the Supreme Court, which by the 1950s and 1960s came to be seen as a sympathetic forum for their causes.[141] To be sure, the early reapportionment cases, which were all challenges to statewide

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[137] 209 U.S. 123 (1908).

[138] *Id.* at 155–56.

[139] Michael E. Solimine, *Congress,* Ex parte Young, *and the Fate of the Three–Judge District Court*, 70 U. PITT. L. REV. 101, 101 (2008) [hereinafter Solimine, *Congress*].

[140] The three-judge district court statute is now codified, as amended, in 28 U.S.C. § 2284 (2006), and the direct appeal provision is codified at 28 U.S.C. § 1253 (2006). A discussion of *Ex parte Young* and the congressional reaction to it, which culminated in the 1910 statute, is found in Solimine, *Congress*, *supra* note 139, at 104–18.

[141] Solimine, *Congress*, *supra* note 139, at 125–34. The most notable example of this litigation strategy is *Brown v. Board of Edcucation*, 347 U.S. 483 (1954). Solimine, *Congress*, *supra* note 139, at 126–28.

laws and hence fell under the coverage of the three-judge district court, did not particularly benefit from being litigated in those courts. Plaintiffs in *Baker v. Carr*[142] and most (though not all) other cases[143] initially lost below, but they were able to promptly appeal losses to what turned out to be a sympathetic Supreme Court.

Shortly after the Court's first round of reapportionment cases, Congress affirmatively embraced the three-judge district court as the appropriate and sympathetic forum to adjudicate certain cases under the VRA, passed in 1965. Under section 5 of the VRA, as it stands now, nine Southern states, and some subsections of other states, must seek preclearance from the federal government before changing certain voting provisions. The requirement is premised on historic discrimination in those states against the voting rights of African Americans and other minorities. Those jurisdictions can seek preclearance by obtaining the permission of the Department of Justice, or by filing a declaratory judgment action before a three-judge district court in the District of Columbia.[144]

Placing these cases in that venue was a matter of controversy. The congressional rationale appears to have been based on venue requirements for actions against federal officials, many of whom work in the District of Columbia, and more substantively on the notion that the VRA would be more expansively interpreted, and receive more of a uniform application, by the presumably nonparochial federal judges in the District of Columbia. Absent this provision, preclearance actions would have been litigated in federal courts in the affected states, before local federal judges who, Congress apparently presumed, might be more sympathetic to state interests and less to the requirements of the VRA.[145] Not surprisingly,

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[142] 369 U.S. 186 (1962), *rev'd* 179 F. Supp. 824 (M.D. Tenn. 1959) (per curiam) (three–judge court). For a discussion of the three judges in the district court in Tennessee and the proceedings before them, see CORTNER, *supra* note 7, at 60–69.

[143] *See e.g.*, Wesberry v. Sanders, 376 U.S. 1, 3–4 (1964), *rev'd* Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962) (three–judge court) (reversing the dismissal of plaintiffs complaint); Reynolds v. Sims, 377 U.S. 533, 586–87 (1964), *aff'd* Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962) (per curiam) (three-judge court) (affirming the District Court's finding for plaintiffs); Lucas v. Forty–Fourth Gen. Assembly of Colorado, 377 U.S. 713, 739 (1964), *rev'd* Lisco v. Love, 219 F. Supp. 922 (D. Colo. 1963) (three-judge court) (reversing the dismissal of plaintiffs claim).

[144] 42 U.S.C. § 1973b–c (2006); 28 C.F.R. app. pt. 51 (2011). For further details on the preclearance provisions and their application by courts, see DIMINO, SMITH & SOLIMINE, *supra* note 21, at 225–83.

[145] *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 16–20 (1987) (discussing controversial measures of the VRA); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act*, *1965–2007*, 86 TEX. L. REV. 667, 681 (2008) (discussing the legislative history of adding Section 5 to the VRA); *see also,* Solimine, *Congress*, *supra* note 139, at 132–33 (discussing possible rationales for vesting judicial preclearance in a three–judge district court in the District of Columbia).

southern Democrats in both chambers were among the leaders of the congressional opposition to this provision, including Representative Tuck.[146] Perhaps surprisingly, given his opposition at the time to the reapportionment cases, among the congressional leaders supporting the provision was Senator Dirksen.[147] The VRA survived a constitutional challenge the year after passage in *South Carolina v. Katzenbach*.[148] There, the majority acknowledged the burden on state governments of litigating cases in the District of Columbia, but found it a permissible exercise of congressional power to regulate the jurisdiction of the federal courts.[149] Justice Hugo Black dissented in part on the basis (echoing congressional critics) that the preclearance provision forced states "to entreat federal authorities in far-away places for approval of local laws."[150] The VRA and the preclearance component have been reauthorized by Congress in 1970, 1975, 1982, and 2006, and the exclusive venue of the District of Columbia court has not been revisited.[151]

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[146] THERNSTROM, *supra* note 145, at 19–20 (quoting Tuck).

[147] For a detailed discussion of the Senate opposition to the District of Columbia venue for preclearance actions and Dirksen's role in overcoming it, see Gyung–Ho Jeong, Gary J. Miller & Itai Sened, *Closing the Deal: Negotiating Civil Rights Legislation*, 103 AM. POL. SCI. REV. 588, 599–601 (2009).

[148] 383 U.S. 301 (1966).

[149] *Id*. at 331.

[150] *Id*. at 359 (Black, J., dissenting). The Supreme Court subsequently engaged in some revisionist history in *Allen v. State Bd. of Elections*, 393 U.S. 544, 562–63 (1969), when it stated that federalism concerns raised by federal court review of state voting procedures called for a special court to convene to resolve those concerns. This suggests that the District of Columbia court was deemed to be protective of state prerogatives, when Congress seemed to hold the opposite assumption.

[151] Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 784 n.76 (2007) [hereinafter Solimine, *Institutional Process*] (Congress rejected subsequent efforts to extend the venue of preclearance actions). The preclearance provision has recently been the subject of constitutional attack, on the basis that the law exceeds the powers of Congress, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) (not reaching such a challenge to the 2006 reauthorization of the VRA since case resolved on other grounds), and been the subject of considerable scholarly literature, *e.g.*, Richard H. Pildes, *Voting Rights: The Next Generation*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 17 (Guy–Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) [hereinafter RACE, REFORM, AND REGULATION]; Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act,* 3 NAT'L AFF., Spring 2010, at 52; Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785 (2006), but there has apparently been little if any discussion of modifying the venue for preclearance actions. It is worth noting that litigation challenging the constitutionality of Section 5 continues. *See, e.g*., Shelby Cnty. v. Holder, 811 F.Supp.2d 424 (D.D.C. 2011) –(upholding constitutionality of section 5), aff'd, No. 11–5256, 2012 WL 1759997 (May 18, 2012) The latter case was decided by a single district judge, unlike the three–judge district court that considered the *NAMUNDO* case. The difference is due to the plaintiff in *NAMUNDO* having requested a bailout under section 5, which is heard by a three-judge district court. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 508; 42 U.S.C. § 1973b(a)(5) (2006). In contrast, the plaintiff in *Shelby County* did not request a bailout or preclearance, but simply asked for a declaratory judgment on the constitutionality of that provision. *Shelby Cnty.*,811

Congress revisited the use of the three-judge district court in the 1970s. While that court had been perceived to be a welcome device by some civil rights plaintiffs, it became increasingly unpopular among many federal judges and Supreme Court justices. Their opposition was based on the administrative burdens on the three judges sitting in a trial capacity; the relatively large number of cases in the 1950s and 1960s that went before such courts; and the burden on the Supreme Court to hear and dispose of the numerous, ostensibly mandatory, direct appeals from such courts, when otherwise many appeals would have been resolved in the circuit courts with only review by certiorari thereafter.[152] By the early 1970s, the Supreme Court, the American Law Institute, a distinguished committee appointed by Chief Justice Warren Burger, and others had called for the abolition of the three-judge district court, casting their arguments in wholly practical, nonideological terms.[153] Congress took up the proposals, and although the NAACP and other civil rights organizations opposed the change, bipartisan support was too strong and the repeal passed in 1976.[154]

Some of the abolitionists had argued that the three-judge district court should continue to be used for certain types of controversial matters, such as reapportionment cases. The precise rationale for such an exception was never made clear. The unelaborated argument was made that the court ought to be used for such cases because of their asserted "public importance" and the need for the "public acceptance" of such decisions.[155] While the supposed widespread acceptance of the reapportionment decisions is frequently asserted, perhaps the decennial practice of federal courts reviewing the actions of state legislatures on districting was unsettling, in the minds of some members of Congress (and even some judges), and they concluded that three federal judges undertaking that task should be left intact. Likewise, members of Congress may have thought that reapportionment cases were genuinely difficult to resolve and that

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F.Supp.2d at 427. .The same judge in parallel litigation held that a three-judge district court need not be convened to hear such a case. Laroque v. Holder, 755 F. Supp. 2d 156, 165–66 (D.D.C. 2010), *rev'd on other grounds*, 650 F.3d 777 (D.C. Cir. 2011).

[152] Solimine, *Congress*, *supra* note 139, at 134–37 (discussing opposition among federal judges and others).

[153] *Id*. at 138–41.

[154] Act of Aug. 12, 1976, Pub. L. No. 94–381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284 (2006)). For a detailed discussion of the legislative history of the repeal, see Solimine, *Congress*, *supra* note 139, at 141–48.

[155] *Id.* at 142 (referring to congressional testimony by well–known federal judges Henry J. Friendly and J. Skelly Wright).

three minds were better than one. Finally, some members may have thought that some (perhaps many) federal judges were inevitably prone to partisan decision making when reviewing the districts drawn by state legislatures, and that such partisanship might be diluted when three federal judges heard the case rather than one.[156] The enacted legislation contained the exception.

How has the three-judge district court worked in such cases since 1976?[157] This question is difficult to answer, since the perceived importance or acceptance of such cases is difficult to measure, as would be a comparison to the decision making in these cases by single district judges, with normal appellate review thereafter, had the court been totally abolished. Some efforts have been made to analyze the composition of and decision making by three-judge district courts and litigant behavior in reapportionment cases, which can shed light on the question.

Both before and after the 1976 amendment, the Chief Judge of the circuit in which the case is filed is statutorily tasked with appointing the two additional members of the panel.[158] Prior to the amendment, there is some evidence that in some civil rights cases in the 1960s, Chief Judges would occasionally appear to "stack" the composition of the panel to achieve a presumably favorable outcome, especially when the judge to whom the case was originally assigned seemed hostile to the enforcement of civil rights.[159] Assuming such stacking sometimes took place, did it happen in reapportionment cases? Not so

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[156] *Id*. at 144–45.

[157] For an overview of the operation of three-judge district courts in election law cases, see Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 455–67. Many reapportionment cases brought under the Equal Protection Clause are coupled with claims under the VRA. While the exception does not textually cover the latter claims, the exception has been construed to apply to cases where both claims are raised. Page v. Bartels, 248 F.3d 175, 187–91 (3d Cir. 2001) (illustrating this point); Michael E. Solimine, *The Three–Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REF. 79, 95–97 (1996) [hereinafter Solimine, *Three-Judge District Court*]. Also, states covered by section 5 may need to have their reapportionment plans reviewed by two different three–judge district courts. *See, e.g.*, Perry v. Perez, 132 S. Ct. 934, 941–43 (2012) (per curiam) (while waiting for decision by three–judge district court in D.C. on section 5 preclearance review, three–judge district court in Texas must defer to initial redrawing of districts by the Texas legislature when drawing interim maps).

[158] 28 U.S.C. § 2284(b)(1)(2006). Usually, cases are randomly assigned to federal district judges, and three-judge panels on the Courts of Appeals are randomly constituted. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Courts of Appeals*, 78 TEX. L. REV. 1037, 1041 (2000).

[159] For an overview and evaluation of the evidence, see Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1729 (1993) (describing evidence); Solimine, *Three-Judge District Court*, *supra* note 157, at 110–16. Most of evidence concerns the alleged stacking by Chief Judge Elbert Tuttle of the Fifth Circuit, an Eisenhower appointee from Georgia with notably progressive views on civil rights and race. *Id.* at 111–12.

much, it appears.[160] The hearings that led up to the 1976 statutory change appear not to have directly addressed the issue.[161] One study of eighty-nine cases (many of them reapportionment matters) decided after the amendment, from 1976 to 1994, indicates that in only five cases was more than one circuit judge added to the panel, and in seventy-three cases all of the judges were from one state, leading to the conclusion that "a highly politicized composition process" had not taken place.[162] On the other hand, the same study reported a survey taken of Chief Judges and circuit executives in 1995. The survey indicated that purely administrative reasons were employed to decide who would serve on the panel, but responses from at least two circuits indicated that the Chief Judges would sometimes overtly attempt to balance the panel politically, given the politically consequential nature of reapportionment cases.[163] Perhaps it was used in other circuits as well. This milder form of stacking might be applauded as an effort to create the appearance (and actuality) of fairness in such cases, or criticized as an inappropriate overt step that institutionalizes judicial partisanship.[164]

The purported stacking of three-judge panels raises the issue of whether federal judges are making partisan decisions in

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[160] *See, e.g.*, Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962) (three–judge court) (2–1 decision), *rev'd sub nom.* Wesberry v. Sanders, 376 U.S. 1 (1964). In the district court, Chief Judge Tuttle appointed himself, and Circuit Judge Griffin Bell, who also had a generally progressive record in civil rights cases, to the panel in an important reapportionment case, but Tuttle ended up dissenting in the case when Bell and the district judge found for the defendant.

[161] The legislative history of the amendment makes no direct reference to the alleged stacking issue, although it does characterize the Chief Judge's role as "entirely ministerial." Solimine, *Three-Judge District Court*, *supra* note 157, at 112 (quoting H.R. REP. NO. 94–1379, at 7 (1976)).

[162] *Id.* at 114. The study did not directly examine the political composition of the appointed judges, and suggested more extensive study of that issue would be appropriate to more fully examine the possible "packing" phenomenon. *Id.* at 114–15. A recent study by Mark McKenzie, whose work I rely on below, *see infra* notes 170–74 & accompanying text, provides additional albeit indirect support for the conclusion that little overt stacking takes place. He studied the judicial behavior of members of three–judge district courts in 149 redistricting decisions from 1981 to 2007. Rather than using the proxy of the party of the appointing president, he used the self–described partisan affiliation (if any) of the judges prior to their appointment. In only twenty–two of the 149 decisions were the panels made up entirely of the judges of one party (ten all Republican, twelve all Democratic). Of the remaining panels, forty–two had one Democrat, while fifty–nine had one Republican. Twenty six panels had one or more independents sitting. E–mail from Mark McKenzie, Assistant Professor of Political Science, Texas Tech University, to Michael E. Solimine, Professor of Law, University of Cincinnati College of Law (Oct. 12, 2011, 21:31 EST) (on file with author) [hereinafter McKenzie email]. In compiling this data, Prof. McKenzie did not directly examine (nor did the study mentioned in the text) the process of appointment of any given panel, and the personnel options available to the appointing Chief Judge of the circuit for any particular case. But, if overt stacking by Chief Judges were taking place in these cases, presumably there would be more instances of all–Republican or all–Democratic panels.

[163] Solimine, *Three-Judge District Court, supra* note 157, at 113.

[164] For a discussion of the competing concerns, *see id.* at 127, 135.

reapportionment cases and related election law cases. Many studies of decision making by federal judges assume their ideological preferences are the same as the presidents who appointed them, and that decisions in this context can be categorized as liberal or conservative, depending on whether the plaintiff or defendant prevailed in a case involving, say, the VRA.[165] The assumption of much of the literature is that judges will attempt to favor the political party with whom they were affiliated in some way. But such studies must be used with caution in evaluating judicial performance in reapportionment and related cases. The oft-used proxy of the party of the appointing president can be a crude measure of presumed judicial ideology. Presidents occasionally name judges affiliated with the opposing political party, since lower court appointments can be influenced by the party affiliations of Senators from the state of appointment. Likewise, the precise nature of the reapportionment plan typically under review by a federal court needs to be examined to determine if a federal judge is supposedly favoring his or her party, rather than simply determining if a plaintiff or defendant prevails.[166]

Whatever measures are used, the empirical evidence on ideological or partisan voting by federal judges in reapportionment and related cases is mixed. Some studies have suggested that federal judges do act in partisan ways in considering the validity of reapportionment plans.[167] Other studies have suggested that federal judges, on the whole, do not vote in overtly partisan ways in reapportionment and other related election law cases.[168] Consider one recent, relatively

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[165] For one representative study with these characteristics, see Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493 (2008) (empirical study of federal court decisions concerning section 2 of the VRA, using the party of the appointing president as a proxy for ideological preference of federal judges). This study did not specifically differentiate the voting of district judges sitting alone from those in three-judge district courts.

[166] Solimine, *Three-Judge District Court*, *supra* note 157, at 121–23 (discussing complexities of empirical study of judicial behavior in this context). *See also* Solimine, *Institutional Process, supra* note 151, at 789–90 (discussing the same). Similar difficulties attend the study of judicial review of racially gerrymandered districts. It is sometimes said that such districts, ostensibly established to aid the election of minorities, usually affiliated with the Democratic party, are supported by Republican operatives, to pack minority voters into one district and lessen their influence in other districts. So a judge who presumably favors the GOP may nonetheless be motivated to uphold the validity of such districts. Solimine, *Causes*, *supra* note 136, at 583. *But see* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011) (arguing against consensus that minority-majority districts, as required by the VRA, often hurt Democrats, due to diverse behavior by voters, and that such districts also constrain Republicans in the redistricting process).

[167] *See, e.g.*, Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995) (study of eighty–nine cases decided from 1964 to 1983).

[168] *See* Solimine, *Institutional Process, supra* note 151, at 790–91 (reaching this

comprehensive study of 149 three-judge district court decisions from 1981 to 2007.[169] This study found that "partisanship matters" in reapportionment cases, but "partisan favoritism is conditioned by the type of legal case."[170] Thus, it found that in cases only concerning the one-person, one-vote principle, usually regarded as a fairly settled area of law, there was little partisan voting, but there was more partisanship for attacks on redistricting plans under the VRA, an area of law less settled.[171] The study concluded that judicial partisanship was "constrained," because if "judges were crass partisan actors . . . then they should uphold" more than they did state legislative districting plans formulated by their own parties.[172]

Other evidence suggests that federal judges act in distinctive ways in redistricting cases. Surveys of judges have confirmed that they are not oblivious to the political implications of redistricting decisions, and indeed some judges suggested that such cases led to animosity and a lack of collegiality within the panel.[173] There are also higher rates of dissent in these cases, as compared to the low rate of dissent in three-judge panels in the courts of appeals in all cases.[174] Judges might react in two ways to this stress. Some might compensate by taking the greatest care to exclude their own political considerations from influencing their vote in the case. Others might take the opposite tack and, consciously or unconsciously, take political considerations

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conclusion from discussion of studies up till 2006, though acknowledging that there can be individual cases that are exceptions to this generalization); Richard L. Hasen, *Judges as Political Regulators: Evidence and Options for Institutional Change*, *in* RACE, REFORM, AND REGULATION, *supra* note 151, at 101, 104–08 (survey of empirical studies of voting by federal and state judges in election law cases).

[169] Mark Jonathan McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, POL. RES. Q. (forthcoming), *available at* http://prq.sagepub.com/content/early/2011/09/03/1065912911421012.abstract.

[170] *Id.* at 9. The study used the "common space" score of judges, as a measure of presumed ideology, rather than automatically using the proxy of the party of the appointing president. *Id.* at 6. "Common space" scores are predicated on measures of ideology of the appointing president and those of the Senators of the state from where the judge is appointed. *See* Lee Epstein, et al., *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303 (2007) (discussing this method of measurement).

[171] McKenzie, *supra* note 169, at 10.

[172] *Id.* at 9.

[173] Mark Jonathan McKenzie, Beyond Partisanship? Federal Courts, State Commissions, and Redistricting 154–55 (August 2007) (unpublished Ph.D. dissertation, University of Texas) (on file with author), *available at* http://repositories.lib.utexas.edu/handle/2152/3367 (summarizing results of survey of federal judges in redistricting cases).

[174] Solimine, *Three–Judge District Court, supra* note 157, at 139, tbl.4 (in eighty–nine three-judge court cases from 1976 to 1994, there were twenty–two dissents); McKenzie email, *supra* note 162 (reporting higher rates of dissent in study of 149 three–judge district court decisions from 1981 to 2007, than that typically found in three–judge panels on the Courts of Appeals).

into account if they perceive that is the proper and expected role of judges on a "politically balanced" panel.

Other aspects of decision making by three-judge district courts, as opposed to district judges acting alone, have been examined. One concern of such cases is that district judges might excessively defer to the votes of the circuit judge sitting on the panel. Studies have shown that circuit judges were not disproportionately authoring majority opinions in such cases.[175] Another reason for leaving such panels intact to hear reapportionment cases is that three judges would better arrive at a decision in these often complicated cases than merely one. There seems almost universal agreement that these are indeed difficult cases, not only due to the potential complications of the substantive law, but because that abundant expert testimony on quantitative issues is often presented and must be digested by the court.[176] It is difficult to objectively measure whether three judges, collectively acting, deal with or use such evidence better than one judge.[177] No doubt, the conclusion on this score is often in the eye of the beholder.

A final peculiarity of the three-judge district court is the availability of direct appeal to the Supreme Court. Studies have shown that appeals are filed in about 30 to 40 percent of such cases, which is higher than the typical rate of appeal for any given civil case decided by a district judge sitting alone.[178] No doubt the discrepancy is due to the consequential nature of such decisions to the political operatives in the states, who are parties to or behind the litigation. On the other hand, the Supreme Court has often disposed of such putatively mandatory appeals in a summary fashion, which seems to

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[175] Solimine, *Three-Judge District Court, supra* note 157, at 117–20 (study of 89 decisions of such courts between 1976 and 1994).

[176] D. James Greiner, *The Quantitative Empirics of Redistricting Litigation: Knowledge, Threats to Knowledge, and the Need for Less Districting*, 29 YALE L. & POL'Y REV. 527, 532–38 (2011) (discussing problems associated with judicial use of sophisticated quantitative evidence in redistricting cases); Solimine, *Three-Judge District Court*, *supra* note 156, at 116–17 (discussing the problems of generalized judges dealing with a specialized area of the law).

[177] The study by McKenzie, *supra* note 169, found that the partisan composition of the panel had no effect on the individual voting behavior of judges. McKenzie email, *supra* note 162 (commenting on findings not presented in forthcoming article). This suggests that the judges were reaching decisions free of undue influence of the other members of the panel.

[178] Solimine, *Three-Judge District Court*, *supra* note 157, at 99. One treatise reports a significant diminution of direct appeals since the 1976 amendment, using data from selected Terms in various decades. GRESSMAN ET AL., *supra* note 42, at 91 (reporting drop in such appeals, from three–judge district courts and certain district judges sitting alone, of 211 in 1971 Term, to six and two in the 2003 and 2004 Terms, respectively). These figures may not take into account that the number of direct appeals would be expected to be higher in the early terms of any given decade, since reapportionment litigation generally takes place shortly after the redistricting that takes place early in a decade. Solimine, *Three-Judge District Court, supra* note 157, at 108.

diminish the asserted utility of permitting direct appeals.[179] On balance, the possibility of a direct appeal probably does not much affect the behavior of the judges on a three-judge district court. The Supreme Court rarely reviews the decisions of lower courts (i.e., the U.S. Courts of Appeals and state supreme courts) in the normal appellate process. The same is true for direct appeals of three-judge district court decisions. Yet there is considerable evidence that the *threat* of review and reversal has a constraining effect on the behavior of lower court judges.[180] That, combined with the presumed fact that most federal judges internalize, to various degrees, norms of stare decisis, and the highly salient nature of reapportionment cases inside and outside the legal community suggests that the members of a three-judge district court are no more likely to ignore law and precedent any more than their brethren (and themselves) when sitting outside of that court.[181]

Congress left the three-judge district court intact to decide "important" reapportionment cases, and the largely unarticulated presumption was that litigation before that court would be different than that before single district judges. The presumption might be well founded, though perhaps not in all ways contemplated by Congress in 1976. While there is little evidence of overt stacking of such panels, there is some evidence, in some cases, that judges, consciously or not, take partisan considerations into account in their decision making. Nor is it clear that three judge panels render better or more accepted decisions, in any meaningful sense, than would one judge, with normal appellate review thereafter. The possibility of direct review by the Supreme Court has apparently not had much of a constraining effect, different from the normal appeal process that follows the decision of a district judge. It is thus difficult to settle on a facile conclusion regarding the efficacy of the three-judge district court in reapportionment and related cases since 1976.[182]

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[179] GRESSMAN ET AL., *supra* note 42, at 304–10; Solimine, *Congress, supra* note 139, at 127 n.134.

[180] For an overview of the considerable empirical literature that supports this proposition, see Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 556–57 (2011).

[181] Solimine, *Three–Judge District Court, supra* note 158, at 109.

[182] Despite that ambiguous record, Congress since 1976 has created special three-judge district courts as forums to consider legal challenges to other federal statutes. For examples, see GRESSMAN ET AL., *supra* note 42, at 102–03 (listing seven such statutes enacted since 1986). Most notable in the election law field is the three-judge district court in the District of Columbia which hears legal challenges to various provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107–155, § 403(a), 116 Stat. 81, (2002), codified at 2 U.S.C. § 437h. For discussion of that provision and its frequent use, see Douglas, *supra* note 157, at 455–58; Solimine, *Institutional Process*, *supra* note 151, at 771–79. Recent examples of litigation before that court include Citizens United v. FEC, 130 S. Ct. 876 (2010) (on review of three-

Many of the reapportionment cases have suggested that Congress could and should take a more active role in regulating state reapportionment of electoral districts, at least for members of Congress. Those calls continue to the present day,[183] though the support in Congress for such laws has been modest.[184] No doubt, the inaction is because many incumbents in both parties prefer the status quo and the inability to forge a bipartisan consensus among those who do not prefer the status quo. If those proposals were to pass, it would seem that there would be less litigation challenging redistricting, and less work for three-judge district courts. But until that day arrives, the three-judge district court will be the main vehicle of congressional regulation of the state redistricting process. So far as I know, there have been no proposals to abolish the three-judge district court.[185] Apparently, policymakers are satisfied with the status quo on that front as well.

CONCLUSION

Over forty years ago, one scholar of the reapportionment decisions argued that the decisions "primarily required acquiescence by state legislatures and state election officials, but it did not require positive support by either Congress or the president in order to be enforced effectively."[186] Strictly speaking, that is correct, but the thesis of this Article is that *Baker v. Carr* and the other reapportionment decisions of the early 1960s can only be understood and appreciated in light of the actions of the other branches of the federal government. The

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judge district court, holding unconstitutional BCRA provisions with limit independent expenditures by corporations and unions); Bluman v. FEC, 132 S. Ct. 1087 (2012), *aff'd mem.*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court) (upholding constitutionality of BCRA provisions barring political contributions by nonresident aliens).

[183] *See, e.g.*, Adam B. Cox, *Designing Redistricting Institutions,* 5 ELECTION L.J. 412, 416–17 (2006) (proposing a federal administrative agency to regulate gerrymandering in all 50 states); Joseph A. Peters, *The Meaningful Vote Commission: Restraining Gerrymanders with a Federal Agency*, 78 GEO. WASH. L. REV. 1051, 1060–63 (2010) (discussing a similar proposal); David Schultz, *Regulating the Political Thicket: Congress, the Courts, and State Reapportionment Commissions*, 3 CHARLESTON L. REV. 107, 139–43 (2008) (giving an overview of options for Congress).

[184] J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform To Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543, 555 (2011) (reviewing congressional bills that would reform state redistricting by encouraging or mandating the use of bipartisan redistricting commissions, but concluding that congressional action in the near term is unlikely).

[185] Other than myself. *See* Solimine, *Three-Judge District Court, supra* note 157, at 126–28 (arguing that the purported advantages of the court have been overstated, and that one district judge, with the normal appellate process thereafter, should hear reapportionment cases).

[186] CORTNER, *supra* note 7, at 260.

executive branch supported the decisions ex post by the Solicitor General's filing of amicus curiae briefs. In contrast, certain influential quarters of Congress criticized the decisions, and proposals that would have limited the impact of, or even overturned, the cases were given serious attention in Congress. Those efforts eventually did not prevail, though that failure may obscure some continuing, low–level opposition among elected state officials to federal court intervention in their redrawing of districts.[187] Both strands of action by the other branches have continued to influence the judicial progeny of *Baker* and of decisions regarding its first juridical cousin under the VRA. The SG has since been frequently involved as a party or as an amicus in reapportionment, VRA, and other election law cases. Congress, for good or ill, has largely taken a hands-off attitude toward the adjudication of these cases, with the notable exception of maintaining the peculiar institution of the three-judge district court to hear such cases.[188] In these ways, the federal courts have not been and are not autonomous institutions when reviewing the redistricting decisions of states.

APPENDIX: THE SOLICITOR GENERAL'S AMICUS CURIAE BRIEFS IN SUPREME COURT ELECTION LAW CASES, 1960-2011

Methodological note: for details on how the cases listed below were complied, see *supra* notes 83-84 and accompanying text. In addition, two cases listed by Hasen, in which the SG did file an amicus brief, *see* In re Heardon, 394 U.S. 399 (1969) (per curiam); Kay v. Ehler, 499 U.S. 432 (1991), are not listed here, since they

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[187] As one example, consider the reaction of William Batchelder, the Speaker of the Ohio House, to the possibility of such federal court intervention. In the wake of *State ex rel. Ohioans for Fair Dists. v. Husted*, 957 N.E.2d 277 (Ohio 2011), in which the Ohio Supreme Court held that there could be a referendum to review the districting plan approved by the state legislature, Batchelder worried that the congressional redistricting plan would be reviewed and possibly changed "by unelected federal judges, who may be judges from Michigan, Kentucky or Tennessee." Howard Wilkinson, *Ruling Muddles Election Process: Congressional Races Thrown Into Chaos,* CINCINNATI ENQUIRER, Oct. 16, 2011, at A1, A12. Batchelder was apparently referring to possible review by a three-judge district court, but past experience shows that such courts almost always are constituted of federal judges from the state in question. *See supra* note 135 and accompanying text. To be fair to Batchelder, he was apparently unhappy with any "judicial interference in the [redistricting process]," *id.* at A12, from federal or state courts.

[188] Members of Congress sometimes file amicus briefs in the reapportionment and other election law cases discussed in this article. *See, e.g.*, Motion for Leave to File *Amicus Curiae* Brief on Behalf of Appellees, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83–1968), 1985 WL 669643; Brief of McConnell et al., as Amici Curiae in Support of Respondents, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07–21, 07–25), 2007 WL 4340890. However, such briefs are filed much less often than those filed by the SG, and it appears to much less effect. *See* COLLINS, *supra* note 49, at 181–82.

involved a contempt proceeding, and the issue of whether a pro se attorney may recover attorney's fees, respectively, neither of which directly concerns the issues addressed in this article. The agreement or disagreement between the position taken by the SG, and the decision of the Court, is determined by the characterization of the SG's position as listed in the Court's decision and determined by the Reporter of Decisions, *see* Kearney & Merrill, *supra* note 42, at 838-42 (discussing use of these sources to characterize the position taken by amicus briefs), or through an examination of the content of the amicus brief. Any reference to the Solicitor General's amicus brief in any of the opinions of the Court in a case is counted as a citation.

1. Gomillion v. Lightfoot, 364 U.S. 339 (1960); agree; no citation.

2. Baker v. Carr, 369 U.S. 186 (1962); agree; no citation.

3. Gray v. Sanders, 372 U.S. 368 (1963); agree; citation.

4. Anderson v. Martin, 375 U.S. 399 (1964); agree; no citation.

5. Wesberry v. Sanders, 376 U.S. 1 (1964); agree; no citation.

6. Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Commission for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964); agree; citation.

7. Harman v. Forssenius, 380 U.S. 528 (1965); agree; no citation.

8. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); agree; no citation.

9. Moody v. Flowers, 387 U.S. 97 (1967); Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967); disagree; no citation.

10. Avery v. Midland County, 390 U.S. 474 (1968); agree; no citation.

11. Allen v. State Board of Elections, 393 U.S. 544 (1969); agree; citation.

12. Hadnott v. Amos, 394 U.S. 358 (1969); agree; no citation.

13. Hall v. Beals, 396 U.S. 45 (1969); disagree; no citation.

14. Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970); agree; no citation.

15. Evans v. Cornman, 398 U.S. 419 (1970); CVSG; agree; no citation.

16. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976); disagree; citation.

17. Morris v. Gressette, 432 U.S. 491 (1977); disagree; citation.

18. Wise v. Lipscomb, 437 U.S. 535 (1978); disagree; citation.

19. Berry v. Doles, 438 U.S. 190 (1978); CVSG; disagree; citation.

20. Dougherty County Board of Education v. White, 439 U.S. 32 (1978); agree; citation.

21. City of Mobile v. Bolden, 446 U.S. 55 (1980); disagree; no citation.

22. McDaniel v. Sanchez, 452 U.S. 130 (1981); agree; citation.

23. Hathorn v. Lovorn, 457 U.S. 255 (1982); agree; citation.

24. McCain v. Lybrand, 465 U.S. 236 (1984); agree; citation.

25. NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985); CVSG; agree; citation.

26. Thornburg v. Gingles, 478 U.S. 30 (1986); CVSG; disagree; citation.

27. Communications Workers of America v. Beck, 487 U.S. 735 (1988); CVSG; agree; citation.

28. Clark v. Roemer, 500 U.S. 646 (1991); CVSG; agree; citation.

29. Presley v. Etowah County Commission, 502 U.S. 491 (1992); disagree; citation.

30. Growe v. Emison, 507 U.S. 25 (1993); agree; no citation.

31. Voinovich v. Quilter, 507 U.S. 146 (1993); agree; citation.

32. Holder v. Hall, 512 U.S. 874 (1994); disagree; citation.

33. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); agree; no citation.

34. Morse v. Republican Party of Virginia, 517 U.S. 186 (1996); agree; citation.

35. Shaw v. Hunt, 517 U.S. 899 (1996); disagree; citation.

36. Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996); O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996); agree; no citation.

37. Chandler v. Miller, 520 U.S. 305 (1997); disagree; citation.

38. Foreman v. Dallas County, 521 U.S. 979 (1997); agree; no citation.

39. Hunt v. Cromartie, 526 U.S. 541 (1999); agree; citation.

40. Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000); agree; no citation.

41. Rice v. Cayetano, 528 U.S. 495 (2000); disagree; citation.

42. Cook v. Gralike, 531 U.S. 510 (2001); agree; no citation.

43. Easley v. Cromartie, 532 U.S. 234 (2001); agree; no citation.

44. Branch v. Smith, 538 U.S. 254 (2003); agree; citation.

45. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); agree; no citation.

46. Crawford v. Marion County Election Board, 553 U.S. 181 (2008); agree; no citation.

47. Riley v. Kennedy, 553 U.S. 406 (2008); disagree; citation.

48. Bartlett v. Strickland, 556 U.S. 1 (2009); agree; citation.

49. Arizona Free Enterprise Club v. Bennett, 131 S. Ct. 2806 (2011); disagree; citation.