2012

Congress, the Solicitor General, and the Path of Reapportionment Litigation

Michael E. Solimine

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Michael E. Solimine, Congress, the Solicitor General, and the Path of Reapportionment Litigation, 62 Case W. Res. L. Rev. 1109 (2012) Available at: https://scholarlycommons.law.case.edu/caselrev/vol62/iss4/10
CONGRESS, THE SOLICITOR GENERAL, AND THE PATH OF REAPPORTIONMENT LITIGATION

Michael E. Solimine†

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

† B.A., Wright State University (1978); J.D., Northwestern University (1981). Donald P. Kekamp Professor of Law, University of Cincinnati College of Law. An earlier version of this Article was presented at the Symposium on Baker v. Carr After 50 Years: Appraising the Reapportionment Revolution, Case Western Reserve University School of Law, sponsored by the Case Western Reserve Law Review, Nov. 4, 2011. I thank Michael Dimino, Jon Entin, Rick Hasen, Mark McKenzie, Ryan Owens, Rich Saphire, and Dan Tokaji, for their helpful comments on an earlier draft; Ross Gillingham for excellent research assistance; and the support of the Schott Fund.
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

---

\(^1\) 369 U.S. 186 (1962).
\(^3\) 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. 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, 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.

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. This hostility, however, faded away quickly, and subsequent congressional actions can be seen as
supportive of the decision. Baker and other reapportionment cases were initiated in three-judge district courts, with direct appeals to the Supreme Court. 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. 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. 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. To consider how the debaters treat Baker v. Carr is instructive.

Friedman begins by briefly summarizing the doctrinal developments before and after Baker. Sixteen years prior to Baker, the Court had held, in a plurality opinion by Justice Felix Frankfurter, in the factually similar case of Colegrove v. Green, that the dangers of courts entering a “political thicket” precluded judicial review of legislative malapportionment. 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
under the Equal Protection Clause. 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. Frankfurter predicted that such entanglements would lessen public confidence in the Court and that state legislatures would resist implementation. 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.

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. 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. 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.”

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

---

19 Id. at 267 (Frankfurter, J., dissenting).
20 Id. at 267–68.
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? 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? The majoritarian model also does not often make clear how life-tenured federal judges are affected or influenced by pressure from these majorities.

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. 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.” 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. 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. 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

---

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.


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

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...”).


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*).


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 \textit{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, \textit{Baker} and the one-person,
one-vote principle seem to be well accepted by the general public, even if their knowledge of redistricting in general is not deeply informed. 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. Regarding the

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, ‘Erasing 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.\(^\text{42}\) 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.\(^\text{43}\) 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.\(^\text{44}\)

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

---


particular presidents and SGs. 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. 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. 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. 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.


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 & Merril, 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).

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. Lightfoot52 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

---

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 amici curiae in Cox v. Peters). The Georgia system was later struck down in Gray v. Sanders, 372 U.S. 368 (1963).
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. 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.

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. 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. 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. 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.

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. Justices Clark, Douglas, and Stewart filed opinions concurring with the majority, while Justices Frankfurter and Harlan dissented. The majority opinion thus mirrored many of

---

56 Id. at 84.
58 Id. at 337.
59 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).
60 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, and indeed subsequent accounts of the internal deliberations of the justices in *Baker* seem to confirm that influence. 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.

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, 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. The Court struck down the system, for the first time explicitly employing the “one

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).


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).


person, one vote” rationale. This time only Justice Harlan in dissent briefly mentioned the SG’s amicus brief.

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, 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.

In 1964, the Court finally directly confronted a challenge to state legislative districts in Reynolds v. Sims and five companion cases, 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, but there was vigorous debate within the Department of Justice on the arguments to be made. Cox was reluctant to argue that application of a strict one-person, one-vote principle was constitutionally demanded. 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), and by the fact that in the case from Colorado, the voters had approved by referendum the malapportioned districts. After much discussion, Cox drafted the amicus brief, and while not arguing for strict application of the principle, the brief did argue that

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.
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.
75 ANSOLABEHERE & SNYDER, supra note 7, at 171.
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

---

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 draft of the SG’s amicus brief).
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

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).


89 See DIMINO, SMITH & SOLOMINE, supra note 21, at 225–26, 285–288 (describing
leading cases in that category,\textsuperscript{90} and in cases involving other election law issues.\textsuperscript{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.\textsuperscript{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.\textsuperscript{93} Those that do cite the brief sometimes make only passing and seemingly inconsequential references,\textsuperscript{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.\textsuperscript{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 increasing litigation under the VRA, and constitutional amendments, with regard to districting and race).


\textsuperscript{92} See supra notes 60–64 accompanying text.


\textsuperscript{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).

\textsuperscript{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) (“attaching[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

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 preclusion 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,
(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 precedent 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. 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.

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. Similar reasons are found in the SG’s briefs filed in later reapportionment cases. 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. 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.

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).


102 ANSOLABEHERE & NYDER, supra note 7, at 137.


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. 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. 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. What possible interest could the federal government have in the outcome of such a case?

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,

---


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).


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 Clause110 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 districts111 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

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).


113 Colegrove v. Green, 328 U.S. 549, 553–56 (1946).
the Elections Clause in calling for judicial noninterference in some reapportionment litigation.\textsuperscript{114}

\textit{A. Congressional Reaction to the Reapportionment Cases in the 1960s}\textsuperscript{115}

Congress considered various statutory and constitutional responses in the wake of \textit{Baker}. As previously observed,\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{118}

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

\textsuperscript{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).

\textsuperscript{115}See supra note 5 and accompanying text.


\textsuperscript{117}For an extremely useful and detailed account of the state reaction to \textit{Baker}, see id. at 529–52.

\textsuperscript{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

---

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.

120 McKay, supra note 119, at 263–65. 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

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


\(^{124}\) 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

---

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); DEXON, 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. And the likely political consequences of the decisions generated support for the reapportionment decisions in Congress and the executive branch. 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. 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 \textit{Baker} at the state level.

Addressing this issue from a broader perspective, empirical studies have suggested that the Court, to certain degrees, \textit{does} take into account the anticipated or actual negative reaction in Congress when it renders constitutional law decisions. 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

\begin{footnotesize}
\begin{itemize}[\itemsep=0pt]
  \item 129 \textit{Id.} at 243.
  \item 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, \textit{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. \textit{See} Tara Leigh Grove, \textit{The Article II Safeguards of Federal Jurisdiction}, 112 COLUM. L. REV. 250 (2012).
  \item 131 GARY W. COX & JONATHAN N. KATZ, \textsc{Elbridge Gerry’s Salamander: The Electoral Consequences of the Reapportionment Revolution} 22–24 (2002).
  \item 132 CORTNER, \textit{supra} note 7, at 223, 225 (reporting criticisms in speeches in 1963 by Chief Justice Warren, and Justices Brennan and Goldberg).
  \item 133 \textit{See} TOM S. CLARK, \textit{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, \textit{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).
\end{itemize}
\end{footnotesize}
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

\(^{134}\) 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); CORTRER, 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*, 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), and was perceived as yet another decision by a conservative Court striking down Progressive Era legislation.

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.

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. To be sure, the early reapportionment cases, which were all challenges to statewide

---

137 209 U.S. 123 (1908).
138 Id. at 155–56.
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.
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,


southern Democrats in both chambers were among the leaders of the congressional opposition to this provision, including Representative Tuck. The congressional leaders supporting the provision was Senator Dirksen. The VRA survived a constitutional challenge the year after passage in *South Carolina v. Katzenbach*. 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. 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.” 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.

---

146 *Thernstrom, supra* note 145, at 19–20 (quoting Tuck).
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.
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. 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. 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.

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. 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


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

Id. at 138–41.


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

---

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).
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. The hearings that led up to the 1976 statutory change appear not to have directly addressed the issue. 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. 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. 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.

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

---

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].

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{168} Consider one recent, relatively

\textsuperscript{165} For one representative study with these characteristics, see Adam B. Cox & Thomas J. Miles, \textit{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.

\textsuperscript{166} Solimine, \textit{Three-Judge District Court, supra} note 157, at 121–23 (discussing complexities of empirical study of judicial behavior in this context). \textit{See also} Solimine, \textit{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, \textit{Causes, supra} note 136, at 583. \textit{But see} Adam B. Cox & Richard T. Holden, \textit{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).


\textsuperscript{168} \textit{See} Solimine, \textit{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 districtsing 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

---

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.
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. 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. It is difficult to objectively measure whether three judges, collectively acting, deal with or use such evidence better than one judge. 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. 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

---

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

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.

---

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, though the support in Congress for such laws has been modest. 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. 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.” 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
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

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.

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.


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

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


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


15. Evans v. Cornman, 398 U.S. 419 (1970); CVSG; agree; no citation.
17. Morris v. Gressette, 432 U.S. 491 (1977); disagree; citation.
20. Dougherty County Board of Education v. White, 439 U.S. 32 (1978); 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.
32. Holder v. Hall, 512 U.S. 874 (1994); disagree; 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.


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.


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.


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