ALL EQUAL, BUT SOME MORE EQUAL: PASSIVE MALAPPORTIONMENT IN INDIA AND ITS CONSTITUTIONAL JUSTICIABILITY

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India's delimitation and seat reapportionment process has been frozen for the Lok Sabha and state legislative assemblies since 2008, which was conducted based on the 2001 census. In the meantime, population growth and migration have substantially altered the demographics of various regions and constituencies, materially affecting the equality of voting power enshrined by the Indian Constitution. Several scholarly articles have already highlighted the malapportionment issue in India, but an examination of this problem from an individual voter's rights perspective has been lacking. Using a data-driven approach to establish the derogation of the 'One Person, One Vote' principle in India, we examine the constitutional sanction of equal suffrage and whether a departure from the same is permissible. Delimitation freezes, whether legally sanctioned or arising through mere executive inaction, do not pass a fundamental rights scrutiny under Article 14 and thus may not be permissible as a policy. While there is significant merit to the assertion that executive discretion should not be unduly fettered in this regard, this prerogative cannot extend to the subordination of citizens' rights to political exigencies. Such a situation must be redressed to maintain the constitutional vision of democracy. We find that the established judicial precedent, both in domestic and foreign jurisdictions, aligns in favour of judicial intervention for the protection of effective voting rights from passive malapportionment.

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I. INTRODUCTION

At the time of writing this, much is being made in Indian political and social circles of the sanctity and dynamics of the federal structure. The question of tax apportionment between the Union and the states, for example, has been festering, especially among the governments of prosperous southern states who feel that their hard-earned tax revenue is being used to subsidise other less 'worthy' provinces.[1] This discussion is, of course, eerily similar to one which occupied much of the 'apportionment' discourse in India, all the way up till the waxing years of the 21st century, but has nowadays mostly fallen by the wayside.

Similar to most major democracies in the world today, India is a representative democracy. That is to say, democracy is conducted here by means of elected representation by certain individuals who are supposed to represent the wishes, aspirations, needs and concerns of their electors.[2] These representatives collectively representing the consolidated will of the nation's populace, collaborate in government to conduct the affairs of the country, lending it a democratic nature. Unlike, say, the Greek *polis* of Athens or the ancient village-level grassroots

[1] The Hindu Bureau, *Devolution of Funds: Siddaramaiah asks Kannadigas to Raise their Voice Against 'Injustice'*, THE HINDU, October 13, 2024, available at https://www.thehindu.com/news/national/karnataka/devolution-of-central-funds-cm-siddaramaiah-calls-on-kannadigas-to-pledge-to-raise-their-voice/article68746017.ece (Last visited on June 26, 2025); The Hindu Bureau, *Tamil Nadu Finance Minister Criticises Union Govt.'s Step-Motherly Attitude*, THE HINDU, October 11, 2024, available at https://www.thehindu.com/news/national/tamil-nadu/tamil-nadu-finance-minister-criticises-union-govts-step-motherly-attitude/article67408237.ece (Last visited on June 26, 2025); THE ECONOMIC TIMES, *Kerala Govt Criticises Centre`s Fiscal Approach Highlights Low Alcohol Tax Contribution*, January 25, 2024, available at https://economictimes.indiatimes.com/news/politics-and-nation/kerala-govt-criticises-centres-fiscal-approach-highlights-low-alcohol-tax-contribution/articleshow/107137786.cms?from=mdr (Last visited on June 26, 2025).

[2] Ministry of External Affairs, EXTERNAL PUBLICITY DIVISION, *India: A Dynamic Democracy* 2004, 51, available at https://www.mea.gov.in/Uploads/PublicationDocs/184_india-dynamic-democracy.pdf (Last visited on July 1, 2025).

democracy hitherto practised in this subcontinent,[3] it is impossible in modern countries with massive populations and incredible technical width and depth of topics subject to regulation, to have direct democracy of the populace. Therefore, representative democracy offers a workable, if not happy, middle ground between the unwieldy government of the masses and the unaccountable despotism of an aristocracy or oligarchy.

The point of divergence between representative democracies has often lain in the decision to demarcate the population into various and distinct groups for separate representation through elections. The hunt for a reliable and acceptable method of apportionment has led to multiple solutions over the years, but the main approaches that emerged were Proportional Representation, Functional Representation, and Territorial Representation. For the most part, however, the world is split between proportional (apportioning seats based on the bare proportion of electors in favour of each electoral contender) and territorial (subdivision into several territorial units, each of which elects a representative to the elected legislature) representation, of which India has adopted the latter for application to its electoral democracy. The seats in the Parliament or State Assembly (more accurately, the Lower House of each) are thus composed of these territorial units. In this, the country is in step with most major democracies around the world, not least of which is the United Kingdom ('U.K.'), the ideological model of the Indian administrative setup,[4] and the oldest democracy in the world, the United States ('U.S.').

The general idea in such a system is that, following the co-equality of every voter in accordance with the universal adult franchise,[5] each representative must also be equally powerful so as not to be overshadowed by any other representative and, by extension, the group of citizens they represent. In other words, each representative must represent and be accountable for roughly an equal number of electors. This ensures that every citizen is actually equal regarding their say in the nation's politics. If there are fifty electors and five representatives, it should stand to reason that there should be ten electors for each representative. If, for example, one representative is accountable for five electors, each elector has essentially one-fifth of a say in the opinion of the electoral group, as compared to one-tenth for a normal division. Assuming each representative is equal in terms of their say in the representative legislative body, a voter from a group with only five voters in effect wields one-twenty-fifth of the aggregate voting power, while a voter from a normally apportioned constituency would have one-fiftieth (keeping in mind that there are fifty voters). Conversely, if a particular representative were to be accountable to fifteen people instead of ten, each voter would suffer a commensurate reduction in his share in the aggregate voting power.

Thus, if any form of representation, whether territorial, proportional or even functional, is divided unevenly among every group, by necessary extension, it leads to inequality of the groups and of the voters constituting that group. It may, therefore, be established that unequal demarcation is harmful to the interests of the universal adult franchise, which is a goal most modern democracies strive for. Such discrepancies in the voting shares of

[3] Dr. Annaaiah Tailur, *Democratic Institutions In Ancient India,* Vol. 7(1), INT'L J. OF CREATIVE RESEARCH THOUGHTS, (2019) available at https://ijcrt.org/papers/IJCRT1135812.pdf (Last visited on July 1, 2025)*; See also* Siddhartha Dash, *Panchayati Raj: Grassroots Democracy*, ORISSA REV., 11–13, March, 2007 (Orissa).

[4] *See* Neil Johnston & Elise Uberoi, *Constituency Boundary Reviews and the Numbers of MPs*, HOUSE OF COMMONS LIBRARY, November 20, 2023, available at https://commonslibrary.parliament.uk/research-briefings/sn05929/ (Last visited on July 1, 2025).

[5] *See infra* Part IV. B on "Right to Vote Under the Indian Constitution".

legislative seats *vis-à-vis* the voting shares of the constituent populations are collectively known as 'malapportionment'.[6]

It hardly needs mentioning that such a situation can bring about a chain of harmful effects both in terms of under-representation and over-representation. The perceived loss of voting power due to being a part of under-represented demarcations is a form of disenfranchisement that leads to certain geographic, ethnic, linguistic or other communities being saddled with a comparatively weaker constitutional voice which may lead to the adoption of extra-constitutional methods of expression of grievances, to the extent of pervasive and systemic violence.[7] Conversely, over-representation can lead to skewed policymaking in favour of the over-represented groups by political actors, seeking to optimise vote security by appealing to the most effective demarcated electoral groups.[8] Such an assertion is also borne out in the scholarship of 'selectorate theory' in political science, which firmly establishes the efficacy of 'private benefits' (that is, bribes, kickbacks and other targeted measures for personal favour) in cases of small 'selectorates'. In other words, where the number of people required to be pleased to hold power is small, it is more cost-efficient to target them directly with incentives rather than investing in public goods and infrastructure.[9]

Therefore, to avoid the situation of unequal representation across constituencies, a process known as delimitation is employed and re-employed as needed by these states. Delimiting is commonly understood as making or drawing limits,[10] and its meaning in politics is no different: it is the process by which the boundaries and extents of electoral constituencies are determined. Naturally, due to the issues discussed above, it is important to conduct this exercise in a regular and periodic manner.[11]

However, this has not been the case in India, where delimitation processes at the state and national levels have remained stalled for over a decade. Through its failure to delimit, and indeed its active bar on delimitation, the Indian State has actively aided and abetted the derogation of the fundamental principle of One Person One Vote ('OPOV') and given rise to 'passive malapportionment' — a phenomenon that will be discussed subsequently.

To prove the same, this paper shall, after looking briefly into the concept of passive malapportionment, analyse available statistical data to show the differential erosion or, where appropriate, strengthening of the individual voter across constituencies due to changes in population over the years. It shall proceed as follows: Part II shall briefly discuss the history of delimitation in Indian constitutionalism and politics concerning the social context guiding the same at various times. Part III shall undertake a statistical analysis of changes in electoral population across constituencies in a representative sample of states to show the effects of differential population growth on voting power. In Part IV, it shall be shown through reference to established jurisprudence and precedent that passive malapportionment constitutes an assault on the fundamental and constitutional rights of the 'individual voter'. Finally, in Part V, the

[6] David Samuels & Richard Snyder, *The Value of a Vote: Malapportionment in Comparative Perspective*, Vol. 31(4), BRITISH JOURNAL OF POLITICAL SCIENCE, 654 (2001) available at https://www.jstor.org/stable/3593296 (Last visited on July 1, 2025).

[7] Ursula Daxecker, *Unequal Votes, Unequal Violence*, Vol. 57(1), J. OF PEACE RESEARCH, 159 (2020) available at https://www.jstor.org/stable/10.2307/48596247 (Last visited on July 1, 2025) ('Daxecker').

[8] Rikhil R. Bhavnani, *The Effects of Malapportionment on Economic Development*, PLOS ONE (2021) available at https://pmc.ncbi.nlm.nih.gov/articles/PMC8635358/ (Last visited on July 1, 2025).

[9] Bruce Bueno de Mesquita & Alaistair Smith, THE LOGIC OF POLITICAL SURVIVAL, 105 (The MIT Press, 2005).

[10] CAMBRIDGE DICTIONARY, *Meaning of Delimit in English*, available at https://dictionary.cambridge.org/dictionary/english/delimit (Last visited on July 1, 2025).

[11] *Id*.

competence of the judiciary to exercise its power of judicial review on the delimitation exercise (and, perhaps more importantly, the lack thereof) shall be examined both in light of the juridical defensibility of such a proposition and the pragmatic reality of judicial activism. Rather than focusing on interstate disputes arising from passive malapportionment, which has already been the subject of much coverage, this paper aims to comment on its impact on an individual voter's rights and how such an impact may be remedied.

II. BORDERS AND BABIES: THE INDIAN DELIMITATION EXPERIENCE

In India, the drawing of territorial constituencies is a Parliamentary prerogative for both national Lok Sabha constituencies and State Assembly constituencies. Article 82 of the Constitution mandates that the territorial boundaries of constituencies shall be adjusted by Parliament after every census.[12] Article 170 contains a similar provision for the state legislative assemblies.[13] The process of delimitation guarantees that the ratio of allocated seats in the Parliament to the population of a state remains relatively uniform across the nation and adjusts itself in response to demographic changes. The importance of the delimitation exercise in the minds of the Constituent Assembly is revealed from the concern raised by Sardar Hukam Singh, who warned his fellow draftsmen about the potential influence of powerful political actors over executive decisions regarding delimitation. He termed the process of delimitation to be "the soul of all elections".[14] Thus, the constitutional intent, at least originally, was to ensure that the existing schema of constituencies in the country would be brought up to speed after every census exercise.

While the Census Act of 1948 does not mention any particular time frame for this, the post-independence experience indicates that, as a matter of convention, the census is taken once every decade: 1951, 1961, 1971, 1981, 1991, 2001, and 2011. Before its postponement, the latest census was supposed to take place in 2020–21.[15] It has now been scheduled for 2025.[16] Even in pre-independent India, the British Census was conducted with regular periodicity starting from the first all-India census in 1872 and then the first regularised decennial census in 1881,[17] which was then continued duly all the way up to 1941. After this point, the census exercise was handed over to the independent administration. Thus, it would appear that the drafters of the Constitution intended to have a census and, accordingly, a delimitation exercise every decade.

This was also followed in practice; the conventional method followed by Parliament was to constitute a Delimitation Commission as a statutory, high-powered expert body to give its plan based on evidence of population changes, which would then be enacted into law and further notified. Following the 1951, 1961, and 1971 census exercises,

[12] The Constitution of India, 1950, Art. 82.
[13] *Id*., Art. 170.
[14] CONSTITUENT ASSEMBLY DEBATES, June 16, 1949, *Speech by* HUKAM SINGH, available at https://www.constitutionofindia.net/debates/16-jun-1949/#136104 (Last visited on July 1, 2025).
[15] PMINDIA, *Cabinet Approves Conduct of Census of India 2021 and Updation of National Population Register*, December 24, 2019, available at https://www.pmindia.gov.in/en/news_updates/cabinet-approves-conduct-of-census-of-india-2021-and-updation-of-national-population-register/ (Last visited on July 1, 2025).
[16] THE ECONOMIC TIMES, *Central Government to Begin Census from 2025*, October 28, 2024, available at https://economictimes.indiatimes.com/news/india/central-govt-to-begin-census-from-2025-says-report/articleshow/114679180.cms (Last visited on July 1, 2025).
[17] Murali Dhar Vemuri, DATA COLLECTION IN CENSUS: A SURVEY OF CENSUS ENUMERATORS, 20 (M.D. Publications, 1997).

Delimitation Commissions were established in 1952,[18] 1962,[19] and 1972.[20] However, Delimitation Commissions were not established following the 1981 and 1991 census results, until 2002,[21] to implement the results of the 2001 census, albeit in a limited fashion.

This break in the established practice originated due to the political currents sweeping India in the 1970s and 80s, particularly the fears of a population explosion and the strain on national infrastructure and resources it would bring. The famous Emergency-era measures for population control, masterminded by the erstwhile Prime Minister Indira Gandhi and her son Sanjay Gandhi, are well-documented.[22] However, even prior to that, the spectre of a population explosion along Malthusian lines of resource scarcity weighed heavily on economics and politics alongside darker considerations.

As early as 1940, before Indian independence, the Congress National Planning Committee established a working group under famed Indian sociologist Dr. Radhakamal Mukherjee to study population policy which decried exploding birth rates amongst the lower castes and minorities and encouraged directed birth control propaganda at lower social classes to prevent "deterioration of the racial makeup" of society, citing eugenic precedent from, among other European and American sources, Nazi racial doctrine.[23]

In 1952, when the First Five-Year Plan was presented to the Indian Parliament, it contained the world's first governmental population control policy (at least in the rational-legal sense of the modern world), with an outlay of INR 6.5 million annually towards reducing birth rates to an economically attractive level.[24] The Second Five-Year Plan established the Central Family Planning Board under the presidency of the Minister of Health. As early as 1959, the chief secretary of Madras, R. Gopalaswami, was paying people INR 30 for undergoing sterilisation and INR 15 for 'motivating' people to get sterilised (an incentive structure that would later be replicated during the Emergency).[25]

Thus, population control and family planning were long-standing obsessions of the Indian polity at the time and not, as a large portion of the popular zeitgeist would hold, a product of the repression of the Emergency period. Every measure utilised during this period, including and up to forced sterilisation, had policy precedence and intellectual backing among Indian policy and political circles for decades prior. In fact, in 1960, a scene that would perhaps only be seen today in some form of surrealist horror media unfolded in the state of Maharashtra, as a five-week 'intensive family planning campaign' was held in medical camps designed like festive carnivals to perform state-sponsored mass vasectomies of over ten-thousand men under an absurdly oppressive environment and peer pressure. Far from being condemned, the annual report of the Directorate General of Health Services held this event up as a model to be followed by other states.[26]

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[18] The Delimitation Commission Act, 1952, §3.
[19] *Id*.
[20] *Id*.
[21] The Delimitation Commission Act, 2002, §3.
[22] Soutik Biswas, *India's Dark History of Sterilisation,* BBC, November 14, 2014, available at https://www.bbc.com/news/world-asia-india-30040790 (Last visited on July 1, 2025).
[23] K.T. Shah, POPULATION: NATIONAL PLANNING COMMITTEE SERIES, 66 (Vora & Co., 1947).
[24] K. Srinivasan, REGULATING REPRODUCTION IN INDIA'S POPULATION: EFFORTS RESULTS AND RECOMMENDATIONS, 58 (SAGE Publication, 1995), available at https://archive.org/details/regulatingreprod0000srin (Last visited on July 1, 2025).
[25] Everett M. Rogers, *Incentives in the Diffusion of Family Planning Innovation*, Vol. 2(12), STUDIES IN FAMILY PLANNING, 242 (1971).
[26] MINISTRY OF HEALTH, *Annual Report of the Directorate General of Health Services*, 1960, 180, 181.

In such a climate, with significant pressure from both the central government and various non-governmental pressure groups,[27] it was noted by political actors that the population growth across India was being subjected to a regional divide.

Till the 1970s, population growth had, more or less, remained uniform across the country. However, starting in 1971, the relatively more prosperous southern states, such as Tamil Nadu, Kerala, etc., successfully achieved reductions in birth rates due to family planning measures and dropping fertility. Conversely, certain northern states, such as Uttar Pradesh and Bihar, still had skyrocketing fertility and reported a high year-on-year population increase.[28] As the constitutional framework mandates the distribution of seats among states on the basis of population, this essentially meant that states that were successfully implementing family planning would then have less population share in the next census, which would result in a reduction in the allocated Lok Sabha seats. Conversely, states that do not implement population control measures would be rewarded with an increased number of seats and influence in the House. Thus, the influence of the prosperous, industrialising states with a lower fertility rate would decline in national politics.

Aiming to prevent this, the 42nd Constitutional Amendment introduced certain changes in the delimitation procedure. According to its Statement of Objects and Reasons, the aim of this amendment, among others, was to remove "the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity".[29] Through amendments to Articles 55, 81, 82, 170, and 330,[30] this amendment essentially froze any delimitation exercise or changes in the voting power of any elector in elections to either the Parliament or state legislative assemblies until the year 2000. Though census operations would be conducted in 1981[31] and 1991,[32] the results of these census exercises would not be implemented through delimitation. It was hoped that by the time of the 2001 census, parity in birth rates would have been achieved, eliminating the bone of contention and allowing fresh delimitation to resume.

However, this lofty dream would not be realised; even while the much-awaited 2001 census was underway, the same voices had already begun drawing attention to the pending disparity between birth rates. Though certainly improved, the problem had not yet been ameliorated, and the regional blocs set to lose seat shares in the House were once again opposed to a delimitation exercise. The southern states protested against the reallocation of seats, arguing that they were being "punished" by the constitutional setup for implementing family planning programmes successfully.[33]

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[27] Matthew Connelly, *Population Control in India: Prologue to the Emergency Period*, Vol. 32(4), POPULATION AND DEVELOPMENT REVIEW, 632 (2006) available at https://www.jstor.org/stable/20058922 (Last visited on July 1, 2025).

[28] Manoj Nair, *India's Demographic Divide is not Just North-South, it is Happening in the West, East And North*, HINDUSTAN TIMES, April 16, 2018, available at https://www.hindustantimes.com/cities/india-s-demographic-divide-is-not-just-north-south-it-is-happening-in-the-west-east-and-north/story-3RsC6cep1FJHvJTkydpIgP.html (Last visited on July 1, 2025).

[29] The Constitution (Forty-Second Amendment) Act, 1976, Statement of Objects and Reasons.

[30] *Id*., §§12, 15, 16, 29, 47.

[31] DIRECTORATE OF CENSUS OPERATIONS, Population Enumeration Data, *Household Population by Religion of Head of Household* (1981 Census Data, India).

[32] OFFICE OF THE REGISTRAR GENERAL & CENSUS COMMISSIONER, Population Enumeration Data, *Language: India and States* (1991 Census Data, India).

[33] LOK SABHA, *Constitution (Ninety-First) Amendment Bill*, 257, Session No. 7, August 21, 2001, available at https://eparlib.nic.in/bitstream/123456789/759630/1/lsd_13_07_21-08-2001.pdf (Last visited on July 1, 2025)..

Thus, the government under Prime Minister Atal Bihari Vajpayee moved the 84th Amendment in Parliament. Penning the Statement of Objects and Reasons, Law and Justice Minister, Arun Jaitley opined:

> "There have been consistent demands, both for and against undertaking the exercise of fresh delimitation. Keeping in view the progress of family planning programmes in different parts of the country, the Government, as part of the National Population Policy strategy, recently decided to extend the current freeze on undertaking fresh delimitation up to the year 2026 as a motivational measure to enable the State Government to pursue the agenda for population stabilisation".[34]

As the above extract should indicate, the relevant provisions were once again amended to extend the freeze on delimitation until the first census to be conducted post-2026.[35] However, as a compromise, a Delimitation Commission was indeed permitted to be set up in 2002 on the basis of the 2001 census. However, this Commission did not change the apportionment of seats between states. It was only concerned with redrawing constituencies within each state and attempting to equalise them in light of the updated population counts.[36] No attempt was made to balance the constituency weighting on an interstate, nationally integrated basis.

This Commission started its work in 2004 and finally submitted a report in 2007, on the basis of which the delimitation exercise was concluded in 2008. Writing the Preface to the report, Justice Kuldip Singh noted:

> "The present delimitation, based on the 2001 census, has been undertaken after 30 years. The population has increased by almost 87%, and the nature of constituencies in the country, by and large, has become malapportioned. The first three Commissions, having met after every ten years, had comparatively easier tasks before them. They also had the power to increase the total number of Lok Sabha and Assembly constituencies in the country. The Parliament by the Constitution (Eighty Fourth) Amendment Act, 2001 froze the total number of seats in the Lok Sabha and Assemblies with the result that the present Commission could not increase the total seats in the Lok Sabha or Assemblies. The delimitation exercise relating to 543 Lok Sabha and 4120 Assembly Constituencies in India has been a gigantic task. The work of the Commission as compared to the earlier three Commissions has been more difficult, extremely sensitive and time consuming".[37]

To date, this remains the last delimitation exercise conducted in India for Parliament and state assembly constituencies. This exercise, based primarily on data collected in 2001 and implemented finally in 2008 (already substantially out of date as a result), is, by itself, at the time of writing this, around seventeen years further out of date. Pursuant to the 84th Amendment, delimitation has remained frozen and will remain frozen for at least a year. However, the population has continued to grow at its own pace, its natural processes not heeding any artificial restrictions of policies and governments.

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[34] The Constitution (Eighty-Fourth Amendment) Act, 2001, Statement of Objects and Reasons.
[35] *Id*., §§3–7.
[36] The Delimitation Act, 2002, §4.
[37] Delimitation Commission of India, CHANGING FACE OF ELECTORAL INDIA: DELIMITATION 2008, Volume I (2008).

Thus, the number of electors has varied across the years across various regions and constituencies. On the other hand, the territorial demarcations feeding into the electoral system have been artificially frozen in time by legislative means. Together, this has created conditions where the national constituency map is, conservatively speaking, at least a couple of decades behind in time compared to the state of the nation on the ground. In other words, the situation fits the textbook definition of malapportionment.

However, it cannot be said that this malapportionment is 'active'.[38] That is to say, the disparities that have arisen today cannot be attributed to the deliberate action of any administrative body. There is no evidence that can attest that any administration has granularly controlled the population growth across the nation to confer distinct political advantages, though political gain may have accrued to certain actors due to the exploitation of these population changes. This distinguishes the Indian situation from the commonly understood idea of 'gerrymandering' as the acts of an administration deliberately altering constituency boundaries to confer upon itself political gain, or to impose political loss and difficulty upon opponents.[39] The malapportionment, in our case, occurs due to an omission of regular reapportionment, as a passive consequence of administrative hesitation and tardiness. Therefore, this form of malapportionment may be termed 'passive malapportionment'.

III. PASSIVE MALAPPORTIONMENT — THE PRICE PAID

India's population is growing steadily, yet surely. Since 1971, when the last delimitation of parliamentary constituencies happened, the population has grown from 548 million (1971 census) to 1.21 billion (2011 census) and is predicted to be 1.47 billion by 2031.[40] As noted before, our country had three delimitation exercises in the 1950s, 60s, and 70s, which duly apportioned the number of parliamentary seats and changed the proportion of seats distributed 'among' the states. However, the 2002 Delimitation Commission did not change the parliamentary seats despite changing the proportion of seats within states. The lack of proportional change in a state's share in Parliamentary seats has been vehemently contested by states.[41]

This part evaluates how freezing in constituency delimitation has negatively impacted voting power in India, thus leading to passive malapportionment. It ultimately leads to appallingly unequal representation within (intra-state) as well as between states (inter-state). A couple of studies have documented the interstate inequality in representation in elections to Parliamentary constituencies. Prominently, political scientist Alister McMillan's study, conducted based on the 2001 census, reveals that passive malapportionment has resulted in, for instance, Tamil Nadu having seven seats more in the Lok Sabha (over-representation) while Uttar Pradesh having seven seats less than it actually should have (under-representation).[42] A

[38] Dr. Lisa Handley, *Challenging the Norms and Standards of Election Administration: Boundary Delimitation*, IFES, 63, 64 (2007) available at https://www.ifes.org/sites/default/files/migrate/4_ifes_challenging_election_norms_and_standards_wp_bndel.pdf (Last visited on July 1, 2025).

[39] Brian Duignan, *Gerrymandering*, BRITANNICA, available at https://www.britannica.com/topic/gerrymandering (Last visited on July 1, 2025).

[40] NATIONAL COMMISSION ON POPULATION, *Population Projects For India And States 2011–2036*, 32 (2019).

[41] *See* A. K. Verma, *Delimitation in India*, Vol. 41(9), ECONOMIC & POLITICAL WEEKLY, 796 (2006), available at https://www.epw.in/journal/2006/09/perspectives/delimitation-india.html (Last visited onJuly 1, 2025).

[42] Alistair McMillan, *Population Change and the Democratic Structure*, INDIA SEMINAR, available at https://india-seminar.com/2001/506/506%20alistair%20mcmillan.htm (Last visited on July 2, 2025) ('McMillan').

recent study updating McMillan's findings based on the 2011 census highlights that northern states would gain in terms of seats and, thus, political power at the cost of southern states.[43] These studies highlight unequal representation between states — an issue which even the 2002 Delimitation Commission did not address.[44] Our paper, while noting and acknowledging the above studies, also reveals passive malapportionment within states ('intra-state') after the Delimitation Commission reallocated the boundaries within states through its 2008 order. This has happened because of the 84th Amendment,[45] which imposed a second freeze on the delimitation process. Furthermore, the effects of population growth on the inter-state allocation, which has remained static since the 1971 census, have also grown in severity over the years of inaction on the part of the State.

A. REVIEW OF EXISTING LITERATURE

This part explores the interstate malapportionment caused by the freeze imposed on the delimitation process by reviewing the existing literature on the same. One of the earliest and most noted research studies in this regard is the one done by Alistair McMillan, who used the census data of 2001 to analyse the impact of the second freeze on delimitation imposed by the Constitution (91st Amendment) Act, 2003.[46] His calculations revealed severe under- and over-representation at the national level and immense discrepancies between constituency sizes across different states. The figures in Table 1 reveal how the states in the north have been severely underrepresented in the Lok Sabha while the states in the south have been drastically overrepresented. Prominently, the most under-represented state was Uttar Pradesh, which instead of 80 should have received 87 seats (*see* Table A).

Subsequent research has updated McMillan's calculations, showing even greater discrepancies and unequal representation. The latest research by PK Patel and TV Sekhar predict that by 2026 (the time the next delimitation is set to happen), Uttar Pradesh will have gained to ninety-one seats (by eleven from the now eighty — as per the 1976 standards) while Tamil Nadu will have lost ten seats from its current count of thirty-nine.[47] Moreover, if this freeze is continued, states would be placed disproportionately in terms of seat distribution in Parliament (*see* Table B). Another research study revealed the rate of unequal representation when the 2011 census data was incorporated into McMillan's projects and revised.[48] This research shows the devastating effect of passive malapportionment owing to the freeze period, which is about to expire in 2026 (*see* Table C). It reveals that if delimitation had happened in 2011, states like Tamil Nadu would not have been over-represented (it would have gained at least seven seats). Clearly, the most under-represented is the state of Uttar Pradesh, which would have gained eight seats in 2011 and is set to gain eleven in 2026. This study also predicted that the reapportionment of states in 2026 would lead to shifts in caste based reserved seats, with some states losing while others gaining seats.[49] Similarly, solutions to

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[43] Milan Vaishnav & Jamie Hintson, *India's Emerging Crisis of Representation*, CARNEGIE MIDDLE EAST CENTER, March 14, 2019, available at https://carnegieendowment.org/research/2019/03/indias-emerging-crisis-of-representation?center=middle-east&lang=en (Last visited on July 1, 2025) ('Vaishnav & Hinston').

[44] Alistair McMillan, *Delimitation, Democracy, and End of Constitutional Freeze*, Vol. 35(15), E.P.W., 1274 (2000).

[45] The Constitution (Eighty-fourth Amendment) Act, 2001.

[46] McMillan, *supra* note 42.

[47] Pankaj Kumar Patel & T.V. Sekhar, *Parliamentary Delimitation: A Study of India's Demographic Struggle for Political Representation*, JOURNAL OF ASIAN AND AFRICAN STUDIES, 12 (2024) available at https://journals.sagepub.com/doi/10.1177/00219096241295634 (Last visited on July 1, 2025) ('Patel & Sekhar').

[48] Vaishnav & Hintson, *supra* note 43.

[49] *Id*.

malapportionment have been proposed in other research studies to incorporate mechanisms from other jurisdictions,[50] like Canada, including the incorporation of the grandfather clause.[51]

Table A

Over and Under-representation According to 2001 Census Figures (*As calculated by Alistair McMillan)*[52]

	Seats 2001	*Proportional seats using the 2001 Census population*	*Over- and Under-representation*
All India	524	524	
Andhra Pradesh	42	39	3
Assam	14	14	0
Bihar	40	43	-3
Chhatisgarh	11	11	0
Gujarat	26	26	0
Haryana	10	11	-1
Himachal Pradesh	4	3	1

[50] S. Raja Sethu Durai & R. Srinivasan, *Electoral Malapportionment in India Options for Correction*, Vol. 59(15), ECONOMIC & POLITICAL WEEKLY (2024) available at https://www.epw.in/journal/2024/15/special-articles/electoral-malapportionment-india.html (Last visited on July 1, 2025).

[51] A grandfather clause is a provision by means of which an existing rule or an older rule continues to apply to existing situations. In the context of delimitation, Canada applied a grandfather clause through legislation to ensure that no province could have fewer seats after redistribution (here, delimitation) than it did in a particular year. This ensured equitable allocation with relatively same number of seats in each province. For more information on this, *see* GOVERNMENT OF CANADA, *Study of Bill C-14, An Act to Amend the Constitution Act*, 1867, June 7, 2022, available at https://www.canada.ca/en/democratic-institutions/corporate/transparency/briefing-document/parliamentary-committees/standing-committee-procedure-house-affairs/study-bill-c-14-act-amend-constitution-act-1867-electoral-representation-june-7-2022.html (Last visited on June 27, 2025).

[52] McMillan, *supra* note 42.

Jammu and Kashmir	6	5	1
Jharkhand	14	14	0
Karnataka	28	27	1
Kerala	20	17	3
Madhya Pradesh	29	31	-2
Maharashtra	48	50	-2
Orissa	21	19	2
Punjab	13	13	0
Rajasthan	25	29	-4
Tamil Nadu	39	32	7
Uttar Pradesh	80	87	-7
Uttaranchal	5	4	1
West Bengal	42	42	0
Delhi	7	7	0

Table B

Prediction of seat distribution in the Lok Sabha for 2026 and 2031 (assuming there is no loss of seats in the current number of seats)[53]

Table 2. Projected seat distribution in Lok Sabha for 2026 and 2031, ensuring no state loses its current number of seats.

Sl. no.	State and UTs	Current seats (since 1976)	Projected seats (2026)	Seats gained (2026)	Projected seats (2031)	Seats gained (2031)
1.	Uttar Pradesh	80	134	+54	137	+57
2.	Bihar	40	73	+33	77	+37
3.	Maharashtra	48	71	+23	73	+25
4.	Rajasthan	25	46	+21	48	+23
5.	Madhya Pradesh	29	50	+21	51	+22
6.	Gujarat	26	41	+15	42	+16
7.	West Bengal	42	56	+14	56	+14
8.	Karnataka	28	38	+10	39	+11
9.	Jharkhand	14	23	+9	24	+10
10.	Haryana	10	17	+7	18	+8
11.	Chhattisgarh	11	17	+6	18	+7
12.	Assam	14	20	+6	21	+7
13.	NCT of Delhi	7	12	+5	13	+6
14.	Odisha	21	26	+5	26	+5
15.	Andhra Pradesh	25	30	+5	30	+5
16.	Telangana	17	21	+4	21	+4
17.	Punjab	13	17	+4	17	+4
18.	Tamil Nadu	39	43	+4	43	+4
19.	J & K + Ladakh	6	8	+2	8	+2
20.	Uttarakhand	5	7	+2	7	+2
21.	Himachal Pradesh	4	4	0	4	0
22.	Kerala	20	20	0	20	0
	Total	524	774	+250	792	+268
	Smaller states and UTs	19	19	0	19	0
	Total	543	793	+250	811	+268

Sources: Authors' calculations, Election Commission of India; National Commission on Population (2020).
(1) Smaller States and UTs – this calculation did not adjust the 19 seats constitutionally exempt from proportional representation. (2) (a) Divisor for the year 2026 is fixed at the population of 1,810,350 per seat and (b) Divisor for the year 2031 is fixed at the population of 1,834,750 per seat.

[53] Patel & Sekhar, *supra* note 47.

Table C

Malapportionment in the Lok Sabha as per 2011 (actual) and the 2026 (projected) figures[54]

State	Current Seats	Proportional Seats (2011)	Over- and Under-representation (2011)	Proportional Seats (2026)	Over- and Under-representation (2026)
Tamil Nadu	39	32	+7	31	+8
Andhra Pradesh + Telangana	42	37	+5	34	+8
Kerala	20	15	+5	12	+8
Odisha	21	18	+3	18	+3
West Bengal	42	40	+2	38	+4
Karnataka	28	27	+1	26	+2
Himachal Pradesh	4	3	+1	3	+1
Punjab	13	12	+1	12	+1
Uttarakhand	5	4	+1	4	+1
Assam	14	14	0	14	0
Jammu and Kashmir	6	6	0	6	0
Chhattisgarh	11	11	0	12	-1
Delhi	7	7	0	8	-1
Maharashtra	48	49	-1	48	0
Gujarat	26	27	-1	27	-1
Haryana	10	11	-1	11	-1
Jharkhand	14	15	-1	15	-1
Madhya Pradesh	29	32	-3	33	-4
Rajasthan	25	30	-5	31	-6
Bihar	40	46	-6	50	-10
Uttar Pradesh	80	88	-8	91	-11

B. METHODOLOGY

Unlike the above, our analysis is targeted at tracking electoral population growth within states. Although the Constitution refers to the population-seat ratio and not the size of the electorate,[55] (the electorate does not include the entire population, as our country does not allow citizens below eighteen years of age from voting) we have considered the

[54] Vaishnav & Hintson, *supra* note 43.
[55] *See* The Constitution of India, 1950, Arts. 81(2), 81(3).

electorate size as a proxy for population — especially since the figures are based on the 2011 census data.[56]

Electoral data from the 2009 and 2019 Lok Sabha elections have been used for this analysis. 2009 was chosen as the base year since the latest delimitation was as per the Delimitation Order, 2008.[57] Since the statistical reports of the latest Lok Sabha elections have not been uploaded by the Election Commission of India ('ECI') as of the date of writing this paper, the 2019 Lok Sabha general elections data have been used for this analysis. To ensure geographical parity, four states across cardinal directions — West Bengal, Maharashtra, Kerala, and Uttar Pradesh have been chosen for this data comparison.

Empirical Study Tables

Key To Colour Codes, Symbols & Other Abbreviations	
	Population increase equal to or above 40%
	Population increase equal to or above 29%
	Population increase equal to or below 20%
	Population fall

[56] The 2021 census has been deferred.
[57] The Delimitation of Parliamentary and Assembly Constituencies Order, 2008.

Table 1 (West Bengal)			
Constituency	**2009**	**2019**	**Percentage increase in population (%)**
Cooch Behar	1329086	1814200	36.49
Alipurduars	1229301	1648383	34.09
Jalpaiguri	1252142	1735464	38.57
Darjeeling	1215464	1611317	32.56
Raiganj	1108382	1601220	44.46
Balurghat	1010224	1431704	41.72
Maldaha Uttar	1101096	1685955	53.11
Maldaha Dakshin	1052093	1575590	49.75
Jangipur	1087054	1616213	48.67
Baharampur	1179938	1638378	38.85
Murshidabad	1192899	1725187	44.62
Krishnanagar	1223082	1631698	33.41
Ranaghat	1329436	1762252	32.55
Bangaon	1246979	1704632	36.70
Barrackpore	1081237	1436431	32.85
Dum Dum	1212220	1566196	29.20
Barasat	1226654	1718252	40.08
Basirhat	1198579	1678357	40.03
Jaynagar	1143640	1648355	44.13
Mathurapur	1227376	1652096	34.60
Diamond Harbour	1302398	1719190	32.00
Jadavpur	1331537	1816857	36.44
Kolkata Dakshin	1505638	1728851	14.82
Kolkata Uttar	1366647	1444082	05.66
Howrah	1344746	1633925	21.50
Uluberia	1251590	1614988	29.03
Srerampur	1395570	1785472	27.93
Hooghly	1405684	1766601	25.67
Arambagh	1375377	1764726	28.30
Tamluk	1271230	1694646	33.30
Kanthi	1249775	1660147	32.8
Ghatal	1354861	1800002	32.85
Jhargram	1241574	1641868	32.24
Medinipur	1262983	1674236	32.56

Purulia	1257799	1645884	30.85
Bankura	1268563	1648906	29.98
Bishnupur	1237948	1627199	31.44
Bardhaman Purba	1289311	1698089	31.70
Bardhaman Durgapur	1353380	1733578	28.09
Asansol	1250052	1615865	29.26
Bolpur	1307730	1705073	30.38
Birbhum	1221893	1699219	39.06

Table 2 (Uttar Pradesh)

Constituency	2009	2019	Percentage increase in population (%)
Saharanpur	1298132	1739082	34.00
Kairana	1282551	1666703	30.00
Muzaffarnagar	1370117	1698003	24.00
Bijnor	1287070	1664125	29.3
Nagina	1196566	1586117	32.6
Moradabad	1388525	1958939	41.1
Rampur	1154544	1679506	45.5
Sambhal	1290810	1828764	41.7
Amroha	1173915	1646435	40.3
Meerut	1508788	1892931	25.46
Baghpat	1280602	1616476	26.22
Ghaziabad	1831688	2728978	49.00
Gautam buddh Nagar	1522397	2302960	51.27
Bulandshahr	1482749	1787925	20.6
Aligarh	1345351	1887127	40.3
Hathras	1437725	1864320	30.00
Mathura	1341649	1807893	34.75
Agra	1539683	1937690	25.84
Fatehpur sikri	1345742	1718837	27.72
Firozabad	1422243	1790510	25.89
Mainpuri	1399259	1723236	23.15
Etah	1278295	1621295	26.83
Badaun	1405695	1891576	34.56
Aonla	1310878	1785605	36.21

Bareilly	1401423	1797655	28.27
Pilibhit	1310007	1761207	34.44
Shahjahanpur	1627964	2114201	29.86
Kheri	1297088	1770699	36.51
Dhaurahra	1269584	1644674	29.54
Sitapur	1230078	1666126	35.44
Hardoi	1416949	1807119	27.53
Misrikh	1464770	1796932	22.67
Unnao	1818980	2191465	20.47
Mohanlalganj	1500237	2023431	34.87
Lucknow	1653123	2040367	23.42
Rae Bareli	1379507	1702248	23.39
Amethi	1431787	1743515	21.77
Sultanpur	1430955	1775196	24.05
Pratapgarh	1435159	1708759	19.06
Farrukhabad	1306214	1708585	30.80
Etawah	1416867	1757984	24.07
Kannauj	1504276	1874824	24.63
Kanpur	1390055	1632983	17.47
Akbarpur	1461050	1766121	20.88
Jalaun	1684988	1933358	14.74
Jhansi	1562082	2040739	30.64
Hamirpur	1498840	1749100	16.69
Banda	1386265	1702024	22.77
Fatehpur	1536621	1839312	19.69
Kaushambi	1391312	1787120	28.44
Phulpur	1426450	2010477	40.94
Allahabad	1267492	1716160	35.39
Barabanki	1422218	1816830	27.74
Faizabad	1500160	1821785	21.43
Ambedkar Nagar	1494838	1785657	19.45
Bahraich	1246823	1729908	38.74
Kaiserganj	1376267	1805946	31.22
Shrawasti	1405884	1914739	36.19
Gonda	1341455	1770248	31.96
Domariyaganj	1499679	1885433	25.72
Basti	1570657	1845223	17.48

Sant Kabir Nagar	1694453	1962903	15.84
Maharajganj	1509167	1915408	26.92
Gorakhpur	1696474	1981197	16.78
Kushi Nagar	1438263	1761564	22.48
Deoria	1580745	1754195	10.97
Bansgaon	1663648	1751258	5.26
Lalganj	1509536	1751980	16.06
Azamgarh	1578854	1789168	13.32
Ghosi	1693231	1991651	17.62
Salempur	1621136	1667282	2.84
Ballia	1679029	1822625	8.55
Jaunpur	1662127	1867976	12.38
Machhlishahr	1751074	1848306	5.55
Ghazipur	1527723	1881077	23.12
Chandauli	1446259	1756837	21.47
Varanasi	1561854	1856791	18.88
Bhadohi	1519449	1942514	27.84
Mirzapur	1405539	1845150	31.28
Robertsganj	1214735	1723538	41.89

Table 3 (Kerala)

Constituency	2009	2019	Percentage increase in population (%)
Kasaragod	1113892	1363937	22.45
Kannur	1069725	1266550	18.39
Vadakara	1071171	1288926	20.33
Wayanad	1102097	1359679	23.37
Kozhikode	1053817	1318024	25.07
Malappuram	1019713	1370544	34.40
Ponnani	997075	1356803	36.08
Palakkad	1074818	1323010	23.09
Alathur	1100843	1266794	15.07
Thrissur	1174161	1337110	13.87
Chalakudy	1075390	1230197	14.39
Ernakulam	1023053	1245972	21.79

Idukki	1062849	1204191	13.29
Kottayam	1095242	1206698	10.18
Alappuzha	1147162	1356701	18.27
Mavelikkara	1142993	1308102	14.45
Pathanamthitta	1213370	1382741	13.96
Kollam	1108686	1296720	16.96
Attingal	1091432	1350710	23.76
Thiruvananthapuram	1122047	1371427	22.23

Table 4 (Maharashtra)

Constituency	2009	2019	Percentage increase in population (%)
Nandurbar	1455543	1871099	28.55
Dhule	1575225	1908173	21.14
Jalgaon	1549391	1931400	24.65
Raver	1418691	1775051	25.12
Buldhana	1382736	1762918	27.49
Akola	1480606	1865169	25.97
Amravati	1423855	1833091	28.74
Wardha	1408781	1743283	23.74
Ramtek	1502900	1922764	27.93
Nagpur	1738920	2161096	24.27
Bhandara - gondiya	1450477	1811556	24.89
Gadchiroli-Chimur	1285387	1581366	23.02
Chandrapur	1536352	1910188	24.33
Yavatmal-Washim	1554042	1916185	23.30
Hingoli	1369774	1733729	26.57
Nanded	1439015	1719322	19.47
Parbhani	1610088	1985228	23.29
Jalna	1426255	1867220	30.91
Aurangabad	1417964	1886284	33.02
Dindori	1432938	1732936	20.93
Nashik	1448414	1885064	30.14
Palghar	1523061	1885600	23.80
Bhiwandi	1483176	1890100	27.43

Kalyan	1588507	1965676	23.74
Thane	1806803	2370903	31.22
Mumbai North	1608924	1647350	2.38
Mumbai North West	1604992	1732263	7.92
Mumbai North East	1572890	1588693	1.00
Mumbai North central	1681985	1679891	-0.12
Mumbai South central	1515899	1440380	-4.98
Mumbai South	1589811	1554176	-2.24
Raigad	1359830	1652965	21.55
Maval	1604886	2298080	43.19
Pune	1806953	2075824	14.87
Baramati	1593460	2114663	32.70
Shirur	1630466	2175529	33.42
Ahmadnagar	1517951	1861396	22.62
Shirdi	1317890	1587079	20.42
Beed	1637239	2045405	24.93
Osmanabad	1608852	1889740	17.45
Latur	1509987	1886657	24.94
Solapur	1594138	1851654	16.15
Madha	1558442	1909574	22.53
Sangli	1490571	1809109	21.37
Satara	1546146	1848489	19.55
Ratnagiri - sindhudurg	1252255	1455577	16.23
Kolhapur	1583030	1880496	18.79
Hatkanangle	1458560	1776555	21.80

C. INFERENCES AND OBSERVATIONS

In West Bengal (Table 1), constituencies like Raiganj, Balurghat, Uttar and Dakshin Maldaha, Murshidabad and Jaynagar have an electoral population change of over 40%, with Maldaha Uttar constituency reaching as high as 53.11%. Conversely, Kolkata Dakshin and Kolkata Uttar constituencies have an electoral population change of almost 14.82% and 5.6% respectively. Thus, a stark variation is seen in electoral constituencies in West Bengal, with electoral population change ranging from 5.6% in Kolkata Uttar to as high as 53.11% in Maldaha Uttar constituencies. Furthermore, the number of constituencies with 30+% population growth is also very high, indicating a radiating growth in electoral populations even beyond the egregious flagged cases. This means a voter from Maldaha Uttar has staggeringly less voting power compared to a voter from Kolkata Uttar.

In Uttar Pradesh (Table 2), the difference in electoral population is stark in just 10 years (2009–2019). In constituencies like Ghaziabad, Rampur and Gautam Buddh Nagar, the population has increased to more than 45%, with Gautam Buddh Nagar showing a population rise of 49%. Looking at constituencies with a growth rate above 29%, which is a staggeringly high population growth rate, we see an additional twenty-two constituencies with runaway population growth. Thus, Uttar Pradesh has showcased overall high population growth. Compare this, however, with Fatehpur (19.69%) or Kanpur (17.47%) — a population rise of less than 20%. In fact, there are a significant number of constituencies with a population growth below 20%. While West Bengal shows a uniformly high rise in population, UP shows not only a rising population but severe regional variations as well.

In Kerala (Table 3), the population growth difference between constituencies is more or less uniform, with almost all of them showing an electoral population growth of under 25%. However, Malappuram (34.40%) and Ponnami (36.08%) show exceptions with an electoral population growth close to 40%.

In Maharashtra (Table 4), an interesting development is seen where the electoral population has fallen in Mumbai South, Mumbai South Central and Mumbai North Central constituencies. A clear hint at the growing voter strength in the area at the 2019 Parliamentary elections. This is compared to the electoral population in the Maval constituency, which has grown manifold to more than 43% (*see* Table 4). The state also has a significant number of constituencies with 30% population growth, indicating some regional volatility, but overall, the variance is still relatively muted, especially with respect to Uttar Pradesh.

The above data reveal a clear disparity in population growth between constituencies within the same state. Prosperous states like Kerala have maintained uniformly low birth rates. Maharashtra has also shown low growth rates with some outliers, with some constituencies even showing a reduction in population. On the other hand, Uttar Pradesh and West Bengal show runaway population growth across a variety of constituencies (alongside extreme regional volatility in the case of Uttar Pradesh), with results of more than forty per cent growth being relatively common. The above data also reveal lower birth rates in urban areas like Kolkata and Mumbai, which have led to relative over-representation, leaving other less urban constituencies whose population has grown faster, under-represented. A study by Shruti Rajagopalan has revealed that in such cases, birth rates are often directly proportional to economic prosperity, leaving the poor disproportionately underrepresented.[58] This is very problematic as it implies that the constituency one is born in determines the worth of their vote. While birth rates have certainly grown closer over the years in terms of the range between states,[59] there is still evidently a long way to go, and the number of electors continues to grow in the meantime. These statistics will probably skew even further every year, as more of the young and adolescent population in states with high birth rates reaches the voting age and joins the electoral rolls. This shows how sensitive our country is to demographic changes, underscoring the need for a religiously regular delimitation exercise after every decennial census.

[58] Shruti Rajagopalan, *Demography, Delimitation and Democracy*, GET DOWN AND SHRUTI, July 3, 2023, available at https://srajagopalan.substack.com/p/demography-delimitation-and-democracy (Last visited on July 1, 2025).
[59] *Id*.

IV. PASSIVE MALAPPORTIONMENT UNDER THE INDIAN CONSTITUTION: VOTER RIGHTS AND THE EQUAL PROTECTION CLAUSE

In performing a constitutional critique of the freeze on delimitation in the Indian context, a few primary questions need to be answered. *Firstly*, whether the right to vote under the Constitution is a statutory, constitutional or fundamental right. *Secondly*, what is the nature of the voting right, in terms of voting power exercisable by citizens? *Thirdly*, how does the failure to delimit materially affect the conception of this right in light of Article 14 of the Constitution?

A. RIGHT TO VOTE: STATUTORY, CONSTITUTIONAL OR FUNDAMENTAL?

For the longest time, the position of the judiciary has been that there is no civil or constitutional right to vote; instead, the voting power of the citizen is derived from statutory law created by Parliament. Though this is still the position in broad strokes, some complications have been introduced into the calculus over time.

In *N.P. Ponnuswami* v. *Returning Officer, Namakkal* ('N.P. Ponnuswami'), challenging the rejection of an election nomination, the Supreme Court ('S.C.') held that the right to vote was a statutory creation and was therefore subject to statutory limitations.[60] Similarly, in *Jyoti Basu & Ors.* v. *Debi Ghoshal & Ors*., the Court upheld the N.P. Ponnuswami ratio and further held:

> "A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election".[61]

This ratio was subsequently upheld in *Rama Kant Pandey* v. *Union of India*,[62] as well as *Anukul Chandra Pradhan, Advocate Supreme Court* v. *Union of India & Ors*.[63] While these judgments made passing references to the right enshrined in Article 326 as previously covered, the effect of this inclusion on the constitutionality of the right to vote was not fully explored until the year 2000 in the case of *Shyamdeo Prasad Singh* v. *Nawal Kishore Yadav*. In this case, a three-judge bench of the Supreme Court opined that with respect to the aforesaid Article:

> "Article 326 of the Constitution is founded on the doctrine of universal adult suffrage. It provides that every adult citizen of India shall be eligible to register as a voter, provided he is not otherwise disqualified. A person who is not entered in the electoral roll of any constituency is not entitled to vote in that constituency though he may be qualified under the Constitution and the law to exercise the right to franchise".[64]

Thus, the position on Article 326 up to that point was that it was a mere enabling provision for the Parliament to enact a law relating to voting, which would then be considered the statutory source of the right to vote. This right had not yet been connected to any

[60] N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, (1952) 1 SCC 94 ('N.P. Ponnuswami').
[61] Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691, ¶8.
[62] Rama Kant Pandey v. Union of India, (1993) 2 SCC 438, ¶8.
[63] Anukul Chandra Pradhan v. Union of India, (1997) 6 SCC 1, ¶9.
[64] Shyamdeo Prasad Singh v. Nawal Kishore Yadav, (2000) 8 SCC 46, ¶9.

constitutional, civil, natural and/or fundamental prerogative. In other words, though voting was central to democracy, the right to vote itself had found no constitutional protection. However, in the 2002 case of *Union of India* v. *Association for Democratic Reforms* ('Democratic Reforms'), while hearing an appeal against a High Court ('H.C.') ruling issuing guidelines in favour of the voters' right to information in an election, the Supreme Court took the jurisprudence in a new direction:

> "Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must".[65]

Therefore, while adjudicating upon the voter's right to information regarding candidates, the judges had implicitly recognised that the casting of votes was a form of protected expression of citizens and consequently, subject to the safeguards of Article 19 of the Constitution. While not recognising a constitutional right to vote, the bench lent its stamp of approval to a constitutional "freedom to vote".

This led to an amendment in the Representation of the People Act in 2002, inserting §33A and §33B to nullify the effect of the judgment insofar as candidates' obligations to disclose were concerned. This was subsequently challenged before the Apex Court in *People's Union for Civil Liberties (PUCL) & Anr.* v. *Union of India & Anr*. ('PUCL').[66] While striking down the 2002 amendment, the constitutionality of the right to vote came up for consideration again. In this respect, there was a split in the bench. Speaking for Justice Dharmadhikari and himself, Justice M. B. Shah toed the line of the established jurisprudence, stating that there "cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein".[67]

On the other hand, Justice P. Venkatarama Reddi, while concurring on the unconstitutionality of the amendment, disagreed on the nature of the right to vote. He ruled that the right to vote is, if not a fundamental right, definitely a constitutional right. It is not a mere statutory right, as the same originates from Article 326 of the Constitution. Justice Venkatarama adds that the right to vote is different from the freedom to vote — an expression protected under Article 19(1)(a). He states that this freedom to vote manifests when "the voter goes to the polling booth and casts his vote, his freedom to express arises".[68] Hence, the freedom to vote, unlike the right to vote, is a species of freedom of expression.[69]

Thus, Justice Reddi made an even more radical break from the Association for Democratic Reforms case, arguing for the recognition of Article 326 as conferring a constitutional right to vote, albeit not a fundamental right. However, this decision was in the minority and subsequently, the court in *Kuldip Nayar & Ors.* v. *Union of India & Ors*. ('Kuldip Nayar')[70] explicitly rejected the contention that the PUCL case had recognised a constitutional right to vote. This was also followed in the 2013 *People's Union for Civil Liberties* v. *Union of India*.[71]

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[65] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294, ¶7 ('Democratic Reforms').
[66] People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399.
[67] *Id*., ¶ 59.
[68] *Id*., ¶101.
[69] *Id*.
[70] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶¶361, 362.
[71] People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1, ¶21.

So until very recently, the position was firmly settled on the conception of the right to vote as a statutory right, with an ancillary constitutional freedom to cast the vote so granted under the statute. It was only in 2023 in *Anoop Baranwal* v. *Union of India* that the S.C. finally opined in favour of a constitutional right to vote, holding that the right of the citizen to suffrage was intrinsic to the constitutional vision. Writing for the majority, Justice K. M. Joseph held:

> "Undoubtedly, the Founding Fathers contemplated conferring the right to participate in elections to the House of People and the Legislative Assemblies on all citizens who were of a certain age. The right was, however, subject to the condition that they were not to be disqualified. The disqualifications, again, were, however, limited to what was contained in Article 326. [….]
>
> At any given point of time, placing Article 326 side-by-side with the law made by Parliament or the law made by the State Legislature, we would find that, if a person is a citizen of India and not below eighteen years of age, and if he does not incur the disqualifications, which cannot be more than what is provided in Article 326, but the content of which, may be provided by the law made by the competent Legislature and the citizen not less than eighteen years does not have the disqualifications, he becomes entitled to be entered in the electoral roll. Such person, as is indicated in Article 326, indeed, has a right, which can be said to be a Constitutional Right, which may be right subject to the restriction. Section 62(1) of the 1951 Act, as we have noticed, gives also the Right to Vote to such a person. Any other interpretation would whittle down the grand object of conferring adult suffrage on citizens."[72]

Drawing a parallel with reasonable restrictions on fundamental rights, the Court held that, just as the existence of a parliamentary statute restricting a fundamental right does not erase the constitutional nature of the right, the existence of a law further elaborating on Article 326, and bound in its extent by the grounds for qualification and disqualification provided for in the Constitution, does not in any way detract from the constitutionality of the right to vote.[73] The Representation of the People Act and other laws passed by Parliament, as well as state legislatures, were enabling provisions for the practical enforcement of the constitutional right to vote and did not create it anew.[74]

However, this opinion was not made binding. The bench was unable to finally pronounce on this point as Kuldip Nayar, which was also a five-judge Constitution Bench, had already decided against a constitutional right to vote.[75] Ultimately, it held that deciding whether the right to vote was constitutional or wholly statutory was not essential to the determination of the issue in question.[76] Despite this, it is likely and indeed safe to say that the S.C. may now be moving towards the recognition of a constitutional right to vote, though the matter will need to be taken up by a larger bench for a conclusive determination.

For now, the judicial writ places the right to vote firmly in the domain of legislative conferment; Article 326 does not vest upon any citizen a judicially enforceable constitutional right to vote. It is only by being registered under the Representation of the People Act and having their name included in the electoral rolls that a citizen acquires the right to cast

[72] Anoop Baranwal v. Union of India [Election Commission Appointments], (2023) 6 SCC 161, ¶180.2.
[73] *Id*., ¶137.
[74] *Id*., ¶138.
[75] *Id*., ¶139.
[76] *Id*., ¶¶139–141.

a vote, although the judicial trends are leaning towards the view that this right ultimately flows from the constitutional provisions themselves.

However, once the right to vote has been received, it is constitutionally protected as a fundamental right, as has been the precedent since the Democratic Reforms, discussed above.[77] Since the issue of delimitation concerns the registered electors, the constitutionality or lack thereof of the right to vote itself is not directly relevant to the examination in this Part. We are currently concerned with the effect of delimitation on the freedom to exercise voting power.

Therefore, it becomes necessary to examine how delimitation preserves the fundamental rights of electors and, conversely, how a freeze on delimitation endangers those rights.

B. RIGHT TO VOTE UNDER THE INDIAN CONSTITUTION

Arguments to prove that a failure to delimit violates the principles of equality under Article 14 are insufficient without an examination of how the 'right to vote' is linked with periodic delimitation and voting power.

The primary source of the 'right to vote' is Article 326 of the Indian Constitution which declares that elections to the Lok Sabha and the Vidhan Sabha are based on Universal Adult Suffrage (every citizen of India, not less than eighteen years of age is entitled to cast their vote unless barred by law).[78]

Both the Article title and contents are illustrative in this regard. Dealing with the title first, it declares that elections to the Lok Sabha and state legislative assemblies shall be on the basis of 'adult suffrage'. A bare textual reading of this indicates that it is intended that all adults in India have the right to vote in the aforementioned elections. The text of the provision further qualifies this as:

1. Any Indian citizen;
2. Above the age of eighteen on an appropriately fixed date (brought down from twenty-one in the 61st Amendment);
3. Not otherwise disqualified on grounds of non-residence, unsoundness of mind, crime, corruption, or illegal practice.

A person who fulfils the above criteria shall be eligible constitutionally to vote in elections. Thus, India follows the 'universal adult franchise' model for voting, meaning that any adult citizen, unless specifically disqualified, is automatically entitled to vote. But this alone does not tell us anything about how this voting power is to be distributed. On a bare reading of Article 326, it only provides that such persons who fulfil these criteria may be registered as eligible voters. The form of vote exercisable by them is left open-ended. Would it, for instance, be constitutionally permissible to have one adult citizen with ten times the votes of another?

To solve the quandary of the exact nature of the vote, we have to read this 'right to vote' provision in light of the other strictures in the Constitution. Upon examining Article 81, which deals with the composition of seats in the Lok Sabha, we find that exact guidelines have been

[77] *See* Democatic Reforms, *supra* note 65, ¶460.
[78] The Constitution of India, 1950, Art. 326.

prescribed as to the delineation of constituencies and their respective seats. The guidelines are presented below:

> 1. Each state is allotted a particular number of seats in the Lok Sabha based on the ratio between the total number of seats in the Lok Sabha and the population of that state, 'as far as is practicable'.[79]
>
> 2. A *proviso* in the same provision, however, clarifies that if the population of a state, for the purposes of allotment of seats to the Lok Sabha, exceeds six million, then the above guideline will not be applicable.
>
> 3. Each state must be divided into territorial constituencies on the basis of the ratio between the total number of seats allotted to that particular state, as far as is practically feasible.[80]
>
> 4. Moreover, the word 'population' is clarified to mean the relevant figures published as per the last preceding census.[81]

For completeness' sake, it may be stated that clause 1 deals with the numerical strength of the House. That aside, the reading of the provisions of clause 2 makes it clear that:

> 1. The ratio of seats to population for each State should be as close to equal as possible (with some allowance for less populous states);
>
> 2. The ratio of seats to population for each constituency within a state should be as close to equal as possible.

In other words, read together, these provisions imply that each seat in the Lok Sabha should be tied to about the same number of voters as every other seat.[82] Every state should have roughly the same number of people per assigned seat, and within each state, every constituency should also have a roughly equal population (assuming, as is the case, that every constituency correlates to a single seat). The corresponding provision for state legislative assemblies is Article 170.[83] It equivalently reveals the same idea and need not be reproduced for the sake of brevity.

Taken together, these provisions point to an important and fundamental principle that appends to and qualifies the right under Article 326: that of the "equality of votes". In other words, the constitutional intent, as derived from a composite reading, is that every person should possess a roughly equivalent amount of voting power in the impugned elections. However, there is plenty of evidence to buttress this point, even beyond a bare textual reading of the Constitution.

Firstly, international law supports the obligations of nations to ensure equality in democratic suffrage in addition to its universality. The Universal Declaration of Human Rights ('UDHR'), to which India is a signatory, declares in the third clause of Article 21 that

[79] The Constitution of India, 1950, Art. 81.
[80] *Id.*
[81] *Id.*
[82] Alistair McMillan, *Constitution 91st Amendment: A Constitutional Fraud?*, Vol. 36(14–15), ECONOMIC & POLITICAL WEEKLY (2001) available at https://www.epw.in/journal/2001/14-15/commentary/constitution-91st-amendment-bill-constitutional-fraud.html (Last visited on July 2, 2025).
[83] The Constitution of India, 1950, Art. 170.

the basis of governmental authority is the will expressed by the people through universal and equal suffrage, held through secret vote and free voting procedure.[84]

Moreover, the International Covenant on Civil and Political Rights ('ICCPR'), which India has also signed and ratified, reconfirms this in Article 25. In the said Article, every citizen has an equal right and opportunity without unfair discrimination and unreasonable restriction to participate in public affairs.[85] Moreover, the Article confers the right to vote and be elected at free elections through fair procedure and the right to equally access and hold posts in the country's public services.[86]

Furthermore, in 1997, the Secretariat of the Commonwealth of Nations, of which India is a member, issued a series of guidelines for proper election management titled "Good Commonwealth Electoral Practice: A Working Document".[87] In paragraph twenty-one under the heading "Delimitation of constituencies", it states the following:

> "General principles guiding the drawing of constituency boundaries include community of interest, convenience, natural boundaries, existing administrative boundaries and population distribution, including minority groups. There should be no scope for any "gerrymandering", and each vote should, to the extent possible, be afforded equal value or weight, in recognition of the democratic principle that all those of voting age participate equally in the ballot".[88]

There has been no explicit recognition of this principle of respect for international law in the Indian legal canon so far (beyond what can be derived from a holistic reading as shown previously). In the 1984 case of *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey & Ors.*, the S.C. held that the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction, provided they do not run into conflict with Acts of Parliament. If there is such a conflict, the will of Parliament will prevail.[89]

Similarly, in *Jeeja Ghosh* v. *Union of India*, the S.C. referred to the Vienna Convention on Law of Treaties ('VCLT') to import the principle of *pacta sunt servanda* into the Indian law.[90]

Mere signing of a treaty or adoption of any principle does not have the effect of entering the same into the statute books. Parliament is the sole lawmaking authority under the Union of India, and any international agreement or obligation only has the force of law once it has been converted into and enacted as a municipal statute. However, it has been a long-standing precedent in India, which constitutionally imposes an obligation to adhere to international law, that municipal laws may be read to be in consonance with international law, insofar as there is no conflict between the two. Where, however, municipal law contradicts

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[84] Universal Declaration of Human Rights, G. A. Res. 217A(III), Art. 21(3), U.N. Doc. A/RES/217A(III) (December 10, 1948).
[85] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (adopted on December 19, 1946, entered into force on March 23, 1976) Art. 25(a).
[86] *Id*., Art. 25(b).
[87] Commonwealth Secretariat, *Good Commonwealth Electoral Practice*, (A Working Document, 1997), available at https://eos.cartercenter.org/uploads/document_file/path/24/CommonwealthElectoralPractice.pdf (Last visited on December 21, 2024).
[88] *Id*.
[89] Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey, (1984) 2 SCC 534, ¶5.
[90] Jeeja Ghosh v. Union of India, (2016) 7 SCC 761, ¶13.

international law, the will of the domestic authority prevails. Hence, it may be well-settled from the aforementioned points that the constitutional and statutory provisions relating to delimitation have to be read in consonance with India's internationally made commitments to the principle of equal suffrage.

Furthermore, the principle of equality of votes or, as it is commonly called, 'one person, one vote', is remarkably resilient in the Indian constituent history, with the provision being traceable to Article 67 of the 1948 draft constitution, whose Clause 5 states: "(c) The ratio between the number of members to be elected at any time for each territorial constituency and the population of that constituency as ascertained at the last preceding census shall, so far as practicable, be the same throughout India".[91]

Furthermore, Dr. Ambedkar also makes a reference to the OPOV principle in his closing speech on November 25, 1949, stating that, "In politics we will be recognising the principle of one man one vote and one vote one value".[92]

Thus, it can be stated with a fair degree of conclusiveness that the voting right granted by the Indian constitution is in the nature of both universal and equal adult suffrage.

C. ONE PERSON, ONE VOTE (OPOV) AND ARTICLE 14

To prove that a failure to delimit violates Article 14 of the Constitution, it needs to be established that the absence of OPOV in elections affects the equal treatment requirements prescribed under this fundamental right.

Article 14 guarantees two rights to all persons within the jurisdiction of the constitution:

1. Equality before the law;
2. Equal protection by the law.

These provisions read in a complementary manner, constitute the core of Article 14, that the law must be equally applicable to and for the benefit of all citizens. Absolute equality is neither desirable nor possible. Medical professionals cannot be treated like military personnel, who, in turn, cannot be treated like manual scavengers. Every group has its own needs and peculiar conditions, but the law must be made in such a manner as to be for the benefit of all such groups. Indeed, it may be said that equal protection of the laws is in itself a guarantor of equality before the law, and conversely, lack of the former automatically implies a lack of the latter.

In *State of West Bengal* v. *Anwar Ali Sarkar*, Chief Justice Patanjali Sastri rightly and succinctly explained the provision by highlighting that the first part of Article 14, adopted from the Irish Constitution, declares that the civil rights of all persons within India are equal. The second part, a corollary of the first, is derived from the 14th Amendment to the

[91] CONSTITUTION OF INDIA, *Draft Constitution of India, 1948*, February 21, 1948, available at: https://www.constitutionofindia.net/committee-report/draft-constitution-of-india-1948/ (Last visited on July 1, 2025).

[92] THE SCROLL, *Why BR Ambedkar's Three Warnings in his Last Speech to the Constituent Assembly Resonate Even Today*, January 26, 2016, available at https://scroll.in/article/802495/why-br-ambedkars-three-warnings-in-his-last-speech-to-the-constituent-assembly-resonate-even-today (Last visited on December 23, 2024).

American Constitution, which states that the law operates alike on all persons without discrimination.[93]

Thus, it may be definitively said that 'like shall be treated alike' is the *sine qua non* of Article 14. As established earlier, the right to vote, whether guaranteed constitutionally or statutorily, explicitly prescribes the principle of equal suffrage. The constitutional vision is that all adult citizens competent to vote are to be equally situated with respect to their voting power. Therefore, reading all provisions of the Constitution in a harmonious manner, it may be safely stated that voting rights, being legal rights, irrespective of their status as civil or fundamental rights, are subject to the requirement of equal protection under Article 14. In other words, the right to equal protection under the law also extends to the equality of votes.

As discussed previously, the evidence is clear: in the absence of a delimitation exercise, there has been rampant and runaway disparity in the voting power of citizens across constituencies and state lines. States and regions which have seen lower birth rates have seen a significant increase in terms of voting strength per person as compared to areas with high population growth, where individual voters have found their vote devalued. This is, in effect, a debasement of the votes of the latter regions.

To sustain such a divide, the State would have to prove that there is a reasonable basis to differentiate between the two. While Article 14 prohibits class legislation and discrimination, it does not prohibit reasonable classification. To prove reasonable classification, there are two basic tests to be followed:

1. Intelligible differentia, which essentially means that there is an identifiable distinguishing factor that separates the groups being treated unequally;[94]

2. Rational nexus, essentially meaning that the differentia chosen must be somehow related to the goal or object sought to be achieved by the classification.[95]

In the present case, the stated goal behind the delimitation freeze is to ensure the implementation of population control measures by states.[96] However, the effect of such a freeze on the individual voter is either a disproportionate reduction or an increase in voting power. Therefore, the true incidence of the measure falls not on the states for whose benefit the provision is purportedly enacted but on the voters within the states or respective constituencies targeted, as we show in the parts that follow.

Is there an intelligible differentia then between these voters who are situated in various constituencies? One might argue that belonging to different regions or states is in itself an intelligible differentia due to the differing circumstances and realities in each state. However, as we have shown in our analysis, the debasement of the equal suffrage principle is not just restricted to state lines. Even within states, different constituencies are showing vastly different growth rates in terms of electoral populations, and it would be a great stretch to say that the people situated inside these constituencies are so different as to be intelligibly differentiated. It is not merely enough that there is a difference, but also that the standard of differentiation is sufficiently intelligible and clear.[97] It cannot be said that the legislature has

[93] State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1, ¶112 (per Patanjali Shastri C.J.).
[94] K. Thimmappa v. Chairman, Central Board of Directors, SBI, AIR 2001 SC 467, ¶25.
[95] *Id*., ¶5.
[96] *See supra* Part II on "Borders and Babies: The Indian Delimitation Experience".
[97] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, ¶13.

made any intelligible criteria for differentiation in enacting the impugned amendments. Laws providing for discrimination on a geographical basis are not necessarily violative of Article 14 as long as cogent reasons can be shown for treating the people of one geographical area differently from another area.[98] However, the same is still subject to the requirements of intelligible differentia and rational nexus.[99] A freeze on delimitation on the aforementioned grounds can indeed show why two states are treated in separate classes, but it cannot show the existence of a well-demarcated differentiation between individual voters. Only individual voters can have fundamental rights in this regard, and it is their standard which has to be used when examining such a statute. The legislature has not managed to carve out clearly demarcated groups of voters on the basis of which it may justify its classification. Indeed, the effects of the legislation across constituencies have been completely organic and unplanned.

However, even if it were to be accepted that there is an intelligible differentia for classification amongst the voters in different constituencies, the stated objective of the measure, which is population restriction, has no rational nexus with the debasement and disparity of voting power amongst the population. To prove a rational nexus, it is necessary to enquire into the object of the statute and then test whether the discrimination pursued by it is aiding the implementation of that self-same object.[100] Furthermore, the nature of classification must not itself be arbitrary or onerous in nature.[101]

In the present case, the well-settled and enunciated purpose of the given legislation was to provide time and incentives for states to implement family planning measures. For this reason, while no explicit classification was made, an implicit distinction in terms of voting power was carved into the voting population. This divided voters into those who would gain voting power and those who would lose voting power, and among those at different rates depending on their location. We have already shown that this distinction is fuzzy at best. While population control is arguably a laudable measure, discriminating between people in terms of voting rights does nothing to achieve this measure. To prove the same, it would be necessary to show that the equality of votes is in itself directly tied to the disparity of population growth rates across the country and, conversely, that discrimination and classification between voters are rationally tied to the equalisation of birth rates.

However, no such connection can be found. The disparity in birth rates arises due to a variety of social and economic factors.[102] Therefore, it cannot be reasonably argued that the principle of 'one man, one vote' is in any way an incentive or a disincentive for growth in population. Even assuming that the birth rates across state lines will eventually converge, it stands to reason that the growth (or shrinkage) in the population will still happen at different rates over the period of convergence, resulting in electoral disparities. Freezing delimitation does not prevent change in the balance of power but only delays it. In fact, it converts what would have been a gradual change into an abrupt one due to a lack of regular updation.

Instead of reasonable classification for the purposes of population control, the negation of equality of votes became a byproduct of the original purpose of this freeze: the pacification of provincial administrations who feared a loss of influence in the Union

[98] Shri Krishna Singh v. Th. Ther Singh, AIR 1955 SC 795, ¶5.
[99] Gopichand v. Delhi Administration, AIR 1959 SC 609.
[100] Charanjit Lal Chowdhury v. Union of India, 1950 SCR 869, ¶88.
[101] Mardia Chemicals v. Union of India, (2004) 4 SCC 311.
[102] *See generally* Bart C. J. M. Fauser, et al., *Declining Global Fertility Rates and the Implications for Family Planning and Family Building: An IFFS Consensus Document Based on a Narrative Review of the Literature*, Vol. 30(2), HUMAN REPRODUCTION UPDATE (2024) available at https://academic.oup.com/humupd/article/30/2/153/7513427 (Last visited on July 3, 2025).

legislature. Far from being a rationally planned measure in pursuit of an objective, the widening gap in voting power amongst electors in different constituencies is little more than a byproduct of kicking the can of delimitation down the road.

It is essentially the subordination and sacrifice of the individual's right to an equal vote at the altar of maintaining a political status quo — not an allowable proposition for reasonable classification. The disparity in vote values is, in truth, not the product of a definitive policy at all but rather a side-effect that would rather be ignored: the product of arbitrary and capricious self-preservative action on the part of the political State apparatus. Nowhere in the constitutional structure has there been any allowance for the compromise of individual political equality to achieve political equality amongst federal units. In fact, the Lok Sabha (and, by extension, the state legislative assemblies) being directly responsible to the people, was always intended to be populated only on the basis of the number of citizens and not on any notions of federal parity. The Rajya Sabha, being the council of states, was reserved for achieving this goal and would have been a more appropriate target of protective action, through, for example, guaranteeing additional seats to states with low populations or birth rates or implementing perfect parity in the manner of the United States Senate. The same is borne out by the vision of the Constituent Assembly; speaking on 31st July, 1947, while moving an amendment to what would become Article 81, Shri N. Gopalaswami Ayyangar noted:

> "The House of the People is essentially a Chamber whose composition is based entirely on the population and it is only reasonable that the ratio which the number of Members representing the Indian States bears to the total population of Indian States should not exceed the ratio which the number of seats for the Provinces bears to the total population in the Provinces. […] Any special treatment which we desire to give to units of the Federation, whether Provinces or Indian States, that treatment will be provided for in the composition of the Council of States".[103]

Thus, a freeze on delimitation or a failure to delimit is destructive of the entitlement of a voter to be treated and protected equally by the laws of the nation. There is no reasonable ground to differentiate one voter from another in terms of their voting power, especially where equal and universal adult suffrage is a constitutionally guaranteed principle.[104] However, this is not to say that the 'one person, one vote' principle is to be followed with exacting precision. A range of deference is always granted to the State when dealing with such objects. Indeed, even the constitutional provisions only state that the apportionment should be as close to equal as possible.

Equality before the law does not mean perfect mathematical equality, as long as it can be proven that the object of the State is to treat them as similarly as possible under the circumstances.[105] Where there are multiple permissible avenues to achieving this goal, the State is free to pick at its discretion; the same is a policy prerogative.[106] But where the State has chosen a path which does not safeguard this right or, indeed, chooses to derogate this right, the same is a violation of the equal protection mandate.[107]

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[103] CONSTITUENT ASSEMBLY DEBATES, July 31, 1947, *speech by* SHRI N. GOPALASWAMI AYYANGAR, ¶4.35.106, available at https://www.constitutionofindia.net/debates/31-jul-1947/ (Last visited on July 1, 2025).
[104] *See supra* Part IV.B on "Right to Vote under the Indian Constitution".
[105] State of Bombay v. F.N. Balsara, AIR 1951 SC 318, ¶28.
[106] Re: Special Reference No. 1 of 2012, [2012] 9 SCR 311, ¶144.
[107] *Id*.

It is well accepted that 'free and fair elections' are indispensable to democracy and are indeed part of the basic structure of the Constitution.[108] 'Fair' in this context necessarily means that the elections should be non-arbitrary and, by extension, premised upon the rule of law and equality before the law. Arbitrariness is the antithesis of equality, and, by extension, the presence of equal protection of the law is an absence of arbitrariness.[109] While it is an aspirational ideal rather than a mathematically perfect expression and indeed, states in practice will deviate from it with regard to situational peculiarities,[110] it must still be upheld as the stated goal to be worked towards in all aspects of policy.

Thus, having regard to the constitutional scheme, it can be stated with a fair degree of confidence that malapportionment, including passive malapportionment, is violative of the equal protection guarantee under Article 14 of the Constitution. To critically test this interpretation, we may turn to an analysis of the juridical trends in the United States of America, the source of much of our interpretation regarding equal protection of laws.

The U.S. courts have recognised the justiciability of vote dilution or debasement since the landmark 1962 case of *Baker* v. *Carr*, wherein vote dilution was held to be justiciable on the grounds of the Equal Protection Clause under the 14th Amendment.[111] Subsequently, it was also recognised that the objective of redistricting (or delimitation) was to protect the principle of 'one person, one vote'. That is to say, to fulfil the mandate of equal protection, redistricting had to be performed in such a manner that every person, no matter their race, sex, occupation or income, etc., had an equal vote.[112]

This jurisprudence would, however, reach its maturation in the 1964 *locus classicus* judgment of *Reynolds* v. *Sims* ('Reynolds').[113] In this case, the U.S. Supreme Court categorically held that "the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis".[114] While additional factors could be considered by states that are performing redistricting, the overarching objective must always be a strict parity of voting power on the basis of population, and only narrow deviations in good faith could be considered. According to the Court, this could be allowed where the deviation was in pursuit of a rational and constitutionally legitimate state policy such as aligning constituencies with political subdivisions, such as counties, provinces, etc.[115] In what is perhaps a particularly relevant observation to the Indian scenario, the U.S. Supreme Court also held that any State interest could not be used to circumvent the protection of a right mandated by the federal constitution.[116] In other words, the constitutional prerogative has precedence over the policy considerations of the administration. In another parallel, it also mandated reapportionment every ten years on the basis of the decennial census, reasoning that it was a rational approach to take into account population growth on a scale responsive enough to meet the constitutional requirements of the Equal Protection Clause.[117] Perfect equality was logically improbable, but the goal must be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State".

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[108] Anukul Chandra Pradhan, *supra* note 63.
[109] E. P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555, ¶85.
[110] R. C. Poudyal v. Union of India, (1994) Supp (1) SCC 324.
[111] Baker v. Carr, 369 U.S. 186 (1962), 226 (Supreme Court of the United States) ('Baker').
[112] Gray v. Sanders, 83 S.Ct. 801 (1963), 811 (Supreme Court of the United States).
[113] Reynolds v. Sims, 377 U.S. 533 (1964) (Supreme Court of the United States).
[114] *Id.*, ¶576.
[115] *Id.*, ¶533.
[116] *Id.*, ¶566.
[117] *Id.*, ¶583.

Though Reynolds uses the total population as a measure for redistricting, it is not necessary for states to stick to that exact standard as long as the overarching objectives of ensuring equality of representation and voting power are maintained.[118] States have other options when choosing the appropriate metric on their own as a political measure (such as the number of electors only, rather than the total number of people). However, the same will be subject to review for suitability.

Thus, American jurisprudence places the OPOV principle firmly within the scope of equal protection of laws, though the metric of the population chosen for the purpose of the calculation is left up to the discretion of the redistricting authority. The Indian standards are perhaps, depending on the reading of the word "population" in Articles 81 and 170, stricter.[119] However, the aforementioned precedent amply establishes the fundamental principle that voter equality is intrinsic to the conception of equal protection of laws. Given that both free and fair elections and equality of suffrage are also recognised by the Indian constitution and jurisprudence (as previously covered),[120] there should be no doubt that similar principles can be and indeed are incorporated into the Indian equal protection mandate.

In view of the same, the assertion that a failure to delimit, whether by omission or by an explicit bar or freeze on the same, is a violation of the equal protection mandate under Article 14 may be held to have been proved.

V. JUDICIAL REVIEW OF MALAPPORTIONMENT: AN EXAMINATION

As demonstrated above, the long freeze to the delimitation exercise leads to passive malapportionment, leading to failure of the political agency of voters and is a violation of the principle of equality of representation under Article 81(2)(a) — an important facet of Article 14 of the Constitution. This part analyses the development of the judicial position relating to the review of delimitation processes in light of the Constitutional embargo under Article 329, Articles 243O and 243ZG ('said Articles'). Besides analysing the Indian position, it also looks into the developments on equivalent points of law around the world. It will be shown that through a plethora of judgements, the Apex Court has clarified the scope and extent of what seems like a 'judicial hands-off' approach when dealing with laws on delimitation, and that judicial review in delimitation matters is not barred *carte blanche*. Moreover, it explores the possibility of judicial review in light of disenfranchisement and political under-/over-representation, and hence, the discrimination that an individual voter might suffer owing to passive malapportionment.

A. THE "HANDS OFF DOCTRINE" JUDICIAL REVIEW OF DELIMITATIONS IN INDIA - DODGING THE NON-OBSTANTE CLAUSE

Beginning shortly after independence, the larger issue of the extent of judicial review exercisable by courts in election matters has been contested. Although there is strong precedent that the judicial review power of the H.C. and the S.C. is a part of the Basic Structure,[121] the scope of judicial review in matters of Constitutional Amendment has been contested.[122] In *K.S. Puttaswamy (Aadhaar-5J.)* v. *Union of India,* Justice Chandrachud, while

[118] Burns v. Richardson, 384 U.S. 73 (1966).
[119] *See supra* Part II on "Borders and Babies: The Indian Delimitation Experience".
[120] *See supra* Part IV on "Passive Malapportionment Under the Indian Constitution: Voter Rights And The Equal Protection Clause".
[121] *See* Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1 ('Election Law case').
[122] *Id*.

clarifying that judicial review cannot be barred, except unless explicitly provided in the provisions of the Constitution, cited the example of the non-obstante used in the said Articles.[123]

Articles 329, 243O, and 243ZG of the Constitution — all of them being identical in wording, begin with non-obstante clauses — "Notwithstanding anything in this Constitution".[124] Clause (b) of the said Articles states thus,

> "(b) no election to either House of Parliament or to the House or either House of the Legislature of a State [Municipality in Article 243ZG and Panchayat in Article 243O] shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature".[125]

This, on a plain reading of the provisions, places a total bar on calling "in question in any court" laws relating to "the delimitation of constituencies or the allotment of seats to such constituencies.[126] The non-obstante, thus, seems, on a bare reading, to render the Article 226 writ jurisdiction of the H.C. and Article 136 Special Leave Petition ('SLP') mechanism before the S.C. redundant in matters relating to election, including delimitation.

On determining the extent of the impact of the non-obstante under the said Articles on the judicial review power of the courts, we shall be exploring the jurisprudence in this regard, from three perspectives, dealing with the jurisdiction of courts in the context of:

1. Determining the scope of the term election, or what amounts to 'calling in question' under the said Articles.

2. The maintainability of election petitions before the Constitutional Courts under the said Articles after the Election Tribunal decides.

3. A challenge to delimitation commission orders in spite of the said Articles.

1. Issue 1: Scope of "Election"

One of the first notable cases in this regard was the 1952 decision of the Apex Court in N.P. Ponnuswami.[127] Here, a writ petition was filed before the Madras H.C. challenging the Returning Officer's rejection of the appellant's nomination paper, praying that the appellant's name be included in the list of published nominations.[128] On the H.C.'s dismissal, the S.C. interpreted that Part XV of the Constitution is a code in itself, setting the groundwork for enacting appropriate laws for conducting elections, appropriate legal machinery and redressal mechanisms in the form of election tribunals. It held that since the election tribunal is apprised of matters relating to the election, there is no need for disputes to be adjudicated by courts. This reasoning stemmed from the idea that elections should not be upset by disputes, as they are time-sensitive in nature. Hence, even matters like nomination fall within the purview of 'election' and are outside the jurisdiction of courts.[129] A similar sentiment

[123] K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 SCC 1, ¶726 (per D. Y. Chandrachud J.).
[124] *See* The Constitution of India, 1950, Arts. 329, 243O, 243ZG.
[125] The Constitution of India, 1950, Art. 329.
[126] *Id*.
[127] N.P. Ponnuswami, *supra* note 60.
[128] *Id*., ¶221.
[129] *Id*., ¶229.

was showcased in *Narayan Bhaskar Khare* v. *Election Commission of India,* where, in the context of Presidential and Vice Presidential elections under Article 71, the Apex Court reiterated that elections should happen in a timely manner and the person "aggrieved should not be permitted to ventilate his individual interest in derogation of the general interest of the people".[130]

Another case hinting at a departure from the established precedent is *Mohinder Singh Gill* v. *Chief Election Commissioner* ('Mohinder Singh Gill'). Delineating the parameters of Article 329(b), the court for the first time distinguished between a writ petition under Article 226 filed when an election is happening (which interferes with the progress of the same) and a writ petition that helps to facilitate or further the election process.[131] So, any challenge under Article 226, that is towards 'the completion of the election proceeding',[132] would not be regarded as one 'calling in question' the election and the bar on judicial review under Article 329 would not apply. Moreover, the court highlighted, like in the cases mentioned above, the primary reasoning behind having the said embargo on judicial review is to further the peremptory urgency of ensuring that the election process happens without interruptions.[133] This, however, the court clarified, does not mean that the authorities like the Election Commission could get impunity when it uses the power bestowed on it mindlessly or with mala fides or arbitrarily. This, the court eloquently clarifies, thus,

> "...this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism — instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process".[134]

Thus, on the same breath, the court concluded that only acts of the Election Commission to further the election process in conformity with the law attract the embargo under Article 329, not otherwise. Importantly, the court authoritatively settled that "election" under Article 329 means the period commencing from the "Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate".[135] (emphasis added)

Affirming the above decision, the S.C. in *Election Commission of India* v. *Ashok Kumar* ('Ashok Kumar') reiterated the caveat placed on election disputes and stated that election disputes are not private in nature and affect the fate of constituencies, and hence, such a dispute should not stall or interrupt the election process.[136] However, this means that judicial intervention is possible if the plea is supported by a clear and strong case for intervention. Reiterating the stance in Mohinder Singh Gill, the court highlighted that orders and actions of the Election Commission are open to review despite the bar if there is a case of *mala fides* or arbitrary exercise of power.[137]

Thus, what emerges from the above discussion is that 'election' means the period starting from the notification date calling for election up to the date of declaration of

[130] Narayan Bhaskar Khare v. Election Commission of India, (1957) SCR 1081, ¶8.
[131] Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405, ¶28 ('Mohinder Singh Gill').
[132] *Id*.
[133] *Id*., ¶34.
[134] *Id*., ¶34.
[135] *Id*., ¶92.
[136] Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216, ¶28.
[137] *Id*., ¶¶31, 32.

results. The primary reason for the embargo during this period, under Article 329, is to ensure that the election process is not unnecessarily interrupted. However, this does not preclude the courts from deciding what stage would be considered a part of the election process.[138] Moreover, if a petition seeks to further or facilitate the process, the embargo on judicial review will not be applicable. Further, the bar would not preclude judicial review of statutory authorities if it is shown that they have acted in an arbitrary and mala fide manner.

2. ISSUE 2: JURISDICTION RELATING TO ELECTION PETITIONS

The S.C. in Ponnuswami left open the question of what powers constitutional courts might have after an election tribunal decides a dispute before it.[139] This question was taken up in *Durga Shankar Mehta* v. *Thakur Raghuraj Singh*.[140] The court here affirmed this question and held that as soon as the matter is decided by the election tribunal, the S.C. has the power of judicial review.[141] In the context of whether the H.C.s have power under Article 226 of the Constitution to interfere after a matter is decided by an election tribunal, the court in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque* held that Article 329(b) was no bar to a writ petition before the H.C. under Article 226,[142] since that would not be regarded as "called in question" under the said Article.[143]

The Court in Mohinder Singh Gill clarified that the person is not rendered remediless for wrongs during the election process. Instead, the remedy is merely postponed until the end of the elections.[144] The court noted the wide amplitude of powers with the election tribunal to give relief to the aggrieved party, and obviously, that post-election remedy to move the constitutional court is available to the party.[145] All these judgments have been later affirmed by the S.C. in *State of Goa* v. *Fouziya Imtiaz Shaikh* ('Fouziya Imtiaz').[146] In Fouziya Imtiaz, referring to Article 243ZG, the court clarified that the writ jurisdiction of the H.C.s or the Article 136 power of the S.C. is not affected by the non-obstante in Article 243ZG. This is because the latter operates only as long as the election is in process.[147]

3. ISSUE 3: JURISDICTION RELATING TO DELIMITATION ORDERS

In the context of delimitation, *Meghraj Kothari* v. *Delimitation Commission* ('Meghraj Kothari')[148] dealt with a challenge to a notification of the Delimitation Commission under the Delimitation Act, 1962 ('the Act'), which notified a hitherto general constituency for Scheduled Castes.[149] The notification was challenged by a writ petition under Article 226 on the grounds that the right to be a candidate to represent the constituency in the Parliament was taken away by the notification.[150] The court had to examine this issue in light of the bar contained in Article 329(a) of the Constitution. The matter reached the S.C. when the H.C. rejected the petition in light of the stated article.

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[138] *See* Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman, (1985) 4 SCC 689, ¶28.
[139] *Id*., 237.
[140] Durga Shankar Mehta v. Thakur Raghuraj Singh, (1954) 2 SCC 20, ¶274.
[141] *Id*., ¶274.
[142] Hari Vishnu Kamath v. Syed Ahmad Ishaque, (1954) 2 SCC 881, ¶8.
[143] *See* The Constitution of India, 1950, Art. 329(b).
[144] Mohinder Singh Gill, *supra* note 131.
[145] *Id*., ¶53.
[146] State of Goa v. Fouziya Imtiaz Shaikh, (2021) 8 SCC 401, ¶68.3 ('Fouziya Imtiaz Shaikh').
[147] *Id*.
[148] Meghraj Kothari v. Delimitation Commission, (1966) SCC OnLine SC 12, ¶3 ('Meghraj Kothari').
[149] *Id*.
[150] *Id*., ¶3.

The argument preferred before the S.C. was that since an order under §9 of the Act, and published as per §10(1) of the Act, is not 'law' within Article 329 and hence does not attract the bar under Article 329.[151] Dismissing the appeal, the S.C. ruled that the said notification was a law that related to the delimitation of constituencies under Article 327 of the Constitution. Moreover, an examination of the Act reveals that notifications issued under §8 and §9 and published under §10(1) of the Act take the force of law and cannot be questioned in any court of law.[152] The reasoning highlighted by the court, drawing from previous judgements, was that no voter should indefinitely hold up and interrupt an election and question the delimitation of constituencies before a court of law.[153]

Drawing from the reasoning above, the court in *Assn. of Residents of Mhow* v. *Delimitation Commission of India* held that delimitation commission orders, once published in the Official Gazette, are put on the same footing as a law made by the Parliament itself and cannot be challenged before any court.[154] A previous division bench judgement from 1995, in *State of U.P.* v. *Pradhan Sangh Kshettra Samiti,* in the context of delimitation of panchayat areas, overturned a H.C. judgement which went into the merits, disregarding the embargo contained in Article 243-O of the Constitution. The court clarified that as long as the constituencies are delimited as per the Constitution, the court cannot interfere with the same.[155]

After a lapse of almost thirty years since then, the S.C. was dealing with a couple of interlocutory applications seeking directions for compliance as per the Constitution, regarding elections to local bodies. This was in a 2020 case of *Dravida Munnetra Kazhagam* v. *State of Tamil Nadu* ('DMK case').[156] Interestingly, the appellants sought the court to give a specific direction to compel the respondents to carry out a delimitation process before holding any elections in the said panchayats or districts. The court noted that despite an increase in the number of districts, no fresh delimitation exercise was conducted. This prompted the court to note that the State Government was not fulfilling its constitutional mandate.[157] These applications, the court reasoned, did not attract the bar to judicial review under Articles 243-O and 243ZG because they only further the completion of elections meant to be conducted fairly.[158]

Subsequently, the S.C. in Fouziya Imtiaz summarised the jurisprudence on electoral matters and the constitutional bar on judicial review.[159] In this matter, the court categorically held that subversion of the constitutional mandate, even by the State Election Commissioner, was not tolerable, and the bar on judicial review was not applicable to the facts of the case.[160]

Recently, a division bench of the S.C. in *Kishorchandra Chhaganlal Rathod* v. *Union of India and Ors* ('Kishorilal')[161] stated that, in delimitation matters, judicial review is not totally barred under the Constitution. On the contrary, it will be open to the court to grant an appropriate remedy if a delimitation order is found to be "manifestly arbitrary and

[151] *Id.*
[152] *Id.*
[153] *Id.*, ¶¶18, 32.
[154] Association of Residents of Mhow (ROM) v. Delimitation Commission of India, (2009) 5 SCC 404, ¶25.
[155] *Id.*, ¶44.
[156] Dravida Munnetra Kazhagam v. State of Tamil Nadu, (2020) 6 SCC 548 ('Dravida Munnetra Kazhagam').
[157] *Id.*, ¶13.
[158] *Id.*, ¶14.
[159] Fouziya Imtiaz Shaikh, *supra* note 146.
[160] *Id.*, ¶72.
[161] Kishorchandra Chhaganlal Rathod v. Union of India and Ors., (2024) SCC OnLine SC 1879 ('Kishorilal').

irreconcilable with the constitutional values".[162] The court distinguished its position from an older ruling of the same court in Meghraj Kothari, wherein a Constitutional Bench had shied away from quashing a notification of the delimitation commission, thus refusing a remedy under a writ petition.[163] In Kishorilal, the court clarified that Meghraj Kothari did not totally ban judicial review; instead, the non-interference was necessary to prevent courts from being flooded by petitions and unnecessarily delaying the election process after the final order is published in the official gazette.[164]

B. KISHORILAL IS TRANSFORMATIVE: DELIMITATION AND COURTS AROUND THE WORLD

Tracing the previous judgments of the S.C. regarding delimitation in part A makes it amply clear that the jurisprudence in this field is not particularly developed yet. In view of the same, this part will argue the transformative nature of the Kishorilal judgment as mirrored by judgments from foreign jurisdictions. This will highlight the progressive and imminently relevant nature of the judgment. The judgment is also in line with the well-researched proposition that 'judicial activism' can significantly reduce malapportionment.[165]

While holding that constitutional courts could interfere for ensuring that elections are run in a smooth manner without the exercise of manifestly arbitrary power, the court used a consequentialist perspective and highlighted the grave consequences that an interpretation such that of a *carte blanche* bar on judicial review would do to the Indian polity i.e. in the words of the court itself — "If judicial intervention is deemed completely barred, citizens would not have any forum to plead their grievances, leaving them solely at the mercy of the Delimitation Commission".[166] Moreover, the court noted its counter-majoritarian role as the Guardian of the Constitution.[167]

Kishorilal, by using the test of manifest arbitrariness, has fostered transformative constitutionalism without disrupting precedent. Its judgment is interestingly in line with some foreign judgments discussed below.

The United Kingdom ('U.K.') has a Boundary Commission, which, like India's Delimitation Commission, is entrusted to review boundaries of Parliamentary constituencies in the U.K. Unlike India's, it is a permanent body constituted under a U.K. legislation called the Parliamentary Constituencies Act, 1986. In a case that challenged the decisions of the Boundary Commission, the U.K. Court of Appeal made a significant decision. This was the case of *R* v. *Boundary Commission for England*. Here, the court highlighted that although the onus of proving their case on a person seeking a judicial review is high, there is nothing that stops the court of law from reviewing the decision of the Boundary Commission.[168] Although the appeal was dismissed, the court clarified that if authorities exceed their legal mandate by

[162] *Id*., ¶7.
[163] Meghraj Kothari, *supra* note 148.
[164] Kishorilal, *supra* note 161, ¶8.
[165] *See* Yuko Kasuya, *Malapportionment and the Judiciary : A Comparative Perspective*, POLITICAL INSTITUTIONS: ELECTIONS EJOURNAL (2013), available at: https://www.semanticscholar.org/paper/Malapportionment-and-the-Judiciary%3A-A-Comparative-Kasuya/93847818bc631e965dd97c52aa4a9b8e1902e7c0 (Last visited on July 1, 2025).
[166] Kishorilal, *supra* note 161, ¶5.
[167] *Id*.
[168] Boundary Commission for. England, ex p. Foot, [1983] 2 W.L.R. 458 (England and Wales Court of Appeal).

doing or failing to do something, the courts "can and will intervene in defence of the ordinary citizen".[169]

Unlike many other countries (including India), the U.S. does not have a limited judicial review in matters of delimitation. In fact, its courts have been active in redrawing district boundaries when faced with malapportionment arising out of population discrepancies, regardless of the causes behind the same. Based on Article 1 of the U.S. Constitution and the 14th Amendment to the same, the courts in the U.S. have categorically held that malapportionment of electoral districts is against the principle of equal protection and hence is unconstitutional.[170] A notable case in this regard is *Wesberry* v. *Sanders,* where the U.S. Supreme Court noted the malapportionment of congressional seats in Georgia.[171] Noting forcefully against the said practice, the Supreme Court noted that malapportionment is against the fundamental basis of democratic government and that the value of democracy is sustained when there is maintenance of "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's".[172]

In *Shaw* v. *Reno,* the Supreme Court of the US, ordered the redistribution of electoral districts as the same violated the provision of equal protection in the Constitution (the redistribution was initially done on the sole basis of race), and held that malapportionment could be challenged before the court of law in the U.S.[173] Both the above cases highlight the power and the necessity of judicial review in matters of delimitation in the face of arbitrary and discriminatory usage of power.

C. WHETHER AN INDIVIDUAL VOTER CAN MOVE THE CONSTITUTIONAL COURT AGAINST PASSIVE MALAPPORTIONMENT?

This part explores whether judicial recourse is available to an individual voter suffering unequal representation owing to passive malapportionment. For this purpose, case laws in the U.S. have been explored, besides exploring the Indian position.

1. MALAPPORTIONMENT AND THE SUPREME COURT OF THE UNITED STATES

As noted before, the case law relating to electoral malapportionment and judicial review is well developed in the U.S. One of the landmark cases on judicial review in the context of electoral malapportionment is the *Baker* v. *Carr* decision of the U.S. Supreme Court. The case arises as per a stipulation under the Tennessee constitution, wherein electoral apportionment was to happen based on the decennial census in a periodic fashion. However, the same was delayed by the state authorities, and the population increased starkly between 1901 (the date of the last apportionment exercise and 1960 (the date of this case).[174] This resulted in grave under-representation owing to population increase in certain counties.

Subsequently, a suit was brought by individual voters from five underrepresented counties against the state election officials. They argued that owing to malapportionment by the state officials, they were denied equal protection under the law under

[169] *Id*.
[170] *See* Karcher v. Daggett, 103 S.Ct. 2653 (1983) (Supreme Court of the United States), 2658; *See also* White v. Weiser, 412 U.S. 783 (1973), 799 (Supreme Court of the United States).
[171] Wesberry v. Sanders, 376 U.S. 1 (1964), 8, 9 (Supreme Court of the United States) ('Wesberry').
[172] *Id*., ¶8.
[173] Shaw v. Reno, (1993) 509 U.S. 630, 900 (Supreme Court of the United States).
[174] Baker, *supra* note 111.

the 14th Amendment of the Constitution, and it resulted in "the debasement of their votes".[175] Interestingly, the court held that the petitioners had jurisdiction with a justiciable cause of action as the claim arose from the equal protection clause of the U.S. Constitution.[176] The court did not go into the merits of the equal protection plea, and the case was remanded to the District Court for trial.

The court also held that merely because the appeal involved political questions, it could not be dismissed solely based on that reason, as it was a claim that arose from the equal protection clause in the U.S. Constitution.[177] Finally, the court ruled that the allegations of a denial of equal protection sufficiently present a justiciable constitutional cause of action. Justice Clark's comment in this regard is indicative of the standard used by the court to deduce the threshold of inquiry. Commenting for the majority, Justice Clark stated that mathematical equality is not needed for passing the test of equal treatment under the Equal Protection Clause.[178]

Although the Supreme Court did not reach the merits of how far the equal protection clause would be applicable to malapportionment cases in *Baker* v. *Carr*, it still held that it was a substantial question raised under the equal protection clause, which in no way could bar the jurisdiction of the court. This decision is important since it upheld the idea that even an individual voter could move the court against passive malapportionment by invoking the equal protection clause of the Constitution. Moreover, it clarified that merely because a dispute raises political questions, it should not be dismissed if it entails a possible violation of the right to equal protection. Thus, the most significant takeaway from the above decision is that the court did not shy away from interfering in the issue of apportionment.

Subsequently, the court in *Wesberry* v. *Sanders* was hearing a challenge from a voter who contended that his vote was debased because of the state's failure to realign the congressional districts in Georgia. He sought the annulment of the apportionment statute. The primary issue here was similar to *Baker* v. *Carr* — whether the apportionment of Tennessee's General Assembly districts deprived citizens of their right to vote and thus be a violation of the equality clause of the US Constitution.[179] The Supreme Court, following the *Baker* v. *Carr* precedent, held that courts had jurisdiction to hear cases where apportionment impacted voter rights and the value of a vote since it affected the equal protection clause of the Constitution of the US.[180]

2. COURTS AND THE INDIAN POSITION

This part explores the possible legal remedies available to an individual voter facing a lack of representation owing to malapportionment. In this regard, two possible legal channels that the voter might resort to are presented — (i) prompting for a Basic Structure Review of the constitutional amendment implementing a freeze on periodic delimitation (Scenario 1); and (ii) invoking the writ jurisdiction of the Constitutional Courts under Articles 226 and 32 to challenge executive inaction if the freeze is implemented without any constitutional amendment (Scenario 2).

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[175] *Id*.
[176] *Id*., ¶226.
[177] *Id*., ¶227 (per Brennan J.).
[178] *Id*., ¶237.
[179] *Id*., ¶188.
[180] Wesberry, *supra* note 171.

a. Scenario 1

As has been argued before, passive malapportionment, causing unequal representation, is a violation of Article 14 of the Constitution. This raises the question: Is equal electoral representation a part of the Basic Structure of the Constitution? This question is important to explore the possibility of a basic structure review of a Constitutional amendment that freezes the regular delimitation process mandated under Article 81. For this purpose, it will be shown that the principle of equal representation in elections is a part of the basic structure of the Constitution because free and fair elections are part of the basic structure of the Constitution and that this principle is a fundamental aspect of Article 14.

In multiple decisions, the court has held that democracy based on the Universal Adult Franchise is a part of the basic structure of the Constitution. Discussing the importance of an independent Election Commission, the Supreme Court in *T. N. Seshan* v. *Union of India* observed that holding of periodical free and fair elections is an important aspect of a healthy democracy necessary to protect the sanctity of the electoral process.[181] Stressing the importance of holding periodic elections, the court in Mohinder Singh Gill observed that the periodic process of free and fair elections must be uninfluenced by partisanship and threats. [182]

In the context of deciding whether the 39th Amendment to the Constitution which by inserting Article 329A sub clause (4) made Presidential, Vice Presidential and Speaker elections immune from judicial review, violated the Basic Structure, Khanna J's concurring opinion in *Indira Gandhi* v. *Raj Narain* ('Election law case'), is of particular relevance. While striking down clause (4) of Article 329A for violating the Constitution, Khanna J. held that the said provision violates the principle of free and fair elections, which is a basic structure of the Constitution.[183] In the same case, Matthew J. endorsed the view taken in *Kesavananda Bharati* v. *State of Kerala,* that the Rule of Law is also a part of the basic structure of the Constitution.[184] While discussing the importance of fair adjudication of electoral disputes and related disqualifications, the Supreme Court in *Kihoto Hollohan* v. *Zachillhu*[185] ruled that democracy is a part of the basic structure of the Constitution and free and fair elections "are basic features of democracy".[186]

The above clearly shows that democracy, as well as the principle of free and fair elections, have been held to be a part of the basic structure of the Constitution. A representative democracy based on free and fair elections hinges on the basic principle that all voters have the ability to cast an equally weighted vote to elect one or more candidates to govern and represent them. Therefore, the principle of equal representation, being sacrosanct to the principle of free and fair elections,[187] (the latter already being a part of the basic structure) ought to also be a part of the Basic Structure of the Constitution.

Article 14 has been held as one of the basic postulates of the Constitution in prominent cases, including in the Election law case,[188] *Minerva Mills Ltd.* v. *Union of India*,[189] and *Maneka Gandhi* v. *Union of India* in which Articles 14, 19, and 21 have been considered

[181] T.N. Seshan, Chief Election Commissioner of India v. Union of India, (1995) 4 SCC 611, ¶10.
[182] Mohinder Singh Gill, *supra* note 132.
[183] Election law case, *supra* note 121, ¶213 (per H.R. Khanna J.).
[184] *Id*., ¶335 (per Matthew J.).
[185] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.
[186] *Id*., ¶8.1.
[187] *See* Daxecker*, supra* note 7, 58.
[188] *See* Election law case, *supra* note 121, ¶679 (per Chandrachud J).
[189] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, ¶19.

as the fabled golden triangle).[190] In fact, referring to Articles 14, 19, and 21, the court in *I.R.Coelho* v. *State of Tamil Nadu* ('IR Coelho'), affirming Minerva Mills held that the three Articles, namely, Article 14, 19 and 21 hold a "different footing — a higher pedestal, even among the fundamental rights in the Constitution". (emphasis added)[191]

Although IR Coelho has been criticised on multiple grounds, including the hierarchisation of fundamental rights,[192] Its endorsement of Article 14 being a part of the basic structure reveals the judicial propensity of considering equality and equal treatment as sacrosanct *vis-à-vis* the Constitution. Thus, equality in state action towards its citizens is cardinal, and the principle of equal representation, being a cardinal aspect of Article 14, makes it a part of the basic structure too. The Constitutional Courts should thus not shy away from doing a basic structure review of the amendments that impose a freeze on periodic delimitation exercises.

b. Scenario 2

As of the date of writing this paper, the Supreme Court, in a *sub judice* matter, has frowned upon the indefinite delay in delimitation processes that have not been conducted in some north-eastern states since 1971.[193] This part analyses a situation where there is a writ petition filed before a constitutional court challenging a deliberate lack of or delay in delimitation (passive malapportionment) in light of the constitutional embargo under the said articles.

To further this discussion, the DMK case is of particular significance. The Supreme Court was hearing a batch of applications questioning *inter alia* deliberate postponement of elections at the local government level in violation of Articles 243D and 243T of the Constitution and delay in the delimitation exercise mandated under the Constitution.[194] Exploring whether this amounted to "calling in question an election", the S.C. noted that the applications were meant to facilitate or further a fair election.[195] It based its reasoning on the Ashok Kumar judgment, which clarified that the judicial bar does not apply if an application is meant to facilitate the election process. Allowing the application, the court noted that the purposes of Part IX would not be fulfilled if delimitation does not happen properly.[196] Noting the discrepancies in the population and the constituency ratio, the court noted that despite an increase in the number of districts in the case, there was no fresh delimitation exercise undertaken by the state government as per the Constitutional mandate. The court mandated that no elections could be held unless fresh delimitation is completed.[197] As a relief, the court ordered the delimitation of the nine new districts before holding elections for the panchayats at the village, the block and the zila level.[198]

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[190] Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶203.
[191] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶109.
[192] Kamala Sankaran, *From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgement and Basic Structure Doctrine*, Vol. 49(2), JOURNAL OF THE INDIAN LAW INSTITUTE, 245 (2007) available at https://www.jstor.org/stable/43952108 (Last visited on July 1, 2025).
[193] THE HINDU, *Supreme Court Flags Delay in Delimitation Excercise In Northeastern States*, November 19, 2024, available at https://www.thehindu.com/news/national/supreme-court-flags-delay-in-delimitation-exercise-in-northeastern-states/article68886598.ece (Last visited on July 1, 2025).
[194] Dravida Munnetra Kazhagam, *supra* note 157.
[195] *Id*., ¶14.
[196] *Id*., ¶12.
[197] *Id*.
[198] *Id*., ¶15.2.

In Fouziya Imtiaz, the Goa State Election Commission had postponed elections to around eleven municipalities and issued delimitation orders leading to reservation disparities in certain seats in the said municipalities.[199] Writ petitions were filed alleging that the actions of the authorities were a violation of Article 243T of the Constitution, which mandates reservation of seats for women and members of the SC and ST communities and relevant provisions of the Municipal Act. After going through a salvo of precedent, the S.C. *inter alia* reiterated that the judicial 'hands-off' principle is only applicable if a litigation seeks to postpone the election process and not when it facilitates the same.[200] Deciding to interfere, it clarified that the bar would not be applicable to the facts before it. In doing so, it reasoned that in the face of a patent violation of constitutional and statutory mandate, the writ court will interfere regardless of the imminence of elections.[201]

The above judgments clearly show that the writ jurisdiction of the constitutional courts is not barred in matters of delimitation if the said challenge seeks to facilitate elections and uphold Constitutional values. Although they deal with delimitation at the local government level, the legal principles that they have enunciated are applicable even to a writ petition that challenges a nationwide passive malapportionment. As the judgments discussed in part A reveal, the bar imposed by the said articles operates only for a period between notification for holding elections and declaration of results and not for those challenges which seek to enforce a constitutional mandate of equality and/or facilitate free and fair elections. Moreover, it has been clarified in the Kishorilal judgment that a state action relating to delimitation, which is "manifestly arbitrary and irreconcilable to the constitutional values"[202] does not bar the writ jurisdiction of courts. A petition challenging passive malapportionment is thus one that facilitates smooth elections and seeks to further the guarantee of equal representation under Article 14 of the Constitution, and would not attract the constitutional bar to judicial review under the said articles.

D. ARE QUESTIONS OF MALAPPORTIONMENT AND DELIMITATION MERELY 'POLITICAL QUESTIONS?' — CONTOURS OF JUDICIAL REVIEW

Some issues that are deemed inappropriate for judicial review in certain jurisdictions (primarily, the U.S.) are called the doctrine of political questions. In the seminal judgement on judicial review, *Marbury* v. *Madison,* the Supreme Court of the U.S. stated, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court".[203] Despite a murky and confused jurisprudence in the U.S. on the exact contours of this doctrine,[204] its evolution is traceable to the strict separation of powers in the U.S.[205] Unlike the U.S., Indian courts have clarified that this doctrine cannot be used as a tool to shield from judicial review of executive action. An authoritative case in this context is *AK Roy* v. *Union of India.* Here, the S.C. succinctly compared the Indian and the U.S. structure of governance and categorically rejected the notion that the doctrine of political question could be used to preclude judicial review. Moreover, it further observed that even in the U.S., the doctrine had come under criticism and was "a little

[199] Fouziya Imtiaz Shaikh, *supra* note 146, ¶2.
[200] *Id*., ¶63.
[201] *Id*.
[202] Kishorilal, *supra* note 161, ¶7.
[203] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (Supreme Court of the United States).
[204] *See* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, Vol. 75, STANFORD L. REV., 1031 (2023), available at https://review.law.stanford.edu/wp-content/uploads/sites/3/2023/05/Bradley-Posner-75-Stan.-L.-Rev.-1031.pdf (Last visited on July 1, 2025).
[205] A.K. Roy v. Union of India, (1982) AIR 710, ¶23.

more than a play of words".[206] In the landmark judgement of *Indra Sawhney* v. *Union of India* ('Indra Sawhney'), the S.C. stated that the doctrine of political question should not be a ground to hamper the power of judicial review of constitutional courts and "deny the Nation the guidance of basic democratic problems".[207] Subsequently, in *B.R. Kapoor* v. *State of Tamil Nadu*, the Supreme Court affirmed that it is the duty of the court to interpret the Constitution regardless of the fact that the answer could have political implications.[208] Thus, the application of the doctrine of political questions to preclude courts from exercising judicial review power in Indian jurisprudence is very limited.

In this part, it is argued that a challenge against passive malapportionment is not a political question that could be argued as non-justiciable. Instead, it will be argued that despite having a political tenor, the dispute is purely legal, making it therefore a justiciable one. Seeking to delineate what is political from the judicial, Lord Porter in *Commonwealth of Australia* v. *Bank of New South Wales*,[209] clarified that a question merely because it has social, political and economic issues does not in itself exclude judicial review power of courts because it is an issue that concerns disputes between the Commonwealth and the intervening states on one hand and the states and the citizens on the other. And it is only the Court, not the Parliament, which has to decide.[210]

A challenge to passive malapportionment might invariably have political questions involved. However, that automatically does not oust jurisdiction of courts, as there are deeper legal issues (as argued before) that need to be adjudicated upon. The U.S. Supreme Court in *Baker* v. *Carr* was confronted with the dilemma of whether the court could decide a challenge to a question dealing with delimitation and malapportionment,[211] an issue that invariably has political questions involved.

Justice Brennan, on determining the contours of what constitutes a political question, concluded that "it is the relationship between the judiciary and the coordinate branches of the Federal Government and not the federal judiciary's relationship to the States, which gives rise to the political question".(emphasis added)[212] Again, it was concluded that the same was a "case-to-case enquiry".[213] The court here clarified that it had to decide whether the state action was in line with the U.S. Constitution and that the court would not venture into "policy determinations for which judicially manageable standards are lacking".[214] Instead, the court noted that it must check whether the particular facts imply that the adjudication "reflects no policy, but simply arbitrary and capricious [state] action".[215] Regardless, to reiterate, the court noted that merely because the case involved political questions, in the face of an equality challenge against state action, its jurisdiction could not be ousted. [216]

This sentiment has been reaffirmed by the Indian S.C. in multiple cases,[217] most prominently, in the Indra Sawhney judgement. Here, the court noted that although a question

[206] *Id*., ¶ 23.
[207] Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217, ¶ 557.
[208] B.R. Kapur v. State of Tamil Nadu, (2001) 7 SCC 231, ¶ 53.
[209] Commonwealth of Australia v. Bank of New South Wales, [1950] A.C. 235 (per Porter J.), 639, 640 (High Court of Australia).
[210] *Id*., ¶310.
[211] Baker, *supra* note 111, ¶139.
[212] *Id*., ¶210 (per Brennan J).
[213] *Id*., ¶211.
[214] *Id*., ¶226.
[215] *Id*.
[216] *See* Baker, *supra* note 111.
[217] *See* BR Kapur v. State of Tamil Nadu, 2001 (7) SCC 231.

might be tinged with politics, it does not in itself be a bar on judicial review, especially on basic democratic problems that face the nation.[218]

Since the issue of passive malapportionment is one that severely affects the constitutional guarantees to citizens and their political agency,[219] it is an issue highlighting arbitrary state action and cannot be regarded merely as a policy or political question that is not justiciable by a constitutional court.

Moreover, it is within the judicial purview of the court to, as a remedy, direct relevant state authorities to conduct delimitation procedures wherever it has deemed it necessary.[220] In fact, a recent Supreme Court decision in the Public *Interest Committee for Scheduling Specific Areas & Anr.* v. *Union of India & ors.,*[221] entailed the court directing the Central Government to constitute a fresh delimitation commission to ensure proportional representation of members of the SC and ST community in the West Bengal and Sikkim Legislative Assemblies.[222] However, the court also clarified that it could not direct the government to make legislative amendments as the same would be a policy matter beyond the ambit of judicial review.[223] Thus, although directing the specifics of a delimitation is a political/policy question, the courts have the power to direct the government to hold regular delimitations to protect Constitutional and legal guarantees.

VI. CONCLUSION

In light of the data and examination conducted, it can be comfortably concluded that there is a good basis for the justiciability of delimitation decision-making by the executive authorities in India. This reading is premised upon the jurisprudential rigour of precedent and legal theory as well as the practical experience of improper delimitation in action in India and foreign jurisdictions. Although there is a relative scarcity of up-to-date primary and secondary data dealing with delimitation, this study initiates an opportunity for further research and analysis in the arena of election laws. Exploration on potential reasons for voter growth in constituencies, such as illicit cross-border migration, and testing the same against the wisdom of a prompt delimitation exercise are fertile areas of possible research work. Moreover, guidelines on how judicial review of delimitation may proceed beyond what is already covered by standing case law must be addressed by further research.

The fundamental principles that were sought to be proved: that the failure to delimit is adversely affecting voter equality, that Indian citizens are entitled to voter equality lawfully, and that the question of the presence or absence of the same is justiciable, have been established. As the Indian Republic rapidly approaches the set date for the end of the delimitation freeze, it is likely that many of the old political voices in favour of freezing the legislative compositions in the country will become vehement once more. At this juncture, we as a legal and societal system must stand ready to test the wisdom and viability of such a move critically. Indeed, though they have continued unchallenged for a few decades now, the time

[218] Indra Sawhney v. Union of India, (1995) 5 SCC 429, ¶557.
[219] For details on the discussion on voting power of a citizen and on the notion of equality of votes, *see supra* Part IV.C on "One Person One Vote" (OPOV) and Article 14".
[220] Anshul Dalmia, *A Timely but (Un) Fair Delimitation Process: Unpacking the Supreme Court's Order Regarding Delimitation in the North East*, CONSTITUTIONAL LAW AND PHILOSOPHY, available at https://indconlawphil.wordpress.com/category/delimitation/ (Last visited on July 1, 2025).
[221] Public Interest Committee for Scheduling Specific Areas & Anr. v. Union of India & ors., Writ Petition (Civil) No. 187 of 2019.
[222] *Id*., ¶103.
[223] *Id*., ¶105.

might have come for a relook at the measures put in place by the 84th Amendment itself. Though it will not bring back the lost years, ending the freeze a little earlier might avoid at least some further disruption.