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The False Promise of One Person, One Vote

Grant M. Hayden

Hofstra University School of Law

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THE FALSE PROMISE OF ONE PERSON, ONE VOTE

Grant M. Hayden*

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INTRODUCTION

It has now been four decades since the Supreme Court stepped into the political thicket with its groundbreaking series of reapportionment cases.¹ Those cases rather quickly brought about radical changes in the structure of our national, state, and local governments

* Associate Professor, Hofstra University School of Law. B.A. 1989, M.A. 1991, University of Kansas; J.D. 1995, Stanford. — Ed. I am most grateful to Stephen Ellis for our many conversations on the subject of interpersonal utility comparisons, and to Heather Gerken, Joanna Grossman, Eric Freedman, Rick Hasen, Sam Issacharoff, Eric Lane, William Rose, and Peter Spiro for their helpful suggestions. Thanks as well to Katherine Gavett, Kristy DeAngelo, and Sarika Kapoor for their valuable research assistance.

1. See *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

and, in so doing, reshaped the political landscape of the country in many, mostly beneficial, ways. The reapportionment cases also signaled the beginning of a revolution in the way we view the rights associated with meaningful participation in a democratic society, a revolution that continues to this day. We now enjoy a right to vote that is much more comprehensive — both in terms of who has the right to exercise the franchise and what that right entails — than at any other time in our history.

Despite this record of success, one of the most important and least controversial aspects of the right to vote — the one person, one vote principle — has never been adequately theorized. Academics, politicians, and the general public have, instead, taken it as an article of democratic faith. We are utterly confident that the one person, one vote principle rests on firm democratic foundations, that it is, in some sense, objective, and that it is a judicially manageable way of parsing out political power. The thesis of this Article is that this confidence is wholly misplaced.

The right to vote now embodies three conceptually distinct types of rights.² First, it includes the right to cast a vote.³ This right of access to the polls is, quite obviously, a necessary component of any conception of the right to vote, and represents the right at its most fundamental level. But the ability to register and vote, taken alone, does not secure meaningful political participation because district lines may be drawn in ways that effectively dilute the power of that vote. Such vote dilution comes in two forms, quantitative and qualitative, and the rights associated with casting an undiluted vote are the second and third types of voting rights.⁴ Quantitative vote dilution occurs when votes receive unequal weight, and thus the power of some votes is nu-

2. I borrow this basic taxonomy from Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989). This, of course, is not the only way to categorize the many facets of political participation and the right to vote. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 7-9 (1994) (categorizing the three generations of attempts to curb tyrannical majorities as involving (1) access to the ballot, (2) qualitative vote dilution, and (3) the policing of legislative voting rules). Karlan's taxonomy does, however, capture most of the essential elements of the right, and follows the basic structure of the law.

3. Claims asserting infringement on the right to cast a vote are typically brought under the Constitution. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding that a poll tax prerequisite to voting in a state election violated the Equal Protection Clause). The Republican Form of Government Clause in the original Constitution implicitly protects the right to vote, U.S. CONST. art. IV, § 4, cl. 1, while constitutional amendments provide more explicit protections to vote free from discrimination on the basis of race, U.S. CONST. amend. XV, § 1; on the basis of sex, U.S. CONST. amend. XIX, § 1; by reason of poll taxes in federal elections, U.S. CONST. amend. XXIV, § 1; or on account of age for citizens who are eighteen years of age or older, U.S. CONST. amend. XXVI, § 1.

4. For a short summary of these two types of vote dilution rights, see Grant M. Hayden, *The Limits of Social Choice Theory: A Defense of the Voting Rights Act*, 74 TUL. L. REV. 87, 91-98 (1999).

merically diluted.⁵ Qualitative dilution, on the other hand, occurs when a voter has less opportunity to elect a representative of her choice, most often as a result of gerrymandered district lines, despite the fact that her vote is weighted equally with all other votes cast.⁶

Of these three types of rights, the right to a quantitatively undiluted vote is the least controversial. A vote is numerically diluted whenever districts are drawn in ways that deviate from a standard district size. Take, for example, a three-member governing body representing three single-member districts in a county of 30,000 people. If district lines are drawn such that the first district has a population of 5,000, the second 5,000, and the third 20,000, then voters in the third district have an obvious disadvantage in voting power as a result of the unequal district sizes. The norm used to measure the extent of their dilution is the equiproportional standard, captured by the appealing phrase “one person, one vote.”

The one person, one vote principle was at the heart of the early reapportionment cases and has since become the sine qua non of democracy.⁷ One of the primary reasons for its success is that it appears to be an objective or neutral way of parsing out political power. That is, unlike the other two types of voting rights — which involve the normatively loaded issues of who receives the right to vote and which groups deserve the right to a qualitatively undiluted vote — the quantitative cases can be resolved by mere reference to what is viewed as an elemental component of democracy. For that reason, the one person, one vote standard enjoys tremendous popular support, and legal challenges to districts that deviate from it are both temporally and doctrinally privileged.

The main thrust of this Article is that this accepted way of viewing quantitative vote dilution is misguided. A close examination of recent work in analytic philosophy and social economics makes clear that a decision to apply the one person, one vote standard is no more neutral or objective than decisions made with respect to the other two types of voting rights. In addition, removing the aura of objectivity from the standard helps reveal the connection between the three different types of voting rights that we now recognize. This, in turn, may allow us to restructure the law in a way that reflects the fundamental nature of the underlying rights.

5. Claims asserting quantitative vote dilution are actionable under the Equal Protection Clause of the Constitution. *Baker*, 369 U.S. at 237.

6. Claims asserting qualitative vote dilution, while once litigated primarily under the Equal Protection Clause, *see, e.g., White v. Regester*, 412 U.S. 755 (1973), are now typically pursued under the more relaxed standards of section 2 of the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (2000)). *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986).

7. For a survey of both academic and societal support for the standard, *see infra* notes 52-65 and accompanying text.

I will develop my argument in three stages. Part I of the Article involves an account of some of the basic concepts involved in quantitative vote dilution. It begins with a brief historical survey of the legal status of population and voting, followed by a discussion of the contemporary appeal of the one person, one vote standard. I conclude this Part with a review of some of the arguments advanced for and against the standard, concluding that most arguments neither justify nor undermine the standard, and certainly do little to link it to the other types of voting rights.

Part II explores what I think is the key to understanding the claim of neutrality for the one person, one vote standard: the enduring problem of making interpersonal comparisons of utility. Utility, for our purposes, is best defined in terms of preference satisfaction, and thus in order to figure out the social utility of a particular state of affairs, we must be able to compare (and, ultimately, sum up) each individual's level of satisfaction. If, for example, I have a box of cookies and a box of crackers to distribute to my two children at the start of a long drive, I would want to know the relative strength of each child's preferences with respect to those treats in order to choose the distribution of cookies and crackers with the largest aggregate utility (or lowest decibel level).

Other, seemingly more important policy and distribution issues also require this sort of assessment of people's preferences. Such an assessment is also built into our acceptance of the one person, one vote standard, which, after all, instructs us how to weigh voter preferences in our political system. Thus, in this second Part, I will work through various attempts made by positivist philosophers and economists to compare the strength of individual preferences. As it turns out (much to the chagrin of those theorists), comparing the strength of the preferences of two or more people can never be done in a value-free, "objective" way.

Finally, Part III argues that the value-laden process of making interpersonal utility comparisons means that attempts to weight votes — which, after all, are revealed preferences — are similarly tainted. That is, any quantitative vote dilution standard, including one person, one vote, necessarily involves normative judgments. This results in the somewhat counterintuitive conclusion that the avoidance, not acceptance, of interpersonal utility comparisons may be what drives us to the equiproportional standard. When faced with the difficulties in assessing the strength of voter preferences with respect to most matters, we, in effect, have thrown up our hands and opted to assign them all equal weights. I also explain how the concept of interpersonal utility comparisons informs our view of deviations from the standard, and how it ties the three aspects of voting rights into a more unified whole. I conclude this Part, and the Article, with some preliminary suggestions for changes in voting rights law.

I. QUANTITATIVE VOTE DILUTION AND ONE PERSON, ONE VOTE

A. *The Legal Status of Population and Voting*

Like the history of the franchise generally,⁸ the relationship between population and voting did not involve smooth and inexorable progress toward a particular goal (with the franchise, universal suffrage; with populations and voting, equally weighted voting). Nor did it involve a sudden moment of enlightenment in which the Court swept aside centuries of dimwitted political thinking and constitutionalized the equiproportional standard. Instead, the notion that people exercising equally weighted votes should elect representative bodies had been central to our notion of government from the country's inception.⁹ Then, over the first half of the twentieth century, the common practice of placing voters in equally sized districts fell by the wayside as a result of restrictive state-constitution provisions and state legislators' unwillingness to relinquish power in the face of substantial demographic change.¹⁰ The constitutionally groundbreaking reapportionment cases of the 1960s, *Baker v. Carr*,¹¹ *Reynolds v. Sims*,¹² and *Wesberry v. Sanders*,¹³ were less a revolution than a rebirth — albeit one with a vengeance — of a practice long part of American political institutions.

8. For a recent discussion of the expansions and contractions of the right to vote, and their social, economic, and political causes, see ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000). See also MARCLETTE G. CHUTE, *THE FIRST LIBERTY: A HISTORY OF THE RIGHT TO VOTE IN AMERICA, 1619-1850* (1969); BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* (1992); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* (1976); CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860* (1960); *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994).

9. See GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT 16-22* (1966) [hereinafter BAKER, *REAPPORTIONMENT REVOLUTION*]; ROBERT B. MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 16-29* (1965); Gordon E. Baker, *One Person, One Vote: "Fair and Effective Representation"?*, in *REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE 71, 72-74* (Robert A. Goldwin ed., 1968) [hereinafter Baker, *One Person, One Vote*]; see also *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964) (discussing the historical foundation of the standard).

10. See BAKER, *REAPPORTIONMENT REVOLUTION*, *supra* note 9, at 24-31; MCKAY, *supra* note 9, at 49-52.

11. 369 U.S. 186 (1962).

12. 377 U.S. 533 (1964).

13. 376 U.S. 1 (1964).

While the Declaration of Independence proclaimed it “self-evident” that “all Men are created equal,”¹⁴ there was no language to that effect in the original Constitution. Nonetheless, there are many signs that proportional representation, if not the norm, was at least a benchmark for democracy at the national level in the late eighteenth and nineteenth centuries. For example, there is evidence that the Framers intended members of the House of Representatives — the only popularly elected federal office at the time¹⁵ — to be elected by people with equally weighted votes.¹⁶ The sentiment could also be found in the Northwest Ordinance of 1787, which, when providing for future governments of the Northwest Territory, said that its inhabitants “shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature.”¹⁷ Thus, there is some indication that population-based districting was an accepted practice on the federal level at the time the country was founded.

The situation was similar at the state level.¹⁸ Six of the original thirteen states based representation in both houses of their state legislatures on population.¹⁹ And equality in representation made great gains during the period in which states were adopting their first constitutions.²⁰ Indeed, of the remaining thirty-seven states, all but seven originally provided for population-based representation in both

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. The president is chosen by members of the Electoral College, U.S. CONST. art. II, § 1, cl. 3, and, under the original Constitution, senators were chosen by the state legislatures, U.S. CONST. art. I, § 3, cl. 1 (amended 1913). The Seventeenth Amendment, ratified in 1913, provides for the direct election of senators. U.S. CONST. amend. XVII.

16. See ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 6-14 (rev. ed. 1964). The evidence comes from a wide range of sources, including the Constitution, the Philadelphia Convention, the Federalist Papers, and the state ratifying conventions. *Id.*; see also *Wesberry*, 376 U.S. at 7-18 (explaining that the historical context of the constitutional requirement that representatives be chosen “by the People of the several States” demands use of the equiproportional standard). *But see id.* at 30-39 (Harlan, J., dissenting) (arguing that the historical record does not support the constitutionalization of the equiproportional standard).

17. An Ordinance for the Government of the Territory of the United States north-west of the river Ohio, art. II (1787), 1 Stat. 50-2 (1789); see Baker, *One Person, One Vote*, *supra* note 9, at 72.

18. For an extensive discussion of the law governing apportionment and redistricting in each of the fifty states, see MCKAY, *supra* note 9, at app.

19. See BAKER, REAPPORTIONMENT REVOLUTION, *supra* note 9, at 20; Baker, *One Person, One Vote*, *supra* note 9, at 72-73; see also MCKAY, *supra* note 9, at 17-19. *But see* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 60-64 (1968) [hereinafter DIXON, DEMOCRATIC REPRESENTATION]; Robert G. Dixon, Jr., *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 239-42 (1964). These contrasting views stem from conflicting interpretations of what it meant for a state constitution to call for apportionments based predominantly on population. For a discussion of the issue, see Baker, *One Person, One Vote*, *supra* note 9, at 73.

20. See MCKAY, *supra* note 9, at 16-19.

houses.²¹ Thus, whatever one says about the rise of the concept of population-based apportionment in the 1960s and 1970s, it was only new to those with short historical memories.

The beginning of the shift away from population-based apportionment came in the five-year period after the Civil War.²² Many of the southern states reentered the Union with new constitutions that incorporated factors other than population into their districting schemes.²³ The South Carolina Senate, for example, included one senator from each county, regardless of population.²⁴ The real shift, though, occurred in the first half of the twentieth century, as new patterns of migration and immigration transformed the demographic landscape of America.

The waves of Europeans and rural blacks who migrated to urban areas meant that, by 1920, white, Protestant, rural Americans had become a minority.²⁵ They were, nevertheless, a minority with control over state legislatures and, hence, command over the reapportionment process for congressional and state legislative districts. In the face of the dramatic population shifts from the country to the city, the rural minority did what it could to preserve its own power, which, in short, meant that it did absolutely nothing — it refused to redraw district lines in light of the population changes.²⁶

The effect of the refusal to redistrict was to numerically concentrate the voting power of those in the relatively small (and shrinking) rural districts, and, correspondingly, to dilute the power of those in the large (and growing) urban districts. Over time, the disparities grew quite large. In Vermont, for example, the most populous district had 987 times more people than the least populous (and, of course, both districts sent one representative to the state legislature).²⁷ While Vermont was an outlier, population differentials of ten or twenty to one were quite common by the middle of the century.²⁸

21. See *id.* at 24-25. From 1790 to 1889, no state was admitted with an original constitution that did not provide for representation based principally on population. *Id.*

22. See William J.D. Boyd, *Reapportionment: Problems, Prospects, and Probabilities*, in REPRESENTATION AND MISREPRESENTATION, *supra* note 9, at 115, 115.

23. *Id.*

24. *Id.*

25. See C. Herman Pritchett, *Representation and the Rule of Equality*, in REPRESENTATION AND MISREPRESENTATION, *supra* note 9, at 1, 3.

26. As H.L. Mencken put it, "The yokels hang on because old apportionments give them unfair advantages." J. Anthony Lukas, *Barnyard Government in Maryland*, in REAPPORTIONMENT 55 (Glendon Schubert ed., 1964); see also BAKER, REAPPORTIONMENT REVOLUTION, *supra* note 9, at 24-31; MCKAY, *supra* note 9, at 49-53.

27. See PAUL T. DAVID & RALPH EISENBERG, DEVALUATION OF THE URBAN & SUBURBAN VOTE 3 (1961).

28. The districts at issue in *Baker v. Carr*, for example, gave rise to differences in voting power of twenty to one, see 369 U.S. 186, 245 (1962) (Douglas, J., concurring), and those in

A political solution to this numerical bottleneck was not forthcoming. State legislators from the more sparsely populated rural districts had no interest in redistricting themselves out of office (or out of power). And, for many years, the Supreme Court was disinclined to intervene in what it considered to be a nonjusticiable political question. But while *Colegrove v. Green*, the landmark case on that issue, upheld the judiciary's hands-off approach,²⁹ it also signaled the changes to come, for three members of the Court asserted for the first time that the Equal Protection Clause required the election of representatives from districts of roughly equal size.³⁰

The reapportionment cases of the early 1960s, of course, broke through the political logjam. The Court found in *Baker v. Carr* that the unequal districts resulting from the Tennessee legislature's refusal to reapportion in the face of large population shifts gave rise to a justiciable claim under the Equal Protection Clause.³¹ And while the Court saw no immediate need to devise standards for judging numerical dilution claims (for the merits of the case were not before it),³² it soon provided some guidance. The very next year, the Court articulated the basic standard in *Gray v. Sanders*: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote."³³

While "one person, one vote" established an ideal — that of equiproportional voting power — the phrase did not demarcate the range of constitutionally permissible variation. The Court offered some refinements on the basic standard the following year in *Wesberry v. Sanders*³⁴ and *Reynolds v. Sims*.³⁵ In *Wesberry*, the Court held that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that *as nearly as is practicable* one man's

Reynolds v. Sims up to forty-one to one, 377 U.S. 533, 545 (1964). See also BAKER, REAPPORTIONMENT REVOLUTION, *supra* note 9, at 82 tbl.11 (listing the range of variation for congressional districts in selected states); MCKAY, *supra* note 9, at 46-47 (listing the range of variation for state legislative districts).

29. 328 U.S. 549, 556 (1946).

30. *Colegrove*, 328 U.S. at 569-72 (Black, J., dissenting). Justices Douglas and Murphy joined Justice Black's dissent both on the equal protection issue and in finding apportionment issues to be justiciable. *Id.* at 572-74 (Black, J., dissenting).

31. 369 U.S. 186, 237 (1962).

32. See *Baker*, 369 U.S. at 198. The lack of a standard stemmed from the political compromises necessary to achieve a majority on the justiciability issue. See RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 52 (2003).

33. 372 U.S. 368, 381 (1963).

34. 376 U.S. 1 (1964).

35. 377 U.S. 533 (1964).

vote in a congressional election is to be worth as much as another's."³⁶ And the *Reynolds* Court found that "seats in both houses of a bicameral state legislature must be apportioned on a population basis,"³⁷ by which it meant that one's right to vote is unconstitutionally impaired when the weight of that vote "is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."³⁸ Thus, when it came to this "basic standard of equality among voters"³⁹ for congressional and state legislative elections, after *Wesberry* and *Reynolds* we had some language indicating the range of permissible variation, at a minimum giving us the idea that the Court may permit some deviation from the ideal.

Over the next several decades, faced with districting plans lacking the dramatic population differences in earlier cases, the Court was forced to further refine its standard.⁴⁰ It increasingly held congressional districts to a strict standard that did not permit them any deviation from the ideal size.⁴¹ The Court, however, effectively gave state

36. *Wesberry*, 376 U.S. at 7-8 (emphasis added). While the Court later conceded that "it may not be possible to draw congressional districts with mathematical precision," *id.* at 18, that possibility became real with the advent of better census data and more powerful computers, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1654 (1993).

37. *Reynolds*, 377 U.S. at 568.

38. *Id.* (emphasis added).

39. *Id.* at 561.

40. Refinements of the standard included developing a standard method of calculating deviation from the equiproportional ideal. The Supreme Court developed a measure called the maximum population deviation, which is calculated for single-member districts using the following steps: First, calculate the ideal district size by dividing the apportionment base (usually population) by the number of districts. Then, add the percentage excess of the largest district over the ideal district size to the percentage deficit of the smallest district under the ideal district size. That sum is the maximum population deviation. This method is most clearly shown in *Chapman v. Meier*, 420 U.S. 1, 21-22 (1975).

If, for example, we are dividing a population of 30,000 among three legislative districts, our ideal district size is 10,000. If the largest and smallest districts actually have populations of 11,500 and 8,000, the maximum population deviation is 35% (15% deviation upward plus 20% deviation downward).

41. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (rejecting a New Jersey districting plan that involved a .6984% maximum deviation); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528-30 (1969) (rejecting a Missouri districting plan that involved a 5.97% maximum deviation). While the Court has been clear that it allows slight deviations in certain circumstances, see *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Karcher*, 462 U.S. at 740; *Connor v. Finch*, 431 U.S. 407, 419-20 (1977); *Chapman*, 420 U.S. at 26, it rarely finds that such circumstances exist.

The constitutional requirement that representatives be apportioned among the several states means that congressional districts do not cross state lines, see U.S. CONST. art. I, § 2, cl. 3, from which it follows that the Court's standard of "precise mathematical equality," *Kirkpatrick*, 394 U.S. at 530-31, only applies to districts within a single state. After the most recent round of redistricting, this, coupled with the one-representative-per-state minimum, means that while the congressional district in Wyoming has a population of 495,304, the one in Montana has a population of 905,316. See KAREN M. MILLS, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT 1, 4 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf>. The average district size is 646,952. *Id.* at 1.

and local election districts a more flexible standard, allowing maximum deviations of up to 10% without justification⁴² and slightly greater deviations when suitably justified.⁴³ But even these deviations were quite small compared to those in the decades before *Baker*, *Reynolds*, and *Wesberry*. Thus, the one person, one vote standard now reigns supreme over congressional, state, and local legislative districting schemes,⁴⁴ and enjoys the doctrinal privilege of being one of the few Equal Protection Clause violations actionable without a showing of discriminatory intent.⁴⁵

B. *The Popular Appeal of "One Person, One Vote"*

In marked contrast to its reluctance to accept some of the Warren Court's other forays into civil rights, America has embraced the one person, one vote standard.⁴⁶ The reasons for the standard's popular appeal are not mysterious. It stems in part from the standard's ability to capture an egalitarian sentiment in something approaching an aphorism.⁴⁷ At the same time, it appears to reflect America's individu-

42. See *Brown v. Thomson*, 462 U.S. 835, 842 (1983):

"[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." [The Court's] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within the category of minor deviations.

Id. (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)); see also *Connor*, 431 U.S. at 418; *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney*, 412 U.S. at 751.

43. See *Mahan v. Howell*, 410 U.S. 315, 324-25 (upholding a Virginia state redistricting plan with a maximum deviation of 16.4% on the basis of the state's interest in preserving the integrity of political subdivision boundary lines), *modified*, 411 U.S. 922 (1973).

44. There are some limited exemptions that apply to some governing bodies. See, e.g., *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 733-35 (1973) (allowing elections for the governing body of a water-storage district to weight votes according to the assessed valuation of each voter's land). For a fuller discussion of the exemption for "special-purpose districts," see *infra* text accompanying notes 185-203.

45. See, e.g., *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1414-15 (7th Cir. 1992).

46. See *Issacharoff*, *supra* note 36, at 1657 n.72 (stating that "the appeal of individual equality in the political process proved so strong that these decisions did not spark an outcry similar to that arising in response to the Court's forays into the civil rights and criminal justice areas"); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 741 (1998) [hereinafter Karlan, *The Fire Next Time*] (claiming that, unlike some of the Warren Court's other holdings, "one person, one vote has occasioned no backlash and seems wildly popular across the political spectrum"); Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 224-25 (1968) (noting that the decisions were more easily implemented than those involving race relations, the First Amendment, and criminal justice).

47. See Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 207 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) ("Ask the average person on the street

alist ethic and its people's affection for the rights of everyday citizens. Finally, like a well-engineered slogan, it structures the issue of representation in a way that makes opposition seem absurd: who could be against "one person, one vote"?

This is not to say that the Supreme Court's early opinions in the area were met with universal acclaim. Those in state legislatures, at least initially, did not share the public's fondness for the standard. There were serious attempts to amend the Constitution and to restrict federal-court review of state reapportionment in a way that would reduce or eliminate the impact of the Supreme Court's reapportionment decisions.⁴⁸ But even state legislatures soon began to accept the new standard,⁴⁹ perhaps because application of the standard ushered in a new set of incumbents whose positions now depended, in part, on the maintenance of the newly drawn districts.⁵⁰ By the early 1970s, as the Court was stepping into the morass of qualitative vote dilution, Justice Brennan could take note of the "truly extraordinary record of compliance with the constitutional mandate" of one person, one vote.⁵¹

Moreover, many in the academy now take the standard for granted as a starting point in their analysis of what they view as the more complex issue of qualitative vote dilution.⁵² Those who are most critical of the Supreme Court's ventures into qualitative vote dilution often contrast the objective, easily managed one person, one vote standard with the subjective, normative process that infects judicial decisions in the qualitative cases.⁵³ For them, the equiproportional standard is the way

what democracy means and she is likely to reply 'majority rule.' Ask her what political equality means and she is likely to reply 'one person, one vote.' "). The phrase is, in a sense, the pithy, democratic answer to "might makes right."

48. See BAKER, REAPPORTIONMENT REVOLUTION, *supra* note 9, at 12-13 (listing some of the political repercussions of the 1964 reapportionment decisions); Jerry B. Waters, *Reapportionment: The Legislative Struggle, in REPRESENTATION AND MISREPRESENTATION*, *supra* note 9, at 141, 153-59 (detailing the response of both Congress and outside organizations to *Reynolds v. Sims*, 377 U.S. 533 (1964), from 1964 to 1966). The Republican Party actually endorsed the idea of a constitutional amendment on apportionment at its 1964 convention. Waters, *supra*, at 154.

49. See Guinier & Karlan, *supra* note 47, at 211 (noting that while in the early 1960s forty-eight of the fifty states had legislatures with district variances of more than 15%, by the early 1970s only fourteen states had such large variances).

50. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 121 (1980).

51. *White v. Regester*, 412 U.S. 755, 779 (1973) (Brennan, J., dissenting).

52. See Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 379-82 (2001). Early on, of course, it was a different story, as *Baker* generated quite a bit of opposition in the academy. See *id.* at 269 & 369-72 nn.56-62 (listing articles by Alexander Bickel, Stanley Friedelbaum, Jerold Israel, Jo Desha Lucas, Robert McCloskey, Phil Neal, and Allan Sandler opposing the decision). It was not, however, without its early defenders. See *id.* at 368-69 n.52 (listing articles by Thomas Emerson, Charles Black, Robert McKay, Louis Pollak, and others defending the decision).

53. See, e.g., Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327, 331-35 (1997) (contrasting the "procedural" conception of democracy that relies upon such principles as majority rule and

that courts have been able to avoid the real political thicket, which lies, it turns out, in the qualitative cases.⁵⁴ And while there have been some academic criticisms of the one person, one vote standard itself, most deal, at best, glancing blows.⁵⁵ Some, for example, focus on the hopelessness of striving for perfect adherence to the standard in a world of imperfect demographic information;⁵⁶ others concentrate on the standard's role in providing vehicle lawsuits for virtually any challenge to a new districting plan.⁵⁷ Few challenge the equiproportional standard head on, except to say that there do not appear to be any positive substantive arguments in its favor.⁵⁸ Far more common, however, are unreflective acceptances of the standard, as when one commentator, in a tribute to Justice Douglas, wrote that in the one person, one vote formulation, "one senses the rightness of that decision, as well as the common sense of this and the other apportionment decisions — despite their alleged lack of analysis and fidelity to text."⁵⁹

The popular appeal of the one person, one vote standard has, if anything, increased over the four decades since it became a constitutional mandate. It continues to hold a position as the defining characteristic of our democracy.⁶⁰ Popular periodicals, for example, refer to the standard in glowing terms.⁶¹ In the 2000 presidential election controversy, the importance of the principles of *Reynolds v. Sims* was one of the few things that both parties, and the Supreme Court, could agree upon.⁶² It has become so deeply entrenched in the popular

one person, one vote with the "substantive" conception of democracy more closely allied with qualitative vote dilution claims).

54. See *id.* at 331.

55. For a more complete discussion, see *infra* Part I.C.2.

56. See *infra* text accompanying notes 101-114.

57. See, e.g., Karlan, *The Fire Next Time*, *supra* note 46, at 735.

58. Some criticize the standard for its failure to achieve the goal of ensuring democratic fairness. See *infra* text accompanying notes 115-119. Others just see a lack of substantive arguments in its favor. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 87 (1990) (criticizing the redistricting decisions on the basis that the "Warren majority's new constitutional doctrine was supported by nothing"); ELY, *supra* note 50, at 121 (famously noting that while the one person, one vote standard "is certainly administratable[,] the more troublesome question is what else it has to recommend it").

59. Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 154 (1992).

60. See Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1355 n.7 (2002) (listing various modern paens to the standard); Guinier & Karlan, *supra* note 47, at 207 (discussing generally the widespread acceptance of the standard).

61. See, e.g., John Carey, *Is There Any Help for the "Hanging Chad"?*, BUS. WK., Nov. 27, 2000, at 54 ("One person, one vote. Each vote counts. That's the bedrock of democracy.").

62. See *Bush v. Gore*, 531 U.S. 98, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' " (quoting *Reynolds v.*

imagination that merely questioning the standard can bring about public approbation. In the contentious confirmation battle over Judge Charles Pickering, Sr. to the Fifth Circuit Court of Appeals, opponents condemned him for (among other things) merely being “troubled” by the legal principle of one person, one vote.⁶³ Michael McConnell, an academic nominated and confirmed to the Tenth Circuit Court of Appeals, ran into similar controversy.⁶⁴ Indeed, the standard is so widely accepted that Jon Elster recently defined democracy as “simple majority rule, based on the principle, ‘One person one vote.’ ”⁶⁵

C. *Justifications for the One Person, One Vote Standard*

1. *Some Traditional Justifications for the Standard*

Although the equiproportional standard enjoys an exalted legal status and continuing popular appeal, the justifications for it are not altogether obvious. Historically, of course, the explanation for the move to the standard was that an entrenched political establishment, determined to hold onto its power in the face of demographic change, produced legislative districts of radically different sizes. This political logjam resulted in what Robert McKay called discrimination by both design and oversight.⁶⁶ Either way, the judiciary (and others) recognized that people in more populous, usually urban, districts were underrepresented. Accordingly, such districts received less state and federal attention to their unique problems.⁶⁷ The introduction of the

Sims, 377 U.S. 533, 554 (1964)); Brief for Petitioners at 40-41, *Bush* (No. 00-949) (“‘The conception of political equality . . . can mean only one thing — one person, one vote . . .’ — [t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.” (quoting *Reynolds*, 377 U.S. at 558 (internal citations omitted))); Brief of Respondent at 2, *Bush* (No. 00-949) (“[T]his Court has long championed the fundamental right of all who are qualified to cast their votes ‘and to have votes counted.’ ” (quoting *Reynolds*, 377 U.S. at 554)). The tenuous connection between the issues in that case and the principles enunciated in *Reynolds* makes my point here even more solid.

63. *An Unworthy Judicial Nomination*, N.Y. TIMES, Feb. 24, 2002, § 4, at 12. Judge Pickering, in an extended discussion of the Supreme Court’s quantitative vote dilution cases, had criticized the Court’s application of the one person, one vote standard as being overly precise. See *Fairly v. Forrest County*, 814 F. Supp. 1327 (S.D. Miss. 1993).

64. *Judging Michael McConnell*, N.Y. TIMES, Sept. 29, 2002, § 4, at 12. This charge was made because McConnell merely questioned the choice to base the one person, one vote decisions on the Equal Protection Clause as opposed to the guarantee of a republican form of government. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103 (2000).

65. Jon Elster, *Introduction to CONSTITUTIONALISM AND DEMOCRACY 1* (Jon Elster & Rune Slagstad eds., 1998).

66. See MCKAY, *supra* note 9, at 55-58.

67. See *id.* at 56-57 (describing instances where state legislatures in Illinois, New York, and Tennessee acted in ways that disadvantaged those in the states’ more populous areas); see also BAKER, REAPPORTIONMENT REVOLUTION, *supra* note 9, at 48-51 (describing ex-

equiproportional standard, so the story goes, broke the logjam and restored principles of majority rule to our political institutions.⁶⁸

But there was nothing in the malapportionment problem that required such an exacting solution. The differences in voting power in *Baker* and *Reynolds* were, respectively, on the order of twenty and forty-one to one.⁶⁹ The Court could have dealt with such large differences without a precise standard by merely issuing a general pronouncement that it would not tolerate such large deviations.⁷⁰ Deviations on the order of two or three to one might have met with the Court's approval when some other substantial state interest was at stake. The malapportionment of the mid-twentieth century is one of those instances in which a court should have been able to remedy an egregious wrong without having to come up with a standard for what, exactly, is right.⁷¹ As Abner Mikva put it, "sometimes the Court wielding a sledgehammer helps, while a judge applying a scalpel does only harm."⁷²

A second justification for the equiproportional standard is that it is "objective."⁷³ It is argued to be an objective standard in at least two senses. First, it is objective in that it keeps judges from injecting their

amples of state inaction on urban problems); HACKER, *supra* note 16, at 95-99 (discussing the impact of malapportioned seats on congressional decisions).

68. See Guinier & Karlan, *supra* note 47, at 211. There are several good discussions of the success of the reapportionment cases in this regard. See, e.g., Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 90-94 (1984) (reviewing studies about the impact of state reapportionment on expenditures in suburban and urban areas, minority representation, and party strength); Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002) (examining the effect of the reapportionment decisions on various aspects of representation).

As Samuel Issacharoff and Richard Pildes argue, the potential for political lockup is an important justification for judicial intervention in democratic politics. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998).

69. See *Reynolds v. Sims*, 377 U.S. 533, 545 (1964); *Baker v. Carr*, 369 U.S. 186, 245 (1962) (Douglas, J., concurring).

70. Luis Fuentes-Rohwer points out that the early reapportionment cases provided (correctly, in his view) just such a standard; only later did the Court become more inflexible. See Fuentes-Rohwer, *supra* note 60; see also Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469 (2002) (arguing for "unmanageable" standards that would provide state and local governments with more flexibility in redistricting).

71. See Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 227-29 (1985).

72. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 697 (1995).

73. See, e.g., Issacharoff, *supra* note 36, at 1648 (noting that the Supreme Court in the 1960s considered the one person, one vote standard to be an objective, easily managed basis for political equality); Karlan, *The Fire Next Time*, *supra* note 46, at 741 (describing the one person, one vote standard as the "paradigmatic 'objective' rule" that "seem[s] to avoid the invocation of a contestable political philosophy").

own subjective political views into the redistricting process.⁷⁴ The Supreme Court's initial reluctance to venture into the malapportionment cases was driven by the concern that courts would be put in the position of making substantive political judgments, entangling the judiciary in the political thicket.⁷⁵ This trepidation manifested itself in the search for an "easily managed"⁷⁶ standard. The Court viewed one person, one vote as just such a neutral, readily administrable basis for political equality,⁷⁷ one that would not turn on a judge's political belief, but instead upon the application of what Justice Stewart (derivatively) called "sixth-grade arithmetic."⁷⁸ Thus, the argument continues, the standard is objective in that it prevents the judiciary from imposing its own subjective political beliefs in redistricting cases.

This aspect of the standard's objectivity does not, unfortunately, carry us very far. It is limited in the sense that once courts restrict the range of possible redistricting plans to those that fall within an acceptable range of deviation from the standard (even if that range is essentially zero, as it is with congressional districts), there are still many plans from which to choose. There are countless ways to slice the electoral pie into equally sized pieces, and, as the Court has learned over the last forty years, deciding which way to divvy up the voters involves making substantive political judgments. To the extent the standard keeps judges from imposing their own political beliefs on the initial decision of acceptable district size, it fulfills this purpose no better than allowing any other decisionmaking mechanism outside the judiciary's hands — even pure chance — to determine it. Judges could have litigants draw straws, run a series of coin flips, or rely on random number generators to decide appropriate district sizes.⁷⁹ Each of these is, in this sense, perfectly objective and judicially manageable —

74. This roughly corresponds to what Brian Leiter calls epistemic objectivity. See Brian Leiter, *Introduction to OBJECTIVITY IN LAW AND MORALS* 1, 1, 3 (Brian Leiter ed., 2001). The introduction to that volume, as well as the essays therein, provides an excellent discussion of the concept of objectivity.

75. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

76. See *Reynolds v. Sims*, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (arguing that courts are incompetent to make such decisions); Hasen, *supra* note 70, at 1475-80 (detailing the judicial search for manageable standards in early reapportionment decisions).

77. See *Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (arguing that strict application of the equiproportional standard was required in order to make it justiciable); Baker, *One Person, One Vote*, *supra* note 9, at 80-81 (arguing that the one person, one vote standard is more "durably neutral" than the alternatives); Issacharoff, *supra* note 36, at 1647, 1687.

78. *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (maintaining that apportionment is "far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic").

79. Samuel Issacharoff recently made a similar point with respect to eliminating legislative self-interest in political gerrymandering. He proposes eliminating redistricting by incumbent powers. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

judges would be given no chance to inject their own beliefs into a districting decision.

But the absurdity of proposals that would produce such arbitrary results tells us that there must be something else to the objective nature of the one person, one vote standard. Those who view the standard as objective must not merely mean that it excludes subjective considerations (in this case, the political views of the judiciary), but that it relates to some real object, something external to the judge's mind.⁸⁰ And here, the external item, the thing that puts the object in objective, appears to be our shared ideas about democracy.

Thus, it is argued, the equiproportional standard is somehow necessary to the concept of democracy. Initially, because denial of an equally weighted vote can be redescribed, at some level, as the denial of the right to vote at all, the standard appears intrinsically linked to the very idea of casting a vote. This is what the Court was describing in *Reynolds v. Sims* when it said that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁸¹ The difference between being disallowed to cast a vote and allowed to cast a vote that only carries a thousandth of the weight of other votes is, at best, a theoretical one, and may not even be that.⁸² But as Nate Persily and others recently pointed out, this aspect of quantitative vote dilution is best redescribed in the less romantic terms of giving each citizen "the equal probability of casting a tie-breaking vote regardless of the location of his or her residence, all other things being equal."⁸³ And, they continue, all things are rarely equal, and the presence of uncompetitive districts and political and racial gerrymanders renders the one person, one vote standard relatively impotent in this regard.⁸⁴

Moreover, the equiproportional standard was viewed as essential to preserving majoritarian elements of our democracy.⁸⁵ When there are deviations in district sizes, representatives elected by a minority of voters may constitute a majority in the governing body — in general,

80. This corresponds to what Brian Leiter calls metaphysical objectivity. See Leiter, *supra* note 74, at 1-3.

81. 377 U.S. 533, 555 (1964). As discussed below, I agree with this assessment, though for what I think are different reasons. See *infra* text accompanying notes 204-230.

82. See *infra* text accompanying notes 204-230.

83. Persily et al., *supra* note 68, at 1311.

84. *Id.* at 1313-14. This also explains, in part, the general failure of the reapportionment decisions to guarantee political equality, whatever that means. See *infra* text accompanying notes 101-119.

85. See Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1146-48 (2002) (discussing this as one of the "core concepts of democratic theory" reflected in the reapportionment decisions).

the larger the deviations, the smaller the controlling minority.⁸⁶ Indeed, many of the Court's early decisions and much of the academic commentary in the area focused on the question of minority control, and quantified the magnitude of the malapportionment problem by pointing to the size of a possible controlling minority, not the deviations in district size.⁸⁷

This, of course, is a legitimate concern, but only to the extent that we embrace a strict commitment to majority rule. And it is clear from the structure of some of our most important political institutions — the Senate and the Presidency, for example — that we are not so committed. Nor has the Supreme Court ever stated that strict adherence to majoritarian principles is what drove its later one person, one vote decisions with respect to other institutions. While the early malapportionment cases involved districts that gave rise to the possibility that relatively small minorities would control the statehouse, those, as discussed above, could be eliminated by a requirement that districts be of roughly equal sizes. The Court, therefore, has not been particularly clear in spelling out the theoretical reasons driving such strict adherence to the equiproportional principle.

Given the Court's relative silence on the theoretical or constitutional justification for the one person, one vote rule, most commentators have been left to cobble together fragments of language here and there in the opinions in an attempt to divine the Court's reasoning.⁸⁸

86. Take, for example, a hypothetical state with 100,000 people divided into ten districts. If six of the districts have 8000 people each, and the other four have 13,000, the total deviation from the ideal district size is 50%, and 48% of the state's population can, theoretically, elect a controlling majority in the statehouse. If, on the other hand, the six smaller districts have 6000 people each, and the other four districts have 16,000, the total deviation from the ideal district size is 100%, and 36% of the state's population can elect a controlling majority in the statehouse. (Of course, the relationship between the total deviation and the size of a possible controlling majority not only depends upon the total deviation — which only takes account of the largest and smallest district — but the size of the districts in between as well.)

87. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 545 (1964) (“Under the existing provisions, applying 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives.”); MCKAY, *supra* note 9, at 46-47 (listing the minimum percentage of the population that can elect a majority of representatives in each of the fifty state legislative bodies). McKay discusses the common use of this measure of quantitative dilution, known as the Dauer-Kelsay measure of representativeness, and its use by the Supreme Court. *Id.* at 43-45.

As Guy Charles recently argued, the one person, one vote standard may also be grounded in other core concepts of democracy, such as responsiveness, substantial political equality, and pluralism. See Charles, *supra* note 85, at 1148-62. But some of these concepts, like responsiveness, do not require strict adherence to the standard, and the others require making fairly obvious choices in democratic theory (that is, they do not appear to be “core” concepts common to all theories of democracy). Charles does not deny this; indeed, he believes that “judges can — and must — utilize democratic theory” in interpreting the Constitution. *Id.* at 1162.

88. See, e.g., Heather Gerken, *Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1420-27 (2002) (arguing that the Court could have fleshed out its notion of equality in at least four different ways, but did not do so); Sanford Levinson, *One Person, One Vote: A*

Many conclude, correctly, I think, that the Court never offers a coherent theoretical basis for the standard.⁸⁹ And so when Heather Gerken calls the Court's justifications at best "minimally theorized,"⁹⁰ she is being quite charitable.

2. *Limitations and Criticisms of the Standard*

Despite its basic appeal, the equiproportional standard is not without its limitations. Initially, the standard does not apply to many important political institutions. The most obvious example is the U.S. Senate.⁹¹ Under our constitutional structure, the two senators from Wyoming represent 495,304 people while the two from California represent 33,930,798.⁹² This exception to the one person, one vote standard was constitutionalized as part of the compromise necessary to get the less populous colonies to join the Union.⁹³ And because each state's power in the Electoral College is derived, in part, from its representation in the Senate, the standard also does not apply to the Presidency.⁹⁴ This, of course, helps explain the possibility that a presidential candidate may win the popular vote but lose the election.⁹⁵ And, as discussed more fully below, on the state and local level there are a host of special-purpose districts that are not subject to the one person, one vote standard.⁹⁶

Mantra in Need of Meaning, 80 N.C. L. REV. 1269, 1307-21 (2002) (discussing the standard as possibly restoring the dignity of an individual's vote, the possibility of competition in elections, and "accurate" representation).

89. See, e.g., Gerken, *supra* note 88, at 1434-36.

90. *Id.* at 1427-28.

91. See U.S. CONST. art. I, § 3, cl. 1. For some critiques of this aspect of the Senate, see ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 46-54 (2002); Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 95 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

92. See MILLS, *supra* note 41, at 2 tbl.1.

93. See *Reynolds v. Sims*, 377 U.S. 533, 571-77 (1964) (explaining the unique historical circumstances that gave rise to the United States Senate and rejecting the federal analogy in cases of state reapportionment); *Wesberry v. Sanders*, 376 U.S. 1, 9-14 (1964) (explaining what became known as the "Great Compromise" that broke the deadlock between delegates from large and small states at the Constitutional Convention); HACKER, *supra* note 16, at 34.

94. See U.S. CONST. art. II, § 1, cl. 2.

95. This has now happened four times in American history: 1824, 1876, 1888, and 2000. Mark A. Siegel, *It's Time to Reform Electoral College Before Next Crisis*, ROLL CALL, Jan. 15, 2001, at B34.

96. See, e.g., *Ball v. James*, 451 U.S. 355 (1981) (exempting a water-storage district from the strict demands of one person, one vote); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (same). For a more thorough discussion, see *infra* text accompanying notes 186-203.

The equiproportional standard also does not apply to judicial elections. See *Wells v. Edward*, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) (affirming the district court's determination that one person, one vote does not apply to the judiciary).

Even the legislative bodies that the standard was designed for — state legislatures and Congress — are not required to adhere precisely to the one person, one vote standard.⁹⁷ State legislative districts may deviate up to 10% without justification, more if the state provides sufficient reasons for the range.⁹⁸ Congressional districts, while equally sized within each state, vary quite a bit from state to state because the Constitution prohibits congressional districts from crossing state borders.⁹⁹ As a result, after the most recent round of redistricting, the congressional district in Wyoming has a population of 495,304, while the one in Montana has a population of 905,316.¹⁰⁰ Thus, the first important limit on the one person, one vote principle is that many of our most basic institutions are not subject to the standard at all and others that are subject to it have a fair amount of flexibility in how they adhere to it.

For the democratic institutions that are subject to the standard, the elegance of the phrase “one person, one vote” masks some complexities. The foremost among these is what, exactly, is meant by “person.” To put it another way, what apportionment base should we use to ensure equal representation? A list of possible candidates, from most to least comprehensive, includes total population,¹⁰¹ voting-age population,¹⁰² voter-eligible population,¹⁰³ registered voters, and actual vot-

97. See *Gaffney v. Cummings*, 412 U.S. 735, 741-43 (1973) (explaining two distinct lines of cases concerning congressional redistricting and state legislative apportionment).

98. See *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Mahan v. Howell*, 410 U.S. 315, 324-25, 329, *modified*, 411 U.S. 922 (1973) (suggesting that a 16.4% maximum deviation “may well approach tolerable limits”).

99. This presumably comes out of the mandate that “Representatives . . . shall be apportioned among the several States . . .” U.S. CONST. art. I, § 2, cl. 3; see also U.S. CONST. amend. XIV, § 2.

100. See *Mills*, *supra* note 41, at 1, 4.

101. In the early malapportionment cases, the disparities were analyzed in terms of differences in the population per representative or the percentage of the population that could elect a controlling majority in the statehouse. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

102. For a discussion of the possibility of using voting-age population to limit the apportionment base, see *Garza v. County of Los Angeles*, 918 F.2d 763, 773-77 (9th Cir. 1990) (rejecting apportionment based on numbers of voting-age citizens).

103. This would limit the pool to those who were both of voting age and not disqualified by some other state voting requirement. The most notable groups excluded from the apportionment base would be aliens, transients, and those convicted of certain crimes. For a discussion of the possibility of using citizenship voting requirements to limit the apportionment base, see *Garza*, 918 F.2d at 773-76; *id.* at 779-88 (Kozinski, J., concurring in part and dissenting in part); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969 (1991) (arguing that the inclusion of illegal aliens in the reapportionment base violates one person, one vote). For a short discussion of disenfranchised felons and ex-felons in the apportionment base, see Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 Nw. U. L. REV. 503, 530-31 (2000). For a general discussion of the effects of including (and excluding)

ers.¹⁰⁴ And while the Supreme Court originally spoke of equal numbers of “residents, or citizens, or voters,”¹⁰⁵ as if equal numbers of each guaranteed the same sort of equality, the Court later acknowledged that they do not, reasoning that “if it is the weight of a person’s vote that matters, total population . . . may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because ‘census persons’ are not voters.”¹⁰⁶ While the Court seems to have settled on total population as the relevant statistic for congressional redistricting,¹⁰⁷ it allows states significant leeway in devising an apportionment base for state and local voting districts.¹⁰⁸ But these variations may be at odds with the phrase itself and affect the weighting of votes (and, in any case, are not without controversy).¹⁰⁹

Once we accept the relevant figure for determining district size (usually, population), we are still a long way from guaranteeing each person numerically equal representation. The main obstacle is that the source of the population figures — the census — has several shortcomings for districting purposes. Initially, census numbers are far from

various non-voting groups from the apportionment base, see Levinson, *supra* note 88, at 1281-97.

104. Use of registered or actual voters as the apportionment base has not been much of an issue since the Supreme Court noted a possible “problem” with the use of a registered voter base or actual voter base. See *Burns v. Richardson*, 384 U.S. 73, 92 (1966). The Court found that such bases were unlikely to survive judicial scrutiny because they may be subject to improper political influence that perpetuates the underrepresentation of some minority groups and because they are subject to sudden fluctuations. See *id.* at 92-93.

105. *Reynolds*, 377 U.S. at 577; see *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 693 (1989) (“Electoral systems should strive to make each *citizen’s* portion equal.” (emphasis added)).

106. *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973); see *Burns*, 384 U.S. at 91-93; *Garza*, 918 F.2d at 773-76; *id.* at 779-88 (Kozinski, J., concurring in part and dissenting in part).

107. This appears to be mandated by the constitutional requirement that the “whole number of free persons” in each state shall be used to apportion representatives, see U.S. CONST. art. I, § 2, cl. 3; see also U.S. CONST. amend. XIV, § 2, and much of the language in the congressional apportionment cases, see, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964). But see *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969) (assuming without deciding that congressional apportionment may be based on voter population rather than total population).

108. See, e.g., *Burns*, 384 U.S. at 91 (“[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”). The Court went on to note that in no case had it suggested that “the States are required to include aliens, transients, short term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which the legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.” *Id.* at 92.

109. Sanford Levinson points out some even more basic problems with what he terms the “mantra” of one person, one vote. He notes that it “does not — indeed *cannot*, as a matter of common sense — mean that every single person within the polity gets a (single) vote.” Levinson, *supra* note 88, at 1270-71. Children, felons, and resident aliens, among others, have no federally protected right to vote. See *id.* at 1271-73.

perfect.¹¹⁰ The census overcounts some populations, undercounts others, and is prohibited from correcting systemic errors of this sort through statistical techniques such as sampling.¹¹¹ As a result, areas with large numbers of people missed by the census, often with large minority populations, are numerically underrepresented.¹¹² And even assuming a perfect decennial census, those numbers only provide a snapshot of a dynamic demographic process. The census numbers rapidly become outdated as people are born, die, and move.¹¹³ Of course, a few imperfections in the census are far from a reason to discard the whole enterprise, for any undertaking of that size is bound to have some slippage. But such imperfections do swamp the precise tolerances built into the law governing some types of redistricting.¹¹⁴

The most serious shortcoming of the equiproportional standard, however, is not its limited range or imperfect application, but its failure to achieve the goal of equal representation. The Warren Court, in concentrating on individual voting equality, overlooked the group nature of meaningful political representation.¹¹⁵ So in the late 1960s, while our democratic institutions reconfigured themselves into districts that equalized individual voting power, they also employed practices like at-large elections and racial gerrymandering to effectively

110. See *Gaffney*, 412 U.S. at 745 & n.10.

111. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1165 (1997); Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 2-13 (1993). When the Census Bureau announced a plan to use statistical sampling in the decennial census of 2000 to remedy the growing problem of undercounting some identifiable groups, the plan was challenged and held invalid under the Census Act, 13 U.S.C. §§ 1-401 (2000), in *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999). Indeed, the mere fact that sampling is so politically contested lends support to the idea that there is nothing objective about the one person, one vote standard.

112. See *Gaffney*, 412 U.S. at 745 n.10 (noting the fact that the 1970 census undercounted blacks by an estimated 7.7% and whites by an estimated 1.9%).

113. See *Abrams v. Johnson*, 521 U.S. 74, 98-100 (1997); *Gaffney*, 412 U.S. at 746. Sanford Levinson notes that the population numbers used for congressional elections are only good for, at best, one election in the five covered by each new set of census data. See Levinson, *supra* note 88, at 1278-80.

114. *Karcher v. Daggett*, 462 U.S. 725, 778 (1983) (White, J., dissenting) ("More than a decade's experience with *Kirkpatrick* demonstrates that insistence on precise numerical equality only invites those who lost in the political arena to refight their battles in federal court."); Karlan, *The Fire Next Time*, *supra* note 46, at 735 ("While the law requires that district populations be as equal as practicable, nobody really sues because the congressional district to which he has been assigned has 527,472 voters while another district has only 523,798."); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705, 1730 (1993) [hereinafter Karlan, *The Rights To Vote*] (describing one person, one vote claims as " 'vehicle lawsuits,' empty of any real content but pregnant with the possibility of persuading a court to adopt a favorable new plan").

115. See GUINIER, *supra* note 2, at 124-25.

shut certain groups out of the political process.¹¹⁶ These new practices, which “qualitatively” diluted votes, became the new constitutional and statutory battleground for voting rights.¹¹⁷ Thus, as it turned out, even if the equiproportional standard is a necessary condition for achieving the goal of fair and effective representation, it is far from a sufficient one.¹¹⁸ And judged by the lofty goals set for the standard by its creators, it has been, in Pam Karlan’s words, “a spectacular failure.”¹¹⁹

116. See DIXON, DEMOCRATIC REPRESENTATION, *supra* note 19, at 22 (“A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as ‘emperor’s clothes.’”); Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277 (examining the relationship between the requirement of population equity and gerrymandering); Issacharoff, *supra* note 36, at 1654 (explaining how advances in computer technology make it easier to gerrymander equipopulous districts); Karlan, *The Fire Next Time*, *supra* note 46, at 736 (noting that “[t]he ‘equipopulous gerrymander’ is a staple of modern reapportionment”).

117. Originally, in cases such as *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973), qualitative vote dilution claims were pursued under the Constitution. After the constitutional claims were undercut by the Supreme Court’s opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (requiring that plaintiffs with such claims prove discriminatory intent), Congress amended section 2 of the Voting Rights Act when it came up for reauthorization in 1982 to include qualitative dilution claims. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (2000)). Thereafter, section 2 became the weapon of choice for voting rights advocates. Constitutional qualitative vote dilution claims brought by white plaintiffs rose to prominence in the 1990s, most notoriously in *Shaw v. Reno*, 509 U.S. 630 (1993). For a very brief summary of qualitative vote dilution, see Hayden, *supra* note 4, at 94-98.

118. See Baker, *One Person, One Vote*, *supra* note 9, at 90; Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 564-65 (1995).

119. Karlan, *The Rights To Vote*, *supra* note 114, at 1705. Chief Justice Earl Warren considered the reapportionment cases the most important in his sixteen years on the Court. See G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 337 (1982); Engstrom, *supra* note 116, at 277.

This does not, of course, exhaust the possible shortcomings of the equiproportional standard. See, e.g., ALFRED DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1963) (cataloging some early predictions about the negative consequences of *Baker v. Carr*); Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1110 (1999) (arguing that applying the one person, one vote standard to local governments prevents the formation of the regional governmental entities necessary to solve problems like growth and traffic management); Alfred De Grazia, *The Applied Science of Equality: The Case of Apportionment, with Special Attention to the Idea of Equi-Populous Districts*, in REPRESENTATION AND MISREPRESENTATION, *supra* note 9, at 169, 188-89 (arguing that the equiproportional standard is a bad idea because, among other things, it takes power away from the legislature, runs contrary to our federalist system of government, and takes attention away from more serious issues); James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1239-43 (2002) (arguing that one person, one vote cannot support “thicker” conceptions of democracy such as communitarianism and civic republicanism); James L. McDowell, “*One Person, One Vote*” and the Decline of Community, 23 LEGAL STUD. F. 131 (1999) (arguing that the equiproportional standard contributed to the decline of the concept of community of interest); Joseph Seliga, *Democratic Solutions to Urban Problems*, 25 HAMLINE L. REV. 1, 5 (2001) (arguing that “the need to ensure equality of votes consistent with the ‘one person, one vote’ doctrine hinders the development of democratic governing structures and innovative solutions to urban problems”).

In sum, the theoretical arguments for and against the equiproportional standard are unsatisfying. One reason they disappoint, I think, is that they fail to go far enough. For example, Justice Frankfurter was clearly onto something when he said that the Court in *Baker v. Carr* was being asked “to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy”¹²⁰ But it is unclear exactly why Frankfurter framed the question this way. Why is such a choice about bases of representation different from the other acceptable choices the Court made in deciding that states could not altogether deny the vote to certain groups? Another shortcoming is that the current explanations appear unrelated to other aspects of voting rights, such as those involving access to the ballot box on one hand and qualitative vote dilution on the other. Thus, while I think commentators like Barbara Phillips are right in pointing out that quantitative and qualitative dilution claims must be related,¹²¹ there is little explanation of how they are related. The whole subject demands a more thorough, perhaps more deeply rooted, explanation.

A more satisfying explanation of the standard would clarify the relationship between weighting votes and democratic fairness. In doing so, it would need to tie the one person, one vote standard to other aspects of voting rights. It would, for example, connect the standard to the reasons invoked to disallow certain people to vote in the first place. It would help explain why we allow deviations from the standard in some cases. And, perhaps most importantly, it may even allow us to bridge the gap between quantitative vote dilution claims and qualitative ones. Many jurists and commentators view these two types of vote dilution claims as distinct concepts — the former involving “individual rights” and the latter “group rights.” They are, therefore, treated differently under the law, and seem related only in the vague sense that each involves an allocation of political power. A more complete, unified theory of voting rights would tie the two types of claims together at some more fundamental level.

Such a theory, I think, must come out of an analysis of why we think it is a good idea to assign every voter an equally weighted vote. Voting, after all, involves revealing preferences, and counting votes involves aggregating those preferences. It seems, then, that figuring out how much weight should be given to a person’s vote means figuring out how much weight should be accorded to each person’s preferences. And because there is apparently no scale for weighing prefer-

120. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

121. See Phillips, *supra* note 118, at 583; see also John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163-64, 175-82 (1999) (noting the false distinction between the individual rights protected in the quantitative dilution cases and the group rights protected in the qualitative ones).

ences, we need to weigh them in relation to each other. And that, in turn, brings us to something that has been giving philosophers and economists fits for a long time — the problem of making interpersonal utility comparisons.

II. INTERPERSONAL UTILITY COMPARISONS

A. *The Problem of Interpersonal Utility Comparisons*

A necessary element of many ethical systems, especially utilitarian ones, is the ability to measure utility, broadly conceived as people's well-being.¹²² Any measure of well-being involves comparing the amount of goods people possess. With material goods — such as income, wealth, and physical health — making such comparisons is not that difficult. While there may be problems in measuring the amount of any material good possessed by a particular individual (indeed, there are entire subdisciplines devoted to the task), the difficulties are mostly practical rather than theoretical.¹²³ In any case, the problems pale in comparison with the difficulties associated with making comparisons of more subjective goods.

Comparisons of subjective goods involve looking at things such as people's mental health, their freedom from anxiety, their sense of satisfaction — in short, their levels of happiness.¹²⁴ Because we don't like the paternalism (and the mistakes) involved in telling people what should make them happy, we often take people's own preferences as the baseline of the inquiry and assess their well-being by looking at whether these preferences are satisfied.¹²⁵ Thus, the project involves

122. For a good, brief discussion of the concept of utility and its relationship to welfare, see Alfred F. MacKay, *Extended Sympathy and Interpersonal Utility Comparisons*, 83 J. PHIL. 305, 306-07 (1986).

123. See Martin Barrett & Daniel Hausman, *Making Interpersonal Comparisons Coherently*, 6 ECON. & PHIL. 293, 293 (1990).

124. See *id.*

125. See Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 415, 415 (1995) [hereinafter Hausman I]. Hausman discusses this view, criticizes it, and concludes that we should not equate welfare with the satisfaction of preferences. *Id.* at 486. His position was criticized by Ruth Weintraub in *The Impossibility of Interpersonal Utility Comparisons: A Critical Note*, 105 MIND 661 (1996), and defended (successfully, I think) in Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons — A Reply*, 106 MIND 99 (1997) [hereinafter Hausman II]. That said, preference satisfaction, or versions of it, is still one of the most often used measures of well-being, see Barrett & Hausman, *supra* note 123, at 293-94; see also Thomas M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, in INTERPERSONAL COMPARISONS OF WELL-BEING 17, 22-44 (Jon Elster & John E. Roemer eds., 1991), and also seems appropriate in the context of voting rights, where the goal is to translate individual preferences into group choices. But while I use preference satisfaction because it is one of the most well-investigated means to make interpersonal comparisons, my argument does not depend upon it as opposed to some other measure of well-being that turns, in some sense, on psychological goods. Nor, I should mention, does my basic point depend upon the difference between the "actual" preferences used by economists and the "rational" or "informed" preferences used by ethical theorists.

comparing, say, Luke's level of satisfaction of his preferences with Emma's level of satisfaction of hers. Such interpersonal comparisons of preference satisfaction are crucial to giving a full account of well-being because people may possess similar amounts of material goods but experience different levels of satisfaction — some may be completely satisfied and others very dissatisfied.¹²⁶ Making assessments of such psychological goods, however, involves tackling a host of difficulties in what is collectively known as the problem with interpersonal utility comparisons.¹²⁷

The overarching problem with interpersonal utility comparisons is, quite simply, that we cannot make them without making the value judgments we seek to avoid. This makes the distribution of material goods problematic. If, for example, we want to choose a single dessert for Luke and Emma, we could ask them whether they prefer jello or ice cream. If they both prefer one or the other, then our decision is easy. But if Luke prefers jello, and Emma prefers ice cream, things become harder. At that point, we would want to determine whether jello is higher in Luke's preference ranking than ice cream is in Emma's. But making such interpersonal comparisons is fraught with difficulties. As Lionel Robbins recognized in the early 1930s:

There is no means of testing the magnitude of A's satisfaction as compared with B's. If we tested the state of their blood-streams, that would be a test of blood, not satisfaction. Introspection does not enable A to measure what is going on in B's mind, nor B to measure what is going on in A's. There is no way of comparing the satisfactions of different people.¹²⁸

Robbins's point was not new — a similar point was made, for example, by Jevons in 1871¹²⁹ — but it seized the imaginations of a generation

126. Or, as the Beatles pointed out more succinctly, "Money can't buy me love" — or many other subjective goods that contribute to well-being. THE BEATLES, CAN'T BUY ME LOVE (Capitol Records 1964).

127. One of the best places to start investigating the problems associated with interpersonal utility comparisons is INTERPERSONAL COMPARISONS OF WELL-BEING, *supra* note 125, which contains a well-written introduction as well as a good cross section of the scholarship on the issue. James Griffin steps through some of the more obvious problems in JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 113-20 (1986). And Peter Hammond provides a particularly useful bibliography in Peter J. Hammond, *Interpersonal Comparisons of Utility: Why and How They Are and Should Be Made*, in INTERPERSONAL COMPARISONS OF WELL-BEING, *supra* note 125, at 200, 238-54.

Despite the obvious connection to any study of law and economics, there has not been an overwhelming amount of commentary on interpersonal utility comparisons among legal scholars. For a relatively brief discussion of the role of interpersonal utility comparisons in law and economics, see Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 60-71 (1992).

128. LORD ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 139-40 (3d ed. 1984).

129. See W. STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY (5th ed. 1965). Jevons noted:

[T]here is never, in any single instance, an attempt to compare the amount of feeling in one mind with that in another. I see no means by which such comparison can be accomplished.

(or two) of economists. Faced with the fact that interpersonal utility comparisons are based on unverifiable evidence, economists structured their views of efficiency and social welfare accordingly.¹³⁰ This reluctance to make interpersonal comparisons, for example, accounts for the prominence (or dominance) of Pareto optimality as a method of making social-welfare comparisons.¹³¹ And the fact that such methods are relatively feeble makes finding a solution to the problem of interpersonal utility comparisons all the more pressing.

The susceptibility of one mind may, for what we know, be a thousand times greater than that of another. But provided that the susceptibility was different in a like ratio in all directions, we should never be able to discover the difference. Every mind is thus inscrutable to every other mind, and no common denominator of feeling seems to be possible. . . . [T]he motive in one mind is weighed only against other motives in the same mind, never against the motives in other minds.

Id. at 14.

Except for some of the terminology, Jevons's quote may just have well come out of a recent issue of *Mind*.

130. See Barrett & Hausman, *supra* note 123, at 293-94. For a brief sketch of the history of the avoidance of interpersonal utility comparisons, see Hammond, *supra* note 127, at 204-07. Amartya Sen provides a useful survey of the literature of social choice theory without interpersonal comparisons in *Social Choice Theory*, in 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1073 (Kenneth J. Arrow & Michael D. Intriligator eds., 1986).

Law and economics scholars have, for the most part, embraced the typical distaste for interpersonal utility comparisons. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 79 (1981) ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison."). But see Richard A. Epstein, *Rights and Rights Talk*, 105 HARV. L. REV. 1106, 1118 (1992) (book review) (acknowledging that "[m]ost of us are quite happy to make such [interpersonal utility] comparisons, and do so with confidence, every day of our lives"). For a general discussion, see Lawson, *supra* note 127, at 61 n.26 (citing a variety of sources discussing the interpersonal comparison of utilities, including sources arguing that such comparison is not impossible).

131. See Hammond, *supra* note 127, at 206. The Pareto Criterion, developed by Vilfredo Pareto in 1897, is a method of determining whether a change in a given state of affairs is efficient or "optimal." Simply put, a change is said to increase the welfare of society if at least one member of the group is made better off without anyone being made worse off. Though Pareto's criterion is somewhat limited, it does have the advantage of avoiding interpersonal comparisons. As James M. Buchanan and Gordon Tullock point out:

The underlying premise of the modern Paretian construction is the purely individualistic one. The individual himself is assumed to be the only one who is able to measure or to quantify his own utility or satisfaction. No external observer is presumed able to make comparisons of utility among separate individuals.

JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 171-72 (1962). The disadvantage of reliance on Pareto optimality, however, is its incompleteness. As Sen notes:

An economy can be optimal in this sense even when some people are rolling in luxury and others are near starvation as long as the starvers cannot be made better off without cutting into the pleasures of the rich. If preventing the burning of Rome would have made Emperor Nero feel worse off, then letting him burn Rome would have been Pareto optimal. In short, a society or an economy can be Pareto-optimal and still be perfectly disgusting.

AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 22 (1970).

One possible way to solve the problem is to limit our inquiry to ordinal, not cardinal, preference rankings.¹³² For example, we could easily find out *whether* Luke prefers jello to ice cream (as opposed to how much more he prefers it): we could run a series of experiments that force him to choose between the two, or, more simply, we could ask him. And, say, we find out that Luke prefers jello to ice cream. Similarly, we can discover Emma's (or anyone else's) ordinal preference ranking with respect to the two desserts (and, say she, unlike Luke, prefers ice cream to jello). At least theoretically, we could do this with their preferences over any goods or states of affairs. Then, with a complete ordering of both individuals' preferences in hand, we could compare the two and make our decision about whether to buy jello or ice cream.

Such a comparison might take different forms. We could, for example, count the levels in between jello and ice cream in both preference orders (which would, of course, include preferences for many other things), and then decide that, because Luke has fewer preference levels between jello and ice cream, he must be more indifferent about the choice than Emma. Hence, we buy the ice cream. Or we could count up from the very bottom (or down from the top) of each child's preference ranking to discern who would derive more satisfaction by the choice of their favored dessert.¹³³ Thus, if we restrict ourselves to ordinal preference rankings, it seems we can, at least theoretically, make the interpersonal utility comparisons that we desire.

Closer scrutiny of this process, however, reveals the many assumptions (and flaws) inherent in such comparisons of ordinal preference rankings. While it may be easy to imagine a fully satisfied or dissatisfied person, what about all of the intermediate preference rankings — how does one locate such a preference ranking in a way that lends itself to meaningful comparison? Counting from the extremes, or between two alternatives, is easier said than done. One problem is that, once you include lotteries among alternatives as well as alternatives, there are an infinite number of levels in anyone's preference rankings.¹³⁴ Another problem is that the number of alternatives above or below a given choice might depend on morally irrelevant factors, such as one's knowledge or capacity for imagination.¹³⁵ If, in the example above, we restrict ourselves to desserts, Luke's knowledge of or capacity to imagine more desserts than Emma may help him if we're counting up from the bottom of both preference orders (since, pre-

132. See Hausman I, *supra* note 125, at 475-77.

133. See *id.* at 476. Of course, without any evidence that Luke and Emma have exactly the same number of preferences in their rankings, counting up from the bottom and down from the top of each ranking might yield different results.

134. See *id.*

135. See *id.*

sumably, jello will be further from his bottom than ice cream from Emma's bottom) or counting the alternatives between jello and ice cream (his many as opposed to Emma's few), but may hurt him if we're counting down from the top (since, given Emma's limited imagination, ice cream may be closer to her top). Finally, Luke, Emma, and the rest of us are often tempted to misrepresent our preferences in order to gain more of a scarce good, be it dessert or something with which you can buy dessert, like a tax break.¹³⁶

These problems tell us that although they may be enough to get market analysis off the ground, ordinal utilities are not the way to make interpersonal utility comparisons.¹³⁷ They also demonstrate that counting the alternatives above, below, or between are really attempts to assign quasi-cardinal significance to certain differences in individual rankings. Making judgments based on the number of steps between preference levels assumes we are talking about equally sized steps. Such quasi-cardinal rankings, however, don't make sense. In the first place, they are not stable, in that adding (or removing) an option increases (or diminishes) the distinctions among some options but not others. In addition, quasi-cardinal rankings are not, generally, consistent with a person's actual cardinal rankings. In sum, we cannot make interpersonal comparisons without comparing preference intervals, and these quasi-cardinal systems do not contain the right information — we need cardinal rankings. Thus, we must reject this stripped-down, ordinal version of interpersonal utility comparison.

A second way of solving the problem involves moving to full-blown cardinal utilities. That is, we need to look at each person's cardinal scale and then calibrate it with the scales of others. The calibration is, of course, the hard part, and economists and philosophers have taken two basic approaches. Some attempt to convert the interpersonal comparisons to intrapersonal comparisons. Others attempt to place preferences on a shared numerical scale, from zero (least preferred) to one (most preferred).

Converting interpersonal comparisons to intrapersonal ones involves putting oneself in another's shoes in order to make a comparison.¹³⁸ In order to compare what it would be like to be Luke with jello to Emma with ice cream, we imagine what it would be like to be him with jello and what it would be like to be her with ice cream. We then convert those difficult interpersonal comparisons into intrapersonal ones, which are, by most accounts, less problematic.¹³⁹ It is not that

136. This problem is by no means limited to comparisons of ordinal utility levels.

137. I am especially indebted to Stephen Ellis for the discussion in this paragraph.

138. A good critical discussion of this solution (and its many versions) may be found in MacKay, *supra* note 122, at 305-22; *see also* Hausman I, *supra* note 125, at 477-78.

139. *See* Hausman I, *supra* note 125, at 477-78; MacKay, *supra* note 122, at 305-06. *But see* Gregory S. Kavka, *Is Individual Choice Less Problematic than Collective Choice?*, 7

controversial, for example, for me to say that Luke is better off with jello than ice cream if and only if he prefers jello to ice cream (intrapersonal comparison). Likewise, I can make comparisons between people by saying that Luke is better off with jello than Emma is with ice cream (interpersonal comparison) if and only if I prefer Luke with jello to Emma with ice cream (intrapersonal comparison).¹⁴⁰ Importantly, when making this conversion, I leave my personal preferences behind: that is, I imagine myself as Luke, with Luke's preferences and a bowl of jello; I imagine myself as Emma, with Emma's preferences and a bowl of ice cream; and then I ask myself in whose position I would prefer to be.¹⁴¹ Thus, by engaging in what Alfred MacKay colorfully calls the "mental shoehorn maneuver,"¹⁴² I can make interpersonal utility comparisons.

This is the principal way that philosophers and welfare economists have dealt with interpersonal comparisons. Kenneth Arrow,¹⁴³ R.M. Hare,¹⁴⁴ and John Harsanyi,¹⁴⁵ for example, have put forth versions of it.¹⁴⁶ Some, like Hare, believe that the maneuver can be made in such a way as to actually induce the experiences of others in oneself in order to compare them.¹⁴⁷ Others, like Harsanyi, make the milder claim that the maneuver merely places one in position to make a certain counterfactual judgment, that if I were in Luke's position with his preferences, I would have such an experience.¹⁴⁸ And while many express doubts

ECON. & PHIL. 143, 143-45 (1991) (arguing that, on certain assumptions, all of the problems with social choice reappear at the personal level).

140. See Hausman I, *supra* note 125, at 477.

141. *Id.*

142. MacKay, *supra* note 122, at 305 & n.1.

143. See, e.g., Kenneth J. Arrow, *Extended Sympathy and the Possibility of Social Choice*, 7 PHILOSOPHIA 223, 223-37 (1978). Arrow, however, admits of some lurking problems in the approach:

[I]f your satisfaction depends on some inner qualities that I do not possess, then I really have not had the experience which will enable me to judge the satisfaction one would derive from that quality in association with some distribution of goods. Hence, my judgment has a probability element in it and therefore will not agree with your judgment.

Id. at 236.

144. See R.M. HARE, MORAL THINKING 87-106, 117-29 (1981).

145. See, e.g., JOHN C. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS 58-59 (1977); John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOC. RES. 623, 638 (1977).

146. There are, of course, other adherents. See, e.g., AMARTYA SEN, ON ECONOMIC INEQUALITY 14-15 (1973); Donald Davidson, *Judging Interpersonal Interests*, in FOUNDATIONS OF SOCIAL CHOICE THEORY (J. Elster & A. Hylland eds., 1986).

147. See HARE, *supra* note 144, at 117-21.

148. See HARSANYI, *supra* note 145, at 58. While Amartya Sen points out that there are at least two versions of this type of maneuver (which he terms "introspective welfare comparison" and "introspective as if choice"), see Amartya Sen, *Interpersonal Comparisons of*

about the enterprise, they often see it as the most promising way to make interpersonal comparisons — and the moral systems that depend upon them — work.

The solution, however, is subject to many criticisms, and may ultimately fail to give a coherent account of interpersonal comparisons. It is too information intensive to use on a large scale: we lack this kind of data on each person's preference rankings¹⁴⁹ and, even if we could get it (through polling or some other device), we would worry about strategic misrepresentations of those preferences. Moreover, one's imagining about what it is like to be another person is often contaminated by her thoughts about the kind of changes she would have to undergo to get there.¹⁵⁰ But the most straightforward criticism is that, to the extent I can put myself in another's shoes, there is no "me" left to make the comparison.¹⁵¹ That is, I may be able to imagine what Luke thinks of jello and Emma thinks of ice cream, but I still cannot compare the intensities of their subjective states with any authority, especially the introspective authority I seek when converting interpersonal comparisons to intrapersonal ones. So whatever the process is called — imaginative empathy, extended utility functions, or extended sympathy — it fails to successfully bridge the gap in a way that solves the problem of interpersonal utility comparisons.

Many theorists have attempted to solve the problem by using some sort of shared index to calibrate people's cardinal preference scales. In order to be at all useful, an index of cardinal utilities must be bounded, for otherwise the number of preferences above and below any given alternative would be infinite, making it impossible to make comparisons.¹⁵² Thus, a numerical range must bind these preferences. Using the example above — with Luke, Emma, and their choices of desserts — we make interpersonal comparisons by comparing the following ratios:¹⁵³

$$\frac{U_e(\text{icecream}) - \min U_e}{\max U_e - \min U_e}$$

Welfare, in *ECONOMICS AND HUMAN WELFARE* 183, 186-88 (Michael J. Boskin ed., 1979), the difference is, I think, irrelevant for our purposes.

149. See Jon Elster & John E. Roemer, *Introduction to INTERPERSONAL COMPARISONS OF WELL-BEING*, *supra* note 125, at 1, 12.

150. See *id.* at 11-12 ("When we think of what it would be like to be handicapped, we are almost unavoidably affected by the thought of what it would be like to become handicapped.")

151. See MacKay, *supra* note 122, at 321-22; see also James Griffin, *Against the Taste Model*, in *INTERPERSONAL COMPARISONS OF WELL-BEING*, *supra* note 125, at 45, 52-59.

152. See Hausman I, *supra* note 125, at 479.

153. See *id.* at 480.

$$\frac{U_I(\text{jello}) - \min U_I}{\max U_I - \min U_I}$$

Where preference satisfaction is the measure of utility, the most common way to gauge it is to use the “zero-one rule,” assigning a value of “0” to the bottoms of everyone’s utility functions and “1” to the tops (this also makes those equations child’s play, since the denominator becomes “1”).¹⁵⁴ Once one has the “correct” cardinal representations of Luke’s and Emma’s (or anyone’s) preferences, then those numbers may be used to make interpersonal utility comparisons.¹⁵⁵ And if one is committed to preference satisfaction as a measure of well-being, the zero-one rule solves the problem of interpersonal comparisons of utilities.

The zero-one rule, however, has been criticized as both false and unfair. Normalizing everyone’s top and bottom is false because it ignores the fact that some people may be capable of experiencing greater satisfaction, or greater dissatisfaction, than others.¹⁵⁶ To use Daniel Hausman’s example, suppose a scientist placed uncalibrated thermometers in different liquids (water, ethanol, benzene, etc.), marked the location on the thermometers where each liquid boiled and froze, and then normalized those intervals using the zero-one rule.¹⁵⁷ He would then be able to make claims that, after storing water and ethanol in the same room for a long time, the ethanol is higher up on its “temperature” scale — “hotter” — than the water.¹⁵⁸ Yet the ethanol and water are the same temperature. The scientist made an

154. *See id.* In the example above, this would make both Luke’s and Emma’s $\max U_e = 1$ and their $\min U_e = 0$. At that point, if we figured out that, on these scales, Luke’s utility from jello is .65 and Emma’s from ice cream is .75, we should choose ice cream (since .75 is greater than .65).

155. *See id.*

156. *See* GRIFFIN, *supra* note 127, at 120; WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 111 (1982); Hausman I, *supra* note 125, at 485. *But see* Frederic Schick, *Beyond Utilitarianism*, 68 J. PHIL. 657, 665-66 (1971). Schick explains that, even if true, different capacities for satisfaction or dissatisfaction should not matter to us:

Some people are said to be capable of greater intensities of feeling than others. The meaning of this is in doubt, and so of course also its truth. But however the claim is understood, I do not see why it should concern us. Adam values his *summum bonum* as highly as he values anything, and his *summum malum* is for him the worst of all possibilities. The same is true for Eve. When then should Adam’s voice on his *extrema* be given any weight different from that given Eve’s voice on hers? Suppose that the two did differ in their capacities for intensity, and indeed differed vastly — why should a fanatic count for more than a person with tired blood? I see no reason why he should, and so have equalized the limits of the utility ranges.

Id.

157. *See* Hausman I, *supra* note 125, at 486-87.

158. *See id.*

error by normalizing the thermometer scales using the zero-one rule.¹⁵⁹ The rule, then, is false with respect to utility comparisons because just as different liquids have different boiling and freezing points, “[i]t is not the case that we all reach the same peaks and valleys.”¹⁶⁰

Although using the zero-one rule to normalize everyone’s preference structure may seem to culminate in the fair treatment of individuals, it may actually produce the opposite result. If we use comparisons based on the rule to distribute goods, for example, the greedy (or more imaginative) will benefit at the expense of the selfless (or less imaginative).¹⁶¹ As Peter Hammond explains:

Consider some undemanding person who achieves his upper bound at a low level of consumption. Do we normalize that person’s utility scale so that it has the same upper and lower bounds as that of a greedy person? If so, and if we distribute goods to each individual so that each achieves, say, 90% of maximum utility (which is now a well-defined utility level), then the greedy person is likely to be given much more than one feels he deserves.¹⁶²

John Rawls also notices the potential price exacted by this solution to interpersonal comparisons, noting that “the zero-one rule implies that, other things equal, greater social utility results from educating people to have simple desires and to be easily satisfied”¹⁶³ Thus, a preference-satisfaction model of utility and its commitment to the zero-one rule may, oddly enough, give rise to unfair distributions of goods and perverse social incentives.

B. *Value Judgments in Interpersonal Comparisons*

The alternative to the zero-one rule, of course, is to place everyone’s preferences on some other, less restrictive universal scale, so that comparisons may be made between them. That is, instead of normalizing the bottoms and tops of everyone’s preference rankings by assigning them the same numbers (such as zero and one), we place them on a more wide-ranging scale. On this view:

We are not forced to say that “‘extent to which preferences are satisfied’ is simply position in a preference ranking”. We can say instead that it is a measure of the intensity of my preference satisfaction; of how high up on

159. *See id.*

160. GRIFFIN, *supra* note 127, at 120.

161. *See* Hammond, *supra* note 127, at 216; Hausman I, *supra* note 125, at 482.

162. Hammond, *supra* note 127, at 216.

163. JOHN RAWLS, A THEORY OF JUSTICE 284 (2nd ed. 1999). This problem stems from assigning too much weight to aspiration levels, and is related to the “happy slave” phenomenon in which people adapt to their current circumstances by lowering their expectations (or aspirations). *See* Elster & Roemer, *supra* note 149, at 6.

the *universal* scale of preference satisfaction I am A person may be at the top of his ranking without being at the top of the universal scale.¹⁶⁴

If Luke, for example, has a greater capacity for satisfaction or more intense desires than Emma with regard to dessert, his preference for jello and ice cream may be represented by, say, 12 and 6 on some universal scale, while Emma's preferences may be 0.9 and 1.2. It would then be clear under many ethical systems that this small society of two would be most satisfied by the choice of jello for dessert. This would at least solve the apparent falsity of the relatively stifling zero-one rule by accounting for the different strengths or intensities of people's preferences.

Once everyone's preferences are placed on the universal scale, we could attempt to solve the fairness problems that might be associated with distributing scarce goods to those with greater capacities for satisfaction, and try to ferret out those who misrepresent their preferences in order to secure more of a scarce good. We might decide that those with greater capacities for satisfaction should get more, or we might use notions like "informed preferences"¹⁶⁵ or "primary goods"¹⁶⁶ to achieve an equitable distribution. In any case, once everyone's preferences are represented on the universal scale, we would have an objective starting point from which we could make interpersonal comparisons and commence the ethical debates about how to distribute goods.

The problem with this solution is, of course, the one discussed in the last several pages: we lack the kind of information that allows us to place people's preferences on some objective, universal scale.¹⁶⁷ We cannot devise a universal scale for ordinal or cardinal utilities because we lack the sort of direct access to the minds of others that we would need to objectively ground our comparisons. There is no omniscient social scientist with the ability to peer into all of our minds, assess our preferences, and make comparisons. We seem, therefore, stuck (or, back where we started): the zero-one rule is flawed because it assumes we all have equal capacities for satisfaction, but we lack the kind of information to objectively pin down just how to make comparisons between people. In other words, we face the basic problem with interpersonal utility comparisons.

So what does all of this mean? Does it mean that we are not really making interpersonal utility comparisons when we think we are? Or

164. Weintraub, *supra* note 125, at 662.

165. John Harsanyi has argued that normative decisions should be based on individuals' rational, fully informed preferences. See John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 311 n.7 (1955).

166. John Rawls has argued that all citizens of a state should have some basic goods and liberties, which he terms "primary goods." See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); RAWLS, *supra* note 163.

167. See, e.g., Hausman II, *supra* note 125, at 99.

that we should not be making such comparisons? Of course not. People obviously make judgments involving interpersonal comparisons all the time.¹⁶⁸ Parents choosing dessert for their children, for example, do their best to compare the strength or intensity of their children's preferences for jello and ice cream. Employers deciding whether to give employees a raise or more vacation time assess which option their employees favor and how strongly they favor it. Governments make scores of redistribution decisions based, at least in part, upon assessments of where the distributed goods will bring about the greatest utility, or satisfy the most people.

The important conclusion to be drawn from the problem of interpersonal utility comparisons, then, is not that one cannot make them, but that they are, in a sense, value judgments necessarily involving complex normative considerations.¹⁶⁹ Even Lionel Robbins, whose views on interpersonal comparisons prompted generations of moral theorists and economists to avoid such comparisons, did not conclude that they are impossible, just that it is silly to think they rest on a "scientific" basis.¹⁷⁰ They cannot be tied down with the kind of neutral, value-free empirical evidence that positivist philosophers and economists desire.¹⁷¹ Once one accepts the fact that we cannot make meaningful interpersonal comparisons in a neutral manner, the problem of making them begins to disappear. In a real sense, the desire to avoid value judgments is the main problem of interpersonal comparisons.¹⁷²

168. Indeed, Amartya Sen, in a decidedly optimistic moment, described the problem of making systemic interpersonal comparisons of welfare as "not one of poverty, but of an embarrassment of riches." See Sen, *supra* note 148, at 184. That moment notwithstanding, most (or all) of the non-normative interpretations of interpersonal comparisons have been criticized on a number of grounds.

169. See JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME 220 (1991); GRIFFIN, *supra* note 127, at 119-20; Hammond, *supra* note 127, at 226, 236-37; Scanlon, *supra* note 125, at 18, 44.

170. See ROBBINS, *supra* note 128, at 140-41.

171. This is not to say that there are *no* descriptive (that is, non-normative) interpretations of interpersonal comparisons. There just are not any that are both descriptive and adequate. Sen, for example, catalogues three types of descriptive interpretations: behaviorism, introspective welfare comparisons, and introspective *as if* choice. See Sen, *supra* note 148, at 185. The latter two interpretations are versions of the "mental shoehorn maneuver," and thus share the problems of that approach, discussed *supra* text accompanying notes 138-151. See Sen, *supra* note 148, at 186-88. Behaviorism involves using behavior as the basis for making comparisons of mental states. *Id.* But such an interpretation of interpersonal comparisons depends upon the existence of some agreed-upon criteria linking behavior to mental states, which is something that we do not have, especially when it comes to more complex mental states. See *id.* at 186. Behaviorism may also fail to deal satisfactorily with strategic misrepresentations (people play-acting in order to secure more of a scarce good). So while a behaviorist approach to interpersonal comparisons is a descriptive one, it, like the many versions of the mental shoehorn maneuver, may fail to describe adequately the mental states that we want to compare.

172. See Scanlon, *supra* note 125, at 18. As he further explains:

In order for a form of interpersonal comparisons to be morally significant, what is compared must be related to the good of the individuals in question. But a familiar moral idea of

Once we accept this, we can reconcile ourselves to the fact that deciding how much weight to assign to one person's preferences compared to another's involves making a fundamental value judgment.¹⁷³

The answer to the question whether we should be making such comparisons must be an unequivocal "yes." This is so because almost all decisions regarding the distribution of goods (including maintaining the status quo, for there is no value-free default to fall back upon) involve some interpersonal comparisons. From simple decisions between two children squabbling over a choice of dessert to more complex ones involving tax-code revisions, we have to figure out how much the people involved want something, and then decide how to parse it out in a way that maximizes happiness. Thus, despite our best attempts, we cannot make the neutral, scientific interpersonal utility comparisons that the positivist economists thought necessary to make value-free decisions about the distributions of goods. Instead, every one of those decisions involves the very type of value judgment that they sought so hard to avoid.

III. IMPLICATIONS FOR VOTING RIGHTS

The problem of interpersonal utility comparisons should directly reveal something about the nature of quantitative vote dilution and the equiproportional standard used to measure it. Because voting is a way to reveal preferences and counting votes is a procedure to aggregate those preferences, assigning numerical weights to votes necessarily means making some judgment as to the proper weight assigned to each voter's preferences. And that, of course, means we have made an interpersonal utility comparison.

This relationship between interpersonal utility comparisons and quantitative vote dilution tells us several things about the nature of the equiproportional standard, and I deal with each in turn. First, the relationship confirms that there is nothing objective or neutral about the standard. Second, it explains our collective attraction to the standard

Neutrality seems to demand that the interpersonal comparisons we make in ethics not be based on our own judgments about what makes a life better for the person who lives it, all such judgments being deferred instead to the preferences of the individuals whose lives are being compared. The clash between these two moral ideas leads to an impasse.

Id. at 44.

173. The process of moving from normative judgment to interpersonal comparison, of course, works both ways. As John Broome explains:

It is not as though, when we make ethical comparisons of distributions across people, the betterness ordering of the distributions must be given in advance, so that we simply find out from this ordering the quantitative scales of good for individuals. To some extent we may already have an idea of how one person's good compares with another's, which we can use to form judgements about the goodness of alternative distributions, and to some extent we may already have an idea of what distributions are better than others.

BROOME, *supra* note 169, at 220.

and, somewhat paradoxically, our acceptance of certain constitutional exceptions to it. In this vein, it also allows us to connect the concept of quantitative vote dilution to the other two aspects of voting rights — the right to exercise the franchise and the right to do so in a way free from qualitative dilution. Third, recasting the equiproportional standard in terms of making interpersonal utility comparisons gives rise to some normative suggestions for restructuring the law governing voting rights.

A. *Why There Is Nothing Objective About One Person, One Vote*

The issues surrounding interpersonal utility comparisons make clear that there is nothing neutral or objective about a decision to assign equal numerical weight to each vote.¹⁷⁴ To be objective, a quantitative vote dilution standard would need to be tied in some transparent way to the most relevant external object — here the relative strengths of the preferences that an election is intended to reveal and aggregate. The neutral way to connect the two together would be to calibrate the weight of every person's vote with the strength of her preference: those who care the most about the outcome of an election receive the highest-weighted votes, those who least care about the outcome get the lowest-weighted votes, and those somewhere in between receive something in between. In such a system, the vote dilution standard is that each person's vote is given a weight that matches the strength of her preference; as more or less weight is assigned to her vote, it concentrates or dilutes her voting power. In this world, each individual would get to have her say in as many different elections as she cared to, in exact proportion to the strength of her preferences.¹⁷⁵

In discussing the assignment of weights to votes based on preference strength, I am making what is mainly a descriptive point. Even with perfect information about everyone's preferences and a method to make comparisons between them, there may be many reasons why we would not want to tie the weight of someone's vote to the strength of her interest in an election. Some (members of some minority groups, for example) may not care that much about the outcome of elections because they have effectively been shut out of the political system for so long. In essence, they have been trained to want and expect less. Their resulting political indifference should not doom them

174. The basic point that the equiproportional standard involves some sort of normative judgment is not new. *See, e.g.*, HASEN, *supra* note 32, at 4-6. But I think the more specific point of why, exactly, it does so is new and helps fill in Rick Hasen's list of why process theory fails to provide an adequate foundation for the standard. *See id.*

175. Of course, other forms of political activity besides voting, such as running for office or making campaign contributions, may involve more calibrated expressions of utility, but they are beyond the scope of this Article.

to a lightly weighed vote. Some (young children, the insane) may have skewed ideas about what is good for them — so skewed that we make a collective decision to override their particular preferences and do what we think is in their best interest. That is, regardless of the strength of their preferences, we think the content should not be reflected in political outcomes. And awarding votes or voting weight based on strength of preference is also a good way to reward hotheads or those easily dissatisfied, since both groups always feel more strongly about the outcome of an election than those with a little more tolerance. In other words, there are many reasons why strictly tying voting weight to preference strength may be a very bad idea.

That said, there is a great deal of evidence that we do in fact correlate the right to vote and the right to have one's vote accorded a certain weight to the strength of one's preferences.¹⁷⁶ When it comes to the right to cast a ballot, controversy often revolves around which people have sufficient interest in the outcome of an election to allow them to vote.¹⁷⁷ That is, both sides in a debate over the extension of the franchise often point to the strength of a person's interest in the election, and the corresponding strength of their preferences regarding its outcome. This is true of many franchise restrictions, from the early property-holding requirements to the modern-day residency requirements.¹⁷⁸ And it is true of some of the exceptions to the one person, one vote requirement carved out by the Supreme Court.¹⁷⁹ Thus, assigning voting strength in proportion to preference strength is something that is, in effect, built into many aspects of our democracy.

Although we can be pretty certain that people care about elections to differing degrees, we lack a foolproof way of figuring out how much they care, and, therefore, we are unable to make comparisons between them.¹⁸⁰ There is no objective way to devise a standard of quantitative vote dilution that ties the weight of each person's vote to the intensity of her preferences. Importantly, this conclusion about the lack of an objective standard applies both to standards that assign votes *different* numerical weights and to standards that assign them the *same* weight.

176. I tend to think we do this mainly for reasons of efficiency, not justice. That is, we do it because we think people will make better decisions when they have something at stake in the outcome of an election.

177. For a more thorough discussion of this point, see *infra* Part III.B.2.

178. See *infra* Part III.B.2.

179. See *infra* Part III.B.1-2.

180. This was the whole point of Part II.

We would, of course, have to make all sorts of other decisions regarding the allocation of voting power in such a system. We would have to worry about the fact that such a system would give people with a greater capacity for satisfaction more political power than the easily satisfied. We would also have to worry about people strategically misrepresenting the strength of their preferences in order to garner more political power. But all of these considerations do not make the equiproportional standard any more objective.

That is, the equiproportional standard is only objective in this sense if people have identically strong (or weak) preferences about the outcome of an election — and we cannot know that any more than we know the exact degree to which their preferences vary. Weighting votes equally, then, is no more objective than weighting them unequally and, indeed, we may very well have good reason for thinking votes should be given different weights because people care about elections to different degrees.

But what if, as discussed above, the relevant object is not the strength of people's preferences but something else, like something fundamental to the concept of democracy? Don't basic notions of democratic fairness demand that each person's preferences, regardless of how strongly held, be given the same amount of weight? Doesn't the one person, one vote standard merely replicate a basic decision about political equality that we have already made in countless other areas?

Well, in a word, no — at least not in our democratic system.¹⁸¹ We do not pretend to assign *every* person's preferences exactly the same weight in any of our democratic institutions. This is true of, among others, the U.S. Presidency, the U.S. Senate, and the federal and state judicial systems. It is also true of institutions subject to the equiproportional standard, such as Congress and state legislatures, for most people are prevented from voting in most elections (because of residency requirements, for example) and some are prevented from voting in any election (because of rather ubiquitous citizenship requirements, for example). And, of course, arguments that such institutions are actually undemocratic precisely because they do not adhere to the one person, one vote principle involve question-begging of the worst sort.

Thus, the first thing the problem of interpersonal utility comparisons reveals about the one person, one vote standard is that Justice Frankfurter was right: there is nothing in our conception of democracy that requires the standard. Instead, it is a normative choice among many "competing bases of representation."¹⁸² Just as philosophers and economists failed in their search for an objective, value-free way to make interpersonal comparisons of people's preference satisfaction, political theorists must fail in their search for a standard way of aggregating those preferences into a social choice. The early reapportionment cases did not involve the judiciary in subjective political decisions just because they inevitably entangled it in the qualitative vote dilution cases (although that did happen). Instead, they did so quite

181. See DAHL, *supra* note 91.

182. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); see also Charles, *supra* note 85, at 1126-29 (discussing the roots of Justice Frankfurter's objections to *Baker*).

directly, by deciding upon a certain correct weighting of votes without reference to the strength of the preferences that those votes revealed. At that point, whether they knew it or not, the Justices were already pretty deep into the political thicket.

B. *Toward a Unified Theory of Voting Rights*

1. *Why We Use the One Person, One Vote Standard*

So why do we continue to apply the equiproportional standard to some of our most important governmental institutions? The answer is, I think, somewhat counterintuitive: we use the one person, one vote standard in order to avoid making interpersonal comparisons of utility. This reason helps explain both the exceptions to the standard and the relationship between quantitative vote dilution and access to the ballot box.

Viewing the equiproportional standard as the result of an unwillingness to evaluate the strength of personal preferences is counterintuitive because the standard appears to embody a positive judgment of political equality, not a negative judgment of futility or avoidance. That is, it is a judgment that everyone has about the same level of interest in the outcome of an election so they should all have their preferences assigned equal weight. Few would argue that we all actually have the perfectly equal interests in the outcome of an election that would justify the slavish adherence to the standard demanded by the Supreme Court for congressional districts. Nonetheless, there may be a positive judgment that, in congressional or state-legislative elections, the interests of those within the country or state are more or less the same, and the interests of those outside the state are significantly lower (close to zero, given that they do not have the opportunity to vote).

But does anyone really believe that everyone within a particular district has about the same interest in an election, or is it that we just lack the kind of information needed to make a more fine-tuned assessment of each person's preferences? I tend to think that it is the latter. If, for example, I live in Connecticut, work in New York, vacation every summer in my second house in Vermont, and have an ailing mother in Kansas, and you live in, work in, and never want to leave Connecticut, it would be ridiculous to describe the strength of our respective interests in the elections of Connecticut, New York, Vermont, and Kansas as (1, 0, 0, 0) and (1, 0, 0, 0). But it would also be perfectly reasonable to say that we could never come close to having the kind of detailed information about the strength of every person's interest in every possible election to allow us to assign and weight votes more

precisely.¹⁸³ Which is why I think use of the equiproportional standard involves a negative judgment, a default that we apply in the many cases in which we lack the kind of detailed information needed to tie the weight of one's vote to the intensity of his preferences more precisely.

The Supreme Court's failure to adopt a consistent notion of equality in the more straightforward quantitative vote dilution cases betrays its reluctance to make substantive judgments without more detailed information about the strength of voter interest. As Heather Gerken has explained, the Court's failure appears to stem from discomfort with the structural or group-based aspects of the one person, one vote claims.¹⁸⁴ A discomfort with group-based claims is a discomfort with making what are obviously substantive political choices — choosing winners and losers in the democratic arena. Thus, when contemplating this facet of the quantitative dilution claims, the Court feels ill-equipped, for whatever reason, to make the substantive political decisions these cases demand. But, of course, the one person, one vote standard is itself a substantive political decision, so the Court has at best fooled itself into thinking that it has extricated the judiciary from making political choices.

This conclusion is also confirmed by and helps explain some of the exceptions to the one person, one vote standard, and, more broadly, accounts for the link between quantitative vote dilution and access to the ballot box. When we do have (or think we have) more detailed information about the strength of voter preferences, we allow exceptions to the one person, one vote standard. (Indeed, as discussed below, we even allow states to withhold the franchise completely.) In such situations, states will often establish a method of weighting votes that corresponds to some proxy for strength of voter interest.¹⁸⁵

The exemption given to special-purpose districts is a good example of this principle. The one person, one vote standard applies to only those local governmental units¹⁸⁶ that exercise “general governmental powers,” including carrying out the common functions of a municipal

183. Along these lines, Gerald Frug has suggested a plan where everyone receives five votes that they may cast in whatever local elections they feel affect their interests. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 106-07 (1999). Allowing voters to define their own interests would surmount some of the hurdles in coming up with detailed information on voter preferences.

184. See Gerken, *supra* note 88, at 1457-66.

185. Of course, the dominant rule in corporate governance is the one *share*, one vote principle, which allows shareholders to cast votes weighted in proportion to their financial stake in the corporation. See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1945 (1996).

186. See, e.g., *Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970) (applying the equiproportional standard to a junior college district); *Avery v. Midland County*, 390 U.S. 474 (1968) (applying the equiproportional standard to a county).

government.¹⁸⁷ We would expect such a governmental body to affect all within its power to more or less the same degree, and would therefore expect people to have more or less the same strength of preferences as to the representatives on that body. It would make sense, then, to apply the equiproportional standard in these districts (if anywhere). In *Avery v. Midland County*, however, the Supreme Court reserved the issue of whether the equiproportional standard applied to local governmental units that did not affect all within their power to the same degree, stating:

Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions.¹⁸⁸

The Court would soon confront the status of these "special-purpose districts" in a case involving California's Tulare Lake Basin Water Storage District.¹⁸⁹

The Tulare Lake water district covered 193,000 acres of farmland inhabited by seventy-seven people, most of whom were employees of one of four large corporations that farmed land in the district.¹⁹⁰ The district was in charge of the acquisition, storage, conservation, and distribution of water.¹⁹¹ To that end, it had the power to acquire and improve property, generate and distribute hydroelectric power, charge for water, and assess costs associated with these activities in accordance with the benefits accruing to each tract of land.¹⁹² An elected

187. See, e.g., *Hadley*, 397 U.S. at 54; *Avery*, 390 U.S. at 484-85; see also *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 694-96 (1989). *Morris* provides a good example of a governmental entity that exercises general governmental powers:

New York law assigns to the board a significant range of functions common to municipal governments. Fiscal responsibilities include calculating sewer and water rates, tax abatements, and property taxes on urban development projects. The board manages all city property; exercises plenary zoning authority; dispenses all franchises and leases on city property; fixes generally the salaries of all officers and persons compensated through city moneys; and grants all city contracts. . . .

In addition, and of major significance, the board shares legislative functions with the city council with respect to modifying and approving the city's capital and expense budgets. The mayor submits a proposed city budget to the board and city council, but does not participate in board decisions to adopt or alter the proposal. Approval or modification of the proposed budget requires agreement between the board and the city council.

Id.

188. *Avery*, 390 U.S. at 483-84.

189. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). Nearly a decade later, the Court confronted another water district and reached a similar result. *Ball v. James*, 451 U.S. 355 (1981).

190. *Salyer Land Co.*, 410 U.S. at 723.

191. *Id.*

192. *Id.* at 723-24.

board of directors governed the water district. The elections, however, were limited in that only landowners could vote, and their votes were apportioned according to the assessed valuation of the land they owned (sort of a one acre, one vote system).¹⁹³ As a result, one corporate landowner had 37,825 votes, while other, smaller landowners had only one vote.¹⁹⁴ The latter brought suit alleging that the voting scheme violated the one person, one vote requirement of the Equal Protection Clause.¹⁹⁵

The Supreme Court disagreed. In doing so, the Court carved out the "special-purpose district" exception to the one person, one vote requirement,¹⁹⁶ and further found that the proportionate voting scheme used in its place had a rational basis.¹⁹⁷ This was so, the Court reasoned, because the board's powers were limited such that its actions disproportionately affected landowners (as opposed to mere residents),¹⁹⁸ and that benefits and burdens fell on landowners in proportion to the amount of land they owned.¹⁹⁹ Landowners have a greater interest in, and care more about, the storage and distribution of water in the Tulare Lake water district, and the strength of their interest roughly corresponds to the amount of land that they own.

This case, therefore, is an example of one in which we think we have some information about the relative strength of people's preferences, and can make the kind of interpersonal utility comparisons that allow us to deviate from the one person, one vote principle.²⁰⁰ Even Justice Douglas, writing in dissent, did not really disagree with the fundamental notion that there may be times when an exception of this

193. *Id.* at 724-25.

194. *Id.* at 733.

195. *See id.* at 724-27. The plaintiffs also contended that the scheme, by requiring voters to own land, resulted in a denial of their equal protection rights. *Id.* at 730.

196. *Id.* at 730.

197. *Id.* at 734.

198. *Id.* at 729.

199. *Id.* at 734.

200. This reasoning has been applied in many cases where the actions of a local governmental entity disproportionately affect people. *See, e.g.*, *Porterfield v. Van Boening*, 744 P.2d 468 (Ariz. 1987) (irrigation district); *Arizona Farmworkers Union v. Agric. Employment Relations Bd.*, 712 P.2d 960 (Ariz. Ct. App. 1985) (union-representation district); *Schindler v. Palo Verde Irrigation Dist.*, 82 Cal. Rptr. 61 (Cal. Ct. App. 1969) (irrigation district); *Thompson v. Bd. of Directors*, 55 Cal. Rptr. 689 (Cal. Ct. App. 1967) (irrigation district); *Chesser v. Buchanan*, 568 P.2d 39 (Colo. 1977) (tunnel-improvement district); *Stelzel v. S. Indian River Water Control Dist.*, 486 So. 2d 65 (Fla. 1986) (water-control district); *State v. Frontier Acres Cmty. Dev. Dist.*, 472 So. 2d 455 (Fla. 1985) (community-development district); *Lake Howell Water & Reclamation Dist. v. State*, 268 So. 2d 897 (Fla. 1972) (drainage district); *Goldstein v. Mitchell*, 494 N.E.2d 914 (Ill. App. Ct. 1986) (drainage district).

Sanford Levinson muses about a few other possibilities in this regard, such as giving lawyers an extra vote in judicial elections because of their special knowledge of and interest in such elections. *See Levinson, supra* note 88, at 1276-77.

kind is appropriate;²⁰¹ instead, he just believed that this was not one of those times. In his opinion, the board took actions that affected all within the district (such as managing flood control), and so everyone had an interest in the elections.²⁰² But all members of the Court shared the notion that the strength of one's interest in an election bears some relationship to the weight assigned to one's vote.

The special-purpose-district cases show us two things. First, they show that the Court is willing to allow states to parse out votes in relationship to the strength of a voter's interest in the outcome of the election. This tells us that in some fairly extreme cases, when we think we have enough information about voter preferences to make interpersonal comparisons of utility, we allow certain tailored exceptions to the one person, one vote standard. Second, the special-purpose-district cases show that the Court will allow a state to — right off the top — restrict voting eligibility to one particular class of people (in this case, landowners).²⁰³ This is something that may be quite obvious, but brings us to the second point of this Part: that in addition to explaining some of the exceptions to the equiproportional standard, the problem of interpersonal utility comparisons helps explain the reasoning behind restricting the franchise outright, and thus the relationship between the right to cast a ballot and the right to cast an equally weighted ballot.

2. *Quantitative Vote Dilution and Access*

That the right to cast a ballot and the right to cast an equally weighted ballot are somehow connected should not be surprising. The Supreme Court in *Reynolds v. Sims*, in oft-quoted language, noted that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”²⁰⁴ Practically speaking, numerically diluting a vote can, in extreme cases, have the same effect as denying the right to vote altogether, and thus our voting rights laws protect against both. But interpersonal utility comparisons tell us that the two types of voting rights are not only related because of a similar effect; they are also, to some extent, produced by the same cause.

The special-purpose-district cases show that we allow states to vary the numerical power of one's vote when we think we have good information about the varying degrees of interest that people have in the

201. *Salyer Land Co.*, 410 U.S. at 736-37 (Douglas, J., dissenting).

202. *Id.* at 737-38 (Douglas, J., dissenting).

203. See *Ball v. James*, 451 U.S. 355, 370-71 (1981); *Salyer Land Co.*, 410 U.S. at 726-30.

204. 377 U.S. 533, 555 (1964); see Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549, 550 (1985) (describing both the relative weight given to votes and the exclusion of some persons from the franchise as “distributional” issues).

outcome of the election. At some point, however, we make a judgment that certain people have so little interest in an election that they should not vote at all. While there is always disagreement about which people have an interest sufficient to allow them to vote, the two sides of any such debate seem to acknowledge the underlying principle that we can make the decision based, at least in part, on the strength of the person's interest in the election, and the corresponding strength of their preferences about its outcome.²⁰⁵ Historical and contemporary examples help illustrate this point.

At this country's founding, many states limited suffrage to white men who owned a certain amount of property.²⁰⁶ One of the principal justifications for these freehold requirements was the idea that those who possessed real property "had a unique 'stake in society' — meaning that they were committed members of (or shareholders in) the community and that they had a personal interest in the policies of the state, especially taxation."²⁰⁷ In the early nineteenth century, when states replaced property requirements with taxpaying requirements, they, too, were justified by arguments that only those with a stake in the community should be able to vote,²⁰⁸ and that only those who share the burdens of government should have a voice in it.²⁰⁹ (In other words, "no representation without taxation.") Both of these early economic restraints on the franchise, then, were justified by the argument that the right to vote should only be extended to those most affected by and interested in the business of government.

One contemporary set of restraints on the exercise of the franchise — so widespread that they are rarely analyzed as such — are residency requirements.²¹⁰ These, too, are justified by the assumption that only those who live within the territory under the control of a government-

205. See Melvyn R. Durchslag, Salyer, Ball, and Holt: *Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1, 38-39 (1982) (discussing the fact that "'interest,' implicitly or explicitly, must be the touchstone of the Court's analysis" of several types of voting rights cases).

206. For a list of the property and taxpaying requirements in the colonies and states between 1776 and 1855, see KEYSSAR, *supra* note 8, at app. tbls.1-3.

207. *Id.* at 5; see also Glenn P. Smith, Note, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 TEXAS L. REV. 1153 (1996).

208. See KEYSSAR, *supra* note 8, at 131.

209. See *id.* at 50.

210. Mere residency requirements, sometimes called bona fide residency requirements, are not to be confused with *durational* residency requirements. Durational residency requirements, which require an extended period of residency before one becomes eligible to vote, were often instituted to diminish the political power of certain, more itinerant groups. See KEYSSAR, *supra* note 8, at 146-51. The Court later declared such requirements unconstitutional unless "necessary to promote a compelling governmental interest," *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (emphasis and citations omitted), although it did allow states to require voters to register thirty days in advance of an election, *id.* at 347.

tal body have enough of a stake in the government to vote.²¹¹ Indeed, residency requirements, like the equiproportional standard, sometimes find justification in the fact that they are easily managed.²¹² In other words, it is too difficult to figure out which nonresidents have a sufficient stake in an election, so we use a residency default as a proxy for such an interest.²¹³ While academics and litigants have challenged such requirements, they usually leave the assumption untouched. Again, the quibble is that residency, or lack of it, does not serve as a very accurate proxy for the strength of one's preferences in the outcome of an election.²¹⁴ Those who live in one city or state and work in another argue that they have enough at stake in their workplace that they should be allowed to vote in its jurisdiction, and those who own vacation homes argue that they too are sufficiently interested in the jurisdictions where their homes are located. All seem to agree that the key to the right to vote is having a sufficient interest in the outcome of the election. And, just as it is with the exceptions to the equiproportional standard, the common root of such arguments is that we can make the kind of interpersonal utility comparisons that would allow us to make informed judgments about different people's levels of interest, and thus their rights to vote or their rights to an equally weighted vote.

The Supreme Court was most explicit about the constitutional status of interest-based exclusions from the franchise in *Kramer v.*

211. See Smith, *supra* note 207, at 1159 (explaining that, in the 1960s, residency became "the sole proxy for electoral interest. Residency — and, in most cases, residency alone — became the standard for granting suffrage to qualified potential voters."). This is not to imply that such a justification is the only justification for residency requirements. They were also imposed in order to limit the voting power of recent immigrants, KEYSSAR, *supra* note 8, at 147-51, and to prevent fraud by those who would temporarily move a large group of people into a jurisdiction in order to win an election, *id.* at 148.

212. See, e.g., Kollar v. City of Tucson, 319 F. Supp. 482 (D. Ariz. 1970) (finding an Arizona law limiting voting in municipal water-bond elections to municipal residents to be constitutional despite the fact that nonresidents may have had a pecuniary interest in the elections).

213. See *id.* at 485 ("To allow the municipal franchise to [extend to] all persons with a pecuniary interest would not permit of a manageable standard or adequately define a cohesive interest group of electors.").

214. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978) ("The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders."); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1132 (1996) ("Boundaries exclude people who may be interested in or affected by the decisions made within the boundaries.").

For this reason and others, some scholars have suggested decoupling voting from residency. See Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1187-89 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909 (1994); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 324-25 (1993). For a critique, see Briffault, *supra*, at 1158-62.

Union Free School District.²¹⁵ *Kramer* involved a challenge to a voter-qualification statute for school-district elections that limited the franchise to people who either (a) owned or leased taxable real property within the district, or (b) had children enrolled in the district's schools.²¹⁶ While the Court rendered the statute unconstitutional because the restrictions were not narrowly tailored (they included some uninterested people and excluded some interested ones),²¹⁷ the Court assumed that a state may limit the franchise to the portion of the electorate 'primarily affected' by the outcome of an election if it demonstrates that "all those excluded are in fact substantially less interested or affected than those the [franchise] includes."²¹⁸ Thus, the Court did not question the assumption that people might be classified into two groups — voters and nonvoters — based upon the level of their interest in the election.²¹⁹ And, as discussed above, the Court allowed just such a classification in the case of special-purpose districts.

Of course, governmental restrictions on the franchise are not the only way to calibrate voter participation with voter interest. Eligible voters may (and undoubtedly often do) decide on their own that a particular election does not merit the time or energy required to actually

215. 395 U.S. 621 (1969).

216. *Kramer*, 395 U.S. at 622.

217. *See id.* at 632. As an example, the Court explained:

[A]ppellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.

Id. at 632 n.15.

218. *See id.* at 632. Rick Hasen, among others, argues that the Court used a "judicial sleight-of-hand" in moving from the state's argument with respect to a voter's objective interest in an election to the plaintiff's subjective interests in an election in deciding that the law was not narrowly tailored enough to pass constitutional scrutiny. *See* HASEN, *supra* note 32, at 63-64; *see also* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 354-56 (1993). While this may be true, I do not think the distinction between objective and subjective interests ultimately has any bearing on this issue here. If anything, it supports the argument that the Court, despite its concern with the level of voter interest, finds making such individualized assessments to be practically impossible.

219. In a similar vein, with respect to the poll tax successfully challenged in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), John Hart Ely explained that, despite the fact that the Court found the tax to be irrational, "[i]t may also be true, or at least it is not irrational to think so, that persons of some wealth tend to be more 'responsible' citizens or, more plausibly still, that willingness to pay a fee for voting is some reflection of serious interest in the election." ELY, *supra* note 50, at 120. Other contemporary restrictions on the franchise, such as citizenship requirements, have also been subject to this type of interest analysis. *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1441-45 (1993) (listing the "classical democratic" arguments for alien suffrage).

vote.²²⁰ Without delving into the voluminous literature on voter turnout,²²¹ it suffices for these purposes to say that at least one of the reasons people do not vote is that they do not care enough about the outcome of the election. But like governmental restrictions on the right to vote, individual decisions to vote only crudely reflect preference strength — people's interest in the election either reaches a particular threshold point at which they vote, or it does not. There is no way to weight a vote in a way that might reflect preference strength in a more nuanced way. But, like outright denials of the franchise, the issue of voter turnout may be amenable to this kind of analysis.

3. *Quantitative and Qualitative Vote Dilution*

Analyzing the equiproportional standard as an exercise in making interpersonal utility comparisons may also tell us that quantitative and qualitative vote dilution are, at some core level, the same thing.²²² This is true for a couple of reasons.

First, because it is impossible to make objective interpersonal comparisons, quantitative vote dilution standards — whether equiproportional or, in a more obvious case, interest-based standards sometimes used in special-purpose districts — stand on judgments every bit as subjective as those used in qualitative vote dilution decisions.²²³ This both confirms and strengthens the argument for what some commentators have been saying for a long time: that the right to a numerically undiluted vote, like the right to a qualitatively undiluted vote, is best viewed as a group right.²²⁴ In both cases, we must make a normative

220. Voluntary decisions not to vote seem different than mandatory restrictions on the franchise, but, either way, if the person does not vote, her preferences are not reflected in the social choice, and there is a relationship between interest and the lack of a vote.

221. See generally FRANCES FOX PIVENS & RICHARD CLOWARD, *WHY AMERICANS DON'T VOTE* (1989) (discussing various theories for low voter turnout).

222. Barbara Phillips makes a similar point, but the basis for her claim is, I think, somewhat thinner. She notes:

Ultimately, it becomes apparent that all vote dilution claims allege injury of essentially the same character. Therefore, it is inappropriate for the Court to apply differing standards to dilution claims depending upon the descriptive nature of the challenged aggregation practice. That the aggregation's deficiency can be attributed to a group characteristic of location, race, language, or political affiliation should be irrelevant to the constitutional inquiry.

Phillips, *supra* note 118, at 583. But it appears that the only common point for her is that all types of dilution claims affect the ability to aggregate votes. That, I think, is true (and is also true of the access cases — since if you cannot vote, you cannot aggregate your vote with those of other like-minded people), but incomplete — for if this is the only connection, it is still quite possible that different sorts of dilution affect a group's ability to aggregate votes in different ways, and thus may require different standards and solutions.

223. See *supra* Part III.A.

224. See, e.g., GUINIER, *supra* note 2, at 124-25; Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 n.30 (1998); Karlan, *The Rights To Vote*, *supra* note 114, at 1717-18.

judgment about which groups of people we will allow to aggregate votes to elect someone to represent their interests. The seductive appeal of the one person, one vote standard has led us to believe that it is somehow based on an individual right and is therefore more neutral or objective. It is not.

Second, and more importantly, the two types of vote dilution may also be related because membership in a particular group, in addition to telling us something about the content of an individual's preferences, tells us something about the strength of those preferences. On a general level, we may describe membership in a political community in terms of shared interest in the outcome of an election. That is, the fact that a particular group of people will experience the impact of a given election more acutely than others helps to define the group.²²⁵ All of those living in an agricultural valley may have a particular interest in water-distribution issues. They may disagree among themselves, but they all have relatively strong interests at stake in — and therefore intense preferences about — a water-board election. Those living in the South may have a strong interest in civil-rights issues. Again, whites and blacks in the South may generally be on opposite sides of such issues, but they all feel strongly about them.

Moreover, within these groups, there are subgroups (farmers or homeowners, whites or blacks) that not only have strong interests in an election, but also share an opinion as to the preferred outcome.²²⁶ Members of such groups are likely to have particularly strong preferences, both because people with strong preferences are initially more likely to identify as part of a group that shares their political objectives and because membership subsequently reinforces the nature and strength of those preferences. (This may also wash out the typical distinction drawn between individual and group rights. People are placed in groups for the purposes of voting based in part on real or perceived individual interest, and that membership in the group, in turn, forms and informs individual interest.)

The fact that certain groups share preferences with similar content and of similar strength provides this second connection between qualitative and quantitative vote dilution. Qualitative vote dilution, as discussed above, occurs when people are unable to combine their votes with those of other like-minded people in a way that allows them to have a chance of electing a candidate of their choice.²²⁷ The presence of a group of like-minded people, then, is a necessary prerequisite to any claim of qualitative dilution. It is for this reason that one must prove membership in a group that is “politically cohesive” in order to

225. See Calhoun, *supra* note 204, at 579-80.

226. *Id.* at 579-80 & n.150.

227. See *supra* note 6 and accompanying text.

bring a claim under section 2 of the Voting Rights Act.²²⁸ But because membership in a politically cohesive group may tell us something about the strength of a person's preferences, we may use it to calibrate the numerical weight of that person's (or group's) vote as well. The fact that a group has a potential qualitative vote dilution claim may tell us that it is also a group whose votes should receive more weight.²²⁹ The remedy, then, may be both to redraw district lines to provide more majority-minority districts and to reduce the size of those districts to concentrate the vote numerically.²³⁰ And all of this comes about because the relationship between group membership and preference strength provides the link between the concepts of qualitative and quantitative vote dilution

4. *Some Implications for Voting Rights Law*

The insights gleaned from viewing voting rights as a function of interpersonal utility comparisons may help reframe some of the theoretical problems associated with voting rights. It makes clear that a districting decision based on the one person, one vote standard is no less subjective than a decision about who gets to vote and about how, exactly, district lines are drawn. It also ties the three types of voting rights together at some fundamental level. The ultimate issue, though, will be what all of this means for the legal status of the various types of voting rights. And though the full implications are beyond the scope of this Article, I do wish to offer some preliminary thoughts on the subject.²³¹

The first and most obvious implication is that, to the extent that the quantitative vote dilution cases receive special legal treatment as a result of the fact that the one person, one vote standard is a more "objective" basis for judicial decisionmaking, we need to either justify that treatment on some other basis or eliminate it. Quantitative vote

228. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). This is discussed in greater detail *infra* Part III.B.4.

229. This argument, one might suppose, could also militate in favor of numerically concentrating the voting power of white voters in a typical qualitative vote dilution case, because such cases require the presence of both minority *and* majority racial bloc voting. See *id.* But there are at least two preliminary answers to this possible implication. First, there is usually a much higher degree of bloc voting among minority groups than among majority groups in the typical vote dilution case (in other words, there are usually more white crossover voters than black or Hispanic crossover voters). Second, nothing in my argument prevents one from making a further normative decision to numerically concentrate the votes of one group over another group with equally strong preferences. Indeed, the argument is that all of these decisions involve substantive political choices.

230. This is discussed more fully *infra* Part III.B.4.

231. For more extended thoughts on the subject, see Grant M. Hayden, *Beyond One Person, One Vote: Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. (forthcoming Dec. 2004).

dilution claims involving state legislative districts are typically brought under the Equal Protection Clause, but, unlike other such claims, they do not require proof of discriminatory intent.²³² That, coupled with the Court's low tolerance for population deviation, means that the moment the census figures are released, almost every existing districting plan is unconstitutional.²³³ This, in turn, licenses "a race to the courthouse" by plaintiffs who, while perhaps not overly concerned with the numerical disparities, see them as an opportunity to present remedial plans that favor their particular interest.²³⁴

These doctrinal and temporal privileges afforded to the one person, one vote claims appear to find roots in the objective nature of the standard; districts with different populations are so obviously wrong that they need to be remedied without regard to intent or any other evidence that they substantively affect a particular group's vote. While I do not think the Court should require proof of discriminatory intent (or, at least, what the Court considers adequate proof of such intent) in any equal protection claims, the point here is that, either way, it should not treat the one person, one vote cases more leniently. An intent requirement, coupled with a relaxation of the Court's strict numerical rules regarding apportionment bases, would go a long way in this direction.

A second set of suggestions for legal reform comes from the relationship between quantitative vote dilution and access to the polls. Currently, one either has the right to vote or not, and one is either counted in the apportionment base or not. But if both access to the polls and quantitative voting power are a function of preference strength, we should, in some cases, be able to do better. That is, if possible — because we have sufficiently detailed preference information — and when appropriate, we should be able to tailor voting power to certain groups.

One example of this involves resident aliens.²³⁵ Resident aliens have vital political, economic, and social interests in the towns, states, and country in which they live.²³⁶ They thus have much at stake in most elections, and we would reasonably expect them to have prefer-

232. See, e.g., *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1414-15 (7th Cir. 1992). Claims involving congressional districts are brought under Article I, section 2 of the Constitution, and also do not require a showing of discriminatory intent.

233. See Karlan, *The Rights To Vote*, *supra* note 114, at 1726.

234. *Id.* at 1726-29.

235. Other, less controversial examples may include assigning partial voting power to students or other people who might qualify as residents in more than one place. See Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954 (2002) (arguing that dual residents should be enfranchised at the local level).

236. For a good discussion of these interests, and judicial commentary on them, see Raskin, *supra* note 219, at 1441-45.

ences about the outcomes that are no less (or little less) strong than those of citizens. But even if they have a bit less of an interest in the outcome of elections than their citizen neighbors, it still seems to be sufficiently hefty to merit *some* voting power. Despite this fact (and periods of our history to the contrary),²³⁷ resident aliens now lack the right to vote in most every jurisdiction in the country.²³⁸ (They are, however, included in the population base for reapportionment purposes, which gives their citizen neighbors a little extra voting power.)

One solution, of course, would be to abolish citizenship requirements and extend the right to vote to resident aliens.²³⁹ But we should also be able to tailor voting power to the level of the group's interest. If we decided that resident aliens systematically lack the full-blown stake in society that their citizen counterparts possess, we could grant them the vote but limit its effect on the outcome of any election. And while it would probably not be possible to modulate voting power by placing resident aliens in larger districts (without diluting their citizen-neighbors' votes), we could easily do so under other voting schemes that give voters multiple votes, such as a cumulative voting system in which each voter has several votes to distribute among candidates,²⁴⁰ or Gerald Frug's proposal to give each voter five votes to cast in the local election of her choice.²⁴¹ If citizen voters were given five votes, resident aliens could be given, say, three votes.

Though it may be symbolically or psychologically damaging to possess only three-fifths of a full citizen's vote (and conjure up memories of the original Census Clause in the Constitution,²⁴² which counted

237. Alien suffrage was quite common during the nineteenth century, coming to a peak in 1875 when twenty-two states and territories granted aliens the right to vote. See KEYSSAR, *supra* note 8, at 32-33, 104-05; Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *LAW & INEQUALITY* 271, 273-83 (2000). Anti-foreigner sentiment, heightened by waves of immigration and World War I, led to the demise of alien suffrage in the first part of the twentieth century. See KEYSSAR, *supra* note 8, at 136-39; Harper Ho, *supra* at 282-83. Although some local jurisdictions, such as Takoma Park, Maryland, have recently extended the right to vote to aliens, a more widespread movement on this front seems unlikely. See KEYSSAR, *supra* note 8, at 310-11; Harper-Ho, *supra* at 283-85.

238. See Raskin, *supra* note 219, at 1460-61.

239. See *id.* (arguing that alien suffrage makes sense for a variety of reasons); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 *MICH. L. REV.* 1092, 1093-94 (1977) (arguing that alien suffrage is constitutionally required).

240. In a cumulative voting scheme, each person is allotted as many votes as there are open seats. Voters may distribute their votes as they see fit, either aggregating their votes for one strongly preferred alternative or dispersing their votes among several alternatives. See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135, 1156 (1993) (arguing that cumulative voting and other "semiproportional election systems may provide a more politically fair route to participation and political representation for racially distinct groups").

241. See FRUG, *supra* note 183, at 106-07.

242. See U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

slaves as three-fifths of a person for apportionment purposes), it may be better than nothing (the current status). But the real points here are that voting power does not have to be an all-or-nothing proposition, and that there may be times and places when legislatures should have the power, within constraints, to tailor access to the polls (here, in terms of the number of votes) and district size to accommodate the unique status of some groups. And while the case of resident aliens probably presents a fairly contentious example, a less controversial proposal might involve giving part-time residents or college students partial voting power in each of their local communities.

A third round of suggested changes comes out of the relationship between quantitative and qualitative vote dilution. Because of their close relationship, and the essentially normative character of each, we should be able to think about them as more or less interchangeable. If, for example, a particular group's vote is qualitatively diluted, we could quantitatively concentrate it in order to shore up its power at the polls.

To be more concrete, imagine a typical claim of qualitative vote dilution brought by a group of black voters against a congressional districting plan under section 2 of the Voting Rights Act.²⁴³ In order to succeed, the plaintiffs would need to show, in the words of the Act, that the plan gives them "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."²⁴⁴ This they could do by proving the factors laid out in *Thornburgh v. Gingles*,²⁴⁵ the Supreme Court's first interpretation of the 1982 amendments or, more recently, by reference to a totality of the circumstances.²⁴⁶

243. See 42 U.S.C. §§ 1971-1973bb-1 (2000).

244. 42 U.S.C. § 1973(b).

245. 478 U.S. 30, 50-51 (1986). The three-part test for vote dilution requires the plaintiff to demonstrate that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate usually. See *id.*

246. See *Johnson v. De Grandy*, 512 U.S. 997 (1994) (requiring courts to go beyond *Gingles*'s three-pronged test and analyze the totality of the circumstances). The *Johnson* Court, quoting *Gingles*, summarized the factors laid out in the Senate Report that accompanied the 1982 amendments to the Voting Rights Act:

The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the

Once the plaintiffs succeeded in proving dilution, the proposed remedy would most likely be a redrawn districting plan in which members of the minority group constitute a voting majority in one or more of the districts. Importantly, all of this currently takes place within the strictures of the constitutional one person, one vote requirement. That is, the original and redrawn districts need to have the same number of people in them (or, in the case of state and local districts, close to the same number of people). The lines are changed, but the population of each district remains the same.

But if the two types of dilution are related, we should be able to manipulate both the shape *and the size* of the district in order to shore up minority political participation.²⁴⁷ That is, in addition to redrawing district lines in a way that creates majority-minority districts, we could allow plaintiffs to propose (and courts to approve) remedial plans that reduce the numerical size of those districts to further concentrate black voting power. This would give voting-rights plaintiffs additional tools to use in their quest for more effective participation.

These suggestions are not meant to be exhaustive, nor are they meant to suggest that judicial micromanagement of voting power based on an analysis of group preferences is necessarily a good idea. Instead, the point is that despite appearances (and law) to the contrary, the three principal varieties of voting rights — involving access to the ballot box, quantitative dilution, and qualitative dilution — all necessarily entail normative judgments of a related character. So when we think about one aspect of voting rights, we should be thinking about all of them. When state legislatures make redistricting decisions, they should be able to manipulate district size in order, say, to meet the strictures of the Voting Rights Act. And once we decide that courts should intervene in democratic politics, we should equip them with a full arsenal of possible remedies.

Indeed, it may well be that removing the aura of objectivity from the one person, one vote claims would result in *less* judicial involvement in democratic politics. If the legal bar for such claims were raised, it would prevent groups from piggybacking their real claims on the backs of violations of the one person, one vote standard. And the judiciary might be less inclined to intervene in disputes that visibly require them to make substantive political decisions. Rick Hasen recently wrote that *Reynolds v. Sims* begets *Bush v. Gore*.²⁴⁸ If he is right

policy underlying the State's or the political subdivisions's use of the contested practice or structure is tenuous may have probative value.

Johnson, 512 U.S. at 1010-11 n.9 (quoting *Gingles*, 478 U.S. at 44-45 (internal citations omitted)).

247. For a variation of this idea, see Hayden, *supra* note 231.

248. Richard L. Hasen, *A "Tincture of Justice": Judge Posner's Failed Rehabilitation of Bush v. Gore*, 80 TEXAS L. REV. 137, 154 (2001) (reviewing RICHARD A. POSNER,

(and I think that he is), bringing the one person, one vote standard back down to the messy world of democratic politics where it belongs may not be such a bad thing.

CONCLUSION

The three types of voting rights, developed over three generations of minority-voting-rights litigation, have resulted in tremendous advances in political participation. But the second type of right — that involving quantitative vote dilution and the one person, one vote standard — is based in part on a false promise of neutrality and objectivity. That false promise now has come back to haunt us: it divorces voting rights law from the reality of preference aggregation and prevents us from developing a more complete theory of voting rights.

A more complete theory of voting rights may, preliminarily, tell us a couple of things. It may tell us, for example, that the law should not be structured in a way that treats the three types of voting rights claims — access to the ballot box, quantitative dilution, and qualitative vote dilution — within three entirely different doctrinal frameworks. Under current law, the sources of the rights are different (some are constitutionalized, some not), the substantive requirements of the claims are different (some require intent, some do not), and the procedural prerequisites are different (some have reduced requirements for standing, for example). The fact that each of the rights, though, are at some level interchangeable, coupled with the essentially normative character of all three, means that such a disjointed approach is not true to the underlying nature of the claims.

The fact that the three types of voting rights are inextricably linked together means that legislatures and courts should have more leeway in analyzing them and in fashioning remedies. Thus, when pursuing certain social goals, such as providing meaningful political participation to historically disadvantaged minority groups, we should allow Congress, state legislatures, and courts to tinker with all three aspects of voting rights. Minority plaintiffs in section 2 Voting Rights Act cases and the Justice Department in section 5 preclearance cases should be able to propose districts that not only serve to concentrate the minority vote qualitatively, but quantitatively as well. Keeping such issues and claims strictly compartmentalized makes little sense from either a theoretical or practical standpoint.

Thus, analyzing the one person, one vote standard from the perspective of interpersonal utility comparisons frees us of the false promise, and resulting constraints, of the seemingly objective nature of the standard. It shows the essentially normative character of all deci-

sions to grant, deny, or dilute the right to vote. And it may provide us with a more unified theory of voting rights.