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Book Review

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Stephen Ansolabehere and James M. Snyder, Jr., *The End of Inequality: One Person, One Vote and the Transformation of American Politics*. New York: W.W. Norton & Company, 2008, 320 pp., $18.75 (softcover).

"One person, one vote" is one of the most appealing political slogans of all time, capturing egalitarian sentiment in something approaching an aphorism. The phrase is embodied in the modern constitutional requirement that most political districts must be drawn to contain the same number of people, thus equalizing the numerical power of individual votes. While the requirement is now widely accepted as a natural feature of democratic districting, this was not always the case. Just a half century ago, there were tremendous variations in district populations, concentrating and diluting the voting power of people living in those districts. Then, beginning in the 1960s, the Supreme Court boldly stepped into the "political thicket" and imposed the one person, one vote standard on almost every political district in the country. This new volume, *The End of Inequality*, is a triumphantly (and, at times, breathlessly) told story of the reapportionment revolution and its aftermath. True to its title, the book's central claim is that the one person, one vote standard ultimately equalized not just votes, but political power. But the book, like the standard it champions, does not quite live up to its promise.

The first third of the book nicely details the scope of the historical malapportionment problem as well as its causes and effects. These days, when population deviations are measured in single-digit percentages (and, in some cases, by handfuls of people), it's difficult to fully appreciate how large the disparities had grown by the late 1950s. In a typical state, population differences between the largest and smallest legislative districts were on the order of 20 to 1; in several states, that ratio rose into the hundreds. The authors, like several commentators at the time, translate the population differences among districts into terms of minority rule in order to convey the full impact of the problem: in many states, a minority comprised of less than a quarter of the population elected a majority of the seats for at least one chamber of the legislature. Such clear departures from the concept of majority rule demanded a solution.

The source of the great population deviations is a well-known story. Over the first half of the twentieth century, state legislators refused to redraw district boundaries in the face of significant demographic shifts from rural areas to growing urban and suburban areas. Their reluctance was motivated by self-preservation—legislators were not about to redistrict themselves out of power—and resulted in the concentration of rural political power. To this basic story, the authors smartly add several overlooked aspects of the malapportionment problem that stood in the way of a political solution. Cities, for example, were beset by rival-

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ries and unable to overcome their own differences to form successful coalitions against the creeping intensification of rural power. In Florida, a rural faction nicknamed "the Pork Chop Gang" (for their control of pork barrel spending) controlled key legislative positions for decades by successfully playing off Miami, Palm Beach, Tallahassee, and Tampa Bay against each other. And most states with initiative processes—devices that would have allowed aggrieved majorities to bypass self-interested state legislators—happened to have populations that were largely rural and thus benefited from malapportionment. As a result, the population disparities just kept growing.

After cataloging these enormous population disparities and the political processes that produced and maintained them, the authors move onto a chapter that identifies the substantive effects of malapportionment. Who were the winners and losers? The question, in other words, is whether the geographic concentration and dilution of numerical voting power mapped onto any existing demographics in a way that skewed voting power in favor or against particular groups. Were there, for example, serious racial effects? Wealth effects? Partisan effects? The answer, according to the authors, is that there were some of each, but not, on a nationwide basis, in a consistent direction. Malapportionment affected every social group, class, and party, but, on average, it did not contribute to the systematic disenfranchisement of racial minorities; the most significant class effect was that it enhanced the power of poorer counties over richer ones; and neither party gained a marked political advantage. Malapportionment was born of a demographic shift to urban areas and, in the end, the authors say, its only consistent effect was the preservation of rural power "with all of the political implications that carried" (68).

The political implications of the preservation of rural power largely played out on a regional or statewide level, and the authors' ability to break down these more micro-level effects, which they do in detail in the final third of the book, is a significant contribution. But Mencken's disdain for the "yokels" aside,[1] it's difficult to get that riled up about something that, on a macro-level, cut so evenly across race, class, and party. The numerical disparities were, indeed, staggering. And if you start with the assumption that equality demands that political systems equalize the numerical voting power of each individual, you are outraged by the disparities and consoled by their subsequent remediation. But surely there are other, perhaps more significant, measures of political equality. If this particular form of inequality had no overall effect on race, class, or party, then we may be talking about a relatively empty, or, at a minimum, contestable, form of equality. But more on this in a moment.

The authors switch gears in the middle third of the book and give us a behind-the-scenes look at the early malapportionment cases. The section eloquently combines the human element of the judicial process with a sophisticated exposition of the law. Case in point: the discussion of Justice Wiley Rutledge's role in *Colegrove v. Green* (1946), the opinion in which the Supreme Court signaled its (initial) refusal to intervene in political redistricting. The authors effectively convey the effect of Rutledge's concurrence on his "stunned" liberal colleagues and, more subtly, on the precedential value of Justice Frankfurter's "political thicket" doctrine. Rutledge's failure to join Frankfurter's majority opinion effectively left the door open to future challenges of malapportioned districting schemes.

The focus of this portion of the book is, of course, the most significant of those challenges—*Baker v. Carr* (1962)—in which the Court reversed course and held that population differences between districts presented a justiciable issue under the Equal Protection Clause of the Fourteenth Amendment. The authors' first chapter on *Baker* picks up the thread of a story left dangling in the introductory chapter (a nice device that helps knit the narrative around the empirical work) and carries it through its conclusion, with Justice Potter Stewart now playing the role of the potential swing vote. Oddly enough, though, it's the

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[1] H.L Mencken complained, "The yokels hang on because old apportionments give them unfair advantages." J. Anthony Lukas, *Barnyard Government in Maryland*, *in* REAPPORTIONMENT 55 (Glendon Schubert ed., 1964).

chapter on the drafting of the opinion, which recounts the mood swings and strategizing that ultimately kept *Baker's* "fragile coalition" together, that's most compelling. It's no small feat to hold a reader's attention through this story—after all, we already know the outcome—and the fact that they do so is a testament to the authors' storytelling skills.

The justiciability issue at the heart of *Colegrove* and *Baker* is one that the authors (and most others) think the Court ultimately got right. The authors clearly believe that judicial oversight in these matters is crucial to maintaining a vital system of checks and balances. And their argument—like a good martial arts move—uses the weight of their opponents against them. Judicial intervention into this aspect of the districting process is not a usurpation of politics, but is, instead, a way to ensure the continuing vitality of the political process. The threat of judicial intervention means that, at least once every ten years, legislatures must remake themselves and engage anew in the messy pull and haul of politics that best captures the interests of their constituents. Politics without judicial oversight can too easily become ossified and, ultimately, unresponsive to the desires of the electorate.

This is a good argument, but it doesn't quite nail down some lingering objections to judicial intervention in the area. Initially, the decision to require strict numerical equality is itself a substantive political judgment, one that the courts have almost completely taken out of the hands of the more political branches. But, more importantly, the Court's foray into the malapportionment cases may have led to additional judicial involvement in other, more troublesome, situations. Numerical vote dilution claims are often just a vehicle for an aggrieved party to attack an otherwise unfavorable districting plan, and once the plan is in front of a court, everything is in play since there are countless ways to slice populations into equally sized districts. For this and other reasons, the seeming straightforwardness of the numerical dilution cases may actually be a vice that gets courts into the habit of intervening in political disputes.[2] These arguments against judicial intervention may, in the end, pale in comparison with the advantages of tight judicial control over district size, but they should at least be addressed, and may counsel moderation, or a little bit of play, in the application of the equiproportional standard.

With the justiciability issue resolved, the Court (and the book) moves on to confront the issue of the standard for numerical vote dilution. Facing scores of cases in the wake of *Baker*, the Court moved relatively quickly to what the authors deem the "self-evident truth" of the one person, one vote standard (166). But then it faced the question of how, exactly, to apply the standard. The Court had to determine whether to require states to strictly adhere to the standard—with little or no deviation from ideal district size—or to allow more flexibility with respect to district size. It also needed to decide whether to mandate population-based districting for both chambers of state government or to allow states to follow the federal model. The Court, now worried about excessive judicial discretion and the potential for inconsistent results, ultimately settled on a relatively strict application of the standard to both chambers of state legislatures.

The strict application of the equiproportional standard is championed, in part, for its manageability. But, even on this front (which is, admittedly, the standard's strong point), the authors avoid some of the thornier issues. For starters, what is the appropriate apportionment base—who is the "person" in "one person, one vote"? The list of possibilities includes total population, voting-age population, voting-eligible population, registered voters, and actual voters. The Court originally spoke of equal numbers of "residents, or citizens, or voters,"[3] as if it made no difference (it does). It seems to have settled on total population for congressional districting, but states are accorded a fair amount of leeway with respect to their choice of apportionment base. The choice is significant, especially in regions with large Hispanic populations (because of the non-citizen component of the population), and states' choices

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[2] *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 47–72 (2003).

[3] Reynolds v. Sims, 377 U.S. 533, 577 (1964).

continue to generate debate and demand judicial resolution.

Once one settles on the appropriate base, there is still the question of how strictly to apply the one person, one vote standard. According to the authors, the Court appears to have considered two basic alternatives: strict application of the standard, or a more flexible application that involved case-by-case determinations of a state's reasons for departure from equiproportional districting. The Court, fearful of a *Brown*-like ending, went with a strict application because it decreased the chance of excessive lower court intervention and uneven results. But requiring strict application of the standard doesn't necessarily cabin judicial bias any more than a relaxed application of the standard. For example, a rule that no district can have a population more than double any other district can be rigorously applied: if a plan does have such disparities, it is unconstitutional; if not, it's constitutional. (This is similar to the rule applied for years to state and local legislative districts, with their 10% deviation safe harbor,[4] but would just set the acceptable deviation substantially higher.) The point here is that one may devise a more relaxed standard with bright-line edges that cabin judicial discretion just as well (or better).

It is also unclear that the historical malapportionment problem demanded "even" results. The differences in voting power in *Baker* and *Reynolds v. Sims* (1964) were, respectively, on the order of about twenty and forty-one to one. The Court eventually chose to dramatically narrow the range of acceptable deviation and, in the case of congressional districting, to eliminate it almost entirely. But it could have gone with a more flexible standard that broke up the political logjam without hamstringing states in their choice of how to best structure representative government. In other words, the negative consequences flowing from the concentration of rural political power could have been overcome without requiring near-perfect numerical equality.

The authors also skirt some interesting issues with respect to the Court's decision to disallow states the federal model, where only one of two chambers of the legislature has representation based on population. The federal system was, of course, born out of the Connecticut Compromise, and was crucial to ensuring that more sparsely populated states would ratify the original constitution. State politicians, in defending their malapportioned districting plans, contended that their states were small versions of the federal system. The problem, as the authors point out early in the book, was that the states did not design their two chambers along the lines of the federal model. In most states, minority rule cumulated across chambers, further solidifying rural power and providing few of the checks and balances that came with the federal system. Thus, the authors seem perfectly comfortable with the *Reynolds* Court's conclusion that the federal analogy does not justify malapportionment, passing it along with virtually no comment later in the book.

Once again, though, it's not clear that, going forward, states and localities should be excluded from adopting systems of government with mixed theories of representation. Strict application of the equiproportional standard can prevent these entities from designing the kinds of institutional structures necessary to solve some of their most significant problems. Take, for example, the cities in the San Francisco Bay area, which considered establishing a regional government to solve certain issues—like traffic—that traversed local boundary lines. Because the proposed government would have to comply with the one person, one vote standard, smaller cities were unwilling to join the regional entity for fear that their votes would be overwhelmed by those in more populous cities.[5] Even on a statewide level, it is not clear that the Court needed to apply the standard to both chambers of the state legislatures in order to break up the malapportionment logjam. Had the Court merely required population-based apportionment in one of the chambers of bicameral legislative bodies, the other

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[4] The safe harbor was called into question by *Cox v. Larios*, 542 U.S. 947 (2004), which summarily affirmed a district court ruling that Georgia's state legislative redistricting plan, despite having a maximum deviation of less than 10%, nonetheless violated the one person, one vote requirement of the Equal Protection Clause.

[5] *See* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1110 (1999).

chambers would be seen less as an organ of a tyrannical minority than as a counter-majoritarian check. Rural legislators would not be able to dictate legislative outcomes, but they would remain vital players within the state political system. As Abner Mikva put it, this may have been a situation where "the Court wielding a sledgehammer helps, while a judge applying a scalpel does only harm."[6]

The final third of the book summarizes and expands upon some of the work the authors have done over the last few years on the policy implications of the reapportionment revolution. They first consider the effect of voting power on the distribution of public funds. An important part of the authors' claim is that the reapportionment revolution did more than equalize votes—it equalized outcomes as well. In the chapter "Equal Votes, Equal Money," they examine how states distributed public monies to their counties. Before reapportionment, the overrepresented, largely rural areas were able to direct a disproportionate share of state funds to themselves; after reapportionment, the monies, following the votes, were equalized across geographic region. This finding is consistent with that of earlier research, but the authors' data are both broad and detailed in a way that makes their point particularly compelling. They also make good use of the U.S. Senate to help illustrate the fact that public fund allocations didn't generally level off during this time period: there were (and continue to be) disparities in public finances between states as a result of unequal representation in the Senate.

The question of whether this equalized outcomes, though, depends on your definition of equality (or, perhaps, your choice of relevant outcomes). Equalizing individual voting power does appear to have equalized distributions—so if your concept of equality demands that all individuals, regardless of their situation, deserve an equal share, then reapportionment is a resounding success. (And the authors make a real contribution by showing that equalizing individual voting power truly did equalize intrastate funding.) But it is not uncontroversial that this is the "equal outcome" we should be focused upon. Remember, the overrepresented rural areas were, at the time of reapportionment, poorer than the underrepresented urban areas. One could certainly argue with the proposition that equality demands the distribution of the same voting power (and the money that follows) to both rich and poor counties. These issues, though critical, are really not acknowledged, much less addressed.

This is not to undervalue the importance of equalizing the distribution of state transfers. Perhaps, in the end, that was a good thing. The point here is that we're talking about contested versions of equality, with the contest essentially decided by the least democratic branch of government. Nobody would argue that the malapportionment problem arose because states were making a conscious decision to redistribute wealth by assigning additional voting power to poorer, rural counties. It just happened that way. But the result was not necessarily unjust, and the Court's application of the one person, one vote standard was itself a substantive political decision that foreclosed the ability of states to numerically concentrate the voting power of certain groups.

Next, the authors take on how the reapportionment revolution affected politics. Redistricting was widely expected to result in gains for Democrats, and, more generally, produce a shift toward more liberal policy outcomes. But, except on civil rights issues, this great shift to the left never seemed to materialize. There was no shortage of theories why this was so. Many explanations—such as the argument that rural legislators continued to control policy from key leadership posts—were ultimately based on the premise that votes don't matter. The authors strongly counter that most of the assumptions and theories on this subject are wrong, and they present some pretty convincing data to support their position.

There was no collective shift to the left, the authors explain, but that was primarily because party and policy preferences among urban, suburban, and rural voters varied in different regions of the country. In the Northeast and Midwest, for example, urban voters were much

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[6] Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. Ill. L. Rev. 683, 697 (1995).

more Democratic than their rural counterparts, but that pattern didn't hold in the South. Urban voters in the Northeast were generally more liberal on social welfare issues than rural voters, but there was little difference between those groups in the South and West. Thus, there were great regional differences on party and policy that, viewed on a nationwide basis, canceled each other out; votes mattered, but, nationwide, redistricting was a wash. The authors' work in this area convincingly resolves an enduring puzzle.

Toward the end of the book, the authors move on to look more broadly at the effects of the reapportionment revolution on our political system. One outcome is that state and local legislators are now forced to redistrict every decade. But such frequent redistricting, according to some critics, may open up the political process to being exploited on other fronts. The districting process, in the words of the authors, faces the "triple threat" of party, race, and incumbency (244). The authors, however, believe that reapportionment has not made political institutions more vulnerable and, indeed, that the "new order" produced by the reapportionment revolution has actually made for a better functioning political system on all three fronts.

On the issues of party bias and incumbent protection, the authors make a compelling case in favor of the new regime. Critics have charged that reapportionment failed to stop and may have even helped political parties and incumbents twist election outcomes in their favor. The authors, in response, effectively dismantle the argument that reapportionment leads to greater partisan bias—at most, partisan gerrymandering may blunt some of the effects of reapportionment on reducing partisan bias, but it hasn't positively contributed to that bias. And this makes sense, given that, before the reapportionment cases, controlling political parties could dilute the other party's voting strength by both gerrymandering and numerically diluting votes—at least now one of those weapons is removed from their arsenal. The authors also provide convincing evidence that the process of redistricting every decade has actually reduced incumbency protection. These showings, along with the earlier chapters on the effect of reapportionment on the distribution of public funds, are the book's greatest contributions to the reapportionment literature.

When it comes to race, though, the authors are not quite as convincing. They start by noting that race has raised some of the most contentious districting issues over the last several decades, and then quickly move to rebut the claim that majority-minority districting has, perversely, helped Republican fortunes. The creation of majority-minority districts, it should be noted, is an area where race and the equiproportional standard converge. In order to create majority-minority districts, minority voters are taken from surrounding districts, changing the racial composition of all districts involved. The adjoining districts, deprived of some of their minority (and reliably Democratic) voters, may be more likely to elect a Republican representative. Majority-minority districting may, therefore, force a tradeoff between what have come to be called descriptive and substantive minority representation. But the tradeoff is only "forced" because strict application to the one person, one vote standard makes districting a zero-sum game: numerically concentrating the voting power of any group, including racial minorities, by placing members of that group into less populous districts is off the table.

The authors rebut this claim by arguing that, by their measures, states with large minority populations (where many majority-minority districts have been drawn) demonstrate a partisan bias in favor of Democrats. At the same time, though, they acknowledge that "[the creation of majority-minority districts has indeed made districting less favorable to the Democrats . . ." (261). The authors explain this apparent contradiction by noting that states with many majority-minority districts, located mostly in the South, started with an unusually high degree of pro-Democratic bias. The level of that bias has apparently been reduced (in part by the creation of majority-minority districts), but it remains in favor of the Democrats. Thus, the authors conclude, when it comes to districting, there is "plenty of room to accommodate multiple goals" (262).

This argument, however, doesn't get to the

heart of the matter. Initially, the perverse outcome associated with majority-minority districting is that this mechanism of improving the political fortunes of racial minorities may come with significant representational costs to that minority group. Even if, at the end of the districting process, there nonetheless remains a partisan bias in favor of the Democratic Party, the bias is still lower than it would have been had the majority-minority districts not been drawn. The relevant baseline to measure the tradeoff is the relative strength of their preferred party before the districting, not a hypothetical state with zero political bias. There is, from the point of view of minority voting strength, a tradeoff, and one that has been forced by strict application of the equiproportional standard.

Moreover, the authors concentrate almost exclusively on the effect of majority-minority districts in state legislatures. But the principal evidence for this critique of majority-minority districting was on the basis of its effect on the 1992 and 1994 congressional elections. Looking at those elections, a number of studies found that a significant number of white Democratic incumbents lost to Republican challengers as a result of racial redistricting.[7] The authors offer very little in the way of a persuasive rebuttal when it comes to this effect on Congress. Indeed, it is hardly acknowledged at all.

The authors conclude their section on race by noting that "[a] districting plan that ensures minority representation does not necessarily create a pro-Republican bias" (262). It is somewhat telling that champions of the equiproportional standard are reduced to this claim. They may be right—the one person, one vote standard may not *necessarily* lead to such perverse outcomes. Nor, however, does it do much in the way of ensuring meaningful minority representation, something that takes us back to the original point that, because malapportionment had little nationwide effect on the basis of race, class, or party, reapportionment brought about relatively minor changes with respect to these important demographics. Certainly, the one person, one vote standard had some effect on these matters—some positive, some negative, most subject to debate—but it did not level the playing field, which is why claims about the substantive success of the standard appear overblown.

Chief Justice Earl Warren considered the reapportionment cases to be the most important in his years on the Supreme Court, but the one person, one vote standard never lived up to the lofty goals set by its creators. While Ansolabehere and Snyder present some compelling new evidence on the effect of the equiproportional standard on incumbency, party strength, and the distribution of public funds, their broad assertions that it leveled politics and restored the "natural balance" (16) between competing interests ignores the contested nature of representation and equality. And this, of course, was at the heart of Justice Frankfurter's observation that the *Baker* Court was being asked "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy. . . . "[8] The book, like the revolution it chronicles, leaves those harder choices for another day.

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[7] *See* Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1609–11 (2004) (discussing studies).

[8] Baker v. Carr, 369 U.S. 186, 300 (Frankfurter, J., dissenting).