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Recommended Citation
Sanford Levinson, One Person, One Vote: A Mantra in Need of Meaning, 80 N.C. L. Rev. 1269 (2002).
Available at: http://scholarship.law.unc.edu/nclr/vol80/iss4/7

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ONE PERSON, ONE VOTE: A MANTRA IN NEED OF MEANING

SANFORD LEVINSON*

Our purpose in this Symposium is to ponder the consequences of *Baker v. Carr*,¹ in which the Supreme Court first held that legislative districting presented a justiciable controversy under the Equal Protection Clause of the Fourteenth Amendment.² Certainly the most dramatic consequence was the fundamental transformation affected in the systems of national and state governance when the Court, in the 1964 cases *Wesberry v. Sanders*³ and *Reynolds v. Sims*,⁴ declared unconstitutional any system of legislative representation that did not accord with the fundamental maxim of one person, one vote. Indeed, the one-person, one-vote maxim—perhaps "mantra" is the better term—has become the most pervasive legacy of *Baker*.⁵ Perhaps like most mantras—one thinks, for example, of "a limited government of assigned powers"—it may be more easily invoked as ritual incantation than subjected to rigorous analysis. To be sure, literally hundreds of cases analyze the term with regard to achieving a goal of equal population among legislative districts, but, as I shall demonstrate below, even that particular goal is only fitfully related to any coherent notion of one person, one vote. John Ely has described

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2. U.S. Const. amend. XIV, § 1. One might well believe that the decision would have been better justified in terms of the Republican Form of Government Clause. See, e.g., Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 105–07 (2000); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. Rev. 1165, 1200–01 (2002). It is not clear, though, if that really would have made a practical difference with regard to future cases and, in any case, is irrelevant to the main topic of this Essay.
3. 376 U.S. 1, 14 (1964) ("As nearly as is practicable[,] one man's vote in a congressional election [must] be worth as much as another's.").
the equipopulation rule as "certainly administrable. In fact, administrability is its long suit, and the more troublesome question what else it has to recommend it." To the extent that I disagree with Ely, it is only with regard to his first premise, rather than his conclusion, for I have come to believe he is surely correct adopting a skeptical tone about the substantive rule itself. One point of this Essay, though, is to question whether the mantra even offers the advantage of easy administration, given the crazy-quilt aspects of the overall law of suffrage that will be examined.

My goal in this Essay is to express some of my own uncertainties about what the term one person, one vote actually does, or, just as much to the point, should, mean. These confusions result from the fact that the mantra most certainly does not hold true either as a description of the electorate or even as a normative guide to deciding which persons should be awarded the franchise and what weight their votes should actually have in the electoral process. After briefly discussing these issues, I will address the main topic of the Essay, which is the potential paradox presented by the fact that the mantra of one person, one vote seems not at all to commit us, at least in the view of the Supreme Court, to the proposition that there should be an equal number of voters in each district. This suggests, perhaps, that our system is better described as operating under a rule of (something like) "equal constituents per voting representative," a rule that generates palpable tension with at least one version of the one-person, one-vote standard. I will conclude this Essay by analyzing whether the requirement of an "equal constituency per voting representative" is an attractive theory of political organization, which, if so, perhaps could also commend it as a sound approach to constitutional interpretation.

It is quite remarkable how incoherent certain aspects of this Supreme Court doctrine remain almost four decades after the confident assertions in both Baker and Reynolds about the application of the Equal Protection Clause to the complex issue of drawing electoral districts. I emphasize that I am not simply making the point that, as with any body of legal doctrine, there will always be difficult cases at the margin. Rather, the central concepts ostensibly at the core of the doctrine may make little sense when subjected to close examination.

Consider the most obvious example of the mantra's failure as an empirical description: one person, one vote does not—indeed cannot,
as a matter of common sense—mean that every single person within a polity gets a (single) vote. We know this because there are literally millions of persons within the polity who do not get even a single vote. The easiest example is children; not even professors or students who take pleasure in offering provocative arguments suggest that, say, five- or twelve-year olds—or, for all but the very most provocative, sixteen-year olds—should have the right to vote. Whatever “imperfections” may pervade the Constitution, no one has given that label to its presumptive permission to states to limit the suffrage to those older than eighteen years of age.

As a practical matter, almost certainly the most important—and controversial—current deviation from “universal suffrage” involves felons and ex-felons. As Alex Keyssar writes, the approximately four million felons and ex-felons “constitute the largest single group of American citizens who are barred by law from participating in elections.” And, as we discovered during the Florida fiasco last year, significant political consequences can flow from the exclusion of felons even following their release from prison. To be sure, the Supreme Court in 1974 almost perfunctorily upheld the right of states to deny convicted felons the right to vote on the basis of a singularly wooden textual analysis of Section 2 of the Fourteenth Amendment. Even if one accepts the Court’s ruling as definitive

8. See U.S. CONST. amend. XXVI. As someone who once worked for the Children’s Defense Fund, I would be quite willing to spend considerably more time discussing the exclusion of minors, since the various reasons that are offered, including lack of relevant knowledge or lack of a capacity for good judgment, could certainly apply to many persons over eighteen. Still, as already suggested, it would be impossible to defend age-blind allocation of the suffrage even if one wanted to tweak somewhat the present system of universal denial of suffrage to persons classified as minors.
9. ALEX KEYSSAR, THE RIGHT TO VOTE 308 (2000). Interestingly enough, Keyssar ignores the fact that the number of child-citizens is obviously far greater, which simply reinforces the point that we literally do not even think about the fact that they are excluded from the suffrage.
10. The consequences are the result also of a certain clumsiness, shall we say, in the method by which Florida (and, presumably, other states) identify the ostensibly affected citizens. See, e.g., Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045, 1046–48 (2001) (suggesting that Al Gore would have been recognized as the winner of the Florida vote had many of his likely supporters not been disenfranchised by the indefensibly slipshod Florida process of determining who were felons).
12. Section 2 of the Fourteenth Amendment provides:
with regard to constitutional command, this obviously has nothing to do with the equities of the issue. This could, after all, like the death penalty—and unlike depriving children of the right to vote—be simply one more substantive injustice that is in fact tolerated by a highly imperfect Constitution.

One might also discuss in this context the millions of resident aliens who, whatever their status as residents and taxpayers within the United States, have no right to participate in basic political activities like voting or jury service.\(^{13}\) Given that such aliens do indeed enjoy the constitutional protection for at least some civil rights,\(^14\) we see the survival, even into the twenty-first century, of the strong distinction between "civil" and "political" rights. This distinction was relied on by at least some defenders of the Fourteenth Amendment to reassure their political adversaries that this new addition to the Constitution would not in fact require that the millions of new black citizens would be entitled to vote or even to serve on a jury. Both voting and jury service were quintessential examples of "political rights," in contrast with such paradigm "civil rights" as the right to sue or testify in court or to enter into contracts for the purchase or sale of land.\(^{15}\)

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed. But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**U.S. CONST. amend. XIV, § 2 (emphasis added).**

13. The Supreme Court, for example, "has never held that aliens have a constitutional right to vote or to hold high public office . . . . Indeed, implicit in many of [the] Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights." Sugarman v. Dougall, 413 U.S. 634, 648-49 (1973). I have discussed elsewhere the theoretical issues presented by denial of the franchise to at least long-term resident aliens. Sanford Levinson, *Suffrage and Community: Who Should Vote?* 41 FLA. L. REV. 545, 555 (1989); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1416-70 (1993) (defending alien suffrage); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right To Vote?*, 75 MICH. L. REV. 1092, 1092-93, 1104-36 (1977) (defending alien suffrage).

14. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 682, 689-96 (2001) (holding that illegal aliens are protected by the Due Process Clause against being held in indefinite detention); *Sugarman*, 413 U.S. at 636 (striking down a New York civil service law providing that only U.S. citizens may hold permanent positions in state civil service).

The conventional wisdom, enshrined into current legal understanding, is that only enrolled members of a given political community should possess the right to vote. Of course the begged question is what in the world constitutes that community. Does enjoyment of the formal juridical status of "citizen" truly establish one as a member of a political community? Interestingly enough, we increasingly observe the practice in the European Union of allowing nationals of one E.U. country, who reside in a second E.U. country, to vote in at least some of the elections of the latter. Within the United States, Takoma Park, Maryland, amended its municipal charter in 1992 to allow resident aliens to vote in local elections, joining several smaller localities in Maryland in allowing non-citizen voting. Indeed, even in New York City, resident aliens with children in the school system are apparently allowed to vote in elections for local school boards.

Needless to say, the United States has not achieved such cosmopolitanism even with regard to membership in the various states that constitute the American political union. As a technical matter, one apparently can enjoy "domicile" or legal "residence" in only one state. I strongly suspect that it would constitute a criminal offense to attempt to vote in more than one state. North Carolina, for example, makes a condition of registration to vote in that state the certification that one will not be voting in another state.

16. See, e.g., Raskin, supra note 13, at 1458-60. "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Members State in which he resides, under the same conditions as nationals of that State." Id. at 1459 (citing Treaty on European Union, Feb. 7, 1992, in Council of the European Community, Treaty on European Union 15 (1992)).
17. Id. at 1463-66.
18. Id. at 1462.
19. Richard Briffault of the Columbia Law School, an expert on New York local government, has written to me as follows: "Noncitizen parents can vote in community school board elections. These are elections that select the community boards that have some significant role in operating elementary and junior high schools (but not high schools)." E-mail from Richard Briffault to Sanford Levinson (Feb. 14, 2002) (on file with author).
20. See 13B Charles Alan Wright et al., Federal Practice and Procedure § 3612 (2d ed. 1984) ("A person has only one domicile at a particular time, even though he may have several residences."); see also Restatement (Second) of Conflicts § 11(2), cmt. m (1971). I am grateful to my colleague Linda Mullenix and to Professor Jack Goldsmith for providing me with these references.
Far more difficulty emerges if we link suffrage not to possibly mysterious notions of political identity but, rather, to the practical reality that voting is a crucial way by which groups can protect their own interests in a liberal democracy. To exclude persons from the right to vote is often the equivalent, as a practical matter, of excluding them from (genuine) representation, a topic about which I shall have more to say presently. Suffice it to say at this point, though, that the presumed constitutional entitlement to deny the right to vote to resident aliens (or out-of-staters who, for whatever reason, wish to retain their prior communal identity) scarcely eliminates any concerns about the political justice of such deprivations.

At the very least, then, we see that invocation of the mantra of one person, one vote is both inaccurate as a descriptive matter and, just as importantly, provides no guidance at all to deciding which persons in the first place will be admitted to the franchise. That decision requires a substantive theory of political membership that rests on far more than "merely" being a "person" who would, indeed, very much like to vote.

The Court's primary consideration of this issue can be found in *Kramer v. Union Free School District No. 15*, which was also the last of Chief Justice Warren's opinions for the Court relating to apportionment. New York law limited the right to vote in school-district elections to those otherwise eligible citizens who also had children in the public school system or owned or leased property that was subject to taxation. The Court noted that among the persons disqualified from voting in school-district elections were:

[S]enior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor

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interesting to find out, though, if North Carolina would, for example, recognize an out-of-state domicile by a person registered to vote in the state. But see Wit v. Berman, 00-9482 (2d Cir. 2002), in which a person with two homes in New York is claiming a right to vote in municipal elections in both places. Columbia law professor Richard Briffault, who argued the case before the Second Circuit for the plaintiff, reports "that the district court, without opinion, granted the state's motion to dismiss. That order is now on appeal before the Second Circuit." E-mail from Richard Briffault to Sanford Levinson (Feb. 15, 2002) (on file with author).

lease qualifying property and whose children attend private schools.23

The Court subjected the exclusion to "strict scrutiny," because "some resident citizens are permitted to participate and some are not."24 Conforming to Gerald Gunther's famous maxim about the consequences of "strict scrutiny,"25 the strict scrutiny was indeed "fatal" to New York's legislation, as the Court held that the State's requirements "are not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise."26

Justice Stewart, joined by Justices Black and Harlan, dissented.27 They pointed out that the discriminatory law was passed by a New York legislature for whose members all of the excluded voters could in fact vote.28 There was, therefore, no "lockup" of the kind that prevented any practical reform of the malapportionment that triggered *Baker v. Carr*.29 For the dissenters, the mantra of one person, one vote seemed to triumph over a more nuanced approach to structuring necessarily complex political institutions. That Mr. Kramer was a member of New York's overall political community did not entail that he was a member of the particular community best suited to engage in school-district elections.30

Let us assume, though, that we have successfully resolved the question of deciding who is a member of the relevant political community. We might then infer from our mantra that each voter,

23. *Id.* at 630. The specific litigant, Mr. Kramer, is described by the Court as "a 31-year-old college-educated stockbroker who lives in his parents’ home." *Id.*

24. *Id.* at 629.


27. *Id.* at 634–41 (Stewart, J., dissenting).

28. *Id.* at 639–40 (Stewart, J., dissenting).


when admitted to the voting booth, is allowed to cast only one vote or, at most, the identical number of votes that everyone else in the electorate is allowed to cast. This is no small matter. After all, in nineteenth and early twentieth century England, for example, graduates of Oxford and Cambridge were given an extra vote, acknowledging their special status in society. Rejection of any such differentiation is an important expression of a commitment to the formal equality of all voters and the rejection of just such class distinctions as justified the special status of Oxbridge graduates.

Before one says too confidently that this practice is ruled out in the United States, however, one must acknowledge those cases, admittedly relatively few, in which the Supreme Court has allowed votes to be allocated on the basis of property. The Court has asserted that these are not genuine "legislative districts," but, rather, administrative units with regard to highly specific governmental programs. So even with regard to formal equality of voters, one must recognize that the principle applies only to some aspects of the polity and not to others.

More importantly, though, formal inequality in the suffrage is not necessarily indefensible. My home state of Texas, for example, elects almost all state officials, including judges (at all levels) and the agricultural commissioner, among many others. Would it really be indefensible to grant all lawyers a second vote with regard to the election of judges or all farmers a second vote with regard to the election of the agricultural commissioner, on the ground that they are likely to possess some relevant knowledge and/or possess relevant interests that would justify this slight extra weight in the electoral scales? Would this really constitute the same kind of deviation from democratic values that we might believe was true of the English practice of plural voting based on attending Oxford or Cambridge? One difference, after all, is that Oxbridge graduates got an extra vote

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31. See generally Ball v. James, 451 U.S. 355 (1981) (examining the process for electing directors of a water reclamation district in Arizona); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (electing boards of directors to a state-created water storage district). The politics of water in the arid Southwest are scarcely unimportant. Indeed, as Joel Garreau has written, "In the dry Southwest, water is the linchpin of the universe." Joel Garreau, Edge City: Life on the New Frontier 193 (1991). It is, to put it mildly, not clear why state governments are entitled to treat water as more "special" than public education when deciding how to allocate voting power. See generally Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339 (1993) (examining the scope of federal constitutional protections of the right to vote at the local level and suggesting the need for a fourth model of local government, federative local governments, to supplement the three existing models of local government).
for any and all offices, whereas the proposed plural vote is far more specific. Lawyers would not gain an advantage in choosing the agricultural commissioner, nor would farmers have an extra vote in deciding who should serve on the judiciary.

One alternative to electing judges or agricultural commissioners, of course, is simply to appoint them. Common sense suggests that lawyers or agricultural interests would play a significant, if not, indeed, dominant role in the selection process. If we are not perturbed by that, then what, exactly, would be wrong with giving them a slight advantage if the officers are selected by the electorate instead of by the governor? Weighted voting in this instance might strike one as a good compromise between a populist principle of “let the people decide” and a more functionalist principle of “let those most knowledgeable about or directly interested in the subject decide.” It would take this Essay too far afield to offer a full analysis of these examples; it should be obvious, though, that mindless repetition of one person, one vote is of almost no help at all to anyone seeking genuine illumination regarding the meaning of equal suffrage.

Much analysis of the notion of equal suffrage has revolved around the notion of voting power and, concomitantly, discussions of how one measures effective voting power. Among other explanations for this discussion is the Supreme Court’s own insistence that “fair and effective representation for all citizens is concededly the basic aim of legislative apportionment.”32 Any concern for “fair and effective representation” requires, among other things, that we recognize the all-important truth that practical politics is not a story of isolated individuals casting votes independently from one another but, rather, the mobilization of groups, including, of course, political parties. Although much scorn, some of it justified, has been heaped on the notion of “identity politics,” no one can cogently discuss political representation without recognizing the central reality of political identity, whether it be described by reference to the standard political parties (Democratic or Republican), ideological configurations (liberal or conservative), economic interests (business or labor), or other demographic attributes (white and non-white). The justifiable concern about gerrymanders, whether racial or political (assuming that these can be distinguished) would make absolutely no sense if we did not in fact agree on the practical

stupidity of treating persons as if their identity is independent of their membership in ascertainable groups.33

Having told you at some length what are not my topics, I now turn to what I am going to discuss. I begin with the following assumption, seen most clearly in current doctrine regarding congressional districting: District A should have, as much as is practically possible, the "same population" as District B,4 at least in the first election following the relevant apportionment. This last clause is no small point. One of the odder features of the one-person, one-vote doctrine, when applied to the population of electoral districts, is that it seemingly applies only in the first election cycle out of the (usual) five in any ten-year period. That is, the practical dynamics of population growth and mobility in the United States operate to assure that mathematically identical districts (by whatever measure) in the first election are almost certainly going to be different, often dramatically so, by the third or fourth election. Indeed, as a practical matter, this differentiation might be present even by the actual occurrence of the first election, which takes place two years after the enumeration on which the reapportionment will have been based.

Consider, for example, the implications of some of the demographics of American population growth between 1990 and 2000. Texas grew from almost seventeen million to almost twenty-one million persons, a change of 22.8%. Only California had a larger population gain, though California's growth rate was only 13.8%. New York, the third largest state, grew by less than a million, for a 5.5% growth rate. The highest percentage of growth was Nevada, which grew by 66.3% in the decade, followed by Arizona with a 40%

33. I should note for the record that I continue to be extremely impressed by Jonathan Still's 1981 article arguing that proportional representation is the only system that genuinely satisfies the maxim of one person, one vote once one moves beyond a completely naïve and untenable focus on atomized individuals as the unit of analysis. Jonathan W. Still, Political Equality and Election Systems 91 ETHICS 375, 384–85 (1981). This analysis helps to explain, as I have argued elsewhere, why the topic of proportional representation continues to be a "brooding omnipresence" in ongoing discussions about what constitutes fairness in voting systems. See Sanford Levinson, Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?, 33 UCLA L. REV. 257, passim (1985). It has become ever more clear over the years, though, that serious discussion of the issues raised by notions of "fairness" in group representation depends, among other things, on certain technical skills that I do not possess. This is only one of the reasons I am not exploring the questions raised by traditional gerrymandering.

As one would expect, the patterns of growth within a given state were sometimes little "smoother" than were national patterns. Thus, within Texas, Travis County (the location of Austin and, indeed, the University of Texas Law School), grew by 40%, and Austin replaced El Paso as Texas's fourth largest city, as the latter city grew by less than 10%.

Alternatively, consider the changes in population of Texas's thirty congressional districts, all of which had approximately 565,000 persons in the reapportionment conducted on the basis of 1990 census figures. Two of the districts (Districts 3 and 26, which are relatively close to Dallas), now have more than 800,000 people. By 2000, Congressional District 10 (which includes Austin) had a population of approximately 791,000, while District 18 (one of Houston's districts) was now the smallest in the state with a population of approximately 606,000. If one makes the reasonable assumption that population growth in these areas throughout the decade was relatively linear, then it is clear the so-called equal populations created in the 1991 session of the Texas legislature and based on 1990 population figures were misleading from the moment of creation. As a result, they bore ever less resemblance to the reality of Texas population growth as the decade went by.


36. U.S. Census Bureau, Population for the 15 Largest Counties and Incorporated Places in Texas: 1990 and 2000, http://www.census.gov/Press-Release/www/2001/tables/tx_tab_6.pdf (last visited Jan. 28, 2002) (on file with the North Carolina Law Review). Bexar County (San Antonio) and Dallas County both grew by less than 20%, as against Collin County's quite remarkable growth rate of 86.2% (and impressive growth in absolute numbers as well of more than 225,000 people). Amarillo, which was Texas's eleventh largest city in 1990 (with almost 160,000 people), dropped to fourteenth, with a mere 10% population growth to almost 175,000 persons. Plano, on the other hand, jumped from thirteenth in 1990 to ninth in 2000, with the addition of almost 100,000 new people (a 27.2% growth rate).

37. Because of population growth, Texas will have thirty-two representatives in the next Congress.


39. Similar patterns can be detected in looking at population tables from other states. Thus, for example, North Carolina's twelve districts (as of 1990—it will have thirteen districts in future Congresses) now range in population from 588,000 (the First District) to 766,000 (the Fourth District). Michigan gained far less population, only rising 6.9%, than did Texas (22.8%) or North Carolina (right behind Texas at 21.4%); indeed, it will lose a seat in the next Congress. Even the Michigan districts, though, now range from 575,000 (District 12) to 686,000 (District 2). See U.S. Census Bureau, Geographic Area: North
So, as a practical matter, the right of an individual to be in a congressional district with close to the identical population of every other district in the state exists, at most, for only one election. For the other four elections in the typical cycle, it is presumably permissible if the given voter in District 1 resides in a larger district than some other voter in District 2. Why this should be so, if we really believe that a truly important individual right is at stake, is not easily explained. Although it is true that the Constitution mandates a census only every decade, it would be altogether feasible if courts (or an unusually zealous Congress determined to "enforce" Reynolds' mandate through exercise of its section 5 powers) required states to conduct their own population counts every two years (and to redraw district lines accordingly). If the reader's intuition is that this requirement would be at best inane, and perhaps out-and-out insane, then perhaps this reaction should suggest a re-evaluation of the wisdom of the mantra in the first place.40


40. Or, of course, this limited protection of the ostensible "right" to an equal vote may be added evidence for the proposition that no one can take seriously the argument that Baker and Reynolds are designed to protect an "individual right" in the first place. According to Sam Issacharoff:

[This reading is implausible. Rather, the history of the rule shows it to be primarily directed at official self-dealing. It was the absence of redistricting that promoted the representational distortions that the Court finally came to address in Baker and Reynolds. The Reynolds rule is, in my view, best seen as a prophylactic construct that limits the range of what redistricting powers may do. By requiring that the deck be reshuffled once every ten years, it serves to make more difficult one type of gerrymandering. But it has little to say as a rule of absolute individual entitlement to equal representation . . . .

Posting of Samuel Issacharoff to Discussion List for Con Law Professors (Jan. 3, 2002) (copy on file with author). There is much to be said for Issacharoff's "prophylactic" reading of these cases, though, of course, the doctrine has scarcely operated to prevent some remarkably patent "self-dealing" in partisan gerrymanders. See, e.g., Davis v. Bandemer, 478 U.S. 109, 113-34 (1986). Indeed, Issacharoff emphasizes that the current doctrine appears to go out of its way to legitimize duopolistic self-dealing by the two predominant parties if they carve out districts to preserve their respective incumbents by leaving them safe from serious (inter-party) challenge. See Issacharoff, supra note 29; Gaffney v. Cummings, 412 U.S. 735, 738, 751–54 (1973).

The Court, of course, has been strikingly less deferential with regard to so-called "racial gerrymanders," as seen in Shaw v. Reno, 509 U.S. 630 (1993), and its progeny. Professor Saunders has suggested that these cases are best understood as the application of basically "prophylactic" (and, by definition, overbroad) rules adopted by the Court to safeguard against what may be hard-to-detect specific instances of unconstitutional discrimination. See Melissa Saunders, Reconsidering Shaw: The Miranda of Race-Conscious Districting, 109 YALE L.J. 1603, 1606, 1636–37 (2000).
As we move away from congressional districts, greater deviation from "pure" population equality is tolerated, but even there the Court continues to require a requisite degree of equality, even if it adopts a more latitudinarian standard than that applied to congressional districts. The Court "explained," according to Geoffrey Stone and his colleagues, that "more flexibility was constitutionally permissible with respect to state legislative reapportionment" because of the interest in "the normal functioning of state and local governments." It held that the deviations in the Virginia plan satisfied Reynolds' goal of "substantial equality of population" and were justified by "the State's policy of maintaining the integrity of political subdivision lines."

It is obvious, then, that the mantra presents a host of difficulties in practical implementation. That being said, we live within a positive-law universe that insists that we take it seriously. I now turn, at last, to my primary focus in the rest of this Essay, which is how, under the mantra of one person, one vote, we decide what constitutes the "equal population" of two (or more) districts. And this discussion will, in turn, generate some musings on the term "representative government."

My basic argument is as follows: Our political system, as reflected in relevant judicial decisions, is not at all committed to the notion of one person, one vote if that term means that political District A should in fact contain the same number of voters as political District B. Instead, the United States currently seems to operate under a system in which any given representative should have (roughly) the same number of constituents as any other representative. One might refer to this as the "one voting representative/one constituent" model. An obvious question is whether this model makes sense, either as a constitutional

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41. See, e.g., Mahan v. Howell, 410 U.S. 315, 328-29 (1973) (upholding a Virginia legislative districting plan in which one district had 16.4% greater population than another).

42. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 755 (4th ed. 2001). It is obvious that no definite meaning can be assigned the "substantial degree of equality" that is required by the Equal Protection Clause. As with Justice Stewart's notorious example of hard-core pornography, the Court "know[s] it when [it] see[s] it." See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Moreover, it is obvious, as with congressional districts, that whatever "substantial equality of population" is required (for whatever reason), it matters not, apparently, if it is absent in elections following the first one in the ten-year cycle.

43. This is subject to the caveat that the standard operates only for the first election following reapportionment.
requirement or, perhaps more importantly, as a sound theory of political organization.

There is, to put it mildly, a paucity of judicial discussion of the point. One Supreme Court case, *Burns v. Richardson*,44 examines the problem, but it is, astonishingly, almost as old as *Baker v. Carr*45 itself. Thus in 1966, just after the revolution announced by *Reynolds*, the Supreme Court addressed a Hawaii redistricting plan in which "equality" of population was computed by reference to the number of registered voters in each district.46 The practical reality was this: If population alone were the measure, then the island of Oahu would be entitled to 79% of the seats in the Hawaii legislature, which would mean forty of the fifty-one members of the House of Representatives. If legislative seats were allocated on the basis only of registered voters, on the other hand, Oahu's share of the population would drop to 73% and its number of representatives to thirty-seven. Much of the difference in the two population bases was attributable to the significant number of military personnel (from other states) stationed on Oahu. So one might phrase the question in the following (deceptively) simple way: Was Oahu entitled to elect "representatives" of persons who were in fact not members of the Hawaiian political community?

Speaking for the Supreme Court,47 Justice Brennan "start[ed] with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which ... population equivalency is to be measured."48 He noted that the opinion in *Reynolds* "carefully left open the question what population was being referred to,"49 and he pointed out that a companion case to *Reynolds*50 had "treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure."51 Thus, according to Brennan, the Court had

44. 384 U.S. 73 (1966).
45. 369 U.S. 186 (1962).
46. *See Burns*, 384 U.S. at 80–82. Just as *Burns* is the sole case discussing the issue, there also seems to be an astonishing paucity of law review commentary. The leading article is Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis To Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521 (1994).
48. *Id.* at 91.
49. *Id.*
never "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 their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."\textsuperscript{52}

It is probably not surprising that Justice Brennan paid no attention to the oft-ignored Section 2 of the Fourteenth Amendment, which states that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."\textsuperscript{53} The specific exclusion of "Indians not taxed" supports the view that all other "persons," regardless of their citizenship status, should be counted at least with regard to determining each state's representation in Congress.\textsuperscript{54} Ask yourself, for example, if Congress today, in deciding the apportionment of representation for the States, could "enforce" Section 2 by excluding from the relevant count "aliens" or felons. This new rule would have profound political consequences for such states as New York, Florida, Texas, and California, all of them havens for recent immigrants, not to mention for presumptive "winners" like Montana, Vermont, and the Dakotas, which, one suspects, have relatively low percentages of non-citizens in their overall population.\textsuperscript{55} It may be, of course, that Section 2, properly interpreted, places constraints on Congress that the Equal Protection Clause does not place on the states themselves, even when constructing congressional districts. Even if this constitutional analysis is correct, though, it obviously does not begin to address the general theoretical justification for any such difference.

\textsuperscript{52} Id. at 92.
\textsuperscript{53} U.S. CONST. amend. XIV, § 2.
\textsuperscript{54} The Court interpreted the Fourteenth Amendment as not giving birthright citizenship to American Indians born on reservations, see Elk v. Wilkins, 112 U.S. 94, 109 (1884), though one presumes that Mr. Elk, having left the reservation and settled in Omaha, was subject to Nebraska taxes. Assuming, then, that he was still living in Omaha in 1890, he presumably would have been counted as part of the population base for Nebraska's representation in the House. As will be noted below, see infra notes 83--98 and accompanying text, it is not clear what it means to say that Mr. Elk was "represented" absent his (and other American Indians') right to vote.
\textsuperscript{55} I offer "suspicion" rather than hard evidence because, astonishingly enough, the United States Census apparently does not tabulate population by reference to citizenship or non-citizenship (or, indeed, the legality of one's residence within the United States). There may be good political explanations for this remarkable omission, but it is hard to believe that inquiring minds would not be interested in the demographics of residents' juridical status.
One might note that Justice Brennan's list of persons to whose political fate the Constitution is apparently indifferent does not include those citizens who are not registered to vote. It is, then, perhaps not surprising that he goes on to state that "[u]se of a registered voter or actual voter basis presents" a problem, which is that it seems to make political representation a function of "political activity of those eligible to register and vote." There are many potential explanations for the failure to register, but it is obviously not unthinkable, given American political practices, that registration rates are a function of what Brennan terms "improper influences" by local political elites determined to exercise control over the voting population. Thus the Court concludes that Hawaii's reliance on such data is acceptable "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." Part of the reason for this conclusion is that Hawaii appears to have had a high percentage of registered voters, though another reason, frankly, is that the plan before the Court was only an "interim" one. The Court presumably thought it undesirable to disable the state from conducting its 1966 elections under the plan that had been adopted, whatever its imperfections. Thus the opinion issued a strong cautionary note: "We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."

The issue of population base remained basically quiescent for a full quarter-century, until Garza v. County of Los Angeles. The issue raised in Garza was the propriety of drawing districts that, by excluding resident aliens among others ineligible to vote, led to a claimed under-representation of Hispanics in the Los Angeles City Council. The majority of the Ninth Circuit panel almost blithely

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56. Burns, 384 U.S. at 92.
57. See generally DENNIS THOMPSON, JUST ELECTIONS (forthcoming 2002), (demonstrating that American practices regarding voting registration are considerably more stringent than anywhere else in the world); see also KEYSSAR, supra note 9, at 311-15 (discussing the tendency of less burdensome registration procedures to result in a higher voter turnout).
58. Burns, 384 U.S. at 92.
59. Id. at 93 (emphasis added).
60. See id. at 96 n.26 (noting that even if an error in statistics was corrected, the registration rate exceeded eighty percent).
61. See, e.g., id. at 97.
62. Id. at 96.
63. 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).
relied on a sentence from the Supreme Court's seminal 1964 decision in Wesberry v. Sanders concerning congressional districting. In that case, the Court announced that "the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." After quoting James Madison's statement that the House of Representatives would be "founded on the aggregate number of inhabitants of each state," the Ninth Circuit goes on to assure readers that "[t]he framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens." Interestingly enough, the court did not include in its originalist litany perhaps the best example for its point—the Three-Fifths Clause. After all, one of the most important compromises at Philadelphia was to increase the power of slave states in the House of Representatives (and the Electoral College) by allowing them to count each slave as three-fifths of a person for purposes of computing representation. Nothing could better demonstrate the point that representation of states in the Congress had literally nothing to do with whether the persons purportedly represented were part of the political community in any sense. In any event, the Ninth Circuit concluded that "population is an appropriate basis for state legislative apportionment.

This opinion drew a separate dissent and concurrence from Judge Alex Kozinski, who interpreted the relevant case law to require an equality of voting power and thus to support the exclusion of non-voters from the computational pool. He distinguished between what he called "the principle of equal representation" and a quite different

64. 376 U.S. 1 (1964).
65. Garza, 918 F.2d at 774.
66. Id.
67. Id. (quoting THE FEDERALIST NO. 54, at 369 (James Madison) (Jacob E. Cooke ed., 1961)).
68. Id. at 774.
70. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–06 (1857) (expressing the proposition that blacks could not as a constitutional matter, be part of the American political community). Any state could, if it wished, welcome blacks into its political community, though, as a matter of fact, almost none did, as Chief Justice Taney demonstrated all too well.
71. Perhaps one should insert a "sic," for the court seems to suggest that population is the basis of apportionment. Garza, 918 F.2d at 774–75.
72. Id. at 774.
"principle of electoral equality." The first principle, basically, is what I have alluded to earlier as an "equal constituency per voting representative" rule. It is obvious that this principle has only the most accidental relation to any plausible account of one person, one vote, in as much as one district could have considerably more voters (eligible or actual) than another. The second principle, obviously, builds on our mantra, but it just as certainly leads to the possibility of significant disparities in the actual numbers of persons "represented" in any two given districts with significantly different populations of persons ineligible to vote.

As Kozinski notes, acceptance of "representational equality" as against "voting equality" has the ironic consequence of entailing at least a partial return to the phenomenon that triggered the original litigation in Baker v. Carr. The complaint in Baker, after all, concerned the "debased" voting power of members of a voter-rich district who were entitled to only the same number of ultimate representatives as the voters in a voter-poor district. Kozinski interpreted the cases to protect "a right belonging to the individual elector," with "the key question" thereby becoming "whether the votes of some electors are materially undercounted," relative to some measure of voting power, "because of the manner in which districts are apportioned." As Heather Gerken demonstrates in her own contribution to this Symposium, there is more than enough material in the case law to support Kozinski's "individualist" reading even if one believes, as she does (and I agree), that a focus on the rights of the "individual elector" is fundamentally misconceived.

The Supreme Court did not believe that the issues presented merited a grant of certiorari, so the Ninth Circuit debate, a full decade later, remains both the best and most legally authoritative

73. Id. at 781–82 (Kozinski, J., concurring and dissenting).
74. As Lani Guinier and Gerald Torres put it, the underlying principle seems to be that no representative be burdened with an extra-large number of constituents to service. Otherwise, they describe the Ninth Circuit's "numerical test" as having "nothing to do with voting at all." LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 190 (2002).
75. 369 U.S. 186 (1962).
76. Justice Brennan described the plaintiffs as complaining that they "are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes." Baker, 369 U.S. at 194.
77. Garza, 918 F.2d at 782 (Kozinski, J., concurring and dissenting).
78. This is, of course, the general point of Professor Gerken's article. See Gerken, supra note 29.
account of the questions raised. That being said, it scarcely presents a definitive resolution of the problem posed by trying to make sense, within our sometimes astonishingly complex social system, of the mantra of one person, one vote. Indeed, the Ninth Circuit’s solution requires, as Judge Kozinski demonstrates, that one ignore one obviously plausible implication of the mantra and adopt instead a rule that, as a practical matter, assures the unequal power of voters in different districts with different rates of alien populations.

The basic question of determining equal voting power across political districts arises, of course, with regard to all representative institutions, ranging from the House of Representatives to a county board of commissioners. The “law of large numbers” may limit the consequences of adopting Kozinski’s “representation principle” instead of his “voting equality” maxim with regard to congressional districting. Even here, though, it might be illuminating to compare at least some of the 435 congressional districts by reference to their populations of resident aliens or incarcerated prisoners, not to mention children. It would surely not be surprising if, say, a congressional district in Idaho contains significantly more potential voters than does a given district in Los Angeles or Brooklyn. As we move to smaller state- or local-level districts, however, the differences

80. And this may be the result not only of differential alien populations, but also of age distributions. For example, consider the fact that California’s current District 29 contains only 13.9% population under the age of eighteen years, whereas more than a third (36.2%) of the population of District 37, as of 2000, is under the age of majority. Census Bureau, Profiles of General Demographic Characteristics: 2000, http://www.census.gov/census_2000/datasets/demographic_profile/California/zkh06.pdf (last visited Jan. 31, 2002) (on file with the North Carolina Law Review).

81. I put the United States Senate to one side, though it is obvious that it cannot survive the application of any serious one-person, one-vote standard. Indeed, as Jack Balkin has suggested, this is also true of at least some “inter” rather than “intra-state” comparisons of congressional districts. That is, even if all California districts have the identical number of persons (and thus fulfill at least one plausible theory of equality), it is almost certain that the California districts would vary significantly when compared with districts from some other states. Or simply consider the smallest state with only one representative—Wyoming, with a 2000 population of almost 500,000 and the largest such state, Montana, which in 2000 contained approximately 900,000 people. Rhode Island gets an additional representative with only 150,000 more persons than Montana. See U.S. Census Bureau, Apportionment Population and Number of Representatives, by State: Census 2000, http://www.census.gov/population/cen2000/tab01.pdf (last visited Jan. 30, 2002) (on file with the North Carolina Law Review). Were these various states simply counties of a “superstate,” then it is obvious that the court would intervene and require redistricting. What prevents this remarkable result, of course, is federalism and the sanctity attached to state boundary lines, a subject whose justification is beyond the scope of this Essay.

produced by adopting one or the other of Judge Kozinski's conflicting standards would become ever more dramatic. "Bedroom suburbs," for example, that cater to families with small children would presumably have significantly fewer voters per total population than would a gated community confined to those eligible for membership in the American Association of Retired Persons. As a political matter, one might welcome this (relative) diminution in the power of the "geezer vote," but no one should doubt the significant political ramifications of deciding, in effect, to privilege the votes of parents with young children over the votes of their own parents (and grandparents).

Guinier and Torres point to anomalies in the use of prisoners as part of the basis for allocating representation. The locale of the prisons, rather than the locality in which the prisoner resided (and, of course, within which his or her family may continue to reside), is treated as the "home district" of the prisoner. As Guinier and Torres write: "The strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation."83 Consider in this context Hartley County, Texas. Its 2000 population was 5,537, representing a 100% growth since 1990. Lest one thinks that yuppies are discovering its charms (which might explain similar population patterns in Vermont, for example), the explanation is that the county, located in the desolate far northwest corner of Texas, near New Mexico, is the site of a new prison built during the 1990s, which contains approximately 2,250 decidedly non-voting felons.84 My

83. GUINIER & TORRES, supra note 74, at 189–90.
84. I am grateful to my colleague Steve Bickerstaff for providing me with this information. Or consider the following:

Twenty years ago, on the verge of becoming a ghost town, Florence, Arizona began gathering some unlikely—and unwilling—new citizens. Since 1982, the town has repeatedly expanded its borders to include prisons being built beyond them, inflating its census count and thereby its state and federal funding.... Today, three fourths of Florence's 21,000 residents are incarcerated, though little of the money they bring in is spent on them .... [Whiteside includes a box noting that "since 1995 $5 million has bought everything from a new town hall to a deluxe senior center, all without a local income tax. Florence's inmates brought in $4 million last year, more than all local revenues combined."] Such lucrative opportunities abound nationwide, and competition over them has inspired at least one fierce legal battle between neighboring towns. Money, however, isn't the only prize. Although in forty-eight states prisoners cannot vote, their numbers influence the drawing of congressional and state districts. And the resulting power shifts can be dramatic, given that most prisoners are
colleague Steve Bickerstaff, an experienced voting-rights attorney, informs me that local politicians, when drawing county government lines, often agree simply to exclude prisoners from the count in order to provide each county commissioner with a roughly equal number of voting constituents. The reason, according to Bickerstaff, has almost nothing to do with abstract political theory; rather, county commissioners are concerned about equalizing the practical burdens of their office. Insofar as one of their primary responsibilities is taking care of local roads, a commissioner with, say, only one hundred voters who might want to register complaints, is at a significant advantage over his colleagues who might have to deal with one thousand angry constituents. There is, then, no apparent sense in which Texans incarcerated in Hartley County are "represented" in the local county commission. They are, for purposes of computing the relevant districts, non-persons, without even the three-fifths status accorded slaves.

To return once more to the Old South, as is perhaps appropriate here in Chapel Hill, it was always unfair to the "slavocrats" to treat them as advocates of counting slaves as only three-fifths of ordinary human beings. I have no doubt that they would have been utterly delighted to have each slave count as five ordinary humans, so long as they could not vote, since any such augmentation would have the practical result of increasing the slaveowners' power. Indeed, even the three-fifths rule acted as a considerable augmentation of the South's political power, enhancing its representation not only in the House of Representatives but also, and just as importantly, in the Electoral College. There is good reason, for example, to believe that Thomas Jefferson would not have prevailed over John Adams in 1800 had he not benefited from the Electoral College "bump" provided by slaves.\textsuperscript{85} It was the anti-slavery North that had originally suggested minorities from urban, Democratic areas and reside in typically white, rural, Republican enclaves hundreds, even thousands, of miles from home.\ldots


The truth of [Hugh] Williamson's observation about the need of the South to have its slaves counted in choosing the President becomes clear when we examine the election of 1800 between John Adams, who never owned a slave, and Thomas Jefferson who owned about two hundred at the time. The election was very close, with Jefferson getting seventy-three electoral votes and Adams sixty-five. Jefferson's strength was in the South, which provided fifty-three of his
that slaves be treated as non-persons when computing representation, and, concomitantly, it was they who insisted that slaves count for no more than three-fifths of a person. One could easily argue that slaves would have been better off with the North's rule, however much it formally denied their membership in the polity. And, of course, slaves would have been even worse off had they been counted as whole persons! 86

So the question very much remains open to us, both as constitutional lawyers and as practical political theorists, as to who, if anyone, among the non-voting eligible population should necessarily be included in population pools that determine the allocation of representatives. In other words: Who, and for what reasons, among those not entitled to vote nonetheless deserve to "be represented" in American political institutions? And, just as much to the point, what does it mean to "be represented" if one is deprived of the right to vote?

It should be obvious that denial of the franchise, which allows one to choose one's leaders, is formally unconnected with a very different question, which is whether these leaders have any duty, sounding in political morality, to take the non-voters' interests into account. Surely no one would (publicly) argue that the fact that children cannot vote means that elected officials are free, as a matter of political morality, to disregard their interests. This is true even if these officials are secure in the belief that by the time those who are

electoral votes. If Jefferson had received no electoral votes based on counting slaves under the Three-Fifths Clause, John Adams would have won the election.

We cannot know how American History would have played out if Adams had won re-election in 1800. But the possibilities are intriguing. When we purchased Louisiana we would have had a President opposed to slavery.... [I]t is at least worth wondering how different our situation might be if the Constitution had not used the electoral college, tied as it was to the Three-Fifths Clause, to elect the President. More importantly, we can only wonder how American history might have played out if the Founders had developed a method of choosing the President that was not weighted in favor of slavery.

_Id._ at 442-43 (citations omitted); _see also_ PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 203 n.65 (2d ed. 2001) (noting that "Thomas Jefferson's victory in the election of 1800, and Madison's elevation to the position of secretary of state and heir apparent, would be possible only because of the electoral votes the southern states gained on account of their slaves." Furthermore, "without the three-fifths clause John Quincy Adams might have had more electoral votes than Andrew Jackson and might have been elected outright in 1824.").

86. _See also_ Reader, _supra_ note 46, at 563 ("[I]t cannot seriously be argued that the interests of slaves would have been better served by being formally recognized as whole persons, the constitutional rule desired by the South, than by being excluded altogether, the constitutional rule desired by the North.").
now children can vote, they will have long since stopped identifying with tots and will focus on interests more appropriate to having achieved (at least legal) maturity. And opponents of women’s suffrage never argued that women’s interests were not deserving of representation; indeed, the claim was that their fathers, husbands, and brothers were motivated by male chivalry to protect adequately any legitimate interests women might have. Similarly, one might well argue that elected officials, even if not politically accountable to prisoners or resident aliens, should, nonetheless, treat them with an appropriate concern and respect that will assure that their interests are in fact taken into account in the making of public policy.

All of this might have made a modicum of sense in a world we no longer inhabit, which included elaborate theories of the male’s duty to protect vulnerable females or the ubiquity of public officials sufficiently virtuous as to be wholly unmotivated by such crass interests as paying sufficient attention to the interests of actual voters as would allow the officials to be returned to office in the next election. That we do not inhabit such a world does not mean it is unimaginable. Indeed, it was the world, at least in imagination, of the Founding Generation, which, with rare exceptions, hated the very idea of political parties, identified with “faction,” and was committed to a “politics of virtue” that would place public leadership in the hands of the “best men” of the community who would make disinterested decisions motivated only by a desire to serve the public interest.

This vision of politics, of course, did not outlast the election of 1800. The imbroglio attached to naming Thomas Jefferson our third President generated the 1803 proposal and ratification of the Twelfth Amendment that, by separating the election of the President and Vice President, recognized the existence of political parties and the linkage between candidates and mass publics.8 By the 1820s, the tacit reliance on “virtual representation” by the virtuous of nonvoting masses of Americans fell victim to the so-called Jacksonian revolution (that in fact preceded the 1828 election of Andrew Jackson as President) that adopted what was at the time viewed as “universal suffrage” inasmuch as it allowed basically all white men to vote and therefore to determine for themselves whom they wanted to protect

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their interests. As one of the key slogans of this period put it, "To the Victor Belongs the Spoils." Losers must wait until the next election.

An obvious reality of a party- (or "faction"-) based view of politics is that it provides almost no support, either in theory or in practice, for the image of the benevolent leader who disregards the views of the electorate—including, most importantly, his or her own supporters—on behalf of "the public good." For starters, one must have a theory of what constitutes the "public good." However, most contemporary political theorists, especially if influenced by economics, which has long since given up any commitment to notions of "just price" or distributive justice that differ from market-produced outcomes, would define it simply as the vector sum produced by vigorous, partisan political competition. This competition is structured by the skillful use of political resources, including, of course, the ability to organize with one another in voting blocs that can serve to get the attention of relevant politicians by indicating the price (or the gains) attached to serving these voters' interests. To be deprived of the right effectively to organize voting pools is the equivalent of turning up at the local hospital without proof of insurance. Every now and then someone might take pity on you, but it is a lousy way to get decent medical care.

In the context of political competition, it is impossible to avoid at least some reference to gerrymandering. After all, the essence of gerrymandering is not only to assure the victory of one's political favorites, but also to provide such victories at the cheapest cost. That is, one does not want to create a district with 100% Democrats or Republicans (unless, that is, one is, respectively, Republican or Democratic and wants to "pack" the district in question with "wasted" votes). It is this reality that led Sam Issacharoff and Alex Aleinikoff to the brilliant notion of "filler people," defined as those members of the disfavored party who are assigned to a given district simply in order to "fill up" the population pool required to meet post-\textit{Baker} "equipopulation" standards but who are otherwise expected to know (and accept) their assigned place as political losers deprived of access to the spoils of office.\textsuperscript{88}

Consider in this context the truly remarkable statement found in Justice White's opinion in \textit{Davis v. Bandemer},\textsuperscript{89} the case in which the


\textsuperscript{89} 478 U.S. 109 (1986).
Court announced, as a practical matter, that it would not intervene in so-called "political gerrymanders," by which one political party does whatever it can to maximize its own electoral prospects and, by definition, minimize those of its political opponents. I note that Justice White was writing for himself and Justices Brennan, Marshall, and Blackmun; the collective amount of service—and, therefore experience—as elected political leaders among these four Justices totaled exactly zero. That did not stop them from confidently offering their perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.

Could any sensible person believe this? Am I simply deluded in believing, for example, that Texas Senators Phil Gramm and Kay Bailey Hutchinson are less likely to be influenced by my views than by those expressed by someone who is, at the very least, a registered Republican voter? Does anybody believe that Vermont Representative Bernard Sanders is as attentive to the interests of Vermont Republicans as he is to his fellow left-wing Democrats? To be minimally fair to the Justices, they said "adequately represented" rather than "equally represented," but one still is completely mystified as to the baseline by which one could measure "adequacy."

The Justices are writing of voters, of course. But why should their "deeming" be confined to voters? If elected officials are sufficiently high-minded and imbued with Rawlsian concern and respect for every member of the electorate regardless of political identification, why should they be particularly interested in whether the supplicants who come to their offices or send them beseeching letters are even voters? What we see in Justice White's pious reassurance is the traces of a theory of virtual representation, by which those without an effective vote (or, perhaps any vote at all) are

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90. As Sam Issacharoff suggested to me, the term "as a practical matter" is doing a lot of work, since the formal holding of the case is that gerrymandering is justiciable and, therefore, that federal courts could conceivably intervene in at least some political gerrymanders. That is true, of course, but the fact is that such intervention has been notably absent in the fifteen years since then, not least because the standards for intervention set out in Davis are formidable. Whatever may be the "law on the books," the "law in action" is that partisan gerrymanders, as a practical matter, receive no meaningful review from courts.

91. Davis, 478 U.S. at 131–32 (emphasis added).
informed that their interests will be sufficiently protected by the virtual representative. What makes the representation “virtual,” of course, is precisely that ordinary mechanisms of political accountability are lacking. Perhaps, in the mischievous analysis that has become attached to contemporary discussions of redistricting, voting is completely “expressive,” serving more as the equivalent of a gold star by the state signifying that one is a member in good standing of the polity rather than a practice indeed linked to the nitty-gritty of politics and the protection of vital interests of those collectivities of voters we call political parties or, at least, “interest groups.” “Virtual representation” has obvious affinities to what is sometimes called a “trusteeship” or “guardian” model of representation. In such models the task of the representative is to “exercise discretion and cast roll call votes in pursuit of their constituents’ best interests,” however these interests might (mistakenly) be conceived by the constituents themselves. One can, of course, offer a Madisonian provenance for such a view: “[I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves” or by representatives who consider themselves obliged simply to serve as transmitters of their constituents’ views.

Indeed, as Professor Banzhaf pointed out decades ago, almost immediately after the revolution signaled by Reynolds, if the point of an electoral system is “simply to select the requisite number of wise and able men [sic] to act together to make judgments for the people of the state[,] there is no evidence to show that the ability to select such men depends closely on population.”

Return once more, to convicted felons, who, as we saw earlier, can be deprived of the suffrage not only while they are “paying their debt” to society through confinement in prison, but for their entire lifetimes. If we actually support this practice, then we should go on

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93. See Gerken, supra note 29, at 1425–26, for a useful discussion of the role that “expressive interests” should play in the analysis of apportionment.
94. See Reader, supra note 46, at 554–55.
95. Id. at 554.
96. Id. (quoting THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961)).
97. Id. at 555 (quoting John F. Banzhof III, Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle, 75 YALE L. J. 1309, 1325 (1966)).
98. See supra notes 9–12 and accompanying text.
to ask (and answer) whether prisoners and/or convicted felons "deserve" any representation in the political process and, if so, how we think such representation could possibly take place. As to the first question perhaps we should return to old practices and view felons as suffering a "civil death" that makes them effectively non-persons, politically, even if not, technically speaking, "outlaws" who have no legal rights that non-felons are bound to respect. One might be less harsh, at least descriptively, with regard to resident aliens, but still ask if they are entitled to any political representation at all. Is it legitimate, for example, for resident aliens to expect elected officials to pay any attention to their interests, except insofar as assuaging them might be instrumentally helpful to the officials "real" constituents, citizens and/or potential voters?

To the extent that we take seriously the civics-book pabulum articulated in Davis, then we can have our cake and eat it too. That is, we can, as good liberals, denounce as outrageous the suggestion that certain persons are disentitled to any representation in our political institutions while supporting the apparently far less extreme position that these very same persons are properly estopped from participating in the electoral process. But, as already suggested, the more we adopt such an analysis—and the linked Ninth Circuit view that the key is "equal constituents per voting representative," the more one has moved very far away from the "naïve" meaning of one person, one vote. It should, under this understanding, be entirely irrelevant if, say, District A has 5000 voters and District B has only 3,000 voters so long as each has a total population that is roughly equal to the other. There may be much to be said for this view. Nevertheless, my point is simply that its defense will require something other than the ritualistic incantation of our mantra.

If, however, we believe that voting is important for more than expressive reasons, then it is unclear why we do not recognize that a "right to effective representation" entails, at the very least, a presumption of a right to vote that should require a "compelling state interest" to defeat. Just as importantly, why not recognize the right not to be subjected to political institutions, including legislative districts, that are designed precisely in order to deprive the groups with which one most strongly identifies of a practical ability to gain political power? One might go further and argue that the contemporary meaning of Republican Form of Government is that the general right to vote extends to the right to vote for certain offices, including electors of the President of the United States. To
the extent that five Justices, in *Bush v. Gore*,99 suggested that there was no such right, that it was a matter of mere legislative grace that the populace was allowed to participate in presidential elections at all, I believe they were grievously mistaken. But that is the topic for another day.

CONCLUSION

Earl Warren apparently considered *Reynolds v. Sims*100 (and, presumably, its progeny) to be his highest achievement on the Court.101 Part of the reason, I strongly suspect, is that he viewed it as part-and-parcel of the general attempt by "his" Court to attack some of the dilemmas posed by America's racial history. Consider the implications of the fact that both *Baker* and *Reynolds* arose from states of the old Confederacy and that the primary beneficiaries of the apportionment systems then in use were undoubtedly whites (since relatively few rural African Americans were, at the time, allowed to register to vote, a development that awaited the passage of the Voting Rights Act of 1965 and its aftermath). Thus, Warren wrote that had regular reapportionment taken place "fifty years ago we would have saved ourselves acute racial troubles. Many of our problems would have been solved a long time ago if everyone had the right to vote and his vote counted the same as everybody else's."102

Warren may be right that some problems might have been solved had, in effect, the Fifteenth Amendment not become a dead letter for almost a century following its formal addition to the Constitution. And it is certainly possible that the "reapportionment revolution" sparked by *Baker* has helped in some measure to alleviate racial tensions. But, surely, we can today recognize an element of naiveté in Warren's comment, as we realize that the forty years since that decision have scarcely seen the solution to our "racial troubles." Indeed, as residents of North Carolina have special reason to know, the tensions produced by so-called "racial gerrymandering" seem to be an ubiquitous part of our contemporary polity, and nothing the Supreme Court has done over the past decade has truly changed the situation.

100. 377 U.S. 533 (1964).
Whatever the historical explanation of the Warren Court's interest in political districting, it enunciated its doctrines in highly general terms. I hope that I have demonstrated the extent to which the Supreme Court's venture into legislative districting has failed to confront adequately the profound questions embedded in the now almost forty year-old maxim of one person, one vote. It will be interesting to see whether there will have been any more judicial wrestling with these questions by the time we celebrate (if that is the proper word) the fiftieth anniversary of Baker.