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One Person, One Vote

By ABIGAIL THERNSTROM

Abortion is the issue that critics of Judge Samuel Alito have inevitably put front and center. But it won't suffice to sink his nomination to the Supreme Court, they seem to know. And so they have seized upon another (and rather surprising) question: Judge Alito's stance on the reapportionment decisions of the early 1960s. It's an issue that even upstages *Roe v. Wade*, Sen. Joseph Biden suggested on the "Fox News Sunday" television show three weeks ago. His was the opening shot, but by now the civil rights groups and Sen. Arlen Specter, chairman of the Judiciary Committee, have also signaled their grave concern.

"The fact that he [Alito] questioned abortion and the idea of quotas is one thing," Sen. Biden said. "The fact that he questioned the idea of the legitimacy of the reapportionment decisions of the Warren Court is even something well beyond that." Judge Alito's unforgivable offense was contained in the now-famous 1985 memo, where he wrote that his "deep interest in constitutional law [was] motivated in large part by disagreement with the Warren Court decisions," including those involving "reapportionment." That Mr. Alito apparently found the court's rulings a constitutional stretch, and an invitation to trouble, should strike no one today as surprising. He was -- and is -- hardly alone.

The reapportionment decisions involved the Supreme Court's discovery that the 14th Amendment demanded equally populated legislative districts. Yet nothing in the actual language of the Constitution suggested the principle of mathematical parity -- a uniform ratio between residents and representatives -- and the U.S. Senate clearly violates that standard. True enough, there was something unpalatable about state electoral maps that allowed over-representation of rural voters. But the court's majority created a constitutional rule out of whole cloth, one that has led the country into unmapped territory whose contours are still very much debated.

Many of Judge Alito's opponents profess to see intimations of racism in his memo. One New York Times story, for example, reported that the Warren Court's reapportionment decisions stopped the creation of "uneven districts that dilute the representation of black voters." But the charge of racism is absurd. *Reynolds v. Sims*, the most important decision, had nothing to do with race. That 1964 case involved districting in Alabama -- a state in which less than 20% of eligible blacks had been allowed to register to vote. (The federal Voting Rights Act, enfranchising southern blacks, was passed a year later.)

Justice Felix Frankfurter once warned that apportionment questions were a "political thicket" which the Supreme Court should avoid. His doubts had not been assuaged by 1962, when the court stepped into that thicket, declaring in *Baker v. Carr* that the apportionment of legislative seats was a legitimate constitutional question. What had

actually been asked of the court, he reminded his colleagues, was "to choose among competing bases of representation -- ultimately, really, among competing theories of political philosophy." But without an explicit articulation of that theory, how could judges weigh such competing "considerations [as] geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, [and] communications"?

Justice Frankfurter's dissent in *Baker v. Carr* was eloquent, but he had underestimated the ease with which the court would find -- or think it would find -- an exit from the political thicket. Two years later, in *Reynolds v. Sims*, a majority embraced equal representation for an equal number of people, the so-called "one person, one vote" principle. "The right to suffrage," the majority contended, "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." And further: "Each and every citizen has an inalienable right to full and effective participation … an equally effective voice." But when were votes "diluted"? When was the exercise of the franchise "full and effective"? It was careless rhetoric.

Justice Harlan, in dissent, instantly recognized that the creation of equally populated districts did not necessarily result in equal representation: Beyond the individual, he noted, were interest groups, the building blocks of political life and a dimension that mathematical parity overlooked. But not for long.

With rising civil rights consciousness, the question of proper representation for groups defined by race, ethnicity and political marginality would soon arise, and by the early 1970s, protection against "diluted" votes on the basis of group affiliation was incorporated into the 1965 Voting Rights Act. Today attorneys, courts, scholars and Congress are still fumbling to define black and Hispanic votes at "full" value, neither "debased" nor "diluted."

In a 1994 voting rights case, Justice Clarence Thomas wrote, "we have immersed the federal courts in a hopeless project of weighing questions of political theory -- questions judges must confront to establish a benchmark concept of an 'undiluted' vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success."

The reapportionment decisions are now what Sen. Specter calls "super-precedents": There is literally zero chance that the court will revisit population equality in legislative districts. Judge Alito himself has called one person, one vote a "bedrock principle." But the unfinished business of the apportionment cases remains unfinished. No one should profess shock or horror if, in 1985, Samuel Alito joined Justices Frankfurter and Harlan -- and might today express the concerns of Justice Thomas over race-based districting.

Senators, think again. You, along with important voices in the media and the civil rights community, have displayed a woeful ignorance of the history and complexities of voting rights law.

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