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Representation and Election: The Reapportionment Cases in Retrospect

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REPRESENTATION AND ELECTION: THE REAPPORTIONMENT CASES IN RETROSPECT

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WHETHER constitutional historians of a later generation will consider the reapportionment cases of 1962-1964 to be as important as several contemporary scholars have suggested[1] is an open question. Not many Supreme Court decisions, of course, are rewarded with such an outpouring of comment—both favorable and critical—in the journals of law and political science, in the popular press, and along the communications networks of concerned interest groups. The very novelty of a reinterpretation of the "political question" doctrine,[2] especially as it related to the sensitive matters of legislative composition and behavior, was bound to excite wide and varied response. But one test of the importance of a judicial decision must be its long-range influence on the constitutional system, and this may or may not be in accord with first speculations. There are sound reasons to question not simply whether the political impact of the reapportionment decisions will be as momentous as has been proposed, but also whether the seeming judicial novelty of the cases will remain as the actual political ramifications of the decisions are better understood.

In general, both in the two-year interval between *Baker v. Carr*[3] and *Reynolds v. Sims*[4] and in the period following the reapportionment decisions of June 1964,[5] discussion of the issue among scholars and publicists has tended to center upon four problems of varying

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1. Professor McKay stated, for example, that *Baker v. Carr* is one of "the two most important cases decided by the Supreme Court of the United States in the twentieth century." *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963). Chief Justice Warren himself has assessed *Baker v. Carr* as the most important decision of the Warren Court. N.Y. Times, July 6, 1968, at 1, col. 8.

2. *See generally* Carrington, *Political Questions: The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956).

3. 369 U.S. 186 (1962).

4. 377 U.S. 533 (1964).

5. The cases decided with full opinions after oral argument were the Colorado case, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); the Delaware case, Roman v. Sincock, 377 U.S. 695 (1964); the Virginia case, Davis v. Mann, 377 U.S. 678 (1964); the Maryland case, Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); the New York case, WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964), and the Alabama case, Reynolds v. Sims, 377 U.S. 533 (1964).

scope and precision: (1) the jurisdiction of the federal courts to pass upon aspects of state legislative apportionment; (2) the justiciability of the same matter; (3) the substantive merits of the several cases; and, (4) the implications of the decisions for democratic theory and practice. No attempt is made here to reopen the argument about federal jurisdiction; that question is no longer at issue. The matter of justiciability, now seemingly quite settled, is broached only indirectly in relating the doctrine of "political questions" to the theory and process of political representation. Thus, it is to the third and fourth of these general questions—to the merits of the reapportionment cases and their likely influence on representation in the American political system—that the following remarks are primarily addressed.

I. The Response to the Cases

Despite the mixed legal interpretations and sometimes sharply conflicting political reactions evoked by the leading reapportionment decisions, it is evident that one or more of three related assumptions underlay most of the commentaries, either explicitly or implicitly. These assumptions, which are fundamentally political but have direct implications for the law, are (1) that electoral procedures are the sole, or at least the controlling, measure of representation in legislative assemblies; (2) that acceptance of an unqualified equal-populations standard of legislative apportionment will (for better or worse) limit or even preclude the representation of discrete interests in legislatures; and, (3) that, by adopting an equal-populations standard (or, by inference, any constitutional standard) of apportionment, the Supreme Court, justifiably or unjustifiably, undertook the task of constructing legislative, deliberative assemblies.[6] The fact that the first two of these assumptions have been cherished in bipartisan fashion by both friends and critics of the reapportionment decisions is more than a matter of passing interest; it is an indication of the failure of many of the parties to the reapportionment controversy, including the Supreme Court, to relate the constitutional issue to the political process. Thus debate has almost invariably centered, not upon the relevant empirical question of *whether* enforcement of the "one man-one vote" principle would have any impact on the process of legislative representation, but—assuming that enforcement must have some impact—upon its constitutional propriety.

6. Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 41 (1964).

The identification of the electoral system, particularly the manner of apportioning electoral constituencies, as the mechanism that controls political representation is rarely explicit, but it occurs so frequently as to make the idea seem a truism to the casual reader of the recent history and law of legislative reform in the United States. It appeared in characteristic form in the Supreme Court dictum that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people,"[7] as well as in a widely held interpretation of the Court's majority opinions in the 1964 reapportionment decisions to mean that "representation of all the people is the only permissible objective of an apportionment system."[8] It was also evident in the statement that the "basic issue of these [reapportionment] cases is what kind of representation processes and institutions are required to assure a government that rests upon the will of the people,"[9] and again in the declaration that "fair representation is the ultimate goal" that the Supreme Court must seek to achieve.[10] In one form or another, the assumption that representation is defined by, if not indeed synonymous with, the electoral device of legislative apportionment animated the analysis of the reapportionment decisions in numerous articles published both before and immediately after the *Reynolds* decision in 1964.[11] Whether this assumption is correct is a question which cuts to the heart of the theory of representation and is decisive for bringing the reapportionment cases into correct perspective.

The second assumption—that the equal-populations standard of legislative apportionment must restrain, perhaps even bar, the representation of discrete interest groups in lawmaking bodies—appeared almost as frequently as the first, and often as a quite explicit assertion. This second assumption evidently springs from the first,

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7. Reynolds v. Sims, 377 U.S. 533, 560-61 (1964).

8. R. HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 112 (1966).

9. Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 248 (1964).

10. Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964).

11. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1 (1964); Bickel, *supra* note 6; Dixon, *supra* note 10; Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962); Kauper, *supra* note 9; Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143 (1964); Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963); McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 55 (1962); Sindler, *Baker v. Carr: How To "Sear the Conscience" of Legislators*, 72 YALE L.J. 23 (1962).

that apportionment and representation are congruent; it proceeds to the logical inference that the representation of types and intensities of interest must occur in direct relation to the apportionment of quantities of people or votes in the electoral system. Ergo, the brief concludes, legislative apportionment according to an equal-populations standard operating on the principle of "one man-one vote-one value" must preclude the possibility that interests will be represented in legislative assemblies except according to their popular numerical weight. This argument was expressed with elemental clarity in the statement that apportionment based on the single standard of equal populations "will end centuries of experimentation with the design of democratic institutions which will accommodate within the same units of government a wide variety of interest groups."[12]

The bipartisan appeal of the argument was surprisingly wide. Professor Auerbach, for example, was surely correct in observing in 1964 that much of the immediate opposition to the *Baker* and *Reynolds* cases resulted from the belief that interests of one sort or another are proper objects of legislative representation, and that apportionment schemes should therefore be devised to accommodate them.[13] He might also have observed, however, that most of the advocates of apportionment reform in the United States, including some of those who welcomed the reapportionment decisions, relied on precisely the same implicit assumption that equality of the vote will somehow inhibit inequality of representation. The assumed competence of the electoral system to control the legislative representation of interests is not simply a property of the detractors of the reapportionment cases, but has been part of the stock in trade of the apportionment reform movement throughout its history. It is fundamentally the belief expressed by Justice Frankfurter in his dissenting opinion in *Baker v. Carr*,[14] but also the grounds upon which Professor Auerbach himself chided the dissenters in the 1964 cases for appealing to the representation of interests.[15]

The final assumption, that adoption of a single equal-populations standard of legislative apportionment thrust the federal judiciary

12. Lucas, *supra* note 11, at 804. The same argument was conveyed somewhat more indirectly in the observation that "the principle of equality of individual representation can be only a partial guide to solution of the apportionment problem," Bickel, *supra* note 6, at 41, as well as in the judgment that the principle "may provide an insufficient standard of fairness," Sindler, *supra* note 11, at 24-25.

13. Auerbach, *supra* note 11, at 30-39.

14. 369 U.S. 186, 266 (1962).

15. Auerbach, *supra* note 11, at 30-39.

headlong into the political thicket of constructing lawmaking bodies,[16] is logically dependent, it is argued below, upon the first two. Whether the Supreme Court indulged in "judicial prescription"[17] in the reapportionment cases has been debated too extensively to require citation. The concern that it might do so was perhaps expressed most poignantly by Professor McCloskey following the announcement of *Baker v. Carr* but before the decision in *Reynolds*: "[i]t is hard to see how the process of balancing these complexities [of geography, insular minorities, and other interests] could be reduced to anything resembling 'an exercise of reason' . . . . It is equally hard to see how the judicial process thus conceived could differ from the legislative process . . . ."[18]

But it would not be hard to see, perhaps, if it were found that the first two assumptions noted above were without theoretical relevance or empirical foundation, and that the specter of the "political thicket" dissolved without their support. In fact, there are good reasons to insist that the processes of election and representation—that is, the individual act of suffrage within some apportionment framework on the one hand, and the social relationship of representation on the other—are theoretically distinct, politically discontinuous, and constitutionally separable. Every available piece of evidence in the long history of parliamentary institutions indicates that the representation of interests and interest groups is a continuing and organic function of legislatures, regardless of electoral procedures. This in turn suggests that the most likely effect of the reapportionment cases on the legislative process will be simply to create a "free market" of interest representation, functioning without statutory bias. The reapportionment decisions must eventually be related to the process of representation as it occurs in the political system rather than to the curious but longstanding myth of electoral creation of representation. When this is accomplished, it will be evident that, far from venturing into the political thicket, the Supreme Court intuitively avoided the difficult questions of legislative composition and behavior with remarkable prudence.

II. The Theory of Representation

A major source of confusion throughout the history of debate on apportionment reform has been the highly ambiguous use of the

16. *See generally* authorities cited *supra* note 11.
17. Dixon, *supra* note 10, at 230.
18. McCloskey, *supra* note 11, at 73.

term "representative."[19] The formal adoption in the United States of the title "Representative" in both federal and state constitutions indicates the conventional identification of an *office* with its *function,* of "my Representative" with "my representative." The confusion of terms is of no practical consequence, of course, unless it obscures the rather obvious fact that my Representative, Senator, or Deputy may not be my representative in any positive or personal sense; he may, indeed, be actively hostile to my interests or, worse, wholly unaware of them. One of the greatest achievements of the parliamentary tradition has been general acceptance of the doctrine that authority adheres to the political office, as constitutionally defined, and not to its transient occupant. Yet, within the range of accepted meanings of the verb "to represent," it is clear that an office, as such, is representative of nothing. Rather, it is the officeholder who is representative, whether that quality is considered as a personal attribute or as one conferred by the nature of his formal position. Whether representation occurs as a function of office, as a perceived distribution of characteristics or interests between two or more persons, or as the product of an operative constitutional system, has never been resolved to anyone's complete satisfaction in political theory. Moreover, this question was overlooked entirely during the legislative apportionment controversy of the 1960's. Whatever the answer may be, political representation is certainly not a simple statutory condition, structured like a crystalline cluster and catalyzed periodically by an apportionment scheme in a brief moment of election. Instead, the evidence suggests that representation is a process, continuous, changing, and influenced by a wide variety of forces of which the electoral system is only one.

Social representation (including political representation) is a relationship established by a perceived distribution of characteristics, interests, or values among people, one or more of whom is authorized to act on behalf of others in the relation.[20] As a perceived distributive relation, representation necessarily involves two or more parties, at a minimum the representative and the one represented; it is thus social by definition and not something that is "possessed" by individuals, groups, or electorates, whether as a right or a dis-

19. The most complete brief compendium of the definitions and theories of representation in the western tradition is found in Fairlie, *The Nature of Political Representation,* 34 AM. POL. SCI. REV. 236, 456 (1940).

20. W. Irwin, Political Representation: An Analytic Model (unpublished paper delivered at the 1968 American Political Science Association Annual Meeting). *See also* C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 264-66 (rev. ed. 1950); H. GOSNELL, DEMOCRACY: THE THRESHOLD OF FREEDOM 206-14 (1948).

pensation. The casual use of such phrases as "right of representation" and "equal representation" as synonyms for "right to vote" and "equal suffrage"—a practice in which the courts, too, have indulged from time to time[21]—suggests that, beyond the citizen's right of electoral expression, even beyond his right to equal protection of the law, he has a comparable right to equal or proportionate attention from the lawmakers themselves. In fact, it is difficult to avoid the conclusion that this thought is the essential, though tacit, premise of much of the literature of the reapportionment controversy, and the principal wellspring from which many of the champions *and* opponents of equal voting rights have drawn sustenance.

Attendant to the commonly held idea that political representation is a fixed condition is the further vague belief that it is, or must be made to be, simple and direct, as the relationship seemingly is between attorney and client or guardian and ward. In a complex organization such as the political system, however, representation tends to be multiple and indirect, while the roles of the parties to the relationship are frequently interchangeable, ambivalent, or even conflicting. Indeed, there are good grounds for concluding that the concept of simple and direct representation could never be more than a misleading analytic model under any circumstances. Representation does not occur in isolation, but within some social context which is continuously influenced by the norms and constraints of third parties and the system itself. In the case of the attorney and his client, to take the evidently simpler case, the relationship is moderated by law, professional standards, custom, and a variety of other restrictions introduced by one or the other of the parties or their associates. Indeed, it is according to some regularized and commonly accepted system of constraints—in law, politics, religion, or any other representative relationship—that the function of representation establishes its meaning and finds its justification in the first place. My representative—my legal counsel or my legislator—is what he is, not because he responds in simple and direct fashion to my wishes and needs, but because he acts responsibly within some sort of legalized constitutional framework, that is, a system of norms and sanctions which we both accept as relevant and legitimate.[22]

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21. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 559-61 (1964).

22. The removal of Congressman Adam Clayton Powell from the House of Representatives during the 90th Congress illustrates the point with rare clarity. There is little question that Powell represented, with intense immediacy, the perceived interests of his constituents in the 18th congressional district of New York. Yet the members of the House felt obliged (subject, of course, to considerable pressure from their own not unbiased constituents) to judge whether his behavior was in conformity with the general

There is a difficulty, however, in settling on the truism that a representative relationship is subject to systemic influences. The statement is plain and for most purposes perfectly adequate; no one would question the assertion that a legislator's proper relation to his constituents had been corrupted because he accepted a bribe. But what is to be said of the legislator who casts his vote contrary to the seeming interests of his constituents because he has received an appeal from the Governor, his political party, or one of his legislative colleagues, all of whom are legitimate participants in the constitutional system but are once removed from "the people back home" in his district? Certainly there would be little point in arguing in such instances that forces alien to the process of representation had somehow confounded its proper execution. Rather, it is evident that such third parties are organically present in any representative relation and that representation occurs functionally, not just according to the simple mechanics of a contractual device such as an election system, but as a variable of the whole political process.

The conclusion that emerges from this brief analysis is that the role of the political representative is fashioned within an exceedingly complex system, one in which his assessment of himself, of those whom he represents, and of the various offices and elements of the system itself are all factors affecting his behavior.[23] Needless to say, the representative's view of any or all of these elements may differ from those of his constituents, who in turn may differ widely in perceptions among themselves. Some of the more obvious conditions which shatter the myth of simple and direct representation are noted at greater length below, although a single example may be cited at this juncture.

Universally among the world's constitutional democracies, political parties are interposed, in a sense, between electorates and parliamentary bodies, not just during campaigns for election, but continuously in and out of legislative sessions. The party is at times concretely on hand as a constitutional organ in the representative process; at other times, or in other systems, it is present as an attitude or commitment which is exhibited in the behavior of both lawmakers

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rules of the game, according to which rules Powell had become a Representative in the first place.

23. A. DE GRAZIA, ESSAY ON APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 54 (1963); Eulau, Wahlke, Bachman, & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742, 749 (1959); D. VERNEY, THE ANALYSIS OF POLITICAL SYSTEMS 144-46 (1959).

and their constituents. However party functions and powers may vary among different political systems, the de facto existence of political parties must be acknowledged in any meaningful theory of representation. It is possible to consider them legitimate representative organs in their own right, as they have become in British practice, moderating and shaping, but presumably not corrupting, the relation between the people at large and their parliamentary bodies.[24] Or parties may be diagnosed as pathological to the body politic, as has often been done in the American tradition, and precautions may be taken against them.[25] In neither case, however, can the existence of political parties be reconciled with the simple belief that political representation can be a direct legislator-constituent bond pledged by arithmetic electoral ratios. Unhappily, this difficulty and others of a similar nature have been resolved by most students of reapportionment in the United States by simply ignoring them.

A further aspect of the theory of representation must be noted, however, before turning to look at the representative function in the American political system. Social representation has been defined as a relation in which one or more persons are *authorized* to act as agent or standard of others. If the relationship is not a straightforward and fixed condition between electors and elected, under what circumstances can it be said that the exercise of power in a complex organization *is* representative, in the sense of being invested with authority rather than simply arbitrary or dictatorial? As a starting point, we can postulate that political power is exercised in a representative fashion when all or most of the parties to the relationship independently perceive the system which prescribes the use of power to be legitimate. This means, in the first place, that it is not only, or even necessarily, the particular legislator-constituent ties which satisfy the meaning of representation, but the general political system which fashions and justifies those same ties. Our quite detailed knowledge of the numbers, intensities, and configurations of electoral interests[26] makes it obvious that a legislator could, at best,

24. D. VERNEY, *supra* note 23, at 116-20.

25. The view that the "mischief of faction" must be carefully controlled was forcefully expressed by James Madison in the *The Federalist No. 23* and has been echoed over and over again in the Jacksonian, Populist, and Progressive traditions of popular democracy. For a thorough historical treatment of the view, *see* A. DE GRAZIA, PUBLIC AND REPUBLIC (1951).

26. A. CAMPBELL, P. CONVERSE, W. MILLER, & O. STOKES, THE AMERICAN VOTER (1964); B. BERELSON, P. LAZARSFELD, & W. MCPHEE, VOTING (1954); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951); H. ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY (1964).

"mirror the views"[27] or interests of no more than a handful of his constituents even if he made a conscientious effort to do so. Yet in a stable constitutional system a legislator's representative qualifications are called into question only in unusual circumstances, even by persons who voted against him or intensely dislike him. Most of us are quite prepared, because of our general confidence that the system is legitimate, to accept as our properly elected representatives persons who may not be spokesmen for our particular interests.

But the implicit acceptance of the system means still more. It is not the political system per se, let alone a single element of it such as an electoral or apportionment arrangement, which supplies authority to the exercise of power; on the contrary, it is a tradition of legitimacy, a body of "operative ideals,"[28] which lends authority to the system and relevance to its detailed procedures. This means, to put the matter another way, that formal political representation is an element in an operative tradition of constitutionalism, in the tradition of exercise of political power according to accepted standards of consent and restraint.[29] If this were not the case, a legislator or other public officer who failed to perform according to the conflicting expectations of his constituents, or a lawmaking body or procedure which momentarily became "unbalanced" or fell short of simulating the apparent character and interests of the electorate, would simply be without continuing authority. Without the prior assumption of legitimacy, furthermore, there could be no justification in the representative system for such practices as electoral or legislative majority decision-making, partisan nominations and elections, partisan organization of legislatures, legislative committee organization, executive leadership in the legislative process, or even, of course, judicial review, all of which are formally "outside" the legislator-constituent relationship, and each of which is itself an apportionment device of sorts, structuring, abridging, encouraging, or restraining the legislative process.

"Every electoral system," Professor Mackenzie has aptly remarked,

27. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, COMMISSION REPORT: APPORTIONMENT OF STATE LEGISLATURES (1962), cited in H. HAMILTON, LEGISLATIVE APPORTIONMENT, KEY TO POWER 121 (1964).

28. A. LINDSAY, THE MODERN DEMOCRATIC STATE 27-51 (1943).

29. The concepts of constitutionalism and representation have been clearly interdependent in their development in the whole period since the twelfth century, as several studies have shown. M. CLARKE, MEDIEVAL REPRESENTATION AND CONSENT (1936); Beard & Lewis, *Representative Government in Evolution*, 26 AM. POL. SCI. REV. 223 (1932); Holden, *The Imperative Mandate in the Spanish Cortes of the Middle Ages*, 24 AM. POL. SCI. REV. 886 (1930).

"is a sort of confidence trick. [They] only work because we believe they are going to work."[30] As fundamental as elections have become to the existence of constitutional democracy, they are neither more nor less than *sanctions* upon the political system, having the primary purposes of eliciting popular consent and providing peaceful continuity of leadership. They do not have the function of causing representation or detailing representative behavior. It is not possible to argue—and it is not, of course, the intent to do so here—that elections bear no political relation to representation; they do so consistently, if quite indirectly, as discussed in the section below. The point is, rather, that electoral formulas alone cannot generate a sense of legitimacy; on the contrary, it is the sense of legitimacy, sanctioned by popular elections, which gives utility and meaning to the concept of representation.[31]

III. The Process of Representation

The process of representation in the American political system—indeed, in all political systems, most evidently in the constitutional democracies—is every bit as intricate as Justices Frankfurter and Harlan have argued,[32] and far more subtle and interesting than many of the advocates of apportionment reform have led us to believe. Because the reapportionment cases themselves, as well as the literature of the reapportionment controversy, refer only to legislative elections, it is necessary to begin an analysis of the system by honoring the nineteenth-century parliamentary fiction that only lawmaking assemblies can satisfy the requirements of representative government.[33] How, then, can the role of one political representative—the legislator—be described to accord with the observed be-

30. Mackenzie, *Representation in Plural Societies*, in 2 Pol. Studies 54, 69 (1954).

31. S. Lipset, Political Man 77 (1963): "Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society."

32. Reynolds v. Sims, 377 U.S. 533, 589-625 (1964) (dissenting opinion); Baker v. Carr, 369 U.S. 186, 266-340 (1962) (dissenting opinion).

33. It is one of the more interesting sidelights of the apportionment controversy that a reform movement which upheld egalitarian and populist standards of representation could applaud such decisions as Reynolds v. Sims, 377 U.S. 533 (1964), and Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964), when the decisions were delivered by an agency of government which is hardly representative by those same standards. It seems fair to infer that the members of the movement must be willing to assign another sort of representative function to the courts. This point illustrates the long-standing need to reconsider the whole theory of representation, incorporating the rather obvious representative functions performed by elected and appointed executives, the courts, clientele-oriented administrative agencies, political parties, and even such quasi-public organizations as community foundations, voluntary health and welfare agencies, chambers of commerce, and so on.

havior of lawmaking bodies, and with what appear to be the principal influences upon that role?

In the most general sense, it is the responsibility of the legislator to act upon perceived human needs within the framework of certain constitutional constraints. Implicit in this statement, however, are four practical considerations which may not be immediately apparent. In the first place, the representative can act, if he acts at all, upon only those needs which come to his attention. And many needs do not come to his attention—not simply for lack of communication, but because "needs" themselves are a matter of definition and perception. Second, the representative may perceive human needs variously in terms of individuals, functional groups, territorial jurisdictions, or ethical certitudes; but because his perceptions are rarely recorded publicly, such distinctions are largely moral and semantic rather than empirical, and thus are not subject to statutory determination. Third, the representative's sensibility to public needs varies not only according to the numbers of people who may have been allotted him by apportionment statutes, but also consonant with the clarity and intensity with which such needs are made known to him, their compatibility one to another, and their legitimacy as he sees them in his moral or constitutional universe. Finally, the constraints upon any representative are multiple and interrelated, both statutory and political, and extend far beyond the immediate electoral and legislative machinery with which they are conventionally associated.

Beyond the logic of the argument, however, the strength of evidence relating to legislative behavior[34] leads to a further conclusion, one which has generally been obscured in the theories of representation and ignored in judicial interpretation. Because the representative is able to act only upon perceived needs, needs which in his observation vary by kind, clarity, intensity, and legitimacy, it follows that in the process of representation (as distinct from the law of elections), a legislator's constituents are effectively defined by a

34. J. MATTHEWS, SOCIAL BACKGROUNDS OF POLITICAL DECISION-MAKERS (1954); J. WAHLKE, W. BACHMAN, & L. FERGUSON, THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR (1962); Chubb, *"Going About Persecuting Civil Servants": The Role of the Irish Parliamentary Representative*, 11 POL. STUDIES 272 (1963); Crane, *The Errand-Running Function of Austrian Legislators*, 15 PARLIAMENTARY AFFAIRS 160 (1962); Dowse, *Representation, General Elections and Democracy*, 15 PARLIAMENTARY AFFAIRS 331 (1962); Epstein, *British M.P.S. and Their Local Parties: The Suez Cases*, 54 AM. POL. SCI. REV. 374 (1960); Eulau, *supra* note 23; Kornberg, *Perception and Constituency Influence on Legislative Behavior*, 19 WESTERN POL. Q. 285 (1966); Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963); Wahlke, Bachman, & Ferguson, *American State Legislators' Role Orientations Toward Pressure Groups*, 22 J. POL. 203 (1960).

pattern of behavior in which both participate—by his identification of certain articulate publics and their reactions to one another. That the law of elections is a factor in this process is, of course, perfectly clear, but it functions as only one of a large number of constraints in the representative's psychological world. There is no doubt in the legislator's mind, and certainly no constitutional barrier to his understanding, that from one day to the next, and even simultaneously, he may be called upon to act on behalf of a specified individual, an organized group, a generalized class or category of persons (such as the aged or the poor), a district, state, region, or nation, and perhaps even some seemingly detached ideal such as "national honor." Yet any or none of these influences may be directly related to the apparent interests of "the people back home in the district." Still he returns to those people periodically, not to pose the conundrum of whether he has satisfied the dictates of "equal representation," but to seek their consent to his behavior by asking, "How am I doing?" This quest for the constituents' general consent is not illogical, however, since the legislator knows that their behavior is not bounded solely by the territorial and numerical provisions of the election statutes; it is subject to the same range of indefinite and conflicting constraints as his own.

Therefore, the assumption that any apportionment system—a necessary yet quite arbitrary device for choosing members of a legislature—can be the dominant, let alone ruling, force upon legislative behavior is as fundamental a misapprehension of the political process as it is possible to entertain. It is obvious that apportionment plans do affect the legislator; they do so, however, not by arithmetically redistributing his sensibilities toward a jurisdiction or the persons who reside within it, but by altering his perception of the whole political system in a way that would be entirely unpredictable if other major factors were not taken into account simultaneously. Far from simply reacting to the stimuli of his statutory environment, the legislator actively engages in the creation of constituencies and constituent interests—identifying, weighing, selecting, and rejecting them, even imputing the existence of needs and aspirations to people who cannot speak for themselves. In short, the legislator is affected by the law, but he is hardly a creature of it; it is his function to make public policy, rather than to attempt to reflect electoral directives which, without his prompting, might not even exist in the first place. It is this consideration—that a government must in some part lead rather than simply follow—that gives meaning and importance to elections as the machinery of consent.

But, apart from the somewhat abstract outline of the role of the representative, attention should be drawn to some of the more obvious constraints within the political system (in addition to apportionment) which tend to modify and shape the representative relationship between electors and elected. Several of these constraints are embedded in the statutes of election and others are found in the operating procedures of government, but they all have roughly the same significance for the representative process as apportionment, and, in a sense, each functions as a de facto apportionment device.[35]

The most evident of the electoral influences upon representation are the states' widely varying suffrage provisions for general elections. Except in areas where Negroes are still effectively disenfranchised, it is generally conceded that these variations no longer present a serious problem for state and federal elections in the United States. Yet in recent years the Supreme Court has entertained questions of discriminatory impairment of suffrage rights by use of the literacy test,[36] by congressional and assembly district gerrymandering,[37] and, in the reapportionment cases themselves, by the arbitrary use of place of residence. On purely constitutional grounds, there is no reason to assume that the federal courts will not be asked in the future to look more closely at voter registration procedures and perhaps term of residence provisions,[38] both of which have been widely used for patently discriminatory purposes.

At the local level these variations are of even greater significance. Given the fact that municipalities, school districts, and a variety of other special election districts are, according to state constitutional

35. Dean Neal notes the effects which legislative districting, special-majority elections, and the seniority system, among other things, have upon representation, and concludes that "equality of voting weight is scarcely any guide to reasonableness or fairness of a State's representative plan. As a standard of performance it is about as adequate an instrument as would be a ruler for judging a work of sculpture or a metronome a symphony orchestra." *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252 (1962). I agree that equality of voting weight is not an adequate measure of representation, but maintain that it is an important constitutional value in itself. The search for a "reasonable" or "fair" standard of representation, it seems to me, is the very definition of "politics in search of law." *See* A. DE GRAZIA, *supra* note 23, for an extensive catalogue of electoral and legislative procedures which directly bear upon the representative relationship.

36. Katzenbach v. Morgan, 384 U.S. 641 (1966); Louisiana v. United States, 380 U.S. 145 (1965); United States v. Mississippi, 380 U.S. 128 (1965); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

37. Wright v. Rockefeller, 376 U.S. 52 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

38. In another context, several cases are now pending before the Supreme Court which challenge the constitutionality of requiring a minimum period of residency before an individual may participate in state welfare programs. For a report of the oral argument of these cases, *see* 37 U.S.L.W. 3153 (Oct. 29, 1968).

standards, "instrumentalities created by the State,"[39] there is a Pandora's box of potential litigation on questions of statutory discrimination in suffrage on the basis of property ownership, tax liability, both place and term of residence, literacy, and perhaps other lesser known standards.[40] Indeed, clarification of one of these potential issues is already underway. Although the Supreme Court has thus far held that the ruling in *Reynolds v. Sims* is applicable only to local government bodies "having general governmental powers"[41]—a definition which is by no means clear—it also declared that "single-member districts of substantially unequal population" for the election of local as well as state governments are in violation of the equal protection clause.[42] The point here is neither to predict nor to encourage further litigation of this sort, however justified it may be, but simply to make it clear that state, county, municipal, and special election districts in the United States are "apportioned," not just according to the number of people residing in them, but frequently on the basis of citizens' attainments, mobility, and solvency as well.

Of a similar order, but on a considerably more confused plane, is the fact that party nomination procedures are an organic part of the electoral process. The Supreme Court has, of course, recognized that primary elections may be "an integral part of the election machinery" and thus are subject to the same public regulation as general elections,[43] a fact which led Professor Emerson to remark that the logic of the reapportionment decisions might apply equally to primary elections.[44] But nominating caucuses and conventions are also integral to the electoral process, and, however remote their procedures may appear to be from the issue of the reapportionment cases, they probably influence the representative process as significantly as both primary and general elections. Although the mat-

39. Reynolds v. Sims, 377 U.S. 533, 575 (1964).

40. *Compare* Cipriano v. City of Houma, 286 F. Supp. 823 (E.D. La. 1968) (property tax requirement for voting in a municipal utility revenue bond issue election held constitutional even though the utility was to be self-financing) *with* Pierce v. Village of Ossining, 292 F. Supp. 113 (E.D.N.Y. 1968) (property ownership requirement for voting in a village election to determine whether to change from a mayoral system to a village manager system of government held unconstitutional).

41. Avery v. Midland County, 390 U.S. 474, 485 (1968). The Court earlier ruled that, because a board of education performs "essentially administrative functions" and is "not legislative in the classical sense," there is no violation of the equal protection clause if the board is appointed or indirectly elected. Sailors v. Board of Educ., 387 U.S. 105, 110 (1967).

42. Avery v. Midland County, 390 U.S. 474, 486 (1968).

43. United States v. Classic, 313 U.S. 299, 318 (1941).

44. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 70 (1962).

ter seems to have little or no judicial relevance, there is no doubt that participation in any of the several nominating procedures, a privilege typically limited by law to narrow categories of electors, is an act—a "vote," if you will—of greater political significance than that which is guaranteed to the population at large in general elections. Obviously, it is also action which has a direct bearing on the subsequent outlook and behavior of the elected representative.

A final example of formal electoral constraints upon representation is legislative districting, a matter which has come before the Supreme Court in several recent cases.[45] It is common knowledge, of course, that legislative districts can be gerrymandered, altering their socioeconomic and partisan characteristics without substantially varying the numbers of people within them or distorting their configurations. The relative utility of large and small districts, single-member and multiple-member districts, or demographically homogeneous and heterogeneous districts has recently been given some attention by political scientists,[46] although no thorough assessment of their impact upon the representative relationship has yet been made. No great amount of evidence is required, however, to sustain the assertion that any of these statutory variables, and in particular the use of multiple-member districts,[47] can affect the representative behavior of legislative assemblies in much the same way as the numerical apportionment of populations among electoral districts.

Most of the recent discussion in the United States about the techniques of legislative districting has rested upon the assumption that such electoral engineering or "legal gerrymandering" must be undertaken within the limits imposed by the doctrine of electoral equality that the Court elaborated in the reapportionment cases. It is worth noting, however, that several combinations of deliberately biased apportionment and legislative districting plans have been used for the purpose of increasing the parliamentary representation of democratic or centrist political parties in a number of European countries;[48] such schemes have also been pointedly urged for New

45. Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Boineau v. Thornton, 379 U.S. 15 (1964).

46. Hamilton, *Some Observations in Ohio: Single-Member Districts, Multi-Member Districts, and the Floating Fraction*, in H. HAMILTON, REAPPORTIONING LEGISLATURES 73 (1966); Irwin, *Colorado: A Matter of Balance*, in M. JEWELL, THE POLITICS OF REAPPORTIONMENT 64 (1962); Jewell, *Criteria Reflected in Recent Apportionments*, in H. HAMILTON, REAPPORTIONING LEGISLATURES 14 (1966).

47. This practice has recently undergone judicial observation. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); cases cited *supra* note 38.

48. General political instability, as well as the growing threat of the Communist Party following World War II, led France, Italy, and Germany, among others, to adopt electoral systems which encouraged the growth of or inflated the number of legislative

Zealand[49] and tentatively suggested for the United States[50] as a means of assuring a legislative majority to the political party which receives a majority of the popular vote. The introduction of any such device for the purpose of shifting "some of the emphasis from representation as a function of election to representation as a function of government,"[51] is in one respect precluded in the United States by the ruling in *Reynolds v. Sims*; districting to provide representation in violation of the equal-populations standard is clearly impermissible. However, the state legislatures are perfectly aware that there is currently no constitutional barrier, nor is there likely to be one in the immediate future, against the manipulation of demographic data in the construction of legislative districts that satisfy the equal-population principle but still achieve partial modification of the representative process.

Although the informal constraints upon the legislator's conduct of his office are superficially less evident, they are perhaps of greater importance to the representative system than those formal limitations just discussed. The most immediate of these constraints is the legislative assembly itself, containing a number of what might be termed "internal constituencies." In order to make collegial lawmaking a practicable undertaking, it has been universally necessary to adopt extensive rules of procedure which, in a sense, apportion the time and attentions of the assembly member. More than three-quarters of a century ago, Woodrow Wilson pointed out that congressional committees tend to assume the qualities of a whole legislative body and are frequently dominated by chairmen with undisputed, near-

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seats held by their democratic and centrist parties. In France, under the Fourth Republic, a scheme of proportional representation was adopted, using a list ballot system in large multiple-member districts. Seats were allocated on the basis of highest averages, a system which reduces the potential impact of small party concentrations in local areas. Italy had used a highest-averages proportional representation system for a brief period between the wars, but returned to a simple list system in 1948. In 1952, after sharp erosion of the electoral base of the Christian Democratic Party, a new law was passed which permitted partisan electoral alliances and which provided that any party or alliance that polled more than 50% of votes cast in the nation at large would be alloted 65% of national assembly seats. Although Germany has altered its electoral provisions several times since World War II, its basic law of 1953 provides for a combination of simple plurality elections in constituencies in which half of the Bundestag members are elected, and a highest-averages proportional representation list system in a single national constituency, by which means the other half of assembly members are chosen. The effect of this system is to reduce not only the size of marginal parties, but the total number of parties as well. W. MACKENZIE, FREE ELECTIONS 85-89 (1958).

49. Scott, *Gerrymandering for Democracy*, 7 POL. SCI. 118 (1955).

50. Sindler, *supra* note 11.

51. J. HOGAN, ELECTION AND REPRESENTATION 183 (1945).

dictatorial authority.[52] An American lawmaker today is at once a member of a whole legislature, one of its houses, one or more committees and subcommittees, a party caucus or conference, and perhaps a study commission or two. Each of these organs is an operative internal constituency which the member "represents" as a matter of duty, deference, or reciprocity.[53] The general tendency of American legislators to specialize, becoming experts on agriculture or taxation while deferring to their colleagues on other matters, further estranges them from the innocent effort to provide "equal representation to equal numbers of people." In addition to representing a host of internal and external constituencies, a legislative body must also represent *itself*, not in order to pursue selfish interests, but to preserve its powers, prestige, and traditions, and to deflect and structure the demands of its external constituents.

Among the external constituencies, finally, are a formidable array of organized centers of power and authority, both in and out of government, which bring varying degrees of influence to bear upon the representative process. The most obvious of these in a presidential system of government is, of course, the chief executive. The role of independently elected chief executives has never been properly considered in the theory of representation, probably because the major elements of the theory are European in origin, and thus related to the experience of parliamentary systems. The point need not be pressed, however, that elected chief executives may be looked upon as representative figures in their own right; it is sufficient to make the commonplace observation that the President, the governor, and other elected state executives, as well as the mayor or city manager, are dominant powers in the legislative process, often exacting continuous and detailed representation from friends and foes alike. In addition, executive departments, departmental bureaus, and independent regulatory agencies at all levels of government frequently maintain ex parte representative relationships with individual members and committees of legislative bodies.[54] Even the courts are present in the legislative process, not as active petitioners, of course, but as a perceived restraining influence—just as they have been in recent years, for example, in respect to legislative apportionment.

52. CONGRESSIONAL GOVERNMENT 60-84 (1885).

53. Huitt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340 (1954).

54. Getz, *Ex Parte Communications: A Study in Legislative Reluctance*, 19 WESTERN POL. Q. 31 (1966).

Too much has been written on the continuing impact of private and quasi-governmental interest groups[55] on both elections and the legislative process to require further elaboration here.[56] It is sufficient to indicate that the influence of such groups upon the representative process is probably substantially greater than that of any electoral device, and that any theory of representation which does not take them into account is completely inadequate.

IV. The Logic of the Reapportionment Cases

Of the three assumptions noted at the outset, the first two, it seems, can be dismissed as insubstantial. The initial assumption that the electoral process, perhaps even the apportionment system alone, is the controlling measure of representation in legislative assemblies is utterly unfounded. The invention begins with a misconception of the meaning and function of the process of representation, ignores the great number of additional constraints upon the relationship between electors and elected, and, finally, assigns to the electoral process the impossible task of generating, rather than supporting and sanctioning, the legitimacy of the system. The second assumption, that adoption of an equal-populations standard of legislative apportionment will limit or preclude the representation of interests, is equally without meaning. It rests, it seems, on the same misconception of the representative process as the first assumption—that is, on the illusion that representation is wholly dependent on the electoral process and that the terms of the latter can be made to occupy the legislator's attentions fully, immunizing him from other influences in the political system. The representation of interests, it is safe to predict, will go on apace in the legislatures of the United States, just as it has in every parliamentary body in history, however apportioned. At most, the effect of the constitutional standard adopted in the reapportionment cases will be to alter slightly the rules of the legislative game, as indicated below.

But what of the third assumption, that the Supreme Court, by entertaining the substantive issue of legislative apportionment, initiated a new and drastic attempt to construct lawmaking bodies? On first reckoning, it appears that the matter of legislative apportionment is so meager an element in the complex political process of representation as to exonerate the Court on the grounds of de mini-

55. Of course, this category includes political parties, discussed in text accompanying note 43-44 *supra*.

56. *See* authorities cited *supra* notes 26 and 34.

mus culpability alone. As Professor Pollack has pointed out, the issue of Negro voting rights, which the Court has steadily clarified in the thirty-three year period between *Nixon v. Herndon*[57] and *Gomillion v. Lightfoot*,[58] has in principle a similar, perhaps identical, relevance for the function of representation as that of apportionment.[59] Certainly the composition and perhaps the behavior of American legislative bodies have been modified by these and other cases dealing with suffrage rights,[60] yet there is no substantial objection that the courts have tampered with the legislative prerogative in any of them.

Still, the answer to the question of whether the Supreme Court has strayed into a political thicket must be related to a more fundamental consideration than that of the degree of its influence upon the political process; it must rest upon the argument—which the Court acted upon but did not clearly enunciate in the reapportionment decisions—that the right of an individual to vote, on the one hand, and the "right" of a person or interest to representation, on the other, belong to essentially different constitutional orders. It is the latter order, that of representation, which is the substance of the political process: it *is* the political thicket. For the Supreme Court to have made any attempt whatever to insure the accommodation of any interest—geographical, economic, ethnic, partisan, or "historical"—in the legislative process would have catapulted it headlong into the continuing political questions, not simply of whether, but also of *which* groups are to receive political advantages in the legislative process. Such questions are at the very heart of public policy determination.

Yet it is remarkable how frequently the Supreme Court was either urged to do precisely this, or reproached for not having done so. To express the hope immediately after *Baker v. Carr* that the Supreme Court would eventually adopt a standard of "rational deviations" from the equal-population principle of apportionment in order to provide "representation according to political subdivisions, geographical regions, or functional divisions in the population" as a matter of "reasoned policy,"[61] was simply to invite the judiciary

57. 273 U.S. 536 (1927).

58. 364 U.S. 339 (1960).

59. *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 83 (1962). Professor Pollack's remarks are particularly perceptive inasmuch as they preceded the decisions of 1964.

60. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 543 (1964); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

61. Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 134 (1962).

into the political thicket. To propose late in 1962 that the Court consider both area representation and some means "of assuring significant legislative representation to the minority party in urban areas"[62] was to issue the same perilous invitation. Or to maintain following the 1964 apportionment decisions that the Court had ignored such considerations as "effective majority rule" and the permanent underrepresentation of minorities, and that it must in the future take them into account,[63] was not only to misconstrue the meaning of the reapportionment cases themselves, but also to entice the Court into the very political morass which virtually everyone agreed in principle that it should avoid.

There is an enduring democratic appeal, of course, in proposals which seek to guarantee to electoral or partisan majorities a proportionate influence in legislative assemblies or to apportion the vote in such a way as to accommodate urban areas or racial minorities, which have certainly suffered legislative indignities in the past. But what standard is available to the Supreme Court as a constitutional test of "rational deviations" from equal suffrage in legislative apportionment? What is the measure of the validity of any particular claim to legislative attention which may be brought forward by a racial, ethnic, or cultural group, by a political jurisdiction, an industrial association, a fraternal society, or even, as Professor Dowse asks,[64] by a birdwatchers club?

Among the various "geographic interests" whose virtues have been debated throughout the history of the apportionment reform movement, which of them is the most reasonable? What, for example, is the "rural interest"? Whatever its substance may have been in the formative years of the Republic, there is little doubt that its meaning has varied sharply in the United States from one regional economy to another and from one era to the next; today it is the mixed voices of urban-based extracting and processing industries, businessmen in small cities, and the more highly organized and conservative farm producer groups, all of whom find the wistful memory of our agrarian past congenial to their present interests. It is probably the case, moreover, that political overrepresentation of the so-called rural interest in state legislatures did not generally result from malapportionment, but instead directly caused it. It required political management of a high order, not only to impose unequal apportionment,

62. Sindler, *Baker v. Carr: How To "Sear the Conscience" of Legislators*, 72 YALE L.J. 23, 29-30 (1962).

63. *See* Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964).

64. Dowse, *supra* note 34, at 336.

as happened in Ohio in 1902 and in Colorado in 1962, but also to sustain it when it resulted from population shifts, as was the case in Tennessee and Alabama. There is little likelihood, under the circumstances, that the directive of the reapportionment cases will radically alter the structure of political skills and power that are operative in the state legislatures.

Moral or political considerations aside, there were simply no available constitutional grounds upon which the Supreme Court could have responded to the plea of one interest rather than another in the reapportionment cases. Accordingly, there was only one course available to the Court—a course which took into consideration the fact, evident beyond any shadow of a doubt, that the votes of some people were not equal in weight to the votes of others under the apportionment schemes of most of the states, but a course which also honored the standing injunction against judicial intervention in "political questions." That course was to act upon the suffrage question in isolation, asserting once again the constitutional right of each citizen to participate equally in the electoral process without reference to whether any citizen or his interest would come to the subsequent attention of a legislature. And it was precisely this, no more, that the Supreme Court accomplished in the reapportionment cases, despite the frequent ambiguity and extravagance of its language.

In *Reynolds v. Sims*, the Court observed: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections . . . ."[65] "[T]he right to vote freely for the candidate of one's choice," it went on to say, "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And 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."[66] Thus, as stated in the Court's own words, the core of the matter is that "the weight of a citizen's vote cannot be made to depend on where he lives."[67]

In *Lucas v. Forty-Fourth General Assembly*[68] this judgment was elaborated: "[A]n individual's constitutionally protected right to cast an equally protected vote cannot be denied even by a vote of a majority of a State's electorate . . . . A citizen's constitutional rights

65. 377 U.S. at 554.
66. 377 U.S. at 555.
67. 377 U.S. at 567.
68. 377 U.S. 713 (1964).

can hardly be infringed simply because a majority of the people choose that it be."[69] In summary, the reapportionment cases declared that the right to vote is "individual and personal"[70] and cannot be infringed by the act of a majority or impaired by the accident of residence, regardless of whether the purpose of the apportionment scheme is to achieve a balance of geographic interests, to accommodate sparsely settled areas, to nourish any special group or interest, to establish easily served electoral districts, or even to honor political tradition. Only the use of political subdivisions, such as counties, may for quite practical reasons be admitted as technical deviations from the equal-populations standard of legislative apportionment.[71]

Frequently, to be sure, the Supreme Court has lapsed into the somewhat allegorical language which has colored public debate on legislative reform for generations—a fact that is not particularly surprising when it is recalled that the same confusions have been entertained by those on all sides of the debate. Thus, the Court resorted to using such phrases as "equal representation" and "the right of equal representation," sometimes quite categorically, as in the observation on its earlier opinion in *Wesberry v. Sanders*[72] "that 'our Constitution's plain objective' was that 'of making equal representation for equal numbers of people the fundamental goal . . . .' "[73] It was not, of course, by any word or hint "our Constitution's plain objective" to guarantee equality of representation; in fact, there is every evidence to the contrary. On the other hand, it *was* a plain objective of the Constitution's draftsmen, as Professor McCloskey has pointed out,[74] to found the constitutional system upon the tradition of popular consent, and, with the passage of time, it has *become* a further constitutional objective to make the process of consent universal.

On other occasions the Court indulged in such appealing dicta as the remark that, "[l]ogically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legisla-

69. 377 U.S. at 736-37.

70. Reynolds v. Sims, 377 U.S. 533, 567 (1964).

71. *See* Reynolds v. Sims, 377 U.S. 533, 580-81 (1964); Vigneault v. Secretary of the Commonwealth, 237 N.E.2d 286 (Mass. 1968); Recent Development, *Reapportionment —Legislative Bodies—Signaficant Deviation from Standard of Substantial Population Equality of State Legislative Districts Is Permissible To Provide Representatives for Two Island Counties*, 67 MICH. L. REV. 587 (1969).

72. 376 U.S. 1 (1964).

73. Reynolds v. Sims, 377 U.S. 533, 559-60 (1964).

74. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Cases*, 76 HARV. L. REV. 55, 71 (1962).

tors."[75] It does seem reasonable, to be sure, but it bears no necessary relation to the issue of equal suffrage, as Professor Lucas has correctly noted.[76] A popular majority can be guaranteed a legislative majority, in fact, only by prescribing the character of that majority (by number, jurisdiction, party, interest, or any combination of such considerations) and thereafter, by biasing electoral procedures to assure the desired outcome. And once so difficult a task is undertaken, as several European nations have learned since World War II, there still can be no guarantee that the interests of that popular majority, however they may be defined, will be represented.

In the final analysis, and despite its sometimes distracting digressions, the Supreme Court did no more—but certainly no less—in the reapportionment cases than add a further and remarkably cautious dimension to the almost universally conceded right of each citizen to vote. While only "qualified" citizens may vote, the Court held (reserving judgment on remaining suffrage limitations), the Constitution cannot permit impairment of the vote on the accidental basis of place of residence. It is difficult to see how *Baker v. Carr* could in the future be held to be anything more or less than Professor Black, in 1962, insisted that it was: a single, clear holding that the Court had been mistaken in *Colegrove v. Green*,[77] and that the complaint was in fact one of "dilution of the plaintiffs' votes."[78] It is also hard to see how the reapportionment decisions of 1964 could be construed by a later generation of scholars in any other light than that which Professor Emerson cast upon them in a remarkable act of anticipation late in 1962: "The fact that the Court [in *Baker v. Carr*] was dealing with the right to vote, a fundamental and special area, indicates that one should perhaps not make too much of this new use of the equal protection clause."[79]

Happily, the Court did not turn to a widely accepted formulation of the issue as being a problem of "fair representation."[80] Quite apart from the judgment, stated above, that representation and suffrage are at once distinct concerns of political theory and only indirectly related in the political process, it would be hard to imagine an adjective more imprecise and political in nature than "fair." The Court looked instead to the patently justiciable and quite objective

75. Reynolds v. Sims, 377 U.S. 553, 565 (1964).

76. Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 772 (1963).

77. 328 U.S. 549 (1946).

78. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13.

79. Emerson, *supra* note 44, at 65.

80. *E.g.*, Dixon, *supra* note 63, at 210.

constitutional issue of equal suffrage, establishing an additional precedent in cases which should be interpreted—indeed, will in time be interpreted—as voting rights cases having little or no relevance to the legislative process.

V. The Implications of the Reapportionment Cases

Two further questions should be touched upon briefly. What will be the likely influence of the reapportionment decisions on legislative behavior after the present period of reapportionment and redistricting is substantially complete? And, what is the logical extension of these cases for possible future judicial determination?

To the extent that apportionment systems act as constraints on the process of representation (an extent minimized above), the withdrawal of all statutory bias in favor of any political group or interest will tend to foster a "free market" of representation in which individuals, groups, geographical areas, and other interests can command legislative attention on a legally random basis. Whether such an outcome is desirable is a question that is likely to be debated at length as it becomes clear that the reapportionment cases will have little or no bearing on the legislative response to any particular political issue such as the social and economic equality of Negroes or the elimination of poverty. The effect of such a representative free market, as in all free markets, will be to give greatest advantage to those who possess the greatest political skills and resources—that is, to the established, the prosperous, and the least scrupulous.[81] It will provide roughly the same political advantage as the previous legislative market provided to any group or coalition of interests which possessed the power to exact favored legislative treatment, including, it should be noted, the coalition that supported or imposed inequality of the vote in the first place.

Finally, contrary to the suggestion that the federal courts must now attend to such aims as "effective majority rule" or the representation of minorities,[82] the logic of the reapportionment cases seems to be otherwise. The likelihood is, in fact, that the Supreme Court has limited its future ability to weigh such political questions, not so much as a result of its reformulation of the doctrine of political questions, but because of its defense of a purely "individual and personal" standard of invidious discrimination in suffrage provisions. The logical extension of the cases, then, appears

81. Dowse, *supra* note 34, at 332.
82. *E.g.*, Dixon, *supra* note 63.

to be toward a further clarification of the meaning of the right to vote as that question may arise with respect to primary elections, elections in local jurisdictions such as counties and municipalities, or alleged discrimination in voting on the basis of term-of-residence standards, property requirements, or, possibly, voter registration procedures. But how many of these electoral questions will be examined in the courts in the future is still another political question.